# Intestacy Kit – WA (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.

For the complete kit including the template documents and appendix please download the PDF.

## New changes to the law

The law in Western Australia applicable to Aboriginal and Torres Strait Islander people has changed with effect from 7 August 2013. Part IV of the *Aboriginal Affairs Planning Authority Act 1972* (WA) which had previously applied to situations where an Aboriginal or Torres Strait Islander person passed away without a will has been repealed.

This information sheet sets out the law which applies where an Aboriginal or Torres Strait Islander person passes away in Western Australia without a will after the new law commences. If you need assistance in relation to the affairs of a person who passed away before 7 August 2013, please see our separate Intestacy Kit – WA (pre 7 August 2013).

## 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**".

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. The estate may also owe money, such as for credit card bills or car payments.

If a person passes away intestate, the laws of intestacy will determine who is entitled to have or share in 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 Western Australia, the laws of intestacy are set out in the Administration Act 1903 (WA) (**Act**). The rules in the Act apply to the estate of any person who was living in Western Australia 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 a will.

Different rules may apply in relation to property that is located outside Western Australia or to property in Western Australia that belonged to a person who lived elsewhere at the time of their death. Contact Arts Law for more information in this situation.

The intestacy rules may require the deceased person's assets to be distributed in a way which is very different to the outcome that the family of the deceased person expects 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.**

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

## 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.

However, that is not possible if the estate includes real property (ie land) or a large bank account, or where galleries or art centres hold unsold artwork. 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. Royalties may be paid 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. Who inherits the copyright is a question that must be determined by the laws of intestacy. 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.

The Act sets out a series of rules for distributing intestate estates to a deceased person's spouse and next of kin. The rules are quite complex and it is usually 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, the artist's estate will be divided among the following surviving persons:

- The deceased's "husband or wife", and
- The deceased's children, grandchildren and their children (also referred to as "issue").

"Husband or wife means:

1. The deceased's husband or wife at the time of the deceased's death, in a marriage recognized as a legal marriage under Western Australian law; and
2. A de facto partner, as long as they had been living together on a genuine domestic basis for at least 2 years ending at the time of the deceased's death.

To be recognised as being in a relationship of 'legal' marriage, the couple must have met the formalities of marriage set out in the Marriage Act 1961 (Cth). This means that the marriage ceremony must have been conducted in the presence of someone authorised as a celebrant under the Marriage Act, two other persons must have attested to witnessing the ceremony and a certificate of marriage must have been issued following the ceremony.

A 'de facto' relationship occurs where two people live together as a couple but who are not married to each other or related by family. Where a marriage under traditional Indigenous law does not meet the test for 'legal' marriage described above, the couple may still be recognised as being in a de facto relationship as long as the couple were together in that relationship in the two years preceding the artist's passing.

The Act specifically contemplates that, at the time of his or her death, a deceased person may have more than one spouse (for example, both a legal wife or husband and a de facto partner). This may cover the traditional family structure that exists in some Indigenous communities where a man may have several wives at one time under traditional law.

"Children" are defined to include children that have been conceived but not yet born. For example, if an artist passes away leaving a pregnant wife and the child is born after the date of death, that child is still entitled to share in the deceased artist's estate in the same way as the artist's other children born before his death.

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For the purposes of the Act, adopted children are considered to be the children of their adopted parents (including same sex parents), not their natural parents. However, the adoption must have taken place in accordance with the adoption laws of Western Australia and many Indigenous families have children who are adopted under traditional law or who have been cared for as part of their family but the adoption has never been formally recognized under the Western Australian adoption laws. Such children will NOT be considered part of that family for the purpose of the intestacy laws. To qualify as an adopted child the formal processes of the adoption legislation must have been complied with.

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

Where the deceased has neither spouse nor children, the estate will be distributed among the following persons:

- The deceased's parents; and
- Other members of the deceased's family, including the deceased's brothers or sisters, grandparents, uncles, aunts or cousins. Half-sisters and brothers and other "half" relationships are treated the same as "full" relationships. These relatives are known under the Act as "next of kin". The intestacy rules do not allow the estate to be distributed to anyone more remote than a first cousin of the deceased.

The family members or next of kin who are entitled to the assets of the deceased under the intestacy rules are called the "beneficiaries" of the estate. More detail about the rules for dividing up an intestate estate are set out in Schedule 2 of the Act, and are summarised in **Schedule 1** of this Kit.

### Variations to the intestacy rules

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.

Unlike in the Northern Territory, there are currently no legal mechanisms that allow Indigenous communities to distribute intestate estates in a different way to that set out in the Act.

The one exception to this is the *Family Provision Act 1972* which gives the Court a discretion to make special distributions for the support and benefit of certain family members who would not otherwise be entitled to anything from the estate or where the Court considers that someone should receive a greater share than the intestacy rules would normally give them. However this applies only to a narrow range of relations including parents, dependant stepchildren or grandchildren, or a de facto who had lived with the deceased person for less than two years.

## How are the assets of the deceased's estate distributed?

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, finalizing certain tax issues and then distributing 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 include the following:

1. money held by the art centre from the sale of paintings
2. paintings held by the art centre or a commercial gallery or dealer on consignment
3. copyright, including entitlements to licensing royalties from collecting societies or under licensing deals negotiated during the artist's lifetime

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4. resale royalties and
5. any personal bank accounts held in the artist's name.

The person who administers the artist's estate may also be responsible for other important assets such as a house or car owned by the artist.

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 person can apply to the Supreme Court to be appointed as the formal administrator of the estate or

**Option 2**: The person can ask the Public Trustee to administer the estate or

**Option 3**: The person can locate the assets and distribute them according to the rules of intestacy without going through the formal process of applying to the Supreme Court.

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 Western Australian intestacy laws.

## Option 1: One or more persons can apply to the Supreme Court to be appointed as the formal administrator of the estate

If a particular person or persons, such as a beneficiary, wishes to be responsible for the administration of the estate, they can apply to the Supreme Court to be formally appointed as the "**administrator**" (also known as the "**personal representative**") of the estate. If successful, this is known as a "**grant of letters of administration**". It is preferable that the person or persons applying to be the administrators of the estate have the consent of all the beneficiaries to do so.

Applying for the authority to administer the deceased's estate can involve costs, can be a complex and time-consuming process, and will often require the assistance of a lawyer. In small estates (not worth more than $10,000), an application can be made directly to the Principal Registrar (or a district agent) of the Supreme Court. Usually you would be interviewed at the office and assisted with making your application for letters of administration. The only payment is the court fees. If the deceased lived more than 80 kilometres from Perth when they died, you should see the registrar of the court at the nearest Magistrates Court. They will be able to assist you with preparing your application.

To avoid some of these costs and effort, the Public Trustee can be asked to administer the estate. This can sometimes be a quicker and cheaper process, especially where the estate is worth less than $150,000. More about this process is set out below, at Option 2.

For estates worth more than $10,000, an application needs to be made to the Supreme Court. There are no standard forms available for an application for Letters of Administration and the assistance of a lawyer will generally be necessary (which may involve paying solicitor's costs). The process of preparing all the necessary documents for filing with the Supreme Court, applying to the Supreme Court and satisfying any requisitions from the Supreme Court may take some time.

Before it will grant letters of administration to someone, the Court must be satisfied that the applicant is an appropriate person to be appointed as the administrator. The Court generally will not grant the right to administer a deceased's estate to a person unrelated to the deceased (such as an art centre) when there are spouses, children or other next of kin who can be identified and are living in Western Australia. However, if there is no family member willing to apply, the Court may appoint someone else.

When hearing an application by a family member, evidence of there being a family relationship would usually be given in the form of an affidavit. An affidavit is a written statement provided to the Court under oath. If there is a basis for challenging affidavit evidence, the Court may require further proof of identity. A chain of birth certificates is the best means to prove a

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family relationship. If this record is not available, other forms of identity may assist in proving the relationship, for example passports, Medicare records, marriage certificates, car registration documents, a driver's licence or bank records. Similar proof of identity may be required in identifying beneficiaries. In some circumstances, it may be necessary for a genealogical report to be prepared. This is usually an expensive process.

Part of the application for Letters of Administration includes valuing the estate. This may be difficult in respect of some of the deceased's assets. Assets should be valued at the date of the deceased's passing. While the value of the artwork still owned by the artist may increase in the future, it is the current value which needs to be considered in valuing the estate.

The application should also identify the potential for the estate to earn income from resale royalties and licensing or sale of the copyright in the artwork (if copyright is still owned by the deceased at the time of passing). Although it is often difficult to place a value on that asset, it is an asset that needs to be distributed in accordance with the rules of intestacy. If the copyright is subject to a licensing agreement at the time of the deceased's passing, the value of that licensing agreement should be considered in making the application.

Applying to the Supreme Court will involve a filing fee of $264 (the cost at December 2013) that must be paid when the documents are lodged. The Registrar of the Supreme Court has the power to waive this filing fee if financial hardship can be demonstrated.

In addition to the filing fee the application for letters of administration may involve some other upfront costs that will need to be paid, such as the purchase of a Death Certificate from the Western Australian Registry of Births, Deaths and Marriages.

If the application is successful, the administrator of the estate has the legal right to deal with the assets of the estate, including the right to provide instructions in relation to the sale of artwork and to collect money owed to the estate. The administrator can usually obtain reimbursement from the assets of the estate for any costs, expenses or fees associated with the administration of the estate (such as the costs of the application to the Supreme Court). After payment of funeral expenses and the artist's debts, the administrator can distribute the remaining assets to the beneficiaries. An administrator has the same rights as a person administering the estate under a will (known as an "**executor**").

The administrator can provide the art centre or bank holding money or property belonging to the estate with a certified copy of the grant of letters of administration and a signed receipt. Upon payment of money or the transfer of any property to the administrator, the administrator becomes legally responsible for such funds or property and for ensuring the estate is administered properly. The art centre or bank is relieved of legal responsibility to look after those funds or that property.

The administrator can also receive resale royalties or licensing fees for distribution to the beneficiaries. Alternatively, the administrator can notify the collecting society of the persons to whom those royalties should be paid.

The administrator may need to file a tax return for the estate. The position of administrator involves substantial responsibility and liability for any improper distribution.

## Option 2 – Refer the administration of the estate to the Public Trustee

Where there is no one who is able or willing to apply for letters of administration, the beneficiaries can approach the Public Trustee of Western Australia and ask them to administer the estate. The Public Trustee is a statutory authority that is a branch of the Western Australian government.

***Document A*** *is a template letter to the Public Trustee requesting that it administer the estate of the deceased artist.*

The Public Trustee must first agree to administer the estate. The Public Trustee will not often refuse to do this, but may do so if, for example, the estate is insolvent. In applying to the Public Trustee, information on the value of the estate, including present value of any artwork and any licensing agreements, will need to be provided. The procedure the Public Trustee must follow to administer an intestate estate (and therefore also the speed of the process and costs involved) can vary, depending on the size of the estate. Regardless of which procedure is used, the Public Trustee will charge fees that must be paid by the

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estate before it is distributed to the beneficiaries:

Where the value of the estate is **less than $50,000**[1], the Public Trustee is able simply to file an 'election to administer' with the Supreme Court. This eliminates the costs and time associated with the Court process, such as court filing fees.

The Public Trustee's charges for administering intestate estates will vary, depending on the size and complexity of the estate, and the number of beneficiaries. In addition to its standard charges, the Public Trustee may also incur certain additional costs that must be paid out of the estate (known as disbursements), such as court filing costs, or the cost of obtaining a Death Certificate. An example of the sort of charges the Public Trustee might incur in administering an intestate estate is set out below. The Public Trustee can decide to waive or reduce the fees in any case where it is satisfied it is proper to do so.

> **Example**:
> An Indigenous artist dies intestate with the following property:
>
> - A bank account with $50,000;
> - $25,000 of unsold artworks; and
> - $25,000 held by an art centre.
>
> Altogether, this estate is worth $100,000. The artist had no husband so her three children are the only beneficiaries.
>
> If there were no difficulties or complexities encountered, the Public Trustee's standard charges would probably be about $2800, plus disbursements (as at 1 December 2013). If complexities were encountered, for example if the Public Trustee needed to spend time finding beneficiaries or preparing a family tree, the Public Trustee's charges could increase, depending on how long these tasks took.

In many cases, administration of an intestate estate can be completed within 6 months. However, more complicated cases can sometimes take years to be complete.

Once the Public Trustee has received the grant of administration, the Public Trustee takes legal responsibility for ensuring the estate is administered properly. The Public Trustee would become responsible for arranging the sale of the artworks and collecting the proceeds of sale.

Where the artist had an agreement with the art centre under which the art centre was entitled to sell and retain commission on works painted at the art centre, the Public Trustee may be obligated to continue those arrangements put into place during the artist's lifetime. Even where there is no such arrangement, the Public Trustee is generally keen to administer estates in the most beneficial way possible, and may be willing to allow the art centre to arrange for exhibitions and sales of unsold artworks to ensure that they get the best possible price.

## Option 3 – Administration of the estate in accordance with the laws of intestacy without applying to the Supreme Court

Given the complexity, cost and time involved in Options 1 and 2, the beneficiaries of the estate may prefer not to proceed through the formal process of applying for letters of administration or involving the Public Trustee. An alternative is to administer the estate informally, without applying to the Supreme Court. The risk in doing this is that you may be held personally liable if you fail to distribute the estate properly.

This option will only be possible if those holding property or money on behalf of the estate (such as a bank or art centre) do not insist on sighting a Court order granting rights of administration before they will release the property or money belonging to the estate. In other words, the bank or art centre must be prepared to transfer the property or release the money to a family member who is not a legally appointed administrator of the estate.

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The first step in this informal approach is to identify which family members are entitled to the deceased artist's assets according to the rules of intestacy (ie the beneficiaries). To do this, you can refer to the summary of the intestacy rules at Schedule 1 and the questionnaire in Schedule 2, and you can request help from Arts Law.

Once the beneficiaries have been identified, they will need to come to an agreement about how to proceed. The beneficiaries should authorise one or two people to be the ones who will contact the organizations holding assets that are part of the artist's estate. ***Document B*** *is a suggested authority which the beneficiaries could sign nominating who will act on behalf of all of them. This document can be used to demonstrate that all the beneficiaries agree.*

Set out below are some suggestions about how the beneficiaries can approach the different organizations who hold the deceased's estate if the deceased's estate is to be administered informally.

1. **Personal bank account held in the artist's name.**

A bank may release funds in a deceased person's bank account to the beneficiaries if those funds are not substantial. In Western Australia, if the sum of money in the account is less than $50,000[1], the bank can apply the sum of money to funeral expenses and pay any balance to the deceased person's surviving spouse, parent or child without any formalities.

***Document C*** *is a suggested template letter to send to the bank. Preferably it would attach a copy of the death certificate and any authority the sender has to represent other beneficiaries, as well as the most recent statement or the passbook and chequebook, if any.*

The bank may require you to go in to a branch and prove your identity by producing, for example, your driver's licence or passport. Once the bank account can be accessed, it should be used to pay any outstanding funeral expenses. Otherwise the money should be kept until it is clear how the estate will be distributed among the beneficiaries. Before allowing access to the account, the bank may request that you sign an "indemnity" document, which can mean that you are liable for any losses the bank suffers as a result of its decision to release the funds to you. If the bank requests that you sign such a document, you should seek legal advice. The Arts Law Centre can provide you with help in this respect.

2. **Money and paintings held by an Indigenous art centre where the artist was a member.**

If the art centre is confident that it is dealing with the proper beneficiaries of the deceased's estate, it may be prepared to sell the paintings in its possession and give the money (after deduction of its commission) to the beneficiaries as well as any other moneys held for the artist in its account. ***Document D*** *is a suggested template letter to send to the art centre.*

There are some risks for the art centre (and anyone else who hands over property where letters of administration have not been obtained) associated with pursuing this course of action, including the following:

1. 1. As there is no formally appointed personal representative of the estate, the art centre cannot transfer legal responsibility for distribution of funds of the estate. It may be legally responsible if it gives property to the wrong people, for example if a will is found later or the artist had another child which the art centre didn't know about and who didn't get a share.
   2. If the artist had any outstanding debts, then the creditors may be entitled to the funds rather than the beneficiaries. The art centre could be responsible if it pays the beneficiaries when there are debts owing to others.
   3. If the art centre gives the funds to one family member and that person doesn't correctly share the funds with the other beneficiaries, the art centre could be legally responsible.

If the art centre (or other business) is concerned about these risks, it may reduce those risks (although not completely) by one or more of the following:

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- Obtaining a signed document from each of the beneficiaries receiving the money that expressly states that they have waived their rights to apply for letters of administration and they indemnify the art centre against any claims or losses arising from the payment of money to them in such circumstances. However, this has significant risks for the persons signing that indemnity. The Arts Law Centre can help you prepare such a document if it is required.
- Notifying the Public Trustee of the proposed distribution so that it can intervene if it considers it appropriate to do so. ***Document E*** *is a template letter to the Public Trustee.*
- Placing an advertisement in a publication likely to be accessed by people who might have an interest in the estate to ensure that the correct beneficiaries have been identified. ***Document F*** *is a suggested form of advertisement.*

Arts Law recommends that the art centre obtain and keep copies of receipts for any amounts paid to beneficiaries.

3. **Money and paintings held by a commercial gallery or dealer.**

Any arrangement with a commercial gallery or dealer is likely to be terminated upon the artist's death. However the beneficiaries may request the gallery or dealer to proceed with the sale of any the paintings and pay the proceeds to them. ***Document G*** *is a suggested template letter to send to a gallery or dealer.* If the gallery or dealer does not agree, the beneficiaries should seek legal advice. It may be necessary to get a grant of letters of administration.

4. **Copyright, including entitlements to licensing royalties from collecting societies or under licensing deals negotiated during the artist's lifetime.**

The beneficiaries are entitled to share the copyright in the way set out in the legislation. Without a grant of administration for the estate, it is likely to be very difficult to assert any claim for royalties arising out of the copyright in the deceased's artwork. It will also be difficult to negotiate any future copyright licences. We recommend that the artist's copyright be registered with the appropriate collecting societies so that they can receive an income stream from copyright licensing opportunities. For information about collecting societies generally, see Arts Law's information sheet: Copyright Collecting Societies.

*Copyright Agency Limited:*

Copyright Agency manages the statutory royalties payable where artworks are reproduced in certain types of government and educational publications such as educational materials (both hard copy and online). See the Copyright Agency website.

Contact Copyright Agency to find out if the deceased artist was registered for statutory royalties. Toll-free number: 1800 066 844.

If the artist is registered with Copyright Agency and the accumulated statutory royalty due is $10,000 or less, Copyright Agency will generally be prepared to pay future statutory royalties directly to the artist's beneficiaries in the following circumstances:

1. If the artist was a member of an Indigenous art centre, a letter from the art centre is provided which confirms:
   - the date of death;
   - that the artist was a member of the art centre;
   - that the artist had no will and that no one has applied for letters of administration,
   - providing details of the names, relationship to the artist and contact details for all known surviving members of the artist's family.***Document H*** *is a suggested template letter from the art centre to Copyright Agency.*

2. If the artist was not a member of an art centre, documents are provided which confirm:
   - the date of death;
   - that the artist had no will and that no one has applied for letters of administration,

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- providing details of the names, relationship to the artist and contact details for all known surviving members of the artist's family.
- evidence of the entitlement of the relevant family members to royalties such as evidence of advice from Arts Law or the Public Trustee.

In all other circumstances, Copyright Agency will not usually pay statutory royalties to beneficiaries without a grant of letters of administration.

If the artist wasn't registered then the beneficiaries can apply for membership with Copyright Agency online. Beneficiaries should mark the box "Owner of copyright in works created by Artist".

*Viscopy:*

Viscopy can manage copyright licensing for the beneficiaries of the deceased artist's estate. Businesses that want to use copies of the deceased artist's artworks in books, on websites, greeting cards and posters, in newspapers, magazines, television, exhibition catalogues, merchandise, advertising and film can approach Viscopy for a license. If the artist's estate is registered with Viscopy, Viscopy will negotiate a royalty for that use and, after deducting its fee, will pay the remainder to the persons registered as the artist's beneficiaries. For information, see Viscopy's website.

Viscopy can also distribute the statutory royalties collected for the artist's estate by Copyright Agency. However commission will need to be paid to both Copyright Agency and Viscopy for this service and Arts Law recommends that artists and their families register directly with Copyright Agency for statutory royalties.

Contact Viscopy to find out if the deceased artist was registered for copyright royalties. Toll-free number: 1800 649 901.

Viscopy's policy in the situation where an artist has passed away intestate is to work with the families on a case by case basis. You will need to discuss with Viscopy how you should proceed to arrange for payments to go to the beneficiaries. Viscopy is likely to require information which confirms:

1. the date of death;
2. that the artist had no will and that no one has applied for letters of administration,
3. details of the names, relationship to the artist and contact details for all known surviving members of the artist's family.

If the artist was not registered with Viscopy, check whether the artist was registered instead with AAA. If not, then Arts Law recommends that families enquire as to how the beneficiaries can become registered with Viscopy (or AAA) for non- statutory royalties.

*Aboriginal Artists Agency Limited (AAA):*

AAA represents over 300 Indigenous artists from the Central desert and Arnhem Land areas by providing similar copyright licensing services to those provided by Viscopy. If the deceased artist was registered with AAA, it can continue to manage non-statutory licensing for the beneficiaries. Businesses that want to use copies of the deceased artist's artworks in books, on websites, greeting cards and posters, in newspapers, magazines, television, exhibition catalogues, merchandise, advertising and film can approach AAA for a license which will negotiate a royalty for that use and, after deducting its fee, will pay the remainder to the persons registered as the artist's beneficiaries. For information, see AAA's website.

Contact Anthony Wallis at AAA by phone: 0417 230 464 or email: anthony@aboriginalartists.com.au to find out if the deceased artist was registered for copyright royalties. If the artist was not registered, Arts Law recommends that families enquire as to how the beneficiaries can become registered with AAA (or Viscopy) so that it can manage the deceased artist's copyright for non- statutory royalties.

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AAA generally deals with the situation where an artist has passed away intestate on a case by case basis. It tries to work with families to find a solution.

*Screenrights:*

Screenrights manages statutory copyright licences for certain uses of audiovisual works (film and video) including uses by government and educational institutions. Often an artistic work such as a painting or sculpture may appear in a film or television broadcast and the owner of copyright in that artwork will share in any royalties collected by Screenrights for the use of that film. For more information see the Screenrights website.

If you know that artworks by the deceased artist appeared in a film or television broadcast, contact Screenrights' Member Services Department to find out if the deceased artist was registered for statutory royalties. Telephone: 02 9904 0133 or email memberservices@screenrights.org.

Screenrights can also distribute the statutory royalties collected for the artist's estate by COPYRIGHT AGENCY. However commission will need to be paid to both COPYRIGHT AGENCY and Screenrights for this service and Arts Law recommends that artists and their families register directly with COPYRIGHT AGENCY for statutory royalties.

Screenrights currently doesn't have a fixed policy about payments in the situation where an artist has passed away intestate. In this situation you will need to discuss with the Member Relations Manager how you should proceed to arrange for payments to go to the beneficiaries.

*Other licensing arrangements:*

If there are other licensing deals that were negotiated during the artist's lifetime without involving a collecting society, the beneficiaries need to decide whether those contracts can and should be terminated or whether they should continue. We recommend that the beneficiaries get legal advice as to whether each licence is a sensible and commercially reasonable arrangement or whether it should be terminated.

***Document I*** *is a letter requesting the licensee to pay any royalties to the beneficiaries in the future.* If the licensee does not agree, seek legal advice as to whether the licence should be terminated. It may be necessary to get a grant of letters of administration in order to deal with these licences.

*For example, the artist had a licence with a souvenir business to use three artworks on stationery and gift cards. The artist passed away without a will. The only beneficiaries were the artist's three children. The children agreed that they would each take copyright in one of the three works. The souvenir business agreed to pay royalties on the first artwork to the artist's eldest son, on the second artwork to the second son and on the third artwork to the artist's daughter.*

*The artist also had a licence with a hotel for the use of an artwork on its website. The hotel wouldn't agree to pay the royalties in three shares or deal with the beneficiaries. However the beneficiaries registered the artist's estate with Viscopy. The hotel agreed to licence the artwork through Viscopy. Viscopy then distributed the royalties to the three beneficiaries after deducting its commission.*

5. **Resale royalties**

For information about the resale royalty right, see Arts Law's information sheet: Resale royalty rights for visual artists. The organization nominated by the Federal government to manage the resale royalty scheme is Copyright Agency and further information can also be found on the Copyright Agency website.

Contact Copyright Agency to find out if the deceased artist was registered for resale royalties. Toll-free number: 1800 066 844. Email: resale@copyright.org.au

If the artist is registered with Copyright Agency and the accumulated resale royalty due is $10,000 or less, Copyright Agency will generally be prepared to pay future resale royalties directly to the artist's beneficiaries in the following circumstances:

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a) If the artist was a member of an Indigenous art centre, a letter from the art centre is provided which confirms:

- the date of death;
- that the artist was a member of the art centre;
- that the artist had no will and that no one has applied for letters of administration,
- details of the names, relationship to the artist and contact details for all known surviving members of the artist's family.

***Document H*** *is a suggested template letter from the art centre to Copyright Agency which deals with both statutory and resale royalties.*

b) If the artist was not a member of an art centre, documents are provided which confirm:

- the date of death;
- that the artist had no will and that no one has applied for letters of administration,
- details of the names, relationship to the artist and contact details for all known surviving members of the artist's family.
- evidence of the entitlement of the relevant family members to royalties such as evidence of advice from Arts Law or the Public Trustee.

1. 1.

In all other circumstances, Copyright Agency will not usually pay resale royalties to beneficiaries without a grant of letters of administration.

If the deceased artist was not a Copyright Agency member, the first step is the registration of the artist's estate with Copyright Agency. Once that is done, follow the steps above.

## If the person died before 7 August 2013

If a person of Aboriginal decent dies before 7 August 2013, under the laws of Western Australia their estate must go to the public trustee to be managed.

## Where someone dies 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 who has died intestate. 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.

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 drivers licence, advise the Department of Motor Registry that the artist has passed away.

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f) Find out if the artist needs to file a tax return. If there is any tax owing, that must be paid before any money can be distributed to the beneficiaries. Many Indigenous artists were considered to be 'hobbyists' the Australia Tax Office while alive and did not have to complete tax returns dealing with income earned from their art. If that is the case then it will not be necessary to file a tax return for the period up to the date of death. However, in relation to any money earned by the estate from sales of artwork **after** the artist's death, tax may be payable.

g) If there are outstanding debts associated with the funeral, any funds must first be applied to the payment of those before any distribution to the beneficiaries.

h) Ascertain any other debts of the artist. These must be paid before any distribution to the beneficiaries.

# SCHEDULE OF DOCUMENTS

1. **Schedule I** contains a general guide of the way in which the Act will distribute an intestate estate.
2. **Schedule 2** 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 Western Australian intestacy laws.
3. **Documents A to I** are template letters and forms that you can adapt and use. The yellow highlighting identifies information that you must insert or change to suit your situation
   - **Document A** is a template letter to the Public Trustee requesting that it administer the estate of the deceased artist.
   - **Document B** is a suggested authority which the beneficiaries could sign nominating who will act on behalf of all of them
   - **Document C** is a suggested template letter to send to the bank
   - **Document D** is a suggested template letter to send to the art centre
   - **Document E** is a template letter to the Public Trustee notifying it of the proposed distribution
   - **Document F** is a suggested form of advertisement to ensure that the correct beneficiaries have been identified
   - **Document G** is a suggested template letter to send to a gallery or dealer.
   - **Document H** is a letter from the artist's art centre to Copyright Agency seeking payment of resale and statutory royalties due to the artist.
   - **Document I** is a letter requesting the copyright licensee to pay any royalties to the beneficiaries in the future.

## Download the Complete Intestacy Kit Including all Template Documents

For the complete kit including the template documents and appendix please download the PDF.

[1] As at 1 December 2013, *Trustee Companies Regulations 1988*, reg 4

[2] *Gazette* 6 February 2009 p. 243

**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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