WILLS KIT NSW – When an Aboriginal or Torres Straits Islander artist passes away with a will

This Wills Kit has been developed to assist families of Indigenous visual artists who made a will before they passed away. If the artist passed away without making a will, see the NSW Intestacy Kit. The development of this resource is made possible through the support of Copyright Agency Limited.

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Download the complete NSW Wills Kit Here

What is a will?

A Will is a legal document that an artist or other person makes during their lifetime that sets out how they want their money and other belongings to be distributed among their family and friends when they pass away.

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 including any copyright and resale royalty. If the person passes away partially intestate, then the law determines how to distribute those things that are not covered by the Will.

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 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 it.

This wills kit documents the steps involved in understanding and using a will.

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.

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, since 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 and Torres Strait visual artists, the most important assets in the estate are likely to be the following:

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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 people who are named in the Will as the ones who should receive the artist's estate after he or she passes away are called the **'beneficiaries'.** If a beneficiary passes away within 30 days of the date on which the artist died, they are not usually entitled to inherit anything under the Will. The Will must be read as if that beneficiary had passed away before the artist.

If the Willmaker married after the date on which he or she made the Will then the Will may be invalid either completely or partly. In that case, all or part of the estate will be distributed according to the intestacy laws and NOT according to the Will. If you think this may be the case, you should get legal advice.

Certain family members including the deceased artist's spouse or de facto partner, a child or grandchild have a right to challenge the way the Will states the estate should be distributed. They may have been left out of the Will or believe that they should receive a larger share of the estate. The executor has to deal with any such claims, which generally must be made within 12 months of the date the artist passed away. The executor will generally need legal assistance if that occurs.

Who is the 'Executor"?

Most wills nominate one person to be the 'trustee' or 'executor' of the Will. It is usually a trusted family member or friend but can be a lawyer or the NSW Trustee and Guardian. The NSW Trustee and Guardian is an agency of the New South Wales Australian Attorney General's Department responsible for providing services in making wills and managing deceased estates, and financial management services for people with decision–making disabilities.

Sometimes the Will appoints two people jointly as the executors and trustees. In some Wills, there is a first choice of executor and then a second choice – in case the first person is sick or dies before the artist or simply doesn't want to be the executor and trustee.

Some Wills don't appoint any executor or the executor may already have passed away. (Sometimes a Will is made many years before the artist actually passes away.) In that case, a family member or other person can apply to be appointed as the executor or the NSW Trustee and Guardian can be asked to administer the estate in accordance with the terms of the Will.

The executor has responsibility for the **"administration"** of the Will and the deceased's estate. The administration of the deceased's estate will involve collecting the deceased's assets, establishing what debts and tax the estate owes, paying them, and then distributing the assets to the beneficiaries named in the Will.

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The NSW Trustee and Guardian website has a useful brochure entitled 'A Guide to Executorship and Probate' which contains a useful table showing the process which is followed by an executor to administer a deceased estate.

It is important to remember that the executor's duties may continue for a long time and are a significant responsibility. The executor may have to look after assets given to children who are under 18 years of age. Many artists appoint the executor to manage their copyright and resale royalty entitlements on an ongoing basis.

The executor is personally responsible paying the deceased person's debts and distributing the remaining assets in accordance with the will. Claims may be made against an executor who ignores the will or distributes assets before paying all the debts.

The Tax Office can hold the executor responsible for any income tax that the estate owes and which wasn't paid before the executor distributed final shares in the estate to the beneficiaries. For this reason, an executor is not obliged to take on that role if he or she does not want that role or does think they can manage it.

Should the executor have a 'reading' of the Will?

One of the executor's first jobs is to find and look after the original Will. If it was not among the papers of the deceased, it may have been held by a solicitor or by the artist's art centre. It must be handed to the executor. In New South Wales, the Will may have been deposited with the Supreme Court. If that is the case, the executor can write to the Supreme Court Registrar to obtain the Will.

The executor must read the Will carefully and understand how the artist wanted his or her estate to be distributed. It is important to identify which family members are entitled to the deceased artist's assets according to the Will (ie the beneficiaries). If you don't understand the Will, you may need to get legal advice. If the deceased person was an artist, you can contact the Arts Law Centre for help.

It is not a legal requirement to have a 'reading' of the Will for the family but it is a good idea to arrange a meeting of the family of the deceased and the beneficiaries named in the Will and explain to them what the Will says. Arts Law or the art centre manager may be able to help with this. If any of the beneficiaries can't attend the meeting, the executor can send them a photocopy of the Will.

The executor will need several copies of the Will – it is very important not to write on, remove the staples from, or give away the original Will. If anyone needs to see the Will, show or give them a photocopy and not the original. Never staple the original Will to any other document.

The executor must provide a copy of the Will to the following people if they request a copy:

a. Any person mentioned in the Will (or any earlier Will) such as a beneficiary;

b. Any spouse, de facto partner, parent, child or grandchild of the person who made the Will;

c. Any parent or guardian of a person mentioned in a Will who is a minor;

d. Any person who would be entitled to share in the estate if the Willmaker had died intestate (without a will); and

e. Any person to whom the willmaker owed money (a creditor).

Funeral Arrangements

Usually funeral arrangements are managed by the family and in accordance with any express wishes of the deceased person. Often the Will says where the artist wanted to be buried. This should be respected if possible. If there is any disagreement within the family, the executor makes the final decision.

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The executor 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 funeral expenses before other any debtors are paid and before distributing any money to the family. If the art centre is holding money for the artist from art sales, it may release money from the artist's account for the funeral.

If there is not enough money to cover the funeral expenses the family can apply to the NSW Aboriginal Land Council for a Funeral Assistance Grant of up to $1000.

Carrying out the instructions in the Will

There are three options for administering the estate:

Option 1: The NSW Trustee and Guardian (known as the NSW Public Trustee up until 1 July 2009) can manage the estate. The Will may nominate the NSW Trustee and Guardian (or Public Trustee) as executor. However the beneficiaries can also ask the NSW Trustee and Guardian to manage the estate even if the Will appointed someone else. This is usually appropriate if the Will does not name an executor or the executor who is named in the Will has also passed away or cannot take on the job of executor AND no one in the family of the deceased is prepared to take on that responsibility.

Option 2: The executor named in the Will can apply to the Supreme Court for an order confirming his or her authority to manage the estate. This is called a **'Grant of Probate'**. Where there is no executor, a family member or other person can apply to the Supreme Court for permission to manage the estate. This is called a **'Grant of Administration'** and is appropriate if the Will does not name an executor or the executor who is named in the Will has also passed away or cannot take on the job of executor. The family may prefer that a family member or trusted friend carry out those responsibilities rather than the NSW Trustee and Guardian. A Grant of Probate or Administration is necessary where businesses or institutions which hold the deceased's assets are not be prepared to release them to the executor unless he or she has such a Court order confirming his or her authority.

Option 3: There is no statutory requirement to obtain probate. The executor named in the Will can try to manage the estate and distribute all the assets in accordance with the instructions in the Will without a Grant of Probate or Administration. This may be possible for smaller estates where there is no real property (land) involved.

For the complete information sheet download the Wills Kit NSW here.

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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