Intestacy Kit – NSW (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.

Please download the full Intestacy Kit NSW here to see the complete information sheet and documents.

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 that person’s estate. If the person passes away partially intestate, then the law determines how to distribute those things which are not covered by the will.

In New South Wales, the laws of intestacy are set out in the *Succession Act 2006* (NSW) (the **Act**). The rules in this Act apply to the estate of any person who was living in New South Wales at the time of their death and did not leave a will. These rules will also apply to any property which was not covered by the deceased person’s will if they did leave one.

Different rules may apply in relation to property which is located outside New South Wales or to property in New South Wales 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 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 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 New South Wales at the time 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.

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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 owns 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 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[1] persons:

- The deceased's "**spouse**" is entitled to the whole estate, as long as the deceased is not also survived by any children from a previous relationship.
  - A **'spouse'** means a person:
    - who was legally married to the deceased immediately before the artist's death, or
    - who was in a domestic partnership with the artist immediately before the artist's death.
  - To be recognised as married, the couple must have met the formalities of a legal 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 domestic partnership is defined as a relationship that is a registered relationship within the meaning of the *Relationships Register Act 2010* (NSW), or a de facto relationship that: (a) has been in existence for a continuous period of 2 years, or (b) has resulted in the birth of a child.[2]
  - 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.
  - If there are children from a previous relationship, the spouse is entitled to the deceased's personal effects (household items, jewellery etc), a statutory legacy of around $350,000, and one-half of the remainder (if any) of the intestate estate. The children from a previous relationship are entitled to the other half of the remainder of the estate. However if the estate is not substantial, children from a previous relationship are unlikely to receive a share of the estate.
  - The Act specifically contemplates in Part 4.2, Division 3 that a deceased may have, at the time of their death, more than one spouse (for example, both a legal wife or husband and a de facto partner). This section provides guidance as to how the estate is to be shared if there is more than one spouse.

- If there is no spouse, the deceased's **children** are entitled to the whole estate in equal shares**.**
  - Children are defined to include children that have been conceived but not yet born.[3] 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.
  - For the purposes of the Act, adopted children are considered to be the children of their adopted parents, not their natural parents.[4] 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 New South Wales

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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 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.

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- 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 an intestate's 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).
- Where the deceased has neither a spouse nor children, the deceased's surviving **parents** are entitled to the whole estate (in equal shares).
- Where the deceased has no spouse, child or parent, the deceased's surviving brothers and sisters **(siblings)** are entitled to the whole estate. If a sibling of the deceased has died, leaving any surviving children, then those nephew/nieces of the deceased are entitled to the share of the estate that would have gone to their parent (and so forth until the entitlement is exhausted).
- Where the deceased has no spouse, child, parent, or sibling, the deceased's surviving **grandparents** are entitled to the whole estate (in equal shares).
- Where the deceased has no spouse, child, parent, sibling or grandparent, the deceased's surviving **aunts and uncles** are entitled to the whole estate (in equal shares). If an aunt or uncle of the deceased has died, leaving any surviving children, then that cousin(s) of the deceased are entitled to the share of the estate that would have gone to their parent. The intestacy rules do not allow the estate to be distributed to anyone more remote than a first cousin of the deceased.
- Where there is no next of kin the estate is described as *'bona vacanti'* and the State takes the assets. While the State has entitlement, there is a provision for the State to distribute the assets to anyone with a 'moral claim' to the assets. This could include an informally adopted child or any other person who was dependent on the deceased at the time of death.[5]

The family members 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 distributing an intestate estate are set out in Chapter 4 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.

The Act contains express provisions which allow Indigenous communities to apply to the Court for orders allowing the distribution of an intestate estate in New South Wales to occur in a different way to that set out in Parts 4.2 and 4.3 of the Act. Part 4.4 of the Act allows a personal representative of a deceased Indigenous person who passed away intestate or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the deceased's Indigenous community or group to apply to the Court for an order for distribution of the intestate estate.

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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.

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, finalising 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 be the following:

- 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.

The administration of estates in New South Wales is governed by the *Probate and Administration Act 1898* (NSW) (the **PA Act**). Until the Supreme Court of New South Wales (**Court**) makes a grant of letters of administration, the real and personal estate of the deceased person vests in the NSW Trustee & Guardian.

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

Option 1: The person can apply to the Court to be appointed as the formal administrator of the estate; or

Option 2: The person can ask the NSW Trustee & Guardian 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 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 New South Wales intestacy laws.

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:

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

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3. 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.
4. If the artist was receiving any benefits from Centrelink, advise Centrelink that the artist has passed away.
5. If the artist had a car or a drivers licence, advise the Department of Motor Registry that the artist has passed away.
6. 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.
7. 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.
8. Ascertain any other debts of the artist. These must be paid before any distribution to the beneficiaries.

[1] The person must survive the intestate for a period of at least 30 days. See s107 of the Act.

[2] See s 105 of the Act.

[3] S 3(2) of the Act.

[4] S 109 of the Act.

[5] Section 137 of the Act

[6] Section 44 of the *Probate and Administration Act 1898*

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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