Intestacy Kit – VIC (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”.

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 Victoria, the laws of intestacy are set out in the *Administration and Probate Act 1958* (Vic) (the **Act**). The rules in this Act apply to the estate of any person who was living in Victoria 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 Victoria or to property in Victoria 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 Victoria 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, the artist's estate will be divided among the following surviving persons:

- The deceased's "**partner**" is entitled to the whole estate if there are no children. A partner means the deceased person's spouse or domestic partner. A spouse means a person who was married to the deceased at the time of their 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 partner means a registered or unregistered domestic partner of the deceased.
  - An unregistered domestic partner means a person (other than a registered domestic partner of the deceased) who, although not legally married to the deceased:
    - was living with the deceased at the time of their death as a couple on a genuine domestic basis (irrespective of gender); and
    - either (i) had lived with the deceased in that manner continuously for a period of at least 2 years immediately before their death; or (ii) is the parent of a child of the deceased, being a child who was under 18 years of age at the time of the person's death.

  - Where a marriage under traditional Indigenous law does not meet the test for a 'legal' marriage described above, the couple may still be recognised as living together as a couple.
  - The Act specifically contemplates in section 51A that a deceased may have, at the time of their death, more than one partner (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 partner. However the Act does not extend to the traditional family structure which exists in some Indigenous communities where a man may have several wives at one time under traditional law.

- If the deceased has children, the **partner** is entitled to:

- The deceased's personal chattels (that is, personal effects which include household items, any car, jewellery etc);
- If the estate is worth not more than $100,000 – the whole of the estate.
- If the estate is worth more than $100,000 – $100,000 (plus interest from the date of death) and one-third of the balance of the estate. The children are entitled to the other two-thirds of the remainder of the estate.

- If there is no partner, the deceased's **children** are entitled to the whole estate in equal shares**.**

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- Children are defined to include children that have been conceived but not yet born.[1] 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.
- Adopted children are considered to be the children of their adopted parents, not their natural parents.[2] However the adoption must have taken place under the Victorian adoption laws. Many Indigenous families have children who are adopted under traditional law or have been cared for as part of their family but the adoption has never been formally recognised under the Victorian adoption laws. Such children will NOT be considered the deceased artist's children for the purposes of the intestacy rules. 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.
- It is however possible to apply to a Court for an order that a payment be made from the estate to someone for whom the deceased was 'responsible' if that person would otherwise not receive anything[3]. This could be a child who has been informally adopted and was still dependant on the deceased at the time the artist passed away.

- 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 partner nor children, the deceased's surviving **parents** are entitled to the whole estate (in equal shares).
- Where the deceased has no partner, child or parent, the deceased's surviving **sibling(s)** are entitled to the whole estate. 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 partner, child, parent, sibling or nephew/nieces the deceased's surviving **grandparents** are entitled to the whole estate (in equal shares).
- The intestacy rules do not allow the estate to be distributed to anyone more remote than a grandparent or niece/nephew 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.[4]

The family members who are entitled to the assets of the deceased under the intestacy rules are called the **"beneficiaries"** of the estate. The rules for distributing an intestate estate are set out in Division 6 of Part 1of 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.

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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 Victoria is governed by Division 2 and Division 4 of Part 1 of the Act. 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 Supreme Court of Victoria (**Court**) may make a Grant of Letters of Administration. If the Grant of Letters of Administration is made on the application by a beneficiary then the real and personal estate of the deceased person vests in that person.

Option 2: The person can ask State Trustees 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 Victorian 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:

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.

[1] Section 5(2) of the Act.

[2] *Adoption Act 1984* (Vic).

[3] Section 91 of the Act

[4] Section 58 of the *Financial Management Act 1994* (Vic)

[5] Section 13 of the Act

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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