Intestacy Kit – SA (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 South Australia, the laws of intestacy are set out in the *Administration and Probate Act 1919* (SA) (the **Act**). The rules in this Act apply to the estate of any deceased person who left property, real or personal, in South Australia. Intestacy rules will apply when the deceased did not leave a will or to any property that was not effectively covered by the deceased person's will if they did leave one.

Different rules may apply in relation to property that is located outside South Australia or to property in South Australia that 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 South Australia 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 and Torres Strait 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 family members as the ones entitled to the artist's estate after he or she passes away. Those family members are called the **'beneficiaries'.**

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 *Administration and Probate 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[1]:

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

The deceased artist's **'spouse'** or **'domestic partner'** is entitled to the whole of the intestate estate if the artist is not survived by any children, grandchildren or great grandchildren (that is, by any of the deceased's direct lineal descendants who are also referred to as an **'issue'**).

A **'spouse'** means a person who was legally married to the deceased artist at the date of his or her death.

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To be recognised as married, a 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 in South Australia.

The term **'domestic partner'** is defined in the *Family Relationships Act 1975* (SA). A person is the domestic partner of another person if:

o The couple have been living in a 'close personal relationship' for a period of three years or, during a period of four years for periods totalling not less than three years; or

o A child has been born to the couple.

Some of the circumstances which will indicate that two people are in a domestic partnership include the duration of the relationship, the nature and extent of common residence, sharing financial resources, common ownership of assets, shared performance of household duties, caring and supporting children, a sexual relationship and having a mutual commitment to a shared life. Not all these circumstances need to be present to be in a domestic partnership but the extent to which they are present or absent gives an overall indication of whether there is a domestic partnership. If there has been a marriage under traditional Indigenous law and it does not meet the test for marriage described above, the couple may still be recognised as being in a domestic partnership.

If the deceased artist is survived by a spouse or domestic partner and also by children, grandchildren or great grandchildren, then different rules apply depending on the value of the estate:

o If the value of the intestate estate does not exceed $100,000, the surviving spouse or domestic partner is entitled to the whole of the intestate estate, including the deceased's personal effects (household items, jewellery etc).

o If the value of the intestate estate exceeds $100,000, the surviving spouse or domestic partner is entitled to:

o $100,000; and

o half of the balance of the intestate estate.

o The other half of the deceased's estate worth more than $100,000 will be shared between the children or grandchildren (the **issue** of the deceased).

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

The Act specifically contemplates that a deceased person may have, at the time of their death, more than one spouse or domestic partner (for example, both a legal wife or husband and a domestic partner)[2]. This section provides guidance as to how the estate is to be shared if there is more than one spouse.

o If an intestate is survived by both a spouse and domestic partner, they each get an equal share of the portion which would have gone to the spouse or domestic partner if there was only one. For example, if there is no issue, they get half each of the whole estate (including the deceased's personal effects).

o Where there is a dispute between the spouse and domestic partner over any personal effects of the deceased, the person responsible for administering the estate can sell those effects and divide the proceeds of the sale equally between the spouse and domestic partner.

When there is no surviving partner?

If there is no surviving spouse or domestic partner but there are surviving children, grandchildren or their children (as determined by the Act), those descendants are entitled to the whole of the intestate estate in equal shares starting with the surviving children.[3]

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- If the artist had only one child and that child is still alive, that child is entitled to the whole of the intestate estate. If that child passed away before the artist but his or her children (the artist's grandchildren) are still alive, then they are entitled to the whole (or relevant part) of the intestate estate in equal shares.
- In any other case, the intestate estate is divided by the number of the deceased artist's children who are either still alive or who predeceased the artist leaving children or grandchildren of their own. Each surviving child is entitled to an equal share of the estate. If a child of the deceased has passed away, leaving a surviving child or children of that deceased child, then those grandchildren are entitled to the share of the estate that would have gone to their deceased parent (in equal shares). This process continues for all direct descendants until the entitlement is exhausted.

For the purposes of the Act, adopted children are considered to be the children of their adopted parents, not their natural parents.[4] In addition, ex-nuptial children will be treated the same as children born of a marriage. An ex-nuptial child is a child of the artist and a person who was not the artist's husband or wife.[5] However, a step-child is not considered to be the child of the deceased and thus does not receive any interest in the intestate estate.

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 is not survived by a spouse or domestic partner or any issue, the deceased's surviving **parents** (if any) are entitled to the whole estate (in equal shares).

Where the deceased has no spouse or domestic partner, direct descendants or parents, the deceased artist's surviving **brothers and sisters** (siblings) are entitled to the whole estate in equal shares unless there are siblings who predeceased the artist leaving surviving children (the artist's nieces and nephews). If a sibling of the deceased has passed away, leaving surviving children (i.e. nieces and nephews of the deceased artist), then those children are entitled to the share of the estate that would have gone to their parent (i.e. the deceased artist's brother or sister) in equal shares (and so forth until the entitlement is exhausted).

If the deceased artist is not survived by any siblings but is survived by **nieces and nephews**, the intestate estate will be distributed to those nieces and nephews and their issue as if they were the deceased artist's own children.

Where the deceased has no surviving spouse or domestic partner, direct descendants (e.g. children and grandchildren), parent, or sibling (or their direct descendants), the deceased's surviving **grandparents** are entitled to the whole estate (in equal shares).

Where the deceased has no surviving spouse or domestic partner, direct descendants (e.g. children and grandchildren), parent, sibling (or their direct descendants) or grandparent, the deceased artist'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 surviving children (the artist's cousins), then any cousins of the deceased artist are entitled to the share of the estate that would have gone to their parent.

If the deceased is not survived by any aunts and uncles but is survived by the direct descendants of the aunt and uncle (e.g. the artist's cousins), the intestate estate will be distributed to those **cousins** as if they were the children of the deceased

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artist.

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 South Australia. 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.

More details about the rules for distributing an intestate estate are set out in Part 3A 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.

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

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 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 those set out above namely:

- 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.

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:

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

Option 2: A beneficiary or other person can apply to the Court to be appointed as the formal administrator of the estate. This is called a **'Grant 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 South Australian 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.

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 Transport SA 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

i. Was the artist a member of an art centre? Which one? Do they hold any money or paintings belonging to the artist?

j. Are there any art galleries holding works of the artist for exhibition and sale? Do you have contact details for them?

k. Did the artist have any agreements or licenses about the use of his/her art? If so, can you provide any details?

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l. Did the artist get royalties from Viscopy or Copyright Agency? Is the artist registered for resale royalties?

m. Have all the funeral expenses been paid? If so, who paid them? 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.

n. What other debts did the artist have? These must be paid before any distribution to the beneficiaries.

o. 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” by the Australian Tax Office and while alive 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.

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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