Intestacy Kit – NT (AITB)

This Intestacy Kit has been developed to assist families of Indigenous artists who passed away without making a will in the NT. 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), motor vehicles, 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 that are not covered by the will.

In the Northern Territory, the laws of intestacy are set out in the *Administration and Probate Act (NT)* (the **Act**). The rules in this Act apply to the estate of any person who was living in the Northern Territory 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 the Northern Territory or to property in the Northern Territory 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 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, although the Northern Territory has made a concerted effort to recognize some aspects of Indigenous customary law in the area of intestacy, the 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 Northern Territory 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**".

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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, 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.

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.

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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 the 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[1] persons:

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

The deceased's **spouse** or **de facto** is entitled to the whole estate if the artist has no children, grandchildren or great-grandchildren. A spouse means a person who was:

- the deceased's spouse or de facto partner at the time of the deceased's death in a marriage recognized as a legal marriage under Northern Territory law.
- An Aboriginal person in a relationship with another Aboriginal person that is that is recognized as a traditional marriage by the Indigenous community or group to which either of them belongs[2].

A de facto partner is defined as a person who was not legally married to the artist but was in a 'marriage-like relationship'[3].

The recognition of traditional Indigenous marriages by the Northern Territory intestacy laws is in contrast to most other States that do not specifically recognize traditional marriages.

If the deceased artist is survived by a spouse or de facto and also by **children, grandchildren or their children** (also referred to as **"issue"**), then different rules apply depending on the value of the estate.

If the estate (excluding personal chattels) is worth less than $370,000, the surviving spouse or de facto is entitled to the whole of the intestate estate. If the estate (excluding personal chattels) is worth more than $370,000, then the surviving spouse or de facto is entitled to the personal chattels, the first $370,000 plus a portion of the remainder with the rest being shared among the children (or other issue).[4]

A de facto generally has no rights unless they were either:

- In that relationship with the artist for the two years immediately prior to the artist's death and the artist did not also live with the legal husband or wife during that time; or
- is the mother of father of any of the artist's surviving children or the grandparent of any of the artist's surviving grandchildren.

It is however possible to apply to vary the intestacy rules in relation to a deceased Aboriginal person. This is discussed in more detail below. This could have the result of enabling a child adopted under customary law to receive a share of the estate.

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

There are specific rules for the situation of a surviving spouse and de facto. The Act also specifically contemplates that Indigenous people may have more than one spouse. The Act provides that if an Indigenous person has more than one spouse at the time of death, the spouses will share equally in the spouse's portion of the estate[5].

When there is no surviving spouse?

If the artist passes away and is not survived by a spouse or partner but there are surviving issue (children, grandchildren and so on), they are entitled to the whole of the intestate estate. If a child of the deceased artist passed away before the artist leaving a surviving child or children, 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).

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If a grandchild would have been entitled to share in the estate but has not survived and leaves any surviving children, then those great-grandchildren are entitled to equal shares in the portion that the grandchild would have had (and so forth until the entitlement is exhausted).

What about traditional adoption under Indigenous laws?

For the purposes of the Act, adopted children are considered to be the children of their adopted parents, not their natural parents. However, the adoption must have taken place in accordance with the adoption laws of the Northern Territory. 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 Northern Territory 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.

When the artist is not survived by a partner or any children, grandchildren or great grandchildren?

Where the deceased has neither spouse nor issue, the estate will be distributed among the following blood relatives of the artist known as the **"next of kin"**:

- The artist's **parents;**
- The artist's **brothers and sisters and their issue** (nieces and nephews, great nieces and nephews and so on).

The intestacy rules do not allow the estate to be distributed to anyone more remote than the issue of siblings – for example aunts and uncles and cousins have no entitlement.

More details about the rules for distributing an intestate estate are set out in Part 6 of the Act, and are summarised in Schedule 1 of this Kit.

When can the intestacy rules be varied?

The rules for the distribution of property of a person who dies intestate are based on a relatively narrow range of family relationships, and those rules may be inappropriate for Indigenous communities that have a broader concept of family relationships.

In many Aboriginal kinship systems, there are also important cultural and familial obligations and rights existing between persons who are not blood relations.

The Northern Territory has tried to address these problems for intestate Indigenous estates in Division 4A of the Act. That Division provides that the Supreme Court of the Northern Territory can make an order for the estate of a deceased Indigenous artist to be distributed in accordance with the traditions of the Indigenous community or group to which the artist belonged.[6] However this is only possible where:

- The artist had not been in a legal marriage (rather than a traditional law marriage or de facto relationship); and
- An order for administration has been made in respect of the artist's estate.

In other words, no application to vary the intestacy rules to provide for a traditional distribution is possible where the artist was in a valid marriage under the *Marriage Act 1961* of the Commonwealth. The application to the Court must be made either by a professional personal representative (like the Public Trustee) or a person who is entitled to an interest in the intestate

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estate under the customs and traditions of the relevant Indigenous community or group. The application must be made within six months after the grant of administration (although extensions are possible) and must be accompanied a plan of distribution prepared in accordance with the traditions of the community or group to which the intestate Indigenous artist belonged.[7]

> In 2000, the Supreme Court made a decision under this Division in relation to the estate of a deceased Aboriginal man who passed away leaving no family members within the categories identified in the Act. He had been 'grown up' by a member of the Jawoyn clan (although he was from a different clan). His adopted father had passed away leaving three living children, Kevin, Kathleen and Lisa. The Court accepted the application of the Public Trustee that the estate should not go to the State but should be distributed to three members of the Jawoyn people who were not his blood relatives but were his close 'family' and entitled to his possessions in accordance with the customs and traditions of the Jawoyn people.

[8]

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:

Option 1: The Public Trustee for the Northern Territory can be asked to manage the estate.

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Option 2: A beneficiary or other person can apply to the Supreme 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 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 but there are risks associated with proceeding in this way as the person will not be entitled to the same level of protection from personal liability that a formal Grant of Administration confers.

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 Northern Territory intestacy laws.

TEMPLATE DOCUMENTS FOR USE WITH THE NORTHERN TERRITORY INTESTACY KIT

Please download the full Intestacy Kit NT here to see the COMPLETE info sheet and template documents.

Schedule of Documents

SCHEDULE 1 contains a general guide about the way in which the Act will distribute an intestate estate.

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 Northern Territory intestacy.

Documents A to L 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 Northern Territory 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 suggested template letter to send to the Public Trustee.
- *Document F* is suggested form of advertisement that the art centre can use to try to ensure that the correct beneficiaries have been identified.
- *Document G* is a suggested template letter to send to a gallery or dealer asking it to return any unsold works and make any payments due.
- *Document H* is an alternative template letter to send to a gallery or dealer asking it to proceed with the exhibition and sale arrangements which were planned during the artist's lifetime.
- *Document I* is a letter from the artist's art centre to Copyright Agency requesting registration of the estate for resale and statutory royalties.
- *Document J* is a suggested template letter to Copyright Agency and a statutory declaration which can be used if the artist was not a member of an art centre.
- *Document K* is a letter from the art centre to the collecting societies (other than Copyright Agency) advising them that the artist has passed away and asking them to continue paying royalties into the art centre account.

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- *Document L* is a template letter to a copyright licensee requesting the licensee to pay any royalties to the beneficiaries in the future.

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[1] *Administration and Probate Act (NT)* section 63 provides that persons under 18 and not married at the time the artist passes away do not receive their entitlement until they reach 18 or marry. If they pass away before reaching 18 years of age or marrying, they are considered to have predeceased the artist. This rule doesn't affect the operation of other laws which allow the use of money in the estate to care for infants younger than 18 years of age.

[2] Section 6(4) of the Act and the *Interpretation Act (NT)* section 19A(1)(b)

[3] *De Facto Relationship Act 1991 (NT),* s 3A(1)

[4] The Act schedule 6 and *Administration and Probate Regulations 1983* (NT), reg 3(1)

[5] *Administration and Probate Act (NT)* s 67A

[6] *Administration and Probate Act (NT)* Division 4A

[7] *Administration and Probate Act (NT)* s 71B

[8] Application by the Public Trustee for the Northern Territory, [2000] NTSC 52

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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