Intestacy Kit – ACT (AITB)

This Intestacy Kit has been developed to assist families of Indigenous artists who passed away without making a will in the ACT. 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.

Below is an introduction to the Intestacy Kit.

Please download the full Intestacy Kit ACT 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".

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 Australian Capital Territory, the laws of intestacy are set out in the *Administration and Probate Act 1929* (ACT) (the **Act**). The rules in this Act apply to the estate of any deceased person who lived in the Australian Capital Territory. The rules will apply when the deceased person did not make a will or, although they had a will, there is property that is not covered by the will.

Different rules may apply in relation to property that is located outside the Australian Capital Territory or to property in the Australian Capital Territory 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 Australian Capital 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**".

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.

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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's **'partner'** and/or partners are entitled to the whole of the intestate estate if the deceased 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 **'issue'**).

A **'partner'** means a person who:

- was the husband or wife (the 'spouse') or civil partner of the deceased artist when the artist passed away; or
- was not the deceased artist's spouse or civil partner but is still an **'eligible partner'**. An eligible partner is a person who was the deceased's **'domestic partner'** when they died and:

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- had been the deceased's domestic partner continuously for 2 or more years when the artist died; or
- is the parent of the deceased artist's child, if the child was under 18 years old when the artist died.

The word **'spouse'** means 'either member of a married pair in relation to the other; one's husband or wife'.[2] For a couple to be recognised as married, the 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.

A **'civil partnership'** refers to a legally recognised relationship that, subject to the *Civil Partnerships Act 2008* (ACT), may be entered into by any 2 adults, regardless of their sex. In practice, civil partners are usually same-sex couples who have the same legal rights as a married couple. To be in a civil partnership, two adults who are in a relationship as a couple must have their relationship registered under section 8 of the *Civil Partnerships Act*. Again, if it is not registered, a husband or wife in a traditional law marriage may not be considered as a civil partner under the intestacy rules.

A **'domestic partnership'** is defined in the *Legislation Act 2001* (ACT) as a relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis. Some of the circumstances that will suggest two people are living together as a couple include the sharing of a residence, sharing financial resources, common ownership of assets, shared performance of household duties, 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 tests described above, the couple may still be recognised as being in a domestic partnership.

If the deceased 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:

- If the value of the intestate estate does not exceed $200,000, the spouse or partner is entitled to the whole of the intestate estate and to the deceased artist's personal effects (household items, jewellery, etc).
- If the value of the intestate estate exceeds $200,000, the spouse or partner is entitled to be paid out of the estate:
  - $200,000;
  - interest on that amount (calculated at the rate of 8% per annum from the date of the death of the deceased artist to the date the amount is paid to the partner); and
  - an additional amount equal to half the value of the remaining estate if there is only one surviving child or the issue of one child or, in any other case, 1/3 of the remaining intestate estate.
- The remainder of the estate worth more than $200,000 will be shared with the deceased artist's 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 they pass away, more than one partner (for example, both a legal wife or husband and a domestic partner)[3]. This section provides guidance as to how the estate is to be shared if there is more than one partner. If the deceased is survived by both a spouse or civil partner and an eligible partner:

- If the eligible partner and the intestate had been domestic partners continuously for less than 5 years when the deceased artist died, the partnership share of the estate will be equally divided between the eligible partner and the spouse or civil partner.

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- If the eligible partner and the deceased artist had been domestic partners continuously for 5 years or more when the deceased artist died, the eligible partner will receive the whole partnership share (which is the relevant share of the estate calculated in accordance with the Act).

When there is no surviving partner?

If the artist passes away and is not survived by a spouse or partner but there are surviving children, grandchildren or great grandchildren, those lineal descendants are entitled to the whole (or relevant part) of the intestate estate[4].

- 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 predeceased 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 died, 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.

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.

The provisions of the *Parentage Act 2004* (ACT) provide that ex-nuptial children will be treated the same as children born of a marriage only if the deceased artist was recognised as the child's parent *before* the artist died.[5]

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

Where the deceased has no spouse or any direct descendants (e.g. children and grandchildren), the deceased's surviving **parents** are entitled to the whole estate in equal shares.

Where the deceased has no spouse, direct descendants (e.g. children and grandchildren), or parents, then 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 (i.e. nieces and nephews of the deceased artist), then those nephews and 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, direct descendants (e.g. children and grandchildren), parents, or siblings, then the deceased's surviving **grandparents** are entitled to the whole estate in equal shares.

Where the deceased has no surviving partner, direct descendants (e.g. children and grandchildren), parents, siblings (or their direct descendants) or grandparents, then 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, 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 an aunt and uncle, then the intestate estate will be distributed to

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those descendants as if they were the direct descendants of the deceased 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 Australian Capital Territory. The public trustee must hold the estate for the Territory for six years after the death of the intestate, after which the trustee must sell the estate and pay the proceeds to the Territory.[6] 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 6 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, New South Wales and Tasmania, 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. However, the Public Trustee for the Australian Capital Territory is currently cooperating with the New South Wales Trustee and Guardian with a view to creating appropriate documentation to assist Indigenous people to make a valid will and effectively distribute their property.

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[7].

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.

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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 Australian Capital Territory 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 Australian Capital Territory intestacy laws.

TEMPLATE DOCUMENTS FOR USE WITH THE AUSTRALIAN CAPITAL TERRITORY INTESTACY KIT

Please download the full Intestacy Kit ACT here to see the complete information sheet and 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 Australian Capital 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 Public Trustee for the Australian Capital Territory 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 suggested form of advertisement that the art centre can use to try to ensure that the correct beneficiaries have been identified.

Document F is a suggested template letter to send to a gallery or dealer asking it to return any unsold works and make any payments due.

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Document G 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 H is a letter from the artist's art centre to Copyright Agency requesting registration of the estate for resale and statutory royalties.

Document I 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 J 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.

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

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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