

WHEN AN ABORIGINAL OR TORRES STRAITS ISLANDER ARTIST PASSES AWAY WITHOUT A WILL IN WESTERN AUSTRALIA – PRE 7 AUGUST 2013

New changes to the law

The law in Western Australia applicable to Aboriginal and Torres Strait Islander people has recently changed. Part IV of the *Aboriginal Affairs Planning Authority Act 1972* (WA) which applies to situations where an Aboriginal or Torres Strait Islander person passes away without a will has been repealed with effect from 7 August 2013.

This information sheet sets out the law which applies where an Aboriginal or Torres Strait Islander person passes away without a will before the new law commenced on 7 August 2013.

What is intestacy?

When a person passes away leaving a valid Will, that Will sets out how his or her belongings should be divided amongst family and friends as well as appointing an executor with responsibility for administering the estate.

If a person passes away without leaving a valid Will that person is said to be “**intestate**”. If the Will only deals with some of his or her belongings, then he or she will be intestate in respect of the belongings not covered by the Will and will be said to be “**partially intestate**”.

What is meant by “estate”?

A person’s “**estate**” consists of any and all belongings owned by that person including “personal estate” such as bank accounts, intellectual property rights, artworks, shares, and personal effects and “real estate”, i.e. land or interests in land. Any debts owed by the person at the time he or she passes away (for example credit card debts or car loan repayments) must be paid out of the estate. If there is insufficient cash then other assets must be sold to satisfy these debts.

What are the applicable intestacy provisions?

If a person passes away intestate, the laws applicable to intestate estates in the State where that person was living will generally apply to the estate. If a person passes away partially intestate, then the relevant intestacy provisions will apply only to assets not covered by the Will.

However it is possible that the intestacy laws of more than one State or Territory may apply to a person’s estate. For example, if a person was living permanently in Western Australia leaving personal estate in Western Australia and real estate in the Northern Territory then it is not clear whether the Western Australian provisions would apply to the whole estate or whether Western Australian law would apply to everything except the real estate which would come under Northern Territory law. If you think that the estate contains assets located in more than State or Territory, you will need legal advice as to which laws apply. Contact Arts Law for more information.

Intestacy Provisions in Western Australia

In this information sheet, we focus on how the intestacy provisions will operate in relation to an artist of Aboriginal descent who was living in, and owned property only in, Western Australia at the time he or she passed away.

In Western Australia, there are three main sets of provisions which will apply to the estate of that artist:

- The *Administration Act 1903*;
- The *Aboriginal Affairs Planning Authority Act 1972*; and
- The *Aboriginal Affairs Planning Authority Act Regulations 1972*.

One or more of these provisions determine who is entitled to the belongings and property of the artist. These provisions may be very different from the outcome which the family of the artist expect and may also be very different from the result that the artist would have wanted. **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.**

Who will administer the Estate?

In some cases, where the artist passes away leaving very few belongings, and has not left a will, 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, simply dealing with the assets as the family wishes is not possible in many circumstances; particularly if the estate includes real property, a large bank account or where unsold artwork is held by galleries or art centres. The artist's estate is likely to include copyright in any artwork created during his or her lifetime and this 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 passed away. In addition, the artist's estate will include the entitlement to re-sale royalties on all eligible commercial re-sales of his or her works which take place in the 70 years after the artist's passing.

In those circumstances the estate must be administered formally in accordance with the relevant provisions relating to intestacy.

Most importantly, if the artist is a person of Aboriginal descent (which the law in Western Australia defines as a full blooded person or a person of more than one fourth full blood) then the estate of the artist will be managed under the provisions of part IV of the *Aboriginal Affairs Planning Authority Act 1972* (the **AAPA Act**) (**Note if the artist passed away on or after 7 August 2013 without making a will, the Intestacy Kit – WA (post 7 August 2013) should be used.**) Where this legislation applies, the estate vests in the Public Trustee and is held by the Public Trustee to pay the deceased's debts. The Public Trustee then distributes the balance amongst the persons entitled to the estate under the laws of Western Australia.

The family of an artist of Aboriginal descent who did not have a will is therefore required to contact the Public Trustee so that the Public Trustee can administer the estate.

However, the Arts Law Centre of Australia believes that the AAPA Act is inconsistent with the *Racial Discrimination Act 1975* (Cth) and, as a consequence is invalid by reason of section 109 of the *Commonwealth Constitution*.

Arts Law has successfully lobbied the Western Australian government to abolish these provisions in the AAPA Act. Those reforms are due to come into operation some time in 2013; however, as the law currently stands in Western Australia, neither the family nor an arts centre can or should administer the estate.

How to notify the Public Trustee

The Public Trustee's Office will not take any action until it is notified that the artist has passed away. This can be done by letter; however the best way is to complete the formal [Intestacy Form](#) in Schedule 1. If you have a copy of the death certificate you should send that in with the form.

You can contact the Public Trustee on its toll free number 1300 746 116.

Who is entitled to the artist's estate?

There are two different sets of rules in Western Australia depending on which members of the artist's family survive him or her.

Distribution under the *Administration Act*.

When a person of Aboriginal descent passes away and is survived by a husband or wife or children then the provisions of the *Administration Act* will usually apply. This is also usually the case if the artist had been in a de facto relationship or a traditional law marriage during the two years immediately before he or she passed away.

The *Administration Act* is quite complex and the entitlements of the family depends on the size of the estate and the persons who survive. Examples of distributions include the following:

- Where the estate is worth \$50,000.00 or less and there is a surviving husband or wife and children, the entire estate including household chattels eg washing machine, goes to the husband or the wife.
- Where the estate is worth more than \$50,000.00, the surviving husband or wife will take all household chattels and the first \$50,000.00 of the estate. The remaining estate is distributed to the husband or wife (one half if there is only one child or one third if there are two or more children) and the child or children (who take the remainder, equally if more than one). Children of any child who passed away before the artist would take their parent's share equally.
- Where the estate is worth \$75,000.00 or less and there is a surviving husband or wife but no children or grandchildren, the surviving husband or wife takes the entire estate including household chattels.
- Where the estate is worth more than \$75,000.00 and there is a surviving husband or wife but no children or grandchildren then the surviving husband or wife take all household chattels and \$75,000.00 together with one-half of the remainder. The other

half of the remainder will be divided between the artist's parents, and extended family in accordance with the provisions set out in the *Administration Act*.

- Where the artist was at some stage married but divorced or the legal spouse passed away before the artist, then the artist's surviving de facto partner or traditional law spouse who lived with the artist for the 2 years immediately prior to the artist's passing has the same entitlement as a wife or husband from a legal marriage.
- Where the artist was living with more than one de facto partner or traditional law spouse in the two years immediately prior to the artist's passing, the de facto or traditional spouses share their entitlement equally between them.

Distribution where the artist has never been married.

Regulation 9 of the *Aboriginal Affairs Planning Authority Act Regulations 1972* applies to all situations which are not covered by the *Administration Act*.

Again the provisions are quite complex and the entitlements depend on relationships of the surviving persons. However the Regulations treat men and women differently. A traditional law wife has a lesser entitlement than a traditional law husband. Children have a lesser entitlement to their mother's estate than to their father's estate.

Examples of distributions set out in the Regulations include:

- Where an Aboriginal male is survived by his Aboriginal traditional law wife then his wife and the children from that traditional marriage (excluding children adopted under traditional law) share his estate equally.
- Where an Aboriginal female is survived by her Aboriginal law husband then her husband is entitled to the whole estate and the children from that traditional marriage have no entitlement.

There are various further provisions to cater for other situations.

It seems that children adopted under traditional law by the artist also have no entitlement either under the *Administration Act* or the Regulations. Such family members would need to make a 'moral claim' to the Public Trustee under section 35 of the AAPA Act. If approved by the Public Trustee, a recommendation is made to the Minister for approval and in turn, the claim must be approved by the Governor. There is no right of appeal from the Public Trustee's decision.

Again, however, it is stressed that the process of identifying who will receive the artist's estate and distributing any assets to the artist's family members will be in the hands of the Public Trustee. The family of the artist should establish contact with the Public Trustee as soon as possible to assist them in their enquiry and ensure that they have access to the necessary information. Unlike all the other States and Territories of Australia, the artist's family cannot undertake this process themselves. They have no choice but to allow the Public Trustee to perform this role and deduct its fees from the estate.

Evidence of family relationships

The Public Trustee will usually get a genealogist to work out who the deceased's artist's family members were. The costs of that genealogist come out of the estate. For that reason, if any of the artist's children or other family members have birth certificates showing their relationship to the deceased artist, these should be sent to the Public Trustee. If the artist was survived by a spouse then a copy of the marriage certificate can be provided. This will save some costs.

If the family do not have birth certificates or marriage certificates, it may be possible to get helpful information from the [Aboriginal History Research Unit of the Western Australian Department of Aboriginal Affairs](#). They have some historical records which the Public Trustee may accept in lieu of birth and marriage certificates.

To request that information, a family member needs to complete the [Family History Application Form](#). You can contact the Aboriginal History Research Unit by writing to Ground Floor, 151 Royal Street, East Perth WA 6004 or telephone (08) 6551 8105 or fax (08) 6551 8088.

The more information that you can provide to the Public Trustee, the sooner the Public Trustee will be able to identify the beneficiaries and distribute any assets.

Disclaimer

This paper is intended as advice for families of persons of Aboriginal descent only. The administration of estates of non-Aboriginal persons is outside its scope. It is recommended that in those cases legal advice is sought to determine the rights of the surviving relatives and the procedure for applying for a grant of Letters of Administration.

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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SCHEDULE 1

Public Trustee Intestacy form on next page



Government of Western Australia
Department of the Attorney General



Public Trustee

**PARTICULARS RELATING TO A DECEASED PERSON
INDIGENOUS ESTATES
(ALL SECTIONS OF THE FORM MUST BE COMPLETED)**

INTESTATE FORM

Full Name (Surname) _____ Given Names _____

Alias, if any _____

Last Place of Residence _____ Post Code _____

Occupation (If aged Pensioner, the last occupation) _____

Date of Birth _____ Place of Birth _____

Date of Death _____ Place of Death _____

Cause of Death _____

Location of deceased (body)
and contact details _____

Married Yes / No Place of Marriage _____

Name of widow/er _____

Separation? Yes / No Divorced? Yes / No

Does the deceased have a will Yes / No

Have searches been conducted in personal paper etc? Yes / No

If yes, who holds the Will? _____

If no, please provide the full name of widow/er and next of kin, stating what relation they bear to the deceased. If any are minors, we require their dates of birth or approximate age if the date of birth is unknown.

If no, is the deceased of Aboriginal descent and more than one-fourth of the full blood?
(as required under Section 33 AAPA Act) Yes / No

THE FOLLOWING BOXES MUST BE COMPLETED BEFORE SENDING TO THE PUBLIC TRUSTEE

Land	
Address _____	Value _____
Location of keys _____	
Whereabouts of Certificate of Title _____	



Government of Western Australia
Department of the Attorney General



Public Trustee

Full Details of all other assets belonging to deceased Bank Accounts (name of bank, a/c no., balance) life assurances, shares, furniture, motor vehicles etc, and state whereabouts of passbooks, policies etc

If the deceased left property requiring protection, state details, contact person and telephone number

Name/address/contact number of Caretaker, if boarding house

Name/address/contact number of Rental property

*If deceased property seized by Police, Seize Report No

Name and Address of Employer

Wages due at date of death

Details of length of time deceased was a patient in Hospital/resided in Nursing Home:

Details of any NOK recorded on deceased's admission paper:

Details of any person who visited deceased

Please provide full details of all searches undertaken to establish any next of kin:

SEARCHES UNDERTAKEN:

1.

2.

3.

4.

Please complete all 3 pages



Government of Western Australia
Department of the Attorney General



Public Trustee

HAS AN EXTENSIVE AND EXHAUSTIVE SEARCH BEEN PERFORMED TO ASCERTAIN IF THERE ARE ANY KNOWN NEXT OF KIN, INCLUDING SEARCH OF PERSONAL PAPERS, ETC.

Yes/No

Any next of kin contacted
Any known family / friends
Please print your full name in capitals
I confirm that all avenues of enquiry have been undertaken to establish the next of kin.
Signature _____ Date _____

Address: _____
Suburb: _____ State: _____ State _____ Post Code: _____
Tel. (H) _____ Tel (W) _____

Public Trustee practise regarding Unclaimed Bodies:

An unclaimed body is where a person has died and no one has claimed the body in order to undertake the funeral arrangements and deal with the assets of the estate. In all instances the Next of Kin (NOK) of the deceased is responsible if the deceased died intestate or the executor of the will is responsible if they died with a will. The Public Trustee generally does not become involved unless reasonable attempts have been made to establish that there is no NOK or the deceased did not leave a will.

It is important that the organisation reporting the estate obtain as much information in relation to NOK and assets of the deceased prior to reporting the matter to the Public Trustee as an unclaimed body.

PLEASE FAX FORM BACK TO 9222 6627
QUERIES CAN BE DIRECTED TO CLIENT SERVICES ON 1300 746 116

e: ptocustomerservices@justice.wa.gov.au

www.publictrustee.wa.gov.au

- Wills • Deceased Estate Administration • WA Will Bank • Enduring Power of Attorney
- Trust Management • Executor Assist • Private Administrator Support

Please complete all 3 pages