Author Wills and their Literary Estates
AUTHORS WILLS and their LITERARY ESTATES

If you own assets, you should have a Will to ensure that your assets are passed to your chosen beneficiaries and not to unintended beneficiaries. Wills can deal with any asset owned solely by you, including real estate and personal property. Wills often contain specific bequests of personal property, such as jewellery, furnishings and artworks. However, an Author’s literary estate, potentially a valuable asset, is often overlooked.

A literary estate can include variety of personal property including:

- tangible property like manuscripts (unpublished and/or incomplete), diaries, letters, and books; and
- intangible property, most importantly copyright and moral rights.

If you are an author, it is particularly crucial for you to consider copyright when planning what will happen to your personal property after your death. Copyright confers both control over how and by whom works are used. It may provide an income stream from royalties when work is licensed.

The Copyright Act (1968) provides that copyright in works will generally last for 70 years after your death. This means that after death there is a long period of time during which the beneficiaries of your copyright can control the use of works created by you and can continue to benefit from publishing contracts and other licensing arrangements for the use of the works.

When preparing a Will, it is important to think about who will be best placed to administer and benefit from your copyright once your estate is distributed by your executor. If there is more than one such person, several children for example, then you should consider how they will work together. In addition to appointing a general executor to administer your estate, you might also want to consider appointing a literary executor to act in an ongoing capacity. A literary executor would be someone who has some knowledge about how to handle matters related to your works, including the management of your copyright.

The following “Frequently Asked Questions” cover many of the issues.

1. **What happens to your copyright if you do not deal specifically with it in your will?**

   Your copyright asset becomes part of what is known as the “residue” of your estate, along with any other property that is not specifically bequeathed, and your executor will distribute it to the beneficiaries of that residue.
2. **What if I want my literary assets to pass to a specific beneficiary or beneficiaries?**

Copyright will vest in the executor of your estate once probate has been granted. The executor will then distribute copyright to your beneficiaries by an assignment in writing. Once copyright passes to the beneficiary, that person will own copyright and be able to deal with your copyright in the way she or he sees fit. It is also possible to give a beneficiary an inheritance structure commonly called a “testamentary discretionary trust”. That structure can be a tax effective means for the beneficiary to deal with the inheritance.

If you give the literary assets to more than one beneficiary, such as your three children, you need to consider what is to happen in the event that the beneficiaries disagree on any relevant issues. Your Lawyer will be able to suggest dispute resolutions options which you can include in your Will.

3. **Should I prepare my own Will?**

Whilst you may be an excellent author, a doctor shouldn’t diagnose themselves, they should seek advice from a suitably qualified medical practitioner. Likewise, when considering your Will and estate planning, it is advisable to seek advice from a Lawyer with expertise in the area or Wills and Estate Law. A suitably qualified Lawyer will ensure your Will is properly drafted and executed, appoints appropriate executors, takes into account all relevant issues, including payment of debts and liabilities and taxation, and is not likely to be subject to challenge. A sophisticated Will can provide a tax effective way for beneficiaries to manage the inherited assets and can build in asset protection strategies to protect against claims by creditors or estranged former partners.

4. **What happens to your copyright if you don’t leave a Will?**

Dying without a Will means you are considered “intestate”. Each State and Territory in Australia has laws that deal with succession whether under a Will or intestacy. These laws set out the rules dictating who will inherit on an intestacy. Starting from next of kin, such as a spouse, property may go to children, parents, siblings or nieces and nephews. The consequence of an intestacy may be that your copyright goes to people that you do not want to receive it. It can also make it difficult to manage if copyright ends up being owned by several people. Once those people die, their share of the copyright will be passed on to their own beneficiaries under a will or intestacy, meaning even more people could end up owning the copyright.

5. **What happens to any licences or agreements entered into by you during your lifetime?**

Beneficiaries inherit the copyright subject to any licences that have been granted during your lifetime.
6. **Should I appoint a literary executor?**

In Australia, the term “Literary Executor” might best be envisaged as a lay term of convenience dependent upon context rather than as a legal concept. In Australia, the expression “Literary Executor” is not a term of art or possessed of a universal meaning. Contrary to expectations in some quarters, it is not a term generally known to estate lawyers. A suggested clause appointing a Literary Executor is set out in FAQ 11(a).

You should consider who is the most appropriate person to manage your copyright and moral rights. You may want your spouse and children to benefit financially from exploitation of your copyright and leave income from your copyright works to them as beneficiaries under your Will. However, these family members may not have the necessary skills to negotiate copyright agreements in your works. In such a situation, you may want to appoint a literary executor who is a literary agent or lawyer with expertise to manage and maximise the commercial return from their works. This would be particularly relevant where a writer has an extensive copyright portfolio.

Again, we suggest you seek the advice of a suitably qualified Wills and Estate Lawyer and make clear your wishes in the terms of your Will.

If you appoint a literary executor in your Will, you can include guidance as to how you wish the literary executor to act. However, it is also possible to state in the Will that you wish the literary executor (or the beneficiaries) to take account of any matters expressed by you contained in a separate document, sometimes referred to as a “Memorandum of Wishes” or a “Letter of Wishes”. That document does not form part of your Will. The advantage of the separate Memorandum is that if you want to add to or vary your wishes you simply amend your Memorandum. There is no need to do a new Will or a codicil to your Will.

With personal items that might contain sensitive information, such as diaries and letters, you may wish to consider when you would grant access to them and whether there are specific people you would be happy to access them or others you would want to specifically exclude from accessing them. Any considerations like this should be recorded clearly for your heirs or for institutions that house such documents for you. A literary executor should be able to manage these issues.

7. **What if I wish that the literary property is given to a charitable or cultural institution?**

If you want to deposit or donate items, you need to know that the institution to which you want to send them is willing to receive them. You may also want to clarify if the institution is a Deductible Gift Recipient (DGR) and therefore able to offer you or your heirs a tax deduction for the value of what you wish to
8. **What should I do about unpublished works?**

This is an issue that comes up frequently in literary estates. As an author you should think very carefully about unpublished manuscripts and letters and diaries. If you are sure you don’t want them published, you should consider destroying them as there are many instances of literary executors or beneficiaries publishing material even when it was expressly prohibited by a deceased author.

If you have identified a person you trust to carry out your wishes to be your literary executor, you should state clearly what you want done with unpublished works. There may be a class of works you want destroyed, or that you do not want published. There may be others where you are happy for your literary executor to use their discretion and enter into publishing or access agreements accordingly. These issues can be covered in the separate “Memorandum of Wishes”.

There are also instances where beneficiaries block uses of works that many believe the author would have wanted – refusing permission for an adaptation of a work because they believe it is contrary to the building of the reputation of the deceased author. Again, to ensure that your works are managed the way you would like, it is important to consider very carefully who will manage such consents.

9. **Other than making my intentions clear in my Will and Memorandum of Wishes, is there anything else I should do?**

It is also good practice to maintain good record keeping, such as a comprehensive creative portfolio, with a list of all your works, all licence agreements associated with those works and all income streams. This will greatly assist your beneficiaries manage income streams, chase up payments and know who to contact for any further correspondence or negotiations.

10. **I would like to bequeath a gift to the Australian Society of Authors. What do I do?**

The Society is a charitable body and welcomes the kindness and generosity shown by those who donate to it. Your Lawyer will advise you how to do so, however the following wording may assist.

*I give [amount of gift or description of specific gift or percentage of estate] to The Australian Society of Authors Limited ABN 26 008 558 790 to be applied for the general purposes of The Australian Society of Authors’ Endowment Fund. I direct that the receipt of the secretary, treasurer or public officer for the time being of the Society shall be an absolute discharge to my executor(s).*
11. Can you suggest clauses for my Will I can pass on to my Lawyer?

a. Suggested clause for appointment of Literary Executor

A. I APPOINT [name] (hereinafter called 'my Literary Executor') to be my Executor in respect of my published and unpublished literary works (including any original documents embodying any such work) and any copyright or interest in copyright therein that I may own at the date of my death and the benefit of any subsisting licence or other subsisting contract concerning them or any of them.

B. I DIRECT that my Literary Executor shall administer any licence or contract referred to in clause A of this clause and shall collect and recover any moneys payable under any such licence or contract.

C. Subject to the subsequent provisions of this my Will I DIRECT that my Literary Executor shall have power to realise my literary works, copyrights and interests in copyrights by sale, assignment or disposition of them or any of them or any interest therein or thereunder or by the grant of any licence or right for, in each and any case, such consideration as they may think proper, including royalties to be paid to my Literary Executor.

D. I DIRECT that my Literary Executor shall be entitled to reimbursement of out-of-pocket expenses incurred by them in the performance of their duties under my Will and to commission at the rate of X percent (X%) of corpus and X percent (X%) of income collected by them in the performance of their duties and the exercise of their powers under this clause.

E. I DIRECT that the moneys collected by my Literary Executor after deduction of the moneys payable to my Literary Executor under the previous subclause shall be paid to my estate Executors and Trustees for distribution to the beneficiaries named in my Will and shall bear the same character of capital or income when so paid as they bore when collected by my Literary Executor.

b. Suggested clause for simple gift to a named beneficiary

A. I give to [name of beneficiary] all rights and interests held by me in my published and unpublished literary works (including any original documents embodying any such work) and any copyright or interest in copyright therein that I may own at the date of my death and the benefit of any subsisting licence or other subsisting contract concerning them or any of them.

B. If [name of beneficiary] does not survive me, such rights or interests which would have passed to that beneficiary shall pass to such of his or her children as survive me and attain the age of 25 years and if more than one in equal shares.

c. Suggested clause for gift to a named beneficiary in a testamentary discretion trust

A. I give to my executor (or Literary Executor) all rights and interests held by me in my literary works to establish a testamentary discretionary trust with [name of beneficiary] as Primary Beneficiary, such trust to contain the provisions set out in [insert relevant part, schedule or clauses in Will] of my Will.

B. The expression "my literary works" shall mean my published and unpublished literary works (including any original documents embodying any such work) and any copyright or interest in copyright therein that I may own at the date of my death and the benefit of any subsisting licence or other subsisting contract concerning them or any of them.
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