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**THE LITERARY EXECUTOR  
AND THE LIGHTHOUSE**

**by**

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**INTRODUCTION: “THE LITERARY EXECUTOR”**

- 1 The deceptively familiar expression “Literary Executor” invites an exploration, not only what *it* means, but also of basic but less familiar aspects of probate law that might, if need be, accommodate it.
- 2 Technological change, with increasingly widespread use of computers and their derivatives, has forced changes in how we store information; how we communicate; how we are entertained; what we view as “creative arts”; and what we recognise, and value, as “property”.
- 3 Even the most conservative probate lawyer has to be alive to the implications this has, or may have, for the administration of a deceased estate, property by another name.
- 4 At the outset, we should remind ourselves of the nature, scope and governing purpose of probate law. It looks to the due and proper administration of a particular deceased estate, in providing for succession to property, having regard to any expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate.

- 5 The task of the Court upon an exercise of probate jurisdiction is to give effect to a deceased person's testamentary intentions (or, in default of any duly expressed testamentary intentions, the scheme of the law governing intestate estates), and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P 154 at 157; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192; *Estate Kouvakis* [2014] NSWSC 786 at [211].
- 6 With the aid of ancillary equity jurisdiction, the Court's probate jurisdiction can (sometimes barely) accommodate, but it does not exist primarily to nurture, trade (in literary, or any other, property) through a deceased estate.
- 7 The concept of a "Literary Executor" is not necessarily confined in its operation to the parameters of probate law; but, to the extent that an endeavour is made to bring it within those parameters, an understanding of probate law and practice is essential.
- 8 This paper provides a necessarily modest contribution to a better understanding of probate law and practice in its intersection with the law, and management, of property in the form of a copyright entitlement, an area of the law only sparsely treated by local case law and commentary.
- 9 On the whole, Australian probate texts generally do not refer to "Literary Executors" in terms, or to copyright at all, and copyright texts do not refer to the law of succession. They have that much in common.
- 10 An aspiration to be practical is necessarily qualified by a need to be speculative. In its treatment of the topic, the paper aims to clarify concepts and, in a fashion, to provide a (non-exhaustive) checklist of factors that may need to be taken into account in decision-making about succession to property in, or incidental to, a literary work.
- 11 A rhetorical question never far from the surface is: *Why* would any will-maker rationally seek to embrace (more, and longer, than is necessary to effect a

succession to property) a formal division of ownership and control of property in a literary work? If that question remains, for you, unanswered at the end of this paper, don't appoint a "Literary Executor" in your will to administer a part, and part only, of your deceased estate. Consider alternatives.

- 12 Literary property might best survive an author if vested in a corporation; gifted to a university or public institution; given to an empathetic individual; or sold to an enterprising entity, preferably with interests in common with those of the author. If and to the extent it requires expertise to sustain it, we live in a world of professionals able to supply specialist services and increasingly bound by law to eschew negligence.
- 13 These realities exist independently of any concept of a "Literary Executor". Nor do they cease to exist if, independently of probate law, and however inaptly, a person representing, or purporting to represent, an author is given, or assumes, an honorific title of "Literary Executor".
- 14 An author confronting alternative models for estate planning must recognise his or her mortality and embrace a risk management philosophy, commencing with formulation of a clear objective.
- 15 In days of old, the prime role of a "Literary Executor" may have been to collate and edit papers for publication, and to destroy those deemed not suitable for publication. In a less modest, more commercial age that role may have moved the role of a "Literary Executor" away from that of a mere editor and towards that of an entrepreneur.
- 16 In a series of papers presented to Elder Law, Succession and Estate Administration lawyers I have suggested that (with a blending of the Court's protective, probate and family provision jurisdictions) "death" has become, in law, a *process* rather than *merely an event*: stretching from the first execution of an enduring power of attorney until closure of opportunities (if ever there can be closure of an opportunity) to make a claim for family provision relief.

- 17 While adhering to that view in speaking of ordinary mortals like “me and thee”, my review of cases involving “literary estates” of one sort or another suggests a different, almost infinite process of death for those we revere as authors: If there is money to be made from intellectual property rights (not limited to copyright) arising out of the work of a writer, an artist or the like, then, in the interests of commerce, death can be postponed infinitely. Celebrity might ruin your health, but prolong your utility.

## **PARAMATERS OF THIS PAPER**

- 18 The focus of this paper is primarily on probate law and practice, not on copyright law or upon alternative legal or economic models for the ownership or transmission of a copyright entitlement.
- 19 Recognising the complexity of copyright law (manifested in the *Copyright Act* 1968 Cth), and a need for reduction of that complexity in the interests of a focussed paper, the following conventions are noted:
- (a) In this paper, a reference to “a literary work” is taken to include all types of “property” capable of sustaining an entitlement to copyright under the *Copyright Act* 1968. Thus, for example, no distinctions are made between literary, dramatic, musical and artistic works of the kind found in section 10 for the purposes of the Act.
  - (b) Consistent with this condensed terminology, and in deference to cultural heritage, the term “Literary Executor” is used without distinction between different types of copyright entitlements.
  - (c) A reference to “copyright” is taken to include, not only an entitlement to “copyright” (elaborated, for example, in sections 31-35 of the *Copyright Act*), but also an entitlement to the “moral rights” of an author elaborated in section 195AM *et seq* of the Act.

- (d) A reference to an “author” may, in context, include a reference to any person (including an assignee or licensee) entitled to copyright.

- 20 Confinement of the parameters of the paper to points of intersection between probate law and practice (on the one hand) and copyright (on the other) comes with a reminder that copyright is but one form of intellectual property. The paper does not address special issues that might arise with trade marks, designs or patents, or with general law issues (such as the tort of passing off or the law of gifts, *inter vivos* or *donatio mortis causa*) that may, from time to time, engage the attention of “authors”, their legal personal representatives and beneficiaries. Lines must be drawn. The law, literature, litigation and the like intersect at many points. See, for example, *Conan Doyle v London Mystery Magazine* (1949) 66 RPC 312 (passing off); *Barbara Jill White v Rex Dupain* (2007) 73 IPR 578 (trade marks); *Matter of Kallman* (1980) 103 Misc 2d 339; 425 NYS 2d 938 (gift of WH Auden papers); *Nolan v Nolan* [2004] VSCA 109 (Sidney Nolan gift, *Executor de son tort*).
- 21 Conceptually, the topic under consideration can be adequately addressed by a definition of “copyright” no more sophisticated than the definitions found in the *Oxford English Dictionary*. It defines “copyright” (the noun) as “the exclusive right given by law for a certain term of years to an author, composer, designer, etc (or his assignee), to print, publish, and sell copies of his original work”. It defines “copyright” (the adjective) as “protected by copyright; not allowed by law to be printed or copied except by permission of the author, designer, etc.” It defines “copyright” (as a transitive verb) as “to secure copyright for; to protect by copyright”.
- 22 Noticing that they might be critically important to estate planning, and estate administration, in a particular case, this paper does not engage with questions that might arise in dealing with:

- (a) the taxation consequences of a particular legal, or economic, model for the ownership or transmission of a copyright entitlement;
- (b) the use of a corporate vehicle as a means for owning or transmitting a copyright entitlement; or
- (c) an application for family provision relief under Chapter 3 of the *Succession Act 2006* NSW in relation to the estate, or notional estate, of a person entitled to copyright.

23 My express exclusion of these topics from this paper is intended nevertheless to be a reminder to you to include them on any checklist of topics that require attention before drafting, or executing, a will that provides for the appointment of a “Literary Executor”.

24 The paper is predicated upon an acceptance that an entitlement to “copyright” is, under Australian law, “property”, rather than merely a personal right. That is the predisposition of the Anglo-Australian tradition: *Sterling on World Copyright Law* (Thomson Reuters, London, 4<sup>th</sup> ed, 2015), paragraphs [2.20]-[2.27] and [2.42]-[2.44], especially at page 67.

## LITERARY EXECUTOR : THE CONCEPT DEFINED

25 The *Oxford English Dictionary* offers two definitions of “**Literary Executor**”, found as subordinate entries under the respective entries for “Literary” and “Executor”.

26 Under the title “**Literary**”, a “Literary Executor” is defined as “a person entrusted with a dead writer’s papers and copyrighted and unpublished works.” Pointedly, here, there is no necessary connection with the office of an executor as understood in probate law.

27 Under the title “**Executor**”, the following definitions appear:

“**[Executor]**... A person appointed by a testator to execute or carry into effect his will after his decease.

**Literary executor**.... One who is entrusted with the care of the papers and unpublished works of a literary man.”

28 Here, too, there is no necessary connection between a “Literary Executor” and the office of an executor as understood in probate law.

29 In an Australian context, 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 probate lawyers.

30 The position may be otherwise in the United States of America. *Black’s Law Dictionary* (10<sup>th</sup> ed, 2014) includes, in its entry for “Executor”, a sub-entry for “Literary Executor”: “*Copyright*. A limited purpose executor appointed to manage copyrighted materials in an estate”.

31 Nevertheless, in *Woodhouse v Cohen* (1950) 198 Misc. 1000; 101 N.Y.S. 2d 675 the Supreme Court of the State of New York (in a short judgment that accords with Australian perceptions of probate law and practice) summarily dismissed an action by a plaintiff, a self-styled “Literary Executor” for a deceased person without any testamentary appointment or a grant of probate evidencing an entitlement to such an office. Eder J is reported to have made the following observations (with emphasis added):

“As to plaintiff suing in the capacity of a ‘Literary Executor’, *there is no such entity in the law. A person may be designated executor solely for the purpose of administering literary property.* Plaintiff does not allege that he was appointed executor, nor does he allege he was appointed ‘literary executor’ by the Surrogate’s Court in which decedent’s will was probated; and it is stated, and not denied, that he was not appointed. His complaint, therefore, as literary executor, is throughout defective and must fail in behalf of the estate.”

## USAGE OF THE CONCEPT, LITERARY EXECUTOR

- 32 If the *Oxford English Dictionary* is any guide, “Literary Executor” is an expression known to have been used in literary circles, if not legal circles, as far back as 1797 at least.
- 33 Unless buried in the detail of an obscure text, it finds no place in Henry Swinburne’s *A Brief Treatise of Testaments and Last Wills* (1<sup>st</sup> ed, 1590; 7<sup>th</sup> ed, 1803), a seminal English probate text.
- 34 Likewise, it appears to have escaped attention in the classic English probate law text of the 20<sup>th</sup> century, H.C. Mortimer’s *The Law and Practice of the Probate Division of the High Court of Justice* (1911).
- 35 It appears to have become fashionable in the United States of America in the 1920s, when the law of probate and copyright law began to intersect in the Hollywood era, in a world of ambulance chasing copyright lawyers intent upon carving out a specialist practice area, developing momentum in the current, electronic age: Francis M Nevins, “The magic kingdom of will-bumping: where estates law and copyright law collide (Part 2)” (1987) 9 *European Intellectual Property Review* 330.
- 36 In the abstract, there is no settled meaning for either the adjective “Literary” or the noun “Executor” when the two are joined together in an environment in which, with rapidly changing technology, concepts of “property” and “the creative arts” are liable to change, and a variety of legal mechanisms are available for the management of property.
- 37 A Literary “Executor” might not necessarily be an “executor” in the probate sense of that term at all. He, she or it might be nothing more or less than an agent, or some other sort of representative, or merely a service provider. The Tolkien Estate, under the direction of the author’s son Christopher, appears to operate through a corporate structure. If, for a time, an executor (in the probate sense), then, in conventional probate terminology, upon completion of executorial duties, a Literary Executor will become, in any continuing

arrangement, a trustee. An author with an over-optimistic ambition to control future events might curtail the process by establishing an *inter vivos* trust, rather than a testamentary trust, attributing the title “Literary Executor” to the trustee nevertheless.

- 38 The nature of the office, and the role, of a “Literary Executor” must ultimately depend upon a variety of case-specific factors, including: (a) the nature of property required to be managed by such a person (eg, merely a physical library of books or one or more manifestations of copyright in literary work); (b) whether that property is liable to change in character in the foreseeable future (e.g., with renewal or reversion of a right to copyright, or with a grant or expiry of a contractual licence to copyright material); (c) the management objectives of the person, or persons, empowered to deal with the property to be managed (be the objective enduring fame, the encouragement of research or profit maximisation, for example); (d) plans for disposition of the property to be managed, or income that may be derived from it; and (e) the time period over which the property, and associated income, is proposed to be managed.

## **THE NATURE OF “PROPERTY” TO BE ADMINISTERED**

- 39 Because any discussion of the topic assumes a common understanding of the word “property” in a rapidly changing world, a working definition of the term is required:

- (1) Conceptually, “property” is a “thing” (tangible or intangible), recognised by law, as able to be:
  - (a) possessed, used, enjoyed or destroyed by the holder (owner) of property rights referable to the thing; and
  - (b) transferred (assigned) for value (that is, bought and sold) or by way of gift; and/or
  - (c) inherited.
- (2) Characteristically, “property” can generally also be divided between more than one person so that, at the same or different times, separate people, jointly or severally, may have a distinct, identifiable “interest” in the “thing” that constitutes property.

- (3) If a “thing” has a value to more than one person (particularly a “market” value) it is likely, consequentially, to be “property”.
- (4) The concept of “contract” and “property” are often related, either because they coexist or because they can be contrasted one with the other.
- (5) The essential differences are that:
  - (a) whereas *contractual* rights and obligations exist as between identified or identifiable “parties” to an agreement, express or implied, *property* rights and obligations may exist as between a property “owner” and “the whole world”, independently of any agreement; and
  - (b) whereas “*contract*” is often, although not necessarily, a vehicle for a “promise” for something to be done, or not done, over a period of time, “*property*” is generally something that exists, or may exist, at one or more points in time.
- (6) A contractual right (eg, to receive income) may constitute property.
- (7) A common feature of property is that its deployment may be productive, over time, of income. The “fruit” from “the tree”, so to speak. The “stock” concept of property (a thing identifiable at different points in time) is associated, and contrasted, with the “flow” concept of income (a stream flowing over time) which, if not consumed or otherwise dissipated but accrued, alters the magnitude, if not the character, of the property of which it is a derivative.

40 Notice here, particularly, that “property” includes an “intangible” thing (of which, in the present setting, copyright provides the prime example); it is, characteristically, assignable, inheritable and divisible; and, commonly, it has value to more than one person, generally a community of persons.

41 Copyright potentially engages the concept of “property” in all its dimensions.

42 Taking copyright as the paradigm illustration of intangible property in an electronic age, in the administration of a deceased estate specific attention may need to be given to the possibility that the estate includes valuable, copyright material on a personal computer or otherwise secreted from the view of a casual observer. The time may come, if it has not already arrived, when executors and beneficiaries of a deceased estate might need to explore that possibility or, at least, preserve electronic property against the possibility

that it may have commercial value. Not in every case, perhaps; but, perhaps, enough to invite new, precautionary inquiries about the course of a life.

## INSIGHTFUL SALES PITCHES FOR A LITERARY EXECUTOR

- 43 With this reminder of the nature and variability of “property”, especially in the context of copyright, attention turns to proponents of the appointment of a “Literary Executor” in order to allow them to elaborate their case.

### **(1) Do I need to appoint a Literary Executor?**

- 44 In an interesting article entitled “Do I need to appoint a Literary Executor?” (May 2004) *Trusts and Estates Law & Tax Journal* 9, Peter Graves makes the following observations (with emphasis added):

“Copyright is, at one level, just like any other property that might form part of an estate. These property rights may be bequeathed, passing automatically to the executors where there is a will, who may therefore take action against a person who has infringed the copyright even before proving the will (although if they are called upon in the course of the proceedings to prove their title they will require probate). In an intestacy, of course, title will only vest in the administrators when letters of administration are granted, but when granted these relate back to the date of death, so actions for infringements committed in the meantime can then be commenced.

*The main difference between copyright and most other forms of property is that it is intangible, and therefore possible to overlook.* The fact that copyright comes into existence automatically, with no formalities to comply with, can make it hard to detect, and an estate could easily be replete with unappreciated copyright. *The pervasive nature of copyright means that almost everyone is likely to own some on their death – but also that in most cases it will not be worth bothering about, as it will have no value.* (If, however, it has a value, that fact cannot conveniently be overlooked as Dylan Thomas’s widow did when obtaining a grant of letters of administration on the basis that the net value of her late husband’s estate was a mere £100 – see *Fazio v Rush* [2002] EWHC 1742 (Ch); [2002] All ER (D) 392). Copyright, and other intellectual property rights, can be a tricky thing on which to place a value, but there are cases in which this has to be done.

*Moreover, copyright is a creature of statute, demanding knowledge of the peculiarities of the law in this arcane area.* The trustees of the estate of James Joyce have been active in using the legal rights given by the law of copyright to control the production of new editions of the author’s masterpiece, a process made complicated by the expiry of copyright in Joyce’s work at the end of 1990 and its revival as a result of the EC directive on copyright term five years later. The resulting case, *Sweeney v Macmillan Publishers Ltd* [2002] RPC 35, kept Lloyd J, three barristers (one a QC),

solicitors and assorted others occupied for seven days, just for the hearing. In copyright law, cut-and-dried answers are unusual, though (in mitigation) so too are disputes of this magnitude.

*Copyright is a form of property that can be sliced up in a variety of different ways – and is, frequently.* An author might have entered into a range of agreements with various parties during their lifetime, and their literary executors might find themselves dealing with different publishers in several different countries, some with hardback rights and others with paperback rights; with translators who have been granted rights to make foreign-language versions of the works; and with others who have rights to make films and other derivative versions. Furthermore, if such rights have not been licensed or assigned to publishers in the author's lifetime, the literary executor may be striking publishing deals on behalf of the estate."

- 45 Grave concluded his paper with an answer to his question ("Do I need to appoint a literary executor?") no more emphatic than this: "In planning how to deal with an estate that contains more than a little copyright, whether that copyright is literary, musical, artistic or cinematographic, it is wise to consider the involvement of an executor versed in these matters." Follow it or not, you can't fault that advice.

## **(2) Selecting a Literary Executor**

- 46 A more emphatic, but also helpful, pitch for the appointment of a "Literary Executor" by will appears on the website of the Law Offices of Lloyd J. Jassin of New York: [www.copylaw.com](http://www.copylaw.com).
- 47 Lloyd Jassin describes himself as an entertainment attorney and co-author (with Steven C Schechter) of *The Copyright Permission and Libel Handbook: A Step-by-Step Guide for Writers, Editors and Publishers* (John Wiley & Sons, 1998).
- 48 In a short article co-authored with Ronald Finkelstein (apparently in 2002) entitled "Selecting a Literary Executor", Jassin offers the following insights, amongst others (with emphasis added):

"While great writers may have the sad habit of dying off, their literary legacies (and royalty checks) tend to live on...

If you are a novelist, playwright, lyricist or composer, advance planning is critical to ensure that your literary legacy is protected after you die. While

during your life you can play catch-up with legal formalities, unless you have a well-drafted will, or have created a valid trust for the benefit of others, you have left ownership and care of your copyrighted works and papers largely to chance. In addition, finding a long-term, nurturing home for your papers or work should not be left for the last minute.

**TIP:** Be sure to bear in mind that there is a clear distinction between the physical possession of letters and papers on the one hand and ownership of the copyrights in those letters and papers on the other. While your papers may reside in a university library, the copyright to those letters and papers would belong to your estate.

Authors should consider naming a 'Literary Executor' in their will. An 'executor' is a person responsible for settling a deceased person's estate. Among the duties of a General Executor -- as opposed to Literary Executor -- are contacting an attorney to file a petition for probate of the will; collecting debts owed to the estate; filing for life insurance and other benefits; contacting an accountant (or attorney) to prepare the decedent's final income tax returns, a federal estate tax return and state estate and inheritance tax returns as may be required; and notifying the beneficiaries named in the will.

A Literary Executor, as opposed to a General Executor, is the person selected for the limited purpose of managing your literary property when you pass on. One court described the Literary Executor's role as 'requir[ing] a delicate balance between economic enhancement and cultural nurture.' If you have made the appropriate provisions in your will, your Literary Executor will distribute all of the literary property that you owned at the time of your death...

### **Selecting a Literary Executor**

A General Executor will often be a spouse or other family member that does not have experience with literary matters. Therefore, you should consider entrusting the care of your papers, existing contracts and unpublished manuscripts to a Literary Executor. Keep in mind that being a Literary Executor can be a lot of work. By taking the time to carefully select a Literary Executor, you lessen the likelihood of intra-family disputes that could result in family members refusing to negotiate for the further exploitation of your works -- preferring instead to retire your copyrighted works from publication. And, if your final wish is that your unfinished play based on your aunt Hilda's lesbian affair go unpublished and unproduced, you can provide in your will that your Literary Executor destroy your manuscript. By way of example: Ernest Hemingway made it clear during his lifetime that he did not want his unfinished and unpublished stories published. However, since his will was silent on this subject, his estate published not only his early stories, but also two unfinished novels after his death. Of course, both novels received poor reviews.

Ideally, your Literary Executor should be someone who understands how the theater world and entertainment industry operates. That person should also be comfortable with negotiating contracts, or savvy enough to hire an attorney or literary agent to help exploit unpublished works, or exploit rights that were retained by your estate. As mentioned previously, your Literary Executor should also be someone who will carry out your intentions. And, since all things come to an end -- including Literary Executors -- you should provide in

your will for a replacement when the estate's Literary Executor dies or becomes incapacitated.

### **Defining the Literary Executor's Duties**

*Because the duties and powers of a Literary Executor are not defined by statute, it is imperative that the person drafting your will take great care in describing the scope of your Literary Executor's duties. The powers of a Literary Executor should be as broad and comprehensive as possible, unless, of course, you believe there should be limitations, qualifications or conditions imposed upon your Literary Executor (e.g., different executors appointed for book publishing and theatre-related matters).*

*In preparing the powers of a Literary Executor, you must consider the following questions:*

- *Will the Literary Executor have the sole and exclusive right to make all decisions regarding appropriate publication, republication, sale, license or other exploitation of your work? Or, should she merely be appointed as an advisor to the General Executor?*
- *Will the Literary Executor be responsible for preparing unfinished or unpublished manuscripts for publication and seeing those works through publication?*
- *Will the Literary Executor have the right to terminate copyright licenses?*
- *Will she have the power to destroy any letters or papers she believes should be destroyed?*
- *In return for her services, will the Literary Executor receive a fee or commission for her services? What is fair compensation? What about reimbursement for expenses? Will the Literary Executor be required to maintain a separate bank account for such monies?*
- *Will the Literary Executor have the sole right to sue for infringement of copyrights?*
- *Will the Literary Executor have the authority to pay attorneys, agents, subagents and others?*
- *In the event the Literary Executor is unwilling or unable to perform her duties, what are the provisions for appointing her successor? Or, will the General Executor assume those duties?*

While a family member may agree to work for free, attorneys and literary agents will most likely seek a fee of between 10% and 15% for new contracts they negotiate on behalf of the estate. With regard to administering existing contracts, fee arrangements can vary greatly depending upon the size of the literary estate and the responsibilities of the Literary Executor.”

- 49 It should not be assumed that an Australian Court would embrace the US approach to remuneration here the subject of report. It is sufficient, for present purposes, to note that any will-maker contemplating the appointment of a “Literary Executor” needs to give specific attention to whether, on what terms and from what source any and all executors the subject of an appointment are to be remunerated. Patrick White’s will (extracted in the Schedule to this paper) provided for his “Literary Executor” to be remunerated on a basis not dissimilar from that here recorded.
- 50 If Australian will-makers were, in numbers, to adopt a practice of appointing “Literary Executors”, nice questions might sooner or later arise as to how to accommodate any consequent application, or applications, for executor’s commission and applications for review of a Literary Executor’s remuneration.

### **(3) A Literary Afterlife**

- 51 A final extract from a promoter of “Literary Executors” is taken from Volume III, Issue 4 (November 2002) of *The Complete Review Quarterly* ([www.complete-review.com](http://www.complete-review.com)).
- 52 It is entitled “Literary Legacies: Executors, Duty, the Law – and a Proposal”.
- 53 The Proposal, upon which I do not pause for reflection, was that there be a “Literary Executors Foundation” to superintend the work of Literary Executors, to police obligations of posterity to enforce a deceased author’s rights (including a right to have copyrighted material destroyed post-death).
- 54 On the way to that proposal, the unknown author wrote the following (with emphasis added):

#### **“Literary Afterlife**

*Once an author dies, pretty much everything is out of their hands. Where they once had complete control over their copyrighted materials - the books they wrote, the works they published (and didn't publish) - upon their death this control passes over to their estate and heirs. Contemporary copyright law, especially in the United States, then keeps the works copyright-protected for decades more....*

The literary legacy an author leaves behind is (vaguely) recognised as something special, not to be treated like the savings account, furniture, or stock portfolio that might also be part of his or her estate. Indeed, it is not uncommon for authors to name a 'literary executor' to handle that literary legacy aspect of the estate. Responsibilities of such literary executors vary, but often include deciding who has access to what private papers, as well as working towards keeping old works in print and overseeing the publication of new editions and/or previously unpublished material (from collected letters to juvenilia, etc.).

Literary executors are often - though not always - heirs themselves, i.e. they have a (completely) vested interest in maximizing the profits from what an author left behind. Often they also have a significant interest in preserving a particular image of the author; until relatively recently it was not uncommon for widows (and the occasional widower) and other heirs to destroy large amounts of private correspondence and other material to keep personal information about an author from posterity. (In the present age, where scandal sells, this no longer appears to be as popular: heirs tends [sic] to preserve (and eventually flog) as much as possible.)

### **The Kafka Dilemma**

Authors often leave instructions (in their wills or elsewhere) as to how they expect their literary estates to be handled; apparently they do not all do so. Unfortunately, last wishes are often taken largely for granted and/or circumvented (which might explain why many authors don't bother leaving any behind in the first place).

Perhaps the most famous case is that of Franz Kafka. Despite clear instructions to Max Brod that all his unpublished work be destroyed Brod chose to preserve all this work and indeed began a veritable Kafka-industry with it, presenting many of these texts, diaries, etc. under his editorship (and thus benefiting both in terms of prestige and cash). Apparently no attempts were made by anyone, including Kafka's heirs, to prevent Brod acting counter to Kafka's express wishes.

The Kafka dilemma is one apparently often faced by executors: authors can be unreasonable in the constraints they set upon their works after their deaths -- or at least one can argue that those constraints are unreasonable. In the case of Kafka, few complain about Brod's actions, arguing that Kafka possibly didn't really mean it (he could have destroyed the works himself if that was what he *really* wanted, some have argued) or that posterity deserves these great works, regardless of whether Kafka wanted them preserved in this state or not. Ignored is the fact that Kafka had apparently thought this through -- he had issued specific instructions dealing with this exact situation -- and that Brod's actions can only be seen as both a betrayal and as illegal. However, no one was in a position to protect Kafka's interests -- or rather Brod, who took it upon himself to supposedly protect those interests, recast them in a manner suggesting his actions were legitimate ....

### **Keeping the Cash Flowing**

The posthumous exploitation of authors is increasingly popular -- there's some money to be made here, and lengthened copyright protection means the cash-cow lasts longer .....

It can take on absurd forms: among the more amusing are the famous dead authors who still manage to churn out a book (or more) every year ....

### **Conflict of Interest**

*The fundamental problem with entrusting one's literary legacy to anyone is the resulting conflict of interest. Be it an independent literary executor who is supposed to act merely as administrator or trustee or, as is more often the case, literary executors who are also the actual estate-beneficiaries there are great incentives for those entrusted with controlling the copyright to act in a profit-maximizing way, i.e. to look at the author's 'literary legacy' in purely financial terms. But, while authors (like most people) generally want to leave their heirs with a bit (or a lot) of financial security, most have different posterity-priorities regarding the work they leave behind. They want their literary legacy to live on -- and, often, not to be debased (i.e. not have the final dollar squeezed out of the copyright by selling a *Catcher in the Rye* TV cartoon-series (or *Gone with the Wind*-sequel, or another *Lolita*-movie, or whatever)).*

Most often the literary legacy is bundled with the rest of the estate, and simply handed over to the heirs. Copyright, however, is different from most of the rest of the estate -- the cash, the other holdings. It does not merely represent instant cash-value: it also offers continuing cash-flow. And depending on how one does it, that flow can be substantial.

Unfortunately, the actual literary legacy -- and in particular, what an author wishes to leave to posterity and how s/he wishes to be remembered -- are often at odds with a profit-maximizing (or even just profit-making) strategy for the copyright.

*Once the author is dead it is also a very uneven relationship: while still alive the author sets down the rules, but, once dead, is in no position to defend them. Indeed, it is the estate that is entrusted with seeing that the author's wishes and demands are carried out -- but it is also the estate that has the greatest incentive (and is in the best position) to deviate from the author's testamentary stipulations.*

Even where the executor is not directly a beneficiary (i.e. doesn't profit inordinately from the selling-out of an author, as the actual heirs do) a conflict of interest remains. It can still be financially worthwhile -- and it can help enhance the prestige of the executor -- to act contrary to an author's wishes -- the example of Brod, who made a career out of Kafka, is particularly instructive. Similarly, the literary executor responsible for selling the movie rights to *Catcher in the Rye* is probably going to be better off in quite a few ways from the one who doesn't return the Hollywood executives' phone calls, even if s/he doesn't (directly) get any of the proceeds.

*A particular problem when executors and estates go against even the express testamentary wishes (the last will and testament) of a writer in these copyright-related issues is that, as long as the executor and the beneficiaries are in agreement (and since they are often one and the same this is generally the case) there is no aggrieved party with any standing to challenge even the most outrageous abuses of the copyright. The aggrieved party is solely the*

author -- and the author's posthumous representatives are the very people who are responsible for the aggrievance.

(Where there are testamentary disputes about authors' estates -- such as recently regarding Ted Hughes' estate -- it is almost always entirely about money and the distribution thereof: some heir thinks they are getting less than their fair share. But those disputes are just like any other testamentary disputes and have little to do with literary legacy issues.)

The one party that might be able to interfere almost never chooses to do so: the state. One would imagine that the state would have some interest in upholding the letter of the law -- including the explicit instructions of authors in their wills. But states bend over backwards to please heirs, and in such a situation, where the only aggrieved party is dead and buried (and thus ineligible to vote and unlikely to complain to anyone -- politicians, the media, etc.), it is easy to let it pass. It can even be argued that it is in the public interest to go against an author's wishes -- to give the public access to the long-lost *Eloise*-books [of Kay Thompson] for example. (The commercialization of the copyright, to the greatest extent possible, also benefits the state by simply generating more cash (which, among other things, leads to additional tax revenues).)

### **Who cares?**

Not many people seem to care about the prostitution of the literary legacy of authors, even when it is done counter to their express wishes.

The world - and the US in particular - have become crassly commercial and consumers are largely indifferent to such outrageous abuses of personal image as when the heirs of famous figures allow these to be used in advertisements for products that these figures never could themselves have endorsed. ... Cashing in is certainly the American way - but it is by no means restricted to the US."

## **THE NATURE OF (COPYRIGHT) PROPERTY REVISITED**

- 55 A case having been made for the appointment of a "Literary Executor", attention returns to the nature of copyright as property in order to enumerate factors that may need to be taken into account in a probate setting.
- 56 Property in the form of copyright in a literary work has, or may have, several distinctive features capable of focusing attention on the nature of "property" in the context of probate law and practice.
- 57 First, copyright is an intangible form of property that depends, for both its existence and its enjoyment, upon control of the use of property (eg, a book or computer programme) by others than the owner of the copyright entitlement

or, at least, an enforceable system of holding users to account. It depends on a capacity, in law and in practice, to force unrelated parties to pay for their use of copyright materials.

- 58 Secondly, copyright is a creature of statute and, as such, it is inherently liable to legislative change and regulation. A reflection of that is found in section 8 of the *Copyright Act* 1968 Cth which, subject to preservation of prerogative rights of the Crown, provides that “copyright does not subsist otherwise than by virtue of this Act”. The *Copyright Act* is drafted in terms that make the *Income Tax Assessment Act* 1936 Cth read like prose bordering on poetry. Whatever its content, section 135ZZZZA is worthy of notice for its designation alone; the mere contemplation of it tends to be soporific.
- 59 Thirdly, copyright has its origins in the creative work (the imagination) of an “author”, for convenience here assumed to be an individual, a prospective testator or testatrix.
- 60 Fourthly, copyright characteristically survives the author. By virtue of section 33 of the *Copyright Act* 1968 Cth, for example, copyright in a literary, dramatic, musical or artistic work generally subsists for 70 years after the death of its author, or, if not published before death, 70 years after publication.
- 61 Fifthly, copyright is capable of being exploited after the death of the author.
- 62 Sixthly, the value of an entitlement to copyright protection may depend critically on whether (and, if so, how) the entitlement is exploited.
- 63 Seventhly, a work the subject of copyright is liable to change (eg, in a revised edition of a book or in production of a film adaptation of a book) in exploitation of the copyright entitlement.

- 64 Eighthly, whether and how copyright is exploited can profoundly affect the reputation of the author, to whom anticipation of a posthumous reputation may be a critical concern affecting the disposition or management of property.
- 65 Ninthly, in a rapidly shrinking world, with information flows commonly operating across national boundaries, copyright questions may involve concerns about conflict of laws and, potentially, cross-border litigation.
- 66 Tenthly, in the management of copyright, no less than in the administration of a deceased estate, there is an almost inescapable series of conflicts of interest (if not also conflicts of duty and interest) arising from the divisibility of the property under management and, to varying degrees, a splitting of ownership and control of the property, authority for dealing with it and attendant responsibility for whatever may be done or not done.
- 67 Eleventhly, management of property in the form of copyright may involve questions about control, accountability and enforcement which, if not promptly, and effectively, addressed can profoundly threaten the value, if not the very existence, of the property itself. An entitlement to copyright (eg, *Copyright Act 1968 Cth*, sections 31 – 35) is only as good as the availability of, and a determination to pursue, a remedy for infringement of the copyright (eg, *Copyright Act 1968 Cth*, sections 36, 50 and 115).
- 68 Twelfthly, in the nature of things even the most farsighted, obsessively controlling author must ultimately recognise that nobody can rule the world forever, especially from the grave. Upon an author's death, critical decisions affecting the copyright, and its deployment, may have to be made and, necessarily so, by somebody other than the author. There is no guarantee that such a person (particularly if a beneficiary with an absolute beneficial entitlement to the copyright), or his or her successor, will stay true to any expressed intentions of the author. Classically, there is no guarantee that documents marked by an author for destruction will be destroyed if there is a dollar in their deployment, and nobody with standing prepared to enforce a duty to destroy.

- 69 Selection of an executor (or other representative) who is both trustworthy and reliable is especially critical, as is clarity in definition of the powers and duties of each person engaged to make decisions affecting an author's property and "moral rights". Even if a chosen "Literary Executor" is loyal, a successor in interest may not be so: DF Madeo, "Literary Creation and American Copyright Law: Authors' Wishes Hardly Resting in Peace" (1992) 5 *Hofstra Property Law Journal* 179 at 199-200. All must, in time, submit to posterity's choices, welcome or not.
- 70 Thirteenthly, because of that reality, choices may have to be made by or on behalf of an author about whether (and, if so, when and to whom) to dispose of core property, absolutely or on conditions, or to trade indefinitely. A gift of property to charity or a public institution by an author concerned about posthumous reputation is not necessarily a selfless act but one which, in order to induce acceptance and to be given full effect, may require a supplementary gift (of capital or income) to cover, or subsidise, ongoing expenses associated with it. Consideration may need to be given to identification of property available to be charged for the costs of maintenance of the property of principal concern.
- 71 Lastly, but not least, recognition must be given to the distinction between property in the form of a physical work such as a book (a tangible thing) and "property" comprising copyright in the work, an intangible thing: *In re Dickens; Dickens v Hawksley* [1935] Ch 267 at 288. A disposition of the former (by assignment, gift or will) without express reference to the latter, in all its intended manifestations, might be construed as not intending to pass an entitlement to copyright. In the context of a specific gift by will, an unintended consequence may be that an entitlement to copyright passes not to the intended legatee but with the residue of the estate.
- 72 The truth that there is need for certainty in the description of "property" the subject of an assignment (whether by way of testamentary disposition or otherwise) applies with particular force when "the property" includes, or is associated with, an entitlement to copyright. That is because of the need to

distinguish between tangible and intangible elements, and because of the ready divisibility of copyright. An illustration of this, in the context of an outright gift, absent a “Literary Executor”, was Max Dupain’s division of his store of photographs and negatives (and associated copyright entitlements) between his widow and his collaborator: *Diana Palmer Dupain v Jill White* (NSW Supreme Court 3593/93, 15 September 1992, unreported). Cohen J entertained the beneficiaries’ competing claims on a Summons for the construction of Dupain’s will. The deceased’s most famous photograph is the iconic “Sunbaker”.

### **THE KEY CONCEPTS : A QUALIFIED APPOINTMENT OF AN EXECUTOR, AND A LIMITED GRANT OF PROBATE OR ADMINISTRATION**

- 73 *Mortimer on Probate Law and Practice* (1<sup>st</sup> ed, 1911) provides a good root of title for an understanding of how the concept of a “Literary Executor” can be accommodated within the framework of a will admitted to probate. Although an English text, it has long informed probate practice in NSW.
- 74 Some books, some editions of some books, retain their vitality despite formal obsolescence. *Mortimer* is such a text. Its coalescence with *Williams on Executors* in what is now called “*Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (being the 20th edition of *Williams on Executors* and the 8th edition of *Mortimer on Probate*)”, published in 2013, does not deprive a backward glance of occasional utility.
- 75 In chapter VII, dealing with **the appointment of executors by a will**, *Mortimer* provides the following statements (at pages 263-264) as a point of commencement (omitting footnotes):

“The appointment of an executor may be either absolute or qualified. It may be qualified either (1) as to time, or (2) as to place, or (3) as to purpose or subject-matter; and (4) the appointment of an executor may be conditional or contingent.

Where a time is limited when the person appointed executor is to begin, or when he shall cease to be executor, and the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other, the

Court may grant of administration with the will annexed until there be an executor, or a cessate administration after the executorship is ended.

A testator may appoint different persons for the representation and distribution of his property in different places. Thus, where a testator appointed certain persons 'executors in Portugal' and others, 'executors in England,' it was held that the persons appointed executors 'in Portugal' (ie, for Portugal) were not entitled to probate in England.

A testator may appoint an executor for a particular purpose: eg. for the purpose of administering the estate of another person, whose sole surviving executor the testator himself was; or for the purpose of carrying into effect the provisions of a particular codicil; and in such a case probate limited for such a purpose is granted to him.

Again, the power of the executor may be limited as to the subject-matter upon which it is to be exercised, as where a person is made executor for a particular part of the testator's property alone; and in such a case probate limited to that part of the estate will be granted to him.

In *In the Goods of Wakehan* (1872) 2 P & D 395, a testator by his will gave certain specific legacies, but did not dispose of the residue of his personal estate. He appointed his daughter executrix for all property 'not named in the will'. The Court refused to grant probate of the will to the daughter as executrix, since she was precluded from dealing with the property which passed under the will.

The same will may contain the appointment of one executor for general, and another for limited purposes. In such a case the general executor is entitled to probate in respect of all the estate, save and except the property which vests in the limited executor; while the limited executor is granted probate limited to the purposes prescribed by the will."

76 In chapter VIII (at pages 279-280) *Mortimer* deals with **grants of probate limited as to time and purpose**, particularly grants limited where a testator has qualified the appointment of an executor (here omitting footnotes):

"There are... certain cases in which the probate is limited in form; for the Court will grant a limited probate wherever the testator has limited the executor.

So if a testator appoints an executor solely for the purpose of administering the estate of one whose sole executor he himself was, probate is granted to him limited for such purpose. Or if an executor is appointed solely for the purpose of carrying into effect the provisions of a particular codicil, the probate is limited accordingly.

The practice when there are two executors, one appointed generally and the other for a limited purpose, is stated to be as follows: If both apply for probate at the same time, the grant is made in the same instrument, but the powers of each are distinguished, that is to say, probate is therein granted to the

general executor of all the estate, save and except the property which vests in the limited executor; while as regards the latter, his probate is restricted according to the will. If the executors apply singly the grant is special in each case....”

- 77 *Mortimer* deals with grants of letters of administration, as distinct from grants of probate, in a substantially similar way, allowing for differences in the character and form of such grants: eg, pages 344-346, 363 and 392-399.
- 78 *Mortimer’s* exposition of the law and practice relating to qualified appointments of executors is supported by references to the seminal English probate texts.
- 79 As material to our topic, Swinburne, *A Brief Treatise of Testaments and Last Wills* (1590), Part IV, Section 18 speaks of an executor being appointed “universally or particularly”.
- 80 John Godolphin, *The Orphan’s Legacy, A Testamentary Abridgement, in Three Parts. I. Of Last Wills and Testaments. II. Of Executors and Administrators. III. Of Legacies and Devises* (1<sup>st</sup> ed, 1673; 4<sup>th</sup> ed, 1701), Part I, chapters 13-14 and Part II, chapter 2 respectively treat “conditional testaments” and “conditional executors”, recognising that a condition of appointment may be that an executor’s functions are limited to particular property.
- 81 *Williams on Executors and Administrators* (1<sup>st</sup> ed, 1832; 2<sup>nd</sup> ed, 1838; 3<sup>rd</sup> ed, 1841, marking a transitional period before and after enactment of the *Wills Act* 1837 (UK)), presages *Mortimer* by speaking of the appointment of an executor being “absolute” or “qualified”: 1<sup>st</sup> ed, pages 129-132; 2<sup>nd</sup> ed, pages 141-144; 3<sup>rd</sup> ed, pages 179-182.
- 82 The current edition of *Williams, Mortimer and Sunnucks* (2013), at [24]-[38], refers in passing to the availability of a limited grant of probate where a testator appoints “a general executor and another for a special purpose, as for instance a “literary executor”. Notably, the expression “literary executor” is

presented in quotation marks, signifying perhaps that it is a colloquial expression both in origin and in current understanding.

- 83 Closer to home, a clear statement of substantially the same principles of law and practice as those enunciated in *Mortimer* (and one that expressly refers to “literary works”) is that found in GL Certoma, *The Law of Succession in New South Wales* (Law Book Co, 4<sup>th</sup> ed, 2010), paragraphs [14.210]-[14.220]. Those paragraphs read as follows (emphasis added, omitting footnotes):

**“GRANTS LIMITED TO PROPERTY**

**Probate limited as to place or property**

[14.210] A testator may by will appoint an executor with respect to property in a specified locality and thus the grant will be limited to the specified country or locality. Similarly *a will may appoint an executor limited to certain property, for example, literary works or a business conducted by the testator, in which case the grant will be limited to that property.*

**Grants ‘save and except’ and ‘caeterorum’**

[14.220] These grants become relevant where a will appoints an executor with respect to particular items of property, or a particular fund, in which case there will be both a particular and a general representative. Thus a limited grant will be made of the particular property to the particular executor and a general grant of the remainder of the estate to the general executor. The general grant will be either a grant ‘save and except’ or ‘caeterorum’ depending upon whether the limited grant has already been made. Thus where the general grant is made first it is a grant save and except the particular property disposed of by the will; where the limited grant has already been made the general grant will be a grant caeterorum of the rest of the estate. The general grant may be of probate where the will appoints an executor, of administration with the will annexed where the general executor renounced or died prior to obtaining a grant or of simple administration where the will disposed of the particular property only and the appointment of the executor was limited to that property.”

- 84 An echo of this treatment can be found in other local texts: eg, Hutley, Woodman & Wood, *Succession: Commentary and Materials* (Law Book Co, 4<sup>th</sup> ed, 1990), page 286; Mason & Handler, *Succession Law and Practice NSW* (LexisNexis, Australia), paragraph [1201.4.1]; RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in NSW* (Law Book Co, 1996), paragraphs [40.72] and [41.42].

- 85 If a will appoints a “Literary Executor” to a nominated part of a deceased’s estate, a vehicle through which the Court may accommodate that appointment in administration of the estate is a grant of probate limited to that property. The general rule is that effect is given to the expressed intention of a testator; if an executor is appointed for portion only of an estate, the probate granted to him will be limited to that portion: *Re Wills of Mary Clark* (1903) 4 SR (NSW) 248 at 250.
- 86 Early cases that illustrate the jurisdiction to make limited grants include *Rose v Bartlett* (1631) Cro. Car. 292; 79 ER 856; *Sutton v Smith* (1753) 1 Lee 275; 161 ER 102; *Lynch v Bellew and Fallon* (1820) 3 Phill. Ecc 422; 161 ER 1372; *In the Goods of Rebecca Beer* (1851) 2 Rob. Ecc. 347; 163 ER 1341; *Davies v The Queen’s Proctor* (1851) 2 Rob. Ecc. 413; 163 ER 1363; and *In the Goods of W Wakeham* (1872) LR 2 P&D 395.
- 87 There is nothing in the history or, so far as I am aware, the practice of the Supreme Court of NSW (or, I apprehend, equivalent Australian Courts) that does more than recognise the appointment of *an executor*. The office recognised by a limited grant in favour of a person described in a will as a “Literary Executor” is not specifically designated as that of a “Literary” Executor. That is a title bestowed by the deceased, as a matter of personal choice, not by the Court as a mark of the office.

#### **A POSSIBLE ALTERNATIVE TO A “LITERARY EXECUTOR” : APPOINTMENT OF A “COADJUTOR” OR “OVERSEER”**

- 88 At this point, before leaving the topic of qualified appointments of, and limited grants of probate to, an executor, notice should be taken of the largely historical office of a “Coadjutor” (sometimes described as an “Overseer”).
- 89 Whether such an office was ever a feature of Australian probate law or practice I do not know; but, in a new era, an old probate office might appeal to some minds preoccupied with the appointment of a “Literary Executor”.

90 The current (2013) edition of *Williams, Mortimer and Sunnucks* summarises the position in England in the following terms (with emphasis added, omitting footnotes):

**“[3-04] Coadjutor or overseer.** Although the practice has fallen into disuse, it is possible to appoint a coadjutor (or overseer) [in a will]. The office of coadjutor or overseer has ancient authority although... it does not constitute its holder an executor. *A coadjutor has no power to administer or intermeddle but can merely counsel, persuade and advise. If this fails to remedy negligence or miscarrying in the executors, the coadjutor is entitled if necessary to refer complaints to the court and his charges in doing so ought to be allowed out of the testator’s estate....*

**[8-27] Appointment by testator of coadjutor or overseer.** As has been seen, a coadjutor or overseer has no power to administer or intermeddle in an estate. His role is simply to counsel, persuade and advise and if that fails to remedy negligence or misconduct by the executors, to complain to the court at the cost of the estate. Accordingly, if A is made an executor, and B a coadjutor, without more, this does not make B a joint executor with A. Again, the matter is one of construction of the will for if A be made executor, and the testator, in his will, directs that B shall administer also with him, and in aid of him, B is an executor as well as A, and may prove the will alone as executor, if A refuses.

Where an infant was made an executor, and A and B *overseers*, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts till the full age of the infant, they were held to be executors in the meantime.

*There are, no doubt, still circumstances where a testator might usefully employ the device of [a] coadjutor to ensure that some responsible person (perhaps unwilling to undertake the details of executorship) can nevertheless ensure satisfactory administration and reference to the court, if need be, while incurring no financial liability. The office is in some ways an analogous to that of arbitrator, or a visitor to a charitable trust.”*

91 The foundation for this statement is *Wentworth’s The Office and Duty of Executors* (London, 14<sup>th</sup> ed, 1829), page 21, a text the first edition of which was published anonymously in 1641. Authorship of the third edition, published in the same year, was attributed to “Thomas Wentworth” but, the editor of the 14<sup>th</sup> and final edition tells us, it was generally believed to have been written by Mr Justice Dodderidge [sic]... a fact too obscure to remain unnoticed in the selection of an authoritative text.

- 92 Sir John Doddridge (1555-1628) is described by AWB Simpson (in his *Biographical Dictionary of the Common Law*, Butterworths, London, 1984) as “a scholarly cultured man and a member of the Society of Antiquaries, none of whose writings appeared in his lifetime”. Edward Foss, in his *Biographical Dictionary of the Judges of England* (1870), spells the judge’s name “Doderidge”.
- 93 The office of coadjutor appears to be a remnant of the days (before 1858) when the jurisdiction now exercised by Australia’s Supreme Courts as “probate jurisdiction” was, in England, exercised by separately constituted “Ecclesiastical Courts”. It may have analogues in other areas of modern law; but it is presently unknown to probate lawyers.
- 94 The *Oxford English Dictionary* offers two definitions of “coadjutor”. The first is: “One who works with and helps another; a helper, assistant, fellow-helper.” The second, specific to the Christian church, is: “One appointed to assist a bishop or other ecclesiastic; a *coadjutor* is appointed as assistant and successor to an old and infirm bishop; and is thus distinct from a suffragan, who has charge of a definite portion of a large diocese.”
- 95 In an age in which the services of professional advisers and agents can readily be made available to an executor or trustee authorised to retain them at the expense of a deceased estate, why would any will-maker appoint a coadjutor; and why, more to the point perhaps, would any person accept appointment to that office or appointment to the office of an executor subject to the supervision of a coadjutor?
- 96 Viewing a prospective will-maker, the answer might be: Much the same sort of person attracted by the idea of appointment of a general executor in conjunction with appointment of a Literary Executor over particular property.
- 97 It is less obvious why any person would accept appointment to symbiotic offices of an “executor” coupled with a “coadjutor” formally imposing on the administration of an estate the rigidity of a formal system of internal review.

## THE PRACTICAL PROBATE LAWYER

- 98 Probate lawyers are, at heart, pragmatic *property* lawyers with a particular focus on *succession* to property on death; establishment of *title* to property; and, with the aid of equitable doctrines and remedies, *accountability*.
- 99 Accountability lies at the heart of executorship. In his recently published book, *The Duty to Account: Development and Principles* (Federation Press, 2016), James Watson of the NSW Bar demonstrates that executors were liable to account at Common Law long before they were recognised as fiduciaries: [254]-[261] and [431].
- 100 An illustration of the pragmatism of probate lawyers lies in their preparedness to counsel that no application for a grant of probate need be made unless a grant is needed to establish “title” to property.
- 101 In a system of law in which title is “relative”, rather than “absolute”, possession may well be nine tenths of the law: in court proceedings for the determination of a dispute about title, the question is not whether one or another of the litigating parties has “the” (absolute) title to property so much as which of the contending parties (each relative to the other) has the “better” title.
- 102 An application for a grant, or revocation, of probate of a will conforms to this model. Probate litigation is “interest litigation” in that, to commence or to be party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Estate Kouvakas*; *Lucas v Konakas* [2014] NSWSC 786 at [212] and cases there cited. A grant of probate bears both the character of a Court order and a title document: *Estate Kouvakas* at [228]-[233]. That is nonetheless so because the title of an executor is said, ultimately, to be derived from the testator’s will (confirmed by the Court’s grant of probate): *Gertsh v Roberts*; *The Estate of Gertsh* (1993) 35 NSWLR 631 at 635B.
- 103 Although the law can accommodate a drawn out process of estate administration, or a change in the character of estate administration (upon a

completion of executorial duties) from that of an executor to that of a trustee, one suspects that the probate jurisdiction operates at its best when the purpose for which it exists is carried fully and quickly into effect, providing for an effective succession to property.

- 104 Tempting though it may be for an author to have the indulgence of a “Literary Executor”, a practical probate lawyer might well encourage a will-maker to minimise unnecessary divisions in the ownership and control of property. An executor, trustee, beneficiary and the property that binds them should not, unnecessarily, be exposed to the vagaries of fiduciary relationships, obligations and entitlements any longer than necessary to effect a change of ownership and control consequent upon death.
- 105 One suspects that a practical lawyer was somewhere in the scene in securing from Stevenson J, in *Sharp v Attorney General of NSW* [2015] NSWSC 1580 at [47]-[49], a declaration that the trustees of a charitable trust (at one time in contemplation as “executors” and a “literary executor”) could, by an appointment made under section 6 of the *Trustee Act* 1925 NSW, appoint a new trustee in substitution for themselves: in the form of a corporation limited by guarantee with objects consistent with those found in the will of the testator, the late Australian artist Martin Ritchie Sharp.
- 106 Lest it be thought that Probate Judges have no need of “practical” advisers, attention is drawn to the historical fact that, from time immemorial, judges have consulted “the Probate Registrar” for advice about the practicalities of orders in contemplation. Probate *practice* can be an important factor in the administration of probate *law*. Research for this paper brought three particular examples to light: *Davies v The Queen’s Proctor* (1851) 163 ER 1363; *Pegg v Chamberlain* (1860) 1 SW & TR 527; 164 ER 844; and *In the Goods of William Watts, deceased* (1860) 1 SW & TR 539; 164 ER 850. Of these, a sentimental favourite must be *Davies v The Queen’s Proctor*, the report of which suggests that the judge (Sir Herbert Jenner Fust), leaning towards a *general* grant of probate, was summarily overruled, in the Registry, by the issue of a *limited* grant.

- 107 If a will-maker is determined to embrace the concept of a “Literary Executor”, with a limited grant of probate coupled with a general grant to another executor, particular care is required to ensure clarity in the will-maker’s instructions and an efficient management model.
- 108 There needs to be clarity in definition of the property the subject of the limited appointment; clarity in definition of the functions, powers and duties of each executor; clarity in identification of beneficiaries and their respective entitlements; clarity in the entitlements, if any, of executors to remuneration; and clarity in the means by which estate property, and income accruing on that property, are to be accounted for. Provision should also be made for the possibility of conflict between the different classes of executor including, prudence might suggest, a requirement that the literary executor account to the general executor rather than directly to beneficiaries. If a Literary Executor is intended, in time, to continue in office as a trustee, and to trade in that capacity, consideration should be given to whether his or her liability to beneficiaries should be limited, either to estate assets or generally.
- 109 The will of the late Patrick White (the essential terms of which are extracted in the Schedule to this paper) provides a concrete example of the terms of a NSW will providing for the appointment of a “Literary Executor”. Notice, in particular, the following features:
- (a) by clause 2, a licensed trustee company was appointed general executor;
  - (b) by clause 3(f), the trustee company was granted a qualified power to appoint another, or substitute, “Literary Executor”;
  - (c) by clause 3(e), the “Literary Executor” was required to account to the trustee company, not any beneficiary directly;
  - (d) by clause 3(d), express provision was made for remuneration of the “Literary Executor”;

- (e) the subject matter of the “Literary Executor’s appointment was defined by clause 3(a), subject to a direction in clause 11 that certain papers be destroyed; and
- (f) sub-clauses 3(b), 3(c) and 3(d) defined the functions and powers of the “Literary Executor”; and
- (g) the terms of the grants of probate issued by the Court were limited in a manner consistent with the Executors’ respective appointments under the Will.

110 In case it be thought that Patrick White’s appointment of a “Literary Executor” was commonplace in local experience, I note that the Court’s file on the Literary Executor’s application for a grant includes a letter dated 16 January 1992 addressed by her solicitor John W Buttfield (an attesting witness to the will and also solicitor for Perpetual Trustee Company Ltd) to the Probate Registry (marked to the attention of the Probate Registrar, John Finlay):

“I refer to recent discussions with the Registrar, Mr Finlay, who suggested that due to the somewhat unusual nature of this application, the matter be referred directly to him.

Accordingly, I would be pleased if the papers could be handled directly to Mr Finlay.”

111 In her “Affidavit of Literary Executor” sworn in support of her application for probate, Barbara Mobbs described herself as “an agent for writers, musicians and composers”. She was a close confidante of Patrick White.

112 In 2006, after the death of White’s partner, she gifted a stockpile of White’s letters, notebooks and manuscripts to the National Library of Australia (in conscious disregard of White’s testamentary instructions): David Marr, *Patrick White: The Final Chapter* (April 2008) *The Monthly*.

113 Other examples of (reported) cases illustrating the appointment of a “Literary Executor” include *In re Orwell’s Will Trusts; Dixon v Blair* [1982] 1 WLR 1337; *Baskin v The Seajay Society Inc* 1997 WL 910371, a decision of the US

District Court, South Carolina District; and *Bella Cohen and Myriam Champigny v Catherine Chaine, Daniel Filipacchi and the Societe Cogedipresse* [1983] E.C.C. 318, a French tribunal decision. There are many cases in which the deceased estate of a writer, musician or composer is engaged in litigation. Very few focus attention on the probate perspective addressed by this paper.

## **CONCLUSION: “THE LIGHTHOUSE”**

- 114 This paper (entitled “The Literary Executor and The Lighthouse”) will have served its purpose if, in a manner analogous to a lighthouse, it has cast a light – albeit, perhaps, too dimly – on rocks in the way of appointment of a “Literary Executor”, and bid those passing by to take another course, if another course is available.
- 115 By all means, speak of a “Literary Executor” as an honorific title; but hesitate before embracing unnecessary divisions, in the ownership and control of a deceased estate, in qualified appointments of multiple executors and in limited grants of probate.

GCL

16 November 2016

NOTE: An acknowledgment is due to Pam Suttor and Raoul Wilson SC for drawing Patrick White’s will to my attention; to Senior Deputy Registrar Louise Brown for retrieving the Court’s files from archives; to Esther Khoo, my Tipstaff, for the quality of her research; and to the staff of the Law Courts Library for their usual professionalism and courtesy.

SUPPLEMENTARY EDITORIAL NOTE: This is a lightly revised version of a paper presented to STEP on 16 November 2016. Leaving aside minor clerical corrections, the only changes are the addition of the final sentences to paragraphs 93 and 104 respectively, and the addition of the third case reference in paragraph 113.

GCL

17 November 2016

## SCHEDULE

### RE: ESTATE OF PATRICK MARTINDALE WHITE, Author, Deceased

#### (A) FORMAL DETAILS

1. Date of death: 30 September 1990.
2. Date of will: 2 March 1988.
3. **General Executor**: Perpetual Trustee Company Limited
4. Probate granted: 7 January 1991 (No. 100024/91).
5. **Form of Grant**: "PROBATE of the last Will and Testament of [the deceased] is hereby granted to PERPETUAL TRUSTEE COMPANY LIMITED of 39 HUNTER STREET, SYDNEY, executor appointed under the will. Save and except the published and unpublished literary works and copyright therein of the testator."
6. **Literary Executor**: Barbara Mobbs.
7. Probate granted: 17 January 1992 (No. 100430/92).
8. **Form of Grant**: "PROBATE" of the last Will and Testament of [the deceased] is hereby granted to BARBARA MOBBS..., the literary executrix appointed under the Will, limited to the published and unpublished literary works and copyright thereof of the testator.
9. Text of Will: In each case, a copy of the will was physically incorporated in the instrument of grant.

#### (B) SCHEME OF PATRICK WHITE'S WILL SO FAR AS IT RELATED TO THE APPOINTMENT AND POWERS OF EXECUTORS

"THIS IS THE LAST WILL AND TESTAMENT of me PATRICK VICTOR MARTINDALE WHITE of... Centennial Park in the State of New South Wales, Author.

1. I HEREBY REVOKE all former Wills and testamentary dispositions at any time heretofore made by me AND DECLARE this to be my last Will and testament.
2. SUBJECT to clause 3 hereof I APPOINT PERPETUAL TRUSTEE COMPANY LIMITED of 39 Hunter Street, Sydney in the State of New South Wales (hereinafter called 'my Trustee') to be the Executor and Trustee of this my Will.
3. (a) I APPOINT BARBARA MOBBS of ... Darling Point in the said State (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 sub-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 she 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 her in the performance of her duties under my Will and to commission at the rate of ten percent (10%) of corpus and ten percent (10%) of income collected by her in the performance of her duties and the exercise of her 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 sub-clause (d) of this Clause shall be paid to my Trustee and shall bear the same character of capital or income when so paid as they bore when collected by my Literary Executor.
  - (f) I DIRECT that my Trustee shall be empowered to appoint any person or persons in its absolute discretion in place of or in addition to the said Barbara Mobbs as my Literary Executor PROVIDED ALWAYS THAT during the lifetime of the said Barbara Mobbs no such appointment shall be made without the consent of the said Barbara Mobbs.
4. I DIRECT that my body shall be privately cremated etc....
  5. I GIVE AND BEQUEATH free of all duties and taxes payable upon or as a consequence of my death to [a named beneficiary, the testator's partner] all moneys standing to my credit in any current account or on deposit with any bank.
  6. I GIVE AND BEQUEATH free of all duties and taxes payable upon or as a consequence of my death the following pecuniary legacies: ... [Several legacies, each of \$10,000, are there set out, including a legacy for Barbara Mobbs].
  7. I GIVE AND BEQUEATH free of all duties and tax payable upon or as a consequence of my death the following specific legacies:

- (a) All books of which I am in possession at the time of my death to the MITCHELL LIBRARY of the State Library of New South Wales to be used for such purposes as the governing body of the said Library may in its absolute discretion think fit....
  - (b) All paintings and sculptures which I am possessed at the time of my death to the ART GALLERY OF NEW SOUTH WALES to be used for such purposes as the Trustees fo [sic] the Art Gallery of New South Wales may in their absolute discretion think fit....
8. ALL THE REST AND RESIDUE of my estate of whatever nature and wheresoever the same may be situated (hereinafter called 'my residuary estate' I GIVE DEVISE AND BEQUEATH unto my Trustee upon the following trusts: ... [There follow trusts for the deceased's partner for life and, upon his death, trusts of the remainder of the residuary estate to be divided between four charities; namely, the Smith Family, the Aboriginal Education Council (NSW), the Aboriginal Island Dance Theatre and the Art Gallery of New South Wales].
9. NOTWITHSTANDING any other provision of this my Will charging the residue of my estate with a payment of taxes I DIRECT that where capital gains tax is assessed against my trustee either consequent upon my death or upon the sale of any asset of my estate by my Trustee such tax shall be a charge firstly upon the asset giving rise to the tax or upon the net proceeds of sale thereof (as the case may be) and secondly upon my residuary estate.
10. I DIRECT that my Trustee shall have the following powers in addition to those conferred upon executors and trustees by law:
- (a) Absolute power from time to time to sell or mortgage the whole or any part or parts of my estate on such terms and in such manner as it in its absolute discretion shall think fit and it shall not be necessary to obtain the consent of any beneficiary to any such sale or mortgage and it shall have power to delay or postpone the sale calling in or conversion of the whole or any part or parts of my estate (including property of a terminable hazardous or wasting nature during such period as it in its absolute discretion shall think fit.
  - (b) to invest any part of my estate liable to be or requiring to be invested in the purchase of or at interest upon the security of such stocks funds shares notes securities or other investments of whatever nature and wheresoever situate and whether involving liability or not or upon such personal credit with or without such security as my Trustee shall in its absolute discretion think fit with the intent that my Trustee shall have the same full and unrestricted powers of investing and transposing investments in all respects as if it were absolutely entitled thereto beneficially and to vary and transpose any investments from time to time.

- (c) I direct that all profits interest dividends and other income received by my Trustee shall be treated as income of my estate and shall not be apportioned either at my death or at the death of any beneficiary and to that end I expressly negative Section 144 of the Conveyancing Act of New South Wales.
  - (d) In the discretion of my Trustee to partition or appropriate any real or personal property forming part of my residuary estate in its then actual condition or state of investment in or towards satisfaction of the share of any person or persons in my residuary estate with power for that purpose conclusively to determine the value of any real or personal property so partitioned or appropriated as aforesaid in such manner as my Trustee shall think fit and every such partition or apportionment shall be binding on all persons interested under this my will.
11. I DIRECT that upon my death my Literary Executor destroy all my notes and all unpublished manuscripts which at the date of my death have not been delivered to my Publisher and/or Agent notwithstanding anything herein before contained.
12. ...”