

GUIDANCE ON YOUR COPYRIGHTS & PAPERS AFTER DEATH 2020



WILLS AND POWERS OF ATTORNEY

Intestacy – the state of not having a will – may create dreadful problems of inheritance and tax for your nearest and dearest. It is obviously preferable to **prepare a will** stating exactly what you are leaving to whom.

While considering your will, you may also want to consider whether you should create **powers of attorney** so that someone can act on your behalf in both 'health and welfare' and 'property and finance' matters should you be unable to do so. These are sometimes considered even more important than wills, as they deal with your assets when you still have the need of them. This Guide considers issues arising from death.

What this Guide covers

- 1: the help the SoA can give
- 2: who inherits what on your death
- 3: executors, 'literary executors' and probate
- 4: the future administration of your copyrights
- 5: your online presence
- 6: inheritance tax
- 7: valuation of literary property for probate
- 8: bequests to the SoA or its charities

1 THE HELP THE SoA CAN GIVE

An author's estate is entitled to join the SoA and to obtain the same advice and assistance as the author was entitled to during his/her lifetime.

If you are a member of the SoA, be assured that your membership will not be cancelled on your death but is automatically transferred to your estate until it expires, at which point we offer the estate the option to renew thereafter on the same terms as for living members. If you have inherited the estate of an author who was not a member of the SoA, you are welcome to join.

The SoA does not normally act as a literary executor. But in special cases, in an agency capacity, it handles negotiations relating to the copyrights of a deceased author. It does this for the estates of Bernard Shaw, T.S. Eliot, John Masefield, Walter de la Mare, Philip Larkin, and others. Authors who wish to make provision for this in their will should discuss their plans with the SoA.

Members are welcome to contact us at any stage on specific queries. We also have a checklist of what should be done immediately after death (see [/www.societyofauthors.org/help/Bereavement](http://www.societyofauthors.org/help/Bereavement)). Below we give some general guidelines:

2 WHO INHERITS WHAT ON YOUR DEATH

2.1. You may leave behind literary assets which have some immediate saleable value, or which will generate income in the years to come. In either case the physical assets are separate from your intellectual property rights which will survive for 70 years after your death.

2.2. If you make no specific disposal of your copyright or of your other literary assets (books, letters, typescripts, illustrations, also e.g. the digitised files of emails and typescripts, working materials such as desk or computer), both the literary assets and the intellectual property rights will pass, in the ordinary way, as part of your residuary estate. However, the physical assets and the copyrights are distinct

'properties', and can be dealt with separately; for example the physical assets being left to one person and the copyright in them to another. The Copyright Act 1988 says, broadly speaking, that if a testator leaves you an unpublished manuscript, he/she will be deemed to have left you the copyright in it too; but that is only a rule of interpretation, which can be defeated by a contrary intention appearing elsewhere in the Will.

2.3. If your writing is done under the umbrella of a limited company, it will generally be the company and not you which owns the copyrights at least in your published work, and you must ensure that what happens to copyrights and any future income if the company is dissolved, and who is entitled to control/dissolve the company on your death, tally with what you intend in your will.

2.4. Remember that while you are the owner of, and can bequeath, copies of letters and other writings sent to you, it is the writer of such material who owns the copyright – and whose consent would be needed if someone wanted to quote from or otherwise reproduce the content. Likewise whoever inherits your copyrights would have a veto over whether letters of yours (which may well be in their recipients' possession) are reproduced or quoted from.

2.5. Some of your manuscripts and papers may be in the possession of your agent. These belong to you and should not be sold without the permission of you or your estate, an agency should return the originals of any such items to you/your estate, on request. In addition, an agent or publisher cannot sell any paperwork relating to your contracts or financial documents without your consent.

2.6. Public Lending Right is a separate right from copyright and can (in theory at least) be left separately. In practice, PLR is normally bequeathed with the copyright or left to pass with all other assets to the residuary beneficiaries

2.7. ALCS monies usually come within copyright although they can be bequeathed separately.

2.8. If you bequeath the copyright to more than one person, be aware that it can result in an administrative headache because any publishing or other proposal to exploit the work will need the formal consent of all copyright owners. You might prefer to bequeath the copyrights to one person and direct that any income arising be shared with other beneficiaries – but even that can be a significant burden for the copyright holder who will be responsible for administering the collection and paying out of monies in the agreed proportions – even after the total sums involved have become negligible. If that is so you might want to clarify whether the person inheriting the copyright is entitled to a larger proportion of any monies and/or the first right to be paid an agreed sum per year after which any monies remaining are shared amongst the beneficiaries) in return for being the one who is responsible for negotiating deals and administering the estate (see 'literary executor' below).

2.9. You might want to consider bequeathing your papers to a library or other archive collection. For further information on this, see the Guide to an Author's Papers and Archives.

2.10. If you are sufficiently eminent you may want to think about authorising your executors or some other person to appoint a biographer, in which case the authorised biographer would normally be given exclusive rights to have access to your papers, and to quote from them, until the biography is completed. That is a matter for your executors to negotiate with the biographer.

2.11 The SoA always appreciates being remembered in an author's will - however small the gift it can help other authors in future, and we would always be pleased to discuss that possibility. Recommended wording for such a bequest is given at the end of this Guidance note.

2.12. The making of your will is a good time for tidying up your affairs. Is all your paperwork arranged in a sensible fashion? Are contracts neatly filed, or are they in an unmarked box in the shed? Will your family know where to find everything, or will the administration of your estate leave them searching for documents, accounts and missing insurance policies? Try to keep well-ordered files and let your executors know where to find them. Remember to include details about the passwords and usernames for all your emails and electronically filed documents and accounts and, if relevant, contact details for your agent, accountant and solicitor.

2.13 If you have a complex literary estate, or are a co-author with others, or have a complex family situation it would be advisable to obtain specialist advice from a solicitor with experience of dealing with literary estates.

3 EXECUTORS, 'LITERARY EXECUTORS' AND PROBATE

3.1. The role of an executor is to collect in the deceased person's assets, meet any outstanding liabilities and then retain or distribute the balance as directed by the will (or to hold them on trust if the beneficiaries are in need of protection). Choose your executors carefully; pick people who will get on well together, are up to the task, and will not be distressed or overwhelmed.

3.2. It is sensible to give your executors adequate powers in your will to deal with all your literary assets – for example to arrange a sale of your papers to a university, to exploit your copyrights, to publish any unfinished work and to exploit your literary reputation.

3.3. The best arrangement is to have a single set of competent executors who will deal with the whole of your estate. You could state that a specific person should advise the main executors on points concerning your papers and copyrights until they are distributed, in which case it would be sufficient to include in the will an obligation on the executors to 'consult with [name the person, do NOT characterise them as "literary executor"] in all matters connected with the publication of my unpublished manuscripts and other papers and the exploitation of my works both published and unpublished.'

3.4: Beware appointing somebody your 'literary executor' (see also point 4.1). It can have consequences you did not intend. The term 'literary executor' is generally understood to mean an executor whose responsibilities are limited to the literary assets of the deceased's estate. Instead of having a single set of people dealing with your affairs, you will have two sets of executors (your executors and your 'literary executor'), who have to co-operate. They must make separate applications for probate. If you have just one set of executors, the income and expenditure of the estate and its capital assets will all be in a single pot out of which tax, debts and so on can be paid. If you have two, it is possible that one set of executors will be short of money. You may have to provide a power for one set of executors to lend money to the other. For example, literary executors may have to lend money to the general executors to pay inheritance tax.

3.5: A half-way house is that the executors can be directed or empowered to appoint a literary manager with full powers to manage the literary estate but not be an executor him/herself.

3.6: Executors and 'literary executors' can license or otherwise deal with rights in your work before Probate has been granted – though they might be asked for a copy of the grant of probate as proof of their title. However, assets such as shares in your literary company need probate to be registered in the name of your executors before they can be dealt with, and unless the executors are already directors of the company it might not be possible to do anything until probate has been granted and the executors have been registered as shareholders and been appointed as directors.

3.7: Generally your estate will want to keep control over your work for the longest time permitted by law. If you are at all well known, the literary income of your estate will tend to increase shortly after your death and then fall away, rising again if new work is published or a biography (or film) comes out, or at the centenary of your birth. After that, literary income will generally diminish over the copyright period, so the law has tended to regard copyrights as 'wasting assets' and there are old cases which suggest that executors are under a duty to sell copyrights for the best figure they can rather than exploit them. This is not always convenient or sensible; your will should contain provisions that enable the executors (and after them, if relevant, trustees) to retain your copyrights and not to be obliged to sell them.

3.8: An executor's responsibilities end once the assets have been distributed. However a 'literary executorship' is a separate grant of probate and continues until:

a) your literary estate has been wound up i.e. copyright has expired and it no longer holds any rights or money; or

b) the 'literary executor' appoints successor trustees (in accordance with the terms of your will or otherwise). Such successors are sometimes wrongly also described as 'literary executors' but this is inaccurate because the only person who can appoint an executor is the testator in his/her will; or

c) the 'literary executor' dies without appointing anyone else as successor trustee (in which case the role would automatically go to the 'literary executor's own personal representatives/executors which is unsatisfactory).

3.9: Some authors are particularly concerned that letters or personal correspondence should be destroyed, or alternatively retained, or sealed up for the long term. You may also want to clarify to what extent beneficiaries have any say over the appointment of any future a successor trustee. These are all directions which you can include in your will and give your ordinary executors or other people authorised by you without needing to engage 'literary executors'.

4 THE FUTURE ADMINISTRATION OF YOUR COPYRIGHTS

4.1 Who will, in the long term, manage your copyrights and make decisions about your publishing affairs? Many authors colloquially refer to such a person as a 'literary executor' but that is a term which should in this context be avoided if at all possible (see points 3.4 and 4.3).

4.2: Whoever inherits your copyrights can be left to deal with them alone and that person can choose to join the SoA (in the same way that the author can) and/or to take on an agent.

4.3: Alternatively, you might want to appoint someone to act as a Trustee for your papers and copyrights, and manage them for an indefinite period for the beneficiaries, e.g. because the beneficiaries are too numerous or too young to fulfil this role themselves, or because, despite the competence of the beneficiaries, the person chosen has particular knowledge of your work or has experience of publishing. If this is your intention, you should bequeath all manuscripts, whether published or not, other papers (e.g. letters and diaries) and any copyrights not previously assigned to others to a named person on trust for named beneficiaries with or without a time limit on the duration of the trust. 4.4: Another possibility is that you would like your literary agent (if you have one) to continue dealing with your work in the normal way for the benefit of your family. In that case, do not appoint your agent as 'literary executor' - simply express a wish in your will that your executors and beneficiaries should continue to use the services of your agent.

4.5: If you appoint a Trustee, you should make clear what/how they will be paid for their time - e.g. will they be entitled to a percentage of any income generated by your estate. And be clear about the extent to which they, rather than beneficiaries, can act as 'keepers of the flame' e.g. make decisions on more subjective matters like whether or not to destroy your unpublished papers, whether or not/who to appoint as authorised biographer or make decisions about the suitability of any particular publishing or other proposals relating to your work.

5 YOUR ONLINE PRESENCE

5.1 Your online footprint could include your email accounts, social media accounts (e.g. Facebook, YouTube, Twitter, Instagram), chatroom and gaming profiles; financial accounts, bank and investment accounts, trading accounts including e.g. Paypal, eBay, and companies with which you regularly shop online. Some of these you would, on your death, want deleted - not just the obvious ones but also for instance to prevent Facebook posthumously issuing 'happy birthday' notices; there are others which your relatives, heirs and friends (your authorised biographer?) might be anxious to save - accounts holding family photos and videos for instance.

5.2 It is most important to ensure that people dealing with your affairs after your death know of all your email accounts and associated passwords. Not only do many people have most of their important information filed on email they are also the key to other accounts. If after your death someone has access to your email account, it can be used to gain access to other of your accounts via the 'forgotten your password' link.

5.3 If you have many passwords (and it is more secure to have different passwords for everything), you could consider storing them in a 'password manager' (there are many listed online). A quick search also reveals a range of companies offering a 'cyberwill' service (e.g. Legacy Locker, AssetLock, Cirrus Legacy) which ensure that the information you supply will be passed to named guardians e.g. on presentation of a death certificate. But do your research - storing sensitive information of this sort online makes it vulnerable to hacking.

5.4 You may well prefer to compile a full list of web addresses, passwords and usernames for your accounts, and deposit that information alongside your will so your executors have ready access to it. (Wills become public information when they go to probate, so don't include such sensitive information actually in the will itself. And if the will refers to another document without making it clear that the other document is non-binding there is a risk it may have to be admitted to probate. Better just to deposit it with the solicitors in a sealed envelope. It will need regular updating anyway.)

5.5 You can sign up to Google's Inactive Account Manager (and thereby avoid having constantly to update your password information) which allows you to determine when your Google account expires (e.g. after 6 or 12 months of inactivity) and you can nominate a beneficiary. After expiry of the

account, that nominee will be given access to, and the ability to extract, your digital assets. You can set up a Legacy Account with Facebook, nominating someone to manage your account after death (which could include creating a memorial page). Facebook will delete an account on production of a death certificate (and some other personal details). Increasingly all the major web-companies now have searchable procedures for reporting, accessing and/or deleting a deceased account holder. If the account in question requires a payment, stopping the payment will delete the account; and when it comes to an email account, many (but not all) companies will automatically close it if it is inactive for any length of time.

6 INHERITANCE TAX

6.1. HMRC generally accepts that 'business property relief', giving exemption from inheritance tax, is available on copyrights if the author was still writing within two years of death. The exemption would also apply to your papers, working library, and working equipment such as pen, desk and computer. If you maintain a separate authorship bank account, any reasonable credit balance will also be covered by business property relief. If you have retired as an author, these assets will no longer be treated as business property. They are simply assets of your former business and may be liable to inheritance tax. Fortunately very few authors ever really retire – they always seem to have plans for a new work, a new or translated edition, a promotional tour, or some late-flowering verse, or are in discussions with their agents, publishers or a film company. While records exist to show that there is continuing authorship activity, relief from inheritance tax will be available.

6.2. If you have it in mind to make gifts to members of your family, it would be sensible to take professional advice. This might include the judicious use of trusts. As a surviving spouse may not qualify for Business Property Relief (BPR) on the copyrights they inherit from you, on their death, you may wish to consider having a 'Business Property Trust' included in your will. This if framed correctly can both support a surviving spouse and prevent a significant inheritance tax liability arising too quickly.

If the spouse is still carrying on the authorship business – new editions, translations, etc then BPR should be available. As time goes by it will be harder to demonstrate that a business is being carried on, as distinct from just receiving royalties – for example if royalties go to young children. A business property trust, where the business is carried on by the trustees is more likely to make the estates of the beneficiaries entitled to BPR. A BP trust would give the trustees power to carry on a business – indeed direct them to do so – and have other clause to demonstrate that a business is being carried on. If the trustees are directed/empowered to form a trading company, that is even more likely to qualify for BPR.

6.3. The value of copyrights transferred on the author's death by will or intestacy must for inheritance tax purposes be included in the total of the author's assets. This is only important if business property relief does not apply. The tax applies at the rate of 40% on non-business assets in excess of £325,000 for individuals. Transfers between spouses and civil partners are exempt from inheritance tax. If you leave your whole estate to your spouse, the £325,000 nil rate band exemption is not used and can now be carried forward and used on the second death – on the death of the survivor the nil rate amount will be £650,000. There are other exemptions from inheritance tax which can be secured by careful planning, including an annual exemption of £3,000 of gifts per donor, and gifts regularly made out of your taxed income, without affecting your standard of living.

6.4. If you operate through a limited company and have held the shares in a trading company owning your intellectual property for two years, you qualify for business property relief. The relief on these shares can 'cascade down the generations' as long as the company remains a trading company.

6.5. Different rules apply for the surviving spouse than for other heirs.

6.6. Bequests to charities (e.g. the Authors' Foundation, the Royal Literary Fund – many archives/libraries are also charities) are exempt from inheritance tax.

6.7. Lifetime gifts of copyright or other assets will not be subject to inheritance tax, unless made within seven years of death, in which case the tax payable on death (if any) will depend on the interval between the transfer and the date of death. Authors having adequate income for their needs may wish to give away some copyrights in their lifetime (e.g. to children).

6.8. Income tax (not capital gains tax) applies to sales of an author's manuscripts, notebooks, working papers and copyrights *made during the author's lifetime*; and sales to a British institution will be subject to VAT if the author is VAT-registered.

7 VALUATION OF LITERARY PROPERTY FOR PROBATE

Copyrights (and PLR), like other assets, have to be valued as part of your estate and may be liable to inheritance tax (see below). It is notoriously difficult to value copyrights for probate purposes. As a rule of thumb, you begin by averaging out the income over a period of years before the death. This evens out the income and avoids the problem of a new book just having come out or which came out three years ago. Then you add a multiplier which depends on the standing of the author and the type of book. For example a 'flash-in-the-pan' book by a pop star might well count for just a year's income (after a year it will be old hat and not reprinted); but a maths textbook might have a long life as a steady seller and HMRC will try to value the copyrights at a higher multiple e.g. five years. Executors should be able to find reasons for arguing in favour of a low valuation (e.g. royalty income has been falling, the author's work is out of fashion, etc.) and the Capital Taxes Office may point to factors suggesting a high valuation. Usually a compromise is reached, under which the copyrights are valued, often at the equivalent of two to three years' income.

8 BEQUESTS TO THE SOCIETY OF AUTHORS OR ITS CHARITIES

We welcome greatly any bequest – of whatever size – either to the SoA (which of course relies for its existence principally on members' subscriptions) or one of the SoA's charities (e.g. the Authors' Foundation which makes grants to authors towards the writing of their next book). There are various short forms of bequest, when making your will or a codicil, some of which we recommend are:

Charitable gifts

• *I give the sum of £.....to the Authors' Foundation, registered charity number 326605, of 24 Bedford Row, London WC1R 4EH for its general charitable purposes, free of inheritance tax.*

• *I give absolutely to the Authors' Foundation, registered charity number 326605 of 24 Bedford Row, London WC1R 4EH all my copyrights, interests in copyrights, Public Lending Right, moral and ancillary rights, royalties, worldwide and in every medium and all monies of every other description accruing from those rights in the following works free of inheritance tax.:-*

[list of works to be left to the charity]

The SoA is not itself a charity. Suggested wording for non-charitable gifts

• *I give the sum of £.....to the Society of Authors, 24 Bedford Row, London WC1R 4EH for its general purposes free of inheritance tax.*

• *I give absolutely to the Society of Authors, 24 Bedford Row, London WC1R 4EH all my copyrights, interests in copyrights, Public Lending Right, moral and ancillary rights, royalties, worldwide and in every medium and all monies of every other description accruing from those rights in the following works for its general purposes free of inheritance tax.:-*

[list of works to be left to the SoA]

These are of course simplified specimen forms of bequest, which may need to be amended by your solicitor according to the circumstances. Please feel free to contact our Chief Executive, Nicola Solomon, if you would like to discuss any aspect of a bequest.

We gratefully acknowledge Robert Craig at solicitors Howard Kennedy, and Barry Kernon and Tim Walford-Fitzgerald at accountants H W Fisher for their assistance in preparing this Guide.

This Guide is intended to provide only general guidance. The SoA cannot accept legal responsibility for any inaccuracies and authors are recommended to consult their own solicitors and accountants about their own particular circumstances.

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