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ESTATE PLANNING FOR AUTHORS

A primer on the special estate planning considerations for clients who are authors or hold intellectual property rights and service agreements.

***13** While all clients have unique planning needs, planning for authors and clients with intellectual property rights and services agreements requires special considerations. This article will discuss practical planning strategies for authors.

Copyright and the Right of Termination

Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression.¹ Works are original when they are independently created by a human author and have a minimal degree of creativity. A work is fixed when it is captured (either by or under the authority of an author) in a sufficiently permanent medium such that the work can be perceived, reproduced, or communicated for more than a short time. Once an individual fixes an original work in a tangible form of expression, that individual is a copyright owner. If a work is created by an employee (or in some cases an independent contractor) acting within the scope of employment, the copyright of this ‘work for hire’ is owned by the employer. Copyright ownership can also be transferred by gift or bequest.

While copyright ownership takes place automatically, in order for the owner to enforce those rights (including the right to seek certain types of monetary damages and attorneys' fees in litigation), the copyright must be registered with the U.S. Copyright Office. A copyright holder has the exclusive right to reproduce the work, prepare derivative works based upon the work, distribute copies to the public by sale or other transfer of ownership or by rental, lease, or lending, and perform or display the work publicly. The copyright holder may authorize others to exercise these rights, whether gratis or in exchange for payment known as a ‘royalty.’

For works created on or after January 1, 1978, a copyright lasts for the life of the author plus 70 years after his or her death.² If the work is a joint work, the term lasts for 70 years after the last surviving author's death.³ For works made for hire and anonymous or pseudonymous works, copyright protection is the shorter of 95 years from publication and 120 years from creation.⁴ A copyright holder could theoretically license a work for the entirety of that duration. However, in recognition of the fact that the true value of licensed rights may not be apparent upon the work's creation, any transfer or license of a copyright can be terminated by the author, or if the author is deceased, by his or her ***14** statutory heirs, at any time during the five-year period beginning 35 years after the date of the assignment, or 35 years from the date of publication where the grant includes

the right of publication of the work.⁵ The right of termination is exercised by providing signed written notice to the assignee at least two years and not more than 10 years before the termination date stated in the notice and recording the notice with the Copyright Office before the effective date of the termination. If the author is deceased when the termination period begins, the right of termination is held:

- **2** • If there is a surviving spouse but no children or grandchildren, by the surviving spouse.

- If there are children or grandchildren but no surviving spouse, by the children and grandchildren, with each holding an interest in the termination right based on generational assignment (*per stirpes*).

- If there is a surviving spouse and children or grandchildren, the surviving spouse holds a 50% interest in the termination right and the children or grandchildren hold the remaining 50%, divided again by their generational assignment.

- If there is no surviving spouse and no living children or grandchildren, the author's personal representative or trustee owns the entire termination interest.⁶

Where multiple people hold an interest in the termination right, the right may be exercised by agreement of those holding more than 50% of the right.⁷ An interest in the termination right is not assignable. Upon the effective date of termination, all licenses and rights in the copyright revert to the author or, if the author is deceased, the persons owning the termination interest.⁸ Importantly, there is an exception to the right of termination for transfers made by will, though this exception does not, at least expressly, apply to transfers made under other testamentary instruments such as a revocable trust. This means that any transfer or license of rights made during an author's life will be subject to the termination right until the termination period has ended.

Understanding and Organizing the Contractual Arrangements

A copyright holder would typically license those rights in order to monetize them. Before diving into planning strategies, it is important to establish the scope of the client's works and the governing contracts. Traditionally, an author will enter into a contract with a publishing house that will cover a single or multiple pieces of works to be written. The contract will provide for the publishing rights, intellectual property rights, and clauses regarding amendments and transfers. Oftentimes, for an established author with a series of works that build upon each other, these contracts will be subsequently amended or certain works will be licensed or reproduced as part of another series. As a result, multiple contracts may govern a single piece of work. Therefore, it is important to develop a log of all contracts and the works governed by each, and to keep organized copies of such contracts. This task is often delegated to the client's agent, whose helpfulness and recordkeeping skills may vary. Thus, it is recommended that practitioners work with the client, agent, and respective publishing house to confirm all contracts have been accounted for. Often at least one of these parties will be missing copies of contracts, especially if a contract predates the digital era.

Once the scope of works is identified, the appropriate planning strategy can be determined. Below this article will discuss the use of a literary executor and/or trustee and the practical implications of the use of an entity.

Literary Executor/Trustee

****3** A literary executor or trustee is a person identified to manage all of the literary works, published and unpublished, and related intellectual property rights for the deceased client. If the client has trusted persons who are knowledgeable about the client's works, contracts, and intentions, and who ideally have experience developing and implementing a strategy to monetize works in a way consistent with the client's wishes, then appointing a literary executor or trustee may make sense. This approach may also be appropriate if the client does not have many works or intellectual property rights governing such works. However,

this approach is only as good as the person identified as literary executor or trustee. For most clients, simply naming a literary executor or trustee will not be sufficient to streamline the administration of literary interests after death.

Use of an Entity

In conjunction with or in lieu of appointing a literary executor or trustee, practitioners may consider advising clients to establish a limited liability company or other entity during their *15 lifetime and assign all of the client's contracts and intellectual property rights to the entity. Once held in the entity, upon the decedent's death payments for such contracts or rights will continue uninterrupted and subsequent transfers of interests in the entity to heirs generally will not necessitate providing notice to publishing houses or updating copyright registrations. Use of an entity also consolidates copyright management in a single vehicle rather than dividing it among multiple heirs, potentially streamlining the management of the rights and, if properly managed, allowing for maximization of value. While this structure will require some administrative effort during the client's lifetime, it will greatly streamline the administration of the client's literary estate at death.

In implementing this structure, practitioners should consider the type of entity to put in place and will also need to work with the client, client's agent, and an intellectual property attorney to assign the client's contracts and intellectual property to the entity. Practitioners should also be mindful of privacy concerns in determining the state of incorporation. Many clients choose to form Delaware entities to take advantage of the privacy afforded under that state's laws; however, practitioners should keep in mind that even in states with minimal public disclosure the client's association with the entity may need to be disclosed to one or more government agencies (for example, under the recently enacted Corporate Transparency Act).

In addition, the entity will likely need to apply for a state business license and may need to apply for a county or city business license as well. Even though the entity will be holding contracts and the author is not engaged in a business involving the general public, the entity will likely be receiving royalties under the contract and the author is engaged in a service. In many municipalities the right to receive royalties will require a business license. Practitioners should confirm that the appropriate licenses have been obtained and should work the client's accountant to determine the correct apportionment of income that will be subject to state and local tax, if applicable.

Funding the Entity

**4 Transfers of copyrights, including a transfer to an entity, must be in writing and signed by the owner, and should be recorded with the Copyright office.⁹ When transferring the contracts to the entity, practitioners can draft a separate assignment for each contract or a general assignment for each publishing house with the respective contracts listed on an exhibit. The latter is more efficient and can also serve as a log of contracts that are held in the entity. Publishing houses may also require a Letter of Inducement or Guarantee before they will approve and acknowledge an assignment. A Letter of Inducement or Guarantee ensures that the services required of the author will still be performed and that the author will not seek separate payment. In reviewing any such Letter of Inducement or Guarantee, practitioners should consider limiting the client's liability to that provided for under the original agreement.

In conjunction with the assignment of contracts, it is important that the intellectual property rights subject to the specific works are also assigned. The most common intellectual property rights an author will have will be copyrights to the works. While the publishing houses may have applied for the copyrights originally, the client is generally responsible for this subsequent assignment. Given that copyrights are what protect the work and can generate revenue it is important that they are also transferred to an entity, whether the same entity holding the service contract or a separate one created to hold intellectual property.¹⁰ Practically, this will involve a search of all copyrights, preparation of a separate copyright assignment, and a filing of the respective copyrights with the U.S. Copyright Office. The client may also have additional intellectual property and it is important that this also be assigned for orderly management and tracking. Not all works will have copyrights and some copyrights or rights to certain characters or storylines may have been previously assigned by the client. Because of the complications that can

arise it is important to work with an attorney experienced in intellectual property to assist with the transfer of the intellectual property to the entity.

Since the contracts and intellectual property will be held in an entity, at the client's death payments under the contracts will continue and the entity will continue to hold the intellectual property. No further updates will be needed to assign the contracts or intellectual property. Rather, when transferring the asset under the client's estate planning documents, a simple assignment of ownership of the entity would be made. Of course, as noted above a transfer of a copyright is subject to a right of termination. Presumably this includes a transfer to an entity by the author during his or her lifetime, and so practitioners should keep in mind the possibility that the author's statutory heirs could unwind the transfer, pulling the copyright back out of the entity, should the author die prior to the termination period. If the client has not funded an entity during life, the issue might be avoided by making the transfer at death under the author's will, since the termination right by law does not apply to a transfer by will.

Gifts Interests

****5** The client may consider gifting the right to payments under the contracts, or if an entity is formed to hold the contracts and intellectual property, ***16** gifting an interest in the entity. Practitioners should consider the income tax consequences when advising clients regarding whether the transfer should occur inter vivos or postmortem.

Under [Section 1221\(a\)\(3\)\(c\)](#), capital asset treatment is denied to a taxpayer whose basis is determined with reference to the basis of the creator of the property. This means that if a literary work is transferred by gift during life, it will not be treated as a capital asset and would generate ordinary income if sold by the donee. Alternatively, if transferred at death, not only would the beneficiaries receive a step-up in basis, but the rights to the literary works would be treated as a capital asset and generate capital gains if sold. If a client does not expect to have a taxable estate at death then there may be no significant advantage to gifting the property during the client's life. However, if a client is expected to have a taxable estate, the income tax savings should be weighed against the increased estate tax cost of the inclusion of the property in the author's gross estate.

Assuming it makes sense to gift the entity or contract interest, it is important to ensure that the transfer effectively shifts the income tax liability to the recipient. Typically, if the underlying contract and related intellectual property are assigned, that will be sufficient to shift the income tax liability to the recipient. If only the payment right is assigned, however, then it is likely an anticipatory assignment has occurred. In such a case, the author could be liable for tax on income that the author never receives. If the author has sufficient funds to pay any such tax liability, then the anticipatory transfer of income can present a planning opportunity similar to the advantage of grantor trusts. An anticipatory transfer would allow for an income stream from the royalties and payments go the recipient and for the author to pay the income tax. Absent an anticipatory transfer, the client should consider the beneficiary's income tax rate when deciding whether to gift, as a gift to a beneficiary taxed at a lower marginal rate may represent an overall income tax savings. Practitioners should delve into the legal requirements with respect to the assignment of income to ensure the proper steps are taken and documentation is prepared to either avoid or structure an anticipatory transfer depending on the client's objective.

Another issue to keep in mind when advising a client on gifting an interest in an entity is the termination right discussed above. Query whether the author's (involuntary) retention of a right of termination at death causes estate inclusion under [Sections 2036](#) or [2037](#). Practitioners and clients may wish to consider a sale to a grantor trust for adequate and full consideration to avoid this result.

****6** In brief, in planning for authors it is recommended the following steps be taken:

- 1 Work with the client and his or her agent to compile an inventory and understanding of the terms of all existing literary contracts, royalty contracts, split payment letters (letters splitting payment under the contracts between the author and the author's agent or another third party), and copyrights, making note of any associated deadlines for filings exercise of termination rights, payment of fees, and other relevant action items.

- 2 Confirm whether the client or client's estate is the sole owner of the applicable rights, and if not what contractual or statutory rights and obligations the client or estate has with respect to co-owners.
- 3 Consult the client's literary agent and an experienced intellectual property attorney in planning and executing an estate planning strategy.
- 4 Be prepared to work with publishing and media houses.
- 5 Consider appointing a literary executor or trustee in the client's will and revocable trust.
- 6 Consider forming an entity and assigning the contracts and copyrights to that entity.
- 7 In determining whether to recommend a gift of contracts or copyrights, consider the income and estate tax consequences of a gift, including the loss of a step-up in basis and capital asset treatment, as well as the potential for anticipatory transfers for income tax purposes and the possible effect of the termination right on a transfer by gift.
- 8 Update the client's estate plan to account for the transfer of the client's interest in any copyrights, intellectual property, personality rights, and literary contracts that may not have already been addressed.

If a literary work is transferred by gift during life, it will not be treated as a capital asset and would generate ordinary income if sold by the donee. Alternatively, if transferred at death, not only would the beneficiaries receive a step-up in basis, but the rights to the literary works would be treated as a capital asset and generate capital gains if sold.

Footnotes

- a1 WILLIAM (BILL) S. FRIEDMAN is Counsel at the firm Perkins Coie LLP. He counsels clients in both tax and non-tax aspects of estate planning, focusing on strategies to minimize taxes through the creation of trusts, business entities and charitable organizations, as well as the use of gifts, sales and other wealth-transfer strategies. NISHA V. NARIYA is a senior Associate at Perkins Coie LLP and graduate of Georgetown University Law Center. Nisha's practice areas include estate planning, advising fiduciaries through estate and trust administrations, and charitable planning including advising tax-exempt organizations. Nisha has counseled a wide range of clients, including authors, artists, and public figures.
- 1 See [17 U.S.C. section 101](#) . For a helpful beginner's summary of copyright and related issues, see the U.S. Copyright Office's web page <https://www.copyright.gov/what-is-copyright/> (last visited September 19, 2022).
- 2 [17 U.S.C. section 302\(a\)](#) .
- 3 *Id.* at section 302(b).
- 4 *Id.* at section 302(c).
- 5 For transfers of copyright (other than transfers relating to a work made for hire) made on or after January 1, 1978, the termination right is governed by [17 U.S.C. section 203](#) .
- 6 [17 U.S.C. section 203\(a\)\(2\)](#) [17 U.S.C. section 203\(a\)\(2\)](#) .

- 7 *Id.* at section 203(a)(1).
- 8 *Id.* at section 203(b).
- 9 *Id.* at sections 204 and 205.
- 10 Practitioners may consider using multiple entities for business management or estate and gift planning purposes. For example, a client may want to house copyrights separate from service agreements and royalty payments under a publishing contract for future gifting purposes.

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