

4 September 2015
Our Ref: 132439

Mr Donald Marshall
8 Joyner Street
MOORABIN VIC 3189

By Express Post and Email

Dear Donald,

Re: Chain of Title - Clementina Hay Marshall ("CHM") - Original Diary ("Diary")

You have instructed our firm that you are in physical possession of the original Diary written by your Great Aunt, Clementina Hay Marshall which depicts her experience as a nurse in World War I. You have further instructed that you now intend to exploit the Diary by creating a biographical novel.

As a condition precedent to the exploitation of the Diary, you have requested that we give our legal opinion, for your benefit, on the status of the intellectual property rights in the Diary.

We stated in our first correspondence that the following three steps needed to be satisfied to proceed:

1. Establishing whether the work is in copyright;
2. Establishing who owns the underlying copyright in the work;
3. Ensuring that you are able to deal with that copyright (this involves ensuring that title has been properly passed to you).

We have now undertaken these three steps and provide our further advice on your rights and options below.

Copyright Existence and Ownership

The following elements must exist for the Diary to be protected by copyright:

1. The Diary must be an original literary work;
2. The owner was a qualified person at the time the Diary was created; and
3. Does the Diary fall within the copyright protection period granted to material protected under the *Copyright Act 1968* (Cth) (**Copyright Act**)?

Pursuant to the *Copyright Act 1968* (Cth) (**Copyright Act**), the Diary is considered a literary work which is protected by section 32(1)(b). The owner of the Diary is the author, per section 35(2), who was CHM. You have instructed that CHM was born in Scotland but moved to Australia at age 9 before joining the Australian Army Nursing Service, she later passed away in Urunga NSW. Therefore, it is an assumption that CHM was an Australian citizen at the time of writing the Diary and therefore was a 'qualified person' under section 32(4) of the *Copyright Act*.

The Diary must be considered to be original in order to be protected by copyright. You have instructed that the Diary is a firsthand reflection and individual description of the experiences of nurses in WWI. Without having seen the diary, but based on your description of the Diary we would suggest that this element would be satisfied.

Under section 33(3) of the Copyright Act, copyright in the Diary lasts for the life of the owner (CHM) plus 70 years, with copyright protection expiring at the end of the 70th year. CHM passed away 16 August 1968. Therefore, the Diary is protected by copyright until the end of 2038.

Chain of Title

Chain of title is the process whereby the underlying copyright in the Diary is shown to have passed by law to you so that you can prove copyright ownership and use the Diary. As CHM passed away in 1968 we were required to research what steps have been taken with respect to CHM's personal property upon her death to show who owns the copyright in the Diary, as copyright forms part of a person's estate upon death.

CHM's Estate

To find out how CHM's estate was dealt with, we were required to research the existence of a Will and/or a grant of probate. The Supreme Court of NSW regulates Wills and estates and they directed our firm to undertake a search with the NSW Trustee and Guardian, as they do not hold records from 1968, when CHM died. We then requested that the Wills and Estates department of the NSW Trustee and Guardian search for any record of CHM. No such Will or any results were available in CHM's name.

You have since confirmed with family members that CHM died without a Will (also known as dying intestate). We then researched two pieces of legislation that regulate the distribution of a person's property when they die intestate. These are the *Succession Act 2006 (NSW)* (the **Succession Act**) and the *Probate and Administration Act 1898 (NSW)* (the **Probate and Administration Act**).

Pursuant to section 129 of the Succession Act, property automatically passes to the brothers and sisters of a person who dies without a Will, no parents, spouse or children. As CHM's brothers and sisters predeceased her, her property would pass to the children of the brothers and sisters in equal shares. However, these rules are used by a court to determine how to divide the deceased's estate, the provision of deceased's estate is not automatic.

To complete the chain of title, you would need to apply to the Supreme Court of NSW using the letters of administration process because of the application of the Probate and Administration Act, section 61. Section 61 states that the property of a deceased's estate, where there is no Will, automatically vests in the NSW Trustee.

This court process would involve detailed searches of your family tree and contacting all family members to the court's satisfaction. The court would then administer CHM's estate (currently the Diary) among the family members. You would then need formal assignments from each person giving their rights to you. Alternatively, you may be able to show the court that you are the rightful owner of the Diary by providing as much written evidence as possible from as many family members as possible.

Due to the number of years that have passed since CHM's death and the amount of family members involved, there will be further time delays and expense incurred by this process and ultimately it may not be resolved in your favour. This will not assist you with proceeding to prepare a book based on CHM's diary immediately. Therefore, we have provided an alternative option to proving chain of title, for your consideration below.

Alternative Option

You have instructed our firm that the purpose of using CHM's Diary to write a book is to enhance Australia's historical knowledge about the services that the nurse's in WWI undertook and acknowledge their contribution to the war effort. You have also instructed us that you have

made every effort to inform the members of your family about the book and to contribute to this process and provide their permission and assistance to you.

The documents that you have provided to our firm that show your efforts are:

- The email, dated 13 May 2015 sent by you sent to all family members known to you and asking that they pass on the email to other members you may have missed;
- Letter from Margaret Yatich (nee Marshall) and signed by Joan Mullins (nee Marshall) (your cousin's) dated 30 May 2015, providing permission for you to write a book based on the Diary;
- Letter from Thomas Maxwell Marshall (your father and closest living blood relative to CHM) dated 1 June 2015, providing permission for you to write a book based on the Diary;
- Email from Ross Marshall (your brother) dated 5 August 2015, confirming that he has no issues with your father's letter granting permission to prepare a book based on CHM's Diary.

The risk that anyone will prevent you from proceeding with the book or make a claim to the book in the future is minimal in comparison to the amount of money and expense involved in proceeding to the Supreme Court to obtain formal proof of ownership of the Diary. Based on our research and your instructions, no one will be able to prove clear copyright ownership in the Diary, and in order to do so they would have to follow the same process as we have explained in this letter. Therefore, it is unlikely that anyone will make a claim or be able to successfully make a claim against you in relation to the copyright ownership in the Diary.

In our experience, these situations are legally difficult and complex, whilst your risk of a claim being made to the Diary would appear quite low. If you decide to proceed with the book, as you have the permission of your family we would recommend creating a hard copy file to store all letters, emails and records of phone conversations between you and your family members in relation to the use of CHM's diary. The communications you have had with your family and this letter of advice should be kept together, as they are a record that you took reasonable steps to ascertain the rights to exploit the Diary.

Next steps

If you would like to proceed to formally engaging the author Susanna De Vries to assist you prepare a book we would also suggest that you arrange a written agreement that reflects the arrangement you make with Susanna.

We look forward to discussing your requirements in relation to the agreement with Susanna De Vries and the NSW State Library.

Thank you for your instructions to date and please do not hesitate to contact us with any further queries.

Yours faithfully,



David Vodicka

Media Arts Lawyers Pty Ltd