

# A Primer on Literary Executors

## PART ONE

By Ellen F. Brown

When doctors die, they can no longer treat patients. When plumbers die, they no longer fix leaky toilets. Writers though often go on to have active and lucrative careers for years—and, in some cases, generations—after they’ve left this world. One of the many virtues of the literary arts is that plays, novels, and poems live and endure apart from their creators. Even writers who did not enjoy enormous commercial or critical success while they were alive have a chance of making it big after they die. A compelling recent example

is Jonathan Larson, who died unexpectedly on the day of *Rent*’s first preview performance. The show went on to earn numerous honors and awards, including the Tony for Best Musical and the Pulitzer Prize for Drama.

Successful posthumous careers do not happen on their own, though. When a creative person dies, if the work is to remain (or become) fruitful, someone must step in and actively oversee the intellectual property in the creator’s stead. Copyrights and trademarks require tending. Sales of publishing and theatrical rights have to be carefully planned. When to sell, what to sell, and how to structure the transactions require thoughtful

decision making. There are also noncommercial issues to address, including how best to nurture the dead writer's legacy. If the work is to endure, somebody needs to be shaping perceptions of the work and what it stands for. As one court noted, posthumous oversight of literary rights "requires a delicate balance between economic enhancement and cultural nurture."

So whose job is it to handle this important balancing act?

If a writer leaves a will, there likely will be a family member, friend, or associate designated in that document to oversee transfer of her assets to the specified beneficiaries. If no estate planning has been done, the rules of intestate succession will come into play, and a third party, typically one of the decedent's heirs, will be appointed by the local court to represent the estate. Terminology varies from state to state as to what these designees are called, but for ease of reference the term "personal representative" will be used to refer to the point person who is responsible for gathering all of the decedent's assets, collecting debts due to the decedent, resolving the decedent's liabilities, and then distributing the remaining assets. While the estate is pending, this person owes a fiduciary duty to the beneficiaries and is obligated to manage all of the assets, including the intellectual property, in a prudent manner.

Once the estate closes, responsibility for the intellectual property typically transfers to the beneficiaries. It is they who, in the long run, will be responsible for overseeing the creator's posthumous career. Beneficiaries are not fiduciaries and thus are not held to any specific standard of duty toward their benefactor's assets. But because they have the potential to earn income from the property, they have an incentive to manage the property efficiently.

Thus, after a playwright dies there is generally going to be somebody responsible for managing her posthumous affairs: first, a personal representative and, then, the beneficiaries. A recurrent problem, however, is that personal representatives

and beneficiaries are not always well-qualified to oversee intellectual property or may lack the time and resources to do so effectively. Difficulties can also arise where there are conflicts of opinion among interested parties over how the creative assets should be handled. Dissension may arise, for instance, where multiple beneficiaries inherit related rights or where a deceased playwright shared rights with a co-author who disagrees with the beneficiaries about how to manage the property. There may also be conflicts between the economic interests of the beneficiaries and the creator's legacy. For instance, if a writer's estate receives an attractive offer to license the decedent's work for a series of commemorative tchotchkes, cash-hungry beneficiaries may be inclined to accept even though doing so might negatively affect perception of the work.

When faced with these complex issues, literary estates often turn to third-party consultants to offer advice and oversight. As entertainment lawyer Joan Bellefield Davis describes it, some intellectual property estates have "an arsenal of experts" on hand, including lawyers, agents, appraisers, tax advisers, accountants, investigators, and even branding experts. But bringing in a crew of outsiders can create its own set of complications. What if the involved parties do not agree on who should be hired? What if the beneficiaries disagree on whether to accept the expert advice?

For many literary estates, these sorts of issues can be dealt with proactively by appointing what is often referred to as a "literary executor," a person whose specific task it is to manage the intellectual property rights and to bring in and oversee outside assistance as needed. The position can take a wide variety of forms, but in general the goal is for the designee to step into the dead writer's shoes for purposes of overseeing his posthumous career. Ideally, the literary executor will be handpicked by the decedent and identified in the estate plan. As Davis notes, "if the idea is to make sure the artist's career is managed consistently with his wishes, it makes sense to have the artist personally select the

literary executor and have the person ready to step into action immediately upon the death.” If a decedent did not make such an election, however, the estate and beneficiaries may be able to agree on a designee to advise them.

Though there is a centuries-old tradition of writers appointing literary executors, there is relatively little legal authority on the subject. The concept of literary executorship is not included in any estate administration statutes and is mentioned in only a handful of published judicial decisions. Nor is there much published guidance on the subject. As a result, many writers and estate planning professionals are not as familiar with the concept as they should be and may be missing out on an important aspect of estate planning. To fill that gap, the following discussion offers an overview of how literary executorship works and presents an array of options for how you may want to incorporate such an advisor into your estate planning.

### **The Scope of a Literary Executor’s Responsibilities**

Because the position of literary executor is not established or defined by statute, there is no specific list of responsibilities that go along with the job. The role will vary from situation to situation depending upon the writer’s intent, the size and nature of the estate’s portfolio of intellectual property, the skillsets of the other people involved in the estate, and the skillset of the person selected as literary executor. At a minimum, the literary executor’s role will be to assist in decision making and to facilitate communication among the involved parties. For small estates, the job may be hands-on, with the designee handling issues directly. In more complex cases, the executor may need to hire and manage outside experts.

Depending on the type of estate involved, it may be important for the literary executor to be ready to step into action immediately upon the death so as to maintain continuity for pending business transactions or to protect assets. In the case of high-profile estates, literary executors may

also be of value in planning the decedent’s funeral. They can be useful in resolving such questions as whether the service should be a family event or open to the public, where the decedent should be buried, and who should give the eulogy. While some estates may prefer to keep the grieving process private, others will want to take advantage of the opportunity these types of gatherings present for promoting a positive view of the decedent’s life and work through favorable speeches and remembrances.

As the estate moves into the administration phase, literary executors can be of service in valuing the intellectual property for purposes of probate and calculating estate taxes or overseeing others who perform such services. Depending on the size of the estate, the “to do” list here may be extensive and complex. Because intellectual property assets are divisible, the rights may be spread out among multiple licensees and subject to a wide variety of terms. Were there deals or productions in progress at the time of death? With a famous playwright, how much is the person’s name worth posthumously? Are there any unpublished or unsold works that are marketable? If literary assets will have to be liquidated to pay the taxes or other debts, which assets should be sold and how should the transactions be structured?

Relatedly, literary executors often play an integral role in handling the decedent’s “papers”—a term that traditionally referred to the letters, manuscripts, drafts, research files, notebooks, diaries, sketches, and books that accrue over the course of a creative career. In recent years, the scope of the term has been expanded to include digital assets such as e-mail, social media, cloud storage, and domain names. For all of these types of materials, decisions will have to be made about what should be retained, sold, donated, or destroyed. This process can be complex and time-consuming, especially when dealing with the digital assets for which there are not yet standardized rules regarding postmortem disposition.

Some writers will want their literary executors

to be involved with the day-to-day job of handling the intellectual property and extracting value from that property. They can help with transferring copyright registrations, monitoring licensing agreements and royalty streams, and policing copyright infringements. There may be issues relating to renewals and recaptures, as well as requests for permissions to quote from or reprint the decedent's work. If there are any unpublished or unfinished manuscripts, the literary executor may be called upon to evaluate which ones should be finished posthumously and perhaps even take the lead in editing or finishing them. Estates holding trademarks must be sure to keep the mark in continual use, file maintenance documents, and monitor potential violations.

Literary executorships can even be structured to give that person a hands-on role in overseeing future productions of a playwright's work. Many writers understandably worry about how their plays will be interpreted after their deaths, when they are no longer around to protect their personal vision of those works. Tennessee Williams sought to address this problem by including a provision in his will stating: "It is my wish that no play which I shall have written shall, for the purpose of presenting it as a first-class attraction on the English-speaking stage, be changed in any manner, whether such change shall be by way of completing it, or adding to it, or deleting from it, or in any other way revising it, except for the customary type of stage directions." His trustee Maria St. Just ruffled more than a few feathers trying to comply with his wishes in the face of requests for permission to stage new interpretations of his plays. More recently, Samuel Beckett's estate has courted controversy by trying to preserve the integrity of his work in a manner that some critics say is too limiting. Play production is an inherently collaborative and interpretative process, the argument goes, and estates need to be flexible and allow for give and take after the writer dies. One way to do this is to appoint a literary executor charged with balancing the playwright's vision with interpretations that

keep the work fresh, relevant, and interesting to audiences. As John Irving has said, novelists have the luxury of living on their own planets but plays aren't really plays until they're produced.

A literary executor also can be useful in nurturing a writer's posthumous legacy. Indeed, to some writers, financial success is secondary to the creative vision. To that end, what should be done to keep the creator's name in the public eye? How does the estate foster continuing demand for the work? Should a biography be authorized? In jurisdictions where the decedent's right of publicity survives death and is descendible, consideration should also be given to opportunities for licensing the decedent's name, image, or likeness.

For each of these issues, the literary executor will have to weigh the competing interests inherent in creative endeavors. Just as living artists struggle with where to draw the line between earning a living and being true to the art, the literary executor will have to balance economic considerations of maximizing value from the playwright's portfolio against protecting her long-term reputation and the public perception of the work. As the court handling author Lillian Hellman's estate described the process, literary executors have to navigate between "keeping the books" and "keeping the flame."<sup>12</sup>

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