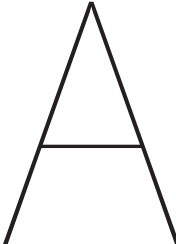


A Primer on Literary Executors

THE AUTHORITY AND DURATION OF EXECUTORSHIP

PART TWO

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s of this publication, no state in America has a statute recognizing literary executors as having the power to make decisions on behalf of the estates they represent. As a general matter, only personal representatives and, ultimately after an estate closes, beneficiaries have that authority. Thus, literary executors technically serve solely in an advisory role. For many estates, this is perfectly

appropriate and in-line with the decedent's intent.

There may be situations, however, where a writer will want the literary executor to have decision-making authority and the power to act on behalf of the estate. This may be necessary where the personal representative is entirely unskilled in handling creative assets or where the portfolio of intellectual property is large or complex. Or it may be a simple matter of efficiency; a literary executor who is monitoring copyright infringements may

be more effective in that role if they do not have to obtain the personal representative's signature on correspondence court pleadings. Where these types of considerations are involved, it may be appropriate to appoint the literary executor as a general co-representative of the estate. Before taking that step, though, keep in mind that personal representatives have broad power over all of a decedent's assets, including houses, cars, and personal property. You may not want the literary executor to have such expansive authority, and thus the language appointing the person as co-representative should be carefully crafted to grant the designee power over only the creative assets.

Also consider how long you want the literary executor involved in managing your intellectual property. In the case of property passing by will, once the estate closes and the intellectual property transfers to the heirs, the heirs are free to do as they like with the intellectual property. If the beneficiaries do not want the literary executor involved in overseeing the creative assets going forward, there is not much the designee can do to insert himself into the situation other than perhaps serving from the sidelines as an unofficial watchdog. If you want the literary executor to have a long-term role after the estate closes, it may be advisable to put the intellectual property into a trust or other legal entity and have the literary executor serve as trustee or manager with the income going to the beneficiaries.

No matter how the relationship is structured, care must be taken when drafting the documents appointing a literary executor, whether it be a will, trust document, or employment contract. The term "intellectual property" is not statutorily defined and can theoretically incorporate a broad array of assets. Thus, to avoid complications later, it is advisable to specifically identify which property interests will fall within the literary executor's domain. It is also important to specify in the documents what standard of care the literary

executor should follow. If you intend for the literary executor to factor legacy planning and other nonmonetary considerations into the day-to-day decision making, the documents should say so. This is crucial if the designee is appointed a personal representative or trustee. In either of those cases, the designee will be operating under a statutorily imposed fiduciary duty to handle the assets in a manner that is beneficial to your heirs. You can waive that standard, but care should be taken to do so narrowly and with specificity.

The Selection Process

Choosing a literary executor is akin to finding a mate. You will have to identify a person who can be trusted, who is familiar with your body of work, and who "gets" what you want to accomplish with your work. There is also the matter of affinity for the task. The ideal candidate will be organized, meticulous, familiar with the type of creative rights involved, capable of weighing in on a wide variety of legal and financial issues, and savvy enough to know when to seek advice from others. While the person does not need to be a lawyer, accountant, or branding expert, a literary executor should be comfortable working in and dealing with people in those fields. But more than a nose for business is needed. Protecting a writer's creative legacy requires vision, sensitivity, and nuance.

Also take into account who is able and willing to take on the task. Even though literary executors are typically compensated for their work, it is no small request to ask someone to devote time and energy to managing another person's affairs. *Gone with the Wind* author Margaret Mitchell's brother frequently expressed frustration at the sacrifices entailed in representing his sister's posthumous career. Despite being a skilled estate and trust lawyer who had a stable of experts at his disposal, he found the work daunting and the glare of public scrutiny exhausting.

In his case, the sting of resentment was ameliorated by the millions of dollars his family made on lucrative licensing and publishing deals, but not all literary executors will be so lucky.

Consider the full scope of each candidate's suitability for the role. Perhaps a scholar or a devoted fan is familiar with your body of work but is elderly or lives on a remote mountaintop. Maybe your spouse is a whiz with accounting but is a beneficiary of the estate and thus will have a financial interest in the choices that will have to be made. Insiders such as fellow creatives, agents, editors, and publishers are often viable candidates but careful consideration must be given to whether their interests might conflict with those of the beneficiaries or your legacy planning. While nobody likes to question the integrity of their inner circle it is unwise to ignore the risk of self-dealing. As was demonstrated in the litigation surrounding the estate of artist Mark Rothko, money can prove a powerful temptation even to trusted insiders.

Where conflicts of interest are a potential problem, it may be appropriate to hire an independent professional representative through a bank, trust company, or consulting firm to serve as literary executor. Because they do not have a vested interest in your estate, such firms presumably can be trusted to give objective advice. They may also prove valuable where the beneficiaries do not get along on a personal level or disagree about how the legacy should be managed. In these types of cases, having an independent third party involved may be necessary to allow the estate to function efficiently. But professional executors will not be ideal in every case. Such services can be expensive, and care will have to be taken to find a firm that is well attuned to the nuances of the theatrical and publishing worlds.

There rarely will be a single person perfectly suited to the task in every respect, which may lead you to consider appointing multiple literary executors. Whether such a plan is advisable will

depend on the parties involved and the complexity of the estate. A key issue in many cases will be whether the assets have enough value to justify the expense of multiple people being involved. Also, careful planning will be necessary to delineate responsibilities and to establish a mechanism for dealing with conflicts that may arise between the designees.

If you are fortunate to have multiple qualified candidates from whom to choose, it may be advisable to appoint a successor designee to assume the role of literary executor if the primary designee is unable to serve. Literary history is rife with examples of literary executors who died or who resigned without there being a suitable replacement in line. Most notoriously, when one of Welsh poet Dylan Thomas's literary trustees resigned, the remaining trustees appointed novelist Kingsley Amis in his place. Amis certainly had the literary credentials to justify the appointment. He is widely considered to be one of the greatest British writers of the twentieth century and had many connections in the publishing industry that could have been beneficial to the Thomas estate. Yet Thomas surely would have been appalled by the appointment given that Amis openly despised both Thomas and his work. In Amis's memoirs, he described Thomas as either a very bad poet or, alternatively, a good one "in a mode that is anathema to me." Amis did not think much of Thomas on a personal level either. "Thomas was an outstandingly unpleasant man," wrote Amis, "one who created and stole from his friends and peed on their carpets." With friends like that, who needs enemies?

Ensuring the Literary Executor's Success

An important first step in ensuring that a literary executor succeeds in the role is making sure that


the person is willing and eager to take on the job. To that end, it is a good idea to inform the designee of the selection while you are still living rather than having the person notified after your death. The designee should be told what the expectations and priorities are and be given the opportunity to ask questions. Preferences about business and legacy issues (e.g., that a biography not be written, or that unfinished work be destroyed) should be communicated and discussed openly to make sure the designee is in accord with your wishes. Also discussed should be whether compensation will be provided, and if so, on what basis (e.g., an hourly rate, a fee schedule, or a share of royalties).

The most important thing you can do for your literary executor and estate is to leave matters in good order. Estates holding intellectual properties face unique challenges that are best dealt with proactively. Thus, it is essential to have sound estate plans in place. The better the plan, the better the chances the literary executor will be effective in managing your posthumous career. Likewise, the more organized your work products and papers are, the easier it will be for the literary executor to be effective. It may even make sense to hire the designee or another third party to help put things in order while you are still living.

Finally, prepare the literary executor for the work ahead. The designee should be provided with a detailed overview of your body of work along with contact information for interested third parties. It may even be advisable to make personal introductions to family members, beneficiaries, agents, publishers, co-authors, producers, actors, and licensees. If you prefer to keep your business matters private while you are still living, all of the necessary information should be readied ahead of time for presentation to the literary executor immediately upon your death. Consideration should also be given to whether the designee might benefit

from training (e.g., accounting, copyright law, licensing, etc.)

Conclusion

As with careers of living playwrights, posthumous success cannot be engineered with certainty. Even with meticulous planning and careful administration, things can go awry. Tastes change. Your beneficiaries may make bad decisions. A former flame may write a damaging biography. A revival of your greatest work may fail in the hands of an overrated producer. Scholars and critics may lose interest in your work. And yet, appointing a qualified person to assume posthumous responsibility for your creative assets is often a worthwhile proposition. With a qualified and dedicated person overseeing your literary assets, there is much that can be done to nurture both the income stream for your beneficiaries and the long-term legacy of your work. Of course, there is no “one size fits all” approach to literary executorship that will work in every case. You will have to consider carefully the unique details of your portfolio of intellectual property. Ask detailed questions, gather a wide array of information, and think through precisely what your intentions are. No two writers will set the same standard of posthumous success, and, thus, your own creative talents will be required in establishing a literary executorship that works for you. 

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