CHAPTER 22

ESTATE PLANNING FOR WRITERS

In 1945, Eugene O'Neill entrusted the original manuscript of *Long Day's Journey Into Night* to his editor, Bennett Cerf of Random House. In a written contract, Random House agreed to O'Neill's request not to publish the play until twenty-five years after his death. Within two years of his death in 1953, O'Neill's widow Carlotta demanded that Random House publish the play. Cerf felt honor-bound not to do so, so Carlotta withdrew the manuscript from Random House and had it published by Yale University Press. O'Neill also left an unfinished manuscript of *More Stately Mansions*. He had told Carlotta shortly before his death that "Nobody must be allowed to finish my play. . . . I don't want anybody else working on my plays." On a flyleaf placed in the manuscript of *More Stately Mansions*, he had written "Unfinished work. This script to be destroyed in case of my death!" Despite his demands, Carlotta had the work revised, published, and produced on Broadway as a new play by Eugene O'Neill. As the executrix of O'Neill's estate, his widow had every right in both instances to ignore the playwright's wishes because they were not formalized in his will.

Estate planning is too often neglected by many, but it is essential in order to protect a person's loved ones and, for writers, to ensure that their wishes regarding the treatment of their literary works will be posthumously

honored. Every adult should have a will that appoints an executor (and if needed, a guardian for their children), disposes of their estate assets and ties up their affairs. Everyone should also consider obtaining a health care proxy, living will, and power of attorney in case they become incapacitated, naming beneficiaries of their investment and bank accounts, and getting life insurance that covers estate-related costs. It is not difficult to do any of these things. If you want to leave your assets to your spouse, children or other family members outright, then unless you have a complicated estate or are wealthy and want to limit your estate tax liability, you can prepare a serviceable will and other estate planning documents yourself using one of many online software programs.[140]

The main objectives of your will should be to efficiently distribute your assets at death to your chosen people and institutions, pay your outstanding debts, and limit the amount of taxes and other burdens to your heirs. Writers have additional concerns because of the nature of their intellectual property as an estate asset. This chapter will give you some general information to help you plan to make your will and take other estate planning steps. The information here is necessarily general, so if you have questions or if the disposition of your estate could raise complications, it is best to find a good probate lawyer or accountant.

BEQUESTS THROUGH A WILL

The most meaningful opportunity you have to control the use of your literary work after your death is through a will or a trust. A will is a written document, signed and witnessed under strictly observed formalities, that provides for the disposition of the maker's (that is, the "testator's") property upon his or her death. A probate court, to which every will is referred, must enforce the testator's intentions as expressed in the will unless there is a legal reason not to do so (such a case is quite rare).[141] Individual state laws govern the proper drafting and interpretation of wills, as well as the disposition of the property of a person who dies "intestate," that is, without a proper will.

[140] The best, with very helpful explanations, are at Nolo Press, www.nolo.com.

[141] One exception to this rule is where a will disinherits the decedent's spouse completely. Most states allow a spouse to choose a "statutory share," that is, a significant fraction of the estate assets, in lieu of what the will leaves to the spouse.

If no will is made, property passes to the decedent's heirs by the laws of intestacy. Intestacy laws vary from state to state, but generally provide that the estate assets pass in full to the decedent's relatives in order of preference: to the deceased's spouse if there is one, equally to the deceased's children if there is no spouse, to the parents if no spouse and no children, and so on. An administrator is appointed by the court to manage the estate of one who dies intestate. Dying without a will leaves the decedent's family in a bad position because they will be tied up in probate court for much longer and expend much more time than if there had been a will, and they will have limited legal rights to reverse the actions of the court appointed administrator. As a writer, you would do your literary estate no favors by dying intestate; the administrator will decide what to do with your copyrights and it is unlikely that a family member would be able to change what the administrator decided to do or not to do with your work.

Your will allows you to distribute your property to specified persons or institutions. For literary properties such as manuscripts and copyrights, this is usually done by bequest or predeath gift either to specific individuals or institutions or to a class (such as all your children or grandchildren). Estate taxes and administration costs are typically paid from the "residuary" estate, that is, the property not specifically distributed under the will, or from life insurance naming the will beneficiaries as the policy beneficiaries.

Items such as life insurance proceeds and your bank, pension, and investment accounts can be left directly to named beneficiaries instead of passing into your estate for disposition under the will. This has the advantage of getting those assets to your beneficiaries much more quickly and without the red tape involved if they were to be transferred to the estate and distributed according to the will.

EXECUTORS AND LITERARY EXECUTORS

When planning your will, think carefully about who should administer your estate, and who should have control over the management of your literary works. The will must designate one or more executors who will have fiduciary responsibility to act in the best interests of the estate and its beneficiaries. If you appoint coexecutors, each will bear equal responsibility for your assets unless you indicate otherwise. Although it makes sense to name your spouse as an executor, also consider appointing a coexecutor who does not have a personal interest in your estate property. One option

is to retain the trust department of a bank or other financial institution for this important role.

An executor has certain unique responsibilities when administering a writer's estate. A preliminary duty is to notify the testator's publishers and licensees that royalties are to be paid to the estate during probate period (i.e., prior to final settlement of the estate). Under the Copyright Act, a writer may not bequeath by will any of her copyright renewal rights that arise after death. Rather, these rights flow directly to the author's spouse and/or children. The executor should file the renewal of those copyrights in the name of the estate if the author's spouse and children, if any, are deceased. Similarly, the writer's inalienable right to terminate licenses and grants under copyright after 35 years (for post-1997 works) and 56 years (for pre-1977 works) does not pass through the estate, but rather passes directly to the writer's spouse and children, or if they are deceased, to the grandchildren.[142]

Should you appoint a literary executor in addition to the primary executor(s)? Although the law does not recognize a "literary executor" as such, you can and should make sure that at least one of your coexecutors is familiar with your work and ideally has some experience in the publishing industry. If willing (and young enough), a trusted agent, editor, or fellow writer could fit the bill. Your will could divide the duties between coexecutors, allowing one to handle general financial matters and the other to handle the disposition of the literary works. But because financial and literary matters are likely to intertwine in estate administration, the will should carefully delineate the duties of the literary executor and give to one of the executors the authority to decide disputed matters, whether over the literary estate or otherwise. After it names the general executor and gives her authority to act in all matters related to the will and estate, the literary executor appointment clause might read as follows:

> I appoint [name executor] to be the literary executor of my estate (hereinafter referred to as my "Literary Executor"), to have custody of, act with respect to, and be empowered to make all determinations concerning the use, disposition, retention, and control of the literary works that I have created or own, my letters, correspondence, documents, private papers, writings, manuscripts, and all other literary property of any kind created by

[142] See chapter 2 for explanations of copyright renewal and the author's inalienable rights to terminate licenses and transfers.

> me, whether or not any such items are unfinished or are completed but not yet divulged to the public. Should a dispute arise between Literary Executor and General Executor concerning my literary property, the determination of the General Executor shall be final and binding.

Unless you make very clear in your will that your literary executor has the authority to determine how your literary and related property are to be used (or not) after your death, the primary executor will have control. In most cases, the estate will likely be administered more efficiently and leave more assets for the beneficiaries if the primary executor does have final decision-making authority even over your literary works. The estate assets, including literary works, must be assigned a fair market value, which, if the estate is very rich (or is in a state with a low estate tax threshold), could affect the tax bill even when the estate lacks sufficient funds to pay taxes. The beneficiaries might be better off if the executor's authority to dispose of assets trumps the literary executor's authority to make aesthetic decisions about your work. You might think differently about your literary legacy, however, as Eugene O'Neill did. If so, learn from his mistake and address how you want your works to be used, or not used, in the will.

In drafting your will, be very clear about your literary properties. Specify the person(s) or organization(s) to whom the rights under copyright are granted; identify unambiguously the property conveyed, both tangible, such as manuscripts and letters, and the copyright to your published and unpublished work, whether or not currently under contract; the rights under copyright conveyed, including their scope and duration; assign the right to receive the benefits from any contracts in force; and list your finished and unfinished manuscripts. Avoid ambiguous language, which could subject your disposition to attack. If you do not unambiguously dispose of specific property or rights, they might pass under the will to the recipient of the residuary estate, (or if there is no residuary clause, through intestacy laws).

An example of a bequest of manuscripts and the copyrights to a specific individual follows:

> I give and bequeath all my right, title, and interest, including but not limited to all rights under copyrights and all other intellectual property rights, in my manuscripts entitled [describe manuscripts] to my daughter, Jane, if she shall survive me.

An example of a bequest of tangible manuscripts but not the copyright in literary works to a class follows:

> I give and bequeath to my son, Dick, my daughter, Jane, and my daughter, Sally, or the survivors or survivor of them if any shall predecease me, all my tangible manuscripts [describe manuscripts], but not the rights under copyright thereto, [which are bequeathed elsewhere in the will]. If they shall be unable to agree upon a division of the said property, my son Dick shall have the first choice, and my daughter Jane shall have the second choice, and my daughter Sally shall have the third choice, the said choices to continue in that order so long as any of them desire to make a selection.

Leave a clear and complete inventory of your assets, passwords, etc., and provide unambiguous written instructions to your executor(s) and heir(s) detailing your desired posthumous treatment of your work. After consulting with your executors and advisors, you can decide whether to put these instructions in a separate letter or in your will. You should also clarify whether your instructions are binding on your executor(s) or are merely advisory. In preparing instructions, consider how much posthumous control you really want to exercise over how your literary work is treated. For example, should your unpublished works be published after your death? If they are published, who may edit them? May another author complete your unfinished works? If so, who may decide who will finish them and how may authorship be credited? The publisher, format, the extent to which subsidiary rights may be exploited are all questions that somebody must answer, and all of these creative decisions can impact the estate financially.

You can direct the publication of some or all of your unpublished works in your will. The executor is not responsible to your beneficiaries, however, if he or she fails after diligent efforts to find a publisher for your work. The scope of the executor's duty to dispose of your literary works extends to entertaining offers fairly and granting licenses that would serve your beneficiaries, unless you expressly prohibit that in the will. There is usually no legal requirement, however, that your executor permit others to reproduce your work. By contrast, you may if you choose restrict certain types of publication and use of your work and provide for a period of time to elapse before posthumous publication.

DONATING YOUR PAPERS

You might want to donate copies of books, manuscripts, letters and other personal papers to a library, university, or another institution. Every institution maintains its own policies on accepting private archives. Many cannot accept all that is offered to them. Be sure to consult with the institution before naming it in your will and identify unambiguously the works to be donated and the institutions to receive them. You should also state in the will whether or not the institutions should receive any copyright interests in the works, or whether you are leaving the copyright to others and wish the proceeds from photocopying, etc., to be given to your heirs.

Related issues involve your personal papers. Who, if anyone, will be allowed to publish letters you have written? In what manner should publication be made? Who will have permission to look at your drafts, notebooks, and diaries? Who will have access to letters you received from others? If you designate an official biographer, how will that affect your estate's willingness to make information available to other researchers and the public? The writer who donates manuscripts and personal papers to a university or museum might want to know in advance the treatment the donated materials will receive. What should your executor do if the institution does not treat your papers as promised? You can address all these questions in your will or in separate instructions to your executor. If you do not, your executor will be operating without knowing what your preference would have been.

TRUSTS

Proper administration of any estate requires funds. If the testator does not set aside enough money to cover costs, the executor might have no choice but to dispose of estate property, even if the will directs otherwise. To avoid these headaches for your executor and loved ones, you could either set aside funds during your lifetime or maintain a life insurance policy for this specific purpose. Another interesting choice is to consider establishing an *inter vivos* revocable trust. Trusts are a valuable estate-planning device under which title to property is given to a trustee who is to use the property (or income from the property) for the benefit of certain named beneficiaries. You may create a trust during your life and/or by will. Trusts created during

life can be revocable by the creator of the trust, or irrevocable, in which case the creator cannot dissolve the trust. *Inter vivos* literally means "during life," and an *inter vivos* trust is a legal instrument in which you transfer title to any of your assets to the trust while you are alive. As trustee, you control what is done with those assets. During your lifetime, you are the beneficiary of the trust. After death, your assets will pass directly to those named in the trust as beneficiaries.

The establishment of an *inter vivos* trust has one great advantage—the avoidance of probate. Property transferred to the trust might or might not be included in the gross estate subject to federal estate tax, but the assets are transferred to your beneficiaries without any of the formalities and delay of probate. Trusts are frequently used to skip a generation of taxes, for example, by giving the income of a trust to children for their lives and having the grandchildren receive the principal. In such cases the principal would not be included in the estates of the children for purposes of estate taxation. The tax law, however, severely restricts the area of generation-skipping trusts and other similar transfers and it is subject to constant change. Consult a tax specialist or estate planning attorney on whether an *inter vivos* trust is a good option for you.

ESTATE TAXES

Estate planning allows you to anticipate and control the amount of estate taxes to be levied by the state (if any) and the federal government. A writer who lives in more than one state risks having a so-called double domicile and being taxed by more than one state, so plan to avoid this result. You will also wish to benefit from a number of deductions, discussed below, that can substantially reduce the taxable estate if properly planned. Tax planning is especially necessary for authors with sizeable estates because copyrights and manuscripts must be given their fair market value in computing the gross estate. Thus, the projected earnings of your works, based when possible on their past earnings, are figured into their fair market value, even though the earnings have not yet been realized. The valuation process creates uncertainty as to the size of the estate (because the valuation might be high or low) and raises the possibility that the estate will lack the ready cash it needs to pay estate expenses and taxes on time.

THE GROSS ESTATE

The gross estate includes the value of all the property in which the testator had an ownership interest at the time of death. Complex rules, depending on the specific circumstances of each case, cover the inclusion in the gross estate of such items as life insurance proceeds, property the testator transferred within three years of death in which she retained an interest, property over which she possessed a general power to appoint an owner, annuities, jointly held interests, and the value of property in certain trusts.

VALUATION

The property included in the gross estate is valued at fair market value as of the date of death or, if the executor chooses, as of an alternate date (typically six months after death). "Fair market value" is defined by the Internal Revenue Code as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Expert appraisers are used to determine the fair market value of copyrights and manuscripts. But whether the estate is large or small, the opinions of experts can exhibit surprising variations. Fair market value is not only important for determining the value of an estate, but also for determining the value of gifts and charitable contributions.

Prior to the Tax Reform Act of 1969, writers could donate copyrights or manuscripts to universities or museums and take a charitable deduction for income tax purposes based on fair market value. Since 1969, such a donation by the author of the work would create a charitable deduction in the amount of only the cost of the materials comprising the work—a negligible amount. (The Authors Guild is supporting legislation that would reverse that regulation.) By contrast, one who inherits the work from an author's estate may make a charitable contribution and deduct its full fair market value.

TAXABLE ESTATE

The executor calculates the taxable estate by reducing the gross estate by the amount of certain deductions. Allowed deductions currently include funeral expenses, some administration expenses, casualty or theft losses during administration, debts and other enforceable claims against the estate, mortgages and liens, the value of property passing to a surviving spouse

(subject to certain limitations), and the value of property donated to a qualified tax-exempt nonprofit organization. Charitable deductions might be of particular interest to an author. One could bequeath copyrights and manuscripts to tax-exempt charitable or educational institutions and reap intangible benefits, including perpetuating the author's reputation. But they do not help reduce the taxable estate because the fair market value of such works is part of the gross estate.

UNIFIED ESTATE AND GIFT TAX

If an author makes gifts of copyrights, manuscripts, or other assets while alive, the value of the gross estate at death will be reduced by their fair market value. If, however, these or other gifts given during life are valued at more than $10,000, a gift tax applies to the amount over $10,000. The government allows everyone a tax credit against gift and estate taxes cumulatively, meaning that any amount of the unified estate and tax credit used during life to avoid gift tax will decrease the credit allowed to the estate upon death. The amount of tax on the cumulative total of the taxable gifts and the taxable estate is reduced by the tax credit, so an estate is subject to federal tax only if the cumulative total of taxable gifts and the taxable estate is greater than the maximum unified credit in the year of death. The unified credit on the basic exclusion amount for 2011 is $1,730,800 (exempting $5 million from tax) and is $1,772,800 for 2012 (exempting $5,120,000 from tax). The complexity of the rules in this area makes legal and tax advice necessary to ensure that the gifts you give are effective for tax purposes.

LIQUIDITY

Most relatively simple estates (cash, publicly traded securities, small amounts of other easily valued assets, and no special deductions or elections, or jointly held property) do not require the filing of an estate tax return. A tax return is required for estates with combined gross assets and prior taxable gifts exceeding $5,000,000 or more for decedent's dying in 2010 or later (note: there are special rules for decedents dying in 2010). If estate taxes are due, they normally must be paid within nine months after death, at the time the estate tax return is filed. For estates that cannot make full payment immediately, it might be possible to spread payment out over a number of years.

One simple way to ensure there is cash available to pay estate taxes is to take out a life insurance policy. The proceeds of life insurance payable to the estate are included in the gross estate, as are the proceeds of policies payable to others if the decedent retained any ownership or control over the policies. Policies payable to other people and not owned or controlled by the decedent will not be included in the gross estate. Therefore, if your spouse or children are the beneficiaries under both a life insurance policy and the will, they may use the life insurance proceeds to pay estate taxes and other administrative fees and preserve the assets of the estate. This arrangement could especially help heirs of creators of valuable intellectual property. Consult with an insurance agent to obtain life insurance to cover your estate taxes and fees.