

The **Estate Analyst**[®]

April, 2008

Planning For Posthumous Success

& Federal Tax News Briefs

By Robert L. Moshman, Esq.

Elvis Presley, J.R.R. Tolkien, and Vincent van Gogh have something in common: All were artists whose “product” became extremely popular after their death. But which estate will remain successful?

While the concept of a “posthumous estate” may seem to be oxymoronic (estates are posthumous by definition), some estates merely provide a concluding coda to a life, while others commence a brand new opus that takes on a life of its own, so to speak.

The right estate plan can facilitate a successful long-term estate that both protects the integrity of a creative person’s intellectual property and future reputation while exploiting the marketability of the decedent as an ongoing business.

Let's consider the lessons of several remarkable persons whose estates have elevated them to a new level of fame after their death. And what is posthumous success really about?

Presented With Our Compliments

Preserving Non-Financial Legacies

Many people have amassed amazing fortunes, had great and successful lives, and have wills, trusts, and other plans in place to protect the financial future of their family.

Yet there are additional legacies at stake as well. People with strong views and philosophies do not want to be misrepresented after their death. People want to protect their posthumous reputation and not be associated with unsavory things. People would like their final affairs handled in a manner that conveys an image of positive virtues such as generosity, good will, fairness, and charity.

Establishing a foundation or charitable trust, for example, is a commendable gesture, but it is also a way of remaining associated with good causes and charity after one's death.

For celebrities, artists, authors, and others with various types of intellectual property, commercial success after death is a competitive struggle and the winner is not only rewarded financially but also gets the broadest exposure with the largest audience.

Elvis Presley's success during life continued after his death and now his name brand is making more money than ever despite the fact that he died more than 30 years ago. J.R.R. Tolkien had some success during his lifetime as an author, but his books only became a billion-dollar industry years after his death. Vincent van Gogh sold only one painting during his lifetime, yet his art is now among the most valuable on the planet.

The King of Rock & Roll

He was a pop icon akin to royalty...at least on the billboard charts. At the time of his death in 1977, Elvis Presley's estate was worth \$10 million, but without the benefit of sound estate planning, 73 percent of the estate went toward legal fees, estate administration costs, and estate taxes, leaving only \$3 million to his daughter.

But the estate was more than liquid assets. Elvis Presley was a marketable commodity and with good management his estate grew to \$250 million posthumously. Under the control of Priscilla Presley, Elvis Present Enterprises was created in 1980. By 2004 the company had revenues of \$45 million annually and 100 licensees, 600,000 annual visitors to Graceland, and intellectual properties including

music and film that had grown in value because the Elvis Presley "product" had been kept alive.

In 2004, entertainment mogul Robert Sillerman acquired an 85% stake in the Elvis Presley assets for \$100 million. "I believe Elvis to be the single most significant icon in American pop culture," he said. That may or may not be true, but the \$100 million he paid for those assets depended on the strategic management of the estate's assets that took place after Elvis had died. In 2007, estate earnings remained steady at \$40 million.

The Lord of the Rings

Author J.R.R. Tolkien finished writing the Lord of the Rings in 1949 and it was published in 1954-55 under an arrangement where there would be no advances or royalties until the book broke even. Critical reviews were mixed, but the book became increasingly popular during the 1960s and had reached cult status by Tolkien's death in 1973.

The Tolkien estate holds copyrights to the literary works of Tolkien, and several posthumous works have been published by Christopher Tolkien, who serves as literary executor of his father's estate. Unfortunately, in 1969, Tolkien sold the film and merchandising rights to the books prior to his death to allow a cartoon movie to be made. There was a binding stipulation that there would never be permitted a "Disneyfied" version of the book.

The 1969 deal never contemplated that a live action movie could be made of such a book. To date, the estate has received none of the \$6 billion generated by the recent Lord of the Ring films. In February, 2008, the estate filed a lawsuit against New Line Cinema claiming it is entitled to 7.5% of the revenues under the 1969 deal that Tolkien had made.

Vincent van Gogh

He rarely exhibited any of his work, sold only one painting during his lifetime, and died at age 37 in 1890. But after his death, the story of Vincent van Gogh's artistic passions and sacrifice became known, first through the publication of his letters, creating a surge of popularity just prior to World War I, and then again after publication of "Lust for Life" by Irving Stone in 1934 and the movie that followed.

Dare we be so gauche as to quantify the value of van Gogh's entire output just to artificially measure the posthumous success of his estate in comparison with

that of Elvis and Tolkien? The van Gogh estate isn't set up as a marketing machine that generates huge earnings. There aren't tours as with Graceland for the Elvis estate. Nor do van Gogh descendants paint new works by van Gogh's for sale the same way that Christopher Tolkien can write or edit books for publication that his father did not complete. But consider what the output of Vincent van Gogh is worth today as another gauge of value.

In 1990, 100 years after the artist's death, van Gogh's *Portrait of Dr. Gachet* sold for \$82.5 million which was then the highest price ever paid for a painting. There are 900 paintings and 1,100 other works by van Gogh, though not all are as valuable. If the 900 paintings averaged \$50 million apiece that would amount to a mind-boggling \$45 billion. This is clearly a body of work that acquits itself well next to a pop culture icon or a famed science fiction writer. Perhaps all three might be considered pop culture icons in certain ways.

But let us flash forward 100 years or 500 years. Many rock stars will have come and gone and there may be scant interest in a pompadoured hip shaker of the mid 20th century. One day a generation may be born that asks, "Elvis who?" Copyrights on Elvis tunes and movies will have expired along with the audience of fans who felt connected to Elvis in some way.

Similarly, new stories may be of greater interest in 2508 than the hobbits of middle earth. The ring trilogy will be a good read that folks enjoy reading, but it will be part of the public domain and read online for free. The market for replicas of Gandolf's staff or Frodo's ring might be completely dried up as well.

By contrast, the finest examples of Van Gogh, being rare collectibles coveted by museums, will continue to be the ultimate status symbol for the collections of the super rich.

Regrets & Secrets

For those estates that contain intellectual property, such as the estate of an author, artist, performer, or celebrity, there may be specialized considerations over how works are displayed, sold, exhibited, and exploited.

What about early works or experiments or half-finished ideas or creations that were just mediocre? Edward Elgar's wish was that his unfinished symphony be burned, but his symphony was posthumously completed and played.

Lessons Learned?

- Keep creative control by appointing a literary executor or art executor who will protect the artist's true legacy and reputation. Centralized control over a body of work is preferable to fragmented assets being dispersed to heirs. A trust administered by professional trustees with a combination of direct instructions and sufficient discretion is the most effective approach.
- Publicity and marketing matter. The Elvis estate was heading toward oblivion before good management put it back on track. Van Gogh might never have been discovered without books depicting him as an artist who suffered and sacrificed and died young.
- If you truly want something not to be published after you are gone, then destroy it during your lifetime while you still can and NEVER put it on the Internet.
- Lifetime financial planning is essential or the artist can be forced to relinquish art and control. An artist getting divorced without a prenuptial agreement could lose half of his estate and be forced to sell intellectual properties.
- An estate that has a large number of works by an artist must be wary of flooding the market with too many works at one time and thereby depressing the value of all of the artist's work.
- License uses with reversions of rights rather than outright sales—this would have helped Tolkien's estate which sold rights for a cartoon movie and then was left on the outside without creative control when movies were made decades later.

Leaving One's Mark

Can you leave any sign on the planet earth that you've been here? Memories fade and buildings crumble. But ideas, art, music, books, and other intellectual properties may outlast the pyramids.

Federal Tax News Briefs

PENSION LITIGATION

On Wednesday, February 20, 2008, the United States Supreme Court overruled the 4th U.S. Circuit Court of Appeals in Richmond, Va., and Federal District Court in South Carolina, and unanimously held that individual participants in a 401(k) retirement plan could sue plan administrators under the Employee Retirement Income Security Act of 1974 (ERISA) to recover losses. The Court ruled that fiduciary misconduct need not threaten the solvency of the entire plan to be actionable by individual participants.

In the case at bar, an employee filed an action claiming that his employer had not implemented the investment strategy that the employee had selected for his employee retirement account. A federal district court found that §502(a)(2) does not provide a remedy for individual beneficiaries. The 4th Circuit Court of Appeals affirmed based on *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U. S. 134 (1985).

The Supreme Court was unanimous in reversing the lower courts. It found that although §502(a)(2) “does not specifically provide a remedy for individual injuries distinct from plan injuries, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant’s individual account.” *LaRue v. DeWolff, Boberg, and Associates, Inc.*, (decided February 20, 2008).

WAIVER OF FLORIDA HOMESTEAD

Florida's Supreme Court has ruled that a Florida resident cannot waive his or her homestead exemption without a secured agreement. The case involved a client who signed an attorney's retainer agreement for services related to an amendment of alimony and child support. The retainer agreement contained a clause waiving the homestead exemption. The trial court

upheld the waiver clause and allowed a lien on the client's home, and the Court of Appeals reversed.

The homestead exemption has been a part of the Constitution of Florida for the past 123 years and prevents a forced sale of the homestead and limits liens to property taxes and home improvements. The homestead is limited to a home and one-half acre if within a municipality or a home, and 160 contiguous acres if outside a municipality. In 1884 and 1956, the Florida Supreme Court rejected unsecured waivers of the homestead exemption.

In, *Chames v. DeMayo*, 32 Fla. L. Weekly S820 (Fla. Dec. 20, 2007), the Court noted a modern trend toward allowing waivers of personal rights, but noted that few jurisdictions

permit a general waiver of homestead in an executory contract and rejected an assertion of a national trend to allow such waivers. It then upheld prior case law because the homestead exemption is intended to protect not only the individual but also the individual's family as well as the State.

Thus, a Florida resident can mortgage a homestead directly but cannot waive the homestead merely by signing boilerplate language that is inserted into some other agreement for the extension of credit. A gift, sale, or mortgage of property would constitute a knowing, voluntary, and intelligent waiver of the exemption.

PREVENTING IDENTITY THEFT

The IRS announced that as of January 6, 2008, all federal tax lien documents filed in public-records offices will contain partially redacted taxpayer Social Security numbers to help prevent identity theft. Only the last four digits of the taxpayer's Social Security number will be used and will appear as “XXX-XX-NNNN.” The redacted format will not apply to employer identification numbers (EINs).

Russell's emphasis on protecting the “entire plan” from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed. Defined contribution plans dominate the retirement plan scene today.

—Justice Stevens in *LaRue v. DeWolff*