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The Estate Tax Fundamentals of Celebrity and Control

We previously suggested in this Journal that post-death publicity rights could be excluded from the decedent's estate for tax purposes if state legislation precluded the decedent from exercising post-death control.¹ In other words, if state legislation designated who would hold these rights after the decedent's death, the value of these rights should not be subject to estate tax. Professor Joshua Tate, in his response to our essay, argues that under current law, estate tax inclusion would be required regardless of the decedent's ability to exercise control.² So, for example, in Professor Tate's analysis, the estate tax would apply even if the legislation vested those rights in the decedent's oldest daughter and even if the decedent had no right to alter this outcome. Professor Tate's analysis misconstrues fundamental estate tax principles and misunderstands the precedents on which he relies.³

Let's start with a bedrock principle that Professor Tate ignores: estate tax inclusion under § 2033 is not appropriate unless the decedent has the right to control the post-death disposition of the interest.⁴ Prior to the decision in *Connecticut Bank & Trust Co. v. United States*,⁵ the treatment of wrongful death

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1. Mitchell M. Gans, Bridget J. Crawford & Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203 (2008), <http://thepocketpart.org/2008/04/01/ganscrawfordblattmachr.html>.
 2. Joshua C. Tate, *Marilyn Monroe's Legacy: Taxation of Postmortem Publicity Rights*, 118 YALE L.J. POCKET PART 38 (2008), <http://thepocketpart.org/2008/09/08/tate.html>.
 3. Others have recognized that publicity rights cannot be included in a decedent's estate, absent post-death control. See Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, 68 TAX NOTES 95, 95 (1995) ("The only question thus is whether the right of publicity is . . . descendible to the decedent's heirs.").
 4. See, e.g., *Estate of Wadewitz v. Comm'r*, 39 T.C. 925, 933 (1963), *aff'd*, 339 F.2d 980 (7th Cir. 1964).
 5. 465 F.2d 760 (2d Cir. 1972).

recoveries for estate tax purposes was uncontroversial. Because the decedent typically could not control the disposition of the damages, there could be no inclusion for federal estate tax purposes.

In *Connecticut Bank*, the decedent's executor recovered damages under Connecticut's wrongful death statute. Unlike traditional wrongful death laws, the Connecticut statute allowed the decedent to determine who received the benefits. Distinguishing earlier administrative rulings,⁶ the IRS argued in its brief that the damages should be included in the estate because the decedent could control their disposition.⁷ The court held that, despite the decedent's control, the damages were not taxable because the decedent lacked any ownership rights in the recovery during life.⁸ It did not reject the universally accepted principle that § 2033 applies only where the decedent has the ability to exercise post-death control. Rather, the court, in effect, held that such control is *necessary* but not *sufficient* for estate tax inclusion under § 2033.

To be sure, after *Connecticut Bank*, a decedent's ability to control the disposition of a wrongful death recovery is no longer critical. Where the statute does not give the decedent the ability to control the recovery, it is excluded from the gross estate on that ground. And if the decedent does have such control, as under the Connecticut statute, it is still excluded because the claim did not accrue during the decedent's life. But—contrary to Professor Tate's reading—the *Connecticut Bank* decision does not alter the bedrock principle that § 2033 can apply only where the decedent has post-death control.

Professor Tate's reading is inconsistent with the received understanding of § 2033 and its settled application in other contexts. To illustrate, consider *Kramer v. United States*.⁹ In *Kramer*, the decedent had an employment contract that entitled him to receive a fixed weekly amount during his lifetime. Upon his death, a substitute amount (\$150 per week) became payable to his spouse. The IRS sought to include in the decedent's gross estate the value of the post-death right conferred on the spouse. The court rejected the IRS's argument on the grounds that the decedent's rights terminated at his death and therefore he could not control—that is, could not alter—the spouse's rights. Relying on the

6. The government cited Rev. Rul. 54-19, 1954-1 C.B. 179; Rev. Rul. 56-637, 1956-2 C.B. 600; E.T. 18, 1940-2 C.B. 285; Rev. Rul. 68-88, 1968-1 C.B. 397; and Rev. Rul. 69-8, 1969-1 C.B. 219. Brief of the Appellee at 12-14, *Conn. Bank*, 465 F.2d 760 (Nos. 561, 562, 563, Dockets 71-1964, 71-1965 and 71-1966).

7. Brief of the Appellee, *supra* note 6, at 14-17.

8. *Conn. Bank*, 465 F.2d at 763.

9. 406 F.2d 1363 (Ct. Cl. 1969).

Tax Court's decision in *Estate of Wadewitz v. Commissioner*,¹⁰ the *Kramer* court stated:

The decedent's interest in the employment contract ceased at his death. He was entitled to be paid a salary as long as he was employed by the Company but nothing beyond that. Decedent had no right to the \$150 per week payments and no control over them. As the Tax Court said in *Estate of Wadewitz* . . . :

“* * * It is well established, * * * that where a decedent holds only a property interest which terminates at his death, * * * such an interest cannot be reached by section 2033 * * * and is not includable thereunder in the decedent's gross estate. * * *”

We think that the interest Abraham Kramer had in his employment agreement was terminable and therefore the property also is not includable under Section 2033.¹¹

Kramer is not aberrational. Rather, it is consistent with the inveterate notion that § 2033 does not apply where the decedent has an interest in a trust that terminates at death. In such a case, as in *Kramer*, the decedent's interest evaporates at death, leaving the decedent with no post-death control and making estate tax inclusion under § 2033 inappropriate.¹² *Kramer* is, of course, also consistent with the pre-*Connecticut Bank* authorities, which exclude wrongful death recoveries from the estate based on the decedent's inability to exercise post-death control.

Not able to cite any affirmative authority to support his assertion that post-death control is irrelevant to estate tax inclusion, Professor Tate poses this question: if post-death control is truly essential, how does one explain the treatment of a decedent who is required under Louisiana law to give a portion of the estate to children under the age of twenty-four? To the extent that such rights do not diminish the value of the estate, it is based on a narrow regulatory exception to the pervasive general rule, which is that inclusion hinges on post-death control.¹³ Indeed, were it otherwise, § 2034 of the Code—which provides, in effect, that the decedent's inability to control the surviving spouse's curtesy-

10. 39 T.C. 925 (1963), *aff'd*, 339 F.2d 980 (7th Cir. 1964).

11. *Kramer*, 406 F.2d 1363, 1369-70 (Ct. Cl. 1969) (citing *Wadewitz*, 39 T.C. at 933).

12. See *Wadewitz*, 39 T.C. at 933-35 (indicating that where a decedent's ability to enjoy an interest in property terminates at death and then reemerges in another person, § 2033 cannot apply because it is not “transferrable through his estate either by will or by intestacy”).

13. See *Estate of Johnson v. Comm'r*, 718 F.2d 1303, 1312 (5th Cir. 1983); I.R.S. Tech. Adv. Mem. 86-51-001 (Aug. 8, 1986).

or dower-type rights does not result in a diminution of the estate—would be superfluous.

Professor Tate’s analysis prompts two final comments. First, the implication in his essay that legislation conferring publicity rights might cause estate tax inclusion for a decedent dying prior to the enactment of the legislation is inconsistent with the holding in *Connecticut Bank*. As two of us have discussed elsewhere,¹⁴ *Connecticut Bank* and other authorities make clear that an interest in property that is not legally enforceable at the moment of death is excluded from the estate on this ground. Thus, if a celebrity were to die before state law permitted the enforcement of post-death publicity rights, any subsequently enacted legislation could not cause federal estate tax inclusion in that decedent’s gross estate.

Second, as Professor Tate indicates, we did suggest that revised legislation could confer on a celebrity the right to extinguish post-death rights without necessarily causing estate tax inclusion. Professor Tate argues that the celebrity’s ability to eliminate the rights of the people designated in the statute surely translates into estate tax inclusion. Yet, in *Kramer*, the decedent could have defeated his wife’s rights by terminating his employment (or perhaps by divorcing his wife), and the court nonetheless held that § 2033 did not apply.¹⁵ While we did not, and do not, take a definitive position on this question, we disagree with Professor Tate’s suggestion that the law is unequivocally to the contrary.¹⁶

In sum, post-death control is an essential prerequisite for estate tax inclusion under § 2033. In its absence, the section cannot as a general rule apply. In suggesting that publicity rights are somehow not subject to this requirement, Professor Tate misreads the significance of *Connecticut Bank* and ignores well-engrained principles of tax law.

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14. See Mitchell M. Gans, Jonathan G. Blattmachr & Austin Bramwell, *Estate Tax Exemption Portability: What Should the IRS Do? And What Should Planners Do in the Interim?*, 42 REAL PROP. PROB. & TR. J. 413, 425-26, n.43, 427-28, n.45 (2007). In a future article, we intend to further explore the expectancy concept.
 15. Cf. Rev. Rul. 80-255, 1980-2 C.B. 272 (indicating that the kind of control on which estate tax inclusion can be predicated is not necessarily present where the scope of the decedent’s control is circumscribed). While this ruling deals with §§ 2036 and 2038, rather than § 2033, it does suggest that a decedent may not be viewed as having control for estate tax purposes if the decedent’s ability to exercise it is limited.
 16. For a discussion of the impact of a decedent’s direction to destroy property, see Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 786-89 (1998) (critiquing reasoning in *Ahmanson Found. v. United States*, 674 F.2d 761 (9th Cir. 1981)).

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