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### Publicity Rights and the Estate Tax

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## Publicity Rights and the Estate Tax

Mitchell M. Gans\*

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### INTRODUCTION

The estate tax treatment of publicity rights factors into the debate regarding whether such rights should be transferrable at death. Some point to the estate tax as a reason for making publicity rights non-transferrable. For if they are transferrable, estate-tax inclusion could result. And, the argument goes, the estate or the beneficiaries could well be coerced into commercializing the rights in order to raise

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the money to pay the tax. Making them nontransferable would eliminate this possibility. This Article considers some of the connections between the federal estate tax and the state law treatment of publicity rights. It concludes with a suggestion about the tax treatment of publicity rights at a more general level.

Part I explores the estate tax treatment of publicity rights and, in particular, the provision the celebrity Robin Williams used in his will in order to address his apparent concern about forced commercialization. While the provision appears to be based on dicta in the Ninth Circuit, its effectiveness is questionable. This Part concludes with a recommendation that legislation at the state level permit celebrities to extinguish during life their post-death publicity rights. With such legislation in place, the concern about forced commercialization would be eliminated—thus permitting the state law question of transferability to be resolved solely on the basis of non-tax considerations.

Part II considers the characterization of post-death publicity rights as an independent right under state legislation and the estate tax implications of such a characterization. An analogy is made to the estate-tax treatment of wrongful death proceeds, which are typically characterized as independent of the victim's pre-death claim and are therefore not included in the gross estate.

Part III examines two ancillary estate-tax issues that can arise where state law authorizes transferability: first, the impact of retroactive state legislation making publicity rights transferrable in the case of a decedent dying prior to enactment; and, second, the impact of a movement away from traditional choice-of-law rules in this context.

Part IV concludes with a broader suggestion: that the estate tax be made entirely inapplicable to publicity rights without regard to the state law question of transferability. Instead, the proceeds from the exploitation of these rights would be fully taxable as income to the beneficiaries when received, obviating the need to engage in a difficult, potentially protracted inquiry into the valuation of the rights at the time of death.

### **I. FORCED COMMERCIALIZATION: THE FLAW IN THE ROBIN WILLIAMS ESTATE PLAN AND SUGGESTED REFORM**

Robin Williams included an interesting provision in his will relating to his publicity rights. Under the provision, the rights are to be held in trust for the ultimate benefit of charity subject to a proviso: During the first twenty-five years after his death, the trustee is prohibited from engaging in the exploitation of these rights.<sup>1</sup> Although Williams' motivation is not known, the provision was presumably tax-driven, based on a concern that the value of these rights would otherwise be subject to federal estate tax.<sup>2</sup> Is such a provision effective? Probably not.

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1. Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York?*, 36 CARDOZO ARTS & ENT. L.J. 573, 596 (2018).

2. See Jeffrey K. Eisen & Allan E. Biblin, *Estate Planning for Clients in the Entertainment Business*, 33 EST. PLAN. 26 (2006) (suggesting the need for celebrities to address the issue in their estate planning documents).

### A. SECTION 2033: DETERMINING THE GROSS ESTATE

Section 2033 of the Internal Revenue Code requires the inclusion in the gross estate of “property” in which the decedent had an interest “at the time of his death.”<sup>3</sup> Although the Code fails to elaborate on the meaning of this language, court decisions and IRS rulings indicate that a critical question is whether the decedent had testamentary control under state law. State law can therefore be determinative. Where state law permits testamentary control of an item, it is included in calculating the gross estate under § 2033 (if, as will be discussed, the right accrued prior to death).<sup>4</sup> Under California law, Williams could have controlled the publicity rights under his will.<sup>5</sup> Therefore, had Williams simply bequeathed the right to his family free of any restriction, the full value of the rights would have been included in his gross estate.<sup>6</sup> In contrast, had Williams’ publicity rights been based entirely on New

3. 26 U.S.C.A. § 2033 (Westlaw through Pub. L. No. 113–74).

4. See *Estate of Andrews v. United States*, 850 F. Supp. 1279 (E.D. Va 1994); *Estate of Wadewitz v. Commissioner*, 39 T.C. 925, 933–35 (1963) (citing *Helvering v. Safe Deposit Co.*, 316 U.S. 56 (1942)) (interests that terminate at death are not subject to 26 U.S.C.A. § 2033); *Estate of Royce v. Comm’r*, 46 B.T.A. 1090, 1094 (1942) (quoting *Davis v. United States*, 27 F. Supp. 698 (S.D.N.Y. 1939)) (inclusion under the predecessor of 26 U.S.C.A § 2033 required that the “property [was] owned by a decedent *and passing at death by will or intestacy*”) (emphasis added); Rev. Rul. 2002–39, 2002–2 C.B. 33, 2002 WL 1277320 (I.R.C. § 2033 not applicable because “decedent had no power to designate the recipient of the benefit”); Paul L. Caron, *Estate Planning Implications of the Right of Publicity*, 68 TAX NOTES 95, 95 (1995).

While a regulation under I.R.C. § 2033 (Treas. Reg. § 20.2033–1(b)) does indicate that property subject to homestead or other exemptions under state law is includible in the gross estate without addressing the effect of the decedent’s lack of testamentary control, the Tax Court has held, in applying the regulation, that a lack-of-control discount is appropriate in valuing the property. See *Estate of Johnson v. Comm’r*, 77 T.C. 120 (1981), *rev’d*, 718 F.2d 1303 (5th Cir. 1983). In effect, the portion of the property subject to homestead rights and therefore beyond the decedent’s control is not subject to estate tax under the Tax Court’s approach. Only the portion of the property over which the decedent had testamentary control is subject to tax under I.R.C. § 2033. *Id.* at 126 (decedent could not “dispose of the entire homestead property by will without its being subject to the rights of her surviving spouse”). *But see* I.R.S. G.C.M. 39,592 (July 8, 1986) (disagreeing with the Tax Court); I.R.S. Tech. Adv. Mem. 8651001 (Aug. 8, 1986) (same).

The Fifth Circuit, while reversing in *Johnson*, did not disagree with the Tax Court’s approach to 26 U.S.C.A. § 2033. Instead, it held that the entire value of the property, without discount, was includible under § 2034, obviating the need to consider § 2033. Under § 2034, the undiscounted value of property subject to dower or similar statutory right is includible in the gross estate despite the decedent’s lack of control. Although the Fifth Circuit did not elaborate on the relationship between §§ 2033 and 2034, the latter section establishes that the decedent’s lack of control is irrelevant in the context of property subject to dower-type rights. In effect, § 2034 creates an exception for property subject to such rights that proves the general rule in § 2033 that inclusion requires testamentary control. In short, if testamentary control were not an essential element under § 2033, property subject to dower-type rights would be includible under §§ 2033 and 2034 would be unnecessary.

In any event, the narrow provision in 26 U.S.C.A. § 2033 regulation with respect to homestead and exemption should not be read to undermine the section’s general requirement of testamentary control.

5. Cal. Civ. Code § 3344.1 (2007).

6. See *Estate of Andrews*, 850 F. Supp. at 1293–95; Caron, *supra* note 4, at 95 (“The only question thus is whether the right of publicity is a property interest recognized under the applicable state law and descendible to the decedent’s heirs.”); Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 767 (1998) (“Since the estate tax is nominally a tax on the privilege of transferring property at death, interests which cannot be transferred at

York law—where, currently, the post-death right to publicity is not subject to testamentary control—estate tax inclusion would not have been possible.<sup>7</sup>

The question is whether celebrities subject to California law or other similar laws can avoid estate tax inclusion—and the difficult battle with the IRS determining the value of the right<sup>8</sup>—by imposing the kind of restriction that Williams used in his will. While, as will be discussed, there is dicta in the Ninth Circuit that appears to provide support for the Williams approach, the dicta is inconsistent with basic principles. Indeed, the Williams bequest might have proven to be counterproductive had the IRS challenged it.

Under basic principles, the gross estate is determined without regard to any restrictions imposed in the decedent's will. Thus, if the decedent had owned 100% of the stock in a company and bequeathed 20% to each of his five children, the value of 100% of the stock would be included in the gross estate—i.e., no discount would be permitted on account of the nature of the minority interest given to each of the children.<sup>9</sup> Were the law otherwise, it would be relatively easy to depress the value of the gross estate through artful drafting.<sup>10</sup> This would not only create the inequity of imposing a different tax on similarly situated decedents merely because they included different terms in their will, but would also lead to distortions in planning: A person who wanted to bequeath 100% of her stock to one child would

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death (i.e. which are not devisable or descendible) are not subject to the estate tax system"); Bridget J. Crawford, Mitchell M. Gans, & Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 2003 (2008), <https://perma.cc/FUK8-MR8Y>; Bridget J. Crawford, Mitchell M. Gans, & Jonathan G. Blattmachr, *The Estate Tax Fundamentals of Celebrity and Control*, 118 YALE L.J. POCKET PART 50 (2008), <https://perma.cc/B4LF-JWK6>. *But see* Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1 (2009) (maintaining that, under current law, testamentary control is not relevant to the applicability of § 2033).

7. *See supra* note 6.

8. *See Estate of Andrews*, 850 F. Supp. at 1287–95 (determining value of projected income stream based on a discount rate taking risk into account); Rothman, *supra* note 1, at 596 (describing the different positions of the IRS and the Estate of Michael Jackson on the valuation question).

9. *See Estate of McClatchy v. Comm'r*, 147 F.3d 1089, 1093–94 (9th Cir. 1998) (bequest to different legatees does not alter estate tax value); *Citizens Bank & Trust Co. v. Comm'r*, 839 F.2d 1249, 1255 (7th Cir. 1988) (restrictions imposed in estate planning document not taken into account for purposes of estate-tax valuation); *Ahmanson Found. v. United States*, 674 F.2d 761, 768–69 (9th Cir. 1981) (“To take into account for valuation purposes the fact that the testator’s unitary holding has become divided in the hands of two or more beneficiaries, would invite abuse.”); *Estate of Bright v. United States*, 658 F.2d 999, 1006 (5th Cir. 1981) (“It would be strange indeed if the estate tax value of a block of stock would vary depending upon the legatee to whom it was devised.”); *Estate of Adler v. Comm'r*, 101 T.C.M. (CCH) 1118 (2011) (“A property interest transferred to separate owners at death is not valued separately for estate tax purposes.”). For gift tax purposes, the rule is different. An inter vivos gift of 20% to each of five children would qualify each gift for a discount. Rev. Rul. 93-12, 1993-7 C.B. 202 (embracing the gift-tax approach adopted in *Estate of Bright, supra*). Although the IRS had long argued against discount in this context, and although one could argue that the same concern that animates the estate tax rule should have enabled the IRS to prevail, it ultimately conceded the gift-tax issue after suffering defeat in the courts and what might be considered a legislative defeat as well. *Id.* *See also* H.R. Rep. No. 101-964 (1990) (Conf. Report) (“[t]hese rules do not affect minority discounts or other discounts available under present law”—implicitly endorsing the cases rejecting the IRS position).

10. *See Ahmanson*, 674 F.2d at 768 (“[It] would invite abuse.”).

face the reality of a higher estate tax than if she bequeathed a minority interest to each of her children.

### B. NINTH CIRCUIT DICTA

Nonetheless, in the face of this well-established principle for computing the value of a gross estate, the Ninth Circuit in *Ahmanson Found. v. United States* supplied in dicta a surprising answer to a hypothetical it posited: A direction in a will requires the executor to destroy posthumously the decedent's private papers.<sup>11</sup> The court indicated that, in such a case, it would require only the value of the ashes be included in the gross estate, not the pre-destruction value of the papers.<sup>12</sup> Given that Williams was a California resident, his advisers likely relied on this dicta in drafting the publicity-rights provision in his will, hoping the restriction on exploitation would suppress the value of the publicity rights for estate tax purposes.<sup>13</sup>

The dicta, however, is of questionable validity for two reasons. Although, as will be discussed, the dicta may be defensible on policy grounds, it is of questionable validity as a conventional matter for two reasons. First, to support its conclusion, the court relied on *Provident Nat'l Bank v. United States*, a decision principally involving the calculation of the marital deduction.<sup>14</sup> Because the deduction is equal to the amount passing to the spouse, the *Provident* court took into account in computing the marital deduction a will-imposed provision that impacted the value of stock passing as part of the marital bequest.<sup>15</sup> Given that the dicta did not address the amount of a deduction but rather the valuation of an item in the gross estate—papers or ashes—the marital-deduction analysis is inapt.<sup>16</sup>

Second, the dicta is inconsistent with the court's holding that valuation for purposes of computing the gross estate is determined *without* regard to the identity

11. *Id.*

12. *Id.*

13. Indeed, in a student note, the suggestion was made that, under the *Ahmanson* dicta, the value of publicity rights could be extinguished. See Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683 (1995). Perhaps the Williams advisers were aware of this Note at the time they drafted the will.

14. 581 F.2d 1081, 1086–87 (3d Cir. 1978).

15. In *Provident*, after discussing the valuation question in the context of computing the marital deduction, the court did indicate that it was necessary to use the same value for purposes of calculating the gross estate. *Id.* at 1091. This aspect of *Provident* was rejected in *Ahmanson* as well as in the Tax Court. *Estate of Chenoweth v. Comm'r*, 88 T.C. 1577, 1588–90 (1993) (explaining the difference between *Ahmanson* and *Provident* on this issue and rejecting *Provident* in favor of *Ahmanson*). See also *Estate of McClatchy v. Comm'r*, 147 F.3d 1089, 1092–93 n.2 (9th Cir. 1998); *Estate of McClatchy*, 147 F.3d at 1092–93 n.2 (reading *Provident* as holding that the valuation of an item in the gross estate is determined without regard to “directives” imposed in the will); Joseph M. Dodge, *Lifting the Shroud Obscuring Estate of Hubert: The Logic of the Income and Estate Tax Treatment of Estate Administration Expenses*, 3 FLA. TAX REV. 647, 662–63 n.66 (1998) (indicating that this aspect of *Provident* is erroneous).

16. See Dodge, *supra* note 15, at 662–63 n.66 (indicating that the *Ahmanson* dicta is invalid); Madoff, *supra* note 6, 788–89 (same). See also Treas. Reg. § 20.2033–1(b) (stating that the direction in will to extinguish debt owed to the decedent is disregarded for estate tax purposes).

of the legatees as established by the terms of the will.<sup>17</sup> That is to say that the terms of the will should not affect the valuation of the gross estate. Indeed, the Ninth Circuit itself appears to have tacitly disavowed the dicta in a later decision.<sup>18</sup>

### C. BACK-UP PLAN: CHARITABLE BEQUEST

Perhaps appreciating the questionable validity of the dicta, Williams' advisers included a back-up provision in the will: a bequest of the publicity right to charity subject to the twenty-five-year restriction. They presumably thought that if the IRS were to challenge the validity of the twenty-five-year restriction, the estate could claim a charitable deduction and thereby eliminate any estate tax on the publicity rights.<sup>19</sup> Would this provision have been effective in a litigation with the IRS? Not entirely.

Contributions to charity are deductible for estate tax purposes.<sup>20</sup> The advisers presumably hoped that, in the event the dicta were determined to be invalid, the estate would nonetheless be entitled to a charitable deduction for estate tax purposes in an amount equal to the full value of the publicity rights. Like the marital deduction, however, in general, the amount of the charitable deduction is equal to the value of what passes to charity.<sup>21</sup> The amount passing to charity under Williams' will was equal to the value of the publicity right reduced by an amount reflecting the twenty-five-year restriction.<sup>22</sup> Put differently, since the charity's enjoyment of the right would be postponed for twenty-five years, it would be as if charity took subject to an encumbrance that had the effect of suppressing the value of its interest.<sup>23</sup>

17. *Ahmanson Found. v. United States*, 674 F.2d 761, 768–69 (9th Cir. 1981). For an argument that any distinction between the rule that the gross estate is determined without regard to the terms of the will and the dicta is not convincing, see Dodge, *supra* note 15, at 662–63 n.66.

18. In *Estate of McClatchy*, the Ninth Circuit had occasion to invoke the dicta. The dissent referenced it, arguing in effect that, based on the dicta, it would not be impermissible to consider the identity of the executor designated in the will in determining the value of an item in the gross estate. 147 F.3d at 1095–96. In refusing to consider the designation contained in the will, the majority did not attempt to defend the dicta or otherwise respond directly to the dissent's point about the dicta—thus suggesting that it may not continue to be viable even in the Ninth Circuit.

19. 26 U.S.C.A. § 2055.

20. *Id.*

21. See, e.g., *Dieringer v. Comm'r*, No. 16–72640, 2019 WL 1119598, at \*7 (9th Cir. Mar. 12, 2019) (prohibiting “crafting an estate plan . . . so as to game the system and guarantee a charitable deduction that is larger than the amount actually given to charity”); *Ahmanson*, 674 F.2d at 772; Treas. Reg. § 20.2055–3(a) (“[T]he deduction is based on the amount actually available for charitable uses”).

22. See Rev. Rul. 2003–28, 2003–1 C.B. 594, 2003 WL 480096 (“[W]hen a donor places a restriction on the marketability or use of property, the amount of the charitable contribution is the fair market value of the property at the time of the contribution determined in light of the restriction”); Rev. Rul. 85–99, 1985–2 C.B. 83, 1985 WL 287178 (same); Madoff, *supra* note 6, at 790–91 (stating that bequest of publicity rights subject to restriction on exploitation results in reduced charitable deduction); Alan F. Rothschild Jr., *Planning and Documenting Charitable Gifts*, 20 PROB. & PROP. 53 (2006).

23. Where a bequest to charity constitutes only a partial interest in the bequeathed property, the deduction is denied in its entirety unless certain requirements are satisfied. 26 U.S.C.A. § 2055(e)(2). While, on initial examination, the charitable bequest in Williams' will might appear to be subject to full denial under this rule because of the twenty-five-year limitation, such a limitation should not trigger the full-denial rule. See Rev. Rul. 2003–28, *supra* note 2222. Instead, as indicated in text, the deduction is

To illustrate, assume that the value of the publicity right on the date of death was \$100 and that its value would only be \$10 once the twenty-five-year restriction was taken into account. In this case, only \$10 would be deductible for estate tax purposes. At the same time, however, under conventional principles (i.e., assuming the *Ahmanson* dicta is invalid), the amount includible in the gross estate would be \$100. Thus, if litigation with the IRS had ensued in the Williams estate, based on these hypothetical values, the correct amount of the inclusion in the gross estate would have been \$100, and the charitable deduction would have been \$10.

At first blush, this result might appear incongruous—valuing the publicity right at \$100 in computing the gross estate while permitting a deduction of only \$10. But, as discussed, unlike the rule applied in valuing an item in the gross estate, the rule applied in computing the amount of a deduction requires that restrictions contained in the will be considered in arriving at the amount that passes to the beneficiary.<sup>24</sup> For the deduction is equal to the amount that the decedent passes or transfers to charity (or to a spouse in the case of the marital deduction). Thus, if, as in this example, the restriction reduces value, the deduction must be correspondingly reduced. So, perhaps somewhat counterintuitively, assuming the *Ahmanson* dicta is invalid, the provision in Williams' will would not have been fully effective in eliminating the estate tax on Williams' publicity rights.

#### D. ALTERNATIVE PLAN: EXTINGUISHING RIGHTS DURING LIFE

Given the uncertainty about the dicta and the charitable deduction's passing concept, what should Williams' advisers have recommended? A bequest to charity of the publicity rights free from any restriction would have resulted in a charitable deduction equal to the value of the rights, thus entirely negating any estate tax on the rights. But, of course, this would have enabled the charity to exploit the publicity rights. Indeed, given the fiduciary duty imposed on those who manage charitable organizations, exploitation would certainly have occurred.

Alternatively, had Williams destroyed the rights during his life, instead of addressing the issue in his will—assuming a direction during life to destroy the rights would have been valid under state law—the rights could not have been included in his gross estate. Items consumed or destroyed during life cannot be controlled by will at the time of death and therefore cannot be treated as the subject of a death-time transfer.

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limited to the value of what passes to charity, with the limitation having the effect of reducing this value and therefore the amount of the deduction. *See id.*

24. *See Ahmanson Found. v. United States*, 674 F.2d 761, 771–73 (9th Cir. 1981) (holding that item bequeathed to charity may be valued for charitable deduction purposes at less than its value for purposes of computing gross estate); *Estate of Chenoweth v. Comm'r*, 88 T.C. 1577, 1584–90 (1993) (holding that valuation for purposes of determining gross estate not equivalent to valuation for marital deduction purposes). *See also* *Rothschild*, *supra* note 22, at 55 (“[T]he estate tax charitable deduction may be significantly below the property’s value for estate tax purposes.”); *Dodge*, *supra* note 15, at 662–63 n.66. *But see* *Provident Nat’l Bank v. United States*, 581 F.2d 1081, 1091–92 (3d Cir. 1978) (holding that valuation of item for marital deduction purposes must equal its gross estate value).



### E. EXTINGUISHING RIGHTS DURING LIFE FROM A POLICY PERSPECTIVE

Although, as suggested, there are questions about the validity of the *Ahmanson* dicta, the court's hypothetical does bear further consideration on policy grounds. If, before death, a person destroys her papers—or any other asset, for that matter—only the value of the ashes, not the papers, would be subject to estate tax under conventional principles. Were the outcome otherwise, the estate tax would extend beyond what the decedent leaves behind for transfer at death.<sup>25</sup> Put differently, to the extent that someone consumes or otherwise destroys, intentionally or unintentionally, an asset during life, it cannot be included in her gross estate.

And there is no policy justification for treating the posthumous destruction of papers in accordance with a direction in the will differently. First, as a matter of equity, people who destroy their papers prior to death and those who accomplish it by a provision in their will are similarly situated. Why should one be taxed more harshly than the other? Second, a testamentary direction to destroy papers does not present any gaming opportunities. Whether a person seeking post-death privacy accomplishes the destruction of her papers before or after death is not tax-driven and does not implicate the equity or distortion concerns that animate the conventional rule that precludes consideration of a will-imposed restriction or direction in valuing an item in the gross estate.

There is simply no transfer if the property is destroyed, and whether the destruction occurs before death or immediately after death in accordance with the will should not matter. In either case, there should be no estate-tax inclusion. Parenthetically, the potential for posthumously directed destruction of assets to proliferate is inherently limited by state law, which typically invalidates such directions on public policy grounds.<sup>26</sup> In short, while the validity of the *Ahmanson* dicta remains in question, it is surely defensible on policy grounds—and is perhaps a reflection of the court's tacit sensitivity to the policy implications.<sup>27</sup>

This analysis of the destruction-of-papers issue should apply with equal force in the context of a posthumous direction to destroy publicity rights. Whether private papers or publicity rights are under consideration, there can be no transfer if destruction occurs prior to death. And, for the reasons suggested, there is no justification for distinguishing between pre-and post-death destruction.

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25. See *Knowlton v. Moore*, 178 U.S. 41, 48 (1900) (holding that estate tax is an excise tax on the transfer of wealth that passes from the decedent); *Estate of Heller v. Commissioner*, 147 T.C. 370 (2016) (“The estate tax is imposed on the value of property transferred to beneficiaries”); Madoff, *supra* note 6, at 767 (stating that tax is imposed “on the privilege of transferring property at death.”).

26. See, e.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975) (forbidding destruction even though the court conceded testator could have destroyed the property while alive); *Matter of Pace*, 93 Misc.2d 969 (N.Y. Sur. Ct. 1977); Restatement (Third) of Trusts § 47 cmt. e (2003) (stating that destruction would be for a capricious purpose, which is not a permissible purpose for a trust); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 74, 83 (1999) (explaining the policy justification for the rule prohibiting destruction); Eva E. Subotnik, *Artistic Control After Death*, 92 WASH. L. REV. 253 (2017).

27. Perhaps, the Ninth Circuit had these policy considerations in mind when it formulated the dicta. *But see* Dodge, *supra* note 15, at 662–63 n.66 (arguing that the dicta was based on an unconvincing distinction).

## F. AVOIDING COERCED COMMERCIALIZATION

To the extent that a person has publicity rights during life and they are transferrable at death under state law, they are subject to estate tax. As some have suggested, this could result in the forced post-death commercialization of these rights in order to enable the beneficiaries to raise the funds to pay the estate tax.<sup>28</sup> But if these rights are extinguished prior to death in accordance with state law, no transfer should be deemed to occur at death, and the estate tax should not apply. Given the concern about forced commercialization, states that permit transfer at death should adopt legislation authorizing the pre-death destruction of these rights.<sup>29</sup> This would provide celebrities with a choice that would eliminate coerced commercialization: Extinguish the rights prior to death and thereby eliminate concerns about the estate tax,<sup>30</sup> or permit the rights to survive death so they can be exploited by beneficiaries, subject of course to the estate tax.

At the same time, the Code should be amended to expand the opportunity to extinguish publicity rights without triggering the estate tax. First, for the reasons suggested, posthumous destruction should be treated no less favorably than pre-death destruction. Thus, the Code should embrace the *Ahmanson* dicta, excluding private papers or publicity rights from the gross estate where post-death destruction is directed in the will. Second, the Code should be amended to provide for estate tax-exclusion where publicity rights are extinguished by the beneficiaries in accordance with state law during a limited post-death time frame.<sup>31</sup> Under this approach, where the celebrity fails to address the issue, the beneficiaries would have the ability to do so. To the extent the Code adopts this approach, states would need to follow through

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28. See Rothman, *supra* note 1, at 596; Madoff, *supra* note 6, at 780–82.

29. If the state failed to authorize such destruction, the decedent's invalid attempt to extinguish the rights could not be respected for tax purposes.

30. Under 26 U.S.C.A. § 2501, the gift tax is imposed on the “transfer of property by gift.” Consistent with this fundamental proposition, the gift tax cannot apply if there is no transferee. See *Comm’r v. Hogle*, 165 F.2d 352, 353 (10th Cir. 1981) (“[T]ax cannot be sustained unless there was a transferor, a transferee, and an effective transfer of title or other economic interest or benefit in property having the quality of a gift.”); Treas. Reg. § 25.2511–2(a) (“[The gift tax] attaches regardless of the fact that the identity of the donee may not then be known or ascertainable”). Thus, where publicity rights are extinguished or destroyed during life, no gift tax can be imposed because there is no transferee (i.e., no present transferee and no future transferee who will be later ascertained).

31. This would be analogous to the disclaimer concept, which is addressed in 26 U.S.C.A. § 2518 and state statutes across the country. Note, however, the difference: When a beneficiary disclaims, the property passes to an alternative beneficiary; under the suggested approach, the extinguished publicity rights would be extinguished and would therefore not pass to anyone. Note also a practical difficulty with the suggested approach: If the publicity rights were bequeathed to more than one beneficiary either as a specific or residuary gift, disagreement among the beneficiaries could result in an inability to decide whether or not to extinguish the rights. A well-advised celebrity could of course, anticipating this problem, include a provision in the will that addressed it. For example, the will could bequeath the publicity rights to one beneficiary. Or if there are more than one beneficiary, the will could confer on one of the beneficiaries the right to decide whether to extinguish the rights. State legislation might also address the issue. For example, a default rule could apply in the case of multiple beneficiaries, under which publicity rights would be extinguished unless all (or perhaps a majority) of the beneficiaries agreed otherwise.

with conforming legislation recognizing the post-death right of the beneficiaries to extinguish publicity rights.<sup>32</sup>

If the Code were amended to incorporate the suggested approach—or state law permitted the rights to be extinguished during life—the potential for forced commercialization would be eliminated. The estate tax would only be imposed in those cases where a decision was made by the decedent (or the beneficiaries) not to extinguish the publicity rights. And the question whether, as a matter of non-tax law, these rights should be transferrable could be decided on its own merit free from the specter of forced commercialization.<sup>33</sup>

## II. INDEPENDENT RIGHT AND WRONGFUL DEATH ANALOGY

Legislation is currently pending in New York which would significantly alter the treatment of publicity rights. Under the legislation, two separate, independent rights would be created: the pre-death right to privacy and the post-death right to publicity.<sup>34</sup> Indeed, the bill explicitly refers to the latter right as an independent one. Is it possible that the designation of publicity rights as an independent one could have an impact on their estate tax treatment? Perhaps—although it seems doubtful.

### A. WRONGFUL DEATH AND THE ESTATE TAX

Consider the estate-tax treatment of wrongful-death proceeds, which raises a somewhat analogous question. In *Connecticut Bank & Trust Co. v. United States*, wrongful death proceeds were payable to the decedent's estate under state law.<sup>35</sup> On those occasions when the wrongful-death issue had previously arisen, the proceeds were found not to be includible in the gross estate.<sup>36</sup> A critical predicate was their treatment under state law: They were payable to the decedent's intestate takers and could not be controlled by the decedent's will.<sup>37</sup>

The twist in *Connecticut Bank* was that, under the Connecticut statute, the proceeds were controllable by the decedent's will. The IRS argued that this difference was sufficient to make the proceeds includible under § 2033. Rejecting this argument, the court reasoned that the wrongful-death claim did not arise until

32. Professor Madoff suggests an alternative: that the Code be amended to permit the decedent's personal representative to elect to treat certain property as being non-marketable (which would have the effect of significantly lowering its value for estate tax purposes). She suggests, in addition, that a mechanism be adopted under which the estate tax would be "recaptured" or collected in the event the beneficiaries later decided to exploit the property's market value. See Madoff, *supra* note 6, at 808–10.

33. See *id.* at 808 (arguing that the estate tax should not be permitted to drive the substantive property law question of transferability).

34. See N.Y. Assemb. No. A08155, 2017 Leg., 240th Sess. (N.Y. 2017) available at <https://perma.cc/XVT5-SBGZ>.

35. 465 F.2d 760, 763 (2d Cir. 1972).

36. I.R.S. G.C.M. 36135; Rev. Rul. 54–19 1954–1 C.B. 179 (obsoleted in Rev. Rul. 2007–14, 2007–1 C.B. 747); *Maxwell Trust v. Comm'r*, 58 T.C. 444 (1972).

37. *Connecticut Bank & Trust Co. v. United States*, 465 F.2d 760, 763 (2d Cir. 1972).

the decedent had died.<sup>38</sup> The court emphasized that, under state law, no person is permitted to “possess an action or right of action” “during his lifetime” that has as an element the person’s own death.<sup>39</sup> Put differently, a wrongful death claim requires as a critical element the death of the victim, which of course cannot be pleaded until death occurs. The wrongful death proceeds were not, the court concluded, the subject of a wealth transfer by the decedent and therefore could not be subject to estate tax.<sup>40</sup>

Having been embraced by the IRS,<sup>41</sup> *Connecticut Bank* definitively establishes the two requirements that must be satisfied in order for § 2033 to apply: the preexisting requirement of the decedent’s testamentary control under state law; and the new requirement introduced by the court that the decedent’s rights be acquired under state law before death.<sup>42</sup> If one of these requirements is not met, the decedent is deemed not to have made a transfer within the meaning of § 2033. Thus, under *Connecticut Bank*, even if state law permits the decedent to control wrongful-death proceeds by will, they are not includible because the right does not accrue prior to death.

Contrast this with the treatment of claims that accrue pre-death and that survive death. Typically, these claims are based on pain and suffering and loss of income during life. Because the claims survive, the victim’s personal representative is permitted to pursue them post-death.<sup>43</sup> In *Connecticut Bank*, the accident resulted in instantaneous death. As a result, the decedent did not suffer a loss of income during life or pain and suffering. Where, however, death is not instantaneous, survival claims based on such pre-death harms would be available. And because, by their nature, survival claims accrue prior to death—and are controllable by will—they must be included in the gross estate.<sup>44</sup>

Consider a case where death is not instantaneous. After death, two claims are brought: a claim seeking compensation loss of income during life; and a wrongful death claim seeking compensation for loss of income resulting from the victim’s premature death. If, under the state statute, the wrongful death proceeds are payable to the victim’s estate and are therefore controllable by will, must the claim for lost income attributable to the post-death period be included in the gross estate? To be sure, as indicated, the claim attributable to the pre-death period, having accrued prior to death, must be included. But what about the wrongful death claim with respect to the post-death income loss?

38. *Id.* (“Simple logic mandates the conclusion that an action for wrongful death cannot exist until a decedent has died, at which point, he is no longer a person capable of owning any property interests.”).

39. *Id.*

40. *Id.*

41. Rev. Rul. 75–27, 1975–1 C.B. 297, 1975 WL 34813; Rev. Rul. 75–126, 1975–1 C.B. 296 1975 WL 34812.

42. See Rev. Rul. 78–292, 1978–2 C.B. 233, 1978 WL 42201 (“The value of the right to amounts that accrue to a decedent before death and are paid after death are includible in the decedent’s gross estate as property in which the decedent had an interest.”).

43. See Restatement (Second) of Torts § 926.

44. See Rev. Rul. 75–127, *supra* note 41 (“[W]here it can be established that such proceeds represent damages to which the decedent had become entitled during his lifetime (such as for pain and suffering and medical expenses) rather than damages for his premature death, the value of these amounts will be includible in the decedent’s gross estate.”).

Put differently, is the portion of the wrongful death claim based on loss of income attributable to the post-death period sufficiently independent of the pre-death lost-income claim to permit its exclusion from the gross estate? Or is it merely a continuation of the pre-death claim? To the extent it is viewed as a continuation of the pre-death claim, should not the proceeds be included in the gross estate? After all, the two conditions for inclusion under § 2033 would be satisfied: pre-death accrual; and testamentary control over the proceeds.

The IRS appears to permit the estate tax treatment of the post-death lost-income claim to track the state law characterization, treating it as independent of the pre-death claim and therefore not taxable.<sup>45</sup> Does this tracking of state law make sense? On the one hand, it could be argued that tracking makes a mere label supplied by state law determinative, in effect elevating form over substance.<sup>46</sup> On the other hand, it could be argued there is a policy-based justification for excluding all wrongful death proceeds from the gross estate—with this justification driving the conclusion that the wrongful death claim is independent of the survival claim.

### B. POLICY-BASED JUSTIFICATIONS

First, treating wrongful death proceeds as a wealth transfer by the decedent would be difficult to defend given that they represent a substitute for income the decedent would have earned and presumably used to support her loved ones had she lived.<sup>47</sup> Since using one's income to provide such support during life could not be the subject of a taxable wealth transfer,<sup>48</sup> providing a substitute in the form of wrongful death damages for loved ones should not lead to a different outcome.<sup>49</sup> Similarly, to the

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45. See Rev. Rul. 75-127, *supra* note 41 (concluding that a wrongful death recovery is not includible in the gross estate after first stating that “[a] wrongful death action is an original and distinct claim for damages sustained by the statutory beneficiaries and is not a derivative of or a continuation of a claim existing in the decedent.”); Rev. Rul. 54-19, *supra* note 36 (stating that since decedent “never had an interest in the [wrongful death] right of action” during life, estate tax inclusion was inappropriate); I.R.S. G.C.M. 36135 (“The Arizona wrongful death statute provides for an original and distinct right of recovery, one which arises after the decedent’s death and one which is not a continuation of any rights of the decedent. It is a property right not in existence as of the decedent’s death and it is this property right which we must consider for purposes of Code §§ 2033 and 2041.”). Note, however, that, in I.R.S. G.C.M. 38053, the IRS did not simply look at the state law characterization of the post-death claim as an independent one. Instead, in concluding that the post-death lost-income claim was not includible, it determined that the post-death and pre-death claims were substantively different based on its analysis of the measure of damages each claim generated under state (Pennsylvania) law. Similarly, in Rev. Rul. 75-127, the IRS placed its emphasis on the substantive issue rather than any state law label, strongly implying that damages attributable to “premature death” are not includible without discussing their characterization under state law.

46. As a general matter, state law labels that lack substance are ignored for tax purposes. See *Lyeth v. Hoey*, 304 U.S. 557 (1938); Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 EMORY L.J. 871 (1999).

47. See Restatement (Second) of Torts § 925, cmt. b (indicating that, in general, the damages in a wrongful death reflect what decedent’s family would have received had death not occurred).

48. See, e.g., Rev. Rul. 68-379, 1968-2 C.B. 414, 1968 WL 15238; Rev. Rul. 77-314, 1977-2 C.B. 349, 1977 WL 43812.

49. For an analogous concept in the income tax context, see *Raytheon Prod. Corp. v. Comm’r*, 144 F.2d 110 (1st Cir. 1944) (taxing damages by examining the loss for which they provide a substitute). Note,

extent that wrongful death damages compensate surviving family members for the “loss of society” they suffer on account of the decedent’s death,<sup>50</sup> they should not be treated as transfer of wealth by the decedent.<sup>51</sup>

Second, if the *Connecticut Bank* court had held that the decedent’s ability to control the wrongful death proceeds by will was sufficient to make it includible in the gross estate, inequity would result: Victims in states that permit such control would be required to include the proceeds in their gross estate while victims in states that do not permit such control—but instead require the proceeds to go to intestate takers—would avoid estate tax inclusion. Treating similarly situated wrongful-death victims differently merely because of such a difference in state law would result in discrimination difficult to defend.<sup>52</sup>

### C. ARE POST-DEATH PUBLICITY RIGHTS INDEPENDENT FROM PRE-DEATH PRIVACY RIGHTS?

Does the New York bill—which explicitly provides that the post-death publicity claim is independent of the pre-death privacy claim—create a basis for arguing that the publicity claims should be treated like wrongful death claims? If the post-death claim is treated as separate and distinct from the pre-death claim for tax purposes, estate tax exclusion might plausibly be appropriate. For, as in *Connecticut Bank*, where a claim arises under state law at death and there is therefore no pre-death right to the claim, the decedent should not be viewed as having made a transfer.<sup>53</sup> Under

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however, that some argue that it is difficult to justify the estate-tax exclusion of wrongful death proceeds from the gross estate to the extent the damages are attributable to lost wages. See Tate, *supra* note 6, at n.283 (citing Harry L. Gutman, *A Comment on the ABA Tax Section Task Force Report on Transfer Tax Restructuring*, 41 TAX LAW. 653, 663 (1988), for this proposition).

50. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585–89 (1974) (discussing the availability of loss-of-society damages under state law).

51. In addition, the exclusion of wrongful death proceeds from the gross estate could plausibly be justified on the basis of sympathy for the victims. Section 104 analogously excludes personal injury damages from gross income. The policy justification for the personal-injury exclusion is a matter of debate, but some point to sympathy as a basis for the exclusion. See, e.g., Mary L. Heen, *An Alternative Approach to the Taxation of Employment Discrimination Recoveries under Federal Civil Rights Statutes: Income from Human Capital, Realization, and Nonrecognition*, 72 N.C. L. REV. 549, 560–61 (1994); F. Philip Manns Jr., *Restoring Tortiously Damaged Human Capital Tax Free Under Internal Revenue Code Section 104(a)(2)’s New Physical Injury Requirement*, 46 BUFF. L. REV. 347, 354–55 (1998). The same justification could explain the exclusion of wrongful death proceeds from the gross estate.

52. The *Connecticut Bank* court betrayed its concern that a contrary result could produce unwarranted discrimination, stating that the “differences in results under the two types of statutes may be more theoretical than real . . . .” *Connecticut Bank & Trust Co. v. United States*, 465 F.2d 760, 763 (2d Cir. 1972).

53. *Id.* In *Connecticut Bank*, the IRS argued that estate-tax inclusion was required on two alternative theories: 26 U.S.C.A. §§ 2033 and 2041. The latter section applies where the decedent had a general power of appointment (i.e., where the decedent could have exercised it in favor of herself, her creditors, her estate or the creditors of her estate). Because the decedent’s creditors could have reached the wrongful death proceeds under Connecticut law, the decedent would have been treated as having a general power and inclusion would have therefore been required under § 2041 had the claim come into existence prior to death. *Id.* at 763–65. Similarly, in the case of publicity rights, § 2041 could apply—assuming that the decedent’s creditors could reach the rights (or their proceeds) or some other basis for inclusion under the section were present—only if the rights were deemed to accrue pre-death.

the New York bill, no person while living could bring an action based on the post-death claim. As in the case of a wrongful death claim, given the language of the bill, a critical element of the claim would be an allegation that death had already occurred. Moreover, to the extent that it is appropriate to track for tax purposes the state law's characterization of the right,<sup>54</sup> the independent status of the post-death right under the bill supports the argument against inclusion.

The counter-argument: Whatever one may say about the relationship between a wrongful death claim and a pre-death lost-income claim, a state statute proclaiming that the post-death publicity right is independent of the pre-death privacy right is a mere label lacking in substance. The pre-death right is cultivated during life and given protection under state law. And this protection is continued in the form of the post-death right.

This is analogous to a state statute that confers rights on the owner of property and goes on to provide that, after the death of the owner, rights with respect to the property must be pursued as an independent claim by those designated in the owner's will. If substance is to prevail over form, property subject to such a statute would surely be included in the owner's gross estate. In other words, the use of the label "independent" should not have the effect of eliminating the property from the owner's gross estate. Similarly, designating the post-death right as independent from the pre-death privacy right should not have any effect on the question of estate tax inclusion.

Moreover, to the extent that the post-death right is freely transferrable during life—as the New York bill provides—labeling the right an independent one is without substance. A wrongful death claim, in contrast, is a mere expectancy until the claim accrues at death and, as a result, is generally not capable of pre-death transfer.<sup>55</sup> Its characterization as an independent right is consequently more substantive—though, as suggested, whether it is truly substantive is certainly debatable.<sup>56</sup> Thus, the labeling of a post-death-publicity right as independent should not carry any estate tax significance, particularly where it is freely transferable during life.

In short, however one views the relationship between a wrongful death claim and a pre-death-lost-income claim, the argument that post-death publicity claims are substantively independent from their pre-death counterpart is not very compelling. And, indeed, there is no authority—other than in the wrongful-death context—

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And if the decedent had § 2041-type rights and they accrued pre-death, inclusion would result under the section even if the decedent lacked testamentary control. *See* Estate of Dietz v. Comm'r, 72 T.C.M. (CCH) 1058 (1996). If, for example, the decedent's publicity rights could be reached by creditors under state law, inclusion under § 2041 would be appropriate provided the rights were deemed to exist prior to death, even if the decedent lacked testamentary control.

54. In *Connecticut Bank*, the court emphasized that, under state law, a wrongful death claim cannot be possessed by anyone while still alive. *Connecticut Bank*, 465 F.2d at 763.

55. *See* Restatement (Third) of Property: Wills and Donative Transfers § 2.6, cmt. j.

56. *See* I.R.S. G.C.M. 38053 (indicating that wrongful death damages, concerning lost income for the post-death period, are not includible, with the IRS referencing the state law characterization of the claim as an "independent" one but also acknowledging that the claim is viewed as a "continuation of the rights possessed by the decedent during life").

suggesting that post-death claims that are subject to testamentary control can or should be excluded from the gross estate merely because state law characterizes the claim as independent from its pre-death counterpart. And it would, indeed, be surprising if post-death publicity rights that are subject to testamentary control could be excluded from the gross estate merely because state law characterizes them as independent from their pre-death counterpart.<sup>57</sup>

### III. ANCILLARY ESTATE TAX ISSUES

As the treatment of publicity rights transitions under state law, two ancillary issues could arise: 1) the effect of legislation that retroactively creates transferability; and 2) the effect of new choice-of-law principles. This part will briefly consider these two issues.

#### A. RETROACTIVITY

At the time Prince died, he was domiciled in Minnesota, which did not permit testamentary control over publicity rights.<sup>58</sup> After his death, legislation was apparently proposed that would have permitted testamentary control under Minnesota law.<sup>59</sup> Apparently, one of the primary reasons the bill failed was a concern about the estate tax implications.<sup>60</sup> What would have been the estate tax outcome for the Prince estate had the legislation been enacted on a retroactive basis i.e., applicable to the Prince estate even though he died before enactment?<sup>61</sup>

As suggested, § 2033 requires not only testamentary control but also pre-death rights.<sup>62</sup> To the extent that the right first accrues after the decedent's death, the section is inapplicable,<sup>63</sup> which is consistent with an essential aspect of the estate tax: If the right does not accrue until after death, the decedent cannot be viewed as having made a transfer. Put differently, until the enactment of the legislation, the hope that post-death publicity rights could prove to be enforceable through legislation is a mere expectancy—which is not includible in the gross estate.<sup>64</sup>

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57. See Madoff, *supra* note 6, at 808 (indicating that estate tax inclusion of publicity rights turns solely on the issue of testamentary control); Caron, *supra* note 4, at 95.

58. See Rothman, *supra* note 1, at 594.

59. See *id.*

60. See *id.*

61. In the litigation over publicity rights in the Marilyn Monroe estate, legislation enacted after her death permitted testamentary control on a retroactive basis. See *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007). Post-death legislation was similarly invoked in litigation involving the Jimi Hendrix estate. *Experience Hendrix, LLC v. Hendrixlicensing.com, Ltd.*, 766 F. Supp. 2d 1122, 1130 (W.D. Wash. 2011), *aff'd in part, rev'd in part, vacated in part*, 762 F.3d 829 (9th Cir. 2014).

62. See *supra* Part 1.A.

63. See *Estate of Barr v. Comm'r*, 40 T.C. 227 (1963).

64. See *id.* at 233 (“[It] was a mere expectancy that his widow would receive the payment [and] it is not includible as a part of his gross estate.”).



### B. CHOICE OF LAW

As a traditional matter, the transferability of post-death publicity rights is determined under the law of the decedent's domicile.<sup>65</sup> Thus, if the decedent was domiciled in a state that does not permit transferability, there could be no estate tax inclusion under the traditional approach. But under the New York bill, when a post-death act or event occurs in New York, New York law applies.<sup>66</sup>

Assume, for example, that the decedent was domiciled in a traditional state. While, at first blush, this would appear to preclude transferability and therefore estate-tax inclusion, the estate would nevertheless need to consider the possible application of New York law. For, to the extent an act or event were to occur in New York post-death, New York courts would apply its law and permit the claim to be enforced by the decedent's transferee. Even though the decedent was domiciled in a traditional state, the possibility that such a claim might arise would need to be taken into account in determining the gross estate—although the value of the claim might be very difficult to establish given the uncertainty, at the time of death, of an act or event occurring in New York.

### IV. BROADER ESTATE TAX REFORM

How should a post-death publicity right be treated for estate tax purposes? Whatever the state law label, the question should be whether wealth passes to the decedent's loved ones based on the efforts of the decedent.<sup>67</sup> Where that occurs by reason of the decedent's ability to control the claim by will, estate tax inclusion should be the result. Were it otherwise, inequity would occur. Compare an entrepreneur who has built a business and created goodwill having a value of \$30 million with a celebrity who has established a brand based on her name and recognition of an equal value. Why should the celebrity be treated more favorably than the entrepreneur? There would be no plausible justification for such discrimination.

Based on valuation and administrative convenience concerns, however, a different model might make sense.<sup>68</sup> To the extent that the publicity right is included in the estate, the beneficiary receives a basis in the asset equal to its value on the date of death.<sup>69</sup> The beneficiary is then entitled to amortize the basis—taking deductions against the income from exploiting the publicity right.<sup>70</sup> In a rough sense, the

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65. See, e.g., *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012) (applying traditional rule). See also *Experience Hendrix*, 766 F. Supp. 2d at 1131.

66. While the district court in *Experience Hendrix* held such a choice-of-law rule unconstitutional, 788 F. Supp. 2d at 1141–42, the Ninth Circuit reversed on this point. 762 F.3d at 835–37.

67. To the extent, however, that the claim is extinguished before death—or perhaps even posthumously by reason of a direction in the will or by the consent of the beneficiaries—publicity rights should not be included in the gross estate. See notes *supra* 28–33 and accompanying text.

68. For a discussion of the difficulties encountered in valuing publicity rights, see *Andrews v. United States*, 850 F. Supp. 1279 (E.D. Va 1994).

69. See 26 U.S.C.A. § 1014.

70. See 26 U.S.C.A. § 197; I.R.S. Priv. Ltr. Rul. 199949037 (Dec. 10, 1999) (permitting amortization of intangibles inherited by the taxpayer).

amortization prevents the income generated by the publicity right from being taxed under both the estate tax and the income tax. Given the difficulties in valuing the publicity right at the time of death and the possible lack of liquid assets with which to pay the tax, a model that permits an exclusion from the estate tax for the publicity right while requiring full inclusion of the proceeds from exploiting the publicity right to be included in income could be attractive. However, were this model adopted, equity would require that it not be made specific to publicity rights but rather be made available to entrepreneurs' goodwill and other similar assets, as well.<sup>71</sup>

## V. CONCLUSION

Making publicity rights transferable at death does not inevitably lead to coerced commercialization. To the extent that state law permits the rights to be extinguished during life—or to the extent that the Code is amended to recognize post-death destruction of the right by the beneficiaries or by a direction in the celebrity's will—forced commercialization will not occur. And once the specter of forced commercialization is eliminated, the question of transferability can be addressed on its own terms based on non-tax considerations. In addition, given the difficulties in valuing publicity rights, broader reform should be undertaken. Under current law, the *projected* value of the rights as measured on the date of death are subject to estate tax, whereas to a large extent no income tax is imposed on the *actual* proceeds received by the beneficiaries on account of the exploitation of the rights. If the projected value of the rights were excluded from the estate and *actual* proceeds were instead subject to the income tax, the system would be easier to administer and the risk of taxing estates on the value of rights that might well prove to be worth less than anticipated would be eliminated. Replacing the estate tax with an income tax on the proceeds actually received by the beneficiaries would therefore be a welcome change.

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71. Under an alternative approach, taxpayers could be given an election: To include the projected value of the rights in the estate or to instead include the actual proceeds from exploiting the rights in income.