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Dead Hand Control and Estate Tax Considerations



By
**Terence E.
Smolev**



And
**Christina
Jonathan**

BY CHRISTINA JONATHAN
AND TERENCE E. SMOLEV

The will of Pulitzer and Tony Award winning author and playwright Edward Albee was recently admitted to probate in the Suffolk County Surrogate's Court. This will directed his executors to destroy some of his works.

Albee passed away on Sept. 1, 2016 without a spouse, children or close relatives. His executors are accountant Arnold Toren and designer William Katz. As of this date, it appears that no one with legal authority (if any) has contested his last will and testament, which has been sparking controversial debates regarding these final wishes.

The specific directive appearing in the will instructs his executors to destroy any incomplete manuscripts, in any medium (electronic, writing or other) as well as all

CHRISTINA JONATHAN is a partner at the firm Berkman, Henoch, Peterson, Peddy & Fenchel. TERENCE E. SMOLEV is of counsel to the firm.



copies of same. Once a will is admitted to probate, the executors have an obligation to comply with the will's instructions. The problem is that courts generally do not examine a decedent's will to see if each provision has been fulfilled, absent someone contesting same, or if an accounting is required. Thus, Albee's executors can themselves

decide whether or not to honor his last wishes.

During Albee's life, he certainly possessed the right to destroy his property whenever he chose. Albee had elected to further exercise dead hand control, thereby controlling his property post mortem. The law generally allows certain control after death,

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limited by some policy reasons and violations of the rule against perpetuities.

There are only a handful of cases that address issues where executors had to destroy decedent's property. Other famous deceased artists, such as German Novelist Franz Kafka, had instructed that all his works be destroyed by his friend and literary agent. Luckily for the literary world, Kafka's friend did not follow his wishes. In addition, the will of Beastie Boys founder Adam Yauch prohibited any of his music to be used for advertising purposes.

There was at least one case from 1998 wherein a will contest arose to prevent an executor from demolishing a decedent's real property pursuant to an article in her will. *In Re Estate of Beck*, 177 Misc.2d 203. In *Beck*, Erie County Surrogate ruled that he was not going to substitute the interests of a quasi-public agency for that of decedent in a valid will, and specifically held:

The court's responsibility in overseeing the administration of a decedent's estate is rooted in the principle of implementing the decedent's testamentary plan as determined from the words used within the four corners of the will. That intent, where discernible, must be given effect unless contrary to law or public policy. Statutes

or public policy may limit the manner in which a testatrix may otherwise legally dispose of certain property.

Of course, there are cases taking different viewpoints from the Beck Court. As to Albee, with no one having objected to the will's validity or the instructions therein, it appears that there is no roadblock to prohibit the executors from following Albee's instructions.

In addition, there exists a strong possibility that Albee's estate will face future litigation should one of his unpublished works debut after his death. Whether the executors can seek court intervention to prohibit this release to the public

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raises issues of possession and whether Albee's will can bar a third party from finishing and/or releasing any of his unpublished works.

The executors of the Albee estate will also be subject to preparing and filing accurate estate tax returns, with the task of determining how to report the value of partially complete or fully complete manuscripts. As a general rule, 26 U.S. Code §2001 imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or

resident of the United States. This taxable estate includes all of the taxpayer's property at the time of death, less any applicable deductions. The executors may also elect alternate valuation, which generally allows the value to be determined six months after decedent's date of death, as opposed to the actual value at the date of death, pursuant to 26 U.S. Code §2032.

There are two issues that Albee's executors have to consider herein. First, what is the value of the manuscripts considering all of the relevant facts? Second, how does the destruction of the manuscripts affect the value of the gross estate so as to be in compliance with applicable Internal Revenue Law, Rules and Regulations?

Generally, fair market value is defined as "the price at which the property would exchange hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." 26 CFR 20.2031-1. The simplest way to determine the value of any property is obviously to obtain a certified appraisal report. There are actually several sophisticated appraisers who specifically value certain manuscripts and fine art-related documents.

Since Albee was a renowned playwright, the value of his manuscripts will possibly be worth significantly more now that the

artist has passed away. For example, playwright Eugene O'Neill provided written instructions that his play, "Long Day's Journey Into Night," not be made public until 25 years after his death. His wife disregarded these instructions and released it three years after his death. This was deemed to be his finest work. Albee was best known for his work "Who's Afraid of Virginia Woolf," which was turned into a drama starring Elizabeth Taylor and Richard Burton. Albee won the Pulitzer Prize three times, as well as two Tony Awards. Thus, like O'Neill, his unfinished works very well could contain his next masterpiece. In addition, Eva E. Subotnik, a St. John's University School of Law professor, correctly states that "there is something special about these kinds of assets—they're not just like a mansion or a fancy watch, but they're socially valuable, and that has to play into the calculus."

Unfortunately, Albee directed his executors to "treat the materials herein directed to be destroyed as strictly confidential and to ensure that such materials are not copied, made available for scholarly or critical review or made public in any way." If his executors are carrying out his wishes to the fullest extent, then it is worthless, since a willing buyer will pay zero for property that will be "destroyed" pursuant to

Albee's will. But then again, what happens from a tax point of view if Albee's works *appear* after his death?

Nevertheless, taxing authorities may still consider the value of some of Albee's manuscripts before they would be destroyed in an effort to increase the value of his taxable estate. The information made public for at least one manuscript is that a play entitled "Laying an Egg" was scheduled twice in the Signature Theater. This Off-Broadway nonprofit theater had the play "withdrawn by Albee, who said it wasn't ready." *Id.* Surely, some value can be calculated for this one piece about a middle-aged woman struggling to become pregnant. Thus, it appears that at least one of the unfinished manuscript's value may have to be reported on Albee's estate tax return, especially if there are copies of this piece already distributed.

Furthermore, the usual rule for taking a deductible loss on tax returns is that any damage, destruction or loss of property resulting from an identifiable event that is sudden, unexpected or unusual, i.e., a casualty loss, can be claimed. It can be argued that the destruction of the manuscripts can be considered an "unusual casualty loss." However, a willful act clearly disqualifies any deductions that could have otherwise

been claimed. So, ill-advisedly for Albee's estate, this destruction of the manuscript may now cost his estate additional taxes at no benefit to the estate whatsoever.

Perhaps Albee knew that the value of his unfinished works would be considered by the Internal Revenue Service as part of his gross estate, and therefore he strategically decided to destroy same. But more than likely, the artist simply wanted to retain dead hand control over his manuscripts, especially given his reputation for discriminating against actors while casting his plays. Moreover, he could have easily left the manuscripts to his Foundation, qualifying as a charitable deduction if he was concerned about the estate tax.

Meanwhile, the unfinished works of a great writer may never see the light of day. What a shame for the art-loving community and for historical, as well as theatrical, purposes.

BH

BERKMAN HENOCH

PETERSON PEDDY & FENCHEL, P.C.

100 Garden City Plaza, 3rd Floor

Garden City, New York 11530

Phone (516) 222-6200 Ext. 236