THE Hollywood REPORTER®

Nine things entertainment lawyers should know about probate

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Nov 6, 2007

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The Forbes.com annual list of the "Top-Earning Dead Celebrities" demonstrates year after year that fame is not so fleeting. Last year's list, topped by grunge rock pioneer Kurt Cobain -- followed by the King himself, Elvis Presley -- features 13 of the richest dead celebs, with earnings totaling $247 million. Earning power can survive and even increase after death. So what can an entertainment lawyer do to maximize those earnings while the celebrity is on this side of the grass?

1. Will or trust?

Celebrities seem to have a monopoly on dying intestate or with wills that are so inadequate they create partial intestacies. Bob Marley died without a will because his Rastafarian faith prohibited a belief in death, but that faith did not prevent a fight over his estate.

While the law provides for a division of assets at death, when a person dies intestate -- i.e., without a will -- the failure to specify one's intent simply invites conflict.

Of course, executing even the clearest will or trust will not always prevent litigation. But anyone with assets would be wise to establish a revocable trust and a pourover will. The sole beneficiary of the pourover will is the trust. It is called a pourover because any assets that were not transferred during life into the trust will "pour over" into the trust. The trust contains the provisions for distribution of the estate.

Make certain to transfer all assets to the trust so that the pourover will is a meaningless piece of paper at death. Why do you want the will to be meaningless? Because with a will comes probate. Probate, the process of court-supervised administration of a decedent's estate, is cumbersome and expensive and, significant particularly to celebrities, it is public. The decedent's assets must be inventoried in public filings in court, and the distribution of the estate is public information.

While there is no guarantee of avoiding court proceedings with trusts, trusts are not by law court-supervised. Trust documents are not disclosed to the court unless there are court proceedings that are initiated by the trustee or beneficiaries. The assets of the trust are private, and the actions of the trustees are between only the trustee and the beneficiaries. Trusts also can be advantageous because they can be structured to minimize the effects of estate taxes.

2. Death and taxes

The government wants to take nearly half of everything when your client dies. But entertainment executives, producers and other talent have available to them many tools to minimize the tax bite. For example, many clients have transferred motion picture rights into family-owned limited partnerships with their children as limited partners.

Given the speculative nature of the film industry, even a franchise like Disney's "Pirates of the Caribbean" will result in a low appraisal. When it hits big, a substantial amount of wealth will have been transferred, in most cases without paying any gift tax (or inheritance tax at death).

3. Name and likeness are descendible

The ability to control the exploitation of a celebrity's name, image, voice and likeness is firmly established in California and elsewhere, including the ability to prevent imitation (not simply the use of an actual photograph or sound recording) as established in well-known cases involving Vanna White and Tom Waits.

In 1972, California enacted its first right of publicity statute. Cal. Civil Code ? 3344. In 1985, in response to lobbying by Fred Astaire's widow following an adverse court ruling, the California Legislature enacted Civil Code ? 3344.1 establishing that the right of publicity is a property right that is descendible.

In other words, a celebrity can transfer her right of publicity to anyone she chooses during life or by testamentary instrument (will or trust). If she fails to make a will or trust disposing of her right of publicity at death, the statute mandates the manner in which the right of publicity is transferred at death. (For example, if there is a surviving spouse and one child, a 50% interest in the right of publicity passes to each of them.)

Currently in California, the right of publicity survives for 70 years after the death of the celebrity and then falls into the public domain.

While most wills and trusts have provisions broad enough to cover the right of publicity so that it will pass according to the terms of the residuary clause, most celebrities still do not include provisions that pertain specifically to their names, images and likenesses. This can lead to two problems.

First, it can create an ambiguity as to whether the celebrity effectively transferred her right of publicity by her testamentary document. Second, there often are multiple beneficiaries under the residuary clause (which disposes of the residue of the estate that has not been specifically gifted to expressly identified persons). Whenever a person essentially creates a partnership in an asset, particularly a lucrative asset like the right of publicity, there is the potential for conflict.

The beneficiaries of the right of publicity may have very different ideas about the exploitation of these rights. There are planning techniques for avoiding these problems.

3. Will bumping

Federal law pre-emption of state law becomes significant when a client owns copyrights.

So-called "will bumping" had greater significance before Dec. 31, 2005, when the last possible copyright protected under the Copyright Act of 1909 was in its first term and subject to renewal (28 years from Dec. 31, 1977; the Copyright Act of 1976 became effective for works created on and after Jan. 1, 1978). If the author of the work died before the end of the first term, the renewal term did not vest, and the author had no right to transfer ownership during the renewal term by will or trust. Any testamentary document that purported to do so was "bumped" (meaning it was ineffective).

Will bumping still has meaning even though the 1976 Act did away with the renewal system. Under the 1976 Act, the author of copyright or, if the author is deceased, her statutorily defined heirs, have "termination rights." They can recapture the copyright from a person to whom the copyright was transferred by contract. (It is not applicable to works made for hire or works transferred by will.)

For copyrights created under the 1909 Act, the 1976 Act provided for termination of transfers within a five-year window beginning 56 years after copyright in the work was originally secured. 17 U.S.C. ? 304(c). For copyrights created under the 1976 Act, the right to terminate transfers or assignments subsists 35 years after the transfer or assignment, or if the assignment includes the right of publication, 35 years from the date of publication or 40 years from the date the assignment is executed, whichever is earlier.

Again, there is a five-year window to effectuate the termination. 17 U.S.C. ? 203(a). Any attempt by will or trust to divest the "protected class" of termination rights is void; the will is bumped.

4. Community property and the forced election

Copyrights, like other property, are subject to California's community property laws. Marriage of Worth, 195 Cal.App.3d 768 (1987). Although no court has decided whether rights of publicity are subject to community property laws, it seems unlikely they would be. Property is community property in California if it is acquired during the marriage. Of course, a

person acquires her name (at least her given name), image, voice and likeness very early in life. She may not acquire her valuable persona until after she is married, but that is no different than any other property that increases in value during the marriage. As long as it was acquired before marriage, post-marital appreciation remains separate property.

But because there is no set law in this area, it may be wise to take advantage of a strategy approved by the California Supreme Court in Burch v. George, 7 Cal.4th 246 (1994): the forced election. The will or trust gives the surviving spouse a choice: She can accept the gift made to her under the will or trust and forego making any claims under community property laws, or she can pursue those claims, but she forfeits any gift provided under the will or trust.

5. No-contest clauses

The forced election is effective because the will or trust contains a "no-contest clause," a provision that conditions a gift on the beneficiary's acquiescence to the terms of the instrument. A beneficiary who violates the no-contest clause usually is disinherited. Thus, if the no-contest clause states that the beneficiary may not contest the validity of the trust or any of its terms or take action that seeks to impair the terms of the trust (the wording of a typical clause), a beneficiary who does take such action will be disinherited (unless the beneficiary successfully invalidates the entire instrument).

No-contest clauses can be extremely effective in preventing disgruntled beneficiaries from fighting over the estate. To be effective, however, the instrument must leave something to the beneficiary that is sufficient to deter a contest.

Some people find it difficult to leave a sizable gift to the family's black sheep in order to deter her from contesting. The client's advisors need to be able to explain that, in the long run, leaving a deterrent gift will be much less expensive and less troublesome to the client's loved ones. We represented Frank Sinatra, and it was his no-contest clause that kept his heirs at bay and kept it all out of court.

In addition, there are certain public policy limitations on the use of no-contest clauses. For example, the will cannot prevent a beneficiary from challenging the conduct of the executor. There also are efforts under way to persuade the state legislature to curtail the effectiveness of no-contest clauses even further.

However, they have been enforceable in California for more than 100 years, and although California and New York are in the minority of states that enforce such clauses, they are likely to remain powerful tools for discouraging litigation even if there are changes in the law.

6. Born out of wedlock

Celebrities tend to be prolific in all things, including having children out of wedlock. The law presumes that a decedent intends to provide for her heirs, but it may be impossible to obtain efficacious DNA testing if genetic material is not preserved from the decedent.

And even if the decedent's will or trust fails to make any provision for a child, the child is entitled to what she would receive had the decedent died intestate. The decedent can prevent this result and the fighting that ensues by a provision in the will or trust that very specifically indicates the decedent's clear intention to make no provision for any child not expressly identified in the will or trust, no matter when that child may be born (before or after the execution of the document).

7. Wives and paramours

Disputes often arise after death with spouses from whom the decedent was never divorced and with paramours who never became spouses. Under California Family Code ? 771, a man and woman who are "living separate and apart" terminate the rights of spouses to claim a community property right in property acquired after their separation.

The "living separate and apart" requirement is a term of art that finds its contours in numerous cases that struggle with its meaning. It is a highly fact-intensive inquiry for the courts, but one theme has emerged: Courts strive to find in favor of marital rights unless it appears clear that the ties have been severed.

Thus, even in cases in which one spouse has been living with another woman for many years but sends birthday cards to his wife and has dinner at the wife's home on occasion, courts con-

clude that the spouses were not "living separate and apart."

As for the lover or life partner, she may find herself without any protection at all. Unless the decedent provided for her by will or trust or other testamentary gift (joint tenancy deed, beneficiary of life insurance or retirement benefits, for example), she has no legal claim in the estate.

She often will assert palimony claims made famous by the California

Supreme Court's decision in Marvin v. Marvin, 18 Cal.3d 660 (1976). Palimony is an equitable claim that seeks to establish an oral or implied contract to provide for the disadvantaged partner or to share in earnings or assets accumulated during the relationship. The courts will only find for the plaintiff when there is a long and stable relationship, though there is no defining what that will mean in any given case.

But it is clear that courts only find merit in palimony cases when the relationship appears to be consistent with what society would ordinarily think of as a marriage.

The problems of spouses and paramours can be resolved by an effective use of the forced election -- that is, by providing for the spouse or lover in the estate plan and using a no-contest clause to deter by threat of inheritance the assertion of any claims against the estate.

8. The promise to make a will

Akin to the claim of palimony or of marital rights in property is a claim that the decedent promised to leave assets or some part of the estate to a particular person. Although the Probate Code provides that promises to make a will must be in writing, the exceptions swallow the rule.

Indeed, the court in equity will enforce a promise to make a will if the claimant can prove by clear and convincing evidence that such a promise was made and that she relied to her detriment on that promise. Juran v. Epstein, 23 Cal.App.4th 882 (1994).

The typical situation involves a lover who claims that she relied to her detriment on such a promise by giving up career opportunities or a friend or family member who provided services or took care of the decedent in reliance on such a promise. These claims are more difficult to prove because of the higher quantum of proof required, i.e., the clear and convincing evidence standard. However, the no-contest clause is again a lever against such claims.

9. Avoiding conservatorships

None of us enjoys talking with a client about issues concerning medical care or affairs should she become incapacitated. The problems in failing to do so, however, can be nightmarish. Unless the client has executed an advanced health care directive and either a power-of-attorney over asset management or a trust which holds all her assets, a family member or friend will have to petition the court to establish a conservatorship over her (for purposes of physical care) and our client's estate (to manage her affairs).

Conservatorships are cumbersome, expensive and frequently invite open warfare among the vultures who seek to establish rights in our client's estate. The standard for establishing a conservatorship is based on whether the client is capable of managing her affairs or resisting undue influence by others. There can be protracted, expensive litigation over whether the person needs a conservatorship. We can avoid this mess by executing the instruments mentioned above and appointing a person based on conditions we define to make medical decisions for the client and to handle her financial affairs. She can also specify what medical decisions she wants to be taken under certain circumstances.

Hopefully, this article helps those of us who advise celebrities and other entertainment executives, artists and performers to appreciate some of the important issues that can affect all of us without proper planning.

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