

The Estate Analyst®

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A Kafkaesque Estate

Also: Bracing for Impact; The 2011 Tax Uncuts

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If Franz Kafka were writing a short story about an estate, it would undoubtedly have featured his signature themes of autobiographic reflections, alienation, and betrayal while caught in the teeth of a pointless and irrational bureaucratic nightmare.

Example: You wake up and discover that you've become a monstrous insect. You find yourself being interrogated. You are on trial with your colleagues testifying

against you, yet you don't even know what you are being accused of. It is bleak, surreal, and goes downhill from there. Ahh, good times with Kafka.

***“I have the true feeling
of myself only when I am
unbearably unhappy.”***

—Franz Kafka

Little did Kafka realize that his actual estate was going to resemble one of his own novels. His unfinished work and private letters would be saved, scrutinized, modified, and published for more than 80 years with legal battles over ownership.

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The Last Wish

Dying of tuberculosis, Kafka wrote to his friend and literary executor, Max Brod: “Dearest Max, my last request: Everything I leave behind me ... in the way of diaries, manuscripts, letters (my own and others’), sketches, and so on, [is] to be burned unread.”

Needless to say, Brod ignored these instructions. Brod claims to have told Kafka that he’d ignore such a command, so his theory is that Kafka gave the instruction knowing that Brod would disregard it. Empowered by this rationalization, Brod published *The Castle*, *The Trial*, and *Amerika* after Kafka’s death. If the end justifies the means, then the fact that Kafka became one of the most influential novelists of the 20th century would support Brod’s decision, at least on artistic grounds.

Whether Kafka would have been happy about these developments is open to interpretation. The ownership of the physical manuscripts remains the subject of legal debate, even though more than 80 years have passed.

Infamous Literary Executors

As opposed to standard executors who administer estates, account for assets, maintain fiduciary duty, and report to the courts, a “literary executor” is to exercise some discretion over the publication, sale, and future financial exploitation of artistic creations and intellectual property rights.

Many literary executors are faithful to the art they protect, generate value for estates, and enrich our culture. But the wrong choice of literary executor can have spectacularly bad results. It is almost a cliché akin to “the butler did it” in a murder mystery: When artists and authors are betrayed after death...the culprit inevitably seems to be the “literary executor.”

Most infamous in this category would be Rufus Wilmot Griswold, the literary executor of Edgar Allan Poe. This “executor” was a character assassin who bore a personal grudge against Poe, insinuated himself into Poe’s affairs, published a defamatory obituary of Poe under a pseudonym, exploited Poe’s work for profit while falsely depicting Poe as a depraved drug addict, and even forged letters by Poe to back up his claim. Conclusion: Think twice before naming anyone named “Rufus” as your literary executor. In fact, just don’t do it.

Second place of notoriety would be that of Elisabeth Förster-Nietzsche, the younger sister of German philosopher Friedrich Nietzsche. Elisabeth had been married to Bernhard Förster, who founded Neuva Germania in Paraguay in 1887 to demonstrate German superiority but committed suicide in

1893. Elisabeth returned to Germany when her brother suffered a mental breakdown. After his death, she published her brother’s notes...but modified them to reflect her own anti-Semitism to support the Nazis. Ironically, Nietzsche is known for identifying the “will to power” as the driving force of humans (as opposed to Schopenhauer’s “will to live” theme), and Nietzsche’s own sister seized power over his writings.

Unfinished Works

Artists, composers, and authors often pass away leaving partially finished works, so executors have decisions to make about what to publish. Some works end up being treasured. A famous example is Franz Schubert’s *Unfinished Symphony*. Was it really unfinished? Scholars have debated this. Two movements were written for the Graz Musical Society and were left in the care of Anselm Huttenbrenner, who would not otherwise grace the pages of *The Estate Analyst* had he not kept the work a secret and then revealed it 37 years after Schubert’s death. In 1928, 100 years after Schubert’s death, the Columbia Graphophone Company held a competition to complete the score; about 100 contestants submitted versions to complete the work.

There are a number of other examples. In 1273, St. Thomas Aquinas had a mystical experience and ceased work on his *Summa Theologica*. Leonardo da Vinci designed *Il Gran Cavallo*, a horse statue meant to be 24 feet tall; however, the bronze needed to make it was diverted to make cannon balls, and construction of the horse was delayed by 500 years. Charles Dickens did not complete *The Mystery of Edwin Drood*, but the tale is widely read. Edmund Spenser intended *The Faerie Queene* to be 12 books, making it the longest epic poem in the English language but only completed 6 of the books. J.R.R. Tolkien worked on the *Silmarillion* for many years, and his son Christopher Tolkien assembled the work and published it posthumously.

Sir Edward Elgar is best known in the United States for *Pomp and Circumstance*, which is played at graduations from kindergarten through college from coast to coast. In 2003, Miles Hoffman of National Public Radio traced the genesis of this use back to 1905 when it was played when an honorary doctorate was bestowed upon Sir Edward at Yale. Soon Princeton, the University of Chicago, and Columbia followed suit; before long, it became the essential music for every graduation.

Pomp and Circumstance as America knows it is merely the trio section from a march that was originally used for the coronation of King Edward VII. It was one of six marches in Elgar’s Opus Number 39. Elgar wrote about 90 pieces that in-

cluded songs, concertos, and symphonies. He is held in sufficient esteem in England to have 65 roadways named after him and to have his likeness appear on English currency for a number of years. After the death of his wife in 1920, Elgar retired from public life. But in the last year of his life, he was coaxed into writing one more piece. Famed playwright George Bernard Shaw and conductor Ronald Landon persuaded the BBC to commission an Elgar Symphony. Elgar left 130 pages of manuscript. Before dying in 1934, Elgar left contradictory instructions, saying at one point, "Don't let them tinker with it!" But, at another point, he also said that perhaps someone else would come along and complete it "or write a better one." In 1997, composer Anthony Payne "elaborated" on Elgar's sketches for the Third Symphony and produced a completed score.

In 2008, it was revealed that the last unfinished work of Vladimir Nabokov, consisting of 138 index cards of notes, was being held in a Swiss bank vault while his 73-year-old son deliberated on whether to honor his father's request to burn it. Nabokov died in 1977, and the unfinished work was locked away.

Writing in *Slate*, Ron Rosenbaum weighed in with his own mixed feelings "to burn or not to burn." Law Professor Jon Siegel commented in a 2008 blog entitled "Literary Dilemma" that "[I]f...the reason Nabokov didn't want this manuscript published was his feeling that it wasn't up to snuff, I say snuff it." (See: <http://jsiegel.blogspot.com/2008/01/literary-dilemma.html>.)

Then, in 2009, Nabokov's unfinished work, *The Original of Laura*, was published against his wishes. The reviews, summarized in *Wikipedia*, ranged from "nuclear accident" to "a generous gift to readers." The original manuscript was expected to sell at auction for \$600,000; however, when bidding stopped at \$280,000 in an auction in December 2009, the sale was abandoned. The book was published (complete with photos of the index cards and perforations so that the reader can tear them out and rearrange them), and *Playboy* magazine purchased rights to publish serial excerpts of the book. Some feel that Nabokov, a fastidious perfectionist, would not have approved of an unfinished work being published.

A Kafkaesque Epilogue

As described above, a struggle over unpublished work isn't unique to Kafka, but the Kafka estate has been especially convoluted. It wasn't just Max Brod who ignored Franz Kafka's last request for privacy and the destruction of his letters and unpublished work. Everyone associated with Kafka has ignored his requests. It is as if these papers put a spell over anyone who possesses them. When it comes to valuable papers of artists, there seems to be a 100% failure rate for following instructions to destroy them.

Kafka's lover, Dora Diamant, did not destroy correspondence from him as requested. She had 20 of his notebooks and 33 of his letters that were confiscated by the Gestapo in 1933. Researchers are still trying to track these down. The Kafka Project has located certain items and released them but is now accused by other researchers of covering up documents, such as some salacious material that Kafka might have subscribed to. But the story gets even more Kafkaesque.

Even after publishing the vast majority of Kafka's unfinished work, Max Brod retained the remaining bits and pieces of Kafka's writing. He had smuggled them to Israel in 1938. Brod left his papers (including the Kafka papers) to his secretary/lover, Esther Hoffe, with the instruction that she give them to an academic institution. Just as Brod did not follow Kafka's instruction, Hoffe ignored Brod and retained those items after Brod's death, except for the manuscript of *The Trial*, which was auctioned at Sotheby's in 1991 for \$1.8 million.

The items remained in Hoffe's Tel Aviv apartment until her death at the age of 101. Franz Kafka died in 1924. Max Brod died in 1968. Esther Hoffe died in Tel Aviv in 2007 and left the remaining papers to her two daughters. But Israel's National Library contends that it is the rightful owner under Brod's will. The Hoffe heirs claim that their mother received the papers as a gift and that she had the discretion to bequeath the papers to institutions of her choice or not at all.

In 2010, under orders from an Israeli court, experts opened 10 safe-deposit boxes of papers in Israel and Switzerland to determine just what papers there are and who actually owns them. Life has imitated art long enough; even Kafka's estate should not continue in such a Kafkaesque manner.

Post Modern IP Estates

We live in a new world where it is rare to have a single handwritten letter that gets saved in a vault for 80 years. Modern texting, tweets, blog postings, and e-mails get circulated in digital form; once they hit the Internet, they are beyond the control of the author. Instead of ink and paper in a vault, information has become digital and can be posted online in the blink of an eye.

This new world also has a different afterlife for intellectual property rights. Copyrights and trademarks have extensive periods of value that survive the author's life, and the connected Internet-based society supplies a vast market for every type of art, music, writing, or idea.

Several basic precepts should govern those who own intellectual properties, in light of the lessons of Kafka and other famous artists and these current conditions:

Treat the Internet postings, e-mails, and text messages as though they were being distributed to everyone in a

public stadium. These communications will invade privacy, dilute intellectual property values, and allow otherwise protected creations to enter the public domain.

Plan for the ownership and exploitation of works during life using trusts, LLCs, FLPs, or other entities. Establish a tax-efficient management model during life, and test-drive it.

Don't select a literary executor named Rufus. Don't rely on any one literary executor. Create an oversight

system with multiple trustees. Plan for the long-term supervision of intellectual property.

Be clear with instructions. Establish crystal-clear criteria for which letters, e-mails, doodles, recordings, notes, and manuscripts are published or made available to scholars.

Review the lessons of the Kafka estate, the Nabokov estate, and those of other artists, and learn from the problems that have affected others.

Bracing For Impact: The 2011 Tax Uncuts

Ancient Mayan prophecies indicate a transformative event occurring at the end of the 5,125-year "long count" calendar by 2012. But there is another transformative event that is scheduled for arrival somewhat sooner. Behold and beware: Ancient CPAs and tax attorneys foretell of a perilous time at the End of Days...otherwise known colloquially as the expiration of the Bush tax cuts on January 1, 2011.

The 120-month-long count leading to the expiration of tax laws adds a level of Congressional mysticism to tax events that ordinary tax planners aren't prepared for. The reason for this expiration event—and the resulting problems—is quite ironic. Congress has been so dysfunctional for so long that it has adopted rules to force itself to be more responsible (the "Byrd Rule").

Here's one aspect of the rule: A provision that is added to a budget reconciliation is considered extraneous if it raises the deficit beyond the period of time covered by the reconciliation and can be removed from the reconciliation process. Congress made up this rule to control itself. Yet Congress also found a way to outsmart itself with a sunset provision, a rule that will expire. This, of course, has defeated the purpose of responsible planning.

Thus, 10 years of uncertainty, leading up to billionaire estates arbitrarily escaping estate taxes in 2010 and concluding with a round-trip back to square one, resulted from Congress trying to be more responsible and then using a loophole to trick itself.

As a result of these rules, and as things stand now, the Economic Growth and Tax Relief Reconciliation Act of 2001, and all the tax cuts contained therein, is going to expire in 2011. The estate tax repeal will automatically end. On January 1, 2011, barring a) a responsible act on the part of Congress or b) a realignment of planets and sun flares that reverse the geomagnetic polarity of Earth, the estate tax will revert to 2001 levels with a \$1-million exemption amount, 55% top estate tax

rate, and a stepped-up basis for appreciated assets held at death. Income tax rates will also increase across the board, along with taxes on capital gains.

The impact of all of this creates bizarre and unpredictable tax laws that no Shaman could anticipate—and not just for the estate tax. Options are wide open.

Among the possible outcomes are:

1) Automatic reversion to 2001 levels of taxation by default if Congress fails to take action. This is the leading contender.

2) Keeping the 2010 repealed estate tax and 2010 levels for other taxes as well. Very little chance of this. Would require congressional action and a large level of bipartisanship.

3) Reverting to 2009 levels just for the estate tax and addressing other tax cuts in some other manner. A slight chance of this...but also not likely. The bigger political question of the expiring income tax cuts is driving the process.

4) A change that puts the estate tax in a new place with a top rate of 35% and an exemption at \$5 million that is tied to inflation. This has been suggested by a pair of Senators and resembles other proposals from 2009. There may be bipartisan support for this, but again, the income tax aspects of the plan could delay implementation. A key factor of how capital gains are treated at death remains to be seen.

Bold Prediction: The estate tax returns with a top rate keyed to the income tax rates, which will be 38% and an exemption level of \$3.5 million tied to inflation. Stepped-up basis returns but not for the estates that avoided estate taxes during 2010. Bush tax cuts expire for the higher levels of earners, but capital gains taxes remain at lower levels. The estate and gift tax systems then get reunited. This is just one hypothesis that is as good as any. Unfortunately, uncertainty is going to continue until Congress takes action.