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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2114

Date: 09-Jul-13

From: Steve Leimberg's Estate Planning Newsletter

Subject: **Bruce Steiner: Lessons from James Gandolfini's Will**

"Estate planners can learn some lessons from James Gandolfini's will. For example, in his Will, he recites that 'I have in mind my beloved son, Michael Gandolfini, but I am not providing for him other than as set forth in this my Last Will and Testament because I have made other provisions for him.'"

An affidavit filed with the court asking that no guardian be appointed for the son says that in connection with Mr. Gandolfini's divorce from Marcella, he set up an insurance trust with \$7 million of insurance on his life.

Life insurance is an inexpensive way to protect against the risk of a premature death. By putting the policy in a trust, the proceeds will not be subject to estate tax in Mr. Gandolfini's estate."

Now, **Bruce Steiner** provides members with a number of fascinating observations on the planning issues raised in [James Gandolfini's Will](#).

Bruce D. Steiner, of the New York City law firm of **Kleinberg, Kaplan, Wolff & Cohen, P.C.**, and a member of the New York, New Jersey and Florida Bars, is a long time LISI commentator team member and frequent contributor to Estate Planning, Trusts & Estates and other major tax and estate planning publications. He is on the editorial advisory board of Trusts & Estates, and is a popular seminar presenter at continuing education seminars and for Estate Planning Councils throughout the country. He was named a New York Super Lawyer in 2010, 2011 and 2012.

Bruce has been quoted in various publications including *Forbes*, the *New York Times*, the *Wall Street Journal*, the *Daily Tax Report*, *Lawyers Weekly*, *Bloomberg's Wealth Manager*, *Financial Planning*, *Kiplinger's Retirement Report*, *Medical Economics*, *Newsday*, the *New York Post*, the *Naples Daily News*, *Individual Investor*, *TheStreet.com*, and Dow Jones (formerly CBS) Market Watch.

Here is his commentary:

EXECUTIVE SUMMARY:

Estate planners can learn some lessons from James Gandolfini's will.

FACTS:

James Gandolfini, the actor who played Tony Soprano, died on June 19, 2013, while on vacation in Italy. He was 51 years old, and lived in Manhattan.

Mr. Gandolfini was divorced from his first wife, Marcella Wudarsky

Gandolfini, in 2002. He had a son, Michael, from his first marriage. Michael was born in 2000, and is 13 years old.

Mr. Gandolfini married his second wife, Deborah Lin, a former model, in 2008. Deborah is about 45 years old. He and Deborah had a daughter, Liliana, who was born on October 10, 2012, and is less than a year old.

His Will dated December 19, 2012, provides as follows:

- * He left his clothing and jewelry to his son.
- * He left his other tangibles to his wife.
- * He left \$200,000 to his assistant, Paulette Flynn Bourne, \$50,000 to his friend Fatima Bae, \$500,000 to each of his nieces, Laura Antonacci and Jenna Antonacci, \$100,000 to his godson, Robert Parish, \$200,000 to his friend Thomas Richardson, and \$50,000 to his friend Doug Katz, with the hope that he will use it for the benefit of his son.
- * He gave the trust he created for his son the option to purchase his New York condominium apartment and parking space at its fair market value.
- * He left his home in Italy in trust for his children until they both reach age 25.
- * He left his residuary estate 30% to his sister Leta Gandolfini, 30% to his sister Johanna Antonacci, 20% to his wife, and 20% to his daughter, subject to a trust to age 21 in the case of his daughter.
- * He named his wife, his sister Leta, and his attorney, Roger Haber, as executors and trustees.
- * If the mother of any minor child predeceased him, he named his sister Leta as guardian.
- * He directed that all estate or other death taxes be paid out of his residuary estate, without apportionment.

COMMENT:

There are several lessons that estate planners can learn from Mr. Gandolfini's Will.

The Importance of Planning

Mr. Gandolfini was only 51 years old when he died. While most people live substantially longer, he had a Will in place to provide for the possibility that he might die prematurely.

Provisions for Deborah

Mr. Gandolfini left 20% of his residuary estate to Deborah. He also said "I have also made other provisions for Deborah Lin and therefore, I am not making any further provisions for her under this, my Last Will and Testament."

We do not know the nature and extent of the other provisions he made for Deborah. He may have named her the beneficiary of his life insurance or retirement benefits, or he may have had joint accounts with her. She may have been a discretionary beneficiary of trusts established during lifetime.

He might have provided for Deborah in a QTIP trust rather than outright. This would have protected Deborah's share against potential creditors, as well as future spouses if she remarried.

He might have added some or all of Liliana's share to Deborah's share and left it in a QTIP trust for Deborah. This would have given Deborah the opportunity to do her own estate planning. She could make gifts to or in trust for Liliana.

The trust could be a grantor trust, so that Deborah would pay the income tax on the trust's income and gains, thereby shifting additional wealth out of her estate. She could lend money or sell assets to the trust, taking advantage of the current low interest rates. She could create GRATs. While Liliana could not be a beneficiary of the QTIP trust, the trustees could consider Deborah's generosity to Liliana in deciding on discretionary distributions to Deborah.

Provision for Sisters

Mr. Gandolfini could have provided for his sisters in separate trusts for their benefit rather than outright. This would have kept their inheritances out of their estates, and protected against their creditors and spouses. Since his sisters are in the same generation, there wouldn't have been any generation-skipping transfer (GST) tax upon his sister's deaths.

Each sister could effectively control her own trust. In other words, each sister could be a trustee of her trust, and could have the power to remove and replace her co-trustee (provided the replacement trustee is not a close relative or subordinate employee). Each sister could have the broadest possible special power of appointment over her trust, so that she could appoint (give or leave) the trust assets to anyone she wants (other than herself or her estate or creditors), either during her lifetime or by her Will.

New York Condominium Apartment and Parking Space

Mr. Gandolfini gave his son's trust the option to purchase his New York condominium apartment and parking space at fair market value. This tells us that he created a trust for his son during lifetime.

Since the apartment is a condominium, the deed is a matter of public record. The public records show that Mr. Gandolfini purchased the apartment and the parking space on June 20, 2001, for \$1,975,000. The value is probably substantially higher now.

Home in Italy

Presumably Mr. Gandolfini's attorneys consulted with Italian counsel as to Italian law.

If it wouldn't create any problems under Italian law, Mr. Gandolfini might have continued the trust beyond age 25. That would keep the home out of his children's estates, and protect it against their creditors and spouses. The children could control the trust upon reaching age 25.

While it's unlikely that a child will die before age 25, Mr. Gandolfini's Will doesn't say what happens to a child's share if he or she dies before age 25. He should have specified whether a deceased child's share goes to the deceased child's issue, or to the surviving child.

Provision for Liliana

Liliana receives her 20% share of the residuary estate outright upon reaching age 21. That could be a great deal of money for a child to receive, or even to control, at age 21.

As set forth above, Mr. Gandolfini could have combined some or all of Liliana's share with Deborah's share and left it in a QTIP trust. In that way, it

would have qualified for the marital deduction, and Deborah would have had an opportunity to do her own estate planning for Liliana's benefit.

Notwithstanding the above, to the extent Mr. Gandolfini wanted to provide for Liliana at his death, he could have provided for her in a lifetime trust rather than in a trust to age 21. In that way, Liliana's inheritance would not be included in her estate, and it would be protected from her creditors and spouses.

He could have given Liliana control over the trust at age 21, or some other age. In other words, at the point he wanted Liliana to have control, he could have given her the right to become a trustee, and the power to remove and replace her co-trustee (provided the replacement trustee is not a close relative or subordinate employee). Liliana could have the broadest special power of appointment, so she could appoint (give or leave) the trust assets to anyone she wanted (except herself or her estate or creditors).

Elective Share

The New York elective share is generally one-third of the estate, including the value of most nonprobate assets. We don't know if Deborah received any nonprobate assets, or if there was a prenuptial agreement. If not, then she might claim her elective share.

Other Planning

In his Will, he recites that "I have in mind my beloved son, Michael Gandolfini, but I am not providing for him other than as set forth in this my Last Will and Testament because I have made other provisions for him."

An affidavit filed with the court asking that no guardian be appointed for the son says that in connection with Mr. Gandolfini's divorce from Marcella, he set up an insurance trust with \$7 million of insurance on his life. That will give the trust the money to exercise the option to purchase the New York apartment and parking space.

Life insurance is an inexpensive way to protect against the risk of a premature death. By putting the policy in a trust, the proceeds will not be subject to estate tax in Mr. Gandolfini's estate.

Since he signed his Will on December 19, 2012, just before the estate and gift tax exempt amount was scheduled to revert to \$1 million, he may have made substantial gifts and done other estate planning at the same time. However, we do not know the extent of any other planning he may have done.

Tax Clause

Mr. Gandolfini directed that all estate and other death taxes be paid out of his residuary estate, without apportionment.

If Deborah's share pays its share of the estate tax, there will be a circular calculation, and more estate tax in Mr. Gandolfini's estate than if he had directed that the estate tax be paid out of the shares of the residuary estate passing to the other beneficiaries. However, if there is no change in the assets or the value of the assets, or in the tax rate, the total tax in both estates will be the same.

For example, suppose Mr. Gandolfini's residuary estate is \$50 million. If he had directed that the estate tax be paid out of the other recipients' shares of his residuary estate, Deborah would receive \$10 million, or 20% of the residuary estate, free of estate taxes (though includible in her estate and subject to estate tax at her death). At a 50% combined Federal and New York estate tax rate, the other residuary beneficiaries would receive \$40 million

before estate taxes, or \$20 million after estate taxes. The estate taxes would have been \$20 million.

By charging the estate tax against the residuary estate, the tax is \$22,222,222. The residuary estate after taxes is \$27,777,778. Deborah's 20% share is \$5,555,556. The taxable estate is \$44,444,444 (\$50 million less Deborah's share, \$5,555,556). The other residuary beneficiaries receive \$22,222,222 after estate taxes.

To avoid any doubt, if this is what Mr. Gandolfini intended, he could have made this clear. For example, he could have said that he understands that this

will result in a circular calculation, and a higher estate tax than if the estate tax were payable out of the shares of the residuary estate passing to the beneficiaries other than Deborah.

If the assets and their values remain the same, and the tax rates remain the same, the total tax in both estates will be the same under either approach. If Deborah's share is subject to estate tax, so that she receives \$5,555,556, the estate tax on this amount in her estate will be \$2,777,778. The total estate tax in both estates (ignoring Deborah's other assets and her exempt amount) will be \$25 million, including the \$22,222,222 estate tax in Mr. Gandolfini's estate.

If Deborah's share is free of estate tax, she will receive \$10 million. The estate tax on this amount in her estate will be \$5 million. The total estate tax in both estates (ignoring Deborah's other assets and her exempt amount) will be \$25 million, including \$20 million in Mr. Gandolfini's estate.

The above does not take into account the pre-residuary bequests, any assets passing outside the Will, or the exempt amounts.

Despite Some Comments, the Will Was Not a Disaster

At least one news story suggests that Mr. Gandolfini's Will was a disaster because there will be a substantial estate tax on the 80% of his estate that he left to his sisters and Liliana, and because Deborah's 20% share is after estate taxes. The story suggests that the sisters and Liliana could renounce (disclaim) their shares in exchange for payments later on down the road.

As previously noted, Mr. Gandolfini could have added his daughter's share to his wife's share (since his daughter was a child of his marriage to Deborah), so as to give Deborah a chance to do estate planning for Liliana's benefit. He also could have provided for his sisters in trust rather than outright, to keep their shares out of their estates.

However, Mr. Gandolfini could not have expected Deborah to do estate planning for his sisters' benefit.

Nor could his sisters and Liliana disclaim in exchange for payments later on. In order to be effective for tax purposes, there can't be any consideration for a disclaimer.

Since Liliana is a minor, she has until nine months after reaching age 21 to disclaim. However, if she disclaims, the disclaimed property will be divided among Mr. Gandolfini's sisters and Deborah. Nevertheless, Mr. Gandolfini's executors might want to consider filing a protective estate tax refund claim in case Liliana disclaims upon reaching majority.

A guardian for Liliana could also disclaim, with court approval. However, in this case, it's unlikely that a court would approve a disclaimer on Liliana's behalf.

The story describes the estate tax burden as enormous. The Federal estate tax is 40%. The marital deduction postpones the estate tax, but doesn't eliminate it unless the spouse uses the money or does estate planning of her own. Transfers to others are subject to estate tax. That's not a disaster.

Concluding Observation

Estate planners can learn valuable lessons from James Gandolfini's Will.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Bruce Steiner

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CITES:

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