**Date:** 25-Aug-14
**From:** Steve Leimberg's Estate Planning Newsletter
**Subject:** **Bruce Steiner & Lessons from Robin Williams' Insurance Trusts**

**Bruce Steiner** previously commented on the lessons planners can learn from James Gandolfini and Philip Seymour Hoffman's wills. See Estate Planning Newsletter #2114 and Estate Planning Newsletter #2206. Now Bruce returns with commentary about the lessons planners can learn from Robin Williams' insurance trusts.

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Here is his commentary:

## EXECUTIVE SUMMARY:

Planners can learn some valuable lessons from Robin Williams' insurance trusts.

## FACTS:

Robin Williams, the actor and comedian, died on August 11, 2014. He was 63 years old, and lived in California.

Mr. Williams presumably left a large estate. The value of his estate has been reported to be $35 million. His winery in Napa was listed for $29.9

million. He also had a home in Tiburon that he had purchased for over $4 million in 2008.

He was survived by his third wife, Susan Schneider, and three adult children, Zachary, Zelda and Cody. Zachary, who was born in 1983, was from his first marriage to Valerie Velardi, and Zelda, who was born in 1989, and Cody, who was born in 1991, were from his second marriage to Marsha Garces.

Mr. Williams created two insurance trusts, one in 1990 and one in 2009.

His 1990 insurance trust provides as follows:

* Mr. Williams can specify as to each contribution that one or more of the current income beneficiaries will have a *Crummey* withdrawal power, and how much of the contributions each such person can withdraw. The powers lapse 30 days after notice.

* During Mr. Williams' lifetime, the trustees shall pay to Zachary and his issue the amounts necessary to provide for their support, education and medical care, taking into account their other income and resources. In addition, the trustees have discretion to distribute the income and principal to or for the benefit of Zachary and his issue. Any undistributed income is added to principal. However, no amounts can be paid to anyone other than his first wife, Valerie, or Zachary until certain support obligations under the marital settlement agreement have been satisfied.

* After Mr. Williams' death, until Zachary reaches age 25, the trustee shall pay or apply the amounts necessary for Zachary's health, support, maintenance and education, taking into consideration any other income or resources available. Upon reaching age 25, Zachary receives all of the income of the trust, and the trustee shall pay or apply out of principal the amounts necessary for his health, support, maintenance and education, taking into account any other income or resources available.

* Zachary has a special power of appointment. Before age 30, he has a testamentary special power of appointment, exercisable in favor of his issue and their spouses, and his spouse if living with him at his death. After age 30, he has a power of appointment, exercisable both

during lifetime and at death, in favor of anyone other than himself or his estate or creditors. In default of exercise, the balance goes to Zachary's issue, in further trust upon the same terms.

∗ If there would otherwise be a GST tax, then Zachary instead has a general power of appointment at his death.

∗ Stephen Tenenbaum and Gerald Margolis were the initial trustees. Each trustee has the power to name his or her successor. Zachary can become a trustee of his trust upon reaching age 30 (or when the trust is created, if later).

Mr. Williams originally transferred two insurance policies to the trust. The trust agreement does not specify the amount of the insurance coverage, either initially or at his death.

In 2000, Stephen Tenenbaum appointed Joel Faden as his successor, and resigned, effective upon Joel Faden's acceptance; and Joel Faden accepted.

In 2008, Gerald Margolis died without having named a successor trustee. This left Joel Faden as the sole trustee.

In 2010, Joel Faden filed a petition with the court in California requesting the appointment of Stephen Tenenbaum as co-trustee, with Mathew Rosengart as Mr. Tenenbaum's successor. He also asked that Cynthia Margolis be his own successor, that the last of Stephen Tenenbaum and Mathew Rosengart be permitted to name his or her successor, and that the last of himself and Cynthia Margolis be permitted to name his or her successor.

In 2011, while the petition was pending, Stephen Tenenbaum withdrew his consent to serve. Joel Faden then requested that Mathew Rosengart be appointed as co-trustee, with Arnold Kassoy as Mr. Rosengart's successor, and the last of Mathew Rosengart and Arnold Kassoy being permitted to name his successor.

The court granted the petition, as amended.

The provisions of the 2009 insurance trust were as follows:

∗ Each child has a *Crummey* power, up to the annual exclusion amount. The power lapses 30 days after notice. The child has a

special power of appointment over lapsed amounts in excess of the annual exclusion.

* The trustee must pay the insurance premiums out of principal (after any exercise of the *Crummey* powers), but cannot use income to pay insurance premiums.

* During Mr. Williams' lifetime, the trustee can distribute the income and the remaining principal to or for the benefit of his children, equally or unequally.

* Upon his death, Zelda and Cody each get (in trust) an amount equal to the value of Zachary's 1990 insurance trust. The balance is then divided among the children equally, in separate trusts for their benefit.

* Until the child reaches age 21, the trustee shall pay or apply the amount necessary to provide for the child's health, education, support and maintenance. After age 21, the child receives all of the income of the trust. The trustee shall also distribute principal if necessary for the child's health, education, support and maintenance, considering other income and resources. The child receives the principal of the trust at ages 21, 25 and 30.

* The child has a testamentary general power of appointment.

* Joel Faden was the initial trustee. Each trustee has the power to name his or her successor. However, no one related or subordinate to Mr. Williams can be a trustee.

## COMMENT:

There are several lessons that estate planners can learn from Mr. Williams' insurance trusts.

Provisions for Additional and Successor Trustees

Trusts often last for a long time. Trustees die or retire. New trustees need to be appointed.

These trusts let each trustee name a successor. However, there are additional provisions that could have been included.

∗ Mr. Williams could have retained the power to name successor trustees.

∗ In 2009, Mr. Williams could have retained the power to name additional trustees, so long as they were not related or subordinate to him.

∗ In 2009, Mr. Williams could have retained the power to remove and replace the trustees, provided the replacement trustees were not related or subordinate to him.

∗ The last acting trustee could have been given the power to add a co-trustee.

∗ The trustees, acting either unanimously or by majority vote, could have been given the power to add additional trustees.

Any of these provisions might have eliminated the need to go to court to add a co-trustee.

Grantor Trust Status

Most insurance trusts are grantor trusts.

A trust is a grantor trust if the income can be used to pay insurance premiums on the life of the grantor or the grantor's spouse but without the consent of an adverse party, or in the discretion of the grantor or a nonadverse party.

In addition, a trust is generally a grantor trust if the income or principal is subject to a power of disposition exercisable by the grantor or a nonadverse party, without the approval or consent of an adverse party. However, there is an exception if no more than half of the trustees holding the power to make distributions are related or subordinate to the grantor.

The 2009 trust was careful to avoid grantor trust status. The trustees are prohibited from using the income to pay the insurance premiums. Also, the trustees had to be persons not related or subordinate to Mr. Williams.

Grantor trust status usually has little or no significance for an insurance trust. If the only assets of the trust are the insurance policies, or the insurance policies and a small amount of cash to pay the premiums, the trust will have little or no income.

However, sometimes an insurance trust can have substantial income. An insurance trust may cash in or sell a policy, and reinvest the proceeds. It may have other assets so it can pay premiums without relying on future contributions. The grantor might make a large contribution to the trust, so that the future investment income and gains can be used to pay the insurance premiums. Or the trust could be the remainder beneficiary of a GRAT.

If the trust has income, grantor trust status is often beneficial. By paying the tax on the trust's income and gains, the grantor is effectively shifting additional wealth out of his or her estate, free of transfer tax. However, sometimes the grantor is more interested in avoiding state income tax.

In the case of the 2009 trust, the trustee was Joel Faden, a resident of New York. New York treats a trust as a resident trust if the grantor resides in New York. Since Mr. Williams resided in California, the trust is not a New York resident trust. California treats a trust as a resident trust if the trustees or the noncontingent beneficiaries reside in California. Since Mr. Faden resided in New York, and (ignoring the *Crummey* withdrawal powers) the beneficiaries' interests were contingent during Mr. Williams' lifetime, the trust would not have paid state income tax in either New York or California absent any New York or California source income or any distributions to California resident beneficiaries. However, if a California resident becomes a trustee, the trust would become subject to California income tax on a portion of its income.

Another reason for avoiding grantor trust status might have been to insulate Mr. Williams from personal liability if the trust financed the premiums and had debt cancellation income if it could not pay off the loan.

Crummey Powers

The trusts have *Crummey* withdrawal powers, intended to qualify the contributions for the gift tax annual exclusion.

In the 1990 trust, Mr. Williams can specify as to each contribution that one or more of the current income beneficiaries will have a *Crummey* withdrawal

power, and how much of the contributions each such person can withdraw. The powers lapse 30 days after notice.

If a *Crummey* power lapses to the extent of more than the greater of $5,000 or 5% of the value of the trust each year, the excess will be a gift by the beneficiary, or will be included in the beneficiary's estate. So long as the insurance premiums were less than $5,000 multiplied by the number of beneficiaries holding *Crummey* powers, this was not a concern. In any event, before 1982, the gift tax annual exclusion was only $3,000 ($6,000 for a husband and wife combined if they elected gift-splitting), so it was not possible to obtain annual exclusions for more than $6,000 per beneficiary in any event.

In 1982, the annual exclusion was increased from $3,000 to $10,000. At the same time, insurance policies were more likely to have larger premiums than before. To take advantage of the increase in the annual exclusion, the technique of a hanging *Crummey* power was developed. A hanging *Crummey* power lapses only to the extent of the greater of $5,000 or 5% of the value of the trust each year. In the early years of the trust, the unlapsed *Crummey* powers will increase. However, at some point (after the insured's death in the case of an insurance trust), the trust will be large enough that the unlapsed *Crummey* powers will lapse at a rapid rate.

However, while hanging *Crummey* powers were coming into use by 1990, they were not universally used at that time. In the case of the 1990 trust, since Mr. Williams intended for the trust to be subject to estate tax rather than GST tax, it was not necessary to use a hanging *Crummey* power.

In the 2009 trust, each child has a *Crummey* power over a pro rata portion of the contributions, up to the amount of the gift tax annual exclusion. The powers lapse 30 days after notice. To avoid a taxable lapse, if a child predeceased Mr. Williams, he or she would have a special power of appointment over the amounts that he or she could have but did not withdraw.

Generation-Skipping Transfer Tax Issues

Whether to allocate GST exemption to an insurance trust must be analyzed on a case by case basis. In the case of a cash value policy, taxpayers who do not plan to make substantial other gifts during lifetime will often allocate GST exemption to the insurance trust since the death benefit will usually exceed the premiums paid. However, taxpayers who plan to make substantial other gifts

during lifetime may prefer to allocate their GST exemption to other transfers. In the case of a term policy, it may be possible to fully exempt the trust by allocating GST exemption to the last premium if the insured dies during the term of the policy.

Prior to 2001, there was no default allocation of GST exemption. Beginning in 2001, there is often a default allocation to trusts that could have a generation-skipping transfer. However, there are some exceptions to the default allocation rules. Since it is often difficult to determine whether the default allocation rules apply to insurance trusts, it is generally advisable to file a gift tax return and elect that the default allocation rules will or will not apply.

Since Zachary receives all of the income of his 1990 trust after age 25, the 1990 trust might not be the best place to allocate GST exemption. Accordingly, the 1990 trust provides that at Zachary's death, to the extent there would otherwise be a GST tax payable, then he has a general testamentary power of appointment. That would subject the property that would otherwise be subject to GST tax instead to estate tax. It would also allow Zachary to use his applicable exclusion amount against this property. Also, if the estate tax rates remained graduated as they were in 1990, it would have allowed Zachary to take advantage of the lower tax rate brackets.

Alternatively, the 1990 trust could have been a lifetime trust, without requiring that the income be distributed beginning at age 25. Mr. Williams could then have allocated GST exemption to the 1990 trust. If the trust were GST taxable, Zachary could have deferred the GST tax by appointing the trust assets in further trust for his surviving spouse, if any. He could also have passed the trust assets down two generations at the cost of only one transfer tax by appointing the trust assets to or in further trust for his grandchildren.

The 2009 trust is payable to the children at age 30 (or upon Mr. Williams' death, if later). Therefore, it was unlikely that Mr. Williams would allocate GST exemption to the 2009 trust.

Asset Protection

By distributing the income of the 1990 trust beginning at age 25, and the principal of the 2009 trust at age 30 (or upon Mr. Williams' death, if later), the trust assets will be included in the children's estates for estate tax purposes,

and will be subject to the children's creditors and spouses.

Mr. Williams could have achieved more asset protection by not mandating distributions. Instead, the beneficiary could have been given more control over the trust upon reaching a specified age.

For example, upon reaching a specified age:

> * The beneficiary could become a trustee (Zachary has this right in the 1990 trust).
>
> * In the case of the 2009 trust, the beneficiary could have the power to remove and replace his or her co-trustee, provided the replacement trustee is not related or subordinate. (In 1990, there was a risk that giving Zachary this power would have caused the trust to be included in his estate, since the Internal Revenue Service did not concede that a grantor could have this power until 1995.)
>
> * The beneficiary could have a broad special power of appointment, exercisable in favor of anyone other than the beneficiary or his or her estate or creditors (or a narrower class of permissible appointees).

<u>The Will</u>

Unfortunately from an educational standpoint, as of now, Mr. Williams' Will is not available. Since Mr. Williams lived in California, where revocable trusts are more common than in most states, it is possible that Mr. Williams had a revocable trust. If he did, we may never get to see its contents.

**Concluding Observation**

Planners can learn valuable lessons from Robin Williams' insurance trusts.

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

*Bruce Steiner*

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## CITES:

Internal Revenue Code Sections 677(a)(3), 674 and 2632(c);

1990 insurance trust; 2009 insurance trust; Robin Williams; Bruce Steiner – Lessons From James Gandolfini's Will, LISI Estate Planning Newsletter # 2114, (July 9, 2013); Bruce Steiner – Lessons From Philip Seymour Hoffman's Will, LISI Estate Planning Newsletter #2206 (March 25, 2014).