

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2246

Date: 18-Sep-14
From: Steve Leimberg's Estate Planning Newsletter
Subject: [Bruce Steiner: Valuable Lessons Learned from Lauren Bacall's Will](#)

Bruce Steiner previously commented on the lessons planners can learn from James Gandolfini and Philip Seymour Hoffman's Wills and Robin Williams' insurance trusts. See Estate Planning Newsletters [#2114](#), [#2206](#), [#2240](#). Now, Bruce returns to comment on the lessons estate planners can learn from Lauren Bacall'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, 2012 and 2013. 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*, *Fox Business*, *TheStreet.com*, and Dow Jones (formerly CBS) Market Watch.

Here is his commentary:

EXECUTIVE SUMMARY:

Estate planners can learn some valuable lessons from Lauren Bacall's Will.

FACTS:

Lauren Bacall died on August 12, 2014. She was 89 years old, and lived in Manhattan.

Ms. Bacall left a large estate. The probate petition estimated the value of her estate at \$26.6 million, consisting of her apartment valued at \$25 million, tangible personal property valued at \$1.5 million, and cash of \$100,000. In addition, she had a general power of appointment over the marital trust created by her first husband, Humphrey Bogart. The probate petition does not indicate the size of that trust.

Ms. Bacall was survived by three adult children, Stephen Humphrey Bogart, Leslie Bogart and Sam Prideaux Robards. Stephen, who was born in 1949, and Leslie, who was born in 1952, were from her first marriage to Humphrey Bogart, and Sam, who was born in 1961, was from her second marriage to Jason Robards. Stephen is a news producer, documentary film maker and author. Leslie is a yoga instructor. Sam is an actor.

Sam has an adult child, Jasper, from his first marriage to actor Suzy Amis, and two minor children from his second marriage to model Sidsel Jensen, Calvin, who was born in 1999, and Sebastian, who was born in 2001.

Ms. Bacall's Will provides as follows:

- *□She leaves her dog to Sam, together with \$10,000 to take care of the dog.
- *□She leaves her tangibles to her children as they agree. She requests that they respect her wish to keep private certain personal letters, writings, diaries, and other papers or memorabilia.
- *□She leaves to her children, equally, her rights to her name, likeness, voice, visual representation and signature, including her rights of publicity therein, and her copyright interests in her personal papers, letters, books and other writings by her, including any royalty or other rights with respect thereto. She directs that all decisions regarding these assets be made by her children unanimously.
- *□She leaves her interest in Bacall LLC to her children, equally.
- *□She directs that her residences be sold.
- *□She exercises her general testamentary power of appointment over the trust for her benefit under the Will of her husband Humphrey

Bogart, who died in 1957, and appoints the trust assets to her children (or the issue of a deceased child).

*□She leaves \$20,000 to one household employee and \$15,000 to another household employee.

*□She leaves \$250,000 in trust for each of her grandsons Calvin and Sebastian. The trustee can distribute the income and principal to or for the grandchild's benefit. However, there is a special statement that she intends that the trust assets be used primarily for the grandchild's undergraduate education. The trust ends when the grandchild completes his undergraduate education or reaches age 30, whereupon the grandchild receives the balance of his trust. If the grandchild dies before the trust ends, the balance of the trust goes to the grandchild's issue, or if none then to the other of Calvin and Sebastian, or if the other one is not living, then to Sam, if he is living, or if not then to Ms. Bacall's then living issue.

*□She leaves the rest of her estate to her children (or the issue of a deceased child), outright.

*□She directs that her estate taxes be paid out of her residuary estate.

*□Her three children are the executors. She waives the provision of New York law limiting her executors to two full executors' commissions collectively. She requests that her executors retain Stuart Gelwarg to provide accounting services and such other services as may be required.

*□Sam is the trustee of his children's trusts. Sam's wife, Sidsel Jensen, is his successor.

*□The executors can name co-executors and successor executors, and the trustees can name co-trustees and successor trustees. If there is ever a vacancy, a majority of her then living adult descendants can name an executor or trustee. If none of her then living descendants is an adult, then a majority of the parents or guardians of her then living descendants can name a successor executor or trustee.

COMMENT:

There are several lessons that estate planners can learn from Ms. Bacall's Will.

Provisions for Additional and Successor Executors and Trustees

Trusts often last for a long time. Trustees die or retire. New trustees need to be appointed. Estates holding literary or intellectual property may also last a long time. Ms. Bacall wisely provided a mechanism for selecting co-fiduciaries and successor fiduciaries.

Exercising Her General Power of Appointment over the Marital Trust under Humphrey Bogart's Will

Humphrey Bogart died in 1957. At that time, there was no provision for a qualified terminable interest trust (QTIP). In order to qualify for the marital deduction, a trust had to be either a general power of appointment trust or an estate trust. In a general power of appointment trust, the spouse must be entitled to all of the income of the trust, and the spouse has to have a general testamentary power of appointment over the trust. In an estate trust, the trust assets must be payable to the spouse's estate. The general power of appointment trust was the more common of the two.

While QTIP trusts are more common today, a general power of appointment trust or an estate trust will still qualify for the marital deduction under current law. Depending on the interplay between the Federal and the state estate tax, a general power of appointment trust may sometimes be used where it is necessary to obtain the marital deduction without having to make a QTIP election.

Estate planners should check to see whether a client holds a power of appointment, and if so, whether it makes sense to exercise the power. In particular, if the client had a spouse who died before 1982, the planner should check to see whether the client has a general power of appointment over the marital trust in the predeceased spouse's Will.

If the client wants to exercise a power of appointment, the planner should review the terms of the instrument granting the power, to make sure that the

exercise of the power is valid.

The instrument granting a power of appointment can specify how it can be exercised. To avoid the inadvertent exercise of a power of appointment by the residuary clause of the powerholder's Will, the instrument granting the power of appointment may provide that the power can only be exercised by specific reference to the power.

The planner should also review the instrument granting the power of appointment to ascertain the class of permissible appointees. For example, in the case of a special power of appointment, the class of permissible appointees can be limited to the testator's issue, or to the testator's issue and their spouses, or to some other class of persons.

The planner should also make sure that the exercise of the power of appointment does not violate the rule against perpetuities. In New York, the exercise of a general power of appointment, other than in favor of the powerholder's estate, does not reset the perpetuities period.

In deciding whether and how to exercise a general power of appointment, the beneficiary should consider the effect on creditors, if that's relevant. In New York, if a beneficiary has a general power of appointment over a trust, the trust assets are subject to the beneficiary's creditors if the power is currently exercisable, but not if the power is only exercisable by Will. However, in some states, if a beneficiary has a testamentary general power of appointment, the trust assets are subject to the beneficiary's creditors. In other states, if a beneficiary has a testamentary general power of appointment, the trust assets are subject to the beneficiary's creditors if the beneficiary exercises the power (even if not in favor of his or her estate), but are not subject to the beneficiary's creditors if the beneficiary does not exercise the power.

Provisions for Children

Except for \$250,000 in trust for each of two grandchildren and some small cash bequests, Ms. Bacall simply left her estate to her children outright. This provides simplicity, avoids the compressed income tax brackets for trusts, and insures a basis step-up for the assets at the children's deaths. However, it throws the children's inheritances into their estates for estate tax purposes, and exposes their inheritances to their creditors and spouses.

Ms. Bacall could have provided for her children in lifetime trusts rather than outright. In that way, their inheritances would not be included in their estates, and would be protected from their creditors and spouses. She could have given each child effective control over his or her trust. In other words, the child could have been a trustee, and could have had the power to remove and replace her co-trustee (provided the replacement trustee is not a close relative or subordinate employee). The child could have had the broadest special power of appointment, so he or she could appoint (give or leave) the trust assets to anyone the child wanted (except the child or his or her estate or creditors).

To the extent of Ms. Bacall's remaining GST exemption, this would have sheltered her children's inheritances, and the income and growth thereon, from transfer taxes for several generations. We don't know whether she had any remaining GST exemption, or whether she used her GST exemption during her lifetime, perhaps in 2012 when it was scheduled to revert to \$1 million in 2013.

To the extent Ms. Bacall's estate exceeded her remaining GST exemption (the "GST taxable portion"), she had several choices.

- *□To the extent the child will not have a taxable estate, the GST taxable portion can go to the child outright. This provides simplicity, and avoids the compressed income tax brackets for trusts. It also provides another basis step-up at the child's death. However, it exposes the assets to the child's creditors and spouses.

- *□To the extent the child will not have a taxable estate, the GST taxable portion can go to the child in a trust in which the child will have a general testamentary power of appointment. This provides as another basis step-up at the child's death, though the compressed income tax brackets for trusts will still apply. Whether the trust assets will be protected from the child's creditors, subject to the child's creditors, or subject to the child's creditors to the extent the child exercises the power, varies depending on state law.

- *□If the inclusion of the GST taxable portion in the child's estate might not result in any estate tax, the child can have a general power of appointment over that portion of the trust based upon a formula. The IRS has approved a formula provision in at least one private letter ruling. However, drafting the formula can be

complicated, especially if the child leaves a surviving spouse.

*□The trustees can be given the power to grant the child a general power of appointment over a portion or all of the trust. The trustees will have to monitor this. One commentator has suggested that if the trustees have the power to grant a general power of appointment then the beneficiary is treated as already having a general power of appointment.

*□If the child will have a taxable estate, the GST tax is often preferable to the estate tax. The child can appoint the trust assets to or in further trust for his or her grandchildren, moving the assets down two generations at the cost of only one transfer tax. The child can also postpone the GST tax by appointing the trust assets in favor of his or her spouse.

Provisions for Sam's Children

Ms. Bacall left \$250,000 in trust for each of the two minor children of her son Sam, which she intended to be used primarily for their undergraduate education. Each beneficiary receives the balance of his trust when he completes his undergraduate education, or upon reaching age 30.

From a tax planning standpoint, this provision is inefficient. Since it is a direct skip, it uses GST exemption. Instead, she could have left more money to or in trust for Sam, and Sam could have provided for his children's education. However, since Ms. Bacall left the rest of her estate, with minor exceptions, to her children outright, unless she used her GST exemption during lifetime, she did not otherwise use her GST exemption.

This provision might also give her grandchildren an incentive to go to a less expensive college, so that they will receive more money when they graduate from college. However, given the size of Ms. Bacall's estate, it is less likely that her grandchildren would select a less expensive college for this purpose.

Executors' Commissions

In some states, such as New York, there is a statutory schedule for executors' commissions. In New York, the commissions are fixed. In some states, even though there is a statutory schedule, the court can adjust the statutory amount

based upon the facts and circumstances of the estate.

In other states, there is no statutory schedule for executors' commissions. If the executors and beneficiaries cannot agree as to the amount of the executors' commissions, the court will decide, based on the facts and circumstances of the estate.

The statutory schedule in New York is 5% on the first \$100,000, 4% on the next \$200,000, 3% on the next \$700,000, 2.5% on the next \$4 million, and 2% over \$5 million.

If there are two executors, they are each entitled to a commission. If there are more than two executors, they are limited to a total of two full commissions, to be shared based on the services they perform, unless they agree to a different apportionment, provided no one executor may receive more than one full commission. However, the testator can waive the limitation of two full executors' commissions.

Ms. Bacall named her three children as executors, and waived the limitation of two full executors' commissions. Therefore, each child can take a full executor's commission.

In this case, the children are both the executors and the residuary beneficiaries. Their decision whether to take executors' commissions will be based largely on tax considerations. Executors' commissions are deductible for estate tax purposes (or, alternatively, for income tax purposes) by the estate, and are taxable income to the recipients.

For many years, the top estate tax rate was 55%, while the top income tax rate was much lower than 55%. The estate tax exempt amount was much lower. Therefore, children would often take executors' commissions, to take advantage of the difference between the higher estate tax rates and the lower income tax rates, as well as to take advantage of the time value of money since the benefit of the estate tax deduction was effective as of the estate tax due date, which is nine months after death, whereas the income tax may not be due for several years.

The top estate tax rate is 40% (49.6% in a state such as New York with a state estate tax based upon the old state death tax credit). By comparison, the top income tax rate is 39.6% (or higher in a state with a state income

tax). Moreover, with a \$5,340,000 (indexed) estate tax exempt amount and portability, very few estates will be subject to Federal estate tax. Therefore, in most cases, there will not be any tax benefit to taking executors' commissions, though executors may take commissions for nontax reasons.

While New York allows a testator to waive the limitation of two full executors' commissions, it is not clear whether, if a testator does so, the estate can take an estate tax deduction for more than two executors' commissions.

Provision for Pets

Some states, including New York, allow a testator to create a trust for the care of a pet. In this case, since Ms. Bacall was leaving her dog to one of her children, and since her estate was large, it was reasonable for her to conclude that a pet trust was not necessary. If she had left her pet to someone else, she might have considered a pet trust, or a larger cash bequest.

Concluding Observation

Estate planners can learn valuable lessons from Lauren Bacall's Will.

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

Bruce Steiner

CITE AS:

LISI Estate Planning Newsletter #2246, (September 18, 2014)
at <http://www.leimbergservices.com> Copyright 2014 Leimberg Information Services, Inc. (**LISI**). Reproduction in Any Form or Forwarding to Any

Person Prohibited – Without Express Written Permission.

CITES:

[Lauren Bacall](#); PLR 9527024; Dave Cornfeld, 32 U. Miami Inst. on Est. Pl. ¶ 215 (1998).