Berwitz & DiTata LLP

A STEP AHEAD

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The Pitfalls of Joint Ownership

It is not uncommon for an elder parent to add an adult child's name to his or her checking or savings account, or to any other asset, thereby making the child a joint owner. While this is often done for convenience purposes, it can have serious, unexpected and undesirable consequences. Since the child legally owns the asset, creditors of the child can levy against it and, if the child becomes involved in a divorce, the child's spouse may attack the ownership interest in the asset as marital property. At a minimum, the existence of the account will have to be disclosed in the matrimonial action.

When you name a child as a joint owner on your account, you empower the child, during your lifetime, to withdraw money - as much as 100% of it! At your death, the child will automatically become the *sole* owner of the account, thus effectively "disinheriting" other children. While the full value of the joint asset will be part of your taxable estate, it will not pass under the terms of your Will. Therefore, if you want your assets to be equally divided among your children after your death, and for any tax burden to be equally shared, naming a child as a joint owner is a mistake. Naming all of your children as joint

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James Gandolfini's Estate Plan: It's Nobody's Business

Some topics are meant to be private. This list should include "what happens with my money and property when I pass away." People are generally unaware that a Last Will and Testament is a public record. After you die, if a Last Will and Testament is the means by which your estate is administered, your affairs are anything but private. There are alternate means of disposing of one's assets, such as a revocable trust, which would not become part of the public record.

Following the recent and untimely death of James Gandolfini, known to many for his role as Tony Soprano, major media outlets have been covering what is seemingly the celebrity's poorly structured estate plan that will lead to an estimated 30 million dollars in estate taxes. Every major newspaper, television station, radio show and internet blog has quoted estate attorneys and financial planners who have dissected Mr. Gandolfini's intentions in de-

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Same Sex Marriage Update

On June 26, 2013, in *United States v. Windsor,* the Supreme Court of the United States ruled that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. Section 3 of DOMA defined the terms "marriage" as a union between a man and a woman and "spouse" as a person of the opposite sex who is a husband or wife. Under its terms, married same-sex couples were effectively prohibited from receiving the rights, benefits and privileges afforded to traditional married couples under more than 1,000 federal statutes. Many of these rights, benefits and privileges are central to and critical in estate planning. These include, among many others, the surviving spouse's right to Social Security income and death benefits, veteran's spousal benefits, spousal right to IRA benefits and roll-over, the ability to file joint federal income tax returns, marital deductions applicable to federal and state estate taxes, entitlement to distributions from

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A Last Will and Testament, known simply as a Will, is a formal legal document governed by strict statutory requirements. It directs how a deceased person's property and assets will be legally distributed to named individuals and entities. People often misunderstand how property is transferred after death. They believe that when they name their spouse, children or other beneficiaries in a Last Will and Testament, the named beneficiaries will automatically receive the assets after they die. This is incorrect. In order for the named beneficiaries to receive assets of the estate, the Will must be probated. Probate is the legal process by which the Surrogate's Court validates the Will and authorizes the nominated Executor to act on behalf of the estate. A probate proceeding is required to prove the validity of the Will, settle the affairs of the estate, resolve claims of creditors, adjudicate the interests of heirs and other parties and retitle the assets as the Will directs. For purposes of illustration, consider a home. Would you pay a stranger hundreds of thousands of dollars for a home that belonged to someone who had passed away without proof that the seller had the legal right to sell the house? Of course not. The document that establishes the authority to sell the property is called Letters Testamentary and is issued by the Surrogate's Court during the probate proceeding.

Before the Court accepts the Will for probate, the persons who would be entitled to a share of the estate if the decedent had died without a Will are entitled to notice and an opportunity to challenge the Will or the appointment of the Executor. This process can be time-consuming and costly.

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owners is a bigger mistake! That increases the possibility that your assets will be at risk in the event that a child divorces or suffers bankruptcy or creditor issues. Moreover, if a child dies, that child's children do not inherit.

The majority of married couples own their assets jointly, with right of survivorship. This means that when the first dies, the second owns everything. Owning assets in this manner may be convenient while both parties are alive because it gives each of them easy access to accounts. Unfortunately, however, if the combined value of the couple's estate, *including* real property, life insurance, investments, stocks, bonds, mutual funds, annuities and retirement accounts, exceeds $1 million, owning assets jointly can result in adverse tax consequences. Instead, where the couple's combined assets exceed $1 million, it is advisable to take advantage of each spouse's credit against estate tax.

Additionally, owning assets jointly may have adverse capital gains tax consequences. When assets are sold, a capital gains tax is assessed on the difference between the cost basis of the asset and its sales price. For example, the cost basis of your home is the amount that you paid when you purchased it together with the cost of capital improvements. If you sell your house, you will owe a tax based on the difference between what you paid for your home and the sales price. However, assets included in your estate receive a new, "stepped-up" cost basis at the time of death. If the assets are then sold at this higher value, there is no gain, and thus no capital gains tax due. However, assets held jointly receive only a partial "step-up" in basis, on the decedent's share. If the decedent owns the asset alone, the basis of the entire asset will be "stepped-up."

Simply put, owning assets jointly may conflict with estate planning. The goal of giving access to another person "just in case" can be accomplished without exposing those assets to the risks discussed above. Now is the time to review your estate plan, including the manner in which your accounts are titled, to ensure that your wishes are accomplished. Give Berwitz & DiTata LLP a call.

James Gandolfini's Estate Plan: It's Nobody's Business

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signing the plan, its beneficiaries, and whether he was aware of its tax consequences. Perhaps the biggest mistake made by Mr. Gandolfini and his estate planning advisors was not the failure to incorporate effective tax planning strategies but the failure to protect it from public scrutiny. Mr. Gandolfini's estate plan could have remained a private matter for his family.

For many, taxes are only a secondary concern

People fail to realize that, although tax planning is critical, it is only one factor in an overall estate plan. For most people, the question of "who" comes before the question of "how much," even if certain tax advantages will be lost by giving to person "X" instead of to person "Y." It is possible that, even to Mr. Gandolfini, providing for a particular beneficiary was more important than avoiding taxes.

The benefit of estate planning: privacy is not just for celebrities

It is not only the super wealthy who want their estate plan to remain private. Death records, including a Last Will and Testament, are public records. They are easily accessible in the Surrogate's Court in the county where the decedent resided. There are many reasons why one might desire for his or her Will to remain private, for example, if a person wants to leave unequal amounts of money to different children, or wants to provide for children from a prior marriage, or does not want certain family members to know that they were not chosen as an executor or trustee or guardian.

Keeping it private — the revocable trust

A simple means of avoiding the notoriety received by Mr. Gandolfini's estate plan, or failure to plan, would have been to use a revocable trust instead of, or in addition to, a Will. A revocable trust is known as a "testamentary substitute" because it can be used as a vehicle to distribute assets upon death, similar to a Will. However, unlike a Will, a revocable trust is not a public record. No one has the right to know who was chosen to serve in a trusted position, or which family members received which assets, or who was disinherited. Berwitz & DiTata LLP can assist you in devising an estate plan using techniques to help keep your plan private.

Same Sex Marriage Update

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federal retirement plans, portability of the unified credit, and Medicare and Medicaid benefits.

While the Court's ruling greatly expands the rights of same-sex couples who wish to marry or have already married and live in states where same-sex marriage is permitted, questions still remain as to how this ruling will affect the rights of individuals in states which prohibit same-sex marriage. Even in states which permit same-sex marriage, many issues remain unclear. Same-sex couples will still be challenged in making decisions which traditional married people need not consider, such as whether and to what extent a move to a state which does not recognize the marriage will affect their rights and/or the rights of their children, what documents to carry with them when traveling to states which do not recognize the marriage, whether their death in such a state will affect inheritance rights, whether the non-biological parent should adopt a child or children born during the marriage, whether to implement or change estate planning documents to take advantage of the newly realized rights and benefits, grandparents' rights for grandparents who reside within or outside a state that recognizes their child's same-sex marriage.

In further good news for same-sex married couples, Governor Andrew Cuomo has announced that estate tax refunds are available to qualified spouses of same-sex couples. This is an area of law that is rapidly changing and we at Berwitz & DiTata LLP are committed to helping our clients and friends stay up to date as things continue to develop and to help resolve their concerns.

Would You Like To Read About It Here?

We at Berwitz & DiTata LLP are proud of our newsletter and hope that each issue brings our clients and friends insightful and timely information. We endeavor to write articles geared to your interests and concerns. We would be happy to receive your feedback. More importantly, if you have a question or would like us to address a particular topic, please call and let us know. We will try to include it in one of our next issues. Just call or drop us a line.

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Wills and Revocable Living Trusts

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Apart from the cost and delay associated with a probate proceeding, the public nature of the proceeding is often quite distressing. Everything in the Court's file, including the names and addresses of family members and beneficiaries, and a list of assets and their values is accessible to the general public and can be used to contact family members for solicitations regarding estate property and sometimes for other reasons.

Frequently, people inquire if there is a way to distribute assets after death without the need for a probate proceeding. Trusts have become a popular way of accomplishing this goal. One type of trust, the revocable living trust, achieves the same objectives as a Will, and also provides protection during your lifetime. Like a Will, it directs the distribution of your assets after death. Unlike a Will, it becomes effective immediately and continues to exist after your death. This is important for two reasons: first, there is no need for probate, as your assets are owned by and distributed through your revocable living trust; secondly, it carries out your instructions should you become incapacitated.

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