Aston Asset Management

Estate Analyst April 2012

Train Wrecks of Estate Planning

Chief Justice Burger, When Not To Adopt Your Girlfriend, and the Enigmatic Estate of Howard Hughes

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"A helping word to one in trouble is often like a switch on a railroad track ...an inch between wreck and smooth, rolling prosperity."

—Henry Ward Beecher

A wise person once observed that a wreck on the shore serves as a beacon at sea.

Perhaps the estate planning errors of others can also serve as instructive examples. But one must concede that the most egregious train wrecks of bad planning can be mesmerizing.

Without further adieu, here is a collection of testators who left behind estates with notable errors, issues, and messes.

Warren E. Burger

One would expect a substantive and carefully wrought testamentary plan from an accomplished jurist such as the former Chief Justice of the United States Supreme Court, yet the will of Warren E. Burger consisted of a mere 176 words, most of which consisted of the certifications of the witnesses. In fact, there was only one sentence of dispositive instruction:

"The remainder of my estate will be distributed as follows: one-third to my daughter, Margaret Elizabeth Burger Rose, and two-thirds to my son, Wade A. Burger."

It has been speculated that Burger wrote this simple will by himself. Did Justice Burger represent himself...and did he have a fool for a client?

With an estate estimated to be $2 million, the simple will he designed may have exposed his estate to unnecessary taxation. A number of articles have concluded that the will's failure to address any estate taxes cost the estate hundreds of thousands of dollars.

One attorney claimed that the estate was $1.8 million and the failure to include marital trusts cost the estate $450,000 in taxes. Based on Burger's death in 1995, the detractor must have applied the $600,000 exemption amount (based at that time on a unified credit of $192,800) and the effective tax rates at that time.

A national media feeding frenzy ensued, with stories in more than 60 newspapers. Burger was compared to the shoemaker whose family has no shoes, and his estate became a widely used example of what not to do when planning an estate.

Burger Redemption

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided."

–Warren E. Burger

Professor Paul L. Caron provided a redoubtable defense of the Chief Justice that was published in 69 Tax Notes 1020 (1995).

In "Justice Burger, A Better Tax Lawyer Than His Critics," Professor Caron points out that the claim that the standard A/B two-trust plan that critics claimed Justice Burger should have employed would not have avoided the $450,000 of estate tax that was estimated. This was not correct because that approach could only have sheltered up to $1.3 million of assets; that included the state death tax credit for the Virginia "sponge tax" that

was then in effect.

Moreover, Justice Burger wrote his will after his wife had predeceased him, and her estate had already utilized her unified credit. So the use of an A/B plan to take advantage of both spouses' unified credit was entirely inapplicable. Burger's estate had properly used the unified credits of both spouses, properly deferred taxes until the death of the second spouse, and had also shifted assets out of the estate using lifetime gifts and inter vivos trusts.

A smattering of newspapers printed corrections, but, to this day, Justice Burger's estate is cited, incorrectly, as an example of what not to do.

Don't Adopt Your Girlfriend

Adopting an adult is not a conventional estate planning strategy, but there are legitimate reasons for it. Adopting one's adult stepchildren to prevent any challenges to an estate plan has sometimes been employed. Adopting one's companion was utilized in the era before civil unions and same sex marriages were available.

But adopting your girlfriend so that she can share in a trust fund for your actual children doesn't sound like a good idea.

In fact, an approach that begs for a terrible outcome belongs in the same category as marrying your chambermaid at age 76; having her mentally abuse you, allegedly; then leaving your entire estate of $400 million to her instead of your six biological children. J. Seward Johnson tried this and, surprise, it has resulted in three litigations over many years.

Here's another idea that takes misfortune by the arm and welcomes it into your life: Marry a young stripper without a prenuptial agreement when you are age 89. Billionaire oil tycoon J. Howard Marshall tried this by marrying Anna Nicole Smith. The outcome (drum roll please): horrendous litigation continued beyond the lives of the parties involved and cost more than a satisfactory $10 million "thank you for marrying me when I was 89" type of gesture.

But on the point of adopting one's girlfriend, the context for John Goodman, a 48-year-old businessman, could not have been worse. Goodman was driving a $200,000 Bentley and hit a 23-year old man, Scott Wilson, who was driving a Hyundai. Wilson's car was knocked into a canal and landed upside down. Goodman left the scene of the crime, and Wilson drowned. Goodman was ultimately convicted of DUI manslaughter and vehicular homicide, a verdict he is appealing. He also settled a wrongful death action for $46 million.

The "Adoption"

Between the time of the accident and the time of his conviction, Goodman adopted his girlfriend, Heather Laruso Hutchins, age 42, whom he had been dating for about a year. In theory, this would allow her to share up to one-third of the trust fund for Goodman's two minor children. The fund reportedly has in excess of $300 million.

A number of observations may be made about this:

1) The preferred time for asset protection is before you are involved in a vehicular homicide or a wrongful death action. However, the publicized reasons for the adoption were not asset protection.

2) Estimates of Goodman's wealth range from a few hundred million dollars to a billion dollars. Those are numbers that demand layers of asset protection. Based on the incomplete information available to the public, it is likely that many protections are in place. Assets are undoubtedly held in corporations and LLCs. At least he had the good advice and foresight to have the trust for his children set up. So Goodman's concerns may have been focused on the portion of his assets that remained exposed.

3) If you are a super wealthy playboy who is known for playing polo and you are involved in an incident with your Bentley that results in the death of a young man, you are already going to be hated. Adopting your girlfriend for financial reasons is not going to make jurors or judges more sympathetic toward you.

4) Adopting your girlfriend as your daughter in any context is just too creepy. It is now going to stick to Goodman permanently and distinguish his DUI manslaughter from thousands of others.

5) Having the adoption of your girlfriend stand up as being legally valid seems sketchy enough to get you sued for fraud. Yet the adoption appears to be legally valid, and Goodman apparently had enough assets to reach a wrongful death settlement of $46 million.

6) If your biological children are beneficiaries of a family trust, they will not react favorably when their trust funds have to be shared with a new phony sibling who is actually dating their dad. The children are minors, but the Trustee of their trust did file a legal action against Goodman.

7) If you adopt your girlfriend, can you marry her? If you break up, can you cancel the adoption? Will your next girlfriend also want to be adopted? An obviously artificial device will ultimately present problems and invite ridicule.

It has been explained that Goodman adopted his girlfriend because he didn't want to get married again. He has, reportedly, had his girlfriend sign an agreement that limits her to 5% of the trust fund when it is terminated. Can a side agreement to an irrevocable trust withstand scrutiny? Wouldn't that mean the adoption was contractual and therefore void? Wouldn't a marriage with a prenuptial agreement have worked as well?

In any event, for financial planning purposes, don't adopt your girlfriend.

The Posner Curse

Here, reprinted from the July, 2010 issue of The Estate Analyst, is a fortune with a legacy of misfortune. Gail Posner was to be the primary beneficiary of her father's $200-million estate, but shortly before his death, he changed his will to benefit his former girlfriend, Brenda Nestor, a Redbook model.

It was a famous fortune that had been forged by Victor Posner, who dropped out of school at age 13, went into real estate, became a millionaire in his twenties, was building 1,100 homes per year by his thirties, originated the leveraged buyout and junk bonds, and was once thought to be worth between $200 million and $1 billion. Legal battles with one son led to a $100-million settlement in 1995, and the son forfeited any additional claims on the estate. The remaining children each reached various settlements with Posner's estate and Nestor.

Gail Posner, like her father before her, is accused of changing her will shortly before her death. Once again, accusations of undue influence have been brought forth. Gail Posner's estate plan, as amended, provided Conchita, her Chihuahua, the right to live in her $8.3-million mansion with maintenance financed by a $3-million trust. Ms. Posner's staff of bodyguards and housekeepers was provided a $26-million fund and rights to the house as well. Ms. Posner's only surviving son, who was left $1 million, has filed a lawsuit.

Melvin & Howard

I'm not a paranoid deranged millionaire. Goddamit, I'm a billionaire.

–Howard Hughes

Howard Hughes was one of the world's wealthiest individuals. He was a famed aviator, businessman, and movie producer. He was also an eccentric recluse. In 1957, Hughes told his assistants that he wanted to screen some movies at a film studio. He didn't emerge from the studio for four months. He would spend the remainder of his life holed up in various hotels.

Although Hughes died in 1976, his estate was not settled for 34 years. Even now there is a lingering question about whether such a wealthy and powerful individual had his testamentary plans thwarted.

The premise of billionaire Hughes having a chance meeting with gas station owner Melvin Dummar in 1967 and then writing a handwritten will that left Dummar a 1/16th share of his estate seems implausible. A jury didn't buy that tale 36 years ago.

One doesn't normally come upon one of the wealthiest individuals in the world wandering confused and injured in the Nevada desert. If that were the case, there would be a lot of people driving around the desert looking for billionaires requiring assistance. However, Dummar claimed that he was driving home and noticed a man who needed help. He drove this man back to Las Vegas, 150 miles away. The man said that he was Howard Hughes. Dummar did not believe him, but he gave him some money and dropped him off at the Sands Hotel.

Nine years later, Hughes died.

Three weeks later, a mysterious individual dropped off an envelope with Melvin Dummar. It was the handwritten will of Howard Hughes. Dummar took the will to the offices of the Church of Jesus Christ of Latter Day Saints in Salt Lake City and left it on an official's desk. The FBI later found Dummar's fingerprint on the envelope containing the will.

A lot of questions were raised. Who brought Dummar the will? Why Dummar? He was just one of the beneficiaries in the will. How did Dummar know where to take the will?

Did he leave it on someone's desk without speaking to anyone? If the will was entirely in Hughes's handwriting, then why was it concluded that it had been forged? If Dummar took the trouble to have it forged, then why was he only left 1/16th of the estate?

The handwritten "Mormon Will" split the $2.5 billion estate into shares. Dummar's 1/16th would have amounted to $156 million. One quarter of the estate would have gone to the Howard Hughes Medical Institute. About $470 million would have gone to the aides and staff of Hughes.

Two of Hughes's ex-wives would have divided $156 million. Would anyone other than Hughes have devised such a plan? One of those ex-wives was known to be the only woman Hughes ever truly loved. She asked for $70,000 per year as alimony during Hughes's lifetime. Hughes reportedly offered her $1 million, which she refused. Was the handwritten will a genuine expression of his feelings toward her?

In 1978, a jury determined that the will was a hoax. The court declared Hughes to have died intestate. In 1983, 22 cousins of Hughes divided the estate. However, legal actions then took place to locate, manage, and sell off assets over the next 34 years.

In 1985, the U.S. Supreme Court ruled that Hughes Aircraft was owned by the Howard Hughes Medical Institute. California and Texas both sued the estate, seeking inheritance taxes. (Both states lost.) A woman claiming to have been secretly married to Hughes on a yacht surfaced and received a settlement.

Postscript on Dummar

Dummar resurfaced after 30 years with a new witness, a pilot who had flown Hughes on trips to the Nevada desert to brothels during the time period when he was allegedly met by Dummar. This rebutted testimony that the reclusive Hughes had never left his Nevada hotel suite. This testimony was ruled to be 30 years too late.

More recently, a retired FBI agent, Gary Magnesen, located old deeds to properties where Hughes had allegedly been found by Dummar and discovered that the properties had been recently acquired by one of Hughes's companies. Three witnesses were discovered who confirmed that Hughes had left the hotel and had told them about meeting Dummar.

Magnesen also found evidence of witness intimidation and jury tampering that affected the outcome of the trial to determine if the Mormon Will was genuine.

As for what might have been, if the handwritten will had simply been validated, a variety of charities, ex-wives, and relatives would have been fairly treated. Melvin Dummar may have cleared about $36 million after taxes and would not have had to drive packaged meats across the desert to make a living.

"That's all water under the bridge," said Dummar.

Epilogue on Hughes

The estate of Howard Hughes is often cited as an extreme example of what may happen to an estate that is not definitively planned.

Yet, perhaps Howard Hughes knew exactly what he wanted all along. In 1925, at the age of 19, Hughes executed his first will, which indicated that a portion of his estate should be left to a medical research facility that would bear his name. Later in life, Hughes created the Howard Hughes Medical Institute.

During a battle with the IRS, Hughes transferred all of his stock in Hughes Aircraft Company to the Institute, a charitable entity. Hughes was not only victorious over the IRS during life, but this same maneuver also allowed the Institute to eventually sell those shares for $5.2 billion in 1985 to General Motors.

Had Hughes died with the shares of Hughes Aircraft Company in his estate, a Federal estate tax rate of 77% would have applied to all assets over $10 million.

Hughes may have been delusional in his later years, but his lifelong dream of funding a medical institute bearing his name was truly realized. If his handwritten will had been acknowledged, another $625 million would have gone to his Medical Institute, avoiding additional transfer taxation. But even as things turned out, the vast majority of his wealth escaped both income taxation and transfer taxation and reached its intended target.

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