

The Estate Planning Advisor

An Estate Plan that *Didn't* Work

By Richard J. Shapiro, J.D.

Recently a client of one of my litigation partners called me. This client – I'll call him "Robert" – is, along with his brother, the beneficiary under his mother "Eleanor's" will. Eleanor, who died in 2008 a resident of New Jersey, had a gross estate of over \$6 million. Eleanor's husband had predeceased her some years before her death.

I knew from my partner that Robert once had a thriving business, but that the "Great Recession" has left him with potential liabilities to various creditors in the millions of dollars. Robert's creditors would surely be interested in getting their hands on Robert's share of his mother's estate.

Robert explained to me that he needed to "set-up" the trust established under his mother's will for the benefit of he and his children. To determine what exactly needed to be done, I obtained from the New Jersey law firm that was administering Eleanor's estate copies of her will and the filed estate tax returns.

In reviewing Eleanor's will, I determined that Eleanor had established generation skipping trusts for both Robert and his brother "Alan." Since Eleanor's generation skipping tax exemption was \$2 million at the time of her death in 2008, each of her son's respective generation skipping trusts will be funded with \$1 million. The good news is that if properly administered, the assets in each of her son's trusts should be protected from the reach of their creditors, as well as creditors of any of their descendants. Assets in Robert's trust can thus be used to pay for the "needs" of both himself and his descendants without being subject to invasion by any of their creditors.

While the generation skipping trusts established under the will might be deemed a planning "success", other aspects of her estate plan leave much to be desired. In addition to the \$1 million to be funded to his generation skipping trust, Robert is in line to inherit over \$900,000 as an "outright" distribution. The problem here is that because Robert will be receiving those "excess" funds in his own name, his many creditors will have "first dibs" on those assets. It is unlikely that Robert will ever see a dime of that money.

What might Eleanor have done differently to protect her sons' entire inheritance? Quite simply, she could have established "lifetime protective trusts" for each of her sons to be funded with their share of the inheritance in excess of the generation skipping tax exemption amount. Each such trust could have been designed to be accessible by Robert and Alan for their needs, but also to be out of the reach of their creditor claims.

So, why didn't a woman of such means have such a provision in place? My guess is that at the time Eleanor executed her will years before her death, both of her sons were financially secure – or at least appeared to be. Her attorney likely did not focus on asset

protection as an important element of Eleanor's planning, but was rather more concerned with maximizing the generation skipping tax exemption. Robert's financial condition did not begin to unravel until around the time of Eleanor's death, and by then the die had been cast.

The other major problem with Eleanor's estate plan was that from her over \$6 million estate, the total **estate tax bill exceeded \$2.2 million**. While her estate plan effectively manages the generation skipping tax exemption, Eleanor could have implemented a number of strategies that could have minimized, or even eliminated, her estate tax obligation. The attorney who drafted Eleanor's will surely had the expertise to have implemented estate tax savings strategies. But such "advanced planning" techniques require a significant financial commitment from the client, and perhaps Eleanor was unwilling to get past the "cost" to engage in any of those advanced planning techniques. Or, perhaps she believed that Congress would have completely repealed the estate tax by the time of her death. Whatever the reason, a significant portion of Eleanor's personal wealth was diverted to the government for its use, rather than to her loved ones.

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