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PLANNING POTPOURRI

FLP/LLC Audit: Is your FLP/LLC audit ready? An IRS audit of an estate owning an LLC asked for the following items:

- List of all owners since inception (legal documents should support any member joining/leaving the LLC, more owners may support the business purpose of the LLC).
- Distributions to owners since inception (pro-rata distributions demonstrate respect for the LLC form; too many distributions or distributions tracking personal expenses of the owners make the entity look superfluous).
- Who suggested the entity be formed (you want more than just tax reasons).
- Was the creation of the LLC a matter of negotiation (trusts with independent trustees with fiduciary obligations as members, or non-family members, or a charity as a member, may give more credibility than just mom and dad as members).

◦ When were assets transferred to the entity (the more time between transfer and death the better).

- What was the decedent's age and health when the LLC was formed (the younger and healthier the better; get a copy of a recent medical report on those setting up the LLC to show that the LLC wasn't set up in anticipation of death).
- Were transfers made under a power of attorney (its better for the parent to sign assignment documents themselves then under a POA).
- Copies of all LLC records (if it's a real business entity it should have records. Regular Quicken reports are a good thing).
- Minutes of LLC meetings (although not required by law, since the IRS asks for them, have meetings and sign minutes corroborating who attended and what business matters were discussed).

◦ How, when and by whom were LLC assets acquired and used (personal use assets, such as a parent's home, never belong in an LLC).

◦ How were assets managed before contribution to the LLC and after (to avoid the IRS argument that assets were merely "recycled", there should be a change in composition of assets and the management responsibility after contribution that you can demonstrate).

There are many more questions posed by the IRS on the audit, but you should get the drift. Be a Boy Scout and "Be Prepared" for your FLP/LLC audit. **PP**



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LESSONS TO LEARN FROM JAMES BROWN'S ESTATE

James Brown Estate Lessons: Brown left an amazing legacy of music and good deeds, but sadly family problems too. Some valuable lessons can be learned by all from those problems. "Papa Don't Take No Mess", but Papa seems to have left a mess, as the partner (widow, according to some press reports) of the deceased Godfather of Soul, James Brown, was reportedly locked out of his home "for estate legal reasons". I'm "Bewildered" about how Mr. Dynamite left such problems? Tomi Rae Hynie was said to have been married to another man when she married Brown, so their marriage was ineffective. Because Brown and Tomi Rae never re-married after the termination of Tomi Rae's former marriage, they remained merely partners. The press reports that Brown's home, where Tomi Rae stayed with their 5-year old son, was padlocked and she was denied access. A lawyer reported that "legal formalities" and "protocols" had to be followed, and that Brown's estate was left in trust for his children. That's why we love lawyers.

Don't Mar Brown's Reputation with Legal Wrangling: The real facts remain foggy, but as too often happens with famous personalities, a lifetime of brilliant accomplishments, 50+ albums and so much more for Brown, sadly become tarnished by post death haggling over legalities and money. Brown's memory and heirs all deserve more. But this post death posturing and rumor-mongering can be minimized or avoided with a modicum of careful planning. Clearly written legal documents (will, trusts and more), proper ownership of assets, and a plan that addresses real issues not just legal technicalities, can avoid the problems that appear to have so quickly affected Brown's estate and memory. Did Brown want the mother of his 5-year old son padlocked from his home? Did he want "legal formalities" adhered to with this result? Hard to imagine. Don't worry, the lawyer assured the press that it was not an act of "unkindness or an act of a lack of sympathy".

Planning is Key: How careful was Brown's planning? In most celebrity cases the spin becomes so thick that Brown's real wishes may never be known. Many people, especially those with an unmarried partner, can at least learn some lessons from the "Hardest Working Man in Show Business" on how not to handle an estate.

What Might Really be Going On: The facts still aren't known so it's impossible to tell. Legal documents are not always available for public scrutiny, so few people might

actually know what is happening. It might be possible, as some media reports implied, that Tomi Rae is posturing for more of Brown's estate. It's also possible that Brown's partner and son are being harmed unintentionally. The lawyer's comments, although they sound harsh, are not unusual. In many estates, especially those of celebrities, homes have to be secured to prevent people from walking off with memorabilia, cash, and jewelry before they are catalogued so that they can be valued for tax purposes, and then distributed to the specific people the de-

ceased chose. The executor of Brown's estate is personally obligated to make sure all assets are properly valued and reported on the estate tax return, and distributed to the people Brown designated. If the executor fails to do these things he can be sued personally. But those goals can be achieved without harming loved ones.

Trusts: Some media reports indicate that Brown's assets are being left in trust for his children. Well, Tomi Rae's 5 year old is Brown's son. It's common to name the surviv-

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CHECKLIST: PARTNER'S PLAN

If you have a partner in a situation like Tomi Rae, there are many steps you can take to avoid the problems and legal entanglements facing Brown's estate:

✓ Write a will that clearly explains what your partner gets and what her rights are. List in the will all key family and other relationships. Brown might have listed Tomi Rae as his partner, wife, or former partner or former wife. Clarifying the relationships, and your intentions, is vital to minimizing legal entanglements. It's simple, and doesn't take much time or legal cost.

✓ Communicate your personal concerns and wishes to your lawyer. Focus on the people

you want cared for, not taxes and legalities. If your lawyer advises that your requests could be problematic, seek his counsel on better ways to achieve your goals. It's easy for a lawyer to "yes" you and write what you say in your will, but often that doesn't protect your goals or heirs. Example: Brown could have given Tomi Rae the right to live in his home for life (a **life estate**) and following her death the house could pass to his children. Sounds easy, but how would she pay for upkeep? What if a repair was needed? A better approach may be a trust with an independent trustee and sufficient

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...LESSONS FROM JAMES BROWN'S ESTATE

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ing parent of a child along with a bank or family adviser as co-trustees. If that were the case, Tomi Rae would have some input. It's also common to name multiple beneficiaries. For example, Brown could have left his house to a trust for his son, and that trust could have given Tomi Rae the right to live in the house until the son attained the age of 18. A trust for a minor child could provide support payments to the child's parent or guardian while the child is a minor (or for any other period). Tomi Rae is the obvious person to raise, live with, and have input on what her son gets. If Brown felt she didn't have the temperament or ability to serve as a co-trustee, he could have included provisions in a trust requiring the trustees to consider her needs, and her wishes, for their son. As for Tomi Rae, it's unclear what the status of the relationship was, but if Brown intended to provide for her, he could

have established a trust for her. That trust, after some period of time (e.g., the son's attaining the age of majority, Tomi Rae's life, etc.) could end and distribute the remaining trust assets to any one of, or all, of his children. What was done by Brown remains to be seen, but there were a myriad of options. If Brown didn't provide for Tomi Rae was it intentional, or due to the lack of legal guidance? There's not enough information, but it's hard to believe that a man as talented as Brown didn't communicate his wishes clearly if the options were explained to him.

What Was Tomi Rae's Status: The media has continually brought up the strife that the couple had in the past. But it seems that they were together after those episodes. The media reports commented that Tomi Rae hadn't seen Brown for weeks, but the reports don't say why. How often did they see each other? What was the nature of their relationship between the break up years ago and the two weeks before Brown died? The negative implications may be inappropriate. This may have relevance to Tomi Rae's rights to his estate.

What Might Tomi Rae Do: Tomi Rae should have an attorney review the will and all relevant documents to see what she and her son get, but legal action may be necessary to obtain copies of documents that are not public record. Depending on state law, Tomi Rae's first step might be to have her attorney file a legal objection to the probate of Brown's will (**caveat**), or appear and voice objection to the admission of the will (on her own behalf and on her son's behalf). If Brown's estate was held in trusts formed and funded before he died, Tomi Rae's attorney may have to proceed against those trusts before assets are distributed. Tomi Rae might litigate the status of their relationship to show that she was his wife. A surviving wife is entitled to a minimum percentage of her husband's estate even if she was specifi-

cally left out. This is called a **spousal right of election**. In some states this can be a third of the value of the estate. If Tomi Rae can't prove that she was legally Brown's wife, she might try to assert that because of their apparently attempted marriage, bearing his son, perhaps her

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and Brown's living together as husband and wife, and so forth, that she should be entitled to the treatment of a wife. Brown's estate could be prevented (**estopped**) from arguing that she was not entitled to be treated as his wife for inheritance purposes. It may be argued that Tomi Rae should be treated as a **common law** wife. Tomi Rae might bring an action for **palimony** against Brown's estate claiming that something akin to post-death alimony. She might assert that Brown had promised her support, producing letters and witnesses to corroborate the assertion and to enforce those promises against Brown's estate. Tomi Rae might bring actions for **child support**.

Conclusion: It's a shame that reports on Brown's demise focus on issues other than his accomplishments. It's a shame that Tomi Rae and her son have to face these difficulties. It's a shame that the media has the right to make private matters public, but it does. Careful planning, dealing with the real personal issues not just technicalities, addressing everyone important to your life, thinking through the possible scenarios, can all help prevent these problems whether you're a celebrity, or just an average Joe. **PP**

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...CHECKLIST: PLANNING TO PROTECT YOUR PARTNER

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cash to fund upkeep. Life estates can be problematic. You might want to grant your partner some period of time, say 90-days, to live in your residence even if it is bequeathed to others. During the emotional trauma following your death, a loved one (even if not intended to inherit your house) should not be thrown out by children from a prior marriage, or a lawyer doing his job as executor, etc. ✓ Write a personal note of instruction to family, friends and other important people explaining what you are doing and why. In many cases a simple note can take the edge off the pain heirs feel. Perhaps Brown felt that Tomi Rae had adequate housing and that his home should be made into a museum to encourage some of the values dear to him. A note explaining that might have avoid some of the problems.

✓ Never make your estate plan or will vindictive. If you have an ax to grind deal with it while you are alive and able to, not at the end. Even if Brown felt he didn't want to provide for Tomi Rae, they still had a child and many years of a relationship. Perhaps some bequest to help her out, even if not what he thought necessary, may have minimized or eliminated the problems and pain.

✓ Watch how assets are owned (**title**) and note beneficiary designations (IRA, insurance). Title and beneficiary designations determine where your assets go regardless of your will. It all must be coordinated. Brown could have had his house owned jointly with Tomi Rae if he wanted. If Brown wanted to protect Tomi Rae, avoid the media circus, and then have the house to go to charity to establish a museum, he could have transferred ownership of the house to a revocable living trust which reserved 90-days for Tomi Rae to live there following his death, and then transfer the house to the charity.

✓ Take steps to keep your estate decisions out of the limelight. Set up

trusts now to avoid publicity. To work you must tie up loose ends and address issues that could create problems later. Celebrities are often better off using lifetime transfers (**inter-vivos**) to minimize post-death media attention. Also, to minimize the success of a post-death lawsuit, set up a pattern of benefiting the people you bequeath your estate to, especially if there are others that view it differently. Example: If Brown wanted to minimize what Tomi Rae would receive, he should have made lifetime gifts to other heirs intentionally leaving Tomi Rae out to demonstrate consistency with his will that may provide limited bequests for her (if that turns out to be the case).

✓ Have a family law attorney prepare a legal document to protect your

partner. If Brown thought he was marrying Tomi Rae he should have had a pre-nuptial agreement. If Brown knew he and Tomi Rae were not married he should have had a living together agreement. If Brown wanted to assure Tomi Rae of certain bequests he could have formally committed to make certain bequests to his will (**will contract**). This would have prevented Brown from changing his will to cut out Tomi Rae.

✓ Assure your partner has sufficient assets in her name to get her through the transition period following your death but before bequests or trust for her benefit can be effectuated ✓ Plan ahead, be clear, don't be vindictive, establish a pattern...clean up loose ends and minimize the problems. **PP**

RECENT DEVELOPMENTS

The fact that a trust cannot be changed (**irrevocable**) doesn't mean that changes cannot be effected if the trust agreement or state law permit it. But even if change is possible, care must be taken to consider the income, gift, estate and GST, tax consequences of these changes. A recent private letter ruling addressed the tax issues arising if a trust is divided into two. In **PLR 200651028** a trust that was exempt from the **generation skipping transfer (GST) tax** was to be divided (**partitioned**). A trust was formed for beneficiary 1 and GST exemption allocated to it to assure a zero inclusion ratio (i.e., no GST tax). The trust agreement permitted the trustee to partition the trust into separate trusts when more beneficiary 2 was born. The trust was divided on a fractional basis. The terms of the new trust were identical to the original trust, but for having different beneficiaries. The new trust also provided for the same succession of interests as the old trust. The IRS held that the partition was a "qualified severance" under Code Section 2642(a)(3) so that both the old and new trusts will be treated as separate trusts, and both remain GST exempt. The IRS further held that no beneficiary would be considered to have made a gift to the other as a result of the partition. This was because the trust agreement required the creation of the second trust, and after the partition of the trust each beneficiary had substantially the same beneficial interests both before and after the partition. Therefore, no transfer of property was deemed to occur, and no gift tax implication triggered. The ruling also confirmed that the partition of the trust did not cause the trust assets to be included in the estates of any of the trust beneficiaries under Code Sections 2036, 2037 or 2038. Again, the rationale was that the beneficiaries had the same interests before and after the partition.

See also: **PLR 200651005** and **PLR 200651005** both dated September 20, 2006.

PP