

**HECKERLING INSTITUTE 2001
REPORT #3**

As we did in January of the last four years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting to this list throughout the coming weeks highlights of the proceedings of the 35th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 8-12, 2001 at the Fontainebleau Hilton Resort and Towers in Miami Beach, Florida.

Our on-site local reporters there in Miami this year will include:

Steve Leimberg Esq. of Bryn Mawr, PA - leimberg@home.com
Bruce Stone Esq. of Miami, FL - Brucestone@aol.com
Eugene Zuspenn Esq. of Denver, CO - ezuspenn@zuspenn.com
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Again this year a complete listing of the proceedings and speakers is available on the Institute's Web site. The new URL for that site is <http://www.law.miami.edu/heckerling>
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REPORT NO. 3 - Tuesday, January 9, 2001 and Wednesday, January 10, 2001

First, some quick additional news from the Exhibition Hall:

A. The Lackner Group's 6-in-1 Estates and Trusts Administration software. In late 2000 The Lackner Group demonstrated the new features of its 6-in-1 for Windows program throughout Pennsylvania. First, you are now allowed to work with the product as a basic, intermediate or advanced level, and move freely between these three levels. Second, their transaction classification or coding system has been greatly simplified by the use of filters keyed to the user level you choose. Third, they have installed a new search engine for easily finding their forms and documents and the coding system. Fourth, they have improved the way you enter sale transactions when there are multiple lots of a particular asset acquired on different dates and different prices, such as mutual funds with dividend reinvestment plans, including the ability to choose among various methods of identifying which shares you are selling.

For more information, go to www.lacknergroupp.com.

B. Brentmark Software is exhibiting a whole host of software products this year, including Estate Planning Tools [\$395], IRS Factors Calculator [\$149], Charitable Financial Planner [\$349], Estate Planning Quick View [\$249], Wallace Securities Pricing CD-ROM [\$99 for one year], PFP Notebook [\$695], their new Savings Bond Toolkit program [\$249 - it is being previewed as part of the Tech Odyssey 2001 Special Session presentation on Wednesday and Thursday], Pension and Roth IRA Analyzer [\$449], Investment Scenario Generator [\$299], Roth IRA Conversion Analyzer [\$249], Goldberg Reports (on-line) [\$199 per year], Pension Distribution Calculator [\$149], Roth IRA Conversion Calculator [\$49], and Minimum Distribution Calculator [\$79].

For more information, go to www.brentmark.com or www.leimberg.com.

C. Crescendo Interactive is also exhibiting a whole host of software and related products, including crescendo Lite [\$150] and Pro [\$995], Crescendo Plus for PowerPoint [\$495], GiftLegacy.com Web site [\$5,000 per year], GiftLaw.com [FREE], Crescendo Presents [\$150], Crescendo Estate [\$300], and a series of planned giving and conference Videos [\$59 each]. Of particular note is the PowerPoint client side show and program HELP screens that come with their own built-in audio explanations that are times to match the pace of the slide scripts. We suspect that soon everyone who is now offering PowerPoint or Presentation slide shows for sale will be adding automatic or user-defined audio features to their slide shows.

For more information, go to www.crescendosoftware.com.

D. Cowles Legal Systems, Inc. has announced the availability of revocable trust, irrevocable trust, will and trust termination checklists free of charge to current Cowles software and system users via www.cowleslegal.com. Cowles Checklists are designed for use during the initial appointment, when information may be gathered, phrase selections made, and supporting documents and funding documents and correspondence selected, all while the client is available to provide detailed information. Using the checklist to draft during the initial appointment allows for specific fee quotes to be given at the end of the initial appointment and eliminates follow-up calls. At the end of the initial appointment, the checklist may be routed to an assistant for data entry and completion of the estate plan, so the drafter has the completed plan for review shortly after the initial appointment. The drafter may complete data entry, but with use of the checklist, data entry by the drafter is optional. A checklist approach to drafting protects the attorneys' time to allow more initial appointments to take place. Unlike other methods the checklist allows the drafter to make substantive drafting decisions while with the client, significantly enhancing the ability to make decisions based on perceptions of the client's needs and goals, which are most apparent during the appointment. The attorney can complete a thorough, personal and comprehensive initial appointment, allowing the client to see their expertise in the estate planning area, and allowing the attorney to truly listen to the client rather than focusing on what questions need to be asked. The checklist also serves as a receptacle for all pertinent information, and minimizes liability by insuring that all pertinent questions are asked and documented.

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Next, Reporter Julia Fisher reports the following about Dennis Belcher's presentation Tuesday morning entitled "How to Tie a Tight Knot with Marital Agreements and Mark Edwards' Tuesday afternoon presentation entitled "The Pre-Owned IRA":

Dennis Belcher based his talk and his materials on some recent experiences he has had both defending and attacking premarital agreements. Dennis made these points among many others:

1. Remember that a premarital agreement is a litigating document.
2. Remember that in the litigation of a premarital agreement it is the boilerplate that will make the difference.
3. Remember to avoid a jury because juries don't like rich people.
4. Consider including provisions pertaining to divorce in the agreement; if the parties are young, consider a sunset provision if the marriage lasts for a number of years. Be familiar with the relevant divorce laws, or seek the input of someone who is familiar with those rules.
5. Retirement benefits provide a challenge, in that a waiver before the marriage is not effective for ERISA purposes. Consider attaching a signed consent to the agreement and appointing the other spouse as attorney in fact to sign the power.
6. While no state requires separate counsel for each party, it is advisable.
7. Be aware of the difference in the consideration rules under the Uniform Pre-Marital Act for pre and post marital agreements.

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Mark Edwards in his presentation entitled Pre-Owned IRAs covered the significance of satisfying the designated beneficiary rules when the spouse is not the primary beneficiary of the IRA to maximize the stretch-out over the life expectancies of the IRA beneficiaries. He also advised that the attorney should ensure that the client documents the method by which the required minimum distributions are calculated, as the custodian may or may not retain any paperwork evidencing the election. A customized beneficiary

designation should be prepared and sent to the custodian, and the client should check regularly with the custodian (especially in this age of mergers of banks, etc.) that the current designation is on file.

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Next, Reporter Steve Leimberg, reports the following about the Tuesday morning session entitled "Client Capacity, Estate Planning and Malpractice Traps" that was presented by James V. Quillinan and John Becker.

James V. Quillinan, an estate planning attorney with California Trust & Estate Counselors, LLP, in Mountain View, California and John Becker, Ph.D., a neuropsychologist in Los Gatos, California, explored some of the ethical and practical issues pertaining to the representation of clients with marginal mental capacity. Here are some of their key points:

Capacity is a factual determination. --Focus on capacity - since if there is not sufficient capacity

- the documents are worthless.

--Most attorneys have little or no training in this area.

--When examining memory impairment, look at two elements: First, look at the person's ability to absorb and process "new" information. Second, look at his/her ability to recall and process previously learned information.

Can he/she go through a logical process of weighing options?

--A family doctor may consider a person "sharp as a tack" but that person may not have the ability to process new information.

Two hints: First, ask the person to remember 3 things in the room. For instance, a chair, a glass, a pen. Second, ask the person to draw a clock - and set the hands for "10 after 11". This is a test of two quadrant thinking and ability to abstract. As we age, our competence diminishes. If capacity is or may be an issue, it is very important for a qualified medical professional to see this person on MORE than one occasion. Be sure relatives are interviewed. Get information on how they function day to day. Be particularly concerned when a person can't meet the demands of work/life. Be sensitive to the fact that some people "sound" great - until you ask them to DO things.

Indicia of unsound mind or incapacity includes (a) inability to stay alert or maintain attention, (b) information processing problems, (c) faulty thought process, and (d) mood control. Here are some thoughts with regard to these: Alertness/attention: Look for diminished level of consciousness, disorientation with respect to time, places, persons, or situations, or a loss in ability to focus and concentrate.

Information processing: Look for inability to understand or communicate with others, inability to plan or organize "projects" in one's self interest, do abstractions, recognize familiar objects and persons.

Thought Processing: These are more extreme and obvious and include delusions, hallucinations, repetitive thoughts. Inability to Modulate Mood: Look for pervasive and persistent anger, fear, panic, depression, apathy, or euphoria.

The central question is: Does the deficit significantly impair the person's ability to understand and appreciate the consequences of his/her actions? And how often and how severe and for how long does the deficit in mental function occur?

It is important to remember that the mere diagnosis of disorder does not equate to unsound mind or incapacity to perform a given act.

Practical Office Procedures: Develop a form to send to a psychologist. Model the form after your state's definitions of unsound mind and incapacity to make a decision and definition of dementia.

RED ALERT: Some of the conditions that should trigger further investigation are problems we all have (well, at least I have) and that should trigger sensitivity on the professional team's part include:

--Forgetting names

--Misplacing keys or glasses

--Not recognizing someone in an unfamiliar setting

>>>>(Starting to worry? Don't panic - unless you also have problems...)<<<<

--Getting lost while driving a familiar route

--Confusion over what time it is or where you are

--Experiencing a gradual or sudden change in personality

--Experiencing a loss of memory that is disabling to the point that work is impossible or it upsets your ability to conduct normal daily activities.

Quillinan and Becker emphasized that "Once the subject of capacity enters the lawyer's mind, it must be resolved" and "It is essential to take steps to preserve evidence regarding the client's testamentary capacity".

They also noted that as soon as the issue of lack of capacity arises, undue influence must be considered - and to the extent possible - nullified. They suggested careful documentation of: Who brought the client to your office?

Was the client alone with you?

If the estate plan exhibits extreme favoritism, ask why.

A psychologist or psychiatrist rather than the attorney should obtain and study medical records. The family physician may be the worst person to do an analysis. Meticulously record and save and date changes you make to the client's documents.

--Consider sending drafts with obvious mistakes hoping the client picks it up.

--Consider having a psychologist at the execution of key documents.

--Be wary of video and audio taping because it becomes a two-edged sword. It's evidence and the "chain" must be carefully maintained.

--File a post-execution memo for your file.

--When using medical professionals, it is essential to use an engagement letter to outline exactly what you need. Create that letter as a checklist so that there will be "no holes" in the process.

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Next, Reporter Gene Zuspann reports the following on Wednesday morning's leadoff presentation entitled "Flexibility or Contortion" by Ronald D. Aucutt

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Next, Reporter Alan Rothschild reports the following on Dennis I. Belcher's Tuesday morning session entitled "How to Tie a Tight Knot with Marital Agreements":

Ron Aucutt's Weds. morning program introduced issues and challenges in drafting long term irrevocable trusts. Through three fact patterns, Ron illustrated the tax, fiduciary and beneficiary issues that arise in administering long term trusts. Some of the issues include inadequate fiduciary investment powers; lack of flexibility to alter beneficial interests in future generations to address individual needs and circumstances; failure to provide for replacement or succession of trustees; and lack of clarity in the document as to identification of future beneficiaries.

On this last point, Ron said that the class of beneficiaries in a long term trust, particularly in jurisdictions with no perpetuities law, could easily equal the size of a public corporation's shareholders. In multigeneration trusts, it is also important to describe the beneficiaries with great clarity -- this includes at what generation "per stirpes" applies and how the takers in default are defined if a family line runs out generations in the future.

Ron also discussed the Delaware Tax Trap and the uncertainty of its application in jurisdiction's without perpetuities laws. Finally, he discussed the obvious need to draft in light of the uncertain future of the federal transfer tax laws. Although Ron does not presently think the estate tax will be repealed by Congress in 2001, even if it is, we must continue to draft for any pre-repeal period (and post-repeal reinstatement?) as well.

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Next, Reporter Gene Zuspann reports the following on Judy McCue's presentation entitled "How to Greet New Uniform Trust and Estate Acts?: with Rational Exuberance":

The presentation deals with two new acts approved by NCCUSL: The Uniform Disclaimer of Property Interests Act and the Uniform Trust Code.

She started with a discussion of the progress of the adoption of the Uniform Principal and Income Act. Section 104 - the power to adjust has become a "flash point" among the different states considering the act. The result is that some states have refused to adopt the act at all, and some states have adopted the act without section 104. As a result, NCCUSL has adopted a new section - 105 - to keep a court from reviewing the discretion of the trustee, except in cases of abuse. Section 105 also sets forth remedies in case the trustee does abuse discretion, and lastly, the gives trustee the ability to go to court and get approval of the exercise or non-exercise of the power to adjust.

In addition, at least 4 states have either adopted the act, or are looking at adopting the act, with an ability of the trustee to convert the trust to a unitrust. These are Delaware, New York, Pennsylvania and Missouri. Judy believes that this movement will expand "to a legislature near you."

She next addressed the Disclaimer Act. She said that what must be realized is that the Disclaimer Act does not tie disclaimers to IRC 2518. A disclaimer can be made at any time. As such, a disclaimer under the Disclaimer Act would be valid that is not valid for tax planning under section 2518 and would be a taxable gift.

The Disclaimer Act also will be subject to other laws of the state. For instance, each state has to determine the effect of this act on creditors and whether the act should be subject to fraudulent transfer laws. The last 25 minutes of the presentation were on the Uniform Trust Code. The final version is available on the web at:

She believes that this law, because of its breadth and innovation, will generate the greatest amount of controversy. Some of the provisions she discussed were virtual representation, charitable trusts - cy pres will

be the default rule, pet trusts, the time to challenge an action of the trustee for breach of trust - 1 year if notice; 5 years if no notice.

Although, generally, the trust instrument controls, Section 105 of the code provides parts of the law that may not be overridden by the trust. Judy believes that the inability to override the effect of a spendthrift provisions in the Code will be controversial. See Article 5 as to creditors claims, spendthrift and discretionary trusts.

Another controversial provision is the obligation to furnish the whole trust to all beneficiaries, and not just those portions pertaining to that beneficiary. This cannot be overridden by the trust instrument. Also, section 706 provides procedures for removal of a trustee at the request of beneficiaries.

Her final comment was that she expects states to select provisions that they do not approve and modify the act to comply with that state's desires.

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That is it for Report No. 3. The full text of all the Reports will be posted on the ABA RPPT Web site at http://www.americanbar.org/groups/real_property_trust_estate.html beginning early next week.

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