

**Heckerling Institute 2006**

Reports from the event, as posted to the ABA-PTL List Serve

# Report #14

A complete listing of the proceedings and speakers is available on [the Institute's Web site](#)

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 at the Fontainebleau Hilton Resort and Towers in Miami Beach, Florida. A complete listing of the proceedings and speakers is available on the Institute's Web site. The URL for that site is <http://www.law.miami.edu/heckerling>.

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This Report contains additional coverage of the Wednesday morning **Q&A Session** and coverage of the Thursday afternoon Special Session on **Succession Planning**

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**Question and Answer Session**

Wednesday morning Main Session, 1/11/06

Presenters: Dennis I. Belcher [DB], Prof. Jeffrey N. Pennell [JP] and Carol S. Harrington [CH]

Reporters: Jeff Weiler Esq. and Gene Zuspahn Esq.

NOTE: This session was covered by two reporters to make sure we did not miss something important and to give our readers two different slants on what was said. The first report, which was done by Reporter Jeff Weiler Esq., was filed as part of Report No.5. The report below was done by Reporter Gene Zuspahn Esq.

DB: Parallel GRATs - discussed on pgs 38-57 in current events material

A Revocable spousal interest - not mentioned in 2702 or the proposed regs but appeared in the final regs. The Schott case held that it had value and the Cook case that held it did not have value. The Walton case held that it did not have value and adopted the Cook approach

A parallel GRAT - Assume a \$5mm estate

H and W create two \$2mm GRATs for 2 year terms - one by H for W and one for W for H

After the initial term, the GRAT will continue for 25 years for spouse; will terminate at death or 25 years; Both H and W have a will that contains a provision that can terminate GRAT. A 6% GRAT has a 47% (later mentioned 37%) value. It is important that the will contain a power to revoke if the spouse dies in the 25 year term because this portion of the GRAT will not qualify for a gift tax marital deduction.

Want to have a sufficiently long term that the settlor is expected to live. The children will win if the settlor's spouse dies during the 25 year term. The Service takes the position that the settlor's right to revoke can only last during the two year term. Covey says service is wrong. Dennis sides with

Covey because he tried the Walton Case.

Parallel GRATs work where the grantors need the funds.

CH: Discussed the 675(4) power to reacquire property.

The power must not be held in a fiduciary capacity. The rumor is that the service will not rule where it is held in a fiduciary capacity. Jordahl case involved the power held in a fiduciary capacity. Carol says drafting should say the power is held in a non-fiduciary capacity. She does not know how relevant this is because service has discretion to rule.

Some suggest a third party have this power; Carol is not comfortable with this - the statute states that the someone must reacquire property and how can this happen when they did not have it in the first place.

JP: Is there a 2036 problem?

The portion rules under the 671 regs.

Different grantor trust provisions cause the owner to be taxed on different portions of the income; the drafter must be aware of what the grantor needs to be taxed on. If you only want cap gains but not ord income to be taxable to the grantor, you could use 677(a)(1), however, this would cause estate tax inclusion. Losses are captured in the entity until termination. The regs apply a DNI module. You must read the regulations. Grantor trust rules were drafted at a time when they were meant to punish the grantor.

DB: What special provisions would you include in a grantor trust if the grantor is a corporate insider.

Sec 16(b) of the SEC Exch Act of 1934 provides for the recovery of insider profits. A problem would exist under 675(4) language. Initially there is authority that the SEC would not take any action because this is a GRAT. DB believes that a power to reacquire is problematic when dealing with a corporate insider and that you use some other power to cause the grantor trust status. You could provide that an annuity payment will come from income and then principal. Issue - does the termination of the payment cause the grantor trust status to terminate - it probably should not.

JP: Reciprocal trust doctrine - whether it can apply outside the context of 2036 (Grace Case). Does it apply to reciprocal ILITs.

Q is what is necessary to eliminate the reciprocal trust status and what difference in terms is necessary. The Q dealt with a specific fact situation - each trust had distributions to the spouse under standards but one had a cap. Jeff is not comfortable with what differences are necessary to avoid reciprocal trust status..

CH: FLP's Will you continue to use them for existing planning and what do you do with the ones you have.

Respect the ones that you have. Liquidation should be honored. Give up holding any interest as a GP and get out of controlling distributions; CH does not feel that controlling investments is a 2036 power. Get rid of units to the extent possible; if the grantor needs the benefits, sell them to a IDIT

and keep a stream of payments

DB: - going forward -

Can gifted partnership interests be pulled back into the estate under 2036? Yes if Senda, Abraham, etc. situations that there is an implied agreement that the grantor will receive a benefit. If the grantor holds all or substantial interest in the GP, may have a 2036 issue to the gifts. This is especially true if the partnership consists mostly of financial assets. In this case, the grantor should never have control over the GP.

Do you have to get rid of all of your GP interests to avoid 2036(a)(2)?  
Maybe yes.

If the client has a business operations, then he is less worried about 2036. The cases seem to support this view. What is happening in the last 5 years is that the bar is getting higher to qualify and you need to tell the client about the risk.

JP: Section 2043: Transfers for insufficient consideration - issue is why have they not been pursuing this tract.

Response is that they have never studied 2043. This would be applicable in the Abraham case.

If 2036 applies - transfer of underlying assets come back in because of retained control or enjoyment. Congress used 2043 to remedy the effect of double taxation. IRS worried that 2043 is so bad that they fear raising 2043 because the court may reject 2036.

Hypo: G transfers assets to an entity but only receives back 99% of the value of the assets. Under 2036, all assets are still in the estate because I missed value. If close to death, this does not work because the value is 100%. However, if the assets have doubled, there is a major problem. 200% is includible but 2043 only reduces the estate by 99% that was in the original deal. Get rid of the FLP interests so that you no longer have the 2033 inclusion.

DB: If \$1m bond portfolio put in FLP and after death a 30% discount is approved, does the FLP have to elect 754?

The answer is no (unless the election has previously been made). You can revoke a 754 election - (I don't think this is correct). Be careful before you make a 754 election.

CH: GST questions

CLAT has no charity named as bene; no direct skip because no one has an interest.

Discussed the family rules and the assignment of generation. If family rules, they apply based upon the generational relationship within the family. However, if the beneficiary is not family then you use age. Family rules trump the non-family rules, so adoption will cause family rules to be applicable. The issue is what generation is a person is assigned to when there in an adoption of an adult and Carol does not know how generation assignment rules will work.

There is a glitch in the new rules regarding adoption. If a person adopts a cousin, the person will not be treated as a child. The key in all of these decisions is to put the decisions off until, hopefully, we will know the status of the tax. Realize that the system will probably be different and that flexibility is necessary.

JP: Decoupling - the question mentions NY.

Can the Grantor give the trustee the power to increase the amount passing to the credit shelter trust. Some equalizer clauses were challenged because, at the date of death, you did not know how much goes to the surviving spouse. This challenge was lost because the use of a formula determined the amount. The proposal is that the amount would be discretionary at the date of death. JP is not comfortable with this power because the amount would be discretionary after the death. Better opportunity is to modify the amount under the QTIP language.

CH: Where the surviving spouse has the power to make elections; should this ever cause a taxable gift?

Yesterday, Ron Aucutt said no and Carol agrees with this. However there is no guidance available.

DB: What should an attorney do about drafting when it affects taxes in other states where the other state is decoupled?

Do you draft where the client is resident in decoupled state? (pg 36 of current events) The issue is unauthorized practice of law and your competence to draft for client in another state. If there is any question, you need to have an attorney in the other state prepare the documents.

CH: Severance.

If a document does not contain language allowing severance, then each of the severed trusts must contain the same provisions. However, if some gift tax exclusion and some GST allocations have been made, splitting each evenly creates problems. Remember that you can allocate GST exemption without using any gift tax exclusion. Carol now drafts for split up of any trust, either family or marital.

In a decoupled state, where an old formula uses the smallest amount to reduce the federal tax to zero using state death tax credit. Should the formula now say "using the state death tax deduction?" Carol does not believe so and to just ignore the credit because it no longer exists. A problem exists where there is still a state death tax yet there is no deduction in the family trust. The answer is to change the formula and decide how you need to plan. CH is putting the decision off. She believes that repeal is gone but she is not sure where the rates will be in several years. In the very wealthy, many are considering changing domicile to avoid potential state estate taxes.

JP: Jeff believes that the government use of the relief of obligation of support is wrong but it is sprinkled though out the regs. This would be not be true if the distributions by the parent must be under standards.

DB: The last question involved a QPRT under NY law. The panel responded that the questioner needed to hire a NY attorney.

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Case Studies in Succession Planning: Addressing Generation-Specific Issues with Family Business Clients Thursday afternoon Special Session III-C  
Presenter: Mike Cohn

Reporter: Paul Hood Esq.

Mr. Cohn spent his time on two family business succession case studies from his experience. He demonstrated that through the use of family councils, outside directors and family "white papers" or constitutions one could solve some rather vexing intergenerational succession problems.

For more details, our readers are referred to Barbara Dalvano's report on Mr. Cohn's main session on Thursday morning that is contained in Report No. 9.

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News From The Exhibit Hall  
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Now that the Institute is over, we have reviewed our notes to see what vendors we were not able to cover or who did not submit any information to us on which we could report. We wanted to list those vendors here and their Web site URLs in case any of you might have an interest in one of their particular products:

HotDocs [[www.hotdocs.com](http://www.hotdocs.com)] - popular document assembly engine - used by WTP and WealthDocs

GhostFill [[www.ghostfill.com](http://www.ghostfill.com)] - another popular document assembly engine - used by DWTA and Amicus

Connect2A [[www.connect2A.com](http://www.connect2A.com)] - EP client collaboration via the Internet

Capital Trust Company of Delaware [[www.ctcdelaware.com](http://www.ctcdelaware.com)] - planning summaries and presentations

Mercer Capital [[www.mercercapital.com](http://www.mercercapital.com)] - business valuations and investments banking

Foundation Source [[www.foundationsource.com](http://www.foundationsource.com)] - back-office support services for private foundations

Leimberg Information Services, Inc. {LISI} [[www.leimbergservices.com](http://www.leimbergservices.com)] - provider of e-Newsletters for Estate Planning, Employee Benefits and Retirement Planning, Business Entities, Asset Protection Planning, Financial Planning and Charitable Planning, as well as the LawThreads(r) news service, Actual Text, State Laws, and US Code Searchers, and Supersearcher tools. All this for only \$24.95 per month (that's \$300 per year rounded).

Practitioner's Publishing Company (PPC) [[www.ppc.thomson.com](http://www.ppc.thomson.com)] - tax and accounting solutions and services

ProDoc [[www.prodoc.com](http://www.prodoc.com)] - estate administration document assembly system for Texas and Florida

Thomson RIA [[www.ria.thomson.com](http://www.ria.thomson.com)] - tax research and software resources for tax and accounting

professionals, including Fast-Tax Forms 706, 709 and 1041 software

Thomson West [[www.west.thomson.com](http://www.west.thomson.com)] - tax research and software resources for tax and accounting professionals, including Westlaw research and IEP estate planning software

U.S. Trust - [[www.ustrust.com](http://www.ustrust.com)] - Practical Drafting by Richard Covey, a quarterly publication available in print and on CD, plus EP Forms and Estate Planner's Toolbox

The Weinberg Group

[[www.theweinberggroup.com](http://www.theweinberggroup.com)] - Wealth Transfer Plan Design and Funding; Life Insurance Consultant and Expert Witness; and Business, Commercial, and Trust & Estate Mediation"

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Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

#### GENERAL INFORMATION ABOUT INSTITUTE

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