47th Annual Philip E. Heckerling Institute on Estate Planning January 14-18, 2013 *Reports 1-17*

Heckerling 2013

University of Miami School of Law Center for Continuing Legal Education

Orlando World Center Marriott Resort and Convention Center
Orlando, Florida
http://www.law.miami.edu/heckerling

GENERAL INFORMATION ABOUT INSTITUTE:
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NOTICE: Although audio tapes of all of the substantive session at the Miami Institute currently are only made available to Institute registrants for purchase, the entire proceeding of the Institute are published annually by Lexis/Nexis. For further information, go to their Web site at http://www.lexisnexis.com/productsandservices. The text of these proceedings is also available on CD ROM from Authority On-Demand by LexisNexis Matthew Bender. For further information, contact your sales representative, or call (800) 833-9844, or fax (518) 487-3584, or go to http://www.bender.com, or write to Matthew Bender & Co., Inc., Attn: Order Fulfillment Dept.,1275 Broadway, Albany, NY 12204.

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Heckerling 2013 - Preliminary Report

Note: This Preliminary Report was originally sent out on December 23, 2012 and is being rebroadcast at this time to ABA-PTL and ABA-TAX

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

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Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Institute Opening Reception

The Heckerling Institute staff reminds everyone to attend the Complementary Reception for Registrants that will be held in the exhibition hall at the Marriott from 6:00 to 7:00

p.m. on Monday evening, January 14th. This is a don't miss function - plenty of food and lots of things to drink, plus a great place to meet and make friends with a lot of people.

News From the Exhibit Hall

The vendor list this year is again sizeable and included (in alpha order with their booth numbers) the following, including several Platinum and Silver sponsors. Reports on the various technology vendors will be periodically published as part of our Reports.

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Heckerling 2013 - Introduction Part 1

Note: This Introduction Part 1 was originally sent out on January 12, 2013 and is being rebroadcast at this time to ABA-PTL and ABA-TAX

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Institute Opening Reception - Monday Evening, January 14th

The Heckerling Institute staff reminds everyone to attend the Complementary Reception for Registrants that will be held in the exhibition hall at the Marriott from 6:00 to 7:00 on Monday evening, January 14th. This is a don't miss function - plenty of food and lots of things to drink. Be on the look out for your friendly ABA-PTL Reporters who will all have PRESS badges on and say hello to them.

The Purposes and Scope of the Institute

The Heckerling Institute on Estate Planning is the nation's leading conference for estate planners, including attorneys, trust officers, accountants, insurance advisors, and wealth management professionals. The general session lectures and breakout sessions offer comprehensive coverage of the latest estate planning techniques and strategies, and special program tracks allow attendees to customize their educational experience. In addition to traditional estate planning topics, this year's Institute offers programs on the important related areas of elder law, marital law, and income tax planning. Attendees can also enjoy unparalleled networking and professional development opportunities that make attending the Heckerling Institute a valuable investment for every estate planning professional.

Recent Developments: The recent developments panel on Monday afternoon, which features three of the nation's foremost estate planning experts, will guide you through the most significant legislative, regulatory and case law developments of 2012.

Focus Series: Intra-family wealth transfers are often at the heart of the estate planning process. This series examines selected issues in family wealth transfers, including planning with loans and notes, the use of FLPs, LLCs, and trusts, family business succession planning, and spousal transfers. The series also considers the special issues involved with ART children, introduces the new Uniform Premarital and Marital Agreements Act, and examines the ethical issues involved in family wealth transfers. Sessions in the focus series are designated:

Planning with Financial Assets: Our financial assets series covers the taxation of alternative investment products sold to individuals, the effect of the financial crisis on modern financial theory and the Prudent Investor Rule, and the income taxation of life insurance. Sessions in the financial assets series are designated:

Emerging Assets: This new series examines planning techniques for specific asset classes, including intellectual property interests, mineral interests, digital assets, and conservation easements, that are playing an increasingly important role for today's clients. The series also looks at the practical issues involved in planning for and administering unusual assets. Sessions in the emerging assets series are designated:

Fundamentals: The fundamentals programs are designed for both new and experienced planners. The series will review selected issues involved in the income taxation of life insurance and in planning for retirement benefits. The series will also offer valuable insights into the related areas of marital law and elder law, which can enhance an estate planning practice.

Lloyd Leva Plaine Distinguished Lecture: The second in a series of lectures on tax policy and implementation will feature long-time former Congressional staff member and tax policy expert Lindy Paull, who will provide insights on the ongoing effort to overhaul the federal tax code.

Networking and Practice Development: The Institute serves as the national gathering place for estate planning professionals, offering a unique opportunity to exchange ideas and network with colleagues from around the country. Attendees can also review the latest in technology, products and services displayed by nearly 150 vendors in an exhibit hall dedicated entirely to the estate planning industry.

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Heckerling 2013 - Introduction Part 2 - The Schedule

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Institute Program Schedule

Monday, January 14

Fundamentals Program

Elder Law

Lawrence A. Frolik, Bernard A. Krooks

"Come gather 'round people . . .admit that the waters around you have grown. . .for the times they are a-changin." Every day, 10,000 Baby Boomers
turn age 65. They need lawyers. It's time to get on board the Elder Law Special leaving on Track 65. Learn about Later Life Law and how to counsel clients in the last third of their lives. It is not just about Medicaid planning. It's much, much more.

2:10 - 5:15 p.m.
Cypress Ballroom*

Recent Developments 2012

Dennis I. Belcher, Samuel A. Donaldson, Beth Shapiro Kaufman

Tuesday, January 15

9:00 – 9:50 a.m.
Cypress Ballroom*

The Lloyd Leva Plaine Distinguished Lecture Federal Tax Policy: Will Tax Reform Be the Cure-All?

Lindy L. Paull

Everyone agrees that the tax code is too complicated and lacks the stability and certainty that is critical to a voluntary system of taxation. At the same time, the federal government's fiscal situation remains a cause for concern, with high deficits and a rising debt burden becoming the norm. Long-time former Congressional staff member, Lindy Paull, will share her insight into the ongoing efforts to overhaul the federal tax code, the key drivers and challenges facing tax reform, the similarities and differences between the Tax Reform Act of 1986 and current efforts, and the impact of
the November election on tax reform.

9:50 – 10:40 a.m.
Cypress Ballroom*

Going, Going, Gone: Immediate Pre- and Post-Mortem Planning

Joshua S. Rubenstein

This session will revisit immediate pre- and post-mortem planning strategies, particularly in view of the unprecedented economic and legislative change over the last several years - which strategies still work, which ones no longer work, and what new innovative opportunities for last minute and after the fact planning present themselves.

10:55 – 11:45 a.m.
Cypress Ballroom*

Intra-Family Loans and Notes - "But It Seemed So Simple" (Focus Series)

Steve R. Akers

This session will examine a wide variety of tax issues that arise with commonplace intra-amily loans and notes, including when income must be recognized, forgiveness of loans and discharge of indebtedness issues, deductibility of nterest by borrowers, valuation of notes, refinancing existing loans at lower rates, planning opportunities with Graegin notes, and significant income tax traps for installment notes under the installment sales rules.

11:45 a.m. – 12:35 p.m.
Cypress Ballroom*

The Art of Donating Your Cake to Your Family and Eating It Too (Focus Series)

S. Stacy Eastland

This presentation will discuss the advantages and considerations of sales of FLP interests to grantor trusts and grantor trusts created by the transferor's spouse, contributions of leveraged single member non-managing member LLC interests to GRATs, transfers to remainder purchase marital trusts, spousal transfers that avoid the reciprocal trust doctrine and trust beneficiary sales to QSSTs and other third party created 678 trusts.

2:00 – 3:40 p.m.
Cypress Ballroom*

OK, Now What? Advising Clients After the Biggest Planning Year Ever

John F. Bergner, Ronald D. Aucutt, Carol A. Harrington

2012 was a banner year for estate planning but uncertainty surrounding future tax law creates significant challenges for estate planners in advising clients in 2013 and beyond.

This panel will discuss what Congress did or didn't do in 2012, potential developments in 2013 and planning opportunities and pitfalls for whatever situation we find ourselves in.

3:55 – 4:45 p.m.
Cypress Ballroom*

Keeping It in the Family: Family Business Succession Planning (Focus Series)

Louis A. Mezzullo

The presentation will cover the characteristics of a family business, the objectives of the founding entrepreneur, exit strategies, and the planning process. It will also cover particular issues unique to dealing with family owned businesses.

4:45 – 5:35 p.m.
Cypress Ballroom*

All the Days That Adam Lived Were Nine Hundred and Thirty Years, and He Died and Begat Sons and Daughters: The New Genesis in Estate Planning (Focus Series)

Bruce M. Stone

One percent of births in the United States result from assisted reproductive technology. The rights of children conceived after the death of a genetic parent have been litigated all the way to the Supreme Court, yet unanswered questions abound for clients, planners, and administrators. This session will address planning and administration issues for ART children.

Wednesday, January 16

9:00 – 9:50 a.m.
Cypress Ballroom*

With All My Worldly Goods I Thee Endow, Except as Provided in Article Five (Focus Series)

Carlyn S. McCaffrey

Premarital and marital agreements are used to alter rights and obligations between spouses that arise under local law as a matter of marital status. In an effort to promote consistency among the states as to the enforceability of these agreements, a new Uniform

Premarital and Marital Agreements Act is under consideration by the National Conference of Commissioners on Uniform State Laws. This session will focus on the provisions of the new Uniform Act as well as practical aspects of negotiating and drafting these types of agreements.

9:50 – 10:40 a.m.
Cypress Ballroom*

The Fiduciary's Handbook of Sneaky Post-Mortem Income Tax Issues

Carol A. Cantrell

Don't be ambushed by sneaky income tax issues hiding in the bushes on the way home from the funeral. In the world of post-mortem estate planning, income and estate tax issues are usually found in the same company. This discussion highlights both common and emerging income tax issues such as substantiating basis and deductions, mitigating income in respect of a decedent (IRD), protecting the income tax statute of limitations, capturing valuable elections, and everything else the fiduciary wishes he had known about.

10:55 a.m. – 12:35 p.m.
Cypress Ballroom*

Question and Answer Panel
Dennis I. Belcher, Samuel A. Donaldson, Beth Shapiro Kaufman

(Questions for this panel may be submitted ahead of time via email to <mailto:heckerling@law.miami.edu>heckerling@law.miami.edu or by placing them in the Q & A box located at the Institute Registration Desk in the Exhibit Hall by Tuesday at 6:00 p.m.)

2:00 – 5:20 p.m.
Crystal Ballroom
Salon H

Fundamentals Program

(Runs concurrently with Special Sessions I & II)

What Estate Planners Need to Know About Marital Law (Focus Series)

Carlyn S. McCaffrey, Linda J. Ravdin

The unanticipated exercise of marital rights can disrupt the most carefully arranged estate plans. This session will explore the typical patterns of marital rights and obligations imposed on spouses by the various states, the extent to which they can be varied by agreement, and the tax consequences of the common financial arrangements provided for in premarital and marital agreements and in agreements entered into in connection with the dissolution of marriages.

2:00 – 3:30 p.m.

Special Sessions I

Session I-A
Cypress Ballroom*

What's the Encore: Correcting and/or Amplifying Family Wealth Transfers (Focus Series)

Ellen K. Harrison, Steve R. Akers, S. Stacy Eastland

This session will cover the application and management of wealth transfer strategies that provide some benefit to the grantor and/or the grantor's spouse; creative planning with loans and/or annuities owed by an IDGT to the grantor, additional wealth transfer strategies available when gift tax exemption is exhausted, and strategies to preserve a basis adjustment upon the grantor's death.

Session I-B
Crystal Ballroom
Salon J

The Dead and the Dying: Workshop on Immediate Pre- and Post-Mortem Planning

Joshua S. Rubenstein, T. Randolph Harris, Laura M. Twomey

This workshop will review in greater detail immediate pre- and post-mortem planning strategies, particularly in view of the unprecedented economic and legislative change over the last several years -- which strategies still work, which ones no longer work, and what new innovative opportunities for last minute and after the fact planning present themselves. It will also provide practical drafting tips to increase planning flexibility.

Session I-C
Grand Ballroom
Salons 1-2

International Planning Update

Robert C. Lawrence, III, Norman J. Benford, Dean C. Berry

This session will examine the drive for increased transparency regarding the beneficial ownership of financial accounts, as evidenced by multinational initiatives sponsored by two Secretariats of the Organization for Economic Cooperation and Development, the Financial Action Task Force and the Global Forum, and unilateral initiatives such as the Foreign Account Tax Compliance Act (FATCA) including the responsibilities of attorneys, accountants, and other service providers to comply. This session will also examine the emerging distinction between the governing law of a trust and the law of administration of a trust including conflicts of law issues and other uncertainties. Finally, the session will review recent U.S. legislative and judicial decisions affecting trusts.

Session I-D
Grand Ballroom
Salons 3-6

The Brave New World of ART Children: Special Issues in Estate Planning and Administration (Focus Series)

Bruce M. Stone, Susan N. Gary, R. Hugh Magill

The panel will examine real issues being encountered today in estate planning and in administration of estates and trusts concerning the rights of posthumously conceived children, and the potential liabilities they create for planners and administrators.

Session I-E
Grand Ballroom
Salon 7

Intelligent Planning for Intellectual Property (Emerging Assets Series)

Adam F. Streisand, Gabrielle A. Vidal

The speakers will explain the need for specific planning relating to intellectual property assets, including copyright, trademark, patent and name, image and likeness rights, based upon the peculiarities of state and federal law, and international law and treaties, impacting the descendibility, management and exploitation of such rights, as well as complexities associated with reversion rights, “will bumping” and marital dissolution. The speakers will also discuss issues related to the valuation, taxation and accounting of intellectual property rights.

Session I-F
Crystal Ballroom

Salon G

The Prudent Investor Rule After the Financial Crisis (Financial Assets Series)

Max M. Schanzenbach, Stephen B. Malech, Susan Porter

In the wake of the Financial Crisis of 2008, modern financial theory has come under increasing scrutiny. This session will examine the relevance, if any, of evolving views on portfolio theory, efficient markets, and “behavioral” finance for the Prudent Investor Rule and trust investment practice. Particular attention will be paid to trustee compliance, both from empirical and advisory perspectives, as well as to liability exposure and planning considerations.

3:50 – 5:20 p.m.

Special Sessions II

Session II-A
Cypress Ballroom*

Practical Issues in Planning for the Family Business (Focus Series)

Louis A. Mezzullo, Hugh F. Drake, Nancy Schmidt Roush

The session will use hypothetical fact patterns to illustrate the tax and non tax issues involved in planning for the successful transition of the family business to the next generation or for the disposition of the business to non family members.

Session II-B
Crystal Ballroom
Salon J

Top Ten Fiduciary Income Tax Strategies for 2013

Carol A. Cantrell, Steven G. Siegel

This panel will discuss practical strategies for dealing with the 2013 fiduciary income tax landscape in light of possible rate changes, the 3.8% Medicare tax, the alternative minimum tax (AMT), bundling and unbundling fees, balancing 706 and 1041 deductions, defining income under the “not-so-uniform” Uniform Principal and Income Act (UPIA), and much more.

Session II-C

Crystal Ballroom
Salon G

IRA Beneficiary Designations: Just Tell Me What the Answer Is

Timothy H. Guare

The minimum distributions rules are complex. However, most of our clients fall into one of a relatively few categories (unmarried; happily-married; not-so-happily-married; charitable-inclined; etc.), and our advice with respect to beneficiary designations for their individual retirement accounts can be standardized. By examining common fact patterns, participants will learn how to advise most of their clients most of the time.

Session II-D
Grand Ballroom
Salons 1-2

Crossing State Lines with Community Property

M. Read Moore, Nicole M. Pearl

Community property can arise by operation of law or by agreement. This presentation will cover basic principles of community property law geared towards lawyers practicing in noncommunity property states, and will address the legal and tax treatment of community property when one or both members of the couple, including same-sex married couples and registered domestic partners, move to or reside in a noncommunity property state.

Session II-E
Grand Ballroom
Salons 3-6

Estate and Income Tax Planning with Mineral Interests (Emerging Assets Series)

Michael V. Bourland, David R. Croft

This presentation will cover the basics the practitioner needs to understand regarding mineral interests including various types of interests retained by a landowner after entering into a lease, management/maintenance of the mineral interests and the use of tax partnerships and estate planning strategies.

Session II-F
Grand Ballroom
Salon 7
The Taxation of “Exotic” Investment Products Sold to Individuals (Financial Assets Series)
Paul S. Lee

Investing has gone beyond simply stocks, bonds, and mutual funds. Highnet-worth individuals are being offered a dizzying array of "alternative" asset classes and investments (commodities, foreign currency, gold, structured notes, exchange-traded notes, foreign debt, leveraged ETFs, etc.). These investments commonly utilize complex financial instruments and structures, the taxation of which often catches the taxpayer and tax professionals unaware. This presentation will discuss the taxation of these "exotic" investments from the investor's standpoint.

Thursday, January 17

7:45 – 8:45 a.m.
Denver & Chicago Rooms

Florida Insurance: Issues Relating to Unauthorized Entities

(Attendance is required for insurance professionals seeking CE credits in Florida)

9:00 – 9:50 a.m.
Cypress Ballroom*

Tricks and Traps in Planning and Reporting Generation-Skipping Transfers

Diana S.C. Zeydel

Reunification of the transfer tax shelters provided a significant opportunity to shield family wealth from the "death tax". Effective allocation of GSTT exemption is a key tool in maximizing the tax free transfer of wealth. This program will review some of best strategies to plan and report the use of GSTT exemption.

9:50 – 10:40 a.m.
Cypress Ballroom*

Tales from the Dark Side – Drafting Issues from the Fiduciary Perspective

Benjamin H. Pruett

This session will address drafting beyond obtaining a desired tax result, how to ensure that the settlor's non-tax goals are reached decades and generations after the trust agreement is executed with a focus on maintaining flexibility for an uncertain future.

10:55 – 11:45 a.m.
Cypress Ballroom*

Spousal Transfers - During Life, at Death and Beyond (Focus Series)

Barbara A. Sloan

This presentation will focus on the interplay between the marital deduction and the applicable exclusion amount (or its state equivalent) in family wealth transfer planning. It will include inter vivos techniques, formula planning in testamentary documents, and fine tuning the estate plan on a post-mortem basis, including how the use of portability may expand and change traditional methods.

11:45 a.m. – 12:35 p.m.
Cypress Ballroom*

Don’t End Up as Road Kill: Surviving the Ethical Challenges Posed by Transfers Among Family Members (Focus Series)

Charles D. “Skip” Fox, IV

This session will review the ethical challenges facing estate planning professionals in representing family members in transfers among family members. Attention will be paid to potential and real conflicts of interest, joint or separate representation, the use or misuse of waivers, challenges in acting as a fiduciary, and family members with diminished capacity.

2:00 – 3:30 p.m.
Cypress Ballroom*

Fundamentals Program

(Runs Concurrently with Special Sessions III)

What Your Senior T&E Partner Doesn’t Know About Retirement Benefits

Natalie B. Choate

“Estate planning as usual” doesn’t work for retirement benefits, but the top brass hasn’t figured that out. Different marital deduction rules, no “benefits boilerplate,” pecuniary formulae, or standard minor’s trusts. Roth IRAs are sacred, and who drafts the beneficiary designation?

2:00 – 3:30 p.m.

Special Sessions III

Session III-A
Crystal Ballroom
Salon G

Practical Aspects of Spousal Transfer Techniques - Inter Vivos to Post-Mortem (Focus Series)

Barbara A. Sloan, T. Randolph Harris, Eric A. Manterfield

This panel will analyze the application of spousal transfer techniques including, among other techniques, spousal limited access trusts, formula clauses in coupled and decoupled states, Clayton trusts and portability techniques.

Session III-B

Crystal Ballroom
Salon J

Family Limited Partnerships -- Audit, Appeals, and Litigation -- What's Hot and What's Not?

John W. Porter

This program will take a practical approach to dealing with current issues involving the transfer of interests in family limited partnerships and other closely-held entities. Particular emphasis will be placed on valuation issues, formula transfers, Section 2036, Chapter 14, any recently passed or proposed legislation, and strategies to prepare for and resolve transfer tax disputes.

Session III-C

Crystal Ballroom
Salon H

Recent Developments for Fiduciaries 2013

Turney P. Berry, Dana G. Fitzsimons, Jr.

With a focus on how fiduciaries and their advisors may best understand and manage fiduciary risk and related ethical challenges, in an increasingly litigious and confrontational environment, the panel will review recent cases and statutory enactments from across the country and discuss trends and developments in several areas including: investments, concentrations, and special assets; distributions; surcharge exposure;

disclosure to beneficiaries and evidentiary and ethical privileges; the fiduciary as client and conflicts of interest; modification of trusts; settlement, defenses, and limitations on actions against fiduciaries; jurisdiction; trust advisors; incapacity; and third party liability.

Session III-D

Grand Ballroom
Salons 1-3

Hooked on (by?) Ethics – The T & E Lawyer's Impossible Dilemma

Susan T. House, Randy Johnston, Stanley H. Wakshlag

What are the legal, demographic and market-driven factors leading to the explosion of malpractice litigation against T & E lawyers and their clients? What role do the ethical rules play? Can we mitigate the potential damage beforehand?

Session III-E

Grand Ballroom
Salon 7

Digital Death: What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud (Emerging Assets Series)

James D. Lamm, Christina L. Kunz, Damien A. Riehl

This panel will explain how to find, value, and transfer a person's valuable or significant electronic data and other rights and interests in "digital property." Learn the essential steps needed to plan ahead for online accounts, passwords, and encryption, and learn practical estate administration strategies for when a client hasn't planned ahead.

Session III-F

Grand Ballroom
Salons 4-6

3:50 – 5:20 p.m.
Cypress Ballroom*

When Charities Say "No" – And What to do Next

Jerry J. McCoy, Kathryn W. Miree

Cash contributions to charity are comparatively simple, but as clients seek to contribute assets such as life insurance, closely-held business interests, or artworks, they are often surprised to find that the charity may not accept the gift. This interactive session will provide perspective on this trend, review the underlying reasons why this happens, and find ways to achieve the best result for your client and the gift.

FUNDAMENTALS PROGRAM

(Runs concurrently with Special Sessions IV)

So, You Think You Know Everything About the Income Taxation of Life Insurance? Think Again! (Financial Assets Series)

Donald O. Jansen, Lawrence Brody

This session will examine why income tax exemptions for death proceeds and cash value accumulations are not always available; the deductibility of interest on policy loans is hardly ever available; accessing cash values may or may not be tax-free; the definitions of policies for tax purposes are actuarial; policy exchanges aren't always tax-free; Crummey trusts have income tax consequences; and will explore other little known aspects of the income taxation of policies.

3:50 – 5:20 p.m.

Special Sessions IV

Session IV-A
Crystal Ballroom
Salon H

Practical Advice on Surviving the Ethical Challenges Posed by Transfers Among Family Members (Focus Series)

Charles D. "Skip" Fox, IV, Hugh Kendall, Mary F. Radford

Using a series of hypotheticals, the panel will discuss practical ways to address the ethical challenges posed to estate planning professionals by transfers among family members.

Session IV-B

Grand Ballroom
Salons 1-3

Tales from the Deep – In Depth Discussion of Selected Drafting Issues

Benjamin H. Pruett

This session will provide an in depth discussion of a few selected drafting issues, such as "directed trust" provisions, flexibility provisions, and special investments guidelines.

Session IV-C

Crystal Ballroom
Salon J

Protecting Assets Without the Pre-Nup: Use a Self-Settled Trust (Focus Series)

Daniel S. Rubin

When a pre-nuptial agreement appears impractical or impossible, undesirable and potentially unenforceable, complementary or alternative strategies such as the self-settled trust can counter the problems presented by the possibility of a future ex-spouse.

Session IV-D
Crystal Ballroom
Salon G

Florida Law Update

Lauren Y. Detzel, Tae Kelley Bronner, Thomas M. Karr

The panelists will discuss important updates in Florida legislation and case law relevant to fiduciary litigation, probate and estate planning which every practitioner in Florida should know.

Session IV-E

Grand Ballroom
Salons 4-6

Coming to a Tax Court Near You: How to Survive the IRS's Assault on Conservation Easements (Emerging Assets Series)

Alan F. Rothschild, Jr., David J. Dietrich, Nancy A. McLaughlin

Since 2006, courts have decided twenty-seven cases challenging conservation easement donations, and there are hundreds of cases in the pipeline. This session will (i) provide an overview of conservation easements, (ii) offer drafting and tax reporting suggestions to minimize the risk of audit, and (iii) analyze the IRS's Conservation Easement Audit Techniques Guide and the latest cases.

Friday, January 18

9:00 – 9:50 a.m.
Cypress Ballroom*

How to Rehabilitate an IRA with a Shady Past

Natalie B. Choate

Does your client's IRA suffer from excess contributions, botched rollovers, prohibited transactions, titling snafus? The IRS has four weapons to punish IRA misdeeds (disqualification; 6%, 10%, or 50% penalty). Use rollovers, re-characterizations, corrective distributions, waivers, and more to beat the rap.

9:50 – 10:40 a.m.
Cypress Ballroom*

From the Bazaar to the Bizarre: Planning for and Administering Unusual Assets in Estates and Trusts (Emerging Assets Series)

Allen L. Venet

From artwork to firearms to wine cellars, our clients have an unending array of assets. Taxes are important, but people really care about personal items. This session will present useful techniques, with particular attention on assets that pose unusual risks for fiduciaries. What you don't know just might hurt you.

10:50 a.m. – 12:00 p.m.
Cypress Ballroom*

Using Life Insurance to Fund Estate Taxes: A Counterintuitive Approach & A Wrap-up of the Key Presentations of the Week

Jonathan G. Blattmachr, Diana S.C. Zeydel

Life insurance is often purchased as a solution to funding estate taxes. However, it can be inflexible and costly and is seldom a perfect antidote. This presentation will discuss how insurance should be considered in conjunction with alternate lifetime estate planning solutions and will propose alternative atypical insurance designs that can offer substantially more efficiency and flexibility. It is something every planner needs to know for his or her clients. The session will also include a review of key presentations from the week.

Heckerling 2013 - Report No. 1

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html. In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

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Editor Comment: This Report covers all of the substantive sessions that were held on Monday, January 14th, the first day of the Heckerling Institute. The next Report will cover some of the substantive sessions from Tuesday, January 15th, the second day of the Institute.

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Monday, January 14, 2013 9:00 AM - 12:15 PM

Fundamentals No. 1 - Elder Law Presenters: Lawrence A. Frolik, Bernard A. Krooks Reporter: Herb Braverman

“Come gather ‘round people . . .admit that the waters around you have grown. . .for the times they are a-changin.” Every day, 10,000 Baby Boomers turn age 65. They need lawyers. It’s time to get on board the Elder Law Special leaving on Track 65. Learn about Later Life Law and how to counsel clients in the last third of their lives. It is not just about Medicaid planning. It’s much, much more.

The Institute opened this Monday morning with a Fundamentals Program on Elder Law. Professor Frolik reminded us that this specialty is concerned with the "quality of life" in the last 20 to 30 years of one's life. Both he and Mr. Krooks encouraged those attending to consider getting to know the necessary areas better and focusing our practices on serving this increasing population in our country. Professor Frolik reviewed the demographics, citing that 40 million Americans are over the age of 64 and about 10,000 more are added to the total every day in our country. These elder citizens face the problems of aging (particularly, loss of capacity to varying degrees), isolation, dealing with government assistance programs that assist the elderly, the increasing population of singles, who have chosen to not marry and not have a nuclear family, family estrangement and the increasing costs of medical care and of assisted living.

Mr. Krooks noted the 11th Commandment for the elderly, "Thou shall not spend principal" and noted that many elderly need financial planning as well. He has practiced in this area for many years "in the trenches" in New York and presented a thorough and helpful compliment to Professor Frolik's discussions of Medicare, Medicaid, Social Security, long term care and health care decision making. If you are interested in this area of practice, I strongly suggest that you order the tape of their presentation, as their outline (which covers what was a three hour presentation) is only just over 10 pages long.

Elder planning is a broad based, holistic planning area, usually delivered in a near crisis situation for folks who have done little or no prior planning. For example, Mr. Krooks pointed out the 70% of the elderly will need long term care of some type and have done no planning for this need; the other 30% are the lucky ones who die suddenly--no one gets away completely.

Professor Frolik covered income in retirement issues, pointing out that we must be at least familiar with social security. Most people retire at 62, the earliest age one can claim SS; others work to age 65 when Medicare kicks in; some continue to 66, the full retirement age for boomers and a small (but feisty) group retire at 70, after which SS benefits will grow no more and will have reached their maximum, except for indexing; and some just keep on working even then. He discussed options that the elderly have to increase their benefits as a spouse, a divorcee and other techniques for benefit planning. As I looked around the hall where they were speaking, I had the feeling that many attendees were learning some things they could use in their own planning as well.

Professor Frolik also spoke about pensions/401k rollovers and personal savings, both of which also are used by the elderly to provide personal income. He spent time on annuities and seemed to favor putting a portion of one's assets into an annuity that would provide income in future years and not run out before one's death. The options are many, of course. When he spoke of assets from other sources, he spent time on an increased use of trusts by the elderly, not to perform sophisticated tax avoidance tricks, but to be sure that monies would be properly administered and used for the elderly when they cannot do that task themselves.

Professor Frolik then turned to Medicare, the key matter of interest to 65 year olds in our society. He reviewed its 4 parts, A, B, C and D. A covers hospital costs to some degree (think the old Blue Cross), B covers doctors costs to some degree (think the former Blue Shield), C is Medicare Advantage with augments A and B to some extent and D which is directed toward drugs and medicines. One pays a premium for B, C and D, with a variety of plans available from which one puts together the best plan for him/her. We are all aware of the complexities of government programs and the elderly face those complexities at the least convenient time; they often need our assistance.

Mr. Krooks mentioned that the elderly often "know too much", having been on the Internet to get information, are often "fee sensitive" about conventional estate planning, but will pay well for good elder law planning, because the need for it is staring them in the face and they need immediate care.

Mr. Krooks spoke at some length about what Medicare covers in a nursing home setting, noting its very limited role that the elder by and large are unaware of. He suggested a resource for information...The Center for Medicare Advocacy in Connecticut (see their website).

The discussion of Long Term Care was substantial and included a review of Medicaid qualifications and planning. This area is very state specific and one must become familiar with his/her own state laws in this area to be effective as a professional. Both speakers noted the 5 ways to pay for long term care, namely, out-of-pocket, Medicare (for, perhaps, 100 days), VA benefits for some, insurance or Medicaid, if you qualify (by being poor or making yourself poor by planning). Mr. Krooks went into Medicaid planning in depth, why and how one might accomplish this task for a client. Again, the variables are many and the planning is state specific. He covered gifting and the 60 month "look back" period (that may grow longer as it has over the years), use of certain trusts, spend down issues, annuities and other techniques that may work in your state. He emphasized planning for and with the community spouse (not in the nursing home) and discussed the fragile state of the long term care industry these days.

Professor Frolik closed the presentation with a brief discussion of health care decision making for the elderly. He mentioned the documents we are all somewhat familiar with, but emphasized that the elderly (and all of us really) should be able to identify who knows what you want in your later years (when you cannot speak for yourself) and how one wants to be cared for then. He pointed out that the elder client should speak with his/her primary surrogate, as well as with all the successor or alternates, and that these discussions should take place from time to time over the years, since one's ideas and choices may change from time to time--he referred to "the bull looking different inside the ring".

This was a very good fundamental program on an area of the law practice that many who attended the Institute (and many who did not) should consider as a possible diversification area within their own practices.

Monday, January 14, 2013 2:10 - 5:15 PM – **Recent Developments 2012**
Presenters: Dennis I. Belcher, Samuel A. Donaldson, Beth Shapiro Kaufman Reporter: Sarah Butters

The presenters primarily lectured from a detailed outline prepared by the presenters, along with the assistance of contributors Steve Akers, Charles S. "Skip" Fox, IV, Jeffrey Pennell, Howard Zaritsky and Ronald Aucutt. Quite a lineup of talent for such an important topic.

The session began with some overall comments about the status of transfer tax laws generally. Since 2001, transfer tax laws have changed ever couple years and that has just become the landscape within which we practice. In addition, although we have known since 2010 that the fiscal cliff was looming, it seems that the vast majority of clients did little to deal with it until after the 2011 election. Then by the December 31, 2012, we had crammed two years worth of work into two months. As Dennis Belcher described it, it was like taking a drink from a fire hydrant. But shame on us, because the American Taxpayer Relief Act (ATRA) rewarded procrastination (and perhaps contributed to donor remorse).

The presenters' focused on 4 main points for their discussion of ATRA:

1. Finally, there is "permanence" in the transfer tax laws, for the first time in 12 years. At least there is until Congress deals with the looming debt ceiling debate. But for now, we have a permanent $5 million dollar exemption that is indexed for inflation. Portability is now permanent as well. The top tax rate is now 40%. There is no state death tax credit, but there is a death tax deduction. All GST allocations rules are now permanent. And, we no longer need to be concerned with claw back.

2. Income tax planning is becoming more and more important in estate planning and estate/trust administration. Further, the importance of choosing between a step-up in basis or the estate tax exclusion is now in full focus. The income tax rates for HITs (high income taxpayers) is set at 39.6% for individuals with income over $400,000, or $450,000 for couples. That same 39.6% rate applies to trusts with income that exceeds $12.000 annually.

On the bright side, ATRA included some perks for those who are charitably inclined. The IRA rollover provisions were extended for 2012 - with a deadline of January 31, 2013 for 2012 rollovers. In other words, if an individual took a distribution in December of 2012, that individual can make a gift to a charity in January 2013 and elect to treat that contribution as a direct contribution to a charity. Or, for those who did not take a distribution in December 2012, the individual can take a distribution in January of 2013 and pay it directly to a charity, and it will count as a 2012 distribution rather than a 2013. In other words, the contribution will relate back to the prior year. There are some restrictions, however, including:

- The taxpayer has to have been 70 1/2 in December of 2012 to qualify
- The contribution cannot be made to a donor advised.
- The contribution is limited to a maximum amount of $100,000.

In summary, this is a great year for charitable contributions.

For unearned income that exceeds certain limits, there is now a 3% surtax. Those limits are $150,000 for individuals or $250,000 for couples. For trusts, the surtax applies to all trusts with unearned income in excess of $12k unearned income. These increased income tax rates for trusts means that trustees will have to make some tough decisions regarding when and whether to make distributions of income rather than paying the applicable income tax.

3. Portability is a game changer. Discussions with clients now need to focus on portability planning and not just marital deduction/credit shelter trust planning. The presenters spent a good deal of time explaining how portability now works and the definition of the Applicable Exclusion Amount under Sec. 2010(c)(2). In short, the Applicable Exclusion Amount now equals to the sum of two numbers: the donor's basic exclusion amount, plus the deceased spousal unused exclusion amount (the "DSUE").

It is clear that you can use the DSUE for lifetime gifts. So a widow can celebrate death by making gifts. Further, it is clear that those gifts will reduce the DSUE first rather than the surviving spouse's basic exemption amount. But, in order to elect for portability, you need to file a timely Form 706 to make election. The Regs now let you use a Form 706 EZ to do this without a full 706. The EZ form doesn't require appraisals for any property qualifying for the marital or charitable deduction - but you do have to list them. Finally, the DSUE is calculated according to law in place when the spouse died - so if exemption goes up or down, the DSUE doesn't.

Notwithstanding portability, credit shelter gifts still make sense for a number of reasons, including the creditor protection they provide and the ability to capture any appreciation in an exempt trust (which you don't get with portability.

4. Coping with donor remorse and looking forward to 2013. On the bright side, those who made gifts in 2012 can now file gift tax returns and get the clock ticking on the statute of limitations. For this reason, donors should file timely returns, rather than filing on extension. Last year there were about 220,000 gift tax returns files. This year, there will likely be over 500,000, and only about 350 examiners to review those.

The presenters warned that given the debt crisis looming, we can expect that the IRS and Congress will continue to focus on certain hot issues, including valuation discounts, short term GRATs, shortening the GST to 90 years and revising the grantor trust rules. For these reasons, donors shouldn't regret gifts made in 2012 and those who procrastinated should make gifts quickly in 2013 while they can.

The presenters spent a good deal of time discussing the IRS' priorities for 2013, and where we can expect to see some guidance in proposed revenue rulings regarding private trust companies, proposed forms for charitable remainder trusts, guidance on Sec. 2053 and 2801, as well as the GST allocation rules regarding pour-over trusts at the end of an ETIP. Equally interesting what we shouldn't expect to see - any guidance on trust decanting guidance planned.

The presenters also spent a good deal of time on various transfer tax developments, which are more adequately summarized in the materials, but include:

A. Various valuation updates including Gaughen (regarding reliance on appraisals); Finfrock and related PLRs regarding special use valuation; and defined value clauses as addressed in Wandry.

B. FLPs for non-tax reasons (Stone and Kelly) and annual exclusion gifting of FLP interest (Wimmer).

C. Estate tax marital deduction and the definition of "marriage" could be addressed head on by the US Supreme Court in Windsor, which challenges the constitutionality of DOMA and the application of the marital deduction for same sex couples. The presenters also discussed the Gill case, which addressed the deductibility of certain expenses related to post-death litigation expenses.

D. Post-mortem reformation v. rescission. In PLR 201243001, a state court order of reformation was not recognized where it was clear on the pleadings that the trial court lacked authority to reform unless there was a drafting mistake and no such allegation had been made. Instead, it was clear that this was really just donor remorse.

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Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida. The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 2

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html. In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

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Editor Comment: This Report covers two of the substantive sessions that were held on Tuesday, January 15th, the second day of the Heckerling Institute, those being the Lloyd Leva Plaine Distinguished Lecture that led off the day and the new Genesis in Estate Planning for Assisted Reproductive Technology that ended the day The next Report will cover some more of the substantive sessions from Tuesday, January 15th.

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Tuesday, January 15, 2013 9:00 - 9:50

The Lloyd Leva Plaine Distinguished Lecture Federal Tax Policy: Will Tax Reform Be the Cure-All?

Presenters: Lindy L. Paull Reporter: Kimon Karas

Everyone agrees that the tax code is too complicated and lacks the stability and certainty that is critical to a voluntary system of taxation. At the same time, the federal government’s fiscal situation remains a cause for concern, with high deficits and a rising debt burden becoming the norm. Long-time former Congressional staff member, Lindy Paull, shared her insight into the ongoing efforts to overhaul the federal tax code, the key drivers and challenges facing tax reform, the similarities and differences between the Tax Reform Act of 1986 and current efforts, and the impact of the November election on tax reform.

Ms. Paull presented the Lloyd Leva Plaine Distinguished Lecture at this year’s Institute. She worked on the Tax Reform of Act of 1986 and used the Act as a comparison for future tax reform. Over the past couple of years Congressional tax writing committees and staffs have devoted substantial time and resources in educating Congressional members on tax reform issues.

I. What is driving tax reform and its prospects. First, ATRA 2012 did not alter the fundamental basis for tax reform. Several factors are driving the tax reform debate.

A. Tax Code is unstable and unpredictable. ATRA did not solve all issues as there are many tax provisions expiring at end of 2013.
B. Tax Code continues to grow in complexity. Last week's report issued by the National Taxpayer Advocate stated that complexity is the #1 issue facing taxpayers.
C. Improving Tax Code fairness and equity. Major issue addressed during the past Presidential campaign.
D. For businesses need to foster economic growth and improve US company's competitiveness in global economy. Today approximately 95% of consumers are located outside of US borders.
E. Additional need for revenue to address budget deficits. CBO projects that budget deficits into the future will be 2 times historical average which has been about 3% of GDP growing to 6-7% of GDP.

II. Comparison to Tax Reform Act of 1986.

A. The 1986 rates for individuals and corporations were reduced by eliminating deductions and lowering rates. Current discussions centers on both as today with the increased rates of ATRA, the Healthcare Surtax, and phaseouts top rate reaching up to 45%.
B. Even with lower tax rates progressivity was maintained.
C. !986 Act was revenue neutral with the revenue raised from the corporate sector. Today's discussions seek revenue neutrality within all categories, individuals, domestic businesses and international reform.

III. In other respects current situation differs greatly from 1986.

A. Federal deficits in 1986 not as large as today.
B. Strong Presidential leadership and cooperation with Congress.
C. Global business activities were not as significant as today. In 1986 10% of revenue was foreign sourced.
D. Ability to lower individual rates may be difficult.
E. 1986 most business income was earned by corporations; today more than 50% of business income is earned by pass-throughs.
F. 1986 did not modify in a fundamental way the transfer taxes. With "permanence" in ATRA no fundamental reforms are expected. Appears to be a linkage between the highest transfer tax rate of 40% with highest income tax rate

of 39.6%. If income tax rates are lowered will transfer tax rates follow? Although no fundamental reform is expected in the transfer tax area, keep a watch for items in the Budget and Green Book, such as valuation discounts, dealing with grantor trust rules, GRAT minimum terms, among others.

IV. Individual Tax Reform. Individual income tax largest component of federal revenue. Roughly 90% of tax expenditures are attributable to individuals.

A. If rates are to be lowered great tension between rates and expenditures. What expenditures are reduced or repealed which leads to possible limitations/ caps on deductions or more phaseouts.
B. Alt min another issue to be addressed. One-half of the costs associated with ATRA related to alt min relief.

C. V. Business Tax Reform. Important impetus to reform is the concern about the impact of current Code on US competitiveness in the global economy.

D. Top corporate tax rate to be reduced from 35 to 28%, with further reduction to 25% for manufacturing generally and lower rate for 'advanced manufacturing. Cost to be paid by eliminating tax benefits for targeted industries (oil and gas and insurance) and provisions that distort investment (debt financing). Repeal accelerated depreciation and limit the deductibility of interest for corporations and create parity between large corporations and large flow-through entities.
E. President's proposal does not support adoption of a "pure" territorial system.
F. House Republican budget passed in 2012 includes a framework for neutral tax reform. Reduction of top corporate tax rate to 25% and adoption of a territorial tax system. Chairman Camp's draft proposal includes a 95% dividend deduction for active business income earned by controlled foreign corporation and includes a 5.25% tax on deferred foreign income payable over eight years.
G. Ms. Paull stated the solutions to the business issues are not easy. Although now the US system has the highest corporate rate among OECD countries, those countries with the territorial tax system also have in place in conjunction with that a goods and services tax (consumption tax). In comparison the US generates 45% of its revenue from income tax whereas foreign countries generate 35% from income tax but another 32% from goods and services taxes.

VI. The debate will be whether tax reform is part of deficit reductionis there linkage or not. The President in announcing the passage of ATRA also announced the need for deficit reduction but also the need for revenue. The Congressional Republicans have stated that revenue is off the table having been addressed in ATRA. Ms. Paull suggested if tax reform is a separate issue it most likely will be done on a revenue neutral basis much like the 1986 Act by rate reduction coupled with base broadening, and possible territorial tax.

VII. Future. Ms. Paull indicated that the start will be with the President's Budget that will be released most likely in early March. The tax writing committees appear to be in step on entitlements. Ms. Paull's recommendation was for all to keep a close watch on the legislation and provide input. Legislation improves when there is input from varying interested parties.

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Tuesday, January 15, 2013

All the Days That Adam Lived Were Nine Hundred and Thirty Years, and He Died and Begat Sons and Daughters: The New Genesis in Estate Planning (Focus Series)

Presenter: Bruce M. Stone Reporter: Joanne Hindel

One percent of births in the United States result from assisted reproductive technology. The rights of children conceived after the death of a genetic parent have been litigated all the way to the Supreme Court, yet unanswered questions abound for clients, planners, and administrators. This session addressed planning and administration issues for ART children.

Bruce Stone discussed Louise Brown, the first test tube baby. What are the ethical and legal repercussions of genetic reproduction?

Are estate planners sufficiently certain about provisions in documents that address assisted reproductive technology issues?

He discussed the basic situations and defined ART and then provided some statistics. This report covers the highlights of his presentation.

It is possible for a person to deposit genetic material during his or her lifetime with the intention of allowing someone else to decide whether to use that genetic material to cause a child to be conceived after the person's death. In addition, the legalization of same sex marriages or legal unions coupled with the developments in assisted reproductive technology is forcing estate planners to deal not only with legal relationships but also with children of those relationships.

Assisted reproductive technology includes:

- In vitro fertilization
- Gamete intrafallopian transfer
- Zygote intrafallopian transfer

In addition, ART often is categorized according to whether the procedure used a woman's own eggs or eggs from another woman and according to whether the embryos used were newly fertilized or previously fertilized, frozen or thawed.

The number of ART cycles has increased by nearly 50% since 2000, but the number of live births and the number of infants born has almost doubled since 2000.

The average age of women using ART services in 2009 was 36. 70% of all ART cycles in 2009 were performed with fresh, nonfrozen, nondonor eggs or embryos.

According to the CDC, over 1% of all infants born in the US every year are conceived using ART.

The failure of states to address the inheritance rights of children who are conceived or placed in gestation after the death of a genetic parent has resulted in the unjust denial of rights and privileges of children who clearly are intend to inherit or benefit with respect to the estate of the deceased parent. The clearest and most authoritative example of this failure is found in the United States Supreme Court case of Astrue V. Capato.

Bruce then focused his discussion on planning provisions to address these issues. Here are some of the highlights.

Estate planners should include some basic provisions which define who will be treated as descendants and eligible for benefits under the client's testamentary instruments.

Bruce provided real life examples to highlight the need for basic provisions in documents. He discussed the need to hold open the division of the trust until all the beneficiaries in a class have been identified.

The basic form in any document should define when a parent-child relationship exists between a person and another person who was created with that person's gametes (sperm and eggs). It is essential to have the clients define their "family" and the practitioner must ask the right questions to ascertain family members. Bruce stressed that morality and what the law provides are irrelevant to the discussion as to who constitutes family – what is relevant is the intention of the client.

Rules governing family relationships and eligibility for distributions should define the following scenarios:

- Adopted children
- Children of the birth mother- Bruce also pointed the tendency to treat children of women differently than children of men (presumption that a child is the child of the mother but not necessarily the father)
- Children of the genetic father in marriage or substantially similar legal relationship with the genetic mother
- Children conceived other than by copulation – this is the main ART provision
- Children of a marriage or substantially similar legal relationship where one spouse or party is not a genetic parent

- Children born pursuant to an agreement between the intended parent and the birth mother (gestational carrier).
- Children born of a genetic father who is not in a legal relationship with the genetic mother and with no prior written intent to become a parent.
- Children in gestation on the parent's death
- Children not in gestation during the parent's lifetime.

Bruce went through a number of situations that could be easily understood and envisioned in many client relationships. He also referred to recent cases in the news that address the use of genetic material.

Bruce also touched upon the possibility of one genetic parent only – the science of cloning.

Bruce also briefly mentioned the more complicated provisions that address the distribution of assets after defining the family members.

To assist in the orderly administration of the trust and to protect the trustee and other beneficiaries from delayed assertions of the existence of posthumously born ART children after a trust has been terminated and distributed because of the lack of then living descendants, compliance with detailed notice provisions is required in order to extend the period of existence of the trust before it is terminated for lack of then living beneficiaries.

Bruce concluded by saying that most clients will not want trusts held open for long periods of time while additional family members are identified. He recommended that drafting attorneys address these issues with clients and not wait until legislatures catch up to the new technology. He recommended using the provisions and comments drafted in the Uniform Probate Code by Larry Waggoner.

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Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 3

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

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Errata Re Report #1, Recent Developments 2012: In the Portability part of the Report (Part 3) it was stated in part "But, in order to elect for portability, you need to file a timely Form 706 to make election. The Regs now let you use a Form 706 EZ to do this without a full 706. The EZ form doesn't require appraisals for any property qualifying for the marital or charitable deduction - but you do have to list them." For the record, it turns out upon further investigation that this rumored existence of a Form 706 EZ was premature in spite of how much everyone wanted to have one, and our tax form experts doubt that there will be one any time soon. Rather, taxpayers are to simply enter estimated values on the current Form 706 if all it is being filed for is portability purposes. See TD 9593 and Temp.
Reg. Sec. 20.2010-2T(a)(7)(ii).

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Announcement: WealthCounsel and Trusts & Estates Magazine (Wealth Management), both exhibitors at this year's Institute, announced on January 14th the release of a Report about the key findings of the WealthCounsel Sixth Annual Industrial Trends Survey of some 1,500 estate and financial planners. This report can also be found in the January 2013 issue of Trusts & Estates magazine. Complementary copies are available at the WealthCounsel booth in the Exhibit Hall and can be downloaded at either www.wealthcounsel.com or www.estateplanning.com.

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Editor Comments: This Report covers the following sessions that were held on Tuesday, January 15th, the second day of the Institute:Intra-Family Loans and Notes and Advising Clients after ATRA 2012. The next Report will cover more of the Tuesday sessions.

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Tuesday, January 15, 2013
10:55 - 11:45 AM

Intra-Family Loans and Notes - "But It Seemed So Simple" (Focus Series)

Presenter: Steve R. Akers
Reporter: D. Scott Robinson

This session examined a wide variety of tax issues that arise with commonplace intra-family loans and notes, including when income must be recognized, forgiveness of loans and discharge of indebtedness issues, deductibility of interest by borrowers, valuation of notes, refinancing existing loans at lower rates, planning opportunities with Graegin notes, and significant income tax traps for installment notes under the installment sales rules. This report covers the more significant highlights from Steve's presentation.

The venerable Steve Akers gave an outstanding presentation on some of the complexities that arise in intra-family loans. On the surface intra-family loans seem so simple; however, this is clearly not the case. Mr. Akers presentation definitely brought home the point that what seems simple on the surface can be a briar batch of thorns (i.e., traps for the unwary). As with any presentation given by Mr. Akers, the materials that accompany the presentation are extensive (more than 130 pages), well written and are well worth the price of admission.

Estimates are that nearly 99% of decedents will fall within the current estate tax exemption and not owe estate taxes. However, intra-family loans will continue and will likely become more prevalent. Opportunities involving intra-family loans cover a wide range of transactions. Some opportunities including nonrecourse loans, loans to grantor trusts, loans to family members that may or may not have significant assets, sales transactions to children or grantor trusts, loans between trusts and loans involving the estates. Another interesting opportunity that Mr. Akers mentioned was a loan from a child to a wealthier parent where the parent pays a higher rate of interest.

There are many advantages for making loans versus gifts. Arbitrage is one such advantage where a family member acquires an asset with the loan proceeds which yields income and appreciation above the interest rate on the note. Arbitrage can cause a significant wealth transfer without gift tax implications. Mr. Akers gave the example of a client loaning $1 million to a child with a nine-year balloon note with an interest rate of 1.12% compounded annually to purchase income and growth assets. With a combined growth rate of 5%, the net transfer to the child at the end of the nine-year term would yield nearly $500,000 for the child. Other advantages include keeping the interest payments in the family, providing loans to children with poor credit histories and avoiding closing costs.

Mr. Akers then discussed some of the disadvantages of making loans versus making gifts. These include the note receivable being included in the client's estate, loss of the fractionalization discount (related to the transfer of minority interest in an assets rather than the transfer of cash), avoiding interest income, the loan accounting burden and avoiding the application of the OID rules. Mr. Akers noted that many of the disadvantages associated with intra-family loans can be avoided by using a grantor trust.

Next Mr. Akers turned to a discussion of ensuring that the loan will be treated as a loan and not a transfer of equity. There is a general presumption that intra-family transfers are gifts. This presumption can be rebutted by structuring the loan as a bona fide loan. Mr. Akers point out that there are a variety of cases dealing with the bona fides of a loan and summed up the holdings of the cases by stating courts are simply applying the smell test. If it does not smell right, the loan is not a valid loan and involves a gift.

Is there an upfront gift if there is an intent to forgive the loan? The IRS position, under Rev. Rul. 77-299 is clear. If forgiving the loan is part of a prearranged plan, the loan is considered a gift from inception. Mr.
Akers stated there were some cases contrary to the IRS's position before the issuance of the Revenue Ruling. The bottom line and best reasoned approach according to Mr. Akers is that upfront intent to forgive is not a gift. The donor (lender) could change his or her mind, the donor has not given up control, a creditor of the donor can still reach the note and, if the donor dies, the loan will be included in the donor's estate. Mr. Akers suggests, if a client wants to engage in a prearranged plan to forgive a loan over time, making sure that the loan is structured with as many bona fides as possible. These include written loan documents, having security, the borrower's ability to repay and having some repayment.

Mr. Akers than turned to a discussion of his executive summary for the tax treatment of loans. He again emphasized the structure of the loan as a bona fide loan. Mr. Akers then mentioned the Dickman case, which held that interest-free loans between family members are gifts for federal tax
purposes. The Supreme Court in Dickman did not tell us how to calculate
the value of the gift. Shortly after Dickman, Sections 7872 and 1274 were enacted, which set forth how to calculate the gift element as well as the income tax element of interest-free or below market (AFR) loans.

If the loan is less than the AFR, there will be a gift of the foregone imputed interest along with a deemed payment of imputed interest back to the lender. That deemed transfer of income back to the lender is deemed to occur on the last day of the taxable year for income tax purposes. Similar rules apply for the timing of the occurrence of the gift.

There are some exceptions for having to use at the least the AFR. Two of these exceptions are the $10,000 exception and the $100,000 exception. The

$10,000 exception is a de minimus exception that applies for both gift and income tax purposes. The $10,000 exception applies when all of the loans between the lender and borrower (for this purpose husband-and-wife are treated as one) total less than $10,000 and the purpose of the loan was not to purchase or acquire income-producing assets. The $100,000 exception applies only for income tax purposes and when it applies limits the amount of interest income the lender must recognize.

Mr. Akers suggests using terms loans rather than demand loans. Term loans avoid the complexity of regularly having to determine the appropriate AFR and lock in the rate for the term of the note without gift tax consequence for the entire term as long as interest rate is at least equal to the AFR when the loan is originated. Mr. Akers discussed how to determine the interest rates for demands notes and the requirement that the interest rate be adjusted every six months based on January 1 and July 1 short-term AFRs.
If the demand note is outstanding for the entire calendar year than a blended rate, which is the average rate using the January 1 and July 1 rates, is utilized for determining the interest rate for the entire calendar year.

When determining the appropriate interest rate for term notes is important to identify both the appropriate rate (i.e., short-term, mid-term or long-term) based on the term of the note and the appropriate compounding period (e.g, monthly, quarterly or annually). With loans related to sales, there is an additional opportunity for selection of the appropriate interest rate. For sales, the rate selected can be the current rate or the applicable rate for any of the previous three months.

Mr. Akers next topic was the ever so complicated OID rules. He started this discussion with timing in recognition of interest income and interest deductions and made the point that it is difficult to have below-market loans in the current interest environment. With that said, what about situations where interest is being accrued on an annual basis rather than being paid? Does a cash basis lender still have to recognize income? The surprising answer according to Mr. Akers is “yes.”

There are several exceptions to the application of the OID rules. Some of these include the de minimus exception (mentioned above) and certain seller financing transactions. If none of the exceptions apply, the OID rules require the OID over the life of the loan to be reported ratably. OID is the stated redemption price at maturity minus the issue price. Generally speaking, the stated redemption price at maturity will generally be the total payments (principal and income) under the note. The issue price is generally the amount loaned. Mr. Akers mentioned that the complexities of dealing with OID are avoided by lending to a grantor trust.

Mr. Akers suspects that the deemed interest payments are not being reported in the intra-family loan context. He is unaware of any situation where the IRS has pursued such deem payments. However, Mr. Akers believes it is important to recognize the appropriate reporting of OID income in the intra-family loan context.

What about the timing for the borrower to deduct deemed interest? Mr. Akers reports that whenever the lender must report deemed receipt of income, the borrower may deduct the deemed payment of interest as long as such interest is otherwise deductible. Remember there are special rules, such as security for the loan, for the ability to deduct home mortgage interest, and in the family loan context is important to make sure that these rules are followed.

The next topic that Mr. Akers enlightened audience on was the refinancing of intra-family loans. With the continual decrease in interest rates, refinancing has come up a lot in recent times. Mr. Akers reported that the bottom line is that there are no cases on refinancing. Mr. Akers advises that refinancing should be possible-but that it should not be undertaken repeatedly whenever AFR rates continually decrease.

Notes may be discounted for gift and estate tax purposes. In 1982, the IRS conceded that notes are not necessarily valued at their face amounts. There are a variety of factors that go into the discounting consideration. Mr. Akers referred to his materials as providing many citations for cases involving the discounting of promissory notes in both the estate and gift tax arenas.

Mr. Akers discussed the IRS position on the discounting of notes and reluctance on the IRS' part to allow discounts without evidence that shows the note is worth less than its face amount. Mr. Akers mentioned that the Internal Revenue Manual provides that a discounted note in the decedent's estate is a strong indication that a gift occurred at the inception of the note. The gift regulations provide that a note may be discounted because a lower interest rate, extended date of maturity or because of security (collection) issues with the note. It is notable, if the interest rate was at least equal to the AFR rate on the origination, that the note cannot be discounted due to the interest rate. In the estate tax context, the regulations for discounting notes are very similar those for discounting notes for gift tax purposes. However, unlike for gift tax purposes, there is not a statute or regulation directly on point (i.e., nothing in Section 7872 on point).

There is an income tax impact of discounting notes in the estate tax context. Mr. Akers made the point that, if a note is valued below its face amount and the person receiving the note from the decedent later receives full payment of the note, the excess amount appears to be ordinary income. Given the current 40% estate tax rate and current highest income tax rate of 39.6%, there may not be much to gain from discounting a note in a decedent's estate. However, in some instances clients may be very willing to deal with the income tax consequences where estate tax is due nine months from date of death and the income tax not dues for sometime down the road.

What is the effect of forgiving a note? Forgiveness of notes was a popular means of gifting at the end of 2012. Mr. Akers stated that under §102 there are no income tax consequences for forgiving the note (i.e., discharge of indebtedness) to the borrower. Also, there is no issue if the borrower of a forgiven loan is a grantor trust.

There are special rules that apply to the lender related to installment sale notes. In the general loan context, however, the lender may be able to avoid the recognition of unpaid interest income. The authority for non-recognition is found in proposed regulations to §7872. Under Prop. Reg. §7872-11, a lender recognizes income only where the waiver of interest payments meets one of three conditions. The second condition provides there is income if the forgiveness does not include a substantial portion of the principal. It is unclear what "substantial" means in this context.

Mr. Akers concluded his excellent presentation by highlighting the other items discussed in his materials. These items include the installment sales rules, sales to grantor trusts and self-canceling notes (SCINs). With respect to SCINs, Mr. Akers noted the primary issues involving SCINs are valuation issues. These valuation issues relate to the premium that must to be paid based the mortality of the lender and the fact that no clear guidance exists for determining the amount of the premium.

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Tuesday, January 15, 2013
2:00 - 3:40 PM

OK, Now What? Advising Clients After the Biggest Planning Year Ever

Presenters: John F. Bergner, Ronald D. Aucutt, Carol A. Harrington
Reporter: Mike Stiff

2012 was a banner year for estate planning but uncertainty surrounding future tax laws has created significant challenges for estate planners in advising clients in 2013 and beyond. This panel discussed what Congress did or didn't do in 2012, potential developments in 2013 and planning opportunities and pitfalls for whatever situation we find ourselves in.

The materials consisted of a 65 page outline. he panel began by observing that for the first time in 12 years we have permanent laws, but still a lot of uncertainty. This uncertainty provides both challenges and opportunities for practitioners.

Ron Aucutt reviewed the new 2012 Act (ATRA 2012) and provided background on the process leading up to its passage. The process was described as being similar to watching a drunk javelin thrower and not knowing where things will end up. Carole Harrington reviewed the repeal of the sunset provisions which preserved the automatic GST allocation, 9100 relief for late GST allocations, retroactive allocations with death of a child, qualified severances and related provisions set to expire.

The panel reviewed the remaining uncertainty as to things like the required minimum term for GRATs (10 years), limiting the duration of GST trusts (90 years), the elimination/inclusion of Grantor Trusts, consistency in value for transfer and income taxes, and the elimination of the exceptions to transfer for value rules for life insurance.

It was discussed that the projected tax savings for each of these proposals are relatively modest and each lacks broad support. However, there may be pressure for tax reform. May want to pursue while these opportunities are still available.

Carol Harrington discussed the proposal for consistency in value for transfer and income tax purposes. The IRS feels it has been taken advantage of by some taxpayers who claim low value for estate taxes and then a higher value for income tax purposes. Ms. Harrington noted that the beneficiaries may not have been involved in the audit process. It seems unfair to bind them to the decisions of the personal representative and the horse trading that is inherent in the audit process. The other panel members noted that such a rule change would create more tension and conflict between the fiduciaries and beneficiaries. It may become necessary to include the beneficiaries in the process to fulfill their fiduciary duties. Ms. Harrington voiced that the current rule is fair, the new rule would not be fair.

The panel discussed the expected surge in gift tax returns. The question was asked "how rigorous do we need to be in preparing the 2012 gift tax returns? Ron Aucutt noted that while there will be a surge in filed gift tax returns, there will be much fewer taxable estate tax returns filed which will free up resources. He also noted that interesting returns may lead to interesting reviews. Mr. Aucutt believes the rigorous standard still applies and even more important this year. Ms. Harrington noted that the information used to prepare the gift tax return is generally not protected by the attorney client privilege. You may want to create a separate file or jacket for preparation of the gift tax return to keep separate from the planning information. John Bergner stressed the importance of confirming no prior gifts. If you discover prior gifts, you will need to prepare late returns. There is no penalty for late returns with gifts within the applicable exclusion amount and you don't want to make the client's problem your problem.

John Bergner discussed the need to evaluate whether to split gifts in 2012 and whether gift-splitting is available. You may not split gifts to your spouse. Gifts to non-spousal beneficiaries in a trust may only be split if the interest of the non-spousal beneficiaries is ascertainable and severable. This may prevent gift splitting for a typical SLAT.

The panel discussed the benefit of filing gift tax returns to start the 3 year statute of limitations. The statute never runs on an unreported gift. Ms. Harrington doesn't recommend relying on automatic GST allocations. May want to consider late GST allocations for non-exempt trusts or trusts with a mixed inclusion ratio. The mechanics of making a late GST allocation was discussed. If stop allocating GST exemption to trusts, may want to do a qualified severance.

Ron Aucutt reviewed the prior defined value clause cases and the recent Wandry decision. In general, savings clauses are invalid and formula clauses are valid. Ron Aucutt questions whether there is an over reliance on Wandry. He stated that Wandry should be relied on only with great caution. Ms. Harrington noted that due to the circumstances at the end of the year, many had no choice but to rely on formula clauses.

John Bergner reviewed that many of the year end gifts were made to grantor trusts which contained the power to substitute assets of equal value. This provides flexibility and the opportunity to swap hard to transfer assets or hard to value assets now that there is more time available. It may also provide some relief to those with donor's remorse to exchange assets. The panel members generally recommend strict adherence to the formalities and should be as formal as normally done for business purposes between third parties to support an arms-length agreement. May decide to include a formula clause as part of the agreement. John Bergner questioned Carol Harrington if she worried about swapping assets for a promissory note. Ms.
Harrington paused but indicated that she was not especially worried about swapping a promissory note for originally gifted assets. The panel then discussed whether a gift tax return should be filed to report the exercise of the swap power. The panel agreed that it is a judgment call. Ms.
Harrington noted that she is normally inclined to report the non-gift and also observed that while she generally prefers an appraisal, non-gifts do not require an appraisal to meet the adequate disclosure rules.

The panel next discussed the many opportunities created by the 2012 gifting. We may want to approach clients about additional sales in 2013 to leverage the 2012 gifts. Those not wishing to make additional gifts may want to consider allocating GST exemption to existing trusts (old GRATs).

Those with donor's remorse may want to shut off the grantor trust status, substitute assets with lower growth potential or evaluate ways to unwind the transaction. The panel discussed the use of disclaimers to unwind 2012 gifts and the related concerns. Acceptance of any benefit would prevent a qualified disclaimer. Absent express provisions in the trust, a disclaimer by the trustee may not necessarily return the property to the donor. The result of the disclaimer is very dependent upon State law. If one included express provision in the trust agreement, could this be deemed a discretionary power to distribute assets back to the settlor? Carol Harrington noted that there are some very serious issues to be considered before making a disclaimer.

John Bergner noted that a lot of additional work remains in educating our clients on how to administer the newly created trusts. It is very important for clients to follow the formalities, to complete ancillary documents such as leases for personal use and to respect the rights of the beneficiaries. We want to avoid easy challenges by the IRS. Don't allow clients to ignore.

In summary, the panel did an excellent job of reviewing the changes that occurred with the 2012 Act and the challenges and opportunities it created for practitioners. The panel outlined the technical issues and provided very practical solutions and guidance for practitioners.

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Heckerling 2013 - Report No. 4

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In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers the balance of the sessions that were held on Tuesday, January 15th, which were Pre-and Post-Mortem Planning, Donating Your Cake to Your Family and Eating It Too, and Family Business Succession Planning. The next Report will begin our coverage of the Wednesday, January 17th, sessions, the third day of five for the Institute.

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Tuesday, January 15, 2013
9:50 - 10:40 AM

Going, Going, Gone: Immediate Pre- and Post-Mortem Planning

Presenters: Joshua S. Rubenstein
Reporter: Craig Dreyer

This session revisited immediate pre- and post-mortem planning strategies, particularly in view of the unprecedented economic and legislative change over the last several years - which strategies still work, which ones no longer work, and what new innovative opportunities for last minute and after the fact planning present themselves. This report covers some of the more significant highlights.

Mr. Rubenstein opened with the practical concerns of pre-mortem planning.

He noted that it is often tough since your client is usually terminally ill and has an indeterminate time frame. Taxes are generally the easiest part, since less is better, but balancing this concern with the control and comfort of the client is difficult. We must remember that there is always the chance the client survives. He also noted that clients who are terminal often feel out of control and embarrassed for letting their families down when they have a terminal condition. Often creating an estate plan for these individuals helps the client regain some control and provides the client a real benefit.

Mr. Rubenstein noted that pre-mortem planning is similar to traditional estate planning, but everything occurs in a condensed time frame. The first action is to review all estate planning documents. You must also look at state law and the assets in the client's name. Then you can determine what needs to be done. A good place to begin is looking at the will of the client. He noted even if the will appears effective and follows the client's wishes, you may want to execute a new will. This will ensure proper execution, and also provides additional support for the client's estate plan if there is a possibility of litigation. He also noted that updating boiler plate is also important. There are many boilerplate provisions within documents today that can have significant consequences if not addressed. Also, be sure to locate any revocable trusts while the client is able to direct you to them.

Beneficiary designations are also important to review. He notes that in most states, the default if a beneficiary designation is unexecuted is to distribute the assets to the owner's estate. While the gift will pass under the will, it may have the negative aspect of making an exempt asset subject to creditor claims or estate litigation.

He also notes to pay attention to the durable power of attorney. Ensure to check the restrictions on gifting especially when a child is serving as the power of attorney. Also review any powers of appointment and consider any decanting options in current trusts. In addition, it is important to review all prenuptials and post nuptials as these may override the will.

Healthcare documents, living wills, and power of attorneys should be valid in each state the client may be located. Keep in mind that healthcare documents don't always revoke prior executed documents. It may be best to revoke the ex-wife's healthcare surrogate if it is hasn't been revoked yet.

Mr. Rubenstein also reminded us of the importance of guardianship designations for minor children in pre-mortem planning. Consider a standby guardianship designation to act in conjunction with the client, while the person is ill. In addition to guardians for children, it is also important to designate the client's own guardian if necessary.

Burial decisions are also an important issue to consider. Legally this decision is given to the next of kin in most states, so in order to ensure your client's wishes are granted it may be best to get creative on this issue. One idea is to subject bequests to burial wishes as a condition precedent. In addition to burial instructions, anatomical gifts must also be thought through. Also consider discussing these decisions with the family, so that a family member is less likely to argue after the client passes.

In wills check the standard provisions, such as ensuring you have the correct names, distributions, and gift amounts. Also, consider using percentages instead of amounts if the amount of the estate may change. It is also important to review tax apportionment clauses especially if specific gifts are made with probate and non-probate assets. Check definitions within the document's to see if they are appropriate. Acknowledge non-marital children if necessary and ensure adopted children are properly handled. Check for unique assets that may be difficult to administer such as copyrights and oil and gas interests. It may be best to deal with these assets while the client is living or find ways to avoid probate with them. Also these assets may have significant tax attributes associated with them. Consider avoiding ancillary probate issues with various entities or non-probate transfers.

He also reminded us to update memorandums of tangible personal property since it is often a point of controversy. If a poorer spouse is dying, ensure they have proper assets to fund their trust. If client is married to non-citizen consider drafting a QDOT or decide if it is better to do after death. If a QDOT is drafted after death the spouse can draft a grantor QDOT, which is beneficial if the spouse is a noncitizen who does not plan on living in the United States.

Remember to update the family tree while the client is living. After a client passes you may not be able to get this information.

Mr. Rubenstein also noted that the standard of capacity in many states differs between wills and trusts. So keep this in mind with clients who have diminished capacity. Have clients explain their reasoning to witnesses if you anticipate a challenge. Also, consider doing multiple wills if there is time, so that it is harder to challenge the estate plan.

State Law is important to consider as well, so domicile may be an important consideration. Keep in mind that if the decedent does not have capacity, it may be difficult to change domicile. Also, if minimizing the surviving spouse's share is a goal, state law is very important as states differ vastly in how they handle this. In addition, creditor rights and homestead laws are dramatically different from state to state.

If you want to disinherit an individual, one option is to give them no interest in the second to last will and a minimal amount in the final will. This will make it more difficult for the beneficiary to overturn the estate plan as they have to throw out two wills instead of one. This allows you to essentially incorporate a no-contest clause in a state that refuses to enforce them.

Mr. Rubenstein noted that we should also consider titling assets so as to provide liquidity during the pendency of administration after death. Some examples include using Joint accounts, changing the name on a safe deposit box, or using payable on death accounts. Consider transferring low basis assets into the ill spouse's name, if you have over one year, and client may survive years and get step up in basis, but you may also be able to disclaim to by-pass trust, so the client does not get it back. Thus, you may be able to get the step in basis regardless if you survive one year.

If a client is terminal, be sure to review the life insurance for conversion options. Some waive premiums if the insured is terminally ill. It is important to analyze these policies and ensure they are properly owned and have the correct beneficiary designations.

Don't surprise people in terminal situations if it can be prevented. Try to get everyone on board to prevent challenges later. Make annual exclusion gifts, and make them by certified checks if there is a fear the person may pass prior to the cashing of the check. Other options include pre-payment of college, and using the client's applicable exclusion amount during life. Gifting gets discounts and reduces estate. Try gifting minority discounts and retaining a minority interest for the client at their time of death so you can get discounts for the estate. Finally ensure that the estate qualifies for any deferrals you may be planning on such as IRC Section 6161, 6163, and 6166 elections to defer tax payments.

Post Mortem Issues

Mr. Rubenstein concluded with some post mortem issues. Since 1986, bracket compression has reduced the impact of income tax planning with estates. The new high exemption amounts for estates may further increase income tax planning within estates. Decisions regarding taxable years for estates may be more important as the tax rates increase. Also keep in mind that there may be significant implications on where you take deductions between the estate and trust tax returns.

Mr. Rubenstein noted that it is important to remember that you may be able to disclaim assets to resolve certain issues. Also remember that you can disclaim rights. For example, it may be possible to fix a botched QTIP.

Tuesday, January 15, 2013
11:45 a.m. – 12:35 PM

The Art of Donating Your Cake to Your Family and Eating It Too (Focus Series)

Presenter: S. Stacy Eastland
Reporter: Kirstin Dittus

This presentation discuss the advantages and considerations of sales of FLP interests to grantor trusts and grantor trusts created by the transferor's spouse, contributions of leveraged single member non-managing member LLC interests to GRATs, transfers to remainder purchase marital trusts, spousal transfers that avoid the reciprocal trust doctrine and trust beneficiary sales to QSSTs and other third party created 678 trusts.

Mr. Eastland gave a great summary to his 200 page outline in his 50 minute lecture that was filled with complex planning techniques. By necessity this report will cover only the significant highlights.

Mr. Eastland pointed out that we often we will encounter a client who wishes to pass down assets to her children or grandchildren, but she also wants to retain some degree of control over the assets, flexibility for future unforeseeable emergency expenses (such as a vacation home in Aspen), perhaps an income interest, as well as avoiding estate taxes. We need to consider all of the client's goals to achieve the successful succession of the family wealth irrespective of the tax laws.

Mr. Eastland's was able to summarize his best ideas regarding estate planning techniques that ensure a client's consumption needs are satisfied and /or give the client and the client's spouse flexibility to change characteristics of their future stewardship goals as follows:

A. A Family Limited Partnership ("FLP") or Family Limited Liability Company ("FLLC") is a great tool for a client who wants to retain control over investments and generally avoids IRC §2036 issues, however problems can arise if a client wants to control distributions. To retain some indirect influence over distributions without invoking IRC §2036(a)(2), the donor should take one of three safe harbor actions approved by the IRS listed below. Additionally, the Supreme Court discusses the importance of having a definite external standard under United States v. Byrum, 408 U.S. 125 (1972), with the doctrine originating in Jennings v. Smith,161 F.2d, 74 (2d Cir. 1947)).

(1) the retained distribution power should be subject to a standard that could be enforced by a court. See Rev. Rul. 73-143 which endorses Byrum, Jennings and such similar cases;

(2) the general partnership interest could be split with the donor retaining the ability to make investments and the distribution power could be contributed to a trust where the taxpayer has the right to remove and replace the trustee, as long as the replacement is not related or subordinate. See Rev. Rul. 95-58 regarding the trustee removal and replace power; or

(3) the general partnership interest, that has the distribution power, could be contributed by the taxpayer to a corporation and the taxpayer could retain the voting stock and transfer the non-voting stock to his family. See Rev. Rul. 81-15, which discusses transferring an interest to a subchapter S corporation and avoids §2036(a)(2) as long as normal corporate practices are followed, even if the client has a controlling interest in the corporation.

If a partnership agreement says the partnership shall make distributions according to net cash flow, but the client needs extra funds for a future year to make purchases beyond income, Mr. Eastland assured us that the younger generation partners very rarely complain about additional pro-rata distributions.

B. There are significant flexibility advantages to the grantor selling assets to a trust where he is the income tax owner (a "Grantor Trust"), the grantor can receive interest and principal payments on the promissory note which can resolve the need for cash flow and may be converted to an annuity if desired. If the client is in a good healthy marriage he may wish to name his spouse as the beneficiary and give his spouse a special power of appointment over the assets to maximize flexibility in distributing the assets. The advantages to this technique are as follows:

1. By using a Grantor Trust with a retained power to substitute assets of the trust for assets of equivalent value, the result of paying the income taxes of a Grantor Trust is generally the most effective wealth transfer technique (by reducing the Grantor's estate and preserving the assets in trust for the next generation).

2. If the Grantor makes a sale to the Grantor Trust and dies near the end of the term, the principal balance of the promissory note given to the Grantor by the Grantor Trust to pay for the sale will be included in the grantor's estate. The grantor/ seller should bequeath this note to the surviving spouse so she may receive the remaining income and principal payments on the note and thus two lifetimes will benefit from this technique.

3. The appreciation of the value of the assets in the Trust above the interest of the promissory note used in any sale to a Grantor Trust for the grantor's spouse will not be taxable in the grantor/seller's estate.

Some considerations when using this technique are:

1. There should be sufficient equity left in the Trust. Mr. Eastland discussed a generally accepted practice among practitioners of leaving at least 10% equity in the trust.

2. The IRS could be successful in applying the Step Transaction Doctrine to the technique. The step transaction doctrine treats multiple transactions as a single integrated transaction for tax purposes if all of the elements of at least one of three tests are satisfied: (1) the end result test, (2) the interdependence test, or (3) the binding commitment test. True v. United States, 190 F.3d 1165, 1174-75 (10th Cir. 1999).

3. If the assets decrease in value, the gift tax exemption equivalent may not be recoverable.

4. The IRS may contest the valuation of any assets that are hard to value that are donated or sold to a Grantor Trust. Mr. Eastland discussed using a defined value allocation clause to allocate an initial gift to family, and any residual amount beyond the donor's exemption amounts passing to either a charity, a martial trust, or a Grantor Trust (such as a GRAT), but cautioned practitioners to avoid deemed contribution.

For a marital trust beneficiary, he recommended using an independent trustee to obtain an independent appraisal to avoid valuation problems; however, the IRS is most troubled by the use of a GRAT as a beneficiary. He clarified Wandry v. Commissioner (T.C. No. 10751-09, T.C. Memo. 2012-88, March 26, 2012, nonacq.) as a two party transaction using a defined dollar transfer, and recommended that one should not worry about a third party handling the bargaining in this type of case. These techniques could be coupled with the use of a qualified disclaimer by the Trustee. If qualified disclaimer is filed, the Trustee holds some of units not as a Trustee, but as an agent for the Grantor. The Trustee's ability to co-mingle assets is instrumental in avoiding any conflict of interest presented by the fiduciary duty to the beneficiaries of the trust.

Using a GRAT can help avoid a valuation fight with the IRS. The GRAT must have a re-valuation clause and this will increase the annuity. The GRAT also offers a lot of flexibility when used with a single member LLC, so that if there is an income tax event, a promissory note can be used to kick cash out of LLC to pay off note.

Using a leveraged GRAT offers benefits beyond any other alternative plans. Even if the current interest rates are currently low, a donor can contribute discounted units to the GRAT and then pay with cash which is not discounted.

The client should consider gifting and selling FLP Interests to a GRAT that qualifies for the marital deduction where the remainderman is a Trust that purchases the remainder in interest, known as a Remainder Purchase Marital Trust or "RPM." This involves a transfer of assets to a trust in which the donor's spouse has an income or annuity interest for a specified term or life. The remainder of the RPM trust passes to a separate trust (the "Remainderman Trust"), which could be a GST trust. The transfer to the trust is gift tax free because (i) the spouse's income or annuity interest in the RPM Trust qualifies for the gift tax marital deduction, and (ii) the Remainderman Trust pays the donor the actuarial value of the remainder interest when the RPM Trust is created. The RPM Trust assets are not included in either the donor's estate (because the donor has no retained interest in the trust) or the spouse's estate (because the spouse does not have a general power of appointment and there is no QTIP election) at their subsequent deaths.

Another solution is for the client to allocate some of his GST and gift tax exemptions to the GRAT that owns a leveraged FLP with the annuity being defined as that fixed percentage that produces a transfer equal to the Gift tax exemption. The initial payments are likely to be low and if a client dies early in the term, then there will be very little included in the grantor's estate

To get around the terminable interest rule, allow for a sale for full and adequate interest. This threads the needle through IRC 2702 to avoid estate tax on the death and keep the appreciation out of estate of the surviving spouse because the Grantor Trust can make loans for full and adequate consideration. The GST exempt trust could be a remianderman of this trust. Be sure to use the same assets or cash when exchanging assets so it does not raise further questions on valuation.

In closing, Mr. Eastland pointed out that practitioners need to avoid creating reciprocal trusts if both spouses are establishing trusts for each other benefit to avoid estate inclusion for the beneficiary spouse. See U.S. v. Grace, 395 U.S. 316 (1969). Drafting techniques to avoid reciprocal trusts include using Independent Trustees; varying the different elements of the trust, for example having different Trustees, funding assets, distribution standards , or beneficiaries; and providing either the spouse or the remainder beneficiaries with a special power of appointment.

Tuesday, January 15, 2012
3:55 – 4:45 PM

Keeping It in the Family: Family Business Succession Planning (Focus Series)

Presenter: Louis A. Mezzullo
Reporter: Jason Havens

This presentation covered the characteristics of a family business, the objectives of the founding entrepreneur, exit strategies, and the planning process. It also covered particular issues unique to dealing with family owned businesses.

Mr. Mezzullo, who is a member of the Advisory Committee of the Heckerling Institute on Estate Planning as well as the current president of the American College of Trust and Estate Counsel (ACTEC), has written and spoken extensively on business succession planning. He opened with an aside, congratulating Ms. Tina Portuondo, Director of the Institute, for her appointment to ACTEC. His materials include a 30+ page outline covering a general introduction to family business succession planning, various liquidity/exit strategies, an outline of the succession planning process, and special considerations in this planning context.

Mr. Mezzullo noted that the new 2012 (technically enacted in 2013) tax act does not significantly change family business succession planning. It does, however, make the business succession transfer process simpler.

His outline opened with his definition of business succession planning: “planning for the orderly transfer of the management and the ownership of a business to new managers and new owners to avoid a liquidation of the business as well as unnecessary taxes and other expenses, and in a manner that carries out the family’s nontax objectives.” Mr. Mezzullo stated that business succession planning requires the lawyer to draw on numerous areas of law, including corporate, partnership, limited liability company (LLC), and employee benefit law, as well as estate planning and administration.

The materials included some powerful statistics. For instance, “[m]ost businesses in the United States are closely held and create over 75% of all new jobs.” Another point of the statistics focused on the strong liquidity need in the family business succession plan.

Mr. Mezzullo noted that succession planning should begin upon the business' formation. The materials list the numerous factors involved in this planning, as well as helpful planning ideas to effect succession planning. Mr. Mezzullo discussed employee stock ownership plans (ESOPs), sales to grantor trusts, grantor retained annuity trusts (GRATs), life insurance, and charitable remainder unitrusts (CRUTs).

He then covered the process of family business succession planning, including "Steps to a Successful Plan and Implementation." This part of Mr. Mezzullo's session outlined obstacles to succession planning. Mr. Mezzullo concluded with highlights of special considerations during the business succession planning process. Some of those considerations also identified obstacles and pitfalls to avoid like not using a general partnership for family business planning and giving the active family members a call right.

Mr. Mezzullo emphasized the continuing necessity of business succession planning, even if the federal estate tax or the federal income tax were repealed. This session should encourage lawyers to assist clients with business succession planning, particularly due to the potential impact (and decrease) at least of the perceived necessity of personal estate planning. Mr. Mezzullo's special session on this subject will continue the discussion, centering on a case study.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

47th Annual Philip E. Heckerling Institute on Estate Planning January 14-18, 2013 *Reports 5*

Heckerling 2013

University of Miami School of Law Center for Continuing Legal Education

Orlando World Center Marriott Resort and Convention Center
Orlando, Florida
http://www.law.miami.edu/heckerling

GENERAL INFORMATION ABOUT INSTITUTE:
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NOTICE: Although audio tapes of all of the substantive session at the Miami Institute currently are only made available to Institute registrants for purchase, the entire proceeding of the Institute are published annually by Lexis/Nexis. For further information, go to their Web site at http://www.lexisnexis.com/productsandservices. The text of these proceedings is also available on CD ROM from Authority On-Demand by LexisNexis Matthew Bender. For further information, contact your sales representative, or call (800) 833-9844, or fax (518) 487-3584, or go to http://www.bender.com, or write to Matthew Bender & Co., Inc., Attn: Order Fulfillment Dept.,1275 Broadway, Albany, NY 12204

Heckerling 2013 - Report No. 5

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html.

In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers all of the Wednesday morning, January 16th, main sessions, those being the new Uniform Premarital and Marital Agreements Act, Post-Mortem Income Tax Issues and the Question and Answer session which is a follow up to the opening day Recent Developments session. The next Report will include the Wednesday afternoon Fundamentals #2 session and some of the Special Sessions #1.

Wednesday, January 16, 2013
9:00 - 9:50 AM

With All My Worldly Goods I Thee Endow, Except as Provided in Article Five (Focus Series)

Presenter: Carlyn S. McCaffrey
Reporter: Mike Stiff

Premarital and marital agreements are used to alter rights and obligations between spouses that arise under local law as a matter of marital status. In an effort to promote consistency among the states as to the enforceability of these agreements, a new Uniform Premarital and Marital Agreements Act is under consideration by the National Conference of Commissioners on Uniform State Laws. This session focused on the provisions of the new Uniform Act as well as practical aspects of negotiating and drafting these types of agreements. The materials consisted of a 22 page outline. The highlights are covered here.

Carlyn McCaffrey began the presentation by recognizing that assisting with premarital agreements is difficult work and not always as rewarding as other projects. However, our clients routinely come to us for assistance because of our long standing relationship and history of preserving the family wealth. Three of the biggest threats to family wealth are taxes, creditors and divorce. The divorce of a family member may pose the most likely and biggest risk to the family wealth.

If you do not have a premarital agreement, your state has one for you. It is very similar to dying without a will. The laws of most states give a spouse certain rights in the property of the other spouse. These rights fall into three major categories: (1) the right to receive a share of certain property of the other spouse in the event of divorce; (2) the right to be supported during the marriage and to receive support payments in the event of divorce; and (3) the right to receive a share of the other spouse's property if he or she survives his or her spouse. The laws vary from state to state. With 50 states, we have 50 sets of rules.

Prior to the approval of the Uniform Premarital Agreement Act ("UPAA") in 1983, the laws governing the validity and enforceability of premarital agreements was left to judicial development. Although the courts were likely to enforce agreements that governed property rights at death, there was a reluctance to enforce agreements that altered rights on divorce. Provisions that altered economic rights on divorce were often perceived as encouraging divorce and contrary to public policy. The UPAA was adopted in an attempt to bring uniformity among the states and more certainty to the enforceability of such agreements. This uniformity was not achieved because only 26 states adopted the UPAA, many adopted the UPAA with substantial changes and the court's interpretation of the core concepts of the UPAA has varied from state to state.

Ms. McCaffrey provided a brief summary of the UPAA. First the UPAA only applies to premarital agreements. It does not apply to agreements entered into after the marriage. The UPAA provided a list of the financial rights that could be contracted to and a catch all for any other matter not in violation of public policy or a statute imposing a criminal penalty. The only formalities required was that the agreement be in writing and signed by both parties.

Under the UPAA, a premarital agreement is not enforceable against a party if: (1) he or she did not execute the agreement voluntarily; or (2) the agreement was unconscionable when executed and before execution he or she was not provided a fair and reasonable disclosure of property, did not voluntarily and expressly waive in writing such disclosure and did not have or reasonably could not have had an adequate knowledge of the property or financial obligations of the other party. The UPAA doesn't define what voluntary or unconscionable means which has led to many variations between the states. The UPAA doesn't invalidate for inadequate disclosure unless also unconscionable. Similarly, unconscionability alone is not sufficient if there was adequate disclosure, a waiver of disclosure or reasonable knowledge of the property. The states have also varied on whether must be unconscionable at execution or at time of enforcement. The variations among the states are numerous and pronounced. Moving from one state to another can greatly impact the validity and enforceability of a party's rights under a premarital agreement.

Ms. McCaffrey then provided a brief summary of the new Uniform Premarital and Marital Agreement Act ("UPMAA") which was approved by the National Conference of Commissioners on Uniform Laws on July 18, 2012. The purpose of the UPMAA is to bring greater consistency to the way in which states enforce premarital agreements and to extend the uniformity of treatment to agreements that are executed during the marriage. The UPMAA, unlike the UPAA, applies to marital agreements and amendments executed after the marriage.

Section 10 of the UPMAA provides a list of provisions that will not be enforceable. This includes provisions that adversely affect a child's right to support or that define rights or duties of the parties regarding child custody, that limit or restrict a remedy available to a victim of domestic violence, that purport to modify the grounds for a court-decreed separation or marital dissolution, or that penalize a party for initiating a judicial proceeding leading to a court-decreed separation or marital dissolution.

Under the UPMAA, the agreement must be in a record signed by both parties. Oral agreements are not enforceable. A record includes electronic or other mediums. To sign includes electronic signatures and other methods used with present intent to authenticate or adopt a record. No other formalities are required.

Section 9 of the UPMAA provides four requirements for enforceability: (1) the party's consent was voluntary and was not the result of duress; (2) the party had access to independent legal representation; (3) if the party did not have independent legal representation at the time the agreement was signed, the agreement included a notice of waiver of rights or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; and (4) before signing the agreement the party received adequate financial disclosure. A noticeable change was the addition of consent that was not the result of duress. However, no attempt is made to define voluntary or duress. The UPMAA also requires access to independent legal counsel but does not require independent legal counsel to be enforceable. A separate notice of waiver of rights can be signed in lieu of counsel and must contain language substantially similar to language provided in the UPMAA that is conspicuously displayed. This is intended to provide a general idea of the rights the party may be waiving. There is no requirement that the party have legal counsel before signing the notice of waiver of legal rights or before waiving a right to disclosure.

The UPMAA provides a special rule for waiver of spousal support. If the waiver would cause the party to be eligible for public assistance, a court may require the other party to provide support but only to the extent necessary to cause the party to lose eligibility for public assistance. The UPMAA also provides the court with discretion to refuse to enforce a term of the agreement if the term was unconscionable at the time of signing. This is a major departure from the UPAA. Under the UPAA, if the party had fair and reasonable disclosure prior to signing, unconscionability alone was not sufficient to invalidate a provision of the agreement.

Section 4 of the UPMAA provides that the governing law may be determined by the law designated in the agreement provided that there is a significant relationship between that jurisdiction and either party to the agreement. However, such choice of law may be disregarded if the court determining the matter concludes that the law of the chosen jurisdiction is contrary to a fundamental public policy of the jurisdiction in which the matter is being decided. Ms. McCaffrey noted that you can't get any certainty no matter how hard you try.

Ms McCaffrey then turned her attention to advising clients and best practices. You need to advise clients of the default rules and the financial impact to the client. In some cases a premarital agreement may not be necessary. A trust for family wealth may be a viable alternative. Generally, you want to avoid any mandatory payments under such a trust. However, a trust doesn't provide complete protection. You need to explain the options and make it clear that a premarital or marital agreement cannot be expected to provide total protection.

The best approach is to seek to satisfy the highest standards of procedural and substantive fairness found in the laws of the various states. Each party should have independent representation by counsel. If the other party can't afford counsel, the other party should pay for such counsel. The timing is important. Ms McCaffrey recommends starting the negotiations several months in advance of the wedding and to present the other party with a draft agreement at least a month before the wedding. The shorter the time, the greater chance for challenge. The financial disclosure should be as complete as possible. Ms. McCaffrey recommends over disclosure and to include a copy of the most recent tax return.

Ms McCaffrey recommended identifying what property the party wants to protect. She recommended having the other party expressly waive any rights to such property in the agreement. You can negotiate spousal support but can't negotiate child support. Ownership of the family home often is especially important to the poorer spouse. Such spouse may be willing to waive other substantial economic rights if given an interest in the family home. Tangible personal property generally does not have a legal title and leads to many disagreements on divorce. May want to include a clause that provides ownership of such property to whomever purchased such item if over a stated amount.

Ms McCaffrey discussed that the waiver of rights in certain retirement benefits can not be accomplished in a premarital agreement and must be signed after the marriage. However, the parties can agree to sign after marriage and agree to repay benefits if actually received. May want to attach the separate agreement to the premarital agreement to encourage signature after marriage occurs.

Ms McCaffrey indicated her support for the new UPMAA and her desire for greater uniformity and enforceability of premarital agreements. She also encouraged others to support the adoption of the UPMAA in their respective states.

This was an outstanding program with a wonderful presenter. The materials and the presentation were very well organized, clear and succinct.

Wednesday, January 15, 2013
9:50 - 10:40 AM

The Fiduciary's Handbook of Sneaky Post-Mortem Income Tax Issues

Presenter: Carol A. Cantrell
Reporter: Craig Dreyer

Don't be ambushed by sneaky income tax issues hiding in the bushes on the way home from the funeral. In the world of post-mortem estate planning, income and estate tax issues are usually found in the same company. This discussion highlighted both common and emerging income tax issues such as substantiating basis and deductions, mitigating income in respect of a decedent (IRD), protecting the income tax statute of limitations, capturing valuable elections, and everything else the fiduciary wishes he had known about. This report presents the important highlights of this session.

Ms. Cantrell opened with the tax issues fiduciaries need to keep their eye on in post mortem planning. She noted there is a tsunami of grantor trusts out there. She pointed out that grantor trusts still have many unknowns, especially in light of the prevalence of mergers, divisions and decanting. She discussed the increase in will disputes and litigation over estate plans. Ms. Cantrell then highlighted the impact of section 63(e) and the significant impact it has on estates and trusts.

She labeled grantor trusts as the seventh wonder of the tax world. She pointed out that we know very little about them considering their prevalence. The grantor trust rules were originally created to stop high bracket taxpayer's from creating multiple trusts to get into lower tax brackets. In 1986, Congress removed the income tax incentive to transferring assets into multiple trusts, and just recently the American Tax Relief Act of 2012 increased the tax rates for trusts. Ms. Cantrell also noted that the current grantor trust rules are obsolete.

Section 671 says if grantor retains certain powers, the grantor will be taxed on all the income and deductions from trust. Rev. Rul. 85-13 lets us ignore transactions between a grantor and a grantor trust. Then 20 years later Rev. Rul. 2004-64, said a grantors payment of income taxes for the trust was not an additional gift to the beneficiary. Rev. Rul. 2008-22 also provided that the swap power does not cause estate inclusion and will not cause an insurance policy to be taxed in the grantor's estate. These rulings have resulted in massive grantor trust use. Recent IRS tax returns have shown a reduction in the filing of tax returns for grantor trusts. However, Ms. Cantrell suspect's grantor trust accounts are being held in accounts under the grantor's tax identification numbers.

The 2012-2013 green book proposes to include the assets of a grantor trusts in the estate of the grantor if the grantor dies during the term of the grantor trust. There would also be a separate tax on the grantor trusts for assets purchased from a sale or exchange with a deemed owner. She notes it is scary that the IRS is even considering these actions. The IRS currently has a no ruling directive for grantor trusts. Ms. Cantrell emphasized that we still know very little about grantor trusts. For example, the counterpart to a grantor trust is a disregarded entity, but the rules for disregarded entities are much clearer from a tax standpoint.

Ms. Cantrell then continued discussing transactions between grantor trusts and the beneficiaries. She asked if grantor trust makes distribution to a beneficiary, what is it. It is not a gift, so what is it for tax purposes? What is the basis? Section 1015 cannot be used since it is only applicable to the donor to donee situation. Is it a deemed transfer from the donee to the trust and then to a beneficiary under section 643? She believes this is the result, but there is no authority.

Notice 2007-73, identified two situations that must be disclosed on an IRS form 8886, Reportable Transaction Disclosure Statement, as a transaction of interest because of their potential abuse. It also discusses the toggling of grantor status in a trust within the context of these rulings. CCA 200923024 identified an additional abusive transaction with grantor trusts. Interestingly, in both of these IRS pronouncements the IRS found the transactions as potentially abusive, but provided no authority to attack the transactions.

Ms. Cantrell also noted that It is unclear if the death of a grantor is treated the same as a conversion during lifetime. It is amazing there is no guidance on this subject. She believes the conversion to a non-grantor trust should be treated the same as during a lifetime.

So, what is the impact on a trust of grantor trust status? It is likely under Rev. Rul. 85-13 you can continually swap assets without tax consequences. You can swap high basis trust assets with low basis non-trust assets and when you die you get step up in basis to grantor on the low basis assets the grantor swapped out of the trust. She is unsure how to handle the change of basis to the trust. She noted that there is no rule that property received by a trust in a swap is tax free. A gift should be tax free under Section 101. A purchase by the trust from the grantor should not be taxed, but if a deemed transfer is the product of a swap, there does not appear to be any authority that says this is tax free. Ms. Cantrell noted that it may be prudent to be cautious about swaps.

While there is a large amount of authority on mergers, division, and decanting in partnership and corporate tax law, there is little on trusts. Decanting is nothing more than a form of merger or division. Rulings on mergers and divisions of trusts show how the IRS may rule. So far the IRS has been lenient. Primarily the questions have involved the loss of GST status, whether a swap is a deemed gift, and does the beneficiary have 2036 inclusion. On the income tax side, the question has arisen whether there is a deemed exchange between the beneficiaries of their beneficial interest. Is there a distribution to the beneficiary, and what is the basis of those assets?

Most state trust codes and trust instruments allow the trustee to merge or divide the trust without the consent of the beneficiaries as long as the merger or division does not impair rights of beneficiaries. The UTC allows new trusts to have different terms, however, when dispositive provisions are changed issues start to arise. A common reason to merge trusts is for ease of administration. Liquidity is another reason to merge trusts. Merger agreements can often take into account documents that are not similar. Divisions occur when there are different investment goals, different trustees, or division may help sprinkle along family units. The income tax consequences concern is the beneficiaries may have different legal entitlement than they had before. IRS rulings on mergers and divisions of trusts all cite the seminal case of Cottage Savings.

Decanting is also a concern since decanting can create significant different legal entitlements. Divisions are clearer, since divisions are nearly always tax free as long as state law and governing document allow them.

Ms. Cantrell then discussed settlement agreements. She noted that with fewer taxes and more money at stake, it is likely more families will argue about estates and trusts. Often once a settlement agreement is entered into, the original estate plan is so heavily modified they are nearly unrecognizable. Lyeth v. Howie, stands for the principal that property acquired in settlement or compromise of a will contest or genuine dispute of an heir are not includable in gross income. However, if proceeds are received in lieu of income they will be treated as taxable. The settlement payments to spouses and charities can also have difficult income tax issues. PLR 201236022, provides guidance on when amounts paid to a charity will be deductible.

Ms. Cantrell closed by noting that legal fees to preserve, protect, administer and distribute the estate are tax deductible. Expenses incurred for benefit of individual are not deductible.

Wednesday, January 16, 2013
10:55 AM – 12:35 PM

Question and Answer Panel

Presenters: Dennis I. Belcher, Samuel A. Donaldson, Beth Shapiro Kaufman
Reporter: Jason Havens

The panel continued their entertaining yet informative discussion after delivering the “Recent Developments 2012” general session on Monday afternoon. There were no printed materials. The entire session provided answers to attendees’ questions. This report covers the major highlights.

The panel focused on the American Taxpayer Relief Act of 2012 (Pub. L. 112-240) (ATRA). Professor Donaldson opened with planning for married clients with less than $5.25 million. He emphasized two key elements: (a) the income tax focus and (b) preservation and management of assets. The key is preserving the step-up in basis upon the death of the surviving spouse (SS), e.g., an "I love you" will or revocable trust, an outright disposition, or a testamentary general power of appointment. The issue is whether to make the portability election.

Ms. Kaufman addressed married clients with $5 to $10 million. The primary decision here is portability or utilizing a bypass/credit shelter trust (CST). Some situations clearly favor one over the other. For example, if the SS is incapable of managing the assets or in 2nd marriage/blended family situations, the CST often makes sense. Tax reasons might weigh heavily. For instance, what is the state estate tax situation? If the state has decoupled and has its own exemption level, you might want to use the first spouse to die's exemption. A handful of decoupled states allow a state qualified terminable interest property (QTIP) election (e.g., MD). With portability, you might only want to utilize the CST for state/federal purposes (maximum limit) and rely on portability for the rest. If the generation-skipping transfer (GST) tax is a factor, you would want the CST and would not want to rely on portability.

Mr. Belcher concluded the opening question with planning approaches for married clients with $10+ million. He noted that the applicable exclusion amount (exemption) is indexed for inflation and rounded to nearest $10K, whereas the annual gift tax exclusion is actually rounded down (finally $14K as of this year). Thus, clients will continually have more to work with, even for those who implemented lifetime planning. The initial question is whether the clients own enough to make a gift. If they can afford the gift, who or what should be the donee? Typically these high net worth clients should use a GST trust.

Mr. Belcher suggested that these clients think about a defined value formula gift. They might use a sale to a grantor trust. He also mentioned retaining the right to release the grantor power(s)/status. This approach places a greater burden on the client, but increases the assets in the trust because the client continues to pay the income tax. Then the client might use more exotic techniques such as charitable lead annuity trusts (CLATs), self-canceling installment notes (SCINs), and other techniques that Mr. Stacy Eastland discussed in his general session yesterday.

You must also consider basis and gift versus inheritance issues. Conventional wisdom suggests that clients give away appreciating assets to allow that appreciation to occur outside of what is now a 40% federal transfer tax rate (rather pay long-term capital gains, even at an effective rate of 28% or so).

The panel moved on to other questions. Ms. Kaufman identified a valuable planning technique under ATRA: electing a fiscal year for an estate. The ATRA effective date and the 3.8% Medicare surtax include tax years beginning after 12/31/2012. This opens up the possibility of a fiscal year for estates. If you can begin the tax year in 2012, you will have the 2012 tax rates with no surtax for the rest of the fiscal year. So you would generally want income taxed to the estate (or the revocable trust with a 645 election in place) -- not to the beneficiaries via the distributable net income (DNI) rules of Subchapter J.

Ms. Kaufman specified that November 30 is the best fiscal year to have. When you apply for the estate's employer identification number via Form SS-4, you can choose a fiscal year. However, that "check the box" approach is not binding. Technically the tax year is elected when you file the first return. Thus, you should carefully calendar the filing date (including extension).

You must still run the numbers. The beneficiaries' tax rates might not be in higher brackets. If the estate opts for the fiscal year, you can then examine and decide whether to make distributions to the beneficiaries or retain as taxable income to the estate.

Mr. Belcher addressed several gift-splitting questions. He referred to articles by Mr. Bruce Steiner (37 Est., Gifts & Tr. J. 320) and Mr. David Pratt and Ms. Alyssa R. Feder (Dec. 2004 issue of the Fla. Bar. J.). The latter is available freely online via The Florida Bar Journal's archives. The bottom line is whether (a) the SS is a beneficiary of a trust involved and (b) that SS' interest is ascertainable.

The panel covered several other questions. One of the more interesting final questions concerned a spousal lifetime access trust (SLAT). Ms. Kaufman analyzed the issue of whether the grantor should serve as trustee. The grantor might want to control the investments and/or distributions. The former is okay unless you have voting stock. The latter poses problems.

Section 2036(a)(2) and its regulations might include the trust in the grantor's taxable estate. Then you have the 2038 regulation regarding the power to alter, amend, or terminate the trust. The example there discusses the power to accumulate income or distribute corpus.

Some case law suggests that if distributions are governed by an ascertainable standard, there is no inclusion under 2036 or 2038. If "may distribute" is used, you might have a problem because the trustee might or might not make the distribution(s). On the other hand, if "shall" is used, then all will be ascertainable standard distributions and perhaps no retention of control (inclusion) problems.

The good news is that the grantor may extricate by resigning because these are purely estate tax issues, applicable upon death. Mr. Belcher noted, however, that as a practical matter, the grantor should serve as the trustee in this situation.

Mr. Belcher also addressed another popular 2012 question: the remorseful donor. Assume that you have a client who created a SLAT and funded it with $5 million, appointing an institutional trustee in Delaware. Now the client wants the cash back.

You might evaluate disclaimers by the beneficiaries. However, if the "no takers" (contingency) clause involves more remote beneficiaries, it might be impossible to obtain disclaimers by siblings, for example, or even nieces and nephews and beyond.

What about decanting into a new trust? Then you could eliminate such a contingency clause. You could also loan back the money to the grantor with a promissory note.

Mr. Belcher thinks decanting is a real possibility, but he would sit down and discuss the advantages of keeping the planning in place. You need to find out what the client's underlying concern is. Besides, under the discretionary ascertainable standard provision, the trustee could distribute the assets to the spouse anyway. This might be an overreaction by the client. You might also use rescission if available.

As mentioned earlier, you might have the trustee terminate by using its discretion. Practically you probably need the professional fiduciary to resign. Then you could have a family member accommodate as successor trustee.

Like the developments session, this "Q and A" session was educational and enjoyable. Professor Donaldson had the audience laughing repeatedly. The panel answered a variety of questions that covered many common 2012 planning situations, as well as planning going forward under ATRA.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 6

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html.

In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers the Wednesday afternoon Fundamentals Program #2 about Marital Planning and Special Sessions #'s 1-A about Family Wealth Transfers and 1-B about Pre- and Post-Mortem Planning. The next Report will cover more of the Wednesday afternoon Special Sessions.

Wednesday, January 16, 2013
9:00 AM - 12:15 PM

Fundamentals Program

(Runs concurrently with Special Sessions I & II) What Estate Planners Need to Know About Marital Law (Focus Series)

Presenters: Carlyn S. McCaffrey, Linda J. Ravdin Reporter; Herb Braverman

The unanticipated exercise of marital rights can disrupt the most carefully arranged estate plans. This session explored the typical patterns of marital rights and obligations imposed on spouses by the various states, the extent to which they can be varied by agreement, and the tax consequences of the common financial arrangements provided for in premarital and marital agreements and in agreements entered into in connection with the dissolution of marriages.

NOTE: Ms. McCaffrey presented a plenary session on Premarital and Marital Agreements, focusing largely on the terms and provisions of the Uniform Premarital Agreement Act and the newer Uniform Premarital and Marital Agreement Act, all of which is reported in appropriate detail in Report #5 from the Institute.

This fundamentals program permitted the presenters to pick up the discussion again and to add a great deal of detail, the highlights of which are reported here. Ms. Ravdin has practiced for many years in the marital/family law areas and has an excellent outline, which she covered in great detail using a power point presentation; she indicated that she may be able to forward the power point program to you upon request; her email address is <mailto:lravdin@pasternakfidis.com>lravdin@pasternakfidis.com. However, if you are serious about these subjects, as you should be, then you should obtain the new Tax Management portfolio that Ms. Ravdin has authored on these subjects. It is 849-2nd T.M., Marital Agreements (Tax Management Inc.
2012).

Their discussions covered a broad range of topics, with a certain focus on the UPMAA, which has not been adopted in any states to date, but which they both feel represents the state of the art in this area and is a statute that the states should adopt as soon as possible. The topics discussed were numerous and covered the many variations offered by the several states in these areas. Spousal property and support rights were discussed, along with the validity and enforceability of marital agreements and drafting issues and points for both premarital and marital agreements (those that are entered into after marriage and are permitted in most states). Ms. Ravdin also discussed provisions for support of children and covered post execution issues.

Ms. McCaffrey, who commented often as Ms. Ravdin covered the many issues of marital/family law broadly, then focused on the income tax treatment of property settlements, discussing cash transfers and others that be may or may not subject to Code Section 1041 and its Regs. She also covered the income tax aspects of the use of trusts (both standard and grantor trusts) in connection with marital settlement agreements of various kinds. Ms. McCaffrey also offered a detailed discussion of impact that transfer taxes may have on such settlement agreements, pointing out the potential traps and potentially expensive consequences for future ex-spouses who fail to plan properly in these areas. With respect to income tax, she discussed the importance of timing for trusts created before termination of a marriage, as well as those created and administered after termination of the marriage as part of the settlement process, citing the importance of and interplay of Code Sections 672, 677 and 682 in this area.

With respect to the transfer tax aspects of marriage settlement agreements, she discussed how Code Section 2516, adhered to carefully, may be helpful to the ex-spouses, as well as the impact of transfers pursuant to a decree rather than an agreement discussed by the Supreme Court in Harris v. Commissioner, 340 U.S. 106 (1950). Ms. McCaffrey also discussed gift tax problems under Code Section 2702 and how this could be avoided by posturing the transfer in question as an incomplete gift. She closed the session with a brief discussion of how a qualified annuity trust or a qualified residence trust may also be helpful in avoiding the worst consequences of the transfer tax in this setting and with an example illustrating how the application of Code Section 2701 might be avoided.

Wednesday, January 16, 2013

2:00 – 3:30 PM

Special Sessions I

Session I-A

What's the Encore: Correcting and/or Amplifying Family Wealth Transfers (Focus Series)

Presenters: Ellen K. Harrison, Steve R. Akers, S. Stacy Eastland
Reporter: Kimon Karas

This session covered the application and management of wealth transfer strategies that provide some benefit to the grantor and/or the grantor's spouse; creative planning with loans and/or annuities owed by an IDGT to the grantor, additional wealth transfer strategies available when gift tax exemption is exhausted, and strategies to preserve a basis adjustment upon the grantor's death.

The panelists incorporated discussions from the earlier presentations by Messrs. Akers and Eastland as well as new concepts. It was a very informative presentation.
Ms. Harrison produced slides from which the panelists discussed the various topics. If available, the slides would be an excellent resource. The session was divided into four separate categories: wealth strategies that benefit the grantor/grantor's spouse; creative planning with loans/annuities; wealth transfers once the exemption has been exhausted; and basis adjustment at death. This Report covers the highlights of these four.

I. Wealth strategies that benefit the grantor and/or grantor's spouse.

A. SLATs. Watch for the reciprocal trust doctrine of US v.Grace. Preferable that each spouse not be a beneficiary of the other's trust. Limited opportunity, if any, for gift splitting. Concern that needs to be addressed or reviewed with client regarding later divorce or death of beneficiary spouse. On death beneficiary spouse could be granted a limited power of appointment in favor of grantor spouse but only if trust is created in a self-settled trust jurisdiction. Consider a power of substitution. If the principal consists of residence the fact that donor spouse resides with beneficiary spouse should not be a Section 2036 issue.
B. Nonreciprocal Trusts.
C. Co-Tenancy between grantor and trust. Each spouse contributes 50% interest in residence to that spouse's trust.
D. Reverse Defective Grantor Trust. Grantor trusts that sell assets back to grantor for a promissory note.
E. Partnership Freeze. A freeze that fails the Section 2701 tests will be a gift but should not be an issue if well within the exemption amount.
F. Exercise of Special Power of Appointment. See A. above but watch if creditor can attach donor's interest since a power of appointment for state law purposes is treated as relation back to original donor.
G. Turn Off Grantor Trust.
H. Self-Settled Trusts.
I. Payment of Management Fees to Grantor.

II. Creative Planning with Loans/Annuities.

A. Valuation of AFR notes. Mr. Akers stated he has heard of situations where agents are raising issue that AFR notes are not adequate and that higher interest rates should be used.
B. Valuation of annuity-must use 7520 rate.
C. Renegotiate loans. Watch however, a multiple renegotiation.
D. Discount loans in subsequent transactions.
E. Exchange loans for a private annuity. Trust needs to have sufficient assets to pay annuity to age 110.
F. Income and gift tax considerations in loan forgiveness.

III Strategies Once the Exemption Amount has been exceeded.

A. GRAT strategies. Consider leveraged GRATS and remainder purchase GRATS. Remainder purchase GRAT implicates GST issues that need to be addressed.
B. Swap and Reload. Use in either situation where asset has increased substantially or declined substantially in value.
C. Multiple GRATS. Use for different assets or asset classes.
D. Back-to –Back GRATs. Parent creates GRAT for child, child creates GRAT for grandchildren.
E. Delaware Series LLCs for uses in GRATS.
F. Long Term GRAT.
G. Cap on Remainder. Grantor concerned that possibly too much value potentially passes to remaindermen. Must be identified in the GRAT instrument cannot be a power/right grantor retains. The concept is at end of term X amount passes to the remainder beneficiaries if the assets remaining in GRAT exceed X amount, the excess reverts to grantor.
H. Remainder Purchase Marital Trust.
I. Installment Sales to Spousal Grantor Trust.
J. Installment Sales to Section 678 Trust. Mr. Eastland cautions use of this technique.
K. Defined Value Formula Transfers. Mr. Eastland suggested if client is intent on using the Wandry case may want to consider authorizing the trustee to simultaneously disclaim any amount that is in excess of the intended gift and such amount is held in an agency relationship coupled with allowing for commingling of trust assets.

IV. Strategies to Preserve Basis Adjustment upon Grantor's Death.

A. Repurchase of appreciated assets.
B. Freeze partnership with Section 754 election.
C. Preferred partnership that fails Section 2701 requirements.
D. Section 704 debt allocation rule that allocate negative basis to transferor.
E. Trigger estate tax inclusion. Bringing gifts back into estate; grant a right to third party to grant a general power of appointment; move a self-settled trust to a jurisdiction that does not recognize self-settled trusts where a creditor would have a right to attach assets. Of course, need to be cognizant if doing so in a state that has a separate estate tax where basis increase is at the cost of an estate tax at state level.

Session I-B

The Dead and the Dying: Workshop on Immediate Pre- and Post-Mortem Planning

Presenters: Joshua S. Rubenstein, T. Randolph Harris, Laura M. Twomey
Reporter: Craig Dreyer

This workshop reviewed in greater detail immediate pre- and post-mortem planning strategies, particularly in view of the unprecedented economic and legislative change over the last several years -- which strategies still work, which ones no longer work, and what new innovative opportunities for last minute and after the fact planning present themselves. It also provided practical drafting tips to increase planning flexibility. Here are the highlights.

Ms. Twomey led off the discussion on the Pre-Mortem planning.

She noted the first step is to ensure a proper power of attorney is in place. The panel also noted that you should ensure you have a discussion with the client upon which scenarios you can release estate planning documents to others. Next it is important to ensure that any revocable trust is properly funded. You also need to confirm proper titling of assets, rather than simply relying on representations. Even in non-community property states, we should check to ensure there is no community property that has been obtained in another jurisdiction as most non-community property states will still recognize community property acquired in other states.

Check beneficiary designations for insurance, IRA's and payable on death accounts. Also check on ancillary probate issues, to determine if there is a way to transfer these assets to a trust or an LLC before death. This also has the added benefit of often avoiding state level estate tax in some cases.

Ms. Twomey then discussed actions to take in non-taxable estates. She noted that first you want to try to ensure there is no step down in basis for devalued assets upon death. Try to find a way to make it separate property of the healthier spouse to avoid the step down in basis. Another option is to sell assets with losses to reduce income tax in the current year. Unmarried couples could also consider gifting in these situations. Mr. Rubenstein noted that if you are gifting between married same sex couples, be sure to file a gift tax return with a claim for a protective marital tax deduction to protect the claim if the current law is struck down.

If you have appreciated assets in a healthy spouse's name, then you may want to transfer them to the ill spouse. (The panel noted that section 2014(e) provides if a spouse gifts an asset to a spouse that dies within one year and receives the asset back they will not receive a step up in basis, but it could pass to bypass trust where you might get the step up in basis even if the spouse is a sprinkle beneficiary). There is no harm in risking this, since you are no worse off. Also the ill spouse may survive over one year. The panel also discussed disclaimer planning by surviving spouse in these cases. The panel noted that you could set up two successive disclaimer trusts where one has spousal access and other does not. Mr. Rubenstein noted this is he is fond of disclaimer planning since you have 20/20 hindsight.

Next Ms. Twomey moved onto planning for a taxable estate. She recommended accelerating non-taxable gifts such as annual exclusion gifting as they are not brought back into the estate. You can also make annual exclusion gifts to a trust with crummy powers. The panel noted this can be very powerful in large families. Keep in mind you can also prepay tuition at grandchildren's schools, pay medical expenses, and even prepay medical premiums. There is also the option of using 529 plans.

Another option is to accelerate charitable contributions to get current income tax savings since the income and estate tax rates are close. It may be important to analyze situations for higher income tax payers as charitable gifts may be limited for individuals over $250,000 in income or married individuals with over $300,000 in income. Keep in mind that giving to a spouse who makes the charitable gift can also be beneficial in some circumstances. The panel also noted to ensure to address any charitable pledges and possibly pay charitable or minor gifts prior to death to simplify administration and eliminate the charity as an interested party.

For large IRA's consider Roth conversions. Life insurance policies should be checked to ensure policies are in life insurance trusts. If a policy has not been transferred to a life insurance trust, consider selling the policy to a grantor trust to get the policy proceeds in trust without the look back period.

The panel also noted to ensure the ill spouse has enough money to absorb the exclusion amount. Ms. Twomey said while you can use portability, she believes transferring to a credit shelter trust is still better. You can also use GST in a credit shelter trust, which is not portable under portability. There is also the benefit of appreciation of the assets and asset protection. Also keep in mind that the state exemptions are not portable in all states. Furthermore, if you rely on portability and the spouse remarries, you may lose the portability amount.

Another benefit of lifetime gifts is the opportunity to use minority interests. Also in state with decoupled estate tax, they may not take into account gifts, so you may save the state estate taxes.

The panel also noted that, if an ill spouse cannot make gifts, consider creating a trust and giving the ill spouse a general power of appointment to drag assets back into their estate.

The panel also discussed some other options such as paying off grantor trust loans to make the estate tax audit simpler. Consider loaning money to the grantor for taxes rather than simply distributing money too them. Also consider buying property back from a trust or swapping assets in the trust.

Mr. Harris then led off the post-mortem discussion.

Mr. Harris began by noting the first step is to determine what elections may need to be made such as the elections under 6166 and 6145. Estate and income tax rates are very close and many states have higher income than estate tax rates. Therefore income tax planning is becoming significant once again in estate administration. It may be best to make distributions from the estate to avoid estate from paying 3.8% tax at such low levels of income. Since beneficiaries may have different situations as well, this analysis can become extremely complicated.

To elect an estate fiscal year an estate simply files a timely return. Mr. Harris noted that the SS-4 or extension to file application is not dispositive for the purpose of electing an estate fiscal year. He also noted that an analysis should be done with 30 days left in the estate fiscal year, to decide when to take expenses and also consider what distributions to take although you have some additional time for these. Also remember that an estate cannot carry forward deductions. Also 642(g) says you have to choose administration expenses on 706 or 1041. Section 691(b) paying accountant for services performed prior to death or interest payments accrued prior to death of decedent is deducted on schedule K as a debt deduction on the Form 706. Mr. Harris noted that you can also deduct these on the Form 1041 if a miscellaneous itemized deduction as well.

Mr. Harris than discussed the Hubert issue which shows that where expenses were deducted on the Form 1041 or the Form 706 can affect the funding of the credit shelter trust. It is important to analyze these decisions to see the impact on the eventual distribution. Mr. Harris then discussed the impact of various expenses on and their impact on the funding of the credit shelter trust. He noted that management expenses should be taken on 1041, since there is no benefit on 706.

Mr. Harris noted that we should consider RMD requirements for retirement accounts and what tax impact they may have on the estate. The panel also noted that Portability will be a major issue for those who die without a credit shelter trust.

The panel then moved on to disclaimers. They reminded us that disclaimers can be used to fix documents or unwanted powers. In a provision for the transmission of property you can provide what happens in the event of a disclaimer, so if this has been done the post mortem planning may work well, but you still need to ensure you meet all the requirements of Section 2518. A disclaiming party cannot have control of property after the disclaimer. Acceptance of benefits is very important in post mortem disclaimer planning.

Mr. Harris reminded us to get all the clients Forms 709 if client has made adjusted taxable gifts since they should be attached to the Form 706. He also reminded us that the gift tax return for the final year of gifting is due when estate tax return is due. So it is possible the final gift tax return will be due before the normal April 15 deadline. Mr. Harris also noted that for QTIP trusts, you should always get extensions to file the estate tax return in case the spouse dies during subsequent 6 month period as there may be a significant tax savings if you do not elect QTIP status. He also noted that Graegin loans are very useful in estates without enough liquidity to pay estate taxes.

Our on-site local reporters who will be present in Orlando in 2013 are >Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 7

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Announcement: ALI-CLE in Co-Sponsorship with ACTEC will he holding a one hour CLE on Estate Planning After the American Taxpayer Relief Act of 2012 on Friday, January 25, 2013 from 12:00 PM to 1:00 PM Eastern. The speakers will be Ronald D. Aucutt, Beth Shapiro Kaufman and Mary Ann Mancini. For more information, contact www.ali-cle.org.

Editor Comments: This Report covers three more of the Special Sessions #1 held on Wednesday afternoon, the same being 1-C, International Planning, 1-D, ART Children, and 1-F, the Prudent Investor Rule. A Report on 1-E is still in process for publication at a later date. The next Report will cover some of the sessions from Special Sessions #2 held later on Wednesday afternoon.

Wednesday, January 16, 2013
2:00 – 3:30 PM

Special Sessions I (Continued)

Session I-C

International Planning Update

Presenters: Robert C. Lawrence, III, Norman J. Benford, Dean C. Berry
Reporter: Kristin Dittus

This session examined the drive for increased transparency regarding the beneficial ownership of financial accounts, as evidenced by multinational initiatives sponsored by two Secretariats of the Organization for Economic Cooperation and Development, the Financial Action Task Force and the Global Forum, and unilateral initiatives such as the Foreign Account Tax Compliance Act (FATCA), including the responsibilities of attorneys, accountants, and other service providers to comply. This session also examined the emerging distinction between the governing law of a trust and the law of administration of a trust including conflicts of law issues and other uncertainties. Finally, the session reviewed recent U.S. legislative and judicial decisions affecting trusts.

The lecture focused on compliance regulations in effect regarding international financial transactions laws that have been created over the last few decades and are undergoing current review and development under US law and with the international community. This Report will highlight the significant items that were discussed. Mr. Lawrence cautioned that he didn't want his audience to be afraid (of all the compliance regulations, requirements and subsequent liability) but to be careful in your practice and perform due diligence with your international clients.

The panel gave a brief background on the development of the Global Forum on Transparency and Exchange of Information for Tax Purposes (the "GF"). The GF is a multilateral framework for tax transparency and exchange of information among the participating jurisdictions. Its responsibility is to develop standards of transparency and exchange of information for tax purposes and, thereafter, to monitor and review the implementation of those standards. Currently, the standards are primarily set forth in a Model Agreement finalized in 2002 and set forth under Article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries. The need for the GF resulted from a perception that globalization provides many opportunities for corporate and individual taxpayers to shelter their property and the income therefrom in order to evade paying taxes, and the fact that jurisdictions suffer as a result of this lost revenue. It was also noted that often times there may be unrelated problems that raise financial issues, such as environmental violations that are under review by related regulators.

The GF framework provides a means by which a jurisdiction may obtain relevant information for the administration and enforcement of its domestic tax laws. The relevant information to be provided includes information held by banks, financial institutions, agents and fiduciaries.

To ensure the appropriate framework is in place and functioning properly in each jurisdiction, there are peer reviews of laws, regulations and procedures in the participating jurisdictions. These reviews determine a jurisdiction's legal and regulatory framework for the exchange of information, as well as the practical implementation of that framework.

The GF has 10 essentials for transparency and exchange of information for tax purposes that fall into 3 categories in this outline. The lecture primarily addressed the first category, which addresses the availability of information for an entity, such as ownership and identity, as well as the need for maintenance of reliable accounting and banking records. The second category of accessing information by having competent authorities able to obtain and provide information that is requested in each jurisdiction was also addressed.

The Financial Action Task Force ("FATF") was established in 1989 by the G7 nations and other countries to counter the use of the financial system by criminals against terrorism and money laundering. Civil law jurisdictions are generally suspicious that trusts could protect criminal activity and insist that an attorney have full knowledge about their client and how their client obtained any money that is transferred. US attorneys should be wary of dealing with international clients for a one time transaction, if they only work with the client's agent, if the client comes from a country sanctioned by the United Nations or if there are layered entities. If a US firm is handling the international sale of a business they have exposure to liability under FATF unless they comply with the due diligence expectations of researching both the client and the requirements of the jurisdiction they are working with. How much due diligence is required is not completely clear, and the panel discussed that an attorney can only go back so far with the client's records or be an expert of so many areas of law. For example, it is assumed that a New York attorney could rely on an attorney in the corresponding jurisdiction as to the compliance requirements of that jurisdiction.

The Foreign Account Tax Compliance Act (FATCA) began as a US initiative to regulate tax evasion. This Act creates a blanket tax of 30% on some investments, unless there is an exemption. It was not proposed as a revenue raiser, but more so to gain access to the financial information of US persons in other jurisdictions. There are two main categories, the Foreign Financial Institutions ("FFI"), which the IRS would like to comply with keeping records and reporting, and Non-Financial Foreign Entities ("NFFE"). The IRS is working to create agreements with FFIs so that they will close down the accounts of a US person who is not complying with reporting financial information. For practitioners in this area, this raises many challenging questions that have not yet been clarified regarding the layering of different entities together. For example, if a holding company is held by a trust and the holding company is an FFI, would the entire trust be subject to the stricter scrutiny regulations of an FFI or is the FFI scrutiny limited to the holding company alone? Additionally, trust ownership may be viewed differently under FATCA then under US law, for example a non-grantor beneficiary may be considered an "owner" of a grantor trust based on the assets held by the trust and the distributions received by such beneficiary.

When FATCA came out the US was in negotiations with other nations (up to 50 or more) to develop an intergovernmental approach to global compliance. Ideally each country will have one domestic reporting authority that can communicate with other national authorities regarding all financial information.

The panel discussed the potential for problems in applying the attorney/client privilege with international matters, and that practitioners should be aware of what materials are disclosed to third parties (billing records, transactional records, tax preparation) because these are discoverable.

Many countries have a Mutual Legal Assistant Treaty (also known as MLAP) in place, which is an agreement between two countries for the purpose of gathering and exchanging information in an effort to enforce public laws or criminal laws. These are not tax focused, they generally exempt military law, and would be reviewed by the US Attorney General or Department of Justice. If an attorney from another country came to the US under such a treaty, and there is no objection by the Attorney General, such attorney could proceed with all the rights and privileges of a US prosecuting attorney.

A decanting issue was presented by the panel's hypothetical problem. A revocable trust in a foreign jurisdiction partially "decanted" with a trustee to trustee transfer of assets from the foreign revocable trust to two U.S. trusts. Because the foreign trust held real property and assets located in the U.S. and two of the children are U.S. citizens, this could cause a taxable event. When there is decanting to a US based trust from a foreign trust, the U.S. trustee wants to receive a distribution statement from the foreign trust and can rely on those facts. If there are no U.S. assets, there will generally be no tax, however, if there is no distribution statement, then the U.S. trustee is forced to report the transaction as a taxable event and may be subject to multiple tax. As a revocable foreign trust (in the hypothetical), the grantor could have taken possession of the assets individually and then gifted them to a trust for his children without the process of decanting and had minimal reporting issues to face. The materials include a letter from the American College of Trust and Estate Counsel to the IRS that provides a comprehensive overview of decanting.

Session I-D

The Brave New World of ART Children: Special Issues in Estate Planning and Administration (Focus Series)

Presenters: Bruce M. Stone, Susan N. Gary, R. Hugh Magill
Reporter:

The panel examined real issues being encountered today in estate planning and in administration of estates and trusts concerning the rights of posthumously conceived children, and the potential liabilities they create for planners and administrators. This report covers the highlights of this session.

The presenters began with a discussion regarding the definition of terms like "child", "descendant" or "issue". State law is all over the board in how they define these terms and how they will approach the issue when the need arises. Courts often look to the definitions under intestate laws, but courts necessarily don't have to defer to the intestate laws in defining these terms. Some courts will rely on the Restatement, while others value and consider the testator's verbal statements or other evidence of what the testator meant.

In dealing with such ART children, most states don't deal with the issue of posthumous conception directly. The presenters' materials contain materials authored by Sean Kelley, which include a thorough analysis of the existing state laws that address ART children and a comparison of those various provisions. Nonetheless, most states have not enacted any laws to address ART children.

Accordingly, courts are left to rely on rules of construction to resolve any ART related issues. As a starting point, the rules of construction as they were applied to adopted children before most statutes were revised to address adopted children are instructive. Further, will and trust construction doctrines traditionally defer to the settlor's intent, and/or the common intent, usage or meaning of the word, while balancing any public policy concerns. See, the Martin and Libbey cases which are discussed in more detail in the materials.

Federal courts have historically deferred to state intestacy laws to define these terms, as evidenced by the recent US Supreme Court decision in Caputo, dealing with the rights of ART children to receive Social Security benefits as a survivor of the children's deceased father.

Drafting:

While Bruce Stone went into much more detail regarding drafting for ART children in his materials and presentation on Tuesday titled "The New Genesis in Estate Planning" (Report #2), the presenters supplemented that presentation with a good deal of discussion regarding best practices. Obviously, when drafting for ART children, how you define terms like "issue", "descendants" and "children" is highly specialized and not conducive to boilerplate or default language. It’s a very specialized issue based on each family's facts. So while it seems fairly easy to draft for existing kids, it's tricky to draft for the possibility of future born descendants and how to accommodate when they are not yet conceived at the time of the settlor's death. Issues need to be discussed with clients, including how long you keep an estate open to include posthumous children.

The UPC suggests that an ART child only be included in a class of beneficiaries if that child is in utero within 3 years of the date of death and born within 45 months. Bruce Stone tries to follow this in his personal documents by saying the child must be born within 45 months and the sample provisions he provided in his materials tracks this language. But, in practice, the client needs to decide how long is long enough given their facts, circumstances and preferences.

From a fiduciary perspective, identifying ART children can be problematic to a trustee who is not necessarily knowledgeable regarding a family's reproductive planning. For this reason, the presenters suggest that any documents that contemplate the inclusion of ART children also include some notice provisions. Specifically, Stone suggested the following 3 notice requirements:

1. Upon the death of a donor, the donor's descendant needs to give notice that he/she has donated material out there;

2. The descendant should be required to designate a person for the fiduciary to send notices and obtain information about the trust; and

3. The fiduciary should do a search for any ART beneficiaries and find any beneficiaries it's been noticed about to let them know of the following two deadlines:

a. Any descendant has 6 months to confirm that the material is still out there; and

b. Such descendant must report back regarding the use of that material within the 45 month period to give the fiduciary notice if a birth has occurred.

Trustee issues:

Some additional concerns that are raised by ART are questions regarding who is a "descendant" and thus a beneficiary/holder of withdrawal rights/permissible appointee? Who has rights to remove/appoint a trustee or approve of accountings?

Further, is there any obligation to distribute to a beneficiary who wishes to obtain in vitro medical services? It is very expensive and there are also ancillary costs that are not necessarily medical - like attorney fees, storage costs... Further, can a fiduciary distribute for in vitro expenses knowing it may alter trust beneficiaries?

There was a recent Kansas case where sperm donor contributed material to same sex couple. The couple agreed to indemnify the donor and agreed he would never have to pay child support. The couple later sought state financial assistance, and Kansas law required that the State of Kansas pursue contribution for child support for anyone on state assistance. Accordingly, the State of Kansas then went after the sperm donor notwithstanding the indemnification agreement. Unfortunately, such a contract was not enforceable here because Kansas state law required that all sperm donation be supervised by a doctor, and this particular child was not conceived through medical assistance. Accordingly, the contract was not enforced.

The presenters discussed some ethical issues regarding the collection of biological materials post-death. The ABA model act regarding the collection of material from a deceased or disabled person prohibit the collection absent the expressed consent of person or a court order. Nonetheless, there are more and more probate court cases being reported where courts are permitting the post-death collection of materials from a person. For example, there was a recent case where the probate court permitted the mother of a deceased 21 year old male to collect the sperm of her son for the purpose of having that sperm fertilize an anonymous donor egg in order to allow the mother to become a grandmother.

Currently state laws don't contemplate the myriad of issues now facing us as a result of scientific technology. ART now includes not just test tube babies and post-humously conceived children, but the possibility of children produced as a result of cloning and gene splicing.

With that backdrop, the panel discussed the sample problems listed in the materials.

Session I-E

Intelligent Planning for Intellectual Property (Emerging Assets Series)

Report is in process for later publication.

Session I-F

The Prudent Investor Rule After the Financial Crisis (Financial Assets Series)

Presenters: Max M. Schanzenbach, Stephen B. Malech, Susan Porter
Reporter: Joanne Hindel

In the wake of the Financial Crisis of 2008, modern financial theory has come under increasing scrutiny. This session examined the relevance, if any, of evolving views on portfolio theory, efficient markets, and "behavioral" finance for the Prudent Investor Rule and trust investment practice. Particular attention was paid to trustee compliance, both from empirical and advisory perspectives, as well as to liability exposure and planning considerations. This Report covers the significant highlights of this session.

Max Schanzenbach started the presentation by reviewing some basic information:

The Restatement (Third) of Trusts codified the Modern Portfolio Theory (MPT) in 1992 and in the Uniform Prudent Investor Act (UPIA) in 1994 which accounts for the Efficient Capital Markets Hypothesis (ECMH). The UPIA has been adopted in every state.

He then posed the question: In light of the 2008 Financial Crisis what is the difference between MPT and ECMH? Does the Financial Crisis have an impact on MPT

Max took the audience through a quick review of trust investment law over the last 300 years.

Through the mid 1990s legal lists were used that limited trustee powers and did not entail any significant fiduciary scrutiny. In the mid 1990s (around 1959) the prudent man rule (PMR) replaced legal lists but focused on speculation, per se rules and safe harbors. Sub rules developed that put the focus on default risk but inflation risk was ignored. Investments were viewed in isolation, not as a part of overall portfolio. The standard was prudence not speculation.

ERISA rules in the 1980s started the change to the UPIA.

With the enactment of the UPIA, there are no categorical limits on types of investments. The fiduciary is subject to ex post fiduciary scrutiny for overall risk/return suitable to the beneficiaries and purpose.

Corporate fiduciaries increased investments in equities with the enactment of the UPIA through 2006. With the 2008 Financial Crisis questions arose whether the Prudent Investor Rule (PIR) fit to economic theories.

MPT is a trade-off between risk and return with a review of two types of risk: idiosyncratic risk and market or systematic risk. The first can be controlled by holding a diversified portfolio but market risk is controlled by holding different asset classes. Market risk cannot be controlled by diversification.

Diversification is the only free lunch in economics. The law requires that risk is managed through diversification. A fiduciary must also figure out which of well-managed portfolios is best for the particular beneficiaries of a trust.

MPT is a theory of portfolio design and points toward a efficient portfolio in which return is maximized for a given level of risk. ECMH is a hypothesis about information and pricing in public securities markets. In an efficient market, the price of a security reflects all publicly available information and to be efficient a market requires transparency and liquidity. The hypothesis implies a passive strategy will offer greater returns net of costs.

ECMH is not at odds with MPT – active management still is important to fit particular portfolios to specific beneficiaries.

Max concluded his presentation by reviewing his chart on state average stock holdings which he indicated shows that UPIA is working effectively based upon the stock holdings for various states.

Steve Malech then started his presentation by reviewing matters that he has litigated regarding growth of portfolios and diversification of portfolios.
Steve referred to 10 “life lessons” to avoid contests over investment management.

Choose a team, identify a leader, train the team, develop a written plan, stick to the plan, follow through, communicate with the beneficiaries, communicate with the rest of the team, take the high road and paper the file.

Throughout his presentation Max read excerpts from actual depositions that highlighted the lack of knowledge by trust officers and portfolio managers.

The best way to avoid a contest over investment management is to choose the right team. You should consider the experience of the fiduciary with respect to handling fiduciary versus non-fiduciary accounts, types of assets, concentrated positions and complex tax or other issues. Be sure to designate a team leader and understand what needs to be done: will there be administration of a trust or estate, portfolio management? What compliance with applicable law and policies and procedures will be required?

The fiduciary should develop a written plan and:

- Establish investment objectives
- Select investments to meet objectives
- Execute the objectives
- Maintain flexibility to address uncertainties and risks as they arise

Steve discussed the particular concerns in dealing with concentrated positions. He listed the following factors:

- Marketability of assets
- Needs of the beneficiaries
- Involvement of professionals to determine a fair price

- Economic outlook for the assets
- Expected tax consequences
- Possible sale of entire position to a single buyer
- Stated desire in the document to retain assets
- Other discounting factors

Courts find fault with fiduciaries that reference other assets held by the family (although a fiduciary may have to consider outside assets to determine the extent of concentration of assets); selling assets when "it feels right"; a lack of meaningful investment reviews and using nominal long-term gains as a defense for lack of diversification.

Stick to the plan and follow through with regular team meetings, checklists and communication with beneficiaries. Include beneficiaries in formulating the plan and identifying potential concerns and get "buy-in". Be careful not to punish problem beneficiaries. Don't unnecessarily increase costs and be sure to maintain internal documentation justifying decisions.

Susan Porter then presented this question: Is the Prudent Investor Act still valid after the financial crisis of 2008? UPIA modernized trust investment law and restored flexibility in investment management. Three important changes with UPIA: no categorical restriction on types of investments, retention of original assets allowed and ability to delegate investment management to agents. There was also a change in emphasis with respect to the trustee's duty to diversify.

Susan read from an earlier article containing an interview with Dean Halbach who was the principal draftsman of the Restatement Third of Trusts.
In that interview Dean Halbach did not confirm that a trustee would have to understand MPT.

Susan discussed the 8 tenets of professional investment management used by her trust company:

1. Risk is not volatility- real risk is loss of capital 2. Price and value are different things- although interconnected 3. Investors need to know what they own 4. There is no such thing as passive investing.
5. Preserving wealth is the first step toward growing it.
6. There is a difference between wealth and money and that difference is purchasing power.
7. Cash provides option buying for investors 8. Diversification is an inadequate tool for managing risk.

At the conclusion of their formal presentation, the speakers took questions from the audience.

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Heckerling 2013 - Report No. 8

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Editor Comments: This Report covers part of the Special Session II sessions, including II-A, Family Business Planning, II-B,Top 10 Fiduciary Income Tax Strategies of 2013, II-C, IRA Beneficiary Designations, and II-D, Community Property. The next Report will cover the balance of the Wednesday Special Sessions.

Wednesday, January 16, 2013
3:50 - 5:20 PM

Special Sessions II

Session II-

A Practical Issues in Planning for the Family Business (Focus Series)

Presenters: Louis A. Mezzullo, Hugh F. Drake, Nancy Schmidt Roush
Reporter: Jason Havens

This session used hypothetical fact patterns to illustrate the tax and non tax issues involved in planning for the successful transition of the family business to the next generation or for the disposition of the business to non family members.

This special session continued Mr. Mezzullo's general session earlier in the day (Report #4) on family business succession planning. However, the panel primarily used a case study to illustrate the issues involved in this succession planning context. The case study involved a married couple with three adult children, only one of whom ("Billy") currently works for the family business/company.

Mr. Mezzullo pointed out that this couple's goal of treating all three children equally poses some of the most challenging practical problems. He joked that family business succession planning is so much simpler when the couple only has one child! You can use voting and nonvoting interests to help deal with the control/continuity issues while still generally equalizing among the children.

The panel discussed several conflict of interests issues along with fiduciary concerns. One situation revolves around whether a trust owns the interest in the family business. Mr. Drake suggested that you might consider a voting trust, which the panelists do not use regularly in practice. Nevertheless, Mr. Mezzullo noted that he has used voting trusts with car dealership clients, where the owner wants to ensure that decisions will be made more objectively and in the best interests of the company.

The panel went through several techniques to transfer the family business, including installment sales or perhaps even an employee stock ownership plan (ESOP). These techniques are covered in the supplemental outline for this special session and also Mr. Mezzullo's general session outline.

Mr. Drake discussed the possibility of Graegin loans to finance the payment of estate taxes in this business succession scenario where the family lacks liquidity. The panel agreed that Graegin loans are on the Service's radar. Mr. Mezzullo pondered whether interest on Graegin loans should be treated as deductible.

They also addressed the option of installment payments of the estate tax under Section 6166. Mr. Mezzullo's outline covers the qualification for installment payments of the estate tax in detail. One of the key requirements is that the "value of the closely held business interests must exceed 35% of the value of the decedent's adjusted gross estate. I.R.C. § 6166(a)(1)."

The panel concluded by covering various issues raised if the family business is a C corporation, an S corporation, or a limited liability company (LLC). One of the advantages of using a sale to a grantor trust is the fact that the trust qualifies as an eligible Subchapter S shareholder. Self-canceling installment notes (SCINs) and private annuities were also discussed in the supplemental outline.

Session II-B

Top Ten Fiduciary Income Tax Strategies for 2013

Presenters: Carol A. Cantrell, Steven G. Siegel
Reporter:Kimon Karas

This panel discussed practical strategies for dealing with the 2013 fiduciary income tax landscape in light of possible rate changes, the 3.8% Medicare tax, the alternative minimum tax (AMT), bundling and unbundling fees, balancing 706 and 1041 deductions, defining income under the "not-so-uniform" Uniform Principal and Income Act (UPIA), and much more. This report covers the significant highlights of this session.

Mr. Siegel commenced by reminding the audience that after years of low income tax rates that now with higher income tax rates post ATRA and the Medicare surtax of 3.8% that income tax planning is now a significant concern. Additionally because of the varying rates, phase outs at individual levels, there is no one size fits all analysis. Practitioners will need to "run the numbers."

Starting both in first tax year commencing in 2013, ATRA's 39.6% top rate is effective together with the 3.8% Medicare surtax. For estates and trusts ('T"), the threshold for reaching the top rate is $11,950. The surtax applies to the lesser of adjusted gross income in excess of the highest income tax bracket ($11,950) or undistributed net investment income. Compare with individuals filing jointly is $450,000 and the Medicare surtax is $250,000. There will be pressure to distribute income to beneficiaries, but does the instrument permit it and secondly is that the prudent thing to do depending upon the particular beneficiary.

I. Medicare surtax.

The tax is levied on unearned income. The Code describes this (although not defined) as 'undistributed net investment income.' Most likely net investment income means net investment income less distributions of income that is net investment income. The adjusted gross income of the T is determined under Section 67(e). Computed same as individual generally including costs which are paid or incurred in connection with the administration of the T.

A. Net investment income includes gross income from interest, dividends, rents, royalties, annuities, gains from sales, passive activities less "properly allocable expenses."
B. Certain income excluded- distributions from IRAs, non-passive trade or business income, tax exempt income. Proposed regulations were issued in early December and in the area of trade or business left open the definition of a trade or business referring to Section 162, which of course does not define trade or business either. Ultimately will become a facts and circumstances determination. Compare the self-rental rules in the passive loss rules which classify that income as active so that owner cannot offset passive losses from income, but for the Medicare tax this income is classified as passive.
C. Watch allocation of expenses. Indirect expenses can be allocated to any category

as long as allocated is made to tax exempt income. Dividends are capped even for T's at 20% rate. Watch software if T has significant dividends so that expenses are not offsetting 20% income resulting in more 39.6% income to be taxed.

D. Capital gains most likely will be trapped in T unless there is specific authority to distribute. However capital gains from pass-throughs pass through DNI, i.e. partnerships, (LLCs taxed as partnerships), S corporations.

E. Passive income is included both in AGI and net investment income. Passive income is trade or business income in which taxpayer does not materially participate. Rental is per se passive. IRS position is that in case of T, trustee must satisfy the material participation test. But see, Carter v. US, that held that material participation should be determined by reference to all persons who conducted business operations on trust's behalf.

F. Desire will be to convert passive income to active.

G. Grantor trust's activities determined at grantor's level. Watch use of S corporation stock as who is ultimate owner where shares have been transferred to trusts for children, non-active members or directly to such persons.

II. 65-day rule.

T may treat some or all of distribution made within the first 65-days of a taxable year as paid on the last day of preceding year.

III. Non-calendar year election.

An estate including a revocable trust (with Section 645 election for at least 2 years) may elect any year it chooses. A taxable year is selected by timely filing the initial tax return for such year. The year identified when obtaining an EIN on Form SS-4, is not determinative or binding. By selecting fiscal year can minimize the impact of ATRA and the Medicare tax for some period of time since those taxes do not become effective until the first taxable year starting in 2013. For a decedent dying in December of 2012, select a fiscal year ending November 30th.

IV. Claim deductions on Form 1041 not 706.

Need to do the analysis.

V. Taxes on income from pass-through entities.

Cash distributions are fiduciary accounting income. Entity distributes less than what the T needs to pay its income taxes, that creates cash flow issues for T. Alternatively entity distributes more than enough to cover T's income taxes. How much can the T distribute to the beneficiary is determined by an algebraic formula. The T will deduct from its taxable income the distribution to the beneficiary so it must apply the formula to determine the amount owed to the beneficiary so that after deducting the distribution there are enough remaining funds to pay T's tax.

VI. Grantor trust planning with S Corporations.

When the grantor dies need to trace where the S stock ultimately is passed to. Depending upon the ultimate beneficiary the S election could be jeopardized if appropriate elections are not made, i.e. QSSTs or ESBTs

VII. Grantor Trust Planning

What are the income tax consequences to the trust grantor or the estate of the trust grantor if the grantor of the intentionally defective grantor trust dies with an unsatisfied installment note still outstanding. There was a debate between the panelists, Mr. Siegel's position is that death is a tax non-event and Ms. Cantrell's position is that death is a tax event resulting in gain recognition. To date there is no definitive guidance on which approach is correct. The result - both panelists agreed the best practice is for the note to be paid prior to death (if only one could predict when death is to occur)!

Session II-C

IRA Beneficiary Designations: Just Tell Me What the Answer Is

Presenter: Timothy H. Guare
Reporter: Mike Stiff

The minimum distributions rules are complex. However, most of our clients fall into one of a relatively few categories (unmarried; happily-married; not-so-happily-married; charitable-inclined; etc.), and our advice with respect to beneficiary designations for their individual retirement accounts can be standardized. By examining common fact patterns, participants learned how to advise most of their clients most of the time.

The materials consisted of a 56 page outline. This report highlights the more significant parts of this session.

Timothy Guare began with a basic review of the terms and definitions relevant to IRA beneficiary designations. He also explained that the Uniform Lifetime Table, which dictates the distribution period for most participants, is based upon the joint life expectancy of the participant and someone 10 years younger than the participant. For this reason, it is usually very favorable to the participant and, obviously, more favorable than the single life table.

The general premise of Mr. Guare's presentation was despite the complexity of the rules surrounding beneficiary designations, most clients can be categorized into 4-5 general groups and the advice can be standardized for each group. Obviously, the size of the retirement plan and unique objectives of the client may warrant exceptions and a more customized solution.

Mr. Guare reviewed the planning objectives common to most clients (in the order of priority): (1) accomplish client's non-tax objectives with regard to distribution of assets after death; (2) allow deferral of income taxes for as long as possible during client's lifetime; (3) minimize estate tax and allocate any such tax to appropriate beneficiaries; and (4) allow for deferral of income taxes after client's death. Complicated beneficiary designations and extensive legal fees to preserve maximum deferral options may not be warranted. Most beneficiaries do not take advantage of maximum deferral period.

Mr. Guare then walked through four typical scenarios providing the standard recommendation, reasons for the standard recommendation and potential concerns.

The first scenario was for a happily married participant with no perceived need for a QTIP trust. The standard recommendation was to name the spouse as the primary beneficiary and the Revocable Trust (which provides for a fractional funding of Marital and Credit Shelter trusts) as the contingent beneficiary. This provides maximum income deferral during participant's life and flexibility after participant's death. After the participant's death, the surviving spouse may rollover to her own IRA, treat as inherited IRA or disclaim to fund the Credit Shelter trust. The potential concerns are the spouse may fail to disclaim or the separate share treatment may not be available to the contingent beneficiaries of the trust, resulting in the acceleration of distributions for younger beneficiaries.

The second scenario was for an unhappily married, previously married or married couple desiring a more restrictive arrangement. The primary beneficiary would be the QTIP Trust, Credit Shelter Trust or Revocable Trust (which provides for fractional funding of the QTIP and Credit Shelter trusts). This is for clients who wish to control the ultimate disposition of the retirement assets. No need for the spouse to disclaim and may grant the spouse a power of appointment, if appropriate. Mr. Guare noted that special language is needed if participant is naming the QTIP Trust as a potential beneficiary of the retirement plan. Sample language was provided which insures all income from the retirement plan is distributed to the spouse and QTIP Trust will qualify for the marital deduction. Mr. Guare also noted that if are naming a trust as a beneficiary of the retirement plan, it is necessary to meet the trust requirements that will allow the beneficiaries to be accorded designated beneficiary status. The four requirements are (1) the trust must be valid under state law, (2) the beneficiaries of the trust must be identifiable, (3) the trust must be irrevocable after the participant's death, and (4) certain documentation requirements must be satisfied by October 31st of the year following the year of death (must send copy of trust to custodian). Additional concerns are that the separate share treatment may not be available and may have to use the measuring life of the oldest beneficiary. Mr. Guare discussed how the beneficiary designation and/or the trust agreement could be structured to qualify for the separate share treatment. Mr. Guare also offered that if beneficiaries are generally close in age, this may not make a big difference. In cases where there was a big disparity in ages, you may need to insure separate share treatment or could create trusts for each group (for example, one trust for children and one for grandchildren).

The third scenario was for an unmarried participant with no charitable intent. The recommended beneficiary was the Revocable Trust. After death, the desired control and distribution is achieved through the terms of the trust. This eliminates the complex beneficiary designations and the trust can provide a centralized distribution plan and deal with contingencies, as appropriate. The potential concerns include the same concerns associated with the second scenario (trust requirements to qualify as designated beneficiary & separate share treatment). It also becomes very important to review and address estate tax apportionment among the beneficiaries.

The fourth scenario was for an unmarried participant with charitable intent. The recommended beneficiary designation was to directly name the individuals and charities. This made separate share treatment more likely. The retirement assets that are allocated to charity will not be subject to income taxes. No need to meet the trust requirements if beneficiaries named directly. The potential concerns included a more complex beneficiary designation and still need to address estate tax apportionment.

Mr. Guare finished his presentation with planning considerations after the death of a participant. He reviewed the options available if the designated beneficiary is the estate, a trust, a charity or multiple beneficiaries. Mr. Guare noted that you have until the Beneficiary Determination Date, which is September 30th of the year following the year of death, to pay charitable beneficiaries, establish separate shares and to plan for desired beneficiaries.

Mr. Guare was a good presenter, provided a clear and simple to understand outline, provided sample language and presented a simple approach to a complex subject. While I generally take a more complicated approach, Mr. Guare made me re-think whether this is appropriate for all of my clients. Mr. Guare's general premise was most clients don't take advantage of the maximum deferral option and we should identify non-tax objectives of the family before adding complexity and additional costs.

Session II-D

Crossing State Lines with Community Property

Presenters: M. Read Moore, Nicole M. Pearl
Reporter: Joanne Hindel

Community property can arise by operation of law or by agreement. This presentation covered the basic principles of community property law geared towards lawyers practicing in noncommunity property states, and it addressed the legal and tax treatment of community property when one or both members of the couple, including same-sex married couples and registered domestic partners, move to or reside in a noncommunity property state.

The speakers started by saying that the presentation will cover the law of community property generally and conflicts of law.

Read Moore mentioned that the outline dates back to 1991 with updates and he pointed out that here have been many changes regarding what is considered marriage since the drafting of the original outline .

Nicole Pearl started with an overview of community property and said that it does not stop at the state line so the failure of a common law state lawyer to understand community property will often result in the failure to preserve community property of migrating couples. She posed the question: what happens when married couples living in non-community property states have some connection to a community property jurisdiction?

She defined community property as all property a married couple acquires during the marriage other than by gift or inheritance and said that both spouses have equal, undivided interests in the community property. Community property is vested at the time it is earned. Title is generally irrelevant even if in only spouse's name – it may still be considered community property unless obtained before marriage, by gift or inheritance. The source of the property is more important than title. Either spouse can manage the property but there are restrictions on the transfer of community property to third persons either as gifts during lifetime or upon a spouse's death. In general, creditors can reach community assets to satisfy debts incurred by either spouse during marriage, and one spouse's separate property is generally not liable for the other spouse's debt. Community property can have significant impact on income, estate and gift tax planning for married couples.

Eight states have a mandatory community property regime that will apply unless a separate written agreement applies. The states that have mandatory laws inherited their legal systems from either France or Mexico. Countries with a civil law legal system tend to have community property concepts. Often in these countries couples can elect whether they will choose a community property regime.

Community property issues can arise when two individuals have a relationship with one another that the jurisdiction in question considers to be a marriage or the equivalent of a marriage, such as a registered domestic partnership. Same sex couples may have reporting requirements depending upon laws governing domestic partners. Most states have statutes that govern the issuance of marriage licenses and that set forth the requirements for entering into a valid marriage in that state. Even if a same-sex marriage is valid in both the jurisdiction in which it is formed and the jurisdiction of the parties' domicile, the marriage may not be recognized for federal law purposes. Some states allow couples to form contractual common law marriages without obtaining a formal marriage license or having a formal ceremony.

When dealing with couples, you should ask where the couple has lived and identify any possible community property issues.

If a married couple has established a domicile in a community property state or jurisdiction the property that they thereafter acquire will be characterized based on that jurisdiction's community property laws. Married couples can agree in a premarital agreement that the laws of a particular state will govern their rights in property acquired while married. Further, spouses living in a common law state may acquire community property by purchasing real property located in a community property jurisdiction.

A fundamental feature of American choice of law rules is "mutability" which means that the law governing a married couple's property depends on where the couple lives from time to time. As a result, when a couple moves from state to state, the law that applies to the characterization of their property also changes. However, when spouses move from a community property state to a common law state, the property they acquired with community funds and property traceable to those community funds continues to be community property despite the fact that the couple now lives in a common law state.

In addition to the community property retaining its character, the income from the property may be considered community property also.

Some courts in common law states have failed to recognize the continuing community character of community property brought to their state.

If a couple enters into an agreement either before or after they are married that provided that some or all of their property would be community property, a court in a common law state is likely to uphold the provisions of that agreement.

Couples leaving a community property state and moving to a jurisdiction that may not recognize their marriage or domestic partnership should consider titling assets in their joint names, or using contractual agreements or trusts to preserve the character of the property. This minimizes the possibility that a court of the new state would fail to recognize the property interests that were created in the prior domicile, depriving one spouse or partner of his or her property rights.

Take steps to preserve community property by memorializing the status of the property in an agreement or memorandum. If possible, transfer the property to a separate revocable trust to preserve its character as separate or community.

There are possible commingling issues if property starts out as community property but one spouse continues to contribute to the property over time.

If a couple moves from a community property to a non-community property state, they should avoid taking title to assets located in the common law state as tenants by the entirety or joint tenants with rights of survivorship. These situations arise often with military families.

Some states have adopted the Uniform Disposition of Community Property Rights at Death Act in order to more readily recognize the attributes of transitory community property on the death of the first spouse to die.

Income from community property is owned 50/50 by the spouses. Disposition of real estate in community property states requires the signature of both spouses.

Community property gets a double basis step-up – see IRC 1014(b)(6).

The speakers discussed the effect of a move on premarital agreements or marital property agreements. Generally, the agreements are upheld by common law states in order to acknowledge the character of property acquired by the couple.

New York and New Jersey courts have a long tradition to upholding foreign premarital agreements. Florida did not uphold an agreement that attempted to disinherit one spouse.

Federal tax cases address decisions related to the effect of a non-U.S. property characterization agreement.

If spouses are gifting a community property asset, there is no need for spouses to elect to split the gifts. A gift of community property assets is deemed to have been made one-half from each spouse. Practitioners in common law states should be careful not to gift community property to a trust of which one of the spouses will be a trustee or beneficiary. Transmutation agreements should be used to first transmute the community property asset to the separate property of the spouse who is creating the trust.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 9

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html.

In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers the balance of the Wednesday afternoon Special Sessions II (except for SS 2-F about Exotic Investment Products, which is in the works), those being SS I-E Planning for Intellectual Property and SS 2-E Planning for Mineral Interests. The next Report will begin the coverage of the Thursday, January 17th, Sessions.

Session 1-E

Intelligent Planning for Intellectual Property (Emerging Assets Series)

Presenters: Adam F. Streisand, Gabrielle A. Vidal
Reporter: D. Scott Robinson

The speakers explained the need for specific planning relating to intellectual property assets, including copyright, trademark, patent and name, image and likeness rights, based upon the peculiarities of state and federal law, and international law and treaties, impacting the descendibility, management and exploitation of such rights, as well as complexities associated with reversion rights, "will bumping" and marital dissolution. The speakers also discussed issues related to the valuation, taxation and accounting of intellectual property rights.

Intellectual property assets can be very significant assets in an individual's estate. This is shown somewhat by the annual publication of the earnings of intellectual property of deceased celebrities put out by Forbes. Topping the list in 2012 was Elizabeth Taylor, Michael Jackson and Elvis to name a few. The significance is also shown by the many famous authors, such as Gene

Roddenberry (creator of Star Trek), who never earned little during their lifetime for their work but whose work produced substantial earnings after their death.

This report highlights the more significant parts of the intriguing presentation given by Mr. Streisand and Ms. Vidal on intellectual property and the estate and tax planning considerations involving such property. The presentation focused on copyright law, which Mr. Streisand stated was a crazy as many of the clients we deal with (keep in mind that Mr. Streisand represents celebrities and their families). The presentation began with a very helpful overview of copyright law and then moved to the various planning aspects involving intellectual property.

Copyright is governed by Title VII of the US Code. Section 102 of that Title extends copyright protection to original works of authorship fixed in a tangible medium of expression from which such works can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Mr. Streisand stated that a common misconception is that works need to be "copyrighted" in order to receive copyright protection. Mr. Streisand made clear this is not the case as copyright protection is afforded the moment that creator places the work in a tangible medium. Mr. Streisand mentioned that what is often being referred as copyright is copyright registration. Copyright registration has the benefit of putting the world on notice of the copyright. Registration also has the added benefit of allowing the option for the copyright holder to obtain statutory damages for copyright infringements. Theses statutory damages are equal to $100,000 per infringement. This becomes an important facet of registration as infringement damages are often difficult to discern.

Copyrightable works include literary works, musical works, pantomime and choreographic works, motion pictures and sound recordings. With respect to music, there is often confusion with respect to the copyright in the musical work (the composition, written notes) and the sound recording (performance of the composition). There is a different and distinct copyright in the written musical composition and actual performance of the music contained in the sound recording. The speaker gave an example of this using Michael Jackson and Quincy Jones. If Michael Jackson records and performs a song composed by Quincy Jones, Michael Jackson has a copyright in the sound recording and Quincy Jones has a copyright in the musical composition. Michael Jackson would need a license from Quincy Jones in order to perform the composition. Both Michael Jackson and Quincy Jones would be entitled to royalties from the sale of the sound recording containing the song performed by Michael Jackson and written by Quincy Jones.

Copyright ownership is often referred to as a bundle of rights. These rights include the right to reproduce the work, to prepare derivative works, to display or distribute the work or perform the work. There is a distinction between physical item and the actual copyright. For example, assume there is a master recording made of a Michael Jackson song and someone else physically owns the master recording. The ownership of the master recording does not mean that owner is able to do anything with the master recording other than listen to it for the owner's own enjoyment. The copyright is what actually allows for the master recording to be copied, distributed and sold.

Mr. Streisand then turned to a discussion of derivative works. Derivative works are works that are created from original source work. Mr. Streisand gave the example of a play being turned into a screenplay, which is then turned into a motion picture, as derivative works. The screenplay is a derivative work of the play and the motion picture is a derivative work of the screenplay and play. Each derivative work must be authorized by the person owning the original work (i.e. the play in the example).

Copyrights are freely transferable during life or at death. In contrast to many property rights, copyright laws create two mechanisms by which the copyright can be recovered either by the author or by the family of the author (the "protected class"). There are two main bodies of copyright law 1909 Act and the 1976 Act. The 1976 Copyright Act governs all works created on or after January 1, 1978. The 1909 Act governs all works created prior to January 1, 1978. The 1909 Act provides for a different duration for the copyright and for two terms of duration. The first copyright term is for 28 years and the second term is also for 28 years. This second term was extended under the 1976 Act to 47 years, which was again extended by the Sonny Bono Act to 67 years. With all of the extensions, it is possible to extend copyright protection under the 1909 Act for 95 years. Under the 1976 Act and Sonny Bono Act, when all is said and done, it is possible to extend copyright protection for 70 years beyond the life of the author. Interestingly, Ms. Vidal mentioned that the Sonny Bono Act was in large part due to Mickey Mouse soon entering public domain.

The 1909 Act contains renewal rights. Mr. Streisand stated that these renewal rights came about because Congress felt that the author initially had weak bargaining rights with studios and others that would utilize the work. Renewal rights were vested only in the author only if the author was alive at the end of the 28 year initial term. If the author did not survive the initial 28 year term the copyright renewal rights vested in the author's surviving spouse and children. Due to this quirky system of vesting it was really not possible for the author to transfer his or her renewal right if the author did not survive the initial term as any such assignment was able to be terminated and the copyright renewed by the protected class. This termination of assignment and reclamation of the copyright is called bumping. Also an author could not devise a copyright outside of the protected class if the author died before the end of the first term as the right would automatically vest to the members of the protected class. There were many issues created by these renewal rights under the 1909 Act. Fortunately, these issues have been essentially eliminated as all renewal rights had to vest by December 31, 2005.

The 1976 Act did away with renewal rights and replaced them with termination rights (also known as recapture rights). Ms. Vidal indicated that one of the driving forces for the change from renewal rights to termination rights was due to Superman and its creators, which barely benefited from their creation during their lifetime. Termination rights allow the author or the protected class to terminate any transfer or assignment of a copyright by the author 35 years after such assignment or transfer was made. Ms. Vidal mentioned that there is an issue involving musicians and recording studios with respect to the "work for hire" provisions under Section 304(c) of the 1976 Act that has become ripe (as of January 1) and is expected to be heavily litigated.

Similar to renewal rights an author cannot devise termination rights to anyone outside the protected class as the termination rights automatically vest in the author's surviving spouse and/or children. There is an ambiguity that exists with respect to apportionment under Section 304 of the 1976 Act with respect to the renewal rights under the 1909 Act.
According to the Sixth Circuit Court of Appeals, in the Roger Miller case, a surviving spouse and children receive renewal rights in the same manner as termination rights. Termination rights are received in disproportionate shares by the surviving spouse and children.

Ms. Vidal next turned to a discussion of how federal copyright law and state community property law may cause a conflict as to the ownership of a copyright. Under copyright law ownership is held solely by the author.
Under California community property law, the author and the author's spouse have equal undivided shares in the copyright if the copyright was created during the marriage. Whenever state law conflicts with federal law, the state law is preempted under the Supremacy Clause and is governed by the Supreme Court's test under Hisquierdo. Ms. Vidal reported that the California Court of Appeals applied the Hisquierdo test in Marriage of Worth. In Worth, the court answered the question regarding whether a copyright created during the marriage was community property. The court answered to the affirmative. The open question after words is whether renewal rights were affected by community property rights. Ms. Vidal stated that this question remains unanswered. Despite the holding in Worth, Ms. Vidal believes that community property law is in direct conflict with respect to termination rights under federal copyright law, and therefore if ever challenged such property laws would likely be preempted.

Next, Ms. Vidal discussed of the right of publicity. Ms. Vidal stated that the California statute is the model statute for the right of publicity. A majority of states recognize the right of publicity. However, only a minority of states, including California, recognize the right to transfer the right of publicity at death. Rights of publicity can be very valuable and have estate tax implications. Ms. Vidal noted the right to publicity is an intangible property right that must be listed on the federal estate tax return and the valuation of the right to publicity remains at issue.

Mr. Streisand then turned to the planning for the management of intellectual property. He discussed the issues of joint copyright ownership, which are similar to the issues faced with ownership in tenants in common. Joint ownership can potentially cause a copyright to be damaged as each owner has the right to market and make deals to exploit the copyright works. Mr. Streisand indicated that use of a limited liability company or limited partnership helps with dealing with joint ownership issues and also with lifetime and death planning.

Mr. Streisand also talked about some of the tax benefits involving the lifetime transfer of intellectual property to an entity. These include the ability to receive the benefit of fractional discounts and freezing the value of the property for transfer tax purposes. To illustrate some of the transfer tax benefits, Mr. Streisand discuss the Mirowski case. That case involved the establishment of a limited liability company to hold certain patents and other assets. The IRS had contended that the assets of the LLC were included in the decedent's estate under Section 2036 (similar to the Strangi line of cases). The Tax Court held in favor of the estate and concluded that the joint management of the business matters relating to the patents met the bona fide sale exception to Section 2036.

Mr. Streisand concluded the presentation with a discussion of some of the income tax considerations involving intellectual property and emphasized that intellectual property is generally not a capital asset. Intellectual property is often income in respect to decedent (IRD) under Section 691. In that respect intellectual property may have detrimental effects to an estate. Mr. Streisand cautioned that funding a pecuniary bequest with IRD property accelerates the gain/income recognition inherent in the property.
In order to determine whether or not intellectual property is IRD property it is necessary to determine whether the property has been sold. Mr.

Streisand stated that this is not always an easy determination and that this determination is based on whether the copyright owner has given up all of his or her rights in exchange for a royalty stream.

This reporter's take away from the presentation was to get an intellectual property attorney involved when an estate has or may significant intellectual property.

Session II-E

Estate and Income Tax Planning with Mineral Interests (Emerging Assets Series)

Presenters: Michael V. Bourland, David R. Croft
Reporter: D. Scott Robinson

This presentation covered the basics the practitioner needs to understand regarding mineral interests including various types of interests retained by a landowner after entering into a lease, management/maintenance of the mineral interests and the use of tax partnerships and estate planning strategies. This report covers the significant highlights of this session.

This session dealt with emerging asset of mineral interests and more specifically with oil and gas interests. In recent times there has been an ever increasing prevalence of mineral interests involved in estate planning. Recent developments in oil and gas technology are allowing the extraction of oil and gas in areas which were once unavailable. Inevitably, an estate planning practitioner will be dealing with mineral interest while assisting clients undertake estate planning transactions.

The session opened up with Mr. Bourland providing a superb overview of the types of "economic interests" that are found in the mineral interest context. The term "economic interests" as the term relates to mineral interests is not defined in the Internal Revenue Code. Common types of economic interests include lease bonus, royalty interests, working interests and overriding royalty interests. Other types of economic interests include interest arrangements, production payments and net profit arrangements.

After the overview of economic interests, Mr. Bourland then discussed the federal tax consequences related to oil and lease payments ranging from the time of acquisition through protection and for damages. This discussion was done in reference to excellence tables provided in the presentation materials. In essence, acquisition and production payments for economic interests are generally ordinary income to the recipient and are deductible or must be capitalized by the payor. It is important in this context to know the type of economic interest for which the payment relates. As shown in the tables, some interests are allowed a deduction for depletion. Damage payments that relate to business and goodwill are treated as return of capital (tax-free) to the extent of basis for the recipient. Other types of damage payments are generally ordinary income to the recipient. The tax consequences to the payor for damage payments depends on whether such payments relate to the acquisition or lease of the interest. If such payments do relate, the damage payments are capitalized as geological and geophysical costs.

After laying the foundation, Mr. Bourland turned the presentation over to Mr. Croft for the discussion of the use of tax partnerships for the management and maintenance of mineral interests. Tax partnerships (such as LLCs and limited partnerships) often form the basic structure for wealth transfer planning involving mineral interests. Tax partnerships also provide a structure for the maintenance and ownership of the mineral interest. Tax partnerships are governed by either an operating agreement with respect to an LLC or a partnership agreement with respect to limited partnership. The management provisions of operating/partnership agreement are often the key to effective management of the mineral interests. Also, key is the ability to provide restrictions on transfer and ownership in the operating/partnership agreement rather than trying to utilize deeds with such types of restrictions. Utilizing a tax partnership also prevents the fractionalization of the underlying real estate and mineral interests, which will eliminate significant administrative burden and costs.

Next, Mr. Croft discussed the essential provisions of the partnership/operating agreement. Mr. Croft began with a discussion of the capital contribution provisions. Additional capital contributions may be needed because it is often the case in the early years of a mineral lease that there is not enough income in the development phase generated by production to offset the operating expenses and taxes.

Another important aspect of the partnership/operating agreement is the tax distribution provisions. Tax partnerships are pass through entities, which can leave the owners of the partnership with significant tax liabilities without money to pay such liabilities. The purpose of the distribution provisions is to provide cash to the partners to pay their tax bills. Historically, Mr. Croft has used provisions requiring the partnership to distribute 45% of the income annually to offset the tax burden of the partners. However, this amount is changing as tax rates increase.

Management succession and buy-sell restrictions are also vital provisions of the partnership/operating agreement. With respect to the buy-sell provisions, Mr. Croft likes the other partners to have the first right of purchase (a cross purchase arrangement) upon a triggering even with the entity maintaining a redemption right if the cross purchase right is not exercised. Lastly Mr. Croft discussed the importance of assignee versus substituted partner/member provisions (i.e. who gets to have voting rights versus just economic rights if any interest is transferred). Mr. Bourland concluded his discussion of agreement provisions by saying that the entity agreements were not as sexy as the tax planning but were of more importance to the day-to-day ownership and management of the mineral interests.

The income taxation of oil and gas partnerships or "the dark side" as Mr. Crawford stated, was the next topic of the presentation. Income taxation of oil and gas partnerships is incredibly complicated. This complication is due to the collusion of partnership tax with oil and gas taxation.

The first topic taken up in this section dealt with intangible drilling costs and development costs (IDC costs). These types of costs may be written off immediately in the year incurred if a one-time election is made. One key point Mr. Croft made when using a limited liability entity as the tax partnership is that many of the partners will not be considered to be" materially participating" in the business and may have their deductions for IDC costs limited under the passive activity rules.

With respect to the basis of oil and gas properties held by the partnership, Mr. Croft discussed how the depletion rules are applied at the partner level rather than at the partnership level. These rules cause additional complications for basis calculations. Often this complication is dealt with through the special allocation rules available to tax partnerships. There are two types of depletion: cost depletion and percentage depletion. Most operators use the percentage depletion method, which allows for depletion in excess of basis. Depletion impacts the maintenance of capital accounts with the tax partnership.

After the income tax discussion, the presentation turned to the estate planning strategies. Mr. Bourland returned to the helm for this section of the presentation and discussed some of the tools utilized for estate planning with mineral interests. As it turns out the tools utilized for mineral interests are very much the same as the tools utilized in dealing with most other types of assets. Mr. Bourland emphasized his favorite tool, which is the intentionally defective grantor trust (IDGT) and mentioned that the IDGT is on the Obama administration's hit list.

An IDGT is irrevocable trust in which the settlor (and sometimes a beneficiary) is treated as the owner of the trust assets inside the trust for income tax purposes. However, for transfer tax (gift, estate and GST) purposes assets inside the trust are outside of the settlor's estate. Because the settlor is treated as the owner of the assets of the trust, the settlor reports the tax consequences associated with the trust assets on his or her return and is responsible for the for any tax liability. The benefit of the IDGT structure is that the payment of the tax liability by the settlor is economically substantially equal to the settlor making a tax-free gift to the trust in the amount of the tax liability.

Mr. Bourland discussed two types of grantor trusts, which he referred to as the settlor IDGT and the beneficiary IDGT. In this respect Mr. Bourland discussed the number of provisions that would cause the trust to be a grantor trust with respect to the settlor under Sections 671-677. Mr.
Bourland indicated that his preferred provision is the right to substitute assets under Section 675. When creating a beneficiary IDGT, the drafting attorney must thread the needle of ensuring that the beneficiary has the only power that would cause the beneficiary to be the grantor under Section 678. If both the settlor and the beneficiary could be treated as the grantors for income tax purpose, the settlor will trump the beneficiary as the grantor according to Mr. Bourland. In regard to tax payment for a grantor trust, Mr. Bourland stated that it is possible to give the trustee of IDGT, as long as the trustee is not a related or subordinate to the grantor under Section 672, the discretion to pay the tax liability to the IRS for the grantor. This seems like a better approach than the ability of the trustee to reimburse the grantor for tax payments.

Next, Mr. Bourland turned to an informative discussion of charitable giving with mineral interests. In this context, Mr. Bourland brought to light that there is a definite issue with gifting mineral interests under the partial interest rules. Under the partial interest rules, a charitable deduction is usually not allowed if the donor transfers an interest in the property while retaining an interest in that same property. Mr. Croft then brought up the point that there are issues surrounding Section 501(c)(7) (often hunting clubs) related to the income generated from mineral interests and maintaining the organizations tax exempt status.

Mr. Bourland then discussed the use of defined value gifts and the usefulness of this type a gift when trying to transfer a specified value that is uncertain at the time the gift is made. Mr. Bourland stated that in order to decrease gift tax exposure that the excess amount, if any, can go to a charity or a grantor retained annuity trust. The key to this strategy is having an independent third-party appraisal. Mr. Bourland also discussed defined value clauses that in the sales context and stated that the same considerations applied.

For transferring larger amounts, Mr. Bourland discussed the use of a sales transaction and the requirements for the sales technique to be effective and not treated as a retained interest under Section 2036. In this context, Mr. Bourland mentioned the use of a promissory note, self-canceling installment note and a private annuity.
Mr. Bourland also discussed the tax issues with the sales and valuation issues. Valuation of mineral interests is complex and requires the use of qualified petroleum engineer. Once the mineral interests are valued a qualified independent business appraiser must be used for value the tax partnership interest be transfer.

The presentation concluded with two illustrative case studies. Both case studies were thoroughly described in the materials. The first case study involved a married couple establishing a limited partnership with an LLC as general partner along with of two settlor IDGTs for the couple's two children. The second case study involved the establishment of a beneficiary IDGT and GRAT. Both case studies demonstrated the powerful wealth shifting and asset protection that can be achieved using IDGTs. No wonder they are Mr. Bourland's favorites.

Session II-F

The Taxation of "Exotic" Investment Products Sold to Individuals (Financial Assets Series)

Paul S. Lee

Investing has gone beyond simply stocks, bonds, and mutual funds. High net-worth individuals are being offered a dizzying array of "alternative" asset classes and investments (commodities, foreign currency, gold, structured notes, exchange-traded notes, foreign debt, leveraged ETFs, etc.). These investments commonly utilize complex financial instruments and structures, the taxation of which often catches the taxpayer and tax professionals unaware. This presentation discussed the taxation of these "exotic" investments from the investor's standpoint.

The report on this Session is in process and will be published in a later Report.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 10

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

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In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers all but one of the Thursday morning main sessions, those being GST, Fiduciary Drafting Issues and Spousal Transfers. The one on Ethical Challenges Posed by Transfers among Family Members will be covered in a later Report. The next Report will begin our coverage of the Thursday afternoon Special Sessions III and IV.

Thursday, January 17, 2013
9:00 – 9:50 AM

Tricks and Traps in Planning and Reporting Generation-Skipping Transfers

Presenter: Diana S.C. Zeydel
Reporter:Kristin Dittus

Reunification of the transfer tax shelters provided a significant opportunity to shield family wealth from the “death tax”. Effective allocation of GSTT exemption is a key tool in maximizing the tax free transfer of wealth. This program reviewed some of the best strategies to plan and report the use of GSTT exemption. Here are the significant highlights.

Ms. Zeydel began with some basics for everyone to keep in mind:

1. Always affirmatively elect either in or out of your GST exemption on the IRS 709 Gift Tax Return rather than relying on the deemed allocation rules.
2. Always use a formula when allocating the GST exemption
3. State in the trust the intention that the trust be GST exempt or not GST exempt.

4. Always mail to the right address

A. Governing Law. Under IRC §2632 there are five methods by which a transferor's Generation Skipping Transfer ("GST") tax exemption may be allocated. The first method is by an affirmative allocation by the transferor, or the transferor's executor, at any time on or before the date prescribed for filing the transferor's estate tax return (determined with regard to extensions) and whether or not a return is required.

B. A late allocation is better than no allocation. If there has been no allocation of GST during someone's life, and a beneficiary's death will cause a taxable termination, there is still time to allocate GST exemption if the return is filed on the same day as the GST event. Ms. Zeydel encourages practitioners not to worry – if you are really quick – there is still hope to save a GST allocation.

C. First of the month rule. You can use the 1st day of the month to obtain the valuation of the asset, but allocation will not occur until the day the return is filed.

D. Affirmative allocation is irrevocable. However, if you file your allocation before the required filing deadline, you can revoke that allocation if you do so before the required filing date.

E. Deemed allocation of GST exemption to a lifetime direct skip. The second method by which GST exemption may be allocated is by a deemed allocation to a direct skip transfer made during the transferor's lifetime, such as an outright gift or by a gift to a trust to grandchildren or lower generations. The purpose of this deemed allocation rule is to avoid inadvertent GST tax when it is anticipated that the taxpayer would have wished to allocate GST exemption. This deemed allocation gets priority over all other allocations on your return. So if you do not want this deemed allocation to take priority, you MUST elect out. To check the box on the IRS 709 Gift Tax return is not sufficient to avoid such a deemed allocation.

There are some murky waters in the current regulations in the event a return preparer makes an error in calculating the amount of GST to elect out of. Given the example that a taxpayer is electing out of the automatically allocated GST for a gift of $3,000, but the actual value of the gift is $3,500, it is unclear if the excess would be lumped in with the elected out of GST, or be considered GST exempt under the automatic rules. This computational error is another reason to always use a formula rather than a number (except as provided below).

F. When a Deemed Allocation is Not Desirable. Under the auto allocation rules, if there is a transfer that has a zero inclusion ratio, such transfer will not create a deemed allocation. This can be problematic if you want to allocate GST to a trust that benefits a spouse, such as an Irrevocable Life Insurance Trust ("ILIT"), a Spousal Lifetime Access Trust ("SLAT"), or a Crummey Trust.

Certain accounts may also be treated as a trust, such as a custodian account or an annuity. Keep in mind if the transferor is also the custodian of an account for a minor child, this causes IRC §2036 inclusion in the estate of the transferor because she has control over both the timing and the distribution, and it also falls under the Estate Tax Inclusion Period ("ETIP") rules.

G. Exceptions. Of course, like any other good tax topic – there are several complicated exceptions to the already very complicated allocation rules. Ms. Zeydel did not discuss all six exceptions, but they are in the materials on page 13.

H. Additional Affirmation for Affirmative GST Election. One of the tricky factors about auto allocation is that there may be a difference in a client's situation from year to year and such change would cause an auto allocation in year one, but not a deemed election in year two, and this could cause big headaches for the administration of the trust. Generally, with GST we want to either allocate GST or elect out of the GST allocation from the beginning and keep that consistent each subsequent year. Again, Ms. Zeydel emphasized the importance of making an affirmative election rather than relying on the auto allocation rules. The 709 Return provides the taxpayer with the opportunity to elect that any future contributions to the same trust for which the 709 is being filed will thereafter be consider treated the same as the initial election. While this is very helpful and, as we all know, the IRS rarely misconstrues tax information, Ms. Zeydel recommends a written reminder of any previous election on all future returns filed with something along the lines of, "I have previously elected that all contributions to this Trust are exempt from GST and therefore this trust has a zero inclusion ratio."

I. Return Preparation. When preparing returns, less is more. Return preparers who want to cite the regulations on the return run the risk of possibly having a typo that could be problematic in a later dispute with the IRS regarding the return. In preparing the return, Ms. Zeydel advises to "check the box" to elect out of the deemed allocation and put all other information on the schedules. Upon death, the deemed allocation rules do not apply, and a Schedule R must be completed in order to properly allocate GST exemptions.

I. A Note on QPRTs. Regarding a Qualified Personal Residence Trust (QTIP), if the Grantor dies before the end of the trust term the assets will get pulled back into the Grantor's estate. The GST exemption allocation is not required to be filed until the end of the ETIP period, which is at the same time the QPRT term is completed. However, the Grantor's death is an intervening factor that brings an early end to the ETIP, so it is safer to allocate that GST exemption on the initial contribution of assets to the trust.

J. Gift Splitting. Section 2513 permits the first return filed by either spouse to elect split gift treatment. If this is a late filing for the gift splitting of GST allocation it is effective retroactively and very friendly to the filer, even to the extent of allowing the filer to elect gift splitting with a deceased so long as the IRS has not issued a notice of deficiency. If spouses elect to gift split and wish to elect out of a deemed allocation, each spouse must file his or her own timely Form 709 making the appropriate elections. An election out of deemed allocation by the spouse making the transfer will not effectuate an election out of deemed allocation by the consenting spouse.

K. Retroactive Allocation. Section 2632(d) authorizes retroactive allocation of GST exemption in the case of an unnatural sequence of deaths in the transferor's family. If a non-skip person dies, there is a chance to apply GST exemption retroactively to the entire trust. If more than one transfer has been made to the trust, the allocation must be made in chronological order from the first gift year.

January 17, 2013
9:50 – 10:40 AM

Tales from the Dark Side – Drafting Issues from the Fiduciary Perspective

Presenter: Benjamin H. Pruett
Reporter: Joanne Hindel

This session addressed drafting beyond obtaining a desired tax result and how to ensure that the settlor's non-tax goals are reached decades and generations after the trust agreement is executed with a focus on maintaining flexibility for an uncertain future. Some of the more significant highlights are as follows.

Ben started off by saying that his focus changed when he left private practice and went to a trust company.

Most of his suggestions are based upon the fact that a trust is expected to last a long time and issues that arise should be resolved outside of a court proceeding.

Even when in a UTC state do not rely upon statutes in the governing state law but rather draft them into the governing document.

He discussed opportunities to make changes and adjustments to documents to deal with changing circumstances. In the case of wills and revocable trusts, changes can be made at any time as long as the testator or settlor is still living and possesses full capacity.

If codicils or amendments are to be used, they should be limited to changes that are relatively minor and uncontroversial. He referred to his appendix that highlights changes to a will by a codicil that showed that the changes were as long as the original will. The second codicil further changed the first codicil and the changes dealt primarily with who would get what from the testator. Honeycutt and Dyess are cases addressing issues that would not have arisen had the testators in each case simply executed new wills.

Ben then discussed avoiding challenges to provisions in trusts and wills.

He quoted an old English provision in a document that would be considered an "in terrorem" clause today:

"He that bereaves my will, which by God's permission I have now made, let him be bereaved of these earthly joys; and may the Almighty Lord – cut him off from all holy men's communion in Doomsday; and be he delivered to Satan, the Devil and all his cursed companions to hell's bottom, and there be tortured, with those whom God has cast off or forsaken, without intermission, and never trouble my heirs."

No contest provisions can be helpful in those states that honor such provisions to prevent disgruntled relatives from litigating in an effort to sidestep the testator's or settlor's wishes.

These provisions serve as a disincentive to challenge the validity of the document because an unsuccessful challenge will result in the challenger receiving nothing at all, rather than the benefit originally provided. Provisions should not be drafted to challenge any action for clarification or instruction or for any action alleging a breach of trust.

To make clear the intent of the settlor, it is always helpful to include a statement expressly setting forth whether the settlor intends that a trust be treated as a grantor trust or not.

An example of a grantor trust might be the corpus substitution power. Ben discussed some IRS rulings dealing with substitution of corpus and whether that power would cause a trust to be included in the settlor's estate.

If a settlor retains a power of corpus substitution, the trustee has a duty to make sure that any substituted property was of equivalent value. With respect to directed trusts, the person holding the power over substitution will hold the duty to ensure that the property is of equivalent value. The substitution power should specify whether the power is held in a fiduciary or non-fiduciary capacity and whether the power is exercisable without the consent of someone in a fiduciary capacity.

Another popular grantor trust trigger is for some person to have the power to add beneficiaries to the trust. Generally this applies to the addition of charitable beneficiaries. This power should never be given to a trustee and should only be given to someone who is not a fiduciary.

The power to terminate grantor trust status should not be held by the trustee or at least not exclusively by the trustee.

Ben discussed changes in the law pertaining to the GST tax. He concluded that general power of appointment provisions should be for non-exempt property and should be contingent on estate inclusion resulting in a lower aggregate tax and make the general power applicable only to that portion of the property that will result in a benefit.

Ben then turned to provisions that provide as much flexibility in a trust as possible. Some provisions to consider are virtual representation provisions in the document itself even if representation is provided for under state law. He reviewed a sample provision of virtual representation that had enhancements over the UTC version. Another might be a provision addressing the use of non-judicial settlement agreements. A provision might also define a charitable trust or simply state that the intention is not to create a charitable trust. Another useful provision is to clearly provide the trustee with the ability to decant to another trust but be careful about adverse tax consequences. Ben briefly discussed the Delaware tax trap as an adverse tax consequence of decanting.

Trustees might be given powers to enhance flexibility and benefits such as the power to hold property for a beneficiary's use, the power to change the principal place of administration and governing law, and the power to lend to beneficiaries.

Provisions that express settlor intent might include a statement of the intent to reduce taxes and protect assets from creditors, settlor intent to have a trust qualify for the marital deduction as well as the intent to exclude assets from the settlor's estate, and exclude assets from the beneficiary's estate.

The settlor may also want to include provisions that guide the trustee by establishing priority among multiple beneficiaries, guidance on the exercise of distribution discretion, definitions for health, education, maintenance and support, and whether or not the trustee should consider beneficiary resources.

Ben also mentioned a provision that would allow the trustee to apportion expenses between income and principal that is different than what is allowed under the Uniform Principal and Income Act.

Other important provisions might include the ability to remove a trustee, whether corporate or individual, and acquiring desirable trustees through the use of provisions addressing the qualifications of a successor trustee.

Trust provisions might also address more clearly the trustee's duty to inform beneficiaries and might negate the general duty to diversify trust assets.

Ben concluded with a reference to his in-depth session that was going to be held later today in Special Session IV-B.

January 17, 2013
10:55 – 11:45 AM

Spousal Transfers - During Life, at Death and Beyond (Focus Series)

Presenter: Barbara A. Sloan

This presentation focused on the interplay between the marital deduction and the applicable exclusion amount (or its state equivalent) in family wealth transfer planning. It included inter vivos techniques, formula planning in testamentary documents, and fine tuning the estate plan on a post-mortem basis, including how the use of portability may expand and change traditional methods. The materials consisted of a 63 page outline.
This Report covers the significant highlights of this presentation.

Barbara Sloan began by reviewing the various roles a spouse may serve in family wealth planning. It may be as the donor, a beneficiary, the fiduciary or through gift-splitting. Ms Sloan reviewed the many powers that could not be retained by the donor-spouse but which can be granted to the donee-spouse without estate tax inclusion. She also discussed the flexibility afforded when the spouse is included as a beneficiary.

Ms. Sloan reviewed several strategies that may permit the donor of a gift in trust to have varying degrees of access to the trust assets without causing estate tax inclusion. This may be comforting to those individuals having donor's remorse. This could include borrowing from the trust, renting or leasing assets back, or shutting off the grantor trust status. Ms. Sloan also stated that if the donee-spouse is permitted to occupy a residence of the trust, then the donee-spouse could allow the donor-spouse to also occupy the residence with him or her without causing estate tax inclusion relying on the Gutchess case. She also stressed the importance of reviewing the insurance policies if a residence is transferred to a trust and may need renter's policies as well as general coverage which may be more expensive or difficult to acquire.

Ms. Sloan spent the majority of the program addressing portability. Ms. Sloan noted that portability may just be the biggest change to occur in estate planning since the advent of the unlimited marital deduction. Portability allows any unused applicable exclusion amount after the first spouse's death to be transferred to the surviving spouse without the need for a credit shelter trust to preserve the first spouse's applicable exclusion amount. The deceased spouse's unused applicable exclusion amount is referred to as the "DSUE." The DSUE occurs in one of two ways: (1) decedent's estate was smaller than applicable exclusion amount; or (2) estate assets were protected by the marital or charitable deduction.

The concept of portability is simple on its face, but becomes more complex as rules to implement it are developed. Congress provided that the details of how portability would work would be developed by the Treasury in legislative regulations. The Treasury and the IRS provided preliminary guidance on October 17, 2011 and temporary regulations on June 15, 2012. The election is made by the executor on a timely-filed estate tax return. The last timely-filed estate tax return is determinative of whether the election is made and that decision is irrevocable thereafter. No protective election can be made and no relief is provided to make a late election. If there is no executor, the election may be made by any person in actual or constructive possession of the decedent's property.

The portability election is made by filing a complete and properly prepared estate tax return. However, the preparer is not required to list marital and charitable deduction property and only required to provide description of the property, the beneficiary and information sufficient to establish entitled to the marital deduction. The executor may estimate the total fair market value of the gross estate within $250,000. To opt out of portability the executor must state affirmatively on timely filed estate tax return or, if no return is required, may opt out by simply not filing an estate tax return. The new Form 706 has a box to check.

Ms. Sloan noted that no portability election is available for nonresident decedents who are not US citizens. In addition, a nonresident surviving spouse who is not a US citizen may not take into account any DSUE amount of a deceased spouse, except as may be allowed under an applicable treaty with the US. There also are special rules for Qualified Domestic Trusts.

One of the big questions was when could the DSUE be used by the surviving spouse. The temporary regulations clarify that the DSUE can be used by the surviving spouse immediately after the decedent's death. The regulations also clarify that the DSUE is used first and before the surviving spouse's own applicable exclusion amount.

The last deceased spouse means the most recently deceased individual who, at that individual's death after December 31, 2010, was married to the surviving spouse. The identity of the last deceased spouse is not changed by the surviving spouse's remarriage or subsequent divorce from the new spouse. However, the remarriage and then death of the new spouse would change the identity of the last deceased spouse. There also are ordering rules in the case of multiple deceased spouses. If the identity of last deceased spouse changes, then any remaining

DSUE from old spouse disappears but no penalty for prior gifts utilizing DSUE. The spouse would then receive the DSUE of the last deceased spouse, if any. This may encourage the use of the DSUE before remarriage.

If you elect portability, then the Service may review the last deceased spouse's tax returns even if the period of limitations for assessment has expired. The Service may adjust or eliminate the DSUE, but may not assess additional tax.

Ms. Sloan reviewed the advantages and disadvantages of portability. The advantages include simplification, less need for retitling of assets, no loss of basis adjustment under Section 1014, easier planning for large retirement plans and opportunities to avoid state estate tax in decoupled states through lifetime gifts. The disadvantages include no sheltering of future appreciation, no creditor protection, may be problematic in complex family structures and no portability of GST exemption.

Ms. Sloan finished her presentation by reviewing several factors to consider with portability. Whether to utilize portability depends upon size of clients' estate, clients' age, surviving spouse's consumption needs, surviving spouse's financial skills and judgment, non-tax objectives, and whether in decoupled state. Ms. Sloan referred to portability as our new silent partner in estate planning. She concluded with mentioning that when she last spoke in 2004, she was preaching the need for flexibility, flexibility and flexibility. She longed for permanent laws. Now we have permanent laws and she is still preaching flexibility, flexibility and flexibility.

January 12, 2013
11:45 AM – 12:35 PM

Don't End Up as Road Kill: Surviving the Ethical Challenges Posed by Transfers Among Family Members (Focus Series)

Charles D. "Skip" Fox, IV

This session reviewed the ethical challenges facing estate planning professionals in representing family members in transfers among family members. Attention was paid to potential and real conflicts of interest, joint or separate representation, the use or misuse of waivers, challenges in acting as a fiduciary, and family members with diminished capacity.

The report on this Session is in process and will be published in a later Report.

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Heckerling 2013 - Report No. 11

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Editor Comments: This Report covers some of the Thursday afternoon Special Sessions III, those being SS III-C on Recent Developments for Fiduciaries, SS III-D on Ethics for T&E Lawyers, and SS III-E on Digital Death. The other Special Session III presentations on Spousal Transfers (SS III-A), FLPs (SS III-B), and When Charities Say No (SS III-F) will be covered in later Reports. The next Report will cover some of the Thursday afternoon Special Session IV sessions.

Thursday, January 17, 2013
2:00 - 3:30 PM

Special Sessions III

Session III-C

Recent Developments for Fiduciaries 2013

Presenters: Turney P. Berry, Dana G. Fitzsimons, Jr.
Reporter: Joanne Hindel

With a focus on how fiduciaries and their advisors may best understand and manage fiduciary risk and related ethical challenges, in an increasingly litigious and confrontational environment, the panel reviewed recent cases and statutory enactments from across the country and discussed trends and developments in several areas including: investments, concentrations, and special assets; distributions; surcharge exposure; disclosure to beneficiaries and evidentiary and ethical privileges; the fiduciary as client and conflicts of interest; modification of trusts; settlement, defenses, and limitations on actions against fiduciaries; jurisdiction; trust advisors; incapacity; and third party liability. This Report covers most of the significant highlights from this presentation.

Turney and Dana discussed selected cases detailed in their materials in order to focus on particular areas pertaining to fiduciary administration and the representation of fiduciaries. They focused on cases with the broadest implications.

The biggest trend in the last year with about 2 dozen cases (not included in the outline) are where estates have sued for funds taken out of the hands of elderly people. Turney wanted to point out that elder law is becoming a bigger issue in overall estate planning matters.

Turney also mentioned the Fiduciary Management of Digital Assets in the Uniform laws area – some states have already passed certain statutes and the Uniform Law Commission is working on a uniform act to address this issue. See Special Session III-E included in this Report

The presenters discussed recent developments in the following areas:

Investments

A good fiduciary process is important – when it breaks down cases go against the fiduciary. Unusual assets and concentrations tend to be the primary area of litigation.

Dana reviewed the Buford case in which the trust had a clause that recommended but did not direct retention of Exxon stock. The corporate trustee used a VPF (variable prepaid forward) and pledged 100% of the Exxon stock for the VPF. The Court held that the corporate trustee had violated its fiduciary duty and had violated the retention clause – the Court was concerned about the complexity of the financial arrangement and the fees incurred in handling the arrangement. The corporate trustee will appeal the decision and challenge whether the retention clause was mandatory or permissive.

Dana then discussed the Knox case in which the surrogate's court surcharged the trustee over $21 million for not diversifying investments and taking investment directions from a non-fiduciary family member. The appellate court largely reversed the surcharge on appeal because of language in the trust document allowing the trustee to rely upon "counsel" (not limited to attorneys).

Dana also discussed the Carter case in which the court affirmed dismissal of a surcharge claim against the surviving spouse for investing marital trust assets as trustee in municipal bonds to increase her own income from the trust.

Finally Dana covered the Hunter case in which the court surcharged the trustee for losses in value of 100% concentration of Kodak stock. The case was affirmed on appeal in 2012.

Turney discussed the lessons from these cases and the difficulty in a corporate trustee relying upon language in a trust agreement such as in Buford. He also discussed the difficulty for attorneys in giving advice on financial products and the need for trust officers to be able to understand and review complex financial products contemplated for trusts.

Distributions

Turney discussed Candler decision in which the corporate trustee was surcharged for excessive and arbitrary discretionary distributions to a surviving spouse from a marital trust. The court was particularly concerned about the lack of process.

In the Reinhardt case (Georgia court of appeals) the court dealt with a marital trust in which the son was the trustee and made a sizeable charitable distribution. The court required the charity to place the funds in a constructive trust for the benefit of the other remainder beneficiaries of the marital trust.

Turney also discussed a few other cases not in the outline that addressed distribution standards set forth in trust documents, and discretionary language allowing a trustee to allocate receipts and disbursements between income and principal.

Account Closing

Dana then covered account closing cases that deal with actions of the trustee from the date of terminating event until the date of distribution.

In Hastings the court found that a corporate trustee could request that the trust beneficiaries execute a broad release and indemnification agreement before receiving trust distributions. The court decision was divided
however: while a corporate trustee could ask for a release, the scope of the release was broader than what could be obtained in court. The indemnification provision was comparable to a common law lien against trust assets that a trustee would have upon distribution.

Defenses and Limitations

Turney discussed the Martin case in which an exculpatory clause in trust could not bar a claim for breach of duty to act in good faith.

Settlements

Dana then discussed the Pappas case in which the court refused to approve an estate settlement agreement without proof of the value of the stock surrendered by the estate in the transaction.

This case highlights the fact that private agreements between parties might still be challenged by a court.

He also discussed the Oliveira case in which a jury verdict against the estate attorneys was reduced to zero through a court-approved settlement with the other parties.

Jurisdiction and Standing

Turney discussed Giraldin (California Supreme Court case) dealing with a revocable trust. The son served as the trustee when the settlor was older – the son invested most of the trust assets in a business in which he had an interest. The other beneficiaries (siblings of trustee) sued for the decrease in value of the trust but the son claimed that since he served as trustee while the settlor was alive his duties were to the settlor only.
The court agreed that the trustee duties were only to the settlor while alive but that did not prevent the remainder beneficiaries from suing once the settlor was deceased.

Turney used the case to discuss the need to have provisions in the document that allow someone to stand in the shoes of an incapacitated settlor.

Capacity

Dana discussed the Schaaf case in which the court held that incapacity for guardianship purposes did not deprive the settlor of capacity to execute the trust. He compared this case to Jervis in which the court held that a post-guardianship trust amendment was invalid where the capacity to amend the trust had not been restored in the manner set forth in the trust terms.

Turney discussed the Holmes case decided in November 2012 in Mississippi in which the garage attendants ended up as witnesses to the signing of a will and the court was planning to throw out the will because the witnesses did not know the testator and could not determine if the testator had capacity.
Turney's point was that while we have greater flexibility in the execution of wills, courts may still be very formal in requiring that details be adhered to.

Funding

Turney discussed the Rose case in which an after-acquired property clause in trust was not sufficient to transfer assets to a trust.

Modification

Dana discussed the Bellamy case in which the court would not agree to reform a trust to eliminate the corporate co-trustee and found that to be directly contrary to the settlor's intent and trust terms.

He also discussed the Ruby Owen case in which the court refused to modify a trust to create a special needs trust.

Termination

Dana covered the Pike trust in which the court referred to the UTC provision that reverses the common law presumption that a trust cannot be terminated over a spendthrift trust.

Dana discussed the Church of the Little Flower case in which the trustee fees exceeded the amount being paid to the charity. The charity asked the trustee to terminate the trust and when the trustee refused, the charity sued for termination on the basis that the fees to the trustee were contrary to the intent of the settlor. The lower court approved but the appeals court reversed.

Issue

Turney discussed the Dwight case in which the term "lawful issue" in a 1971 trust was defined by the court as children born in the marriage not out of wedlock.

Turney then turned to the case of Bird Anderson in which the trust term regarding descendants did not include adopted children and when the state law changed to included adopted children as descendants the court did not allow the division of the trust to change because of a subsequent change in state law.

Turney also discussed the Kincaid case in which the trust provided that adopted children were the natural descendants of the adopting parents and were therefore excluded as beneficiaries under the trust terms. By contrast, in the Boehm case the court applied the probate code to construe a will to include a child given up for adoption as a beneficiary.

Turney then discussed the Schafer case in which the court held that a child born by reproductive technology more than 10 months after the father's death was not entitled to Social Security survivor benefits.

Session III-D

Hooked on (by?) Ethics – The T & E Lawyer's Impossible Dilemma

Presenters: Susan T. House, Randy Johnston, Stanley H. Wakshlag Reporter:Craig Dreyer

What are the legal, demographic and market-driven factors leading to the explosion of malpractice litigation against T & E lawyers and their clients? What role do the ethical rules play? Can we mitigate the potential damage beforehand? This Report covers the significant highlights of this most informative session.

The panel consisted of three lawyers. Susan House is a trust and estate lawyer who has an interest in ethics from California, Stanley Wakshlag is a lawyer form Miami who represents professionals in ethics and malpractice matters, and Randy Johnston is a lawyer from Texas that sues other lawyers in malpractice actions. The panel opened by stating that its main goal was to discuss how to prevent malpractice and ethics complaints, and what to do if you are ever in such a situation.

Ms. house noted that the scope of the ABA model rules on ethics are not to be used as a basis for malpractice suits, but in practice they are often used to help prove malpractice cases as the model rules provide that such rules may be used for evidentiary purposes.

The panel then moved on to common issues seen in malpractice cases. One of the most common is when a lawyer fails to admit to errors. The panelist even noted a recent IL case where a lawyer admitted to fault and his malpractice carrier refused to cover him under his malpractice insurance policy that required the lawyer not to admit fault. After much litigation, the Illinois Supreme Court found that the malpractice carrier's provision was unenforceable, since lawyers have an ethical duty to disclose errors to clients.

Mr. Johnston noted that every case is simple. They are about attorneys, a breach, and usually it's about a cover up. He noted that if lawyers can prevent the cover up argument, the plaintiff losses a significant arrow in his quiver. Cover ups of mistakes also cause attorneys to lose close calls with juries. Mr. Wakshlag noted it is incumbent to deal with errors in a forthcoming way, since you only make matters worse by burying them and this also jeopardizes your law license. It also further prejudices you in front of a jury. If a lawyer makes a judgment mistake that is defensible, but once you don't disclose your error it is changed from an innocent mistake or negligence act to an intentional tort. Also intentional torts are usually not covered by insurance coverage. Also if you are put on notice there is a claim, and you do not disclose it to your carrier, this may jeopardize your coverage under an insurance policy. Mr. Johnston notes that not disclosing a mistake is a textbook breach of fiduciary duty.

The panel then discussed why is there has been an explosion in lawsuits against trust and estate lawyers? Mr. Wakshlag noted that the direct privity rule has been eviscerated and most states allow prospective beneficiaries to sue today who have no relation with the lawyer. The panel also noted that the easiest estate to administer in the world is only one divorce and remarriage away from a disaster. He noted that complex families are much more litigious. Also, we have seen the greatest shifting of wealth our country has ever seen. Often malpractice claims follow dissatisfaction. Today many beneficiaries are unhappy because they always believe they will get much more than they are usually getting.

The loss of the long term relationship is also dissipating with older clients, because they are living longer and are more often affected by diminished capacity. Lawyers often bear brunt of this diminished capacity. Often older parents try to make all children happy, instead of being honest they often create unrealistic expectations. This is the perfect storm for trust and estate litigation.

There are also examples of how modern medical technology can lead to bizarre results that lead to litigation such as how children can be born outside of our traditional concept of conception. The other problem in probate is that the most important witness is usually deceased. Mr. Johnston also advised against using generic letters as defenses. Try to customize them. In addition, ensure these letters and memos are not destroyed with client files under your firm's file retention policy. Double check for engagement letters, but also be sure you have termination letters as well. It is also important to document when you refuse to take a case. The panel referred to them as the birth, death, and still born letters. Still born letters are for those clients you never actually engage, but speak with about representation.

Next Ms. House moved the panel on to the discussion of the model rules discussing the duty of care to clients, duty of diligence, duty to communicate with clients, confidentiality with clients, and dealing with the diminished capacity of clients. Most states have adopted the model rules other than California, so attorneys need to know them. The ACTEC commentary on the ABA model rules as they relate to estate and trust practices can be found at http://www.actec.org>www.actec.org.

Next the panel moved on to real life examples of litigation matters. Mr. Johnston looks for plaintiff exhibit #1. He often uses a letter or pleading from the attorney being sued, so be careful what you file and send out. He also notes that bills should be reviewed carefully and document the work well, and should be defense exhibit 1 not plaintiffs exhibit 1.

Mr. Wakshlag also noted that arbitration or jury trial waiver can be provided for in your fee agreement. Arbitration is usually favored, but many states also allow you to insert jury trial waivers. Mr. Johnston noted that an arbitration clause may revoke your malpractice carrier coverage, so read your policy or before changing your engagement letter.

Also ensure you do not jeopardize insurance coverage. The panel noted that when changing carriers be careful since you may expose yourself to coverage defenses. Policies for lawsuits are the policy in effect when the claim is made and when the negligence act occurred. Tail coverage, is to cover claims made from the time you first got your law license to the time you got your policy. If you are changing firms, retiring, or changing policies you should carefully review your malpractice coverage. Prior acts coverage is generally limited to a certain number of years. You may want to buy your own tail coverage in some scenarios.

The panel closed with three major ideas to avoid malpractice actions: 1) don't take a case or client that troubles you, 2) don't take every client that calls, only take what you can do comfortably, and 3) don't over commit to a specialty you are not familiar with.

Session III-E

Digital Death: What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud (Emerging Assets Series)

Presenters: James D. Lamm, Christina L. Kunz, Damien A. Riehl
Reporter: Sarah Butters

This panel explained how to find, value, and transfer a person's valuable or significant electronic data and other rights and interests in "digital property." Learn the essential steps needed to plan ahead for online accounts, passwords, and encryption, and learn practical estate administration strategies for when a client hasn't planned ahead. Here are some of the more significant issues that this digital age has brought upon all of us, including our clients.

There are many obstacles in dealing with digital property: conflicts of law, contract disputes regarding terms of service, criminal laws and intellectual property laws. Planning ahead to address these issues can reduce estate administration costs, ensure that the fiduciary has full access to information, ensure that the property isn't lost or undiscovered, and ensure that the estate is administered smoothly.

What is Digital Property?

The presentation began with a discussion about various types of digital property. Digital property includes things like smart phones, tablets, and computers. It also includes online email accounts, social networking accounts, shopping/vendor accounts, and photo/video sharing accounts. There can also be a lot of value in online video games and virtual worlds, as well as domain names.

Most digital property has little value, but when it does have value, a fiduciary has the same obligations as any other estate assets. Fiduciary duties include collecting and preserving these types of properties.

Digital property is valued in the same way as any other asset on the 706 (willing buyer/seller test). But how do you know what's valuable and what's not? Much like intangible assets like bank accounts and investment accounts, follow the money trail by looking for things like:

· People pay for eBooks, music and games, so that is a good way to know it has value;

· Registration of domain names are invoiced annually and there is a market for the sale of domain names;

· Websites and blogs have value as a result of their advertisers and the people who maintain them and their content. Look for correspondence from Google or other ad placement companies; and

· Video games - there is value in these items (particularly characters in games or virtual "real estate"), but check to see if a transfer of this property is even permissible. And even then, there may be an illicit market for these items and the IRS has previously recognized the value of assets even when the only market is an illicit market (some examples include stolen art and illicit drugs).

The 4 main obstacles to accessing property after death or incapacity are: Passwords, encryption, criminal laws (like the Computer Fraud and Abuse Act and various state laws), and privacy laws (like the Stored Communications Act).

Planning for Incapacity or Death

The best way to avoid these obstacles is to plan ahead for incapacity or death by doing a digit audit that lists accounts, passwords and digital property. The presenter's blog has a template intake form at:

http://www.digitalpassing.com/wordpress/wp-content/uploads/2012/08/DigitalAudit.pdf

Once you have that digital audit, where do you keep the list? There are software programs that will encrypt your list, but to access the list, you need the password. Some online services are available where you can designate a fiduciary who has permission to access this information under certain circumstances. In addition, clients should consider:

A. Giving a fiduciary the specific powers necessary to access this information; and

B. Attaching an authorization and consent for that is specific to digital property.

The presenters' materials have samples of these two documents attached.

A note of caution regarding websites that offer posthumous control of digital assets - while they purport to allow you to appoint a "digital executor," they may not be complying with state law or TOS requirements for the same. So while many online sites offer this service, it remains to be seen how effective they will be in the long run.

Overview of Contracts Terms of Service (TOS) for Websites:

All 50 states have criminalized statutes for unauthorized access. Those laws include access to cable, phone, computers, websites and other accounts. Under nearly all TOS, a fiduciary is not an "authorized user". For example, Facebook and Hotmail prohibit anyone other than the account user from accessing it. In other words, there is no way under the TOS that a user could ever designate someone else to access their account. In such situations, the best way to deal with this type of digital property is to make sure you back-up that account data regularly, so that you can access it on a local computer, rather than through an unauthorized log in.

Otherwise, a user could be subject to criminal statues that include penalties up to 10 years and/or fines for unauthorized use. You can also have your property seized under certain forfeiture provisions of the Computer Fraud and Abuse Act.

Similarly, the Stored Communications Act (SCA) poses obstacles as well. For example, the SCA is part of the 1986 Electronic Communications Act, so some of its definitions don't contemplate today's rapidly expanding computer use. But under SCA, certain service providers may (but aren't required to) disclose information to a third party under certain circumstances.

There was a recent case involving Facebook (the Estate of Sahar Daftary out of the N.D. Cal., Sept. 20, 2012) that addresses the issues faced by service providers who are asked (or are subpoenaed) to disclose information of a deceased user. The presenters' materials provide an in depth discussion of this case beginning at page 14, which resulted in a favorable ruling for Facebook. In summary, the Court concluded that Facebook could not be compelled to turn over any information, but in dicta suggested that nothing prevented Facebook from deciding on its own terms who could have access to a deceased person's materials. This is a wonderful ruling for many service providers who have likewise chosen Santa Clara County, California as the venue for their contract TOS disputes.

Uniform Laws Committee

There is now a Uniform Laws study committee that is studying these issues. They are still in the concept phase of trying to determine whether to amend applicable portions of other uniform acts to deal with this issue (like amending the UPC and guardianship act), or to create a stand alone act. Many states also have study committees on these issues, including California and Pennsylvania and Colorado.

Other Intellectual Property Issues

Digital sales of music now outpaces physical sales. This is true for books as well, but not yet movies. To cope with the transfer of this type of digital property from the original purchaser to a second party, most digital property is secured through digital rights management (DRM), which essentially locks this material to prevent someone from copying and forwarding it. Hard copies of books, tapes and CD can easily be copied and transferred.

So even though you could pass a hard copy book along without violating copyright laws, you might now be violating a contract or DRM. For example, the Digital Millennium Copyright Act of 1998 prohibits you from breaking DRMs or even selling tools that do so. Exceptions to this rule exist, but there is no exception allowing heirs or devisees to do this.

Cloud services (which essentially transfer your property from your personal equipment to another storage space) do not violate any laws in doing do. This is because most cloud service providers have been granted licenses from the music and publishing industries that allow them to do this.

An interesting case to keep an eye on is the ReDigi case pending in S.D.N.Y., which deals with whether a purchaser of digital property can transfer his or her digital property to ReDigi for re-sale, if the original is then deleted from the purchasers hard drive at the time of sale. This is almost like a used book store for digital material. The parallels between this type of transfer and a transfers of property from a decedent to heirs are obvious, so ReDigi may provide some helpful guidance.

Other issues that are being studied include:

1. Whether the transfer of online accounts and digital property to revocable trusts, LLC or other entities typically violate contract terms. Some assets, like domain names, are clearly transferrable, while others are not.

2. Whether the case law that makes clear that a Personal Representative, Executor or Guardian stands in the shoes of the person, has any impact on contract TOS and other digital property laws.

3. Whether the fiduciary should be permitted to access a decedent's account, or just receive a copy of the account data. In other words, should the fiduciary become the replacement "user", or just receive a copy of the information and the account then should be closed.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 12

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html.

In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: Due to the belated receipt of some missing Reports, this Report does not cover any of the Special Session IV Reports (those will be covered beginning with Report #13). Instead it includes Reports on Ethics in Representing Family Members from Thursday morning, the Fundamentals Program #3 on Retirement Benefits from Thursday afternoon, and Special Session III-A on Spousal Transfer Techniques from Thursday afternoon.

Thursday, January 17, 2013
11:45 AM - 12:35 PM

Don't End Up as Road Kill: Surviving the Ethical Challenges Posed by Transfers Among Family Members (Focus Series)

Presenter: Charles D. "Skip" Fox, IV
Reporter: D. Scott Robinson

This session reviewed the ethical challenges facing estate planning professionals in representing family members in transfers among family members. Attention was paid to potential and real conflicts of interest, joint or separate representation, the use or misuse of waivers, challenges in acting as a fiduciary, and family members with diminished capacity. Here are the more significant highlights.

Estate planning attorneys face difficult ethical challenges and constantly need to be on guard for ethical traps. Mr. Fox delivered an outstanding presentation regarding some the ethical dilemmas an estate planning attorney faces and how to avoid ethics/disciplinary complaints. Because the comments to ABA Model Rules of Professional Conduct (the RPC) generally did provide guidance to the estate planning attorney, Mr. Fox recommends the ACTEC Commentaries on the Model Rules of Professional Responsibility (the Commentaries"). The Commentaries are available on the public side of the ACTEC website at www.actec.org and are geared towards estate planning attorneys. The RPC are generally designed for litigators and not for estate planning attorney.

Mr. Fox started the substantive portion of his presentation by pointing out the consequences of failing to take into account ethical issues using some illustrative statistics. The presentation materials contained a chart showing the population of lawyers and state disciplinary caseload for 2009. Interestingly, as Mr. Fox pointed, there are a large number of complaints brought against lawyers each year; however, relatively few of these complaints result in disciplinary action. Nevertheless, minimizing the likelihood of a complaint should be paramount as the mere filing of a complaint against an attorney can cause significant emotional as well as financial damage to the attorney. Mr. Fox pointed out that the lawyer who is accused of violating ethical rules must also be worried about a malpractice claim. In this light it is helpful to think about the ethical rules as something that the attorney should aspire, whereas the risk of a malpractice suit is really the club that keeps the attorney mindful of doing his or her very best.

Mr. Fox began his discussion of the ethical issues with competence. Mr. Fox believes that competence is something that attorneys do not give enough attention to in their practices. Model Rule 1.1 provides that a lawyer shall provide competent representation. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. This is extremely important for estate planning attorneys because of the breadth of areas that estate planning covers. Competence can be gained through preparation and study and is not needed at the outset of the representation. The issue is whether the client will be willing to pay for the attorney to obtain the knowledge and skill to gain competence.

Mr. Fox noted that according to the Commentaries a mistake in judgment does not necessarily mean a lack of competence The Commentaries provide that sometimes the law and facts involved are so complex that a mistake in judgment can occur during competent representation. Mr. Fox made the point that the client probably is not going to agree that a mistake is not a lack of competence. Mr. Fox then discussed several cases involving competence and gave his take away that when an attorney takes on an assignment the attorney has to make sure that the attorney is competent. This especially is the case as the law becomes more complex. If the attorney is not competent, the attorney must be willing to obtain the competence necessary to represent the client. In some instances, it may be necessary to admit to the client that the attorney is unable to represent the client due to the competence needed or advise the client that co-counsel is needed.

The next ethical issue Mr. Fox discussed was the need to provide effective and timely counsel to clients. This issue especially came to light during the end of 2012 with all of the estate planning transfers that were being undertaken. Model Rule 1.3 governs this issue and provides that a lawyer shall act with reasonable diligence and promptness in representing a client. It is the lawyer's duty to manage his or her workload so that representation is timely. Mr. Fox made the point that comment 3 to Model Rule 1.3 provides that no professional shortcoming is more widely resented than procrastination, and that a client interest can be adversely affected by the passage of time, or the change in conditions. Mr. Fox then highlighted that when dealing with complex family matters the need to consult with multiple members of the family may require more time and the delay in handling matters promptly and can have devastating effects. Next, Mr. Fox discussed several cases to illustrate the effect of the failure to provide effective and timely counsel. One take away from these cases is that Mr. Fox believes that the old privity argument (a lawyer's duty was owed to the client and not the beneficiary of an estate plan) is quickly being eroded.

After timely and effective counsel, Mr. Fox discussed communication. Model Rule 1.4 governs communication. Under that rule a lawyer must keep the client reasonably informed of the status of the clients matter and must comply with reasonable requests for information regarding the matter. Mr. Fox stated that regular communication should be provided to clients. Regular communication with clients will minimize the need for the client to request status. Mr. Fox made the point that being proactive is much better than being reactive when it comes to communication. With clients the basic rule is more is better than less.

Regular, communication with clients may be difficult when representing more than one member of the family in a transaction. Mr. Fox hammered this point home with the case of Hotz v. Minyard. In Hotz, an attorney was sued for failing to communicate with a former client the terms of her father's will (the former client's father was also a client of the attorney and the will involved matters related to the attorney's representation of the former client). The Supreme Court of South Carolina held that the attorney owed the client a duty because of their previous attorney-client relationship.

Mr. Fox then turned to a discussion of the extent to which there is a continuing duty to a client after completion of an assignment. Model Rule 1.4 (a)(2) requires that a lawyer reasonably consult with the client about the means by which the client's objectives are accomplished. The issue in the estate planning context under Rule 1.4(a)(2) is whether after initial planning is done the lawyer has a continuing obligation to keep the client informed of changes in the law. Sometimes this issue is addressed in the engagement letter (as it should be) by providing that the duty to keep the client informed about changes in the law ends upon completion of the matter. Mr. Fox emphasized that if the engagement has been appropriately terminated upon its conclusion that the attorney will not have a continuing obligation to keep the client informed of changes in the law. To illustrate this point, Mr. Fox discussed the unreported decision of Standish v. Stapleton, where the court found that a lawyer had no continuing duty to communicate with a former client with respect to a matter involving another family member, which was related to the former client's matter. Mr. Fox stated that he is uncertain whether a court would still find that no duty under the same circumstances would exist today.

Confidentiality of information was the next issue that Fox brought to light. Model Rule 1.6(a) is the governing rule for confidentiality of information. This rule provides that a lawyer shall not reveal information related to the present presentation of a client unless the client gives informed consent. The Commentaries provide confidentiality of information arises in the context of representing multiple family members and the lawyer should review the terms with the family members as to information that will be disclosed during the representation. Mr. Fox advises that the best course of action when representing multiple family members or in a joint representation is to simply have an agreement that no secrets will be kept with respect to the represented parties.

The next topic Mr. Fox discussed was issue of conflicts of interest, which can arise in a multitude of situations in the estate planning context. One view is that common representation should be avoided due to conflicts of interest. The second view is that multiple party representation is often appropriate for cost savings, impracticality of requiring independent representation, and the possibility of losing clients which could have an negative economic effect on the lawyer. Model Rule 1.7(a) creates a presumption that the lawyer cannot provide common representation unless the lawyer can provide competent and diligent representation to all clients involved in the multiple representation. The Commentaries provide that it is often appropriate for lawyer to represent more than one member of the same family in connection with their estate planning because clients may actually be better served by the representation, and the representation can result in cost savings and a better coordinated plan because the lawyer will have a better overall understanding of the relevant considerations. Mr. Fox's take away is that any time a lawyer is representing multiple parties to make sure that the parties understand and there is agreement that there will be no secrets between the parties.

As Mr. Fox sprinted to the finish line he briefly mention the representation of multiple family members in the formation of a family partnership. Mr. Fox referred the audience to a 2009 article written by Mary F. Radford as a good resource for the discussions of the ethical issues involved the formation and operation of a family limited partnership. Mr. Fox also briefly touched on issues related to the payment of the lawyer's fees by another party and dealing with unrepresented persons. The materials cover all of these areas and well as many other areas of ethical issues in detail. All estate planning attorneys would be wise to review Mr. Fox's excellent materials.

Mr. Fox concluded his presentation by providing some sage advice. This advice is to be nice to your clients. Be responsive and make the client like you. A client that likes an attorney is less likely to file a complaint against the attorney.

Heckerling 2013

Thursday, January 17, 2013
2:00 - 3:30 PM

Fundamentals Program #3

(Runs Concurrently with Special Sessions III)

What Your Senior T&E Partner Doesn't Know About Retirement Benefits

Presenter: Natalie B. Choate
Reporter: Herb Braverman

"Estate planning as usual" doesn't work for retirement benefits, but the top brass hasn't figured that out. Different marital deduction rules, no "benefits boilerplate," pecuniary formulae, or standard minor's trusts. Roth IRAs are sacred, and who drafts the beneficiary designation? Find out my reading the following report that covers the significant highlights of this informative session.

NOTE: Ms. Choate will present a plenary session on a related topic on Friday morning; that session is reported elsewhere in appropriate detail.

In this FUNDAMENTAL program, Ms. Choate, who is always an entertaining presenter, decided to take note of 10 "fallacies" that one's senior partner may have regarding the retirement benefits area. After apologizing for a persistent typo in her outline, namely, that "IRB" should read "IRD" and be understood to refer to income in respect of a decedent, she began.

#1: "My standard marital deduction trust works great for retirement benefits." Because of inadequate trust accounting rules in many states and income definitions may vary in documents, it is advisable to specify in the trust document not only that the spouse is entitled to all income of the trust, but in addition to specify that the spouse is entitled to all income of any retirement plan payable to the trust. See Rev. Ruls. 2006-26 and 2000-2 for more information on the Service's ideas in this area.

#2: "Pecuniary funding formulas are fine for a trust holding retirement benefits." Not so. It is wiser to assume that the transfer of retirement benefits out of an estate or a trust to a beneficiary in fulfillment of a pecuniary bequest will trigger immediate income realization under Code Section 691(a)(2) and, therefore, planners should draft their documents in a way that will avoid the problem...either use only fractional formulas or, if you must use a pecuniary formula,make the retirement benefits payable directly to the subtrust (rather than to the "funding" trust) so the benefits do not have to pass through the formula.

#3: "Benefits left to my standard minor's trust can be paid out over the life expectancy of the minor." These trusts, which have remote contingent remainder or "wipe out" beneficiaries may result in a loss of the stretchout payment over the life of the minor. It is better if one uses a "see through" or conduit trust to receive the IRA payments and to distribute them in the same year to the income beneficiary. Other possible approaches are also mentioned in the materials.

#4: "Benefits left to a perpetual GST-exempt trust can be paid out of the trust over the life expectancy of the client's oldest grandchild." However, there is no authority that "blesses" a perpetual trust as qualifying for a life expectancy payout of retirement benefits. It is better to leave the benefits to the children outright or to a GST-nonexempt trust that is a conduit trust for each child. It is common to give each child a general power of appointment by will over the GST-nonexempt trust.

#5: "Just get some boilerplate language to assure the trust qualifies as a see-through." Sorry, there is no such boilerplate. It is the content of the operative provisions that matter and that can create problems. Several alternative solutions to this fallacy are mentioned, but the use of the conduit trust or trusts is a strong alternative again.

#6: "We can solve all these problems by a post-death reformation of the trust." No. Absent specific authority in the Code or Regs., the state court post-death modification of a trust will not be recognized for federal purposes. Do not leave the trust drafting refinements until after the client's death. However, see PLR 2008-46028 discussing the use of a reformation under certain circumstances. A disclaimer might be effective in some circumstances also.

#7: "If the spouse is close to or past age 70 1/2, leaving benefits to a QTIP trust causes no loss of deferral compared with leaving those benefits to her outright, because either way the benefits will have to be distributed (starting immediately) over the spouse's life expectancy." But, there are adverse income tax consequences because different life mortality tables are used. Better to leave the benefits outright to the spouse or use a conduit trust to accomplish a similar end. A useful compromise may be leaving some benefits to the spouse and some to the children.

#8: "This see-through trust stuff doesn't matter for a Roth IRA; since distributions from a Roth are tax-free, we don't care about deferral anymore." Actually, the opposite is true. The value of a tax-free investment vehicle that terminates today is much less than the value of a tax-free investment vehicle that can be kept in existence for years and even decades after the client's death. Proper planning for Roth IRA's is even more important than such planning for traditional plans.

#9: "I drafted the trust; the client will take care of the beneficiary designations." That won't happen, will it? It is up to you to complete the promise and to make the plan effective by making the effort to see that the proper beneficiary designations are completed and kept up to date.

#10: "We hired you exclusively to work on our clients' matters." This is the presenter's tongue in cheek reference to the fact that your senior partner will need your assistance for his/her own matters and planning. Be a planner for retirement benefits.

Ms. Choate added an executive summary of the "minimum distribution rules" to her outline.

Special Sessions III (Continued)

2:00 - 3:30 PM

Session III-A

Practical Aspects of Spousal Transfer Techniques - Inter Vivos to Post-Mortem (Focus Series)

Presenters: Barbara A. Sloan, T. Randolph Harris, Eric A. Manterfield
Reporter: Kristin Dittus

This panel analyzed the application of spousal transfer techniques including, among other techniques, spousal limited access trusts, formula clauses in coupled and decoupled states, Clayton trusts and portability techniques.

Ms. Sloan continued her discussion on planning in light of portability that began with her morning session on the same topic (See Report #10) and using the same outline. Throughout the lecture the panel continued to emphasize that the new laws provide an opportunity for a lot of post mortem planning. Some of the more significant highlights of this session are reported here.

A. The problem with Disclaimer Plans. Ms. Sloan is not a proponent of using a disclaimer plan because it is too easy to get into difficulties with these plans. Often times the surviving spouse inadvertently takes possession of an asset and therefore loses the benefit of the disclaimer. Another problem is that the surviving spouse loses the power to direct any assets disclaimed into a credit shelter trust, thereby foregoing the flexibility and control of a special power to appoint the assets.

B. Advising Your Clients. After the death of the first spouse, with portability as permanent law, the attorney will need to review the pros and cons of various estate plans to provide the best course of action based on the surviving spouse's individual needs and wishes. Ms. Sloan favors trusts and thinks the advantages outweigh an outright distribution in many cases. She also notes that the GST exemption is not portable and therefore not a good plan for clients with large estates.

a. Outright Distribution on Death of the First Spouse. Advantages include the surviving spouse having complete control, simple to understand with no administration, and getting a full step up in basis on the assets at death. Disadvantages include the loss of asset protection and of financial management of the assets, if that is a concern. The client's age and likelihood of remarrying will also be a factor because the surviving spouse will lose their Deceased Spousal Unused Exclusion ("DSUE") amount if they remarry and the second spouse dies. A taxpayer may only use the DSUE amount of the most recent deceased spouse.

b. Credit Shelter Trust. Advantages include asset production, getting the appreciation out of the surviving spouse's estate, the deceased spouse gets to have control over where the assets pass upon the surviving spouse's death; if this is a second marriage, assets can be protected from depletion to pass to the deceased spouse's children from her first marriage. A client does not have to use his entire AEA, but can apportion exemption as desired.

c. Marital Deduction or QTIP Trust. Ms. Sloan does not favor this plan because if forces out the income into the surviving spouse's estate.

d. Clayton Trust. A Clayton Trust is a hybrid trust that functions as a QTIP if the election is made and also allows for beneficiaries other than the surviving spouse if the QTIP election is not made.

e. Intentionally Defective Grantor Trust Created with DSUE Amount. After the death of the first spouse, the surviving spouse can make a gift of the DSUE amount to an IDGT. With the surviving spouse paying income on that trust this achieves amplified wealth transfer to the younger generation, especially if there is a younger surviving spouse. If there is an older surviving spouse this technique may not be worth the risk of opening up surviving spouse's estate to creditors. The immediate gift to an IDGT is among the best ways to immediately utilize (and prevent loss of) the DSUE amount. Also, the surviving spouse can swap out assets at death to get low basis assets out for benefit of step up on death. It is best to use cash when doing this to avoid IRS audit issues.

f. Inter Vivos QTIP trust. If one spouse has very few assets, the richer spouse can create and inter vivos QTIP trust for the poorer spouse and then do a reverse QTIP election for both the GST and AEA allocations. This avoids the need for the richer spouse to transfer the title of the assets.

g. Other considerations include how the client feels about the surviving spouse remarrying and that regardless of any written agreement between spouses, the elective share law will supersede those previous agreements.

C. Planning for Decoupled States. A decoupled state is one that has a lower state estate tax then the federal amount. Ms. Sloan suggests using a credit shelter trust for just the amount of state death tax. If combined estates exceed the state amount use a formula to fund the credit shelter trust that applies to both Fed and State taxes. There is an excellent table of the states varying taxes in the "Recent Development 2012" materials (See Report #1).

New York, for example has a $1 million death tax exemption, and if a client wants to fully fund the CRS with the $5 million exemption, that client would end up paying NYS tax of $400,000 or more. Portability cures this payment of $400,000 if desired. Ms. Sloan has included a formula for this in her materials.

D. Toggling the IDGT Income. A grantor can turn off the required income tax payments, but cannot turn them back on. The panel agreed it is better not to turn off the income tax to the grantor. A solution would be make loans from the trust to the Grantor to pay the income tax. They cautioned against using the reimbursement provision too frequently, but for a case where the client has a business in the Trust and that is sold, the reimbursement provision could be used to pay the capital gains tax. When you lend to a lower generation, the AFR rate is required, but if the grantor is borrowing from the younger generation (in trust assets), the grantor can pay at the fair market value rate (justified by the lost opportunity cost of other investments foregone) which will get more money out of the grantor's estate. The grantor should borrow enough so that she can cover the interest payments.

E. Valuation Discount Concerns. Question #1 voiced concern about losing the marketability and minority share valuation discount on hard to value assets, such as an FLP, if all of the shares pass to the surviving spouse, thereby unifying the asset under one owner. The panel suggested that making an immediate transfer right after death to one or more IDGTs (using the DSUE amount, if any) would preserve these valuation discounts.

Additionally, while the executor is required to merely provide a "good faith estimate" on the 706 for the use of portability, the panel recommends getting a bona fide assessment of hard to value assets to have this amount on record. There is still no concern about tax because the surviving spouse has the marital deduction to shelter any amount in excess of the AEA.

F. Assigning the Interest of a Trust. A member of the audience suggested that a surviving spouse could assign the income interest in a marital deduction trust to remove all of the trust assets from the surviving spouse's estate for both federal and state death tax purposes even though he or she remains a discretionary beneficiary of the trust and this would create both flexibility and tax savings. The panel had a mixed reaction to this idea.

Session II-E
Grand Ballroom Salons 3-6

Estate and Income Tax Planning with Mineral Interests (Emerging Assets Series)

Michael V. Bourland, David R. Croft

This presentation will cover the basics the practitioner needs to understand regarding mineral interests including various types of interests retained by a landowner after entering into a lease, management/maintenance of the mineral interests and the use of tax partnerships and estate planning strategies.

Session II-F
Grand Ballroom Salon 7

The Taxation of "Exotic" Investment Products Sold to Individuals (Financial Assets Series)

Paul S. Lee

Investing has gone beyond simply stocks, bonds, and mutual funds. High net-worth individuals are being offered a dizzying array of "alternative" asset classes and investments (commodities, foreign currency, gold, structured notes, exchange-traded notes, foreign debt, leveraged ETFs, etc.). These investments commonly utilize complex financial instruments and structures, the taxation of which often catches the taxpayer and tax professionals unaware. This presentation will discuss the taxation of these "exotic" investments from the investor's standpoint.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 13

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html.

In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers most of the Special Sessions IV that were held on Thursday afternoon, including SS IV-A on Ethics of Family Transfers, SS IV-B on Selected Drafting Issues, SS IV-D on Florida Law Update and SS IV-E on Conservation Easements. SS IV-C on Self-Settled Trusts is in process and will be published in a later Report. The next Report will cover those sessions from Wednesday and Thursday where reports have not been issued yet.

Special Sessions IV 3:50 – 5:20 PM

Session IV-

A Practical Advice on Surviving the Ethical Challenges Posed by Transfers Among Family Members (Focus Series)

Presenters: Charles D. "Skip" Fox, IV, Hugh Kendall, Mary F. Radford
Reporter: Craig Dreyer

Using a series of hypotheticals, the panel discusses practical ways to address the ethical challenges posed to estate planning professionals by transfers among family members. This presentation builds on the main session that Mr. Fox gave on Thursday morning (See Report #12). Again, this report covers the significant highlights.

The purpose of the session was to give lawyers advice on handling various ethical situations.

The panel began with a hypothetical involving an attorney who normally did basic estate planning, and a client asks him to do complex reorganization of company. In order to analyze the situation the panel discussed Model Rule 1.1 which provides a lawyer must show sufficient competence or devote sufficient skill knowledge and thoroughness in an area preparing so that they can reasonably represent a client. Here the attorney had four options: (1) commit to study and preparation to have expertise to conclude transaction, (2) could associate another lawyer who had expertise, (3) could attempt under Model Rule 1.2 to limit his engagement, or (4) he could have declined representation. The panel also noted that Model Rule 1.4 says a lawyer has the duty to advise on all factors relevant to the decision moving forward.

Model Rule 1.1 makes it clear it is not just subject matter that the lawyer must be proficient in, but a lawyer must also ascertain the relevant facts necessary to make an informed decision. Therefore if you do not ask your client the correct questions, you still may be acting unethically even if you are technically proficient in the area.

The panel next moved to Model Rule 1.3, which provides a lawyer shall act with reasonable diligence and promptness in representing a client. An example the panel used is if an elderly client asks you to draft a will with significant changes and it takes 8 months, then you have likely violated Model Rule 1.3.

Next the panel discussed confidentiality among clients in a joint representation scenario in the family limited partnership context. The panel noted that a single attorney is often used in these situations since it would be overly costly for every child to have their own representation. The panel notes that joint representation generally presumes no secrets between clients. Optimally this is spelled out to the clients. However, the partnership agreement may require disclosure as well. This hypothetical dealt with Model Rule 1.4 (Communication), 1.6 (Confidentiality), and 1.7 (Conflict of Interest). This example was interesting because all these rules conflict with each other. Some issues discussed were that the lawyer is under a duty to provide necessary information to make an informed decision, so the lawyer is probably under a duty to disclose and must respond to reasonable requests for information. However, under model Rule 1.6 there is a duty of confidentiality unless client gives informed consent. Finally, under Model Rule 1.7 he has duty to avoid a conflict of interest; the question here is whether withholding information would violate rule 1.4. The panel noted in these conflict situations often the lawyer must withdraw from representation.

The panel also discussed various issues that arise when lawyers represent both parents and kids. Here it is especially important to send termination letters once a project is finished. For example, what happens when a lawyer represents a family, and then the father wants to cut the son out of his will. In general, a lawyer can represent both if they can provide competent representation, since it may be unrelated to the prior matter. However, it is an important fact that the son's representation was terminated. If the son's representation was not terminated, the lawyer may be under a duty to tell son. The panel also discussed that once a client's representation is terminated, there would be no duty for a lawyer to update the client on new tax laws.

The panel next discussed the ethical obligations where a lawyer represents an entity such as a trust. Does the lawyer represent the trustee or the beneficiaries for the trust? This scenario implicates many Model Rules including: 1.2 (scope of representation), 1.4 (communication and keeping a client reasonably informed), 1.6 (considering confidentiality regarding informed consent), and 4.3 (regarding unrepresented people who might be involved in the matter). Here the lawyer has a duty owed to beneficiaries include the prohibiting lawyer form taking advantage of his position to detriment of the beneficiaries or trust. Some lawyers for trustees or executors may also owe a derivative duty to the beneficiaries. The panel noted the best practice in these scenarios is to be clear at the beginning on who you are representing. The panel always recommends having non-represented beneficiaries seek independent council.

Another issue raised by the panel, was the situation where one spouse advises you that they have another child unknown to their spouse. The question is whether this affects your client's representation. While it may be unclear, the panel generally recommends withdrawing and in some circumstances allowing it to continue may even be considered a fraud on your client.

The panel also discussed the scenario where a married couple comes to see you and then divorces. If it was joint representation, you cannot represent either client in cutting out their soon to be ex-spouse without written consent form the spouse. The panel recommends telling those clients to seek new independent council.

The panel also noted that in many cases ethics charges are used as leverage in a lawsuit, so you may see civil cases that find no violation for an action, but if the same case were brought on an ethics charge the lawyer may get into trouble. It is important to recognize these instances when interpreting case opinions, so you are clear who is being used and for what.

Model Rule 1.13 discusses the representation of entities. While a lawyer can represent an entity and certain partners, this representation should be specifically spelled out. Rule 1.13 also notes that if there is a conflict between the entity and represented partners, the lawyer may be in violation of Model rule 1.7 regarding conflicts between clients.

The panel then discussed Model Rule 5.5. It provides a lawyer can represent clients in other states if the representation arises from the representation in their state of practice. However, once you engage in such out of state representation, then you subject yourself to that states disciplinary committee. See Model Rule 8.5.

Model Rule 1.14, says that for a client with diminished capacity a lawyer must attempt to maintain a lawyer client relationship. This is particularly tricky as you must look out for your clients interests while also protecting them as well as possible. The panel noted that the ABA Committee on Law and Aging has some great material to assist lawyers in this area.

Next the panel discussed whether they can represent a client in a matter in which they may be a witness. Model rule 3.7 says that you cannot.

The panel concluded speaking about client confidentiality after death. Model Rule 1.6 says confidentiality extends after death, but if a lawsuit is brought a lawyer can disclose under the discovery process material relevant to the request such as in a will contest. The panel also notes that with Model Rule 1.6, it does not matter how the information is obtained. A lawyer should not disclose information gathered through representation even if the client discloses it without the client's informed consent.

Session IV-B

Tales from the Deep – In Depth Discussion of Selected Drafting Issues

Presenter: Benjamin H. Pruett Reporter: Herb Braverman

This session provided an in depth discussion of a few selected drafting issues, such as "directed trust" provisions, flexibility provisions, and special investments guidelines. The more significant highlights of this presentation are covered by this report.

NOTE: Mr. Pruett also presented a plenary session using the very same printed materials. The information in the first 47 pages are reported elsewhere in the report on that plenary session (See Report #10). This report picks up the coverage at page 47 of the printed materials presented by Mr. Pruett.

Some of our speakers come before us and "spin" ideas that impress us with their complexity and, in some cases, with their potential value to certain of our clients. We, of course, appreciate that approach, even when the how to's are often vague or incomplete; however, what Mr. Pruett has done for us is that much more appreciated because of the practical value his materials offer to all of us. He has taken a large number of will and trust provisions that he and that his colleagues at Bessemer Trust have seen and has attempted "to improve" upon them from the point of view of the fiduciary who must implement these documents from time to time. In many instances, he has given to us suggested language for our consideration, so that we might have a better understanding of the difficulty that some of our provisions from our documents create for the fiduciary. As a result, it would be a good choice to obtain the Pruett materials and to review them in detail.

Among the topics that he discussed in the special afternoon breakout session were guiding the Trustee by providing priorities among multiple beneficiaries, in the use of discretion, in the use of a proper standard for distributions and in the consideration of the outside resources of beneficiaries. He also spent a good deal of time on the choosing and discarding of Trustees (with and without court action), including capacity issues, termination fees and HIPAA concerns.

Pointing out the obvious that trust terms trump default rules, Mr. Pruett discussed deviant trusts, the duty to diversify holdings, the duty to inform and to report and negating certain duties, among other issues. He also spent time on special considerations for revocable trusts and separately for GRAT's.

Mr. Pruett also spent a good deal of time discussing the history and current best practices for Crummey withdrawal powers.

He closed by pointing out how important it is to pass proposed documents before the Trustee (especially the corporate Trustee) prior to execution for suggestions.

These are 100 pages of very practical information and sample language that will help you in your practice; the session was "meat and potatoes"....enjoy!

Session IV-C

Protecting Assets Without the Pre-Nup - Use a Self-Settled Trust

Presenter: Daniel Rubin

This report is in process and will be included in a later Report

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Session IV-D

Florida Law Update

Presenters: Lauren Y. Detzel, Tae Kelley Bronner, Thomas M. Karr
Reporter: Sarah Butters

The panelists discussed important updates in Florida legislation and case law relevant to fiduciary litigation, probate and estate planning which every practitioner in Florida should know and many non-Florida practitioners may find of interest.

The presenters segregated their discussions into 3 parts, titled below:

Lauren Detzel - provided a Florida Principal and Income Act update

In 2012, there were a lot of legislative changes to the Florida Principal and Income Act (the Act). Those changes became effective January 1, 2013, so they are now in effect. The original Act was enacted in 2002. The 2012 revisions were the first comprehensive changes to that original act and were intended to clarify or modify the Act to make it more workable.

Below is a highlight of some of those changes:

· Makes it clear that it applies to all estates and trusts administered in Florida.

· Added a definition of term "carrying value" - which is the value of the assets at the time it came into the estate or trust, or the acquisition value. But note that when/if there is a change in trustee, the successor trustee can adjust the carrying value to the FMV as of the beginning of their administration, so as to make it easier to track gains and losses since the successor trustee's administration began.

· Added a "smoothing rule" for unitrusts. The smoothing rule allows the FMV of the trust for purposes of determining the unitrust payout to be determined by the average of the current year's FMV plus the 2 preceding years, with adjustment provisions for years when there were large addition or distribution. NOTE: This is a default rule unless drafted around. So that means that unless otherwise provided, all existing unitrusts must use this 3 year smoothing rule as of January 1, 2013.

· Makes clear that there is no statutory right to income on an outright, pecuniary devise.

· Return to using the carrying value for allocating income on pecuniary devises. Now look at carrying value to determine a pecuniary devise, rather than date of distribution value (which requires a re-valuation of assets at distribution).

· Allocations of large distributions from entities listed on a public stock exchange (like when Microsoft made a huge dividend declaration after not paying anything for a decade). Keys factors in applying this rule include:

· Whether the company is a publicly traded entity, non-publicly traded entity, or an investment entity (anything but the first two categories)?

· How large was the distribution?

Thomas Karr - Chair of Trust and Estates Litigation Committee of the FL RPPTL Section provided a litigation update

Tom discussed the Top 9 litigation topics in Florida:

Hill v Davis - Non-resident Personal Representative got appointed when no one objected during the 3 month time period. Later, when the PR's appointment was challenged, the court said that not withstanding the non-qualification of the PR, the PR could continue to serve as PR so long as the original appointment was not procured by fraud or misrepresentation.

Agee v. Brown - Addressing the ethical rules regarding drafting documents that include gifts to the attorney. Currently, a lawyer cannot draft a will that makes a "substantial gift" to the lawyer. But the gift is still valid unless otherwise invalidated for undue influence, lack of capacity… There is proposed legislation in the 2013 session that would void any gifts to drafting lawyer (in addition to what ever sanctions the bar may impose). This bill does not affect the attorney drafting a will that appoints self as a fiduciary and only applies to documents executed as of the effective date of the law (if passed).

Basile v. Aldrich - This is a will construction and partial intestacy case pending before the FL Supreme Court. In summary, the decedent left a self written will that tried to dispose of all of her assets by specific devise and explicitly excluded the decedent's brother. But the will contained no residuary clause so the court had to determine whether the residue passed to the brother as heir at law, notwithstanding the will's provision to disinherit him. The decedent's nieces asked the court to construe the will to avoid intestacy (and avoid the brother inheriting). The Florida Supreme Court is considering this case now.

Recovery of Attorney's fees and costs in will and trust contests - There is a RPPTL committee studying this issue and considering proposed legislation. Stay tuned.

Suing a Nonresident in Florida on trust matters - There is proposed legislation on a long arm statute in the 2013 legislative session clarify when the trustee of a Florida trust can be sued in Florida.

Payment of trustee's fees and costs for defending breach of trust claims - Florida Statute 736.0802 appears to allow payment of fees from the trust when a breach of trust has been alleged, provided notice is given to the beneficiaries. But the statute stops there, providing little guidance on what notice must be given, when it must be given, whether an objection means the fees may not be paid, or when/how a hearing on the issue should occur. The RPPTL section is studying this.

Appellate Rule re: probate appeals - Florida Appellate Rule 9.170 codifies existing law and is a non-exclusive list. The recent Carrithers case makes clear that when appealing an attorney fee award that was made pursuant to a provisions award of appellate attorney's fees, that appeal is properly handled through a motion for review, rather than under Rule 9.170.

Copies of lost wills - Smith v. DeParry case deals with what is a "copy" of a will. Is a digital copy ok? Here, the court said yes, a digital copy from a computer was sufficient evidence. But that opinion begs many related issues. What about the metadata related to that copy? Are we requiring proof that it wasn't modified since the time of signing? Again, the RPPTL section is studying this.

Reformation of Will - New law now permits reformation of wills for mistake.

Tae Bronner - Chair of the Probate Law Committee of the FL RPPTL Section provided a Probate law update

Intestate succession laws - Florida now has a revised intestate statute that applies to decedents who died after October 1, 2011. This new statute was passed to make it more in line with what practitioners were hearing from their clients.

Termination of Parental Rights - Recent legislation now provides that where a parent's rights have been terminated during the child's lifetime for abuse, neglect or abandonment, that parent is now disinherited for intestate purposes. Florida law used to only terminate a parent's intestate inheritance rights if the child was subsequently adopted. Now, it is clear that this parent is not permitted to inherit through the intestacy statutes.

Homestead - 5 topics were discussed:

Life Estate Election by Surviving Spouse - A surviving spouse can now elect to take a 1/2 tenant in common interest in the home instead of the life estate given under Florida Statute 732.402. This election may be taken regardless of the value of the homestead, or the age/health of the surviving spouse. This rule applies only to estates of decedent's who died after July 1, 2012. The election must be made by the spouse within six months unless otherwise tolled as provided under the statute.

Definition of "protected homestead" - The definition of homestead was also revised to distinguish between the homestead in the hands of the decedent and the creditor "protected homestead" in the hands of the heirs. Not all homesteads are creditor "protected homesteads", depending on who are the devisees of the property.

Intervivos conveyance of homestead - A new statute makes clear that an intervivos conveyance of homestead property is not a conveyance provided you follow the new statutory provisions in 732.4017.

Transfers to revocable trusts - An RPPTL ad hoc committee is studying this and whether it violates the creditor protections.

Creditor's claims - Lubee and Morganthal cases did not permit a late filed creditor's claim to be filed unless a petition for extension of time is granted. In these cases, the courts did not even permit the petitions to be heard because it was past the 3 month claims period for publication. The creditors alleged that they were known or reasonably ascertainable creditors who should not have had to even ask for more time because their claim should not have begun until they received individual notice. Again, the RPPTL is studying this to determine what legislative fix should be proposed.

Session IV-E

Coming to a Tax Court Near You: How to Survive the IRS's Assault on Conservation Easements (Emerging Assets Series)

Presenters: Alan F. Rothschild, Jr., David J. Dietrich, Nancy A. McLaughlin
Reporter: Joanne Hindel

Since 2006, courts have decided twenty-seven cases challenging conservation easement donations, and there are hundreds of cases in the pipeline. This session provided an overview of conservation easements, offered drafting and tax reporting suggestions to minimize the risk of audit, and analyzed the IRS's Conservation Easement Audit Techniques Guide and the latest cases. This report covers the significant highlights of this session.

Alan started off by referring to the Recent Developments presentation on Monday (See Report #1) and the fact that many litigated matters address conversation easements and deductions for them. He mentioned that the IRS is going after non-cash charitable contributions but that this is providing practitioners with a good road map to address these issues.

David then started his presentation by saying that he represents land owners that enter into the agreements that establish conservation easements. A conservation easement is a creature of the IRC 170 (h) regulations and of state law. He also mentioned that his outline contains examples of conservation easements particularly in the area of land trusts.

Nancy then covered the various federal tax incentives that depend on whether the donation is made during the donor's lifetime or after the donor's death. She reviewed the lifetime donation incentives and the post-mortem incentives. She cautioned against leaving it to the heirs to make the conservation easement since many times heirs cannot agree. She referred to the Washington Post that published a series of articles alleging abuses in the facade easement donation context. Because of the abuses, the IRS has increased its scrutiny. She also indicated that the Pension Protection Act of 2006 temporarily increased the tax benefits offered to conservation easement donors by making the percentage limitations on the resulting charitable deductions more favorable.

Nancy referred to the IRS Conservation Easement Audit Techniques Guide which is a significant resource.

David then reviewed the conservation purposes: outdoor recreation or education; habitat protection; historic preservation and open-space protection. One has to review not only the regulations but also the governing document itself.

He then provided an overview of each purpose:

Outdoor recreation or education of the general public – rare type of easement as it must allow public access which few landowners choose to grant when less intrusive alternatives are available. Protection of natural habitat or ecosystem – habitat protected does not need to be that of a rare or endangered species. This does not require public access. Open space preservation – where the preservation is pursuant to a clearly delineated federal, state or local governmental conservation policy and will yield significant public benefit. Historic preservation- an easement donated for the purpose of preserving an historically important land area or a certified historic structure that requires some visual public access to the property.

Alan covered easement specific valuation rules that include: Sales prices of comparable easements; before and after method, enhancement and incidental benefit rules and additional easement-specific valuation rules. He said that the before and after method is very complicated and subject to a lot of abuse. Abuse tends to occur when there are not sufficient comparable properties and the appraiser does a hypothetical sales price analysis. He cautioned practitioners to ask a lot of questions if given a hypothetical development approach and try to get comparable sales.

He also mentioned the need to address enhancement rules even if they are not applicable.

He referred to the old rules that existed before the Pension Protection Act of 2006 and then talked about the donors who are not qualified farmers or ranchers and those that are. He discussed the limitations on deductions for both types of donors. He also mentioned C Corporation donors.

He said that this is the year to urge clients to take advantage of the current conservation easement deduction rules.

David then talked about the estate tax benefits of conservation easements. He indicated that with the Tax Reform Act of 1986, Congress enacted provisions that permit a taxpayer to claim a charitable gift or estate tax deduction for the donation of a conservation easement without regard to whether the easement satisfies the conservation purposes test of Section 170(h).

He also talked about the ability of the personal representative to grant or amend a conservation easement post mortem to the donor.

Nancy then covered filing a tax return package to minimize risk of audit and discussed the checklist in the outline. The steps include:

Correctly drafted conservation easement IRS form 8283 and Supplemental Statement Qualified Appraisal Contemporaneous Written Acknowledgment Compelling and Timely Baseline Documentation Correct and Timely Lender Agreement (if applicable)

When drafting a conversation easement consider the rights that you have reserved for the donor to determine whether these might be exercised in a way that could adversely affect the purposes of the easement. Nancy referred to the Carpenter case in which the Tax Court stated that the extinguishment regulation provides taxpayers with a guide, a safe harbor, by which to create the necessary restrictions to guarantee protection of the conservation purpose in perpetuity.

She also said that the IRS is extremely hostile to easements that do not appear to be perpetual.

Alan discussed the rules for substantiating a conservation easement deduction and the completion of IRS Form 8283 and any supplemental statement. He also discussed the fact that all “qualified appraisal” requirements should be satisfied.

He then discussed the Kiva Dunes case which involved a dispute over the valuation of a conservation easement that had been donated in 2002 with respect to a golf course located on the gulf coast in Alabama. The court accepted the before and after values asserted by the donor’s expert and concluded that the conservation easement had a value very close to the donor’s claimed value.

He also pointed out that no deduction is allowed for a charitable contribution of $250 or more unless the taxpayer substantiates the contribution with a contemporaneous written acknowledgement obtained from the donee.

David cautioned that the attorney should be actively involved in the appraisal and the baseline documentation on behalf of the taxpayer.

Nancy talked about the need to have a correct and timely lender agreement and suggested that the donor should get a full subordination agreement if possible at the time of the donation.

The panelists also discussed other important issues, including grantor and grantee considerations, and when the donation is considered complete for tax purposes. They also discussed the IRS objections to “floating development rights” and the Treasury Regulations that contain two examples that address this issue.

David concluded the presentation with a review of some practical tips covering issues and questions that frequently arise in conservation easement transactions and focused on the need to retain independent counsel.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D.

Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 14

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Editor Comments: This Report includes missing reports from Special Sessions that were held on Wednesday and Thursday. The Reports that are included here cover Special Session II-F on the Taxation of Exotic Investments and Special Session III-B on FLPs. The next Report will include the remaining missing Special Session reports from Thursday afternoon as well as the Fundamentals #4 Insurance program that was held on Thursday afternoon.

Wednesday, January 16, 2013
3:50 - 5:20 PM - Special Sessions II
Session II-F

The Taxation of “Exotic” Investment Products Sold to Individuals (Financial Assets Series)

Presenter: Paul S. Lee
Reporter: Kristin Dittus

Investing has gone beyond simply stocks, bonds, and mutual funds. High net-worth individuals are being offered a dizzying array of “alternative” asset classes and investments (commodities, foreign currency, gold, structured notes, exchange-traded notes, foreign debt, leveraged ETFs, etc.). These investments commonly utilize complex financial instruments and structures, the taxation of which often catches the taxpayer and tax professionals unaware. This presentation discussed the taxation of these “exotic” investments from the investor’s standpoint. This session having been described by the Reporter as a challenge, this report attempts to accurately summarize the significant highlights of this presentation.

Mr. Lee has been a National Managing Director at Bernstein Global Wealth Management since 2006, and has been with the firm for more than 13 years. He received a BA, cum laude, in English and a BA in chemistry from Cornell University; his JD, with honors, and his LLM in taxation are from Emory University School of Law.

Mr. Lee's relatable examples helped demystify the complex acronym filled world of financial derivatives. There was a slide presentation that did not accompany the materials, but Mr. Lee is happy to forward these to anyone if contacted at Paul.Lee@Bernstein.com. With the proliferation of financial derivatives and other exotic investment products, these assets are appearing in individual client portfolios more and more, so understanding these assets and how they are taxed is essential to handling a sophisticated estate planning or estate situation.

Exotic Investments. Recent years have brought a wealth of additional assets classes, such as emerging markets and/or direct holdings in foreign currencies and sovereign debt, new sectors like energy markets and biotechnology, and new assets classes such as gold and other commodities. New investment strategies include amplifying returns with leveraged strategies, providing inverse returns with short strategies, promising downside protection and upside equity like returns with principal protected strategies. These new assets classes are also offered in different structures, such as directly held by the investor, packaged products, and commingled vehicles (ie funds, investment trusts, or limited partnerships).

Taxation of these Assets is Being Carefully Examined and Reconsidered by Treasury. The "Present Law and Issues Related to the Taxation of Financial Instruments and Products" (December 2, 2011) was given to / by the Joint Committee on Taxation; IRS Notice 2008-2 discusses the IRS perspective on prepaid forward contracts, the use of Original Issue Discount ("OID") rules, the character of income regarding the underlying property, and the tax effect if an instrument is traded on an exchange. There are also several Proposed Treasury Regulations regarding swaps and Section 1256 contracts.

Overview for Today's Lecture. Today lecture covered financial derivatives and their treatment under the Code, structured notes, exchange traded notes (ETNs), exchange traded funds (ETFs), inflation sensitive investments and selected hedge fund investor issues.

Most Rapid Growth. Mr. Lee provided a series of charts to illustrate the intensely rapid growth of financial derivatives, especially swaps – likening them to the "methamphetamines of the financial world." Financial derivatives dwarf traditional financial holdings with the total instruments issued or held by United States ("US") persons equaling $231.181 billion and the second closest class being corporate equities at $23.247 billion. This tremendous growth increases the chances that these assets will trickle down into our clients' estates.

Understanding a Forward Contract. The IRS consistently looks to futures to assess tax on other derivatives. Forward contracts originated with commodities. To demonstrate the concept of a forward contract, Mr. Lee used the example of a grove farmer growing oranges as the "producer" with concerns about the market being flooded with an excess of oranges from say "those cheap oranges being imported from China," and also concerns about shortages from an orange fungus that is destroying produce. The producers and the distributors, like Tropicana, can chose to settle on a certain price that the oranges can be bought for in the future, and so settle on

$100 per carton for date of delivery (also known as the “forward price”). Both of these parties understand that the future price will never be $100, but will be either above or below the contract price. If the price goes to $110, then Tropicana has benefited by $10 per carton on the date of delivery.

The Rise of Futures Contracts & the Rise of the Speculator/Investor Role in the Market. Lehman Brothers was the first to develop futures as the next progressive capitalizing step after a forward contract. A futures contract is a standard contract that is traded on an exchange such as the Chicago Mercantile Exchange. To become an investor in these contracts a buyer must have "up front" money of a small percentage of the total cash, such as 5%. Once invested, the buyer's equity will fluctuate, and an investor can take money out against appreciation or is required to put money in if there is there is depreciation of the asset to the extent it differs from the purchase price.

The Theory of Futures Pricing. The formula for obtaining a futures price for a financial instrument (ie. a stock) or non-perishable commodities (ie. gold) is to (1) use the current ("spot") price, (2) plus the cost of carrying (e.g. the interest or time value and warehousing costs), (3) minus the expected cash yield (e.g. dividends). This equation shows the difference between the theory price and the actual price on the day of valuation.

Options Contracts - Understanding Puts and Calls. Puts and Calls are options contracts where one party has the option to enforce a request to buy or sell, which is unlike a futures contract where there is an obligation on both sides of the transaction. A Call provides the right to purchase (and the seller must sell) and a Put provides the right to sell (and the purchaser must buy).

Taxation of Futures and Forward Contracts. The realization of gain is deferred until there is a settlement of any of the following: sale or exchange of contract, an offsetting contract, a physical settlement of maturity or a cash settlement at maturity. The character is capital gains if the underlying asset is capital in the hands of the taxpayer. The holding period depends on how long the contract was held; however, a securities futures contract is always short term under IRC §1234B.

Swaps, or Notional Principal Contract. As mentioned above, these are the current financial drug of choice and are the most confusing to understand. The definition under Tres. Reg. § 1.446-3(c)(1)(i) is "a financial instrument that provides for the payment of amounts by one party to another party at specified intervals by reference to a specified index upon a notional principal amount in exchange for specified consideration." Mr. Lee explained this as a transaction between 2 parties who don't put money down on an exchange (differing from futures contracts above), but the parties create a private contract based on the amount each is willing to wager on the performance of the company. This private contract looks like a futures contract, but is not constrained by traditional limitations, such as only wagering up to the fair market value ("FMV").

Taxation of Swaps. Each payment is categorized as follows: a Periodic Payment is taxed as ordinary income, a Non-Periodic Payment is taxed as ordinary income, and a termination payment is taxed as capital gains. Problems arise because there is confusion as to what constitutes a Non-Periodic Payment based on a contingency and are “Significant”

Non-Periodic Payments. A "Bullet" Swap, where all payments are deferred until end of the contract, is treated as termination payment or forward contract.

Section 1256 Contracts: Mark to Market Taxation. These are actively traded on an exchange making it easy to obtain a day to day FMV and there is no need to wait until the end of the contract. The tax year end is the date of the value and can determine the percentage of short and long term gain.

Estate Tax Reporting. The various possibilities allow for a lot of choice in how the asset will be taxed and the tax advisor is responsible for determining the tax method. Reporting methods include Gross Value Method, Net Value Method, and Exchange-Traded Method. Tech. Adv. Mem. 820417 gives guidance regarding exchange-traded options which should be reported under the Gross Value Method. Additionally, obligations under "naked" call options sold by a decedent are non-deductible "contingent claims." Rather than file a protective claim, cash out and claim a deduction you otherwise could not get with case law. For any claims "subject to a contingency,"
Treas. Reg. §2053 provides that the deduction is "limited to amount actually paid by the estate" and also provides procedures for filing protective claims for refund (on claims that "later mature").

Structured Notes: Principal-Protected Investments. The promise made to attract investors is that there is equity-linked performance with principal protection. This investment includes principal-protected notes with 100% of S&P 500 appreciation plus the return of 100% of principal, and enhanced-return notes with 200% of S&P 500 appreciation plus return of 90% of principal. Concerns arises with the credit worthiness of the financial institutions which are granting such guarantees of these unsecured obligations. Downsides include limited secondary trading, if any , and long maturity periods of up to 10 years that typically do not include dividends, however, they may (but often do not) provide interest payments.

Taxation of Structured Notes. Tax advisors play a big role in determining the taxation method for structured notes. The tax consequences of an investment in the notes are unclear. Possible methods of taxation include an open transaction like prepaid variable forward contract (long-term capital gain at maturity), OID on the zero-coupon bond and option treatment (capital gain at settlement) and Contingent Payment Debt Obligation.

Contingent payment debt obligation and non-contingent bond method. There is a 4 Step Process as follows to determine payment:

1. Determine Comparable Yield (based on yield of the issuer; issuer hedge under § 1.1275-6)

2. Determine Projected Payment Schedule (assumed reasonable)

3. Allocate Daily Interest

4. Adjust for Differences Between Projected and Contingent Payments

    - Net positive adjustments with additional interest

- Net negative adjustments with reduction of interest and ordinary loss

There is no capital gain with this method. The taxpayer gets phantom income but no real payments. Any ordinary loss as an individual needs to be taken in the year of loss. Unfortunately there is much more gain under the recently passed American Taxpayer Relief Act then there has been in the past.

Exchange-Traded Funds ("ETFs"). These are wildly popular investment companies. They originated when brokerage houses developed an exchange fund as a product to compete with low cost index funds. As an example, if a bank is willing to invest $100 million, that $100 million is divided into shares proportionate to S&P stocks and the shares are put into a trust. The bank is given 100 creation shares (similar to Net Asset Value) and is classified as an authorized participant. The bank earns a profit by bringing the 100 creation shares to the New York Stock Exchange divided into ETF shares and sold as such to individuals. The structure of the transaction insulates the bank from having any relationship with individual investors.

Taxation of ETFs. Two of the three methods of taxation are as follows:

1. Taxed as a Registered Investment Company like a mutual fund under IRC subchapter M. There is a 90% distribution requirement. This is a pass through tax, taxed to individuals as dividends with the investment fees deducted. There are no losses that come out of the mutual funds.

2. Physical ETF / SPDR investments such as gold. Physical commodities can be difficult to invest in because they require physical storage, are rarely easy to transport, and a security system to safeguard against loss. The Intentionally Defective Grantor Trust Rules are used because this investment does not qualify for the first tax treatment discussed above. If held in trust, the original owner can transfer ownership to individual investors. Holding period is determined by how long the shares have been held, but are generally short term capital gain.

Exchange-Traded Notes (“ETNs”). ETNs promise returns directly linked to a wide range of asset classes, payable in cash at maturity (generally a 30 year term) that can be leveraged (1.5x) or inverse to the asset class or index. There is no tax until the ETN matures or is sold or exchanged. The biggest risk is that these are unsecured obligations of financial institutions (Lehman Brothers was a large sponsor of ETNs). They may (but often do not) provide payments of interest prior to maturity. Dividends, interest or yield are “notionally” reinvested. All sales are “notionally” reflected in values. The taxation of investors in ETNs is unclear, but most issuers take the position that, unlike principal-protected notes discussed above, ETNs are not debt obligations. Rather, ETNs are treated as prepaid forward contracts.

Thursday, January 17, 2013
2:00 - 3: 30 PM - Special Sessions III
Session III-B

Family Limited Partnerships -- Audit, Appeals, and Litigation -- What's Hot and What's Not?

Presenter: John W. Porter
Reporter: Mike Stiff

This program took a practical approach to dealing with current issues involving the transfer of interests in family limited partnerships and other closely-held entities. Particular emphasis was placed on valuation issues, formula transfers, Section 2036, Chapter 14, any recently passed or proposed legislation, and strategies to prepare for and resolve transfer tax disputes. The materials consisted of a 68 page outline. This report covers the significant highlights.

John Porter began his program with a review of the common arguments being made by the Service to attack family limited partnerships or family LLCs and additional issues he would address: (1) gift on formation; (2) step transaction; (3) non-qualification for annual exclusion gifts; (4) Section 2036; (5) valuation; (6) formula clauses; (7) tax reporting; and (8) working with attorneys and appraisers.

Gift on Formation: The gifting on formation argument arises when funding occurs simultaneously or close in time to the transfer of entity interests. Mr. Porter referred to these as simply burden of proof cases. The taxpayer must prove the funding occurred before the transfer. This is easy to avoid with proper documentation. There is no bright line test for how many days between funding and transfer is sufficient. In the Holman case (6 days) and the Gross case (11 days), the taxpayer was successful. In the Heckerman case, the taxpayer was not successful where the funding and transfer occurred simultaneously. The Tax Court noted in the Holman and Gross cases that a longer time may be needed if the assets consist of less volatile assets such as preferred stock or government bonds. Mr. Porter emphasized that there is no bright line rule but believes 30 days should be sufficient. Mr. Porter noted that this issue is on the Service's audit check list.

Step Transaction: The step transaction argument came out of the Pierre case. The LLC was funded by the taxpayer. 12 days later, the taxpayer made a 9.5% gift and 40.5% sale of LLC interests to a trust created for his son and an equal gift and sale to the trust created for his daughter. The Service argued that the simultaneous gift and sale to each child's trust should be aggregated for valuation purposes. The valuation should be of a 50% interest, not a 9.5% and 40.5% interest (note the Service did not argue that the children's interests should be aggregated). This can have significant implications on valuation. In the Pierre case this resulted in a 3% change (38% to 35%). The taxpayer had a valuation expert and the government did not, which may have prevented a harsher result. In addition to the valuation issue, this can have implications in regard to Section2036 and whether the sale is for adequate and full consideration. Mr. Porter recommended separating the funding of the trust and sale of interests by at least 30 days and the next tax year is even better. He also recommended not tying entity distributions to the note payments associated with the sale to avoid a Section 2036 argument that the donor retained the right to income. The preferred approach would be for the entity distributions to be different in time and different in amount when compared to the note repayments.

Annual Exclusion Gifts: The Service has argued that gifts of interests in family limited partnerships or LLCs do not qualify for the annual exclusion with mixed results. The Hackl case involved strange facts where the general partner had broad discretion as to partnership distributions and the terms of the partnership were seen as somewhat unusual. However, the Price case put the issue back on the table. In Price, the transfer restrictions and distribution provisions were fairly typical and there had been relatively significant distributions made to the partners. The Wimmer case involved similar facts to Price but the court found the partnership would generate income, a portion would flow to the donees, distributions would be made for tax liabilities and there was a history of partnership distributions. Mr. Porter recommended requiring distributions for partners' tax liability. He also mentioned that he is ok with the granting of Crummey powers or a put right. Mr. Porter indicated that this is on the Service's radar and should be on yours. There may be better ways to utilize the annual exclusion gifts and the issue can be avoided.

Section 2036: The Section 2036(a)(1) argument has been the silver bullet for the Service and is the most litigated issue at the present time. Mr. Porter noted that there have been 30-34 cases involving Section 2036 and the taxpayer has won approximately one-third and the Service has won approximately two-thirds. If the Service is successful, the results can be draconian with all of the entity assets being brought back into the taxpayer's estate. This is made even worse by the potential estate inclusion with no marital deduction.

Mr. Porter reviewed Section 2036 and the relevant cases. Mr. Porter stated that in every case that the taxpayer has won, the taxpayer has satisfied the bona fide sale for adequate and full consideration exception. This is a two prong test. To meet the Adequate and Full Consideration test, the interests received must be proportionate to the value of the property contributed and the value of the property contributed must be credited to the capital accounts. To meet the Bona Fide Sale test, there must be a significant and legitimate non-tax reason for creating the entity. This is in affect a smell test as to whether there were real non-tax reasons for creating the entity.

Mr. Porter reviewed several successful non-tax reasons from the recent cases: (1) centralized management [Stone, Kimball, Mirowski, Black]; (2) involving next generation in management [Stone, Mirowski, Murphy]; (3) protection from creditors/failed marriage [Kimball, Black, Murphy, Shurtz]; (4) preservation of investment philosophy [Schutt, Murphy, Miller]; (5) avoiding fractionalization of assets [Church, Kimball, Murphy]; (6) avoiding imprudent expenditures by future generations [Murphy, Black].

Mr. Porter also reviewed the factors considered by the courts in applying Section 2036(a)(1): (1) non pro rata distributions; (2) personal expenditures with entity funds; (3) personal use assets; (4) payment of estate tax or estate expenses; (5) inaccurate books and records; (6) insufficient assets outside of partnership. Mr. Porter prefers not to see personal use assets in the entity. If it contains personal use assets, there should be a lease and lease payments made. Recommends utilizing a separate entity for personal use assets so not to taint business assets. He also mentioned the IRS is requesting and reviewing the books and records of the entities. Mr. Porter also stressed the importance of keeping enough assets outside of the entity so not necessary to dip into the entity assets.

Mr. Porter reviewed the Section 2036(a)(2) argument which involves the retained right to designate the persons who will possess or enjoy assets contributed or income from assets contributed to the entity. This generally involves distribution powers. Mr. Porter noted that investment powers are not subject to Section 2036(a)(2). Mr. Porter reviewed the taxpayer victory in the Cohen case. If the distribution power can be exercised arbitrarily and capriciously, then it may be subject to Section 2036(a)(2). If it is subject to cognizable limits (fiduciary duty), then no such right. Mr. Porter compared this to the Turner case which involved absolute discretion to make distributions where the taxpayer lost the 2036(a)(2) argument. Mr. Porter said he is often asked whether the senior family members should serve as general partners. He prefers that they not be general partners but understands client desires and generally ok if don't negate fiduciary obligations. Mr. Porter advises a business judgment with ascertainable standards for distributions. Mr. Porter noted that 2036(a)(2) could be applied to co-general partners since the language of the statute says alone or in conjunction with any person. However, it generally has been raised by the Service with a sole general partner.

Preparation for Audit: Mr. Porter emphasized that preparation for audit begins at the estate planning level. The Service issues broad requests including all documents relating to the creation of the entity from any attorney, accountant or firm involved in recommending the creation of the entity. Your files could be subpoenaed, including emails. You may be required to testify about the reasons for creating the entity (Mr. Porter always calls the attorney to testify). The best evidence of the non-tax reasons comes from the contemporaneous correspondence with the client. Help your client by detailing the non-tax reasons for creating the partnership in such correspondence. It is ok to discuss the tax reasons but also talk about the non-tax reasons. You should also assume that any communication with the clients or any expert is discoverable.

Appeals Coordinated Issues Settlement Guidelines: Mr. Porter reviewed the Appeals Coordinated Issues Settlement Guidelines ("Guidelines") that were issued by the National Office of the Internal Revenue Service on October 20, 2006. The Guidelines indicate that the IRS Appeals is focusing on four basic issues: (1) validity of the partnership or LLC under Sections 2036 and 2038; (2) valuation; (3) indirect gifts; and (4) penalties.

Formula Clauses: Mr. Porter noted that since the reversionary clause in the Proctor case was struck down as being against public policy, the tax landscape has changed dramatically. Due to the changes in the law after the 1944 Proctor decision, we now commonly use formula marital deduction clauses, formula GST transfers, split interest charitable trusts and formula transfers to a GRAT. Mr. Porter reviewed the recent formula transfer cases and the different formulas clauses used in them. Mr. Porter distinguished the formula allocation clauses which involved 3 parties (donor, primary donee and excess donee) with the defined transfer cases which involve only 2 parties (donor and donee). He contrasted the McCord case which relied on the donees (not the donor) reaching an agreement as to the value of post transfer, with the Christiansen and Petter cases which based value on as finally determined for Federal estate (or gift) tax purposes. Mr. Porter then reviewed the Wandry decision which used a formula to fix the value of the gift with the number of units being adjusted if "a final determination of a different value is made by the IRS or a court of law." Mr. Porter generally agrees with the decision in Wandry and noted that semantics are important. Mr. Porter noted that if he was drafting a Wandry style formula clause, he would base the value on "as finally determined for Federal estate (or gift) tax purposes" as was done in Christiansen and Petter. Mr. Porter indicated a preference for the allocation clauses (3 party) as opposed to the 2 party clauses, if client is amenable. The excess amount may pass to: (1) a public charity or donor advised fund; (2) a private foundation [self-dealing rules make difficult]; (3) a lifetime QTIP; or (4) a GRAT. An alternative option is to have a price adjustment clause as was approved in the King case. Mr. Porter indicated that if using a trust for the excess amount, he prefers to have different trustees and different beneficiaries from the primary donee trust. Mr. Porter expects that the IRS will continue to aggressively fight these cases and was surprised they didn't pursue the appeal in Wandry.

Tax Reporting: Mr. Porter recommends reporting non-gifts and you will need to file a gift tax return if the formula clause uses "as finally determined for Federal gift tax purposes. The disclosure must be consistent with the formula used and Mr. Porter recommends quoting the formula in the appropriate gift tax return schedule. For income tax purposes, you may want to consider a protective claim in the event the amount passing to charity may change or if use the as finally determined for Federal gift tax purposes. This is not necessary for a McCord type formula clause, because the value is determined by the donees post transfer.

Mr. Porter concluded his presentation by reviewing the potential legislative changes which included changes to Section 2704(b) to eliminate valuation discounts for closely held entities with passive assets and changes to the grantor trust rules which would cause estate tax inclusion.

As always, this was an excellent program with a great speaker offering practical advice combined with wonderful materials.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 15

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html.

In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers the balance of the Thursday afternoon sessions, those being Special Session III-F on Charitable Giving, Fundamentals Program #4 on the Income Taxation of Life Insurance, and Special Session 4-C on the Use of Self-Settled Trusts with Pre-Nuptial Agreements. The next Report will cover all of the Friday morning sessions.

Special Sessions III (Continued), Thursday, January 17, 2013 Session III-F
2:00 - 3:30 PM

When Charities Say “No” – And What to do Next

Presenters: Jerry J. McCoy, Kathryn W. Miree
Reporter: Jason Havens

Cash contributions to charity are comparatively simple, but as clients seek to contribute assets such as life insurance, closely-held business interests, or artworks, they are often surprised to find that the charity may not accept the gift. This interactive session will provide perspective on this trend, review the underlying reasons why this happens, and find ways to achieve the best result for your client and the gift. This report covers the significant highlights.

Mr. Jerry McCoy was unable to co-present at this presentation due to an earlier accident. We are advised that he is recovering well. Please feel free to send him a card if you know him. He has served on the Institute’s Advisory Committee for years. Like a trooper, Jerry's co-presenter, Ms.
Kathryn Miree, delivered the entire presentation all on her own and did a fine job.

Kathryn opened by highlighting the reasons why charities refuse gifts, including the potential for liability and lawsuits, “thorny” non-cash assets (either due to inexperience or inability to accept), and specific gifts with inappropriate purposes (at least for that charity). Ms. Miree mentioned several cases that involved protracted litigation, including the Philadelphia-area Barnes case, the Robertson case against Princeton, and others.

She explored the issues revolving around non-cash assets. These are more popular gifts now that the economy is suffering, with donors unwilling or unable to give more cash. Sometimes these make perfect gifts from the donor’s perspective because some produce no income, and some are unneeded or unwanted assets. Nevertheless, the charity might face challenges, such as the ability to analyze the appropriateness of the non-cash gift, staff time to handle acceptance and/or liquidation, and late-in-the-year gifts of this type.

Ms. Miree recounted the “life insurance gone awry” case involving Mr. Boone Pickens. Oklahoma State became involved in what was apparently a charity-owned life insurance (CHOLI) situation. The university, which was listed as the university, obtained the policies through financing provided by Lincoln National Life and secured by a $10 million gift by Mr. Pickens. The financial outcome became burdensome, and the university cried foul. Even so, the district court found in favor of the insurance company.

Ms. Miree suggested alternatives where the charity cannot accept non-cash gifts for a variety of reasons, particularly the charity’s inexperience or lack of staffing to do so. Community foundations can sometimes help with non-cash gifts. She also recommended Mr. Bryan Clontz of Charitable Solutions, LLC, who specializes in these types of “thorny” assets.

She concluded with a brief tour of her attached sample gift acceptance policies, which are also available via her website. These policies feature helpful guidance to any charity trying to review the appropriateness of a gift. Her appendix also included an asset checklist and a chart for “FINDING THE RIGHT ASSET FOR CHARITABLE REMAINDER TRUSTS.”

3:50 - 5:20 PM, Thursday, January 17, 2013 –
FUNDAMENTALS PROGRAM #4
(Runs concurrently with Special Sessions IV)

So, You Think You Know Everything About the Income Taxation of Life Insurance? Think Again! (Financial Assets Series)

Presenters: Donald O. Jansen, Lawrence Brody
Reporter: Mike Stiff

This session examined why income tax exemptions for death proceeds and cash value accumulations are not always available; the deductibility of interest on policy loans is hardly ever available; accessing cash values may or may not be tax-free; the definitions of policies for tax purposes are actuarial; policy exchanges aren't always tax-free; Crummey trusts have income tax consequences; and explored other little known aspects of the income taxation of policies. The materials consisted of an 81 page outline prepared by Don Jansen and a 38 page outline prepared by Larry Brody. This report covers the more significant highlights from this presentation.

Don Jansen and Larry Brody began their presentation by reviewing the two general rules of life insurance, the death benefit is not subject to income tax and the cash build-up during lifetime is not subject to income tax. However, the definition of life insurance is very important to knowing whether you qualify for both of these special rules. There was no statutory definition of life insurance prior to the early 80's. The case law, most notably Helvering v. LeGierse, focused on risk shifting (for the insured) and risk sharing (for the insurer). In 1982, Section 101(f) was adopted and provided a temporary definition of life insurance that only applied to universal life insurance policies. In 1984, a more comprehensive and permanent definition of life insurance was adopted with the enactment of Section 7702 which applies to all policies issued after December 31, 1984.

In order to qualify as life insurance for income tax purposes under Section 7702, a policy first must be valid under applicable state law and then must meet either the Cash Value Accumulation Test or the Guideline Premium Test. The Cash Value Accumulation Test requires that the cash surrender value of the policy may not, at any time, exceed the net single premium that would have to be paid at such time to fund future benefits under the contract. The Guideline Premium Test requires that the sum of the premiums paid under the policy may not exceed the "guideline premium limitation" which is the greater of: (1) the guideline single premium, which is the amount that would be required to fund future benefits under the policy, based on certain assumptions; or (2) the sum of guideline level premiums, which is the level amount that would have to be paid over a period not ending before the insured reaches age 95, based upon certain assumptions. In addition, in order to meet the guideline premium test, the ratio of policy death benefit to cash value must fall within the cash value "corridor" established by a table. The Cash Accumulations Test generally is used for traditional whole life policies and the Guideline Premium Test generally applies to other types of cash value policies such as universal and variable policies.

How can an adviser know whether a policy satisfies one of these definitions? Mr. Jansen and Mr. Brody indicated that the short answer is no adviser can, since the answer requires ongoing actuarial calculations. Generally, you have to rely on the insurance company and most policies now state whether the policy will comply with Section 7702 at issuance. It also is possible to request a letter from the insurance company stating that the policy will comply with Section 7702 at issuance and will be administered for the life of the policy to comply with Section 7702. It may also be possible to request indemnification from the insurance company if it fails to comply.

Section 7702A was added in 1988 to address investment-oriented single premium policies. If during the first seven policy years, on a cumulative basis, more premiums are paid into the policy than would be required to pay the policy up at the end of seven years, the policy will be a Modified Endowment Contract ("MEC"). For tax purposes, a MEC is still considered "life insurance" if it complies with Section 7702, and the death benefit will continue to qualify for the income tax-free exclusion. However, lifetime distributions from a MEC do not receive the same income tax treatment as lifetime distributions from non-MEC policies.

Section 101(a) provides the general rule that death benefits from life insurance not subject to income tax. This does not apply to interest paid on the death benefit after the insured's death which represents ordinary income. There are several exceptions to the general rule, most notably the transfer for value rule of Section 101(a)(2) which applies when the policy has been transferred during the insured's lifetime for valuable consideration. If the transfer for value rule applies, the death benefit will be subject to income tax to the extent the death benefit exceeds the consideration paid for the policy and premiums paid by the buyer. However, there are exceptions to the exception. The transfer for value rule doesn't apply to a transfer to the insured, a partner of the insured, to a partnership in which the insured is a partner, or a corporation in which the insured is a shareholder or officer. Note there is not an exception for a shareholder in a corporation of which the insured is a shareholder. The transfer for value rule also does not apply if the transferee's basis in the policy is determined in whole or in part by reference to the transferor's basis in the policy (the carryover basis exception). This would apply to transfers between spouses or to a grantor trust (Rev. Rul. 2007-13). You may still have a problem if there are loans against the policy and treated as part sale and part gift. Other exceptions to the general rule of Section 101(a)(1) include early death benefits under Section 101(g) and Employer Owned Life Insurance ("EOLI") under Section 101(j).

For surrenders of a life insurance policy, basis is not taxed and cash value over basis is taxed as ordinary income. Sale proceeds are generally treated the same as a surrender. However, life settlement proceeds that exceed basis are taxed as capital gains under the viatical settlement exception. One question that has arisen with the sale of a policy is whether basis is reduced by mortality costs. The IRS has taken the position that the basis in the policy should be reduced by the mortality costs. Most practitioners disagree. This would be similar to requiring a homeowner to reduce his or her basis for the fair market rent he or she enjoyed prior to the sale of the home. How would the taxpayer calculate the mortality costs? This remains an open question and no definitive guidance has been provided.

Mr. Jansen and Mr. Brody reviewed the non-taxable exchanges of policies under Section 1035. This generally allows a policyholder to exchange one policy for another without recognizing any of the built-in gain on the first policy, regardless of whether the new policy is issued by a different carrier, has a different face amount, has a different cash value, or is a different type of policy. However, to qualify you must have the same insured. You are not allowed to exchange a policy on the insured for a policy on the insured's spouse or for a joint and survivor policy. In addition, any cash or other non-like kind property ("boot") received will be taxable. If you have a loan against the policy, discharge of indebtedness will be considered boot and will be taxable. Mr. Jansen and Mr. Brody reviewed the effect a 1035 exchange will have on the various grandfathering rules that apply to certain aspects of life insurance, some of which are lost and others which are not affected.

Mr. Brody reviewed the grantor trust rules as they apply to a trust holding life insurance. Mr. Brody also reviewed whether practitioners can rely on Section 677(a)(3) which provides for grantor trust treatment if the trust income may be used to pay premiums on policies of insurance on the life of the grantor or grantor's spouse by a non-adverse party. Mr. Brody reviewed the prior case law and the questions that exist as to what portion of the trust would be a grantor trust. While this appears very straight forward on its face, there is limited authority and many unanswered questions. Generally, you will want to include other grantor trust triggers to insure grantor trust status. However, what should be done to insure can shut off the power in the future? Mr. Brody suggested requiring the distribution of all income to the beneficiaries, keeping the income separate or requiring the consent of an adverse party before income could be used to pay premiums. Mr. Jansen reviewed questions as to how the income would be treated in a year that grantor trust status changes (fractional share for the year or actual income received before change). Mr. Jansen also reviewed the income tax consequences of Crummey withdrawal powers on the powerholders under the grantor trust rules.

This was a very interesting program that provided the general rules in a simple and succinct manner for new practitioners while still providing enough detail to scare experienced practitioners. The materials are well done and provide a continuing reference source for future questions. Great program!

Special Sessions IV (Continued), Thursday, January 17, 2013 Session IV-C
3:50 – 5:20 PM

Protecting Assets Without the Pre-Nup: Use a Self-Settled Trust (Focus Series)

Presenter: Daniel S. Rubin
Reporter: D. Scott Robinson

When a pre-nuptial agreement appears impractical or impossible, undesirable and potentially unenforceable, complementary or alternative strategies, such as the self-settled trust, can counter the problems presented by the possibility of a future ex-spouse.

This report highlights Daniel S. Rubin's presentation regarding the ability to protect assets without the use of a prenuptial agreement through the use of self-settled spendthrift trusts. Mr. Rubin was not advocating that prenuptial agreements not be utilized. Instead, Mr. Rubin advised that prenuptial agreements be used where possible and possibly combined with self-settled spendthrift trusts where appropriate. Mr. Rubin's materials are very well researched and provide an excellent supplement to his outstanding presentation.

Mr. Rubin began with an introduction to the financial consequences of divorce. In general community property states, of which there are nine, divide community property evenly in the event of a divorce. Separate property, however, is not divided. In most community property jurisdictions, community property includes all income and property acquired during the marriage unless such property was received by gift, bequest or inheritance from a third party for the exclusive benefit of one spouse.
Separate property is before the marriage and in some community property jurisdictions the income from such property. Some community property states, like California, are strict division states where the applicable statutes require the courts to divide community property equally between the parties. Other community property states, like Wisconsin, create a presumption that the community property is divided equally--but allow the courts to consider other factors, other than marital misconduct, in determining a final property division between the divorcing parties.

The remaining 41 states are common-law or equitable distribution jurisdictions where the value of the marital property is divided between the spouses based on a variety of equitable factors. Common factors include the respective income and property of each party, the length of the marriage, respective age and health of each party and the financial and nonfinancial contributions made to the marriage by each party. Mr. Rubin pointed out that rarely does marital fault enter in the equation in an equitable property division. Mr. Rubin stated that the common standard for marital fault (if it is considered) is that the fault must shock the conscience of the court, and that one can only imagine what it takes to shock the conscience of the court when dealing in divorces.

Most common-law property jurisdictions are known as dual property states. Dual property refers to the distinction between separate property and marital property. Generally, separate property is property acquired prior to the marriage and property acquired by one spouse by gift, bequest or inheritance during the marriage. Marital property is all property acquired by either or both spouses during the marriage other than separate property. Mr. Rubin mentioned that there is a minority of common-law property jurisdictions that do not distinguish between separate and marital property. These states are known as “kitchen sink states” or “all property states” because all property owned by either spouse is subject to division upon divorce.

Mr. Rubin then discussed the use of validity of prenuptial agreements.
Prenuptial agreements are valid in all 50 states and allow parties to agree on a variety of matters. Mr. Rubin used the example as providing for the mundane, such as to the responsibility for taking out the garbage, or more specific use to provide for property division in the event of divorce or property rights at death. These are all issues which cannot be covered with a self-settled trust. Mr. Rubin said that is because the relationships of the parties in prenuptial agreements are susceptible to attack due to duress, undue influence and unconscionability.

Mr. Rubin made the excellent point referring to the California statute which validates a marital agreement unless it is unconscionable. How many parties interests in a prenuptial agreement will unite to be unconscionable? Another excellent point Mr. Rubin made regarding prenuptial agreements is the difficulty of negotiating such agreements, which include each party being separately represented and there having been full financial disclosures (one or both parties may not want the other to know their financial situation).

Next, Mr. Rubin briefly discussed the history of spendthrift trusts and the amount of creditor protection that such trusts afford the beneficiary. Spendthrift protection is protection from a beneficiary’s creditors as to the attachment of the beneficiary’s interest in the trust. In this regard, Mr. Rubin began with a discussion of the United States Supreme Court’s 1875 decision in Nichols v. Eaton, which was the first case that signaled a break with English common law on spendthrift trusts. Mr. Rubin stated that the basis for the decision was that an individual is free to dispose of his or her property in any manner in which they wish and that such freedom should not being impeded by the person receiving such property holding it subject to the debts of such person creditors. Mr. Rubin then discussed discretionary trusts and combining discretion with the power of a spendthrift protection. In this respect Mr. Rubin discussed two cases with egregious facts: Sligh v. First National Bank of Holmes County and Scheffel v. Krueger. These two cases both illustrated two points. The first point is that sometimes public policy will outweigh spendthrift protection for certain creditors. These creditors are known as exception creditors. The second point is that the legislatures of many states have severely limited those creditors to instances of gross negligence and intentional conduct.

Mr. Rubin then took up the topic of self-settled spendthrift trusts. Such trusts are trusts in which the settlor is also a potential or actual beneficiary. Under the common law self-settled trusts would not afford the settlor spendthrift protection. In other words, all creditors are exception creditors under common law for self-settled trusts. It did not matter what the trust was funded with, who the trustee was, or whether the settlor had creditors at the time the trust was created.

Mr. Rubin then mentioned that previous to 1997 self-settled trusts were only permitted offshore. Alaska and Delaware both passed self-settled spendthrift trust acts in 1997. Now 13 jurisdictions allow self-settled spendthrift trust protection. Please note at the outset that the 13 jurisdictions are not exactly the same as the jurisdictions commonly referred to as domestic asset protection trust jurisdictions. These states are Alaska, Delaware, Hawaii, Missouri, Nevada, New Hampshire, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Virginia and Wyoming (this reporter’s favorite).

To illustrate the common threads in domestic self-settled spendthrift trust acts, Mr. Rubin discussed the Delaware Act as the model for many other jurisdictions acts. Delaware’s self-settled trust act is called the “Qualified Dispositions in Trust Act” (the “Delaware Act”). Under the Delaware Act a settlor may retain a beneficial and interest in a trust while protecting the trust assets from the settlor’s creditors by having the trust instrument provide that the interest of the settlor in the trust property or income may not be transferred, assigned pledge or mortgage, whether voluntarily or involuntarily, before the qualified trustees actually distribute the property or income to the beneficiary. To receive this protection a settlor must transfer property to a qualified trustee. A qualified trustee is an individual resident of Delaware other than the settlor or a Delaware trust company. Mr. Rubin noted that not all trustees are required to be Delaware trustees under the Delaware Act. However Mr. Rubin suggested that is likely preferable that all trustees be Delaware trustees to avoid having another court in a jurisdiction that does not have self-settled spendthrift trust protection gain jurisdiction over the trustee.

The Delaware Act allows the settlor to maintain fairly broad powers. These include the power to remove and appoint qualified trustees or trust distribution advisors. The settlor may also retain the power to act as an investment advisor, a power to veto a distribution from the trust and testamentary special power of appointment without jeopardizing the protection afforded under the Delaware Act.

Of significance to premarital asset protection planning, the Delaware Act provides that there is a statute of limitations applicable to actions brought against property subject to a qualified disposition under the Delaware Act. In general, there is a four-year statue limitations upon a creditor bringing an action if the creditor's claim arose before the establishment of the Delaware self-settled spendthrift trust. In addition, the Delaware Act provides for two classes of creditors that are specifically exempted from the self-settled spendthrift trust protections (exception creditors). One of these classes of creditors is a person in which the settlor has caused death or personal injury or property damage on or before the date of the establishment of the trust. The other class of creditors relates to indebtedness on account of an agreement or court order to the settlor's spouse or former spouse or children (i.e. child support obligation). Mr. Rubin noted that a spouse or former spouse under the Delaware Act includes only persons to whom the settlor was married at or before the time the self-settled spendthrift trust was created. Mr. Rubin noted that the jurisdictions of Alaska, Nevada, Virginia and Wyoming did not include spouses as exception creditors. The presentation materials highlight the nuances of each jurisdictions act.

Mr. Rubin noted that the most significant issue with respect to challenges for self-settled spendthrift trust is a conflict of law analysis. Mr. Rubin pointed out that Section 270 of the Restatement (Second) of Conflict of Laws has been cited by several courts for the proposition that self-settled spendthrift trusts should not be upheld. However, Mr. Rubin also discussed the Riechers v. Riechers case, which is a New York case involving a matrimonial matter, where the New York State Supreme Court stated that the trust involved had been established for legitimate purpose of protecting the family assets and that the Court did not have jurisdiction over the trust and that such issues as to whether the wife was entitled to any trust property should be left to a Cook Islands' courts to decide. Mr. Rubin's presentation materials contain significant discussion of how likely the conflicts of laws hurdle is for self-settled trusts.

To conclude, Mr. Rubin did an excellent job summing up his presentation as follows: With the first time marriage divorce rate near 50% (and increasing) and the second and third time marriage divorce rates being much higher combined with the financial uncertainty of property division upon divorce, the need for premarital asset protection is only going to grow. Prenuptial agreements have their own flaws such as duress, undue influence and unconscionability. Put on top of those issues the fact that prenuptial agreements are not always favored by individuals getting married and that another tool is needed. Fortunately, 11 states have self-settled spendthrift trust statutes that do not name a spouse as an exception creditor if the self-settled trust is established and funded prior to the marriage, and therefore such trusts will provide significant protection for assets in the event of the divorce. Mr. Rubin also advised as a best practice to utilize both a prenuptial agreement and self-settled spendthrift trust in tandem.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 16

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html.

In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report covers all of the Friday morning sessions, the last ones on the program. Those included Choate on Rehabilitating IRAs, Venet on Planning for Unusual Assets and Blattmachr and Zeydel on Using Live Insurance to Fund Estate Taxes plus The Wrap Up. The next Report, which will be our final Report for 2013, will cover the vendors of note who exhibited at this year's Heckerling Institute.

Friday, January 18, 2013

Friday, January 18, 2013
9:00 – 9:50 AM

How to Rehabilitate an IRA with a Shady Past

Presenter: Natalie B. Choate
Reporter: Kimon Karas

Does your client's IRA suffer from excess contributions, botched rollovers, prohibited transactions, titling snafus? The IRS has four weapons to punish IRA misdeeds (disqualification; 6%, 10%, or 50% penalty). How to use rollovers, re-characterizations, corrective distributions, waivers, and more to beat the rap. Here are the significant highlights from this informative presentation. Natalie's earlier Fundamentals Program #2 presentation on retirement benefits is in Report #12.

Natalie started her presentation with a discussion of the ATRA 2012 extension of the IRA charitable rollover. This provision expired as of the end of 2011 and was extended 'retroactively' by ATRA to 2012 and for 2013. For 2012, any distribution made after 12/31/12 and prior to 2/1/13 is deemed made on 12/31/12 and any distribution from an IRA to an individual after 11/30/12 and prior to 1/1/13 may be treated as a charitable distribution if i) such portion is distributed in cash to a charity and ii) before 2/1/13. Person must be 70 1/2. Contribution must be made directly from IRA to charity and charity must be a public charity not a donor advised fund or private foundation. This distribution does not run though one's 1040 and thus is not income nor is there a corresponding charitable deduction taken for the contribution. A couple of available alternatives including a 'cleanup' for 2012 distributions or missed distributions. If a person took an MRD in December of 2012, they can now decide to treat the 2012 distribution as a charitable distribution provided they act before 1/31/13. Alternatively, if a person failed to take 2012 MRD he can make a charitable distribution before 1/31/13, treat as a 2012 distribution, and avoid 50% penalty. Charitable rollover is also available for calendar year 2013.

Natalie then gave her typical entertaining and information presentation only to be interrupted at least twice by fire alarm drills... She discussed ways to avoid IRA mistakes to avoid the i) deemed distribution rules; ii) the 6% excise tax penalty; iii) 10% premature distribution penalty; and iv) 50% penalty for failing to meet MRD with various examples illustrating her points.

1. Attempted Roth Conversion of MRD. An MRD cannot be converted to a Roth IRA. A conversion is treated as a rollover and an MRD cannot be rolled over. The failed conversion is treated as a distribution of the MRD amount to the owner and an excess contribution subject to the excess contribution penalty of 6% and potential 10% early distribution penalty if individuals is under age 59 1/2. The 6% excise tax can be avoided with a timely 'corrective distribution' of the excess contribution plus the earnings thereon (generally October 15 of year following contribution) and if not cured the excess contribution continues to accrue the 6% penalty until the amount is absorbed or withdrawn.

2. Investments that can cause issues. Standard brokerage 'boilerplate' documents can give rise to issues. Where brokerage documents provided that the IRA provider is granted a security interest in all participants accounts at that institution, i.e. cross collateralization for margin accounts, etc. in a DOL Advisory Opinion 2009-03A, this was a prohibited transaction. IRS issued a blanket exemption for these transactions provided that the cross guarantees are not actually activated against the IRA accounts. If a person is recommending an investment or opportunity that one is not sure of, one can always go to the DOL to seek an advisory opinion or even an exemption. Natalie cited Adler, where client wished to place IRA into FLP so family could aggregate investment dollars to meet certain investment adviser's minimum fee (who happened to be Mr. Madoff), where DOL approved the transaction.

3. Other administrative issues:

A. Title to IRA must be in the name of a bank custodian, not the John Doe IRA.

B. Rollover of wrong asset. A rollover must be of same asset.

4. Undistributing the dollars. PLR 201139011 IRS issued a very

favorable ruling that Natalie cautions may be just a sympathy ruling that should not be relied on. The facts of ruling were father died who left IRA to minor daughter. Mother as custodian for daughter instead of implementing an inherited IRA rollover, cashed in the IRA and spent all funds in IRA on herself. New guardian is appointed, sues mother, recovers IRA funds, and IRS allows funds to go into an inherited IRA.

5. Waiver of MRD penalty. First analyze the facts to determine if in fact there is a penalty situation. Review the distribution history. For example in 2009 recall the minimum distribution rules were relaxed for that year. If a potential penalty situation, the penalty can be waived by the IRS if the payee establishes to satisfaction of Commissioner that i) shortfall was due to reasonable error and ii) reasonable steps were taken to remedy the shortfall. Waiver request is made on IRS Form 5329. Payee need not pay penalty as a condition to filing waiver request.

A. Watch statute of limitations. In order to start the statute of limitations the return for this purpose is the IRS Form 5329. Simply filing one's 1040 for the year in question and placing a -0- on the line for "additional tax on IRAs, other qualified plans, etc." does not start statute. See, Paschall, Tax Court Docket #10478 (7/5/11).

6. Waiver of 60-day penalty for rollover. IRS may waive penalty where the failure to waive such penalty would be against equity or good conscience, events beyond the reasonable control of the individual subject to such requirement. Natalie cited an example where the individual lost his job, placed his house for sale and upon the closing of the sale would use sale proceeds to make the rollover and the house burns down prior to closing, where the IRS denied a hardship waiver.

Friday, January 18, 2013
9:50 – 10:40 AM

From the Bazaar to the Bizarre: Planning for and Administering Unusual Assets in Estates and Trusts (Emerging Assets Series)

Presenter: Allen L. Venet
Reporter: D. Scott Robinson

From artwork to firearms to wine cellars, our clients have an unending array of assets. Taxes are important, but people really care about personal items. This session presented useful techniques, with particular attention on assets that pose unusual risks for fiduciaries. What you don't know just might hurt you.

As the sun was beginning to set on the Institute, Mr. Allen Venet gave an outstanding and entertaining presentation on planning and administering personal effects. Booze, firearms, bald eagle feathers, fido, mama's engagement ring and the like are all items of personal effects, which likely receive very little thought during the estate planning process. However, it is not unusual that personal effects, which often have sentimental value attached, have not been properly planned for and ultimately cause a rift in the family.

Mr. Venet believes that not enough attention is paid to personal affects.
Consider the boiler plate in estate planning documents that deals broadly with all tangible personal property. There are individuals, like ranch owners, who operate as sole proprietorships. In such cases significant business assets, such as all the cattle, would pass underneath the broad personal property clause (generally beginning was “All my tangible personal property”). Another common phrase “I leave my personal effects to be divided among my children as they agree” may be opening the door for the difficult child to veto every distribution of personal effects. Mr. Venet suggested making cash distributions from the residual estate to equalize the value of personal effects that are being distributed by a lottery method. Without an equalization provision, the individual that chooses first often picks the most valuable item and leaves those that follow without similar value items to choose.

With respect to administration issues, Mr. Venet began with a discussion of firearms. Firearms have many issues associated with them. Mr. Venet stated that it is not unusual for firearms to disappear before an inventory is prepared. Mr. Venet also brought up the point that gun laws tend to focus on possession of firearms rather than ownership. In that respect, fiduciaries have certain risks associated with firearms. For example, certain individuals cannot legally possess firearms (e.g., convicted
felons) and certain individuals should not possess firearms (e.g., illegal drug users, individuals with mental defects, etc.). How does a fiduciary know whether an individual receiving a firearm cannot or should not possess a firearm? Is the fiduciary responsible for knowing? Mr. Venet discussed that the standard related to liability for transferring possession of firearms as what the fiduciary knows or has reason to know. Obviously, such a standard requires a fiduciary to inquire deeper before making a transfer of firearm.

There are also a myriad of issues related to the type of firearm being transferred. For example, some firearms like short barreled rifles and automatic weapons are subject to different laws regarding their transfer and possession. For another example, there are legal issues with transferring firearms across state lines, which may require a firearm transfer to be facilitated through the use a firearms dealer.

Next Mr. Venet discussed the fact that there are strict regulations controlling the distribution of alcohol and such laws are intentionally written to be broad. Due to such regulations distributing something like a wine collection may pose significant issues for the fiduciary. Also related to alcohol is whether it is even possible to sell a wine collection where non-legal issues such as how well wine as part of a wine collection was stored need to be determined satisfactorily before a buyer would be interested.

There may be other items that are simply illegal (e.g., illegal drugs or contraband) or heavily regulated (e.g., ivory). An interesting point that Mr. Venet discussed was the fact that even if illegal such items may still be taxable. Keep in mind that illegal means that there is no (legal) market for such assets. Such illegal items may have significant value. Mr. Venet hammered this point home by discussing an unreported New York case involving the estate of a deceased New York art collector who had as part of art collection a stuffed bald eagle. The executor of the collector’s estate took the position that the value of the piece containing the bald eagle was zero because as the executor could not sell it. The IRS took the position that the value was $65 million. Ultimately, the issue was resolved by a settlement agreement where the piece containing the bald eagle was donated to a museum.

Personal effects are involved in every estate. Mr. Venet's presentation materials contain many other examples, which he did not have time to discuss during his presentation. Clearly, the issues surrounding personal effects deserve attention by planners and raise issues for fiduciaries during the administration process. Planners should pay more attention to the planning for personal effects to ease the administrative burden. Great presentation!

Note: Regarding planning for gun collections, WealthCounsel (an exhibitor at Heckerling) has recently released a software program called GunDocx that is specifically designed to deal with planning for fire arms.

Friday, January 18, 2013
10:50 AM – 12:00 PM

Using Life Insurance to Fund Estate Taxes: A Counterintuitive Approach & A Wrap-up of the Key Presentations of the Week

Presenters: Jonathan G. Blattmachr, Diana S.C. Zeydel
Reporter: Kimon Karas

Life insurance is often purchased as a solution to funding estate taxes.
However, it can be inflexible and costly and is seldom a perfect antidote.
This presentation discussed how insurance should be considered in conjunction with alternate lifetime estate planning solutions and proposed alternative atypical insurance designs that can offer substantially more efficiency and flexibility. It is something every planner needs to know for his or her clients. The session also included a review of key presentations from the week. Here are the significant highlights.

The presenters stated there is a sea change in the estate planning transfer tax area with ATRA 2012 and the permanency of the exemption amount (with indexing) and portability. The panelists cited that at most 2/10ths of 1% of the population will need transfer tax planning. The panelists cautioned there were certain areas/techniques not addressed by ATRA 2012 but may appear in further tax legislation/deficit reduction, including the following:

1. GRAT legislation to extend minimum term for GRATs. Reports from the Hill this legislation has already been drafted.
2. Grantor trust rule revisions, changes. The target is the installment sale to grantor trusts.
3. Valuation discounts, ie, minority and lack of marketability discounts.
4. Long term trusts.
5. Long term GRATs.

Now may be the time to implement any such strategies if a client is considering doing so, rather than waiting.

I. Portability-Paradigm Shift.

A simple will can accomplish a couple's desires, together with a basis step up in 2nd spouse's death.

Contra reasons for using a simple will, all to surviving spouse.

A. GST exemption at risk as portability does not apply to GST. Consider assets to QTIP type trust where one could allocate GST through reverse election; depending on timing of deaths may not want to elect marital deduction to take advantage of prior credit. Alternative considerations a QTIP type trust with disclaimer or Clayton trust. Diana mentioned in doing a significant amount of financial modeling in 2010 with portability, that portability and planning is almost neutral; the big shift is GST if it is wasted on first death.

B. Do not overlook the nontax benefits of trusts for family planning.

II. Income Tax Changes.

Estate/Trust reaches top income tax bracket of 39.6% at $11,950 together with the 3.8% Medicare surtax on net investment income (NII). Jonathan mentioned an article to be published authored by Jonathan, Diana and Mitch Gans on planning with the Medicare surtax. A discretionary trust offers opportunity of income shifting among beneficiaries that is not available in direct gifts to spouses, beneficiaries together with the 65-day distribution rule. Capital gains can only be shifted if capital gains get into DNI. Two ways for capital gains to get into DNI, if pursuant to the regulations in the instrument allows for 'deemed distributions' or state law allows and today the only state law that allows is Alaska. Jonathan referred to the May 17, 2004, article he and Mitch Gans authored in Tax Notes. Consider adding a charity for a Section 642(c) deduction so long as distribution to charity has 'economic effect.'

III. Death of the grantor of a grantor trust should not be a realization event for income tax purposes. Reference CCA 200923024 which was a 'toggle' into a grantor trust. Turn off grantor trust status watch if there is a lurking gain with liabilities in excess of basis. Similarly there should be no gain is a swap is entered into prior to death exchanging a high basis asset for a low basis asset.

IV. Formula Clauses. Panelists suggested a formula allocation between a taxable trust and a marital trust. Wandry in their view is good law. Even with Wandry, Jonathan suggested utilizing a clause as follows: the transfer is the lesser of i) all of the units/interest (being transferred) or ii) those units/interests that have a value for federal transfer tax purposes of $X. The excess can pass to a 1. GRAT (watch however if there is a failure to timely pay annuity amount IRS treats a failed GRAT); 2.if transferor is married (US citizen) directly to spouse or marital deduction trust (not QTIP); 3. Trust for donor where donor retains special power of appointment; 4. Formula disclaimer where property reverts to grantor. File the gift tax return and attach statement in accordance with Regulation Section 301.6501(c)-1(4) that transaction is not taxable to start statute.

V. Panelists discussed Turner II and possible mismatch between estate inclusion under Section 2036 and marital deduction and even potential double inclusion under both 2033 (including the LP interests that are in estate) and 2036 the transfer. Jonathan's solution is for 'poorer' spouse to create small LP; monied spouse contributes to LP no gift between spouses;

monied spouse should not be treated as 'transfer' for 2036 purposes. For further discussion Jonathan referred to the article this past summer in the Journal of Taxation.

VI. Incomplete gifts. In light of CCA issued earlier this year, panelists suggested aggregating both a testamentary special power of appointment together with a veto power to bolster incomplete gift.

VII. Basis Adjustment on Surviving Spouse's Estate. Jonathan mentioned the Super Charged Credit Shelter Trust and referred to the article in the July, 2007 article in the Probate and Trust Law Journal.

VIII. Panelists concluded with a summary of the earlier presentations of nontax topics, including the presentation on marital agreements. It is extremely important that there be coverage of not only income tax, transfer tax advice but in combination with a domestic relations attorney. Oftentimes prenuptial agreements are drafted by attorneys from one or the other disciplines and to the detriment of the client for failing to consider the other discipline. Also in light of the aging population (10,000 people per day are attaining age 65) it is not only important that clients have documents in place but also expressions of personal wishes, where they wish to live, care, etc.

IX. Jonathan concluded the presentation with reference to his written materials and an accompanying chart. His thesis is most people purchase life insurance for the wrong reasons for estate taxes. People run the numbers and then back into an insurance amount. Often the amount as time passes is way understated for what initially was intended to address, how to predict future estate taxes, rates, and most policies are cancelled prior to the insured's death. His solution for the most efficient cash value policy, assuming there is a significant chance the insured will live to or beyond actuarial life expectancy, is a policy that provides the minimum initial death benefit, but maximum cash value.

The Institute concluded at noon with Tina announcing record attendance for this year's Institute of 2,895 attendees.

Our on-site local reporters who will be present in Orlando in 2013 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq. of Clark Skatoff, PA in Palm Beach Gardens, Florida; Mike Stiff Esq. of Baker Hostetler in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

The editor again in 2013 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

Heckerling 2013 - Report No. 17 (Vendors) FINAL REPORT

As we have done in January for the last sixteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 47th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 14-18, 2013 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in >2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html. >In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL http://mail.americanbar.org/archives/aba-ptl.html by registered subscribers to that List or by anyone at the List's public archive at http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB.

Editor Comments: This Report is our final Report for Heckerling 2013. It covers the vendors of significance who were present in the exhibition hall this year. A complete list of all of the vendors was sent out with our Preliminary Report on 12/20/12 and rebroadcast to PTL and TAX on 1/14/13.

We hope you have enjoyed this year's Reports as much as we enjoyed bringing them to you.

ERRATA re Report #1: One of our readers has questioned the accuracy of the following statement in the Report on Recent Developments:

"For unearned income that exceeds certain limits, there is now a 3% surtax. Those limits are $150,000 for individuals or $250,000 for couples. For trusts, the surtax applies to all trusts with unearned income in excess of $12k unearned income."

The reader states that, "based on my other research, the surtax is actually 3.8%, not 3%, and applies to unmarried taxpayers with AGI of over $200,000, not $150,000."

Since the Reporter for this Session has yet to send us a requested clarification regarding the above and this is our Final Report, we are publishing the above so the rest of the readers can make their own judgment call on the accuracy of what was previously reported.

Announcement The 2013 6th Edition of Solo and Small Firm Legal Technology Guide - Critical Decisions Made Simple has just been released by the ABA Law Practice Management Section. It is authored by Sharon D. Nelson Esq., John W. Simek and Michael C. Maschke, all officers of Sensel Enterprises, Inc. (sensei@senseient.com). The introduction is written by Ross L. Kodner Esq., the President and Founder of MicroLaw, a legal technology consulting firm. It sells for $89.95 ($54.95 for LPM Section Members) and is available from the ABA Web Store at http://apps.americanbar.org/abastore, Product Code #5110758.

The Vendors

January 14 - 17, 2013
Reporters: Craig Dreyer and Jason Havens

The vendor hall seemed even busier for this the 47th Heckerling Institute. The American Tax Relief Act of 2012 (ATRA) evidently brought back the record large crowds because no vendors mentioned attendance issues this year. As a minor "twist," the vendor hall switched places with what was formerly the main presentation ballroom. Our assigned reporters roamed the exhibit hall over the four days the exhibition was open in an attempt to glean what is new and different with the vendors this year. The below reports, which have been rearranged topically for easier reference, reflect the significant highlights of their investigations and vendor interviews. The vendors are listed in no particular order within their assigned groups.

Document Assembly

Lawgic

Lawgic is an estate planning drafting program which now has specific drafting software for 15 states and a state neutral version. In the past year they have added state specific versions for Arkansas, Colorado, Kentucky, Michigan, Ohio, West Virginia, and Tennessee. They recently added a Spousal Lifetime Access Trust template as well. They are updating the user interface and also updated the Florida Power of Attorney and added a military power of attorney.

Lawgic offers free training and support. The cost is $1,800 for state specific versions, and $1,200 for state neutral version. In addition you can buy a separate module for the Florida durable power of attorney and advance directives. Heckerling attendees also received a 20% discount if the package was purchased during the conference. They have also recently teamed up to offer discounts on affiliate services through CrummeyService and My Persona Data Safe. For more information go to the Lawgic website at www.lawgic.com or call (877) 252-9442.

WealthCounsel

WealthDocx by WealthCounsel is a comprehensive estate planning document assembly system put out by WealthCounsel. They are constantly updating their WealthDocx documents and provide everything from simple wills to family limited partnerships. They also have a niche practice planning system called GunDocx for firearm legacy planning. For more information about WealthDocx please visit their website at www.WealthCounsel.com or call (888) 659-4069.

ElderCounsel by WealthCounsel provides estate planning attorneys with critical resources to competently serve the needs of the nation's aging population and those with special needs. Members receive a comprehensive drafting system known as ElderDocx, which includes the Irrevocable Medicaid Asset Protection Trust . Members also gain access to marketing materials (such as client-friendly handouts, sample client newsletters, and sample presentations), bi-monthly newsletters for referral sources, monthly teleconferences and webinars, and an extensive legal research library. ElderCounsel also provides immersion sessions to bring professionals up to speed on Medicaid planning techniques. For more information visit www.eldercounsel.com or call (888) 789-9908.

In addition Wealthcounsel is coming out with Business Docx this year, which will include all the documents necessary for planning for the medium and small sized businesses. They have teamed with Lou Mezzullo to prepare all the documents necessary for advising a small and medium sized business.

Wealthcounsel also recently purchased the domain www.estateplanning.com to assist with client outreach and marketing.

Interactive Legal Suite

Interactive Legal Suite has three separate packages. Wealth Transfer Planning (WTP), Elder Law Planning and Essential Estate Planning. The Wealth Transfer Planning module is implementing a contemporary or plain language version of their documents in the near future. They also have their irrevocable trust system to draft trusts for a husband and wife and ensure they are not reciprocal. The full Wealth Transfer Planning package includes options such as an FLP, FLLC, and Grantor Trusts. Purchasing one license gives you access to multiple state versions in the Wealth Transfer Planning module. In addition to the full Wealth Transfer Planning option they have a simpler and more inexpensive version called Essential Estate Planning.

They also have an Elder Law Planning drafting system. This document assembly system provide documents for over 50 states and the District of Columbia. Pricing is available by contacting them and they have a 10% Heckerling discount.

Also Natalie Choate has recently joined the Interactive legal team. Further information on Interactive Legal can be found at www.interactivelegal.com or by calling (321) 252-0100.

Thomson West

Thomson West's drafting system Drafting Wills and Trust Agreements (DWTA) uses GhostFill vs. HotDocs to create and modify estate planning documents. It uses a straightforward interview process and provides a plain English explanation of each documents section for clients. They also provide flow charts to enable clients to better understand their estate plan. They also include some state specific language provisions for their documents.

Thomson West also provides its common ProDoc software including the Lipman's Wills and Trust library online through a Westlaw subscription. This software includes all the typical estate planning documents in the familiar ProDocs environment on the cloud.

For more information please go to Thomson West website at www.west.thomson.com .

Fiduciary Accounting & Tax Returns

TEdec

TEdec is a full featured Trust and Estate Accounting Software. One time data entry is available for court inventories and accountings, management reports, estate tax and income tax returns that are available through a bridge to Lacerte Tax Software. New for this year is a bridge to CCH Prosystems fx for Forms 706 and 1041. They have also added ESI for online valuations. TEdec also allows you to outsource to them all your fiduciary accounting needs, where they can provide Data Entry, Court Inventories, Accountings, and Releases for you. They are compliant with official forms for NY, PA, NC, FL, CA, and the National Fiduciary Accounting Standards. They also offer webinar training. They offer multiple pricing models. Their most common fee structure is a $395 flat fee per year licensing fee, with an additional $65 per entity processing fee.

For more information please got to their website at www.tdec.com or call 800-345-2154.

Lackner Group 6 in 1 Estate and Trust Administration

They have rolled out an all new more simplified user interface for this year by bringing in professionals to revamp their program. With one entry of data, 6-in-1 allows a user to produce a US Estate Tax Return, Inventory, U.S. Fiduciary Income Tax Return, State Fiduciary Income Tax Return, State Inheritance/Estate Tax, Account (Trustee's and Executors) and Inventory. The system also includes a Form 709 preparer. It also supports probate forms for Pennsylvania and North Carolina. They offer Account, Inventory, State Death Tax, Federal 706 Death Tax, Federal 1041 Fiduciary Income Tax and State Fiduciary for $2,000 or $1,700 during the Heckerling Institute. They also offer varying portions of the 6-1 system individually.

They also provide a program called DecoupleCruncher in order to perform estate tax calculations in multiple states.

For more information, go to The Lackner group web site at www.lacknergroup.com or call (800) 709-1041.

Gillett Publishing LLC - GEMS

Gillett Publishing (http://www.gillettpublishing.com) remains one of the favorites of accountants and attorneys, offering estate tax (GEM706) and gift tax (GEM709) return software. They also offer a fiduciary accounting application (GEMAcct) to prepare estate and trust accountings compliant with the National Fiduciary Accounting Standards. Gillett always seems to lead the pack in responding to releases of draft and/or new forms. Their website features training guides (PDF format) for their software titles, which are useful to see how the system works.

They interface with EVP Systems, Inc. for securities valuations and one or more of the commercially available Form 1041 preparation programs for preparing the form.

For further information, go to Gillett Publishing (http://www.gillettpublishing.com) or call (888) 436-7706.

Bloomberg BNA:

Bloomberg BNA (http://www.bnasoftware.com) continues to offer their Estate & Gift Tax 706 Preparer and 709 Preparer.

They seem to still be featuring their Estate & Gift Tax Planner, which produces reports, PowerPoint presentations, flowcharts, and the likes of Mr. Larry Katzenstein calls it "an indispensable tool in [his] practice," which is quite an endorsement.

Calculations

Thomson West

Intuitive Estate Planner by Donald H. Kelley provides a picture of clients estate plans with various tax calculations. It is one of the most sophisticated and comprehensive calculation illustration programs available in the estate planning area and it allows you to compare among various planning techniques. They offer packages with various levels of capability.

For more information please go to Thomson West website at www.west.thomson.com .

Brentmark Software:

Brentmark (http://www.brentmark.com) will be updating their entire suite of programs during the week of January 21, 2013. These ATRA-related changes will impact Brentmark's Estate Planning Tools, Estate Planning Quick View, Charitable Financial Planner, Retirement Plan Analyzer, and PFP Notebook. Their powerful Kugler Estate Analyzer (comparable to the BNA Estate & Gift Tax Planner, above, and CCH's ViewPlan Advanced, below) was updated on January 18, 2013.

CCH ViewPlan Advanced

It was reported on the ABA-PTL Discussion List on December 20, 2012 that effective January 1, 2013 CCH will discontinue offering ViewPlan and ViewPlan Advanced.\

CharitablePlanning.com:

Emmanuel Kallina's CharitablePlanning.com (http://www.charitableplanning.com) remains an excellent research tool. Emil has added more charitable calculators and now estate and related calculators for members to use. The in-depth handbook on charitable planning has also been expanded.

Estate Valuation & Pricing System, Inc. (EVP)

EVP's latest 7/25/12 Version 7.3.1 of EVP Office, which includes Estate Val, CostBasis and CapWatch, is now available for free download. With it you can quickly and inexpensively obtain accurate valuations for all sorts of stocks and bonds and mutual funds, or you can outsource it to EVP to do for you. The IRS has been their exclusive customer since 1996. Several of the fiduciary accounting programs use this service.

For more information, see www.evpsys.com.

Evaluation Services, Inc. - Appraise

Appraise is the other securities valuation service of note. They offer a monthly Newsletter that is free for the asking. Their product was recently reviewed by Don Kelley in his Technology Column in Trusts and Estates magazine (www.wealthmanagement.com). They offer periodic interactive training webcasts too. Appraise has recently gone into a collaboration with Thomson Reuters ONESOURCE estate and trust administration system using ESI-DIRECT.

For more information, see www.appraisenj.net.

Miscellaneous

My Personal Data Safe

This year my personal data safe added Xchange Port which allows professionals to manage and share information with clients very easily. The new Xchange port has an easier interface for advisors to upload documents for their clients as well. This system allows clients and advisors to store personal family information and upload copies of birth certificates, deeds, medications, stock, life insurance and much more. Clients can update family, medical, financial, legal and insurance information on line. Then access can be limited to certain portions for your advisers, physicians or family members.

This system also provides a place to store electronic passwords for easy access to those who you wish to have access. In addition, if a client passes away, their family can have access to any passwords or information they believe they may need after death. In addition, they offer a medical access card that first responders can access and pull up all your shared emergency medical information, including medications and emergency medical history.

They offer lawyers a package for $3,500 per year which allows you to give clients an unlimited number of accounts.

For more information please go to the My Personal Data Safe website at www.mypersondatasafe.com or call 813-793-7146.

Northern Trust

Northern Trust provides information to professionals through their wealth advisor portal. Here you can sign up for newsletter and they even provide sample estate planning forms at no cost through this website. For more information please go to the Northern Trust Website at http://wealthadvisor.northerntrust.com.

CrummeyService.com, LLC:

CrummeyService (http://www.crummeyservice.com) offers automated withdrawal notices to beneficiaries, funding notices to grantors, and premium payment notices to the trustee. CrummeyService records, processes, and stores all of this trust data.

John Hancock Financial

John Hancock Financial (http://www.johnhancock.com) is one of the premier life insurance and financial services companies in the country. However, you might not know about the superb resources that their Advanced Markets Group (http://jh1.jhlifeinsurance.com/JHSalesNet/Advanced_Markets_Group/Advanced_Markets_Overview) produces. Led by veteran expert Randy Zipse, JD, their team produces some of the best e-newsletters in the estate planning arena. The publication is known as "Central Intelligence," and is available freely as a subscription and also via their website (http://jh1.jhlifeinsurance.com/JHSalesNet/Advanced_Markets_Group/Central_Intelligence). The Advanced Markets Group website also features a relatively sophisticated online estate tax calculator, a "Concept Navigator" with all kinds of summary resources and fact finders (everything from business planning to charitable planning to wealth transfer planning), and their "Business Analyzer" that guides you through life insurance-funded business planning techniques.

Alaska Trust Company:

Alaska Trust Company (http://www.alaskatrust.com) has exhibited at the Institute for years. What you might not know, however, is that you can sign up freely to view sample forms via their helpful website, which also includes various articles and newsletters on the active developments in Alaskan trust and estate law over the past fifteen years or so. After you register, you may view and download internal Alaska Trust Company forms, such as guides to help you open an account and even an "Affidavit of Solvency." Then you will see "Sample LLP & LLC Documents," which feature a partnership agreement and an operating agreement, respectively. For some curious reason, the operating agreement and nearly all of the other sample forms contain "NY" in their auto-text footers...! Joking aside, most of us know and highly respect the well-known brother of Alaska Trust Company president and CEO Doug Blattmachr. The excellent "Sample Trust Documents" feature everything from an Alaska-based grantor retained annuity trust (GRAT) to an Alaska community property trust, with a summary of all sample trust documents preceding the sample documents and annotations in all of them.

American Bar Association Section of Real Property, Trust and Estate Law:

This list has for years been provided by the RPTE Law Section of the ABA (http://www.americanbar.org/groups/real_property_trust_estate.html), which was exhibiting as usual at the Institute. They have more new books relevant to trust and estate practitioners, including one by 2013 Institute faculty member Mr. David Dietrich (one of RPTE's leaders) on conservation easements.

Contact ABA Publishing at http://apps.americanbar.org/abastore for more information.

STEP

STEP stands for the Society of Trust and Estate Practitioners and is a worldwide professional association comprised of attorneys, accountants, trust officers, tax specialists, bankers and financial advisors who have involvements in the international arena. Their website has an online directory for its members. The organization provides education, training, representation and networking for its members.

For more information visit their website at www.STEP.org .

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Herb Braverman Esq., Attorney At Law, in Beachwood, Ohio; D. Scott Robinson Esq. of Long, Reimer, Winegar & Beppler LLP in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida, Kristin Dittus of S.D. Merriitt & Associates, PC in Boulder, Colorado, and Sarah Butters of Holland and Knight, LLP in Tallahasse, Florida.

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