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Heckerling 2017

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Heckerling 2017 – Report No. 6

As we have done in January for the last twenty years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 51st Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 9-13, 2017 at the Orlando World Center Marriott Resort and Convention Center in Florida. A complete listing of the proceedings and the Institute's 2017 brochure are available at www.law.miami.edu/heckerling and the listing of the proceedings was also published as part of **Introduction Part 2** that was distributed on 1/4/17.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Heckerling Reports Website, as we have since the 2000 Institute. Those Reports from 2000 to 2016 can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Editor's Comments:

This Report 6 begins our coverage of the Wednesday afternoon Special Sessions, starting with Special Session #1-A 1. Included in this report are four Special Sessions, 1-A on GRATS, 1-B on Trusts Drafted to Minimize Fiduciary Risk, !-C on International Recent Developments, and 1-D on CLATs.

Coverage of the Wednesday Special Sessions will continue in Report #7.

A rather interesting article by Matthew Talbot entitled "*Avoiding These Celebrity Mistakes with Your Estate Plan*" that was published in Lamorinda Weekly on December 28, 2016 has been brought to our attention by Prof. Gerry W. Beyer via his Wills, Trusts & Estates Blog on the Law Professors Blogs. Makes for some interesting reading.

Wednesday, January 11th, 2:00 to 3:30 pm

SS 1-A Frozen Tasting Menu — A Comparison of GRATs, Sales to Grantor Trusts and Other Estate Freezes [FS]
Presenters: Carlyn S. McCaffrey, N. Todd Angkatavanich and S. Stacy Eastland
Reporter: Kimon Karas

This program explored the currently available techniques for freezing the value of an individual's assets while shifting future income and appreciation to trusts for members of the individual's family. It covered the advantages and disadvantages of each of these approaches. Here are some of the key details.

This program compared the various freeze techniques of GRATs, IDGTs, and Preferred Partnerships. Freeze planning includes containing the value of the assets in the grantor's estate; protect against possible future loss of valuation discounts, shift appreciation to beneficiaries perhaps in multi-generational GST exempt manner, and provide cash flow to grantor in the form of a promissory note payments, annuity payments, or "frozen" preferred coupon payments. For a more detailed discussion of GRATS, I refer you to McCaffrey's presentation, Getting Gratifying GRAT Results, and to a more detailed discussion of preferred partnership freezes, I refer you to Angkatavanich's presentation, Warming Up to Partnership Freezes-Multiple Planning Applications with This Versatile Technique.

The panelists compared each of the techniques under various scenarios.

Tax treatment. A GRAT tax treatment is most certain-creature of statute, regulations and case law; sale to IDGT less certain-not statutorily blessed and Preferred Partnership Freeze more certain-Section 2701 compliant.

Gift. GRAT zero taxable gift is possible; sale to IDGT some gift is required; and Preferred Partnership Freeze possible gift.

Payments to grantor. GRAT annuity payment is fixed; sale to IDGT note payments may be amortized or structured as interest only with a balloon at end of term, i.e. 9 or 15 years-caution failed or missed payments may support argument that not true debt; Preferred Partnership Freeze, preferred return is fixed and cumulative although statute allows for a 4-year grace period for "qualified payments".

Hurdle rate. GRAT must use higher 7520 rate (120% of AFR); sale to IDGT, lowest rate, AFR Rate (mid-term), and Preferred Partnership Freeze, highest payout rate based on theory of RR 83-120. Stacy suggested combining techniques using arbitrage between various hurdle rates; i.e. sale of a retained preferred interest to a grantor trust. Panelists cautioned on sale for a SCIN.

Mortality Risk. GRAT has the greatest mortality risk-if grantor dies during the term the a portion or perhaps all of the remaining assets will be included in the grantor's estate; sale to IDGT less mortality risk but 2036 argument lurking, i.e. that the note itself constitutes a retained income interest in the assets; Preferred Partnership Freeze, less mortality risk (when preferred partner dies, estate receives basis adjustment) but 2036 considerations.

GST Planning. GRAT not effective due to ETIP; sale to IDGT, multi-generational planning available; Preferred Partnership Freeze, multi-generational planning (best used with the common interest).

Valuation. GRAT allows for valuation adjustment; sale to IDGT-valuation risk as to the FMV of transferred asset(s); Preferred Partnership Freeze, valuation risk as to preferred coupon rate and as to value of capital contributions upon entity formation.

Risks. GRAT-Greenbook proposal but probably not relevant with Republican President and Republican control of Congress; sale to IDGT risks are varied including note being characterized as illusory debt-not true debt; Sections 2701/2701; Preferred Partnership Freeze, Section 2701 considerations and requirements.

The Panelists then discussed some planning alternatives.

One technique is to combine two statutory techniques, GRAT and preferred partnership that uses GRAT planning with a way to allocate GST exemption from inception. Transaction is a preferred partnership freeze-parent/grantor making a capital contribution to partnership for a preferred interest and GST exempt trust making a capital contribution for the common interest followed by the parent/grantor transferring the preferred interest to a long term GRAT.

The panelists then discussed a couple of other alternatives of using GST exemption with a GRAT. One alternative is for a non-skip remainderman to sell for full consideration a remainder interest to an existing grantor trust that he created; and slightly before the termination of the ETIP period he purchases that remainder for full consideration. Another alternative is grantor creates a GRAT in which he is the remainderman; the he sells for full consideration his remainder interest to an existing GST grantor trust.

As the program was winding down Stacy quickly discussed a couple of other alternatives one, that he referred to as a "Leveraged Asset Intentionally Defective Grantor Trust"-technique marries the attributes of a single member LLC and a sale to a grantor trust, without some of the considerations of a sale to a grantor trust. Transaction: 1) taxpayer contributed financial assets to an LP; 2) taxpayer contributes LP interest, private equity investments, and cash to a single member LLC in exchange for a note equal to 90% of the value of the contributions and managing and non-managing member interests for the balance of the contributions. Existing grantor trusts may also contribute assets to the LLC; 3) taxpayer then makes a gift (without a sale) most, if not all, of his non-managing member interests to a new grantor trust with a defined value allocation assignment. Some of the advantages include:

-- Smaller chance that the retained note will be recharacterized as a deemed retained interest in the donee trust under equitable tax principles because of too much leverage.

-- If the note is recharacterized as equity because of too much leverage it will be recharachterized as an equity interest in the LLC and not a retained interest in the grantor trust.

-- There may be greater valuation discounts in comparison with sale to grantor trust.

-- Income tax disregarded entity status of the LLC can be turned "off" or "on again" by adding or redeeming member interests that either turn a single member LLC status "off" or "on again."

The outline goes through a number of additional transactions with more detailed analysis including what Stacy refers to as a Double Leveraged Freeze With a Discount: Leveraged Asset Grantor Retained Annuity Trust ("LAGRAT') and Triple Leveraged Freeze With a Discount: Contribution of a Family Entity's Preferred Interests and Growth Interests to Two Different LAGRATs (that is a true mouthfull).

Wednesday, January 11th, 2:00 to 3:30 pm
SS 1-B Do Not Feed After Midnight: Structuring and Drafting Trusts and Administration to Minimize Fiduciary Risk
Presenters: Lauren J. Wolven, Todd A. Flubacher and Stacy E. Singer
Reporter: Joanne Hindel

This panel evaluated options for reducing trustee liability from the inception of a trust, addressing selection of the governing law, choice of trustee, and division of duties among fiduciaries. But risk management does not end with drafting, and the panel also discussed issues surrounding due diligence both at the trust acceptance phase and during ongoing administration.

Choosing a trustee

Stacey started the presentation by indicating that often the last topic that is addressed by the settlor is the choice of trustee. Often people think of naming their children – practitioner should address the pros and cons of individual versus corporate trustees. An individual trustee will have the most information about the settlor's intentions and the beneficiaries' situations. Individuals may stretch terminology within the trust to fit the settlor's plans. Individuals will have difficulty being impartial and going beyond history of interacting with family members. Individuals do not live forever. In dynasty trusts individual trustees do not have the familiarity with the settlor and do not have institutional knowledge regarding administration of trusts.

Advantages of corporate trustees – they do not die and have deep pockets. Corporate trustees do not have to be as concerned about popularity with beneficiaries. Corporate trustees may be less flexible and may be more expensive.

One solution is to name co-trustees to combine an individual with a corporate entity. In doing so however, it is important to address disagreements between two co-trustees.

Todd suggested a directed trust is an alternative to co-trustees because disagreements among co-trustees can hinder effective administration. Using a directed trustee will make it clearer regarding the duties of the various fiduciaries.

Stacey said that the trust agreement should always include a removal power and resignation authority in the document. Consider however limitations on the removal power so that beneficiaries cannot continuously shop for a more favorable trustee.

Lauren suggested that the agreement might provide for a “retirement age” for individual trustees but authorize the beneficiaries to opt for continuation of the individual trustee if appropriate. This would provide a mechanism for addressing the trustee whose capacity is slipping.

Definition of incapacity in the document should also address incapacity of the trustee. Consider having the trustee execute a HIPAA release.

Consider all the gaps when appointing for successive trustees.

Accepting the role of trustee

What should the trustee do to determine whether he/she it will accept the role of trustee?

Stacey said anyone nominated as trustee should consider first the trustee duties generally but also engage in a thorough and careful review of the trust terms to determine if there is any ambiguity.

Understand the potential tax and legal issues with administrative and dispositive terms and consider changes if possible.

Lauren said in addition to a careful review of the trust terms be sure to review the trust’s assets and make sure they can be managed under the trust terms.

Are there unique assets such as real estate or closely-held business interests and are there any concentrated positions?

Do the trust terms address actions of prior trustees- is there any obligation to redress actions of the prior trustee?

Materials include a list of questions to ask when considering the role of trustee.

If you are assuming the role of a successor trustee determine who has been getting statements and whether the proper parties are kept informed pursuant to the law that governs the administration of that trust.

Stacey said to watch out for employees of the trust. Be sure to understand the family dynamics and consider how many prior trustees have served.

She quoted Dick Cheney: what are the known knowns/ what are the known unknowns and what are the unknown unknowns?

Lauren said when considering individual trustees address self-dealing issues – family members who become trustees might be inclined to take actions that benefit them but are not in the best interests of the trust's other beneficiaries.

If the settlor is aware of personality conflicts try to dissuade him from naming two individuals as co-trustees with the idea that they will learn to work together.

Todd discussed the Mennen Company case which dealt with the ability of one individual to represent others. Details about the case are in the materials.

Lauren also said this case is also frightening because the individual co-trustee squandered the trust's assets and the corporate co-trustee, which had misinterpreted the directed trust provision, was held liable and had to make the trust whole.

Hostility between the trustee and the beneficiaries

Courts will review the hostility to determine whether the trustee is not acting in good faith.

How can the trustee be protected in order to do his/her/its job?
When drafting provide the settlor's intent and pair that with an exculpation clause if the trustee acts in good faith absent willful wrongdoing or gross negligence.

Lauren mentioned Osborne v. Griffin and Holt v. Griffin – Kentucky cases that address conflict of interest.

Choice of law and conflict of laws issues

Todd then discussed choice of law and conflict of laws issues

The validity of the trust's creation can be challenged if you have a settlor in one jurisdiction who attempts to establish a trust in another jurisdiction without any connection to that jurisdiction.
Construction of the trust addresses the interpretation of trust terms – definitions of terms within the trust agreement are a good idea.
Administration of the trust relates to trustee powers and other administrative issues which might change if the situs of the trust is changed.

Three pronged approach to determine trust's situs or place of administration: domicile of trustee, intention of the settlor and place where the trust is administered.

Be careful when moving a trust's administration because it could end up giving multiple courts jurisdiction over the trust and multiple states the ability to tax the income from the trust.

Todd then moved to a discussion about directed trusts and referred to the materials that provide a chart of the states' statutes that address directed trustee status. He also mentioned that there are 8 states- some large ones like California and New York that do not have directed trust statutes.

The Uniform Laws Commission is close to finalizing a Uniform Directed Trustee Statute.

Stacey pointed out that the best statutes are the ones that address the trustee's duty to monitor as well as manage the assets.

Both the Restatement Third and UTC continue to impose upon the trustee a duty to monitor the actions of others who might handle the investments if what they do constitutes a breach of fiduciary duty. In effect, therefore, the trustee has a duty to continue to oversee even if supposedly directed.

Other states that have adopted stronger directed trust statutes fall into two categories: "off the rack" statutes which define the duties of the directed trustee clearly or "enabling" statutes which give the settlor the ability to draft language regarding the directed status.

In closing, Stacey said best practices include written direction letters to the trustee if there is an outside advisor or fiduciary. For individual trustees the greatest difficulty is adequate documentation.

Wednesday, January 11th, 2:00 to 3:30 pm
SS 1-C International Recent Developments [INT]
Presenters: Scott A. Bowman, M. Read Moore and Dina Kapur Sanna
Reporter: Michael Sneeringer

International tax planning has been in a dramatic state of change. This panel addressed recent developments and focused on sweeping trends in global tax transparency.

Mr. Bowman introduced the panel and provided a roadmap of the overall presentation. He began his remarks by speaking about the Panama Papers.

Mr. Bowman noted Form 8938. He indicated the threshold matter of determining whether there is a specified entity. He noted that the taxpayer then has to determine whether the specified entity owns specified foreign financial assets.

Mr. Bowman discussed the PFIC Final Regulations which had recently been promulgated. He highlighted such subtopics as the constructive ownership requirement and Form 5571.

Mr. Bowman described the changes to ITIN requirements and their expiration and renewal. He discussed the problems with Form 8971 (consistent basis reporting) and ITINs.

Mr. Bowman discussed Code Section 2801 and expatriation. He defined what a covered expatriate is and how that definition coincides with expatriation and the "2801 Tax." He indicated that there may be privacy and due diligence issues related to covered expatriates which become challenging transparency and disclosure issues. He also discussed indirect transfer and chain of title tracing issues related to disclosure and transparency.

Mr. Bowman discussed the *Topsnik* tax court case. He highlighted the pitfalls this case illustrated with regards to not filing Form 8854.

Mr. Moore spoke next. He began his remarks by discussing what forms foreign citizens must file for income tax purposes when filing in two (2) separate jurisdictions.

Mr. Moore gave a brief update on the foreign account tax compliance act ("FATCA") and FATCA legislation. He described the way FATCA works (Regulations and nuances). He did not spend a lot of time on this because it has been around since 2010.

Mr. Moore discussed three (3) technical updates with regards to FATCA. He described how some FFIs need Global Intermediary Identification Numbers ("GIINs"), with there being one technical exception. He indicated updates to intergovernmental agreement ("IGA") issues, including that some countries have not finished the IGA (agreements entered into but not signed; agreements signed but not implemented or enforced), while other countries have not done an IGA at all (IRS Announcement 2016-27). He indicated that FATCA may be repealed by the government once President-Elect Donald Trump takes office.

Mr. Moore discussed the common reporting standard ("CRS"). He gave an overview of what the CRS scheme does and why it is unnecessary. He indicated that it may spell the end of offshore "bank secrecy laws" as we currently know it. Mr. Moore used the BVI as an example of a jurisdiction that adopted CRS (in addition to about 50 other countries). He noted that there appears to be no comfort as to whether the reported data will remain safe from thieves and unwanted eyes.

Mr. Moore gave an update on anti-laundering rules and bank registries around the world. Mr. Moore's remarks focused on disclosure and the potential for databases which would share information amongst affiliated countries.

Mr. Moore discussed tax fairness and the elimination of tax competition. He indicated that the EU is discussing particular ways of dealing with tax havens.

Ms. Sanna began her remarks by discussing U.S. taxation issues and FATCA. She noted that reciprocal IGAs do not require the U.S. to provide certain information to its counterparts, such as the disclosure of beneficiary information.

Ms. Sanna discussed the FinCen Regulations. She discussed proposed Regulations applicable to single-member LLCs. She described how single-member LLCs owned by non-U.S. individuals will have to obtain an EIN and file Form SS-4 (*i.e.*, the imposition of a reporting requirement).

Ms. Sanna discussed the Financial Action Task Force ("FATF"). She discussed the *Pasquantino* case and the implications the case's reasoning has continued to have on money laundering and tax avoidance. She noted that the government has indicated that the federal mail and wire fraud statutes cannot be used to establish intent to charge attorneys for tax crimes (this has to do with having clients that are not fully compliant in their home jurisdictions). She discussed ethical considerations for attorneys and how attorneys should follow their gut and either decline potential client relationships or withdraw from continuing matters in order to keep their reputations intact.

Mr. Bowman interjected that he has turned away clients or withdrawn from matters where the client has communicated or alluded to a hint of tax avoidance or non-compliance.

Ms. Sanna discussed the dilemma of having clients that want to hide money to protect families from ruthless governments or bad actors in those jurisdictions (instead of doing this planning to solely avoid taxes) and the lawyer's duty to turn these matters away.

Mr. Moore noted that lawyers are not subject to the same rules as bankers and have less checks with regards to anti-money laundering due diligence (as opposed to foreign lawyers).

The panelists concluded by asking the audience for a show of hands as to whether they have received inquiries from clients who have expressed a desire to move out of the U.S. following the 2016 election.

Wednesday, January 11th, 2:00 to 3:30 pm
SS 1-D Extraordinary, Efficient, Elegant, Evolutionary Annual Taxable Gifts Approach and Testamentary CLAT Remainder [CHR][FIN][FS]
Presenters: Richard S. Franklin and Lester B. Law
Reporter: Michelle Mieras

This presentation proposed that wealth be transferred to family during lifetime using the annual taxable gifts approach to entirely eliminate estate taxes. The panel also reviewed the merits of combining this approach with a zeroed-out testamentary CLAT to both eliminate estate taxes and endow the family's foundation. Through a quantitative analysis, the astonishing results were revealed.

Mr. Franklin compared this lecture to the story of Paolo Toscanelli, who centuries ago put a brass plate atop a cathedral dome, captured movements of the sun across the floor below, and used the information to update navigational charts which were ultimately used by Christopher Columbus in his efforts to get to the Spice Islands in 1492.

This is similar: The math may guide you where you want to go. If you start with the premise that it is much more beneficial to transfer assets to family during life, for both tax and non-tax reasons, and if the client can define the amount that they want to get to their family, you can crunch the numbers to see how to get them where they want to be using annual gifts paired with a CLAT funded at death. Mr. Franklin pointed out that the client should never pay estate tax, and that the federal gift tax is 28.6% cheaper to pay than the federal estate tax due to its exclusive nature.

Years ago, Mr. Franklin began playing with the idea that grantor trusts could be used to accomplish large transfers to family without paying gift tax (yes, even in Connecticut). A couple of years ago, he and Mr. Law, using Mr. Law's amazing spreadsheet skills, revealed through the numbers that it was far more efficient than they thought.

Before getting into the details, Mr. Franklin addressed the issue on everyone's minds: potential estate tax repeal. As he explains to his clients, the risks associated with moving capital through generations include investment risk, family risk (e.g., consumption, creditors), and tax risk (transfer, income, property, etc.). Moving assets into irrevocable trusts during clients' lives protects against those risks. Even in the era of potential estate tax repeal (or even in the event of estate tax repeal), the method remains a sound, long-term strategy because a) if repeal occurs, later reinstatement is likely, b) the strategy has asset protection benefits, and c) getting assets to family during life is becoming more significant as affluent people have a much higher life expectancy and inheritances are therefore often delayed. Mr. Franklin noted, however, that changes in tax and other laws should always be taken into consideration and factored into planning. Seize the opportunities to keep capital in the family as changes occur. He concluded by pointing out the hurdles to repeal, including budget issues, but noted that there is a 100% chance of some kind of change.

Mr. Franklin and Mr. Law spent some time presenting the results of the math using some whittled-down spreadsheets. They reviewed three planning scenarios, including family wealth of $250 million, $30 million, and $10 million. They demonstrated how by giving a small (relative to wealth) amount each year, ultimately more passes to the desired beneficiaries, and how using a testamentary CLAT could amplify the effect. With a private foundation as the CLAT annuity beneficiary, the family can essentially retain control of the assets at all times. In the $10 million scenario, they noted that the lifetime gifting solution works even without a CLAT. The point, they reiterated, is that you have to crunch the numbers to truly understand how the options work out.

Mr. Law then turned to the income tax component. When Mr. Franklin approached Mr.

Law with the overall concept, Mr. Law thought that income tax may negate the results. But, after thousands of columns of spreadsheets, he found that income tax does not impact the results over the long term. (And Mr. Franklin had Mr. Law repeat that Mr. Law was wrong, and Mr. Franklin was right.) The reason, Mr. Law explained, is that asset turnover ultimately brings the basis to about 75% of the fair market value over time, and over very long periods of time, income tax becomes insignificant in the calculations.

What kind of trust works with this lifetime gifting strategy? It must be irrevocable, and keep assets out of the estate. It must be a grantor trust, to take advantage of the hidden gem in the Code that allows the client to make unlimited gifts without transfer tax, by having the grantor pay taxes on income earned on the assets held in the grantor trust.

Although the illustrations presented contemplated gifts of cash, additional benefits could be recognized by transferring discounted assets. Mr. Law reminded us that concentration of assets grows wealth, diversification of assets preserves wealth.

Since we can't predict when a client will die, it was suggested that the instrument funding the CLAT at death should be flexible, providing a formula clause to ensure that a certain amount of wealth transfers to the client's family in the event that premature death prevents the long-term lifetime gifting plan from being completed. An alternative is to use life insurance to protect against early death.

What makes this strategy so great? 1. It's simple – just annual gifts and an irrevocable trust - and clients like simple. 2. If you do use cash gifts, the audit risk is virtually eliminated, as are adequate disclosure issues. 3. No potential notoriety.

Mr. Law then turned to some of the most critical factors in the process, including the size of the annual gift. Again, you need to run the numbers, which show that giving away too much during life could, in some circumstances, actually lead to less assets going to the family. The speakers cautioned against focusing on a particular asset or a particular point in time. This strategy is a long-term solution.

When Mr. Franklin wrote an ACTEC article in 2014 regarding this strategy, he realized that there were so many other potential benefits including the effect on a private foundation. By using a CLAT rather than making an outright large transfer to the foundation at death, the foundation can grow into its wealth over time instead of being unprepared for a sudden growth of assets. Additionally, the numbers show that the total amount transferred to the foundation is actually larger at the end of the CLAT term due to the payout requirements.

Mr. Franklin concluded the session by reminding us that just as Toscanelli never knew what Columbus would ultimately find as a result of the updated navigational charts, if you do the math you might be surprised what you will find for your clients.

The Reporters

Our **on-site local reporters** who will be present in Orlando in 2017 are **Joanne Hindel Esq.,** a Vice President with Fifth Third Bank in Cleveland, Ohio; **Kimon Karas Esq.,** an attorney with McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; **Craig Dreyer Esq.**, an attorney with Clark Skatoff, PA in Palm Beach Gardens, Florida; **Herb Braverman Esq.,** an attorney with Braverman & Associates in Orange Village, Ohio; **Kristin Dittus Esq.** a solo attorney in Denver, Colorado, **Michael Sneeringer Esq.**, an attorney with Akermn, LLP in Naples, Florida, **Michelle R. Mieras,** a Fiduciary Risk Manager with Bank of the West in Denver, Colorado, **Beth Anderson Esq,** an attorney with Wyatt, Trrant & Combs, LLP in Louisville, Kentucky, **Bruce A. Tannahill Esq,** a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and **Patrick J, Duffey Esq**, an attorney with Holland & Knight in Tampa, Florida.

The **Report Editor** again in 2017 will be **Joseph G. Hodges Jr. Esq.**, a solo practitioner in Denver, Colorado. He is also the Chief Moderator of the ABA-PTL discussion list.

