50th Annual Philip E. Heckerling Institute on Estate Planning
January 22-26, 2018
Report No. 2
(Tuesday 1/23/18)

Heckerling 2018
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

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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, other than the afternoon special sessions, 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 2018 – Report No. 2

As we have done in January for the last twenty one 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 52nd Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 22-26, 2018 at the Orlando World Center Marriott Resort and Convention Center in Florida. A complete listing of the proceedings and the Institute's 2018 brochure are available at www.law.miami.edu/heckering. Introduction Part 1 issued on 1/11/18 covered the Institute Opening Reception, its Scope, the Faculty, the Advisory Committee, the Sponsors and the Vendors, plus general information at the end about the Institute. Introduction Part 2 issued on 1/12/18 contained a complete listing of all of the proceedings of this Institute. This Report continues our coverage of the proceedings.

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. The Reports from 2000 to 2017 can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling.htm. 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.

Announcement: Tuesday morning InterActive Legal announced to its subscribers the release through the website www.EstatePlanning2018.com the release of a Pre-Publication Draft version of the forthcoming book Estate Planning Under the 2017 Tax Reconciliation Act that is co-authored by attorneys Martin M. Shenkman, Jonathan G. Blattmachr and Joy Matak, a good portion of which was presented as part of their recent webinar on the new Act.

Summary: This Report #2 begins our coverage of the general sessions that were held on Tuesday, those being on business succession, dynasty trusts, estate planning for a contest or difficult beneficiary and beyond private foundations.

The next Report #3 will continue the coverage of the Tuesday general sessions.

Tuesday, January 23rd
9:50-10:40
Presenter: Thomas W. Abendroth
Heckerling 2018

Business succession planning is the process of planning to exit the business, either through sale or through transfer to succeeding generations. This session examined selected tax and non-tax issues associated with exiting the business, and how planning must work with either form of exit. This report covers many of the more significant highlights from this session.

This presentation addressed the issues of business succession planning with the following five concepts or themes: flexibility, bifurcation, diversification, transfer tax savings, and non-tax factors.

1. Flexibility

The a successful business succession plan must be flexible and not tied to one strategy. The speaker provided the example that if you transfer all stock equally to trusts for children, there should be a mechanism to buy the stock from the other trusts in the event one child becomes the successor to lead the business. In addition, the planning attorney must use flexibility in the planning strategy as there is not a single plan that works for every business. Although the attorney may have a favorite or preferred method, that method may not be the best choice for each business. For example loan and GRAT transfers may not be the most advantageous plan for a businesses with poor cash flow.

2. Bifurcation

Separate equity from control of the business. The easiest way to accomplish this it to recapitalize the company so that there are voting and non-voting interests. This allows the current generation to keep control (the voting interest) while passing equity (the non-voting interest) down to next generation. Bifurcation also allows for management succession to be separate from equity succession. For example, the one child that is going to manage and run the business receives the voting interest but all of the children’s trusts receive non-voting interests.

The speaker also discussed the different methods of retaining control and how splitting the voting interests among different entities allowed for discount valuations because no single entity owned a controlling vote and as a way to avoid a valuation premium on the voting control. In light of the new tax act, discounts may or may not be beneficial.
The new tax act is yet another reason to create a flexible plan, so that the family can pivot between transferring assets out of the older generations to basis planning and inclusion of assets in estates. The speaker mentioned that the single pot QTIP trust may be a good vehicle for flexible planning between inclusion and exclusion of assets in estates.

3. Diversification and 4. Transfer Tax Planning

Under this topic, the speaker discussed issues when there is a business that is large enough to generate estate tax and that tax is likely to be painful and disruptive to the succession plan. Methods for tax planning with business succession include starting the new business inside vehicles that are going to be excluded from the older generations estate. For example, grantor may fund an irrevocable grantor trust with a gift and then the grantor and the trust would contribute assets to a LLC. That LLC is a disregarded entity for tax purposes, and the LLC would be the shareholder or partner in the new business venture. Over time, the trust would receive the bulk of the equity interest in the business venture which would pass outside the grantor’s estate, and during the grantor’s life the grantor remains control over the business.

The speaker also discussed potential planning issues for the client that approaches you shortly before the sale of the business with a term sheet in hand. If the ink isn’t on the pages then valuation discounts may be available. Discounts can be taken on risk of the deal falling through, mandatory set asides in the contract, and other issues that make pop up in the due diligence process.

Income tax planning for the sale may include donations to charity to offset income tax gains. The business owner may want to give a portion of the company stock to a donor advised fund which would then sell the stock to the buyer. Of course the client only wants to make the donation if the sale is going to happen, but the Service will disallow the deduction if the right to receive proceeds is certain. Timing the gift to charity is very important so that the deduction is not disallowed.

5. Non-Tax Factors

The speaker rounded out this presentation with addressing two non-tax issues that are a concern in business succession planning. The first is when the next generation ages into business ownership. Perhaps the family made gifts to a
trust that had a termination provision at a young age, 21, 25 or 30. Now that the trust is terminating the family is not ready for the next generation to own the business interests outright because this opens the door to change of control, creditors of children, or spouses of children.

Potential solutions include discussing the legacy of the business and importance of the business with the lower generations, discussing premarital agreements to protect the business, stock restriction agreements, buy-sale agreements, and trust modifications to change the terms of the trust. The speaker cautioned that if entering into a premarital agreement with a young first time marriage consider limiting the agreement to the family business interest. You may not need a full waiver of all rights and it is easier to digest for the young couple.

The second non-tax issues to consider with business succession is buying out the non-business interested family members. Again, educating the younger generations is key so that all of the family members understand the business and the process. Involve the next generation in family meetings early, and explain valuation discounts and risks. Consider using a family advisory board to make the decision or implement the mechanism to remove the difficult family member.

10:55-11:45

Care and Feeding of a Dynasty Trust: High Protein or Low Fat? [TRU]
Presenter: Diana S.C. Zeydel
Reporter: Joanne Hindel

Tax law and concerns about asset protection have driven estate planners to create trusts with longer and longer durations. Keeping these trusts healthy can be challenging. How do we build muscle to withstand challenges? Should we go lean if the estate and GST taxes are repealed? What are the best practices to achieve a fit and flexible trust in uncertain times? Here are the highlights of what the speaker had to say about all of this.

Part I – The Basics regarding Dynasty Trusts

A dynasty trust is a long duration trust that continues for multiple generations until the expiration of the applicable rule against perpetuities. Dynasty trusts
provide numerous benefits unavailable if assets are transferred outright to the beneficiaries, including potential state income tax savings, transfer tax savings, and creditor protection. Usually, a dynasty trust will be structured as a so-called grantor trust for federal income tax purposes, meaning that the grantor will pay the income tax on the trust’s income and the trust will grow tax free for the rest of the grantor’s life.

The 2018 increase in the federal exemption from estate tax now places the family in the best possible position to protect assets from creditors, avoid or minimize state income taxes and increase family wealth outside of the transfer tax system forever.

Most of the provisions found in a trust’s governing instrument reflect a choice between enhancing flexibility and imposing restrictions. Too little flexibility can cause the trust to be too restrictive, resulting in the inability to accomplish desirable objectives in the future. Too much flexibility can also be a problem if it permits the trustee or beneficiaries to trample over the settlor’s intent or a material purpose of the trust. Diana reviewed some provisions to include in well-drafted dynasty trusts.

Diana used an analogy to describe the differences of a traditional trust from a dynasty trust:

Henry Ford’s Model T was the original automobile made available to the world, and it was a perfectly good automobile to get drivers from point A to point B. It had four wheels, an enclosure and a steering wheel to direct where you go; all of the necessary components for its time. But the Model T lacks most of the modern features that automobile owners have come to expect as standard today. While Henry Ford probably never dreamed of including air conditioning or electric windows, let alone wireless phone capability, no one would purchase a car without those features today. And what about options that do not even exist at the time the automobile rolls off the assembly line? Today, manufacturers like Tesla offer free, automatic, over-the-air firmware updates for life, offering owners the possibility of future-proofing their automobiles to receive all available features created in the future, even auto-steering.

The point is that the estate planner, who undertakes drafting a dynasty trust that will survive every person living on the planet today, needs to draft a
Tesla, which contains every modern feature available today, plus the ability to achieve unlimited future software upgrades for life, permitting continuous adaptability to new developments in the field.

Anyone who has ever reviewed a trust instrument drafted in the first half of last century will notice that most of the standard features of a modern trust instrument are missing.

**Part II – Drafting for Flexibility**

One important provision in a dynasty trust is the ability to remove and replace trustees and advisors and appoint a special purpose trustee.

Descendants can remove and appoint the trustee and any investment advisors, distribution advisors, trust protectors or any other power holder. Descendants can also have the power to appoint a special purpose trustee from time to time with exclusive power to exercise specific, limited or restricted powers, duties or responsibilities.

The trust agreement may be drafted to permit the trustee to distribute trust assets to new trusts designed to meet changing needs or circumstances. A trust protector or the trustee can be given the power to amend the trust agreement to preserve favorable tax treatment, respond to changes in the law, or address changing economic conditions or family circumstances among the beneficiaries.

Diana discussed whether the trust terms should provide broad discretionary distribution powers or standards for distribution.

A governing instrument that allows the trustee to make distributions of income and principal to or for the benefit of one or more beneficiaries in the trustee’s sole and absolute discretion allows for much greater flexibility than an instrument that permits distributions only pursuant to an ascertainable standard, in specific amounts or for specific purposes, or grants only an income interest.

Diana also touched upon the use of pot trusts. Drafting a dynasty trust to continue as a so-called “pot trust” over multiple generations is typically discouraged, but could provide certain tax benefits. Continuing a pot trust until
all non-skip persons for GST tax purposes are no longer living can extend the
period during which a non-exempt trust remains sheltered from GST tax.

Therefore, consideration should be given to continuing a pot trust, assuming
appropriate fiduciaries are available to maintain the peace among the
beneficiaries.

**Part III – Making changes to an existing trust**

Diana started this section of the presentation by indicating that if long-duration
trusts are here to stay, the need to change trusts after creation will become
necessary. To analyze the transfer tax consequences of making changes to an
irrevocable trust, one must first understand the applicable property law. In
general, under the common law, transferees may hold three types of future
interests: a vested remainder, a contingent remainder, and an executory
interest.

The property law principles governing a particular interest will impact its
transfer at the time of decedent’s death. In *Pierre v. Commissioner*, the Tax
Court described the relationship between state law determinations of property
interests and federal taxation as follows: “A fundamental premise of transfer
taxation is that State law creates property rights and interests, and Federal tax
law then defines the tax treatment of those property rights.”

Diana then discussed the ability to change an irrevocable trust under the
Uniform Trust Code.

Consistent with the liberalization reflected in the Restatement, the Uniform
Trust Code (“UTC”) contains six separate provisions dealing with the
reformation, modification, or termination of a trust, all of which appear in
Article 4. Section 411 of the UTC deals with modification or termination of a
noncharitable irrevocable trust by consent. If the settlor consents to the
modification or termination, the court may approve it even if it is inconsistent
with a material purpose of the trust. Otherwise, the requirement that the
modification or termination not be inconsistent with a material purpose of the
trust is preserved.

Diana then touched upon considerations regarding the choice of a trust
jurisdiction.
Changing circumstances have led to the evolution of trust laws, so that many jurisdictions now permit such modern advantages as decanting, trust merger, non-judicial settlement agreements, total return unitrusts, silent trusts, perpetual trusts, purpose trusts and pet trusts, and bifurcation of trustee functions between the trustee and a separate advisor.

Consequently, the trustee is often selected because of its ability to administer the trust effectively and efficiently in a desirable jurisdiction.

**Conclusion**

Planning for uncertainty in the law requires consideration of a flexibly drafted dynasty trust as a key component of any estate plan. Careful attention to the terms of the trust that permit subsequent modification or amendment is critical. Comprehensive provisions dealing with the succession of fiduciaries will also be important. Should an existing trust nonetheless prove suboptimal, the trend towards liberalization of the law on reformation and modification or irrevocable trusts may come to the planner's aid.

Rescissions, reformations, modifications, and terminations, however desirable, initially require analysis to determine the potential for adverse tax effects.

2:00-2:50

**Estate Planning in Anticipation of a Contest or a Difficult Beneficiary [LIT] [TRU]**

Presenter: S. Andrew Pharies
Reporter: Michael Sneeringer

This session focused on practical issues in structuring an estate plan to withstand a potential contest or a beneficiary likely to disrupt the post-death administration. It focused on enhancing the enforceability of no contest clauses as well as structuring an estate plan to mitigate fiduciary risk. This report covers some of the more significant highlight from this presentation.

I. Introduction
A. This session focused on practical issues in structuring an estate plan to withstand a potential contest or a beneficiary likely to disrupt the post-death administration. It focused on enhancing the enforceability of no contest clauses as well as structuring an estate plan to mitigate fiduciary risk. This report covers some of the more significant highlights from this presentation.

II. Identifying High Risk Cases

A. Andrew discussed being careful in situations where clients are changing attorneys to higher you, called a “high risk case.” Andrew described the problems that can occur with “high risk cases.”

B. Andrew noted the importance of beginning an estate plan with the end in mind (getting that telephone call about the disposition of a court case stemming from the planning).

C. Andrew described, in general, the problems with disinheriting children.

III. Planning in Anticipation of a Contest

A. Andrew described the planning process for drafting estate planning documents that disinherit descendants. He noted the goal of estate planning in anticipation of a contest.

B. Andrew discussed testamentary capacity. He noted California specific law. He then briefly discussed undue influence.

IV. Creating the Record

A. Andrew described how the attorney should create the record. He noted the importance of having the client evaluated by someone who specializes in cognitive deficits (as opposed to solely the estate planning attorney making that determination). He discussed his procedure for proving that the client is not subject to undue influence at the time the plan is created.

B. Andrew opined on videotaping the client. He noted the importance of the “purpose” for the video tape. He noted the hearsay and state of mind issues related to admissibility. He noted the situations when an
attorney should and should not use video tape. He opined on who should video tape. He stressed the importance of chain of custody.

V. In Terrorem Clauses

A. Andrew discussed no contest clauses. He discussed the limits, exceptions and goals for including a no contest clause in estate planning documents. He spent time on the payment terms related to attorneys’ fees and no contest clauses. He noted that most states allow no contest clauses.

B. Andrew discussed his procedure of giving notice to potential contestants by distribution of the client’s mental competency report prior to the initiation of a will contest.

VI. Defending Against Intentional Interference with Testamentary Expectancy

A. Andrew discussed the tort of intentional interference with testamentary expectancy. He noted how an estate planner might go about planning to defeat such a claim.

VII. Preventing Post-Death Modification of Estate Plan

A. Andrew noted the issue with decanting and how that process disrupts an estate plan. He discussed preserving testamentary intent by creating a document prohibiting reformation and decanting.

VIII. Planning in Anticipation of Difficult Beneficiaries.

A. Andrew discussed contest through a trustee’s breach of fiduciary duty (“weaponized fiduciary duty”). He discussed structuring gifts to problematic beneficiaries that leave such beneficiaries with little to complain about in the administration of a trust.

B. Andrew discussed planning with annuity interests. He highlighted the importance of attorney’s fees provisions.

C. Andrew described modifying the fiduciary duties of a trustee under state law through drafting. He noted that some states allow greater
flexibility than others when modifying these duties. He discussed the importance of precatory language in the document.

D. Andrew highlighted the importance of using business entities to reduce fiduciary duty and weaponized fiduciary duty. He discussed the ownership of entities by trusts, and having the manager of the entity control the investment of assets. He discussed the state law guardrails around the management of assets. He discussed the importance of forum shopping using LLCs.

IX. Limiting Actions by a Successor Trustee

A. Andrew discussed the ability of successor trustees to sue predecessor trustees and attorneys. He described planning that eliminates a successor trustee’s ability to sue attorneys and predecessor counsel.

X. Arbitration Clauses

A. Andrew concluded with a discussion of mandatory arbitration provisions.

3:55-4:45

**Beyond the Private Foundation [CHR]**

Presenter: Martin Hall
Reporter: Joanne Hindel

A private foundation may not be the most effective tax-exempt vehicle to implement a client’s charitable intentions. This program explored the use and structuring of other options, including donor-advised fund accounts, supporting organizations and 501(c)(4) social welfare organizations.

**Part I – Private Foundations and Private Operating Foundations**

Martin started the presentation by stating this he would focus on options available to a donor when wanting to set up a wholly charitable vehicle and operate a long-term charitable goal. He quickly described the basics of a typical private foundation that has the following three characteristics:

a) a single or concentrated source of contributions, in the guise of a single
individual or corporate donor, one family of individual donors, or a discreet group of individual donors;

b) reliance from income earned by an endowed fund to support the charitable activities of the organization, as opposed to annual fundraising;

c) carrying out its charitable purposes through grant making as opposed to the direct operation of specific charitable programs.

Private foundations may be formed as corporations, trusts or unincorporated associations. The corporate and trust forms are the most common because they offer the directors or trustees of the foundation liability protection. Because corporations are generally required to register with the state in which the corporation is formed and to make annual filings, trusts may provide additional benefits of privacy and lower organizational and administration expenses.

A donor to a private foundation is entitled to an income tax charitable contribution deduction for her contribution to the entity. I.R.C. § 170. Furthermore, a contribution of appreciated assets to a private foundation is treated no differently from any other gift to charity; it does not constitute a sale or exchange and thus does not give rise to gain or loss that is recognized for regular tax purposes.

A private foundation is subject to an annual two percent tax on its net investment income, including interest, dividends, rents and royalties, and long- and short term net realized capital gain. I.R.C. § 4940(a). Internal Revenue Code section 4941 applies to any “direct” or “indirect” act of self-dealing. Direct self-dealing occurs when the private foundation is a party to the transaction with the disqualified person. An act of indirect self-dealing occurs when a disqualified person engages in a transaction with an organization controlled by the private foundation or by the foundation managers.

**Part II – Supporting Organizations and Donor Advised Funds**

Martin then discussed alternative organizations available to donors. He started by reviewing the characteristics of **Supporting Organizations ("SOs")**.

To qualify as an SO, an organization must satisfy an organizational test, an operational test, a control test and a relationship test. There are three types of SOs – Type I, II, and III – described in the Internal Revenue Code and Treasury Regulations. All three types of SOs must satisfy the same organizational,
operational and control tests.

A Type III SO is not required to demonstrate the same degree of supported charity involvement in governance as the other two types of SOs, but must satisfy three additional tests – a “responsiveness test,” a “notification test,” and an “integral part test” – to establish the required relationship with its supported charities. This type of SO must be responsive to, and significantly involved in the operations of, the publicly supported organization.” Treas. Reg. § 1.509(a)-4(f)(4).

Next Martin touched on 501(c) (4) organizations.

Section 501(c)(4) of the Internal Revenue Code embraces two general classifications of tax-exempt organizations: a) civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare (“social welfare organizations”); and b) local associations of employees.

Examples of section 501(c)(4) organizations include homeowners associations, veterans organizations, volunteer fire departments, parks associations, community service organizations such as Rotary Clubs, Kiwanis Clubs and Lion Clubs and public recreational facility organizations.

Well-known examples include American Association of Retired Persons (AARP), American Civil Liberties Union (ACLU) and National Rifle Association of America (NRA).

Martin then covered Donor Advised Funds (“DAFs”).

A Donor Advised Fund (“DAF”) is not a separate charitable entity for federal tax purposes. Instead, the term describes a segregated fund or account maintained by an existing section 501(c)(3) public charity to which a donor or small group of donors can make contributions. What distinguishes the fund is that, while its assets belong legally to the public charity, the donor, or a person designated by the donor, retains an advisory role with respect to the distribution and/or the investment of assets held in the fund.

Part III – Comparative Analysis

Martin concluded the presentation by highlighting the key differences between the entities described above, together with a discussion of practical
considerations that may guide the choice of entity adopted by the charitable donor.

First he discussed the deductibility of contributions. A donor to a private foundation is entitled to an income tax charitable contribution deduction for her contribution to the entity. SOs and DAFs are entities that qualify as public charities for the income tax charitable contribution deduction rules applicable to the individual taxpayer. Contributions to a 501 (c) (4) organization generates no income tax benefit to the donor. This consequence must be carefully weighed when considering this type of organization.

Martin also touched upon formation and operation of the various organizations and discussed the ongoing administrative costs and management fees. He also talked about enhanced vigilance during administration.

Finally he discussed the scope of the donor’s philanthropic mission and cautioned the audience to consider the following issues: each of the aforementioned charitable entities affords the donor the option to achieve certain objectives in her philanthropy. Each permits many decisions to be delayed, if necessary. What is important to acknowledge is the limitations that are inherent in certain structures, since those limitations may guide a donor away from its use.

The Reporters:
Our on-site local Reporters who are present in Orlando in 2018 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 the Dreyer Law Firm in Stuart, Florida; Herb Braverman Esq., an attorney with Braverman & Associates in Orange Village, Ohio; Kristin Dittus Esq., a solo attorney with offices in Denver, Colorado, Michael Sneeringer Esq., an attorney with Porter, Wright, Morris and Arthur, 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, Tarrant & 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 Editors in 2018 are Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is the Chief Moderator of the ABA-PTL discussion list. He is being ably assisted in those duties this year by Reporter Bruce A Tannahill Esq..