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Heckerling 2018 - Report No. 10
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University of Miami School of Law Center for Continuing Legal Education
Orlando World Center Marriott Resort and Convention Center
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Heckerling 2018 - Report No. 10

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: MyCase Legal Software hosts several blogs on their website at https://www.mycase.com. Of particular interest to the Wednesday afternoon Session 2-C on technology and estate planning is the free webinar by Jim Galloway of ABA Law Practice Management fame entitled "How to Ethically Use Technology in Your Practice" that can be found at https://www.mycase.com/blog/2017/01/free-webinar-how-to-ethically-use-technology-in-your-practice. A recap version is also available at https://www.mycase.com/blog/2017/02/webinar-recap-how-to-ethically-use-technology-in-your-practice.

Summary: This Report #10 begins our coverage of the Thursday afternoon Special Sessions, those being 3-A on trustees, beneficiaries and directors, 3-B on trust asset protection, 3-C on life insurance planning post TCJA, and 3-D on creative planned giving techniques.

The next Report #11 will continue our coverage of the Thursday afternoon Special Sessions.

Thursday, January 25, 2018 (Cont.)

2:00-3:30 SPECIAL SESSIONS III
Session III-A

Trustees, Beneficiaries, Directors! The Uniform Directed Trust Act Can Conjure a Hollywood Ending from Even the Most Difficult Family Script [TRU]

Presenters: Robert H. Sitkoff + Turney P. Berry + James M. Marion + Susan D. Snyder

Reporter: Joanne Hindel

After three years of collaborative effort, last summer the Uniform Law Commission approved the Uniform Directed Trust Act. This panel explored the effective use of directed trusts, including fiduciary and tax issues, from drafting, administration, and beneficiary points of view in light of the new uniform act and existing state statutes. This session builds on the General Session that Mr. Sitkoff presented on Thursday morning (Report #9). Here are some significant highlights from this presentation.

Part I – Introduction

Robert Sitkoff moderated the panel discussion which consisted of real examples of situations encountered by the panelists in which certain individuals held authority over a trustee’s actions. All the panelists participated in the drafting of the Uniform Directed Trust Act (UDTA) and they discussed each of the examples in the context of the Act.

Part II – Case Studies

Example 1- Investment Concentration

Facts: T is the directed trustee of a directed trust the terms of which name B, one of the beneficiaries, as a trust director with a power to direct T in the investment of the trust property. B directs T to purchase and retain a substantial concentration in a large publicly traded stock. Under T’s policies and procedures, it would not normally purchase or retain such a concentration.

Some Questions: Must T follow the direction to buy and retain the concentration? Should T warn B or the other beneficiaries that the concentration is ill-advised?

Susan said following B’s direction is not wrong and T does not need to separately notify the other beneficiaries but should document the discussion with the directing beneficiary.

Maintenance of asset concentrations is the largest reason for the concept behind UDTA—due to risk associated with holding concentrations.

James pointed out that the directed trustee still holds residual responsibility – this is not a no-responsibility Act.

Example 2- Litigation with Multiple Trust Fiduciaries
Facts: T is the directed trustee of a trust the terms of which provide that D has a power to direct T in the investment of the trust property. D directs T to enter into a contract with S to purchase an asset from S for the trust. After S reneges on the deal, D directs T to sue S for breach of contract.

Some Questions: Must T follow the direction to bring suit against S? Can D bring the suit instead?

Under UDTA § 7(b)(1), “a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director” by the terms of the trust. Even if the terms of the trust do not expressly grant D a power to direct litigation, therefore, arguably in this case directing T to bring a lawsuit against S is an “appropriate” further power. Moreover, irrespective of whether D directs T to bring litigation against S, under prevailing trust fiduciary law, such as Uniform Trust Code § 811 (2000), a trustee is under a duty to “take reasonable steps to enforce claims of the trust and to defend claims against the trust.”

An interesting twist, however, is that under UDTA § 7(b)(1), arguably D could bring a lawsuit against S on behalf of the trust on the theory that bringing the lawsuit is an implied further power “appropriate” to the express power to direct T to contract with S. Indeed, the comment to § 7 points to a power to “prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust” as an example of a further power that might be “appropriate.” Moreover, under UDTA § 8(a)(A), D “has the same fiduciary duty and liability in the exercise or nonexercise of” D’s powers “as a sole trustee in a like position and under similar circumstances.” As such, the familiar duty to “take reasonable steps to enforce claims of the trust and to defend claims against the trust,” as under Uniform Trust Code § 811, would apply to D as well as to T.

Susan focused on who would pay for the lawsuit and how the director would expect the trustee to cover expenses from the trust. She also pointed out that the director might take a position in the lawsuit that is detrimental to the trustee.

Example 3- Taking Control of a Family Business

Facts: T is the directed trustee of two mirror-image trusts, one for the benefit of Brother, the other for the benefit of Sister. The terms of the trusts provide that they will terminate, and pay out the entire corpus, upon the primary beneficiary reaching age 50. Each trust holds a diversified portfolio of liquid financial assets plus half of the shares in a closely held family business that was created by the settlor, who is now dead. Brother is today the dominant manager in the business.

Brother is named by the terms of both trusts as a trust director with a power to direct T in the investment of the trust property.

After a falling out with Sister, Brother directs T to use funds from his trust to buy one share in the family business from Sister’s trust at the fair market value for one share (without regard to control premium effects). If this transaction is carried out, then in the coming years when the trusts
terminate Brother will have a slight majority interest in the business, and Sister will have a minority interest, instead of each of them owning half.

Some Questions: Should T follow the direction? Can T take a directed action with respect to one trust if the action will injure the beneficial interest in the other trust? What options does T have to extricate itself from the situation?

UDTA: T is protected by § 9 with respect to its directed actions in each trust, provided that those actions do not amount to willful misconduct.

The difficulty is that going forward with this transaction will obviously diminish Sister’s beneficial interest, as in return for the fair market value of one share she’ll ultimately receive a minority rather than equal share in the business.

Whether going forward with the directed transaction in such circumstances amounts to willful misconduct is uncertain owing to the paucity of case law. To avoid this risk, T could petition for instructions.

Example 4- Trust Holds Membership Interest in LLC with all activity at the LLC level

Facts: T is the directed trustee of a directed trust the terms of which name B, one of the beneficiaries, as a trust director with a power to direct T in the investment of the trust property. At B’s direction, T conveys the entire trust fund to a new LLC in return for a 100 percent membership interest in the LLC. B is the manager of the LLC. Under the terms of the LLC’s governing instrument, B has plenary management power over the LLC.

Some Questions: What steps must T take, if any, if T does not have adequate information about the goings on within the LLC?

• Suppose that B fails to give T valuations of the LLC or its underlying assets. How is T to make reports or accountings to the beneficiaries or required tax filings?

• Suppose that B causes the LLC to guarantee a large loan to B. Must T as trustee bring an action against B as manager to protect the trust’s membership interest in the LLC? What if B as trust director directs T not to take such action?

• Suppose B causes the LLC to make distributions directly from the LLC to himself or the other beneficiaries. Must T as trustee take action against B as manager to protect the trust’s membership interest in the LLC and T’s fiduciary power over impartial distributions? What if B as trust director directs T not to take such action?

UDTA: These questions bring together a variety of provisions that have been discussed in the prior examples. Thus:

• Under UDTA § 10(b), B is under a duty to give valuation information to T, as that information is reasonably related to both the powers and duties of B and of T.
• Under prevailing trust fiduciary law, such as Uniform Trust Code § 811 (2000), a trustee is under a duty to “take reasonable steps to enforce claims of the trust and to defend claims against the trust.” If B directs T not to take such an action, the question will be whether B’s power of direction as prescribed by the terms of the direction falls within the provision of UDTA § 6(b)(1) that grants every trust director “any further power appropriate to the exercise or nonexercise of a power of direction” under the terms of the trust. Even if D has the power to direct T not to bring the action, under UDTA § 9(a)-(b) T will not be protected from liability if not bringing the action would amount to willful misconduct.

• Much of the same analysis pertains here, with the further wrinkle that B has used his power of direction over investment to take control of distributions, raising the question of whether T not taking action would constitute willful misconduct.

Conclusion
The case studies provided good, common examples of problems faced when multiple fiduciaries are administering trusts. The panelists focused on the concept of “willful misconduct” and tried to analyze each situation based upon its particular facts.

Session III-B
Trust Asset Protection Through a Tri-Focal Lens [LIT][TRU]
Presenters: Daniel S. Rubin + Terrence M. Franklin + Michael M. Gordon
Reporter: Craig Dreyer

This program addressed the asset protection afforded beneficiaries through trusts from the unique and sometimes conflicting perspectives of (i) the drafting attorney, (ii) the trustees and other fiduciaries administering the trust, and (iii) those creditors seeking to reach the trust assets. This report covers some of the more significant highlights from this presentation.

The panel opened by discussing how the rise in federal estate tax exemptions will likely mean that asset protection planning will be more important in our practices. Where a donor puts their assets in a self-settled asset protection trust, we are protecting against future unknown creditors. The panel noted that you cannot transfer against known creditors, since it will be a voidable transaction or fraudulent transfer. Conversely, the panel noted that creating a trust to protect against known third party creditors is completely legal.

The panel then moved on to the reasons trusts offer creditor protection. They noted that since a trust is the legal owner of the property and not the beneficiary this allows protection. The two types of trusts that provide creditor protection are spendthrift trusts and discretionary trusts. Spendthrift trusts are free from creditor claims because the grantor has included a provision in the trust that the assets will be free from claims of a trust beneficiary. They also noted that some states provide statutes to this effect. In a discretionary trust, there is asset protection since the beneficiaries’ interest does not rise to a property interest. The beneficiaries’ property interest is subject to the discretion of the trustee. If a beneficiary cannot compel distributions, a creditor
cannot do so. The panel noted most trust today are combined spendthrift and discretionary trusts and provide asset protection even in egregious circumstances.

A first party or self-settled asset protection trust is where the grantor funds a trust to protect from his future creditors. This was not possible before 1997, but in 1997 Alaska and Delaware began to allow these types of self-settled asset protection trusts. To have a self-settled asset protection trust you need an irrevocable trust, a qualified trustee, and the terms must state the law of the applicable jurisdiction must be adhered to under the trust, and finally the trust must have a spendthrift clause disallowing transfer of assets to beneficiaries’ creditors. The panel then moved on to discuss various types of typical self-settled trust clients. This first client is one in a high-risk occupation such as doctor, lawyer or developer. They usually create grantor trusts that are included in the grantor’s estate. The next typical type of client is high net worth and looking to protect a portion of their assets. The third type of client is doing premarital planning where they do not want to have a prenuptial agreement conversation with their spouse. The final type of typical client is looking for some type of tax planning. The two types of planning for taxation are: 1) ING trusts, with incomplete gifts but structured as non-grantor trusts to avoid state income tax, and 2) a completed gift trust that triggers grantor status. It is important to determine the reason for a trust, so the trustee knows how to properly administer the trust. The panel noted that over 16 states now have self-settled asset protection trust statues.

The panel then went on to discuss third party trusts where a third-party grantor contributes the assets. For asset protection some states require these trusts to have spendthrift clauses, but other states have it codified by statutes. All 50 states allow third party created trusts for creditor protection.

Next, the panel discussed the creditor litigation aspects of such trusts. They noted that some jurisdictions are hostile to self-settled trusts such as California. They then discussed various ways that trusts can be attacked: such as through distribution powers, reciprocal trust doctrines, and other powers which often are used for inclusion in a decedents estate. The discussion then moved to onshore versus offshore asset protection trusts. The panel noted that the full faith and credit clause of the US Constitution should be applicable in onshore trusts. They discussed how going offshore may provide some additional protection; however, the panel noted that this is only true if the assets funded in the trust are held offshore which clients are often hesitant to do.

Next the panel discussed the voidable transaction or fraudulent transfer. This issue arises in funding a third party or self-settled trust. They noted that the Uniform Voidable Transfers Act says a transfer is voidable if the creditor made the transfer to delay, defraud, or hinder a creditor. The law includes badges of fraud to show evidence of intent, such as the transfer occurred when debtor was sued or about be sued, is rendered insolvent by transfer, or is insolvent at time of a transfer. A creditor has burden of proof unless a badge of fraud is present to shift the burden.

The panel then discussed super creditors and exception creditors and the reasons self-settled trusts are used for asset protection. They noted there is very little case law on self-settled asset protection trusts except where there are incredibly bad facts. They discussed how most asset protection trust cases are not litigated to the finish but are settled. To defend against the fraudulent transfer, many lawyers have clients execute affidavits stating that they are not meeting any of the badges of fraud that may shift the burden in a fraudulent transfer case. Most trust
companies limit the amount of a client’s unencumbered assets that will be allowed to be transferred to a self-settled trust to 40%. Hawaii is the only state that limits the percentage of assets.

What if a fraudulent transfer occurs? In a third-party trust, the analysis is in regard to the donor to see if a fraudulent transfer was made. Remedies of the creditor include voiding the transfer, attaching to the trust property, obtaining an injunction against trustee from distributing, and finally they can often obtain a receiver to manage the property. In a self-settled asset protection trust scenario, the creditor can claim from the trust any claims and associated reasonable costs of collection. The sole remedy of the creditor is to have the assets distributed back to the grantor in many states. This presents the opportunity for two layers of asset protection. Many clients put closely held business interests into these trusts, so even if the trust property is distributed to the grantor the creditor may be stuck with an interest in an LLC where the creditor only has a charging lien. This is just another hurdle for the creditor to overcome.

Trustee Liability. If a trustee assists in a fraudulent transfer, they are generally protected if the trustee acts in good faith. If the trustee acts in good faith, the trustee has a priority lien over the trust assets for costs of administration in some states. There is also a burden of proof on the creditor that a trustee acted in bad faith.

Discretionary Distributions. Generally, the only creditors allowed to access a trust under a discretionary distribution are the spouse, former spouse or child of the grantor. The panel noted that avoiding the use of shall and instead using may along with increasing the number of beneficiaries will increase asset protection.

Trustees. If a beneficiary is the sole or co-trustee under the UTC this is not a problem, but under the Restatement of Trusts this may allow the creditor to reach trust property. In non-UTC states you should add a co-trustee.

The panel wrapped up by discussing the impact of trustee removal powers, the use of powers of appointment in trusts, the statute of limitations on transfers to a self-settled trust in various states, and the problems with litigation involving potential laws of various states.

Session III-C
What the Heck(erland) Is Going on with Life Insurance Planning After Tax Reform?
Planning When the Only Certainty Is Ambiguity [FIN]
Presenters: Lawrence Brody + Mary Ann Mancini + Charles L. Ratner
Reporter: Bruce Tannahill

Once again, significant tax reform, whether enacted or anticipated, has created great uncertainty with regard to where, when and how life insurance should be used in financial and estate planning. This presentation covered the implications of wealth transfer tax reform or repeal on the use of life insurance in estate planning, the structure of new purchases, and the options for dealing with policies that clients believe are no
longer needed or wanted for their original purpose. This report covers the more significant highlights from this presentation.

Mr. Brody began the session by paying homage to Michael Weinberg, scheduled to be a panelist, who died last year.

The panel laid the groundwork for the program by discussing the ambiguity concerning life insurance policies created by the low interest rate environment and the Tax Cuts and Jobs Act (TCJA), that clients and their advisors are now dealing with. In the midst of this ambiguity, they are wondering:

1. If policies are needed or wanted for their original purpose,
2. If policies should be maintained for a different purpose, and
3. What is the best way to manage any premium payments required.

According to Ms. Mancini, the first thing an advisor should do is to understand the situation. This involves determining:

1. Is there something that needs to be fixed or just discussed?
2. The client’s objectives, priorities, and constraints, including insurability,
3. The vintage, type, and construct of the policy,
4. Terms and suitability of any ILIT involved, and
5. Type and vintage of split dollar or other financing arrangement for the policy.

As part of understanding the situation, Ms. Mancini said it’s important to get certain facts and figures; These include:

1. The “as sold” illustration, if available. It should show the premium payment assumptions and projected cash value and death benefit.
2. Inforce illustration – it details annual policy charges and other expenses, policy loans. Be aware that the company can increase some charges. If policy loans, should they be paid back? For an indexed universal life (IUL or EIUL) policy, check the index used to determine the crediting rate and the options available. For a variable universal life (VUL), review the subaccounts the policy is currently invested in and the ones available.
3. Current policy statement, including the owner and beneficiary.
4. If policy is owned by an ILIT, get a copy of the trust. Get Crummey letters for annual exclusion gifts and copies of any gift tax returns filed to report gifts to trust. How much exemption was used to fund the trust? For split dollar arrangements, you want an in-force illustration showing the economic benefit through maturity and whether based on the carrier rates or Table 2001.
5. How are premiums being paid? What problems or concerns does the client have with the arrangement?
6. Does the client still need or want all of the insurance? If so, how long? If no, a lesser amount?
7. Are there concerns about the carrier?

Mr. Ratner and Mr. Brody discussed options that may be appropriate to review with clients.

1. If the problem is a cash flow crunch, Mr. Ratner suggested identifying the cause of the crunch. Potential solutions to a cash crunch will depend on the type of policy.
2. A cash value policy purchased for estate liquidity might be redeployed for an investment or retirement purposes. Because of the tax-favored treatment of life insurance, cash value is important.

3. Surrender the policy. Clients are often surprised that gain is ordinary income and a loan may result in tax that exceeds the cash received upon surrender.

4. Exchange the policy – clients often ask if they still need the insurance. Mr. Ratner divides clients into those who have taxable estates with illiquid assets and everyone else. There are many needs beyond estate tax, including estate equalization and spousal needs. Clients should consider that the policy may end up being irreplaceable if things change and you need insurance later. The client needs to understand what’s being given up. The new policy may be last one that can ever be purchased. When considering an exchange, start with the current carrier because they may have a better deal than any other company.

5. Selling (life settlement) the policy makes sense for some clients. They may be able to get more from selling the policy and reinvesting the proceeds than if insured had kept policy and paid any required premiums.
   a. Rev. Rul. 2009-13 provides that the sale is ordinary income to the extent that the cash value exceeds the basis and the excess is capital gain. TCJA provides that the basis is not reduced by cost of insurance, reversing a holding in Rev. Rul. 2009-13.
   b. Because the policy is still in existence, it may affect the insured’s ability to get new insurance.

6. Donate the policy to charity. A charity may not accept all policies offered and will generally not use its own funds to pay premiums so it will look to the donor to pay the premiums. The amount of the deduction depends on whether the policy is an ordinary income asset. If so, the deduction is limited to the lesser of the owner’s basis in the policy or the policy’s fair market value. Mr. Brody says it is a capital asset with aspect of ordinary income. The deduction s/b FMV less the ordinary income portion.

7. If the problem is the ILIT that owns the policy, look to the trust terms or state law on ways to correct the problem.

8. If the problem is a split dollar arrangement, the options are:
   a. Stay the course if the policy will not develop enough cash value for a roll out during the insured’s life expectancy
   b. Roll out and terminate the arrangement, or
   c. Insured uses the increased gift and GST exemption to make gifts to the ILIT to terminate the arrangement.
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Presenter: Michele A.W. McKinnon
Reporter: Michelle Mieras

This program looked at specific planned giving techniques and their continued benefits to donors under the new or proposed tax law changes with a focus on charitable gift annuities, remainder trusts, and lead trusts. I built on Ms McKinnon's General Session presentation on the same subject that was presented on Thursday morning (Report #9). Here is our report on the significant highlights from this presentation.

This session expounded upon Ms. McKinnon’s Thursday morning Plenary Session, “What’s a Donor to Do?” She began with a review of the income tax rules related to charitable deductions and reiterated her morning conclusions regarding the impact of the 2017 Tax Act. She cautioned that the change from a 50% to a 60% deduction limitation for gifts to public charities is not as clear cut as some are making it out to be. Instead, the 60% limit will apply only if the client only makes cash gifts to a public charity; once the client starts donating other types of property, the client is back in the 50% limitation realm.

After a quick review of the limitations on deductions related to gifts of appreciated property to private foundations, gifts of tangible personal property and the related-use certification requirements, and gifts of ordinary income property, Ms. McKinnon addressed the increased gift exclusion amount under the 2017 Tax Act. She noted that the impact on charitable giving remains to be seen. In her experience, most people make charitable gifts for reasons other than tax deductions.

Ms. McKinnon then took the audience on a high-level tour of common gifting vehicles:

1. Outright gifts or bequests are easy and straightforward transfers, and clients often work directly with charities to accomplish these.

2. A bargain sale (part sale, part gift) may be appropriate for a willing donor and a charity that has a specific interest in particular property owned by the donor, such as a specific piece of art or a lot adjoining land owned by the charity.

3. Various forms of charitable remainder trusts allow for a current deduction for the remainder interest, even though the charity won’t receive funds until the lead interest terminates, and offers the added benefit of being tax exempt allowing for liquidation of assets without capital gain recognition.

4. Pooled income funds have specific rules, and are essentially akin to a mutual fund set up by a charitable organization. The donor has units in the pooled income fund and receives actual income. After the income beneficiary dies, the charity pulls the units from the pooled income fund. These have been out of favor for a while, partly due to low interest rates, but she is seeing increased interest so keep these in mind.
5. A charitable gift annuity is a contract between the donor and charity, whereby in exchange for funds the charity agrees to pay the donor a lifetime annuity. These tend to be a better option for charities that do many, as the large pool of participants offers a stronger statistical likelihood that the life expectancies used on the whole will be accurate. The donor needs to understand that this is just a contract with the charity, and the donor needs to feel comfortable that the charity is stable and will be able to pay the income well into the future.

6. The donation of the remainder interest in a personal residence or farm may be a good option for clients who want to make a substantial gift without changing their current lifestyle.

7. Finally, charitable lead trusts may be particularly attractive if a family has other assets and can defer the benefit to their family or desired beneficiaries.

Ms. McKinnon then dove further into certain giving vehicles:

She noted the benefits of charitable gift annuities in comparison to other techniques, including the ability to defer the annuity in favor of increased payout rates, and the inapplicability of the private foundation valuation rules and self-dealing. On the other hand, the annuity must be for a lifetime and cannot be for a term of years, and in order to have the ratable recognition of gains apply the donor must be the annuitant. A testamentary charitable gift annuity could be created by a testator who names a longtime household employee as the annuitant, thereby ensuring that the employee had income replacement once there was no household in which to work.

After summarizing the differences between CRUTs and CRATs, reminding the audience about the sample charitable trust forms provided in various Rev. Procs., reviewing important unitrust provisions, and giving examples of how charitable remainder trusts can solve clients’ non-tax concerns, Ms. McKinnon turned her attention to the Flip CRUT, which she considers to be an overlooked vehicle.

A Flip CRUT begins as a net income CRUT (with or without a makeup provision) and then converts or “flips” to a straight unitrust upon an identified triggering event. Certain requirements must be met to qualify as a Flip CRUT. The governing instrument must 1) identify the trigger as a certain date or single nondiscretionary event, 2) require the actual conversion from a net income to straight unitrust to occur on January 1 of the year immediately following the triggering event, and 3) provide that any makeup amount not paid at the time of the conversion be forfeited. Ms. McKinnon suggested that the broad definition of what could be a triggering event presents great opportunity to work with the client to relieve their specific concerns around gifting. For example, if the client is concerned about having enough for retirement, an approximate age or date of retirement could be used as the trigger (but not retirement itself, as that would be within the donor’s discretion and therefore not a qualifying triggering event). Or, if the client is concerned about having sufficient funds to allocate to their grandchild’s education, use a date coordinating with the child’s expected entry into that expensive private school.
After providing additional examples of how CRTs could be used (e.g., a short-term term of years CRT to hold an asset a charity didn’t want to hold, allowing a current deduction and a window of time for the asset to be liquidated), Ms. McKinnon briefly touched on charitable lead trusts, noting that in some ways they are more flexible than CRTs, and will have different tax consequences depending on whether established as grantor or non-grantor trusts. Ms. McKinnon noted that she still considers private foundations to be attractive vehicles. We know the rules and, as they have been around for some time now, how the IRS will interpret them.

Ms. McKinnon concluded with a review of the substantiation rules:

She noting that clients are not generally good about ensuring the T’s are crossed. The rules are strict, and missing a requirement will jeopardize the client’s deduction. The IRS is pursuing and winning these cases. She suggests making sure the appraiser knows what to do, and not having the appraisal finalized until you get a look at it and make sure all requirements are met. She has seen substantiation fall apart due to something as simple as the client failing to issue himself a receipt for a donation to their own private foundation. Ms. McKinnon referenced the IRS publication on substantiation rules as a good starting place. Finally, she provided her list of most-missed substantiation requirements, including the timing of the appraisal (too long before or after the completed gift), failure of the right appraisers to sign the appraisal (everyone involved must sign), valuing as of the date of inspection versus the date of the completed gifts, and failing to include a statement that the appraisal was prepared for income tax purposes.

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.