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Heckerling 2018 - Report No. 11
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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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http://www.law.miami.edu/heckerling

GENERAL INFORMATION ABOUT INSTITUTE:
Inquiries/Registration:
Philip E. Heckerling Institute on Estate Planning , University of Miami School of Law Center for Continuing Legal Education
P.O. Box 248087
Coral Gables, FL 33124-8087Telephone: 305-284-4762 / FAX: 305-284-6752
Web site: www.law.miami.edu/heckerling E-mail: heckerling@law.miami.edu

Headquarters Hotel - Orlando World Center Marriott
8701 World Center Drive
Orlando, FL 32821
Telephone (407) 239-4200, FAX (407) 238-8777

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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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: Evaluation Services, Inc., the developer of the ESI-Appraise securities pricing valuation service, announced the following four innovative solutions at this year's Heckerling: (1) software as a service (SAS) estate valuations, (2) a 1040/1041 income allocator, (3) a dividend reinvestor calculator, and (4) a cost-basis calculator. For more information, go to www.appraisenj.com.

Summary: This Report #11 continues our coverage of the Thursday afternoon Special Sessions, those being 3-E on closely-held business ethics, 3-F on employment and immigration law, 4-A on the magic age of 70 1/2, and 4-B on preparing fiduciary accountings to mitigate risks.

The next Report #12 will conclude our coverage of the Thursday afternoon Special Sessions.

Thursday, January 25, 2018 (Cont.)

2:00-3:30 SPECIAL SESSIONS III (Cont.)

Session III-E

Ethical Issues in Advising Clients on Planning for, Creating, Operating, Transferring Control and Ownership of, and the Dissolution of Closely-Held
Businesses [CHB]
Presenters: Charles D. “Skip” Fox, IV + J. Lee E. Osborne + Mary F. Radford
Reporter: Herb Braverman

Through the use of case studies this session examined many of the ethical issues involved in all aspects of the life cycle of a closely-held business, from inception to end. Some of the areas examined were competence, timeliness of work, keeping the clients informed, and, of course, the conflicts that can arise in representing more than one party involved in the business. This session builds on some of the other closely held business [CHB] presentations that have already been given at this year's Institute, including Fundamentals #1 on Monday (Report #1), Buy-Sell Agreements on Tuesday and Wednesday (Reports # 3 and 6), entities generally on Wednesday (Report #7), and real estate investors on Thursday (Report #9). Here is a summary of this presentation.

This panel presented a series of hypotheticals in business settings for the purposes of advising attendees regarding the ethics of our profession. The long outline covers both the Model Rules of Professional Conduct and the ACTEC Commentaries on the Model Rules of Professional Responsibility (5th edition 2016), along with cases and other materials. The Commentaries are available on the ACTEC website at www.actec.org.

The hypotheticals allowed the panel to discuss several tenets of our professional ethics, including competence, confidentiality, conflicts of interest, joint representation, multi-generational representation, clients with diminished capacity, dealing with unrepresented persons, business interests with clients, and timeliness, among others. The details of those hypotheticals are covered in depth in the outline materials.

What should be clear to all of us from this presentation is that being very familiar with the Model Rules and the ACTEC Commentaries (maybe even having them on our desks or desktops) before agreeing to represent closely held businesses and/or their individual participants is an absolute must.

Session III-F
Employment and Immigration Law 101 [INT]
Presenters: Linda M. Doyle + Elizabeth A. Quinn
Reporter: Beth Anderson

High net worth families (and family offices) should have a working knowledge of employment issues - both those impacting family employees and staff at the family office. This session focused on issues unique to family (domestic) employees such as the Fair Labor Standards Act, classification as an employee versus independent contractor, and liability. It also addressed issues related to more high-level employees of the office, including hiring, compensation, performance reviews, terminations, and liability. Finally, it addressed issues related to employing non-U.S. citizens.
This presentation highlighted the traps for the unwary and tips for management of domestic employees for private clients. It focused on three general themes: compliance with the law, consistent reporting, and vigilant fact checking and updates.

An individual can be an employer if he or she hires a nanny or cleaning person on a regular basis. The domestic employ space has a lack of understanding of employment based obligations. The relationship, if done correctly, actually shields the employer from liability.

I. Hiring Decisions

Domestic employees have access to very private information and assets, access to the most confidential information. Individuals don’t always treat the hiring process seriously enough. Require an application, resume and both personal and professional references. If the written documentation supplied is false, then this allows for a justified firing and valid reason to end the employment.

Do have a job description and do use this description in the interview process to make sure the potential employee has the correct skill set. Do have multiple people interview the potential employee and it’s good to have a person outside of the family run the interview. Actually check the references! Do federal and state civil and criminal background checks and work with a lawyer to determine what you can and cannot do with the found information. The employer is liable for employees’ negligence and for negligent entrustment (respondent superior theory). Background checks will mitigate the risks. Verify employer insurance will cover these incidents.

In your application and your employee handbook ask “are you legally authorized for employment in the US?” Require the employee to acknowledge in writing the confirmation that he or she is authorized to work in the US.

The panelists did recommend having a written understanding of the employer/employee relationship. It does not have to be a formal handbook and can be in letter form, but should set out the house rules, if the employee is a live-in employee then it should set forth rules about frees, guests, and use of family space. In additional, the agreements should list job duties, hours, compensation, payroll frequency, and that the employment is at will. For authorized workers on visas, it’s a good idea to have an employment agreement with a term that matches the visa term. The panelists commented that one of the most important reasons to have a written employment agreement is to have a confidentiality policy. You should define confidential information broadly (direct and indirect disclosures). This written notice gives legal grounds for enforcing privacy and often has a chilling effect that helps manage expectations at the outset.

II. Employee vs. Contractor

The panelist stated that roughly 99.9% of domestic workers are employees not independent contractors. They then described factors to help distinguish between employees and independent contractors. Contractors are project based engagements with a definite project
or time. Employees are open ended, indefinite relationship, exert control, and cannot work for other individuals or entities.

If you have an independent contractor get a written agreement, require invoicing for work done not a paycheck or salary, get a warranty in the written contract for work performed, make sure homeowner’s policy covers tort incidents, and consistently monitor the independent contractor test because if the circumstances change the independent contractor could become an employee.

If the worker is an employee, the employer must pay social security, Medicare, and federal and state income taxes. The benefit is the employer can apply for workers compensation insurance for torts. An employer cannot get workers comp. for independent contractors. Although the employer has to comply with federal and state employment laws, the panelists believe it’s worth the protection.

The panelists then discussed the importance of maintain good records of time worked because FLSA (fair labor standards act) requires minimum wage and overtime payments for any time worked over 40 hours a week and in some states there is a per day requirement. Employers cannot get around the overtime requirement by paying a higher wage, and a policy that requires overtime to be approved beforehand is likely not enforceable. The standard for overtime is an employee was “suffered or permitted to work.” Turning a blind eye on excess work can result in overtime. Travel time and on call time are compensable work times.

The panelists discussed some exceptions for overtime for different types of employees and the only exception likely to apply to the domestic worker is the live-in exception. A live-in domestic worker does not get overtime pay. There must be a written contract, the live-in arrangement must be primary residence of the worker, and the worker must live there for 5 days or 120 hours. In addition the contract should define free time as unpaid.

### III. Form I-9

A Form I-9 must be completed by every employee and employer, but not for independent contractors, for any employee hired on or after Nov. 6, 1986. This form is required to verify employment authorization. The most current version of the form is available on immigration services website USCIS.

The panelists caution that Form I-9 reviews and audits are on the rise. The form is deceptively simple with only two substantive pages, but the handbook for the form is 116 pages long. The panelists discussed the three sections of the form: employee provided information, employer document review of the employee provided information, and re-verification and updates.

The I-9 Form must be completed within 3 days of hiring the new employee. It’s a good idea to give a copy in advance to the employee so that the employee has time to collect the necessary information and documents. The employer cannot suggest what information the
employee needs to bring. The employer must keep I-9 Forms for the longer of 3 years from hiring or 1 year from firing. The panelists recommended keeping I-9 forms separate from personnel files and not retaining copies of the employee authorization documents.

Depending on the documentation given by the employee, the employer may have a duty to re-verify the employee’s authorization to work. It’s a big red flag if the employee brings in re-verification documents that are drastically different than the original form. Look for new name changes, or proof of evidence that at the original hiring the employee may not have been authorized to work. The panelists commented that it’s not an issue if the employee wasn’t authorized to work but now is, but the re-verification proves that work is currently authorized to work. If the employee does not have a work authorization, the employer must terminate the employee immediately. The former employee can be rehired when the employee can present valid work authorization.

The consequences of hiring an unauthorized worker or failing to re-verify work authorization could result in fines for paperwork violations and fines for having unauthorized workers for the employer as well as loss of the worker, attorneys’ fees for cleaning up the mess, and reputation damage for being known as a hirer of an unauthorized worker. The biggest harm is the loss of the worker, and the worker may be detained and sent back to his or her home country.

3:50-5:20  SPECIAL SESSIONS IV

Session IV-A
The Magic Age Is 70½ [ELD][FIN]
Presenter: Natalie B. Choate
Reporter: Kimon Karas

At 70 1/2 your IRA tax shelter becomes a tax nightmare. Help older clients minimize or eliminate RMDs. Plus, when and how to take RMDs, and where to take them from

A Roth IRA is a totally tax-free wealth builder. The goal is to preserve and protect the Roth tax-free build up. There is no lifetime minimum distribution requirement with a Roth IRA. Only drawback is once funds are removed from the Roth IRA they no longer generate a tax-free return. The new tax act made only one significant change and that relates to Roth characterization. Life expectancy payout is still available as well as see through trusts.

Who should be beneficiary of Roth IRA.

1. Not a charity.
2. Young beneficiary. If concerned young beneficiary may dissipate funds, use a see through trust for the beneficiary.
3. Name the surviving spouse outright as a beneficiary. Spouse can then rollover into spouse’s Roth IRA. Spouse has no minimum distribution requirement. Do not name trust for spouse as beneficiary as no rollover is available and, thus, no tax-free build up potential.

4. If see through trust is Roth IRA beneficiary, trust should place minimum distribution in separate account and then pay trustee administration expenses from separate account. Otherwise would be reducing the tax-free build up in the IRA.

**How one acquires a Roth IRA.**

1. Making annual contributions to a Roth IRA, but subject to income limitations. Contribution limit is $5,500 or $6,500 for persons over age 50.

2. Back door conversion is available. In the new tax act the Conference Committee confirm back door Roth conversions are legal both under prior law and current law.

3. If one has a significant IRA account how can one convert and limit income tax exposure as the conversion is a taxable event. Convert in a year when income tax rate is low; year in which client may have NOLs. With a qualified plan, a participant in a qualified plan with an IRA with both after tax contributions can affect an upstream rollover of the pre-tax funds to a qualified plan and then take the after tax funds in the IRA and convert those funds to a Roth IRA. Otherwise if IRA owner attempted just to convert the after tax funds, it will not work. All IRAs are aggregated and funds coming out are treated proportionally coming from both pre-tax and after-tax amounts.

4. Another alternative is a client with both pretax and after tax funds in a 401k plan. Client opens two separate IRAs, and rolls the pretax funds into IRA-1 and the after tax funds into IRA-2. IRS has blessed this. Caveat, must take the entire distribution although the funds can end up in different destinations.

5. Another way to create Roth IRA assuming 401k plans have a Roth feature.

6. A Roth conversion is a taxable event. Whatever amount of a traditional IRA is converted or rolled over to a Roth IRA is taxed as if the funds had been disturbed to the IRA owner and not rolled over.

**Tax act changes.**

Roth conversions can no longer be characterized. The IRS just announced for those who make Roth conversions in 2017 will have until October 15 to move funds back to transferring IRA with earnings. From now on however no longer will person have the right to change a Roth conversion—it is permanent.

The act did not change Section 408A(d)(6) which permits certain “adjustments” to be made. The tax act does not ban recharacterization of IRA contributions as a method of fixing mistakes, provided the original contribution was not a valid Roth conversion. The provision allows for fixing mistakes. This section allows a taxpayer who has make any
contribution to an individual retirement plan (except after 2017, conversion) during a particular taxable year to move that contribution to “any other individual retirement plan.” If the transfer meets certain requirements, the contribution is treated for all purposes as if it had been originally made to the second (transferee) IRA. For example, an eligible rollover is mistakenly placed in wrong IRA; husband retires and requests direct rollover to his IRA; by mistake funds are placed in wife’s IRA. This should be fixable provided the transfer includes the applicable net earnings together with the original fund. Allows taxpayers to change their minds about their IRA contribution or prior to (2018) conversion and fix mistakes. A “regular” contribution made to either type of IRA (traditional or Roth) for a particular year may be characterized as a contribution to the other type. Reg.1. 408A-5, A-10, Examples 2,3. What cannot be recharacterized however, are funds rolled over from a traditional retirement plan to a traditional IRA by tax-free rollover and then later change that and recharacterize that as a Roth conversion by moving the rolled amount to a Roth IRA.

Session IV-B
All Present and Accounted For: Proactively Preparing Fiduciary Accountings to Facilitate Pre- and Post-Mortem Planning and Mitigate Risk [TRU]
Presenters: Joshua S. Rubenstein + Scott T. Ditman
Reporter: Michelle Mieras

The world is becoming more litigious, especially in the private client arena. Fiduciary accountings, when collaborated on by legal and accounting professionals, not only can protect fiduciaries and the professionals who represent them from litigation, but they also can form the basis for innovative win-win solutions when litigation occurs by distinguishing accounting from tax income, reallocating receipts and expenses between income and principal, facilitating pre- and post-mortem estate planning, and mitigating income and transfer taxation

Mr. Rubenstein began the session with a reminder about the trillions of dollars of wealth that will be passing to the next generation and related statistics. Trusts will continue to be used to transition wealth in light of the various benefits they offer, such as creditor protection and, in some parts of the world, income tax protection. The tension between the benefits of using a trust structure and the beneficiaries’ general preference to have “their money” outright contributes to the significant scrutiny over trust administration. Accountings and releases play a significant role in protecting trustees, although the requirements and benefits vary significantly state to state.

Despite the typical knee-jerk reaction against accountings due to associated complexity and expense, Mr. Rubenstein pointed out that the releases trustees obtain from beneficiaries are only as good as the information you give the beneficiaries, so it is beneficial to do a complete and accurate accounting. Additionally, it makes sense to do it
when the players are still alive, involved, and able to provide information and answer any questions. Finally, performing proactive accountings provides an opportunity to timely correct any identified errors or issues, rather than waiting for years to pass, during which the problem may grow significantly.

Mr. Ditman and Mr. Rubenstein presented five case studies to demonstrate these points. Mr. Ditman noted that common themes throughout all cases are communicating financial information to all interested parties, protecting the fiduciary, and identifying planning opportunities.

**Case Study 1** focused on fiduciary protection and tax savings. In the context of a $300 million marital QTIP trust where the surviving spouse did not need the income to maintain her lifestyle, the trustees were able to strategically allocate certain expenses to income and preserve principal for descendants. The trust instrument also allowed the creation of a depreciation reserve (assets were generally rental real estate LLCs and partnerships), which the trustees were able to make use of. Absent the accounting and the related open communications, these planning opportunities may not have been known or implemented. In this case, they estimate an additional $60MM was transferred to the descendants as a result. The family, and the trustees, benefited tremendously, by having the accountings prepared.

The panelists reminded the audience that so much of the successful administration of a trust comes down to communication, transparency, ensuring that all interested parties receive all financial information. Even though this case involved a nuclear family, the dynamics were volatile, and all parties (including grandchildren) were represented by separate counsel. Through communication and transparency, everyone was able to work together to balance the economic interests of the various parties, by presenting potential scenarios with corresponding consequences. Ensuring that the parties are informed, involved, and feel respected and heard allowed the family to plan together.

**Case Study 2** involved a patriarch who provided financial statements annually to the family, but declined to prepare accountings and obtain signoffs from his children. As he aged and became unable to defend himself, the children sued. It cost $10MM to create accountings for 50 years of activity in multiple trusts. The panelists cautioned that a lot of trust disputes have nothing to do with money; instead, they are based in family dynamics going back to childhood. Best practice is to prepare the accountings and get signoffs while everyone is alive and involved, to avoid a tremendous waste of time, energy and money.

**Case Study 3** centered around a trust holding a concentrated stock position with very low basis where there was general consensus that the stock would not be sold, and debt incurred by trustees (many over time) to fund the current beneficiary’s lifestyle as a result of there being no liquidity in the trust. There had been accountings prepared in the past, but no releases obtained from the beneficiaries. The firm that prepared those accountings went out of business, thwarting efforts to retrieve the underlying information. The panelists suggested preparing accountings and obtaining releases while as many folks as
possible were still around to answer questions on financial activity. The ongoing (and growing) risk of maintaining the concentrated stock position could be somewhat minimized by releases (and in this case, a court order), but the accountings in this case could also provide a basis to determine responsibility values for each of the trustees over time if litigation ensued.

Case Study 4 was found in familiar marital trust ground, but this time the surviving spouse was using funds distributed from the marital trust to benefit one of three children. There was concern that after the surviving spouse’s death, the two other children would bring suit based on the distributions that ultimately benefited the third child. While the surviving spouse was still alive, a summary accounting was prepared and provided to the whole family, and regular family meetings were institute to review the finances of the trust and ensure that all activity was disclosed. This prevented the two non-benefitted children from being surprised at the surviving spouse’s death, and gave them an opportunity to be angry with and confront the matriarch during life; another win for full communication and transparency.

Finally, Case Study 5 discussed a blended family situation in which Mr. Rubenstein and Mr. Ditman were involved, where the parents died in a plane crash, leaving behind two older children of one parent, and three younger children of both parents. Assets were left in various trust arrangements, and the accountings from the inception of the trusts through 2017 are currently being finalized for presentation to the beneficiaries to obtain releases. Strategically, the accountings are being prepared now because the youngest child has attained the age of 18 and can sign off on the accountings, the two older children have each become married (introducing additional complexities into the scenario), and the close family friend who had become the substitute patriarch of sorts was in his late seventies.

Several audience members asked questions around successor trusteeships when no prior accountings were available. The panelists generally advise against accepting such a successor trusteeship in light of the potentially limitless liability. The best the successor trustee could do if they did step in would be to cobble together all the records - including tax returns - that can be located, disclose the deficiencies of this so called “accounting” to the beneficiaries, and try to get everyone’s signoff. But, as previously discussed, the release is only as good as the information you give the beneficiaries.

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..