50th Annual Philip E. Heckerling Institute on Estate Planning
January 22-26, 2018

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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Heckerling 2018 - Introduction Part 1

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/heckerling and the listing of the proceedings will also be published as part of Introduction Part 2 that will be distributed soon. This Introduction Part 1 covers 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.

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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Our on-site local Reporters who will be 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 will be Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is the Chief Moderator of the ABA-PTL discussion list. He will be ably assisted in those duties this year by Reporter Bruce A Tannahill Esq..

Institute's Welcome Reception - Monday Evening, January 22nd

The Heckerling Institute staff reminds everyone to attend the Complementary Welcome Reception for Registrants that will be held in the exhibition hall at the Marriott from 6:00 to 7:00 on Monday evening, January 22nd. This is a don't miss function, especially for first time attendees - plenty of food and lots to drink, all complimentary of the Institute. Be on the look out for your friendly ABA-PTL Reporters who will all have badges on identifying them as such and say hello to them.
The Purposes and Scope of the 2018 Institute

As the leading and largest conference for estate planning professionals, the Heckerling Institute on Estate Planning provides unparalleled educational and professional development opportunities for all members of the estate planning team. The program covers topics of timely interest to attorneys, trust officers, accountants, charitable giving professionals, insurance advisors, elder law specialists, wealth management professionals, educators and non-profit advisors. The Institute is also the home of the nation’s largest exhibit hall dedicated entirely to the estate planning industry.

The 52nd Institute will provide you with the information and practical guidance you need to plan effectively in the current uncertain and unpredictable legal and economic environment. Our faculty of leading experts will explore today’s most important tax and non-tax planning issues, including the planning implications of enacted or anticipated legislation. The Recent Developments Panel will analyze the most significant developments of 2017, and provide valuable insights on emerging trends that can affect your practice. The Lloyd Leva Plaine Distinguished Lecture will feature Trevor Potter, a former Commissioner and Chairman of the Federal Election Commission, who will offer an inside look at Washington and the impact of money in politics. In addition to traditional estate planning topics, the 52nd Institute will also examine the impact of emerging technological developments, the increasing significance of international planning issues, and the continued importance of income tax and basis planning.

Attendees can benefit from programs covering a wide range of advanced level planning topics, or can customize their educational experience with the following specialized program tracks:

**NEW! Closely-Held Business Planning:** This series offers an in-depth look at planning for the closely-held business, including choice of entity and other formation issues, the use of buy-sell agreements, planning for real estate investors, ethical issues, exiting the business, and unwinding FLPs. [CHB]

**NEW! Planning with Trusts:** This series examines the impact of the new Uniform Directed Trust Act (including the planning and drafting implications), fiduciary income tax issues, preparing fiduciary accountings to mitigate risk, the care and feeding of dynasty trusts, the scope of trustee discretion, and trust asset protection through the lens of the drafting attorney, the fiduciaries, and the creditors. [TRU]

**International Planning:** Recognizing the increasing prevalence of clients with international connections, this series provides an overview of the international planning concepts all planners should be familiar with, as well as an introduction to employment and immigration law. It also examines planning with community property, and U.S. tax issues related to foreign trusts. [INT]
**Financial Assets:** These programs explore income tax and basis planning, the current state of planning with life insurance, and the effective use of Roth IRAs. [FIN]

**Charitable Giving:** This track of programs offers guidance on choosing the most effective tax-exempt vehicle to implement a client’s charitable intentions – including alternatives to the private foundation, and how to approach planned giving in a changing landscape. [CHR]

**Elder Law:** This series covers new developments in special needs planning, financing long-term care, improving the quality of life of elderly clients, and planning for IRA required minimum distributions. [ELD]

**Litigation:** This series examines recent cases involving fiduciaries, the ethical issues involved in negotiations, and planning to avoid post-death administrative problems. The series also offers a look at the unique issues involved in celebrity estates, and the lessons to be learned from a historical will contest. [LIT]

**Fundamentals:** The fundamentals programs provide an overview of Subchapter J, examine the issues involved in forming a closely-held business, and cover the international planning issues all domestic estate planners should be familiar with.

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Heckerling 2018 - Introduction Part 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/heckerling. Introduction Part 1 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. This Introduction Part 2 contains a complete listing of all of the proceedings of this Institute.

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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Our on-site local Reporters who will be 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 will be Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is the Chief Moderator of the ABA-PTL discussion list. He will be ably assisted in those duties this year by Reporter Bruce A Tannahill Esq..

Proceedings of the 52nd Heckerling Institute

MONDAY, JANUARY 22

7:00  Conference Check-In and On-Site Registration

9:00-12:15

FUNDAMENTALS PROGRAM #1

Starting Off On the Right Foot While Avoiding Foot Faults - Issues at the Formation of the Closely-Held Business [CHB]
Stephanie Loomis-Price + Samuel A. Donaldson + Ivan Taback

Clients launching new business ventures need a lot of guidance, whether they know it or not. This program will cover most of the important tax and legal issues related to the formation and ongoing maintenance of a new business entity, including understanding the federal tax implications of the various types of business entities, negotiating the documents related to management, coordinating the business capital structure with the estate plan, and optimizing entity maintenance to minimize IRS attacks.

10:30-10:45  Break

12:15-2:00  Lunch

2:00-2:10  Introductory Remarks
Tina Portuondo, Director, Heckerling Institute
Patricia D. White, Dean, University of Miami School of Law

2:10-5:15  Recent Developments 2017
Carol A. Harrington + Steve R. Akers + Jeffrey N. Pennell

This panel will analyze the most significant developments of 2017, including the planning implications of enacted or anticipated legislation.

Materials by: Steve R. Akers, Samuel A. Donaldson, Charles D. "Skip" Fox, IV, Jeffrey N. Pennell, and Howard M. Zaritsky
Edited by: Ronald D. Aucutt

3:30-3:45  Break

6:00-7:00  Welcome Reception

TUESDAY, JANUARY 23

9:00-9:50
Putting It On & Taking It Off: Managing Tax Basis Today for Tomorrow [FIN]
Paul S. Lee
The management and creation of tax basis is the most important planning issue today and, even more so, if “tax reform” occurs (in whatever form). Death may be inevitable but capital gains taxes shouldn’t be. Every client should capitalize on strategies to maximize and concentrate basis in assets where it can be of most benefit. This presentation will demonstrate how innovative, advance planning can maximize value many times over.

9:50-10:40

Thomas W. Abendroth

Business succession planning is the process of planning to exit the business, either through sale or through transfer to succeeding generations. This session will examine selected tax and non-tax issues associated with exiting the business, and how planning must work with either form of exit.

10:40-10:55    Break

10:55-11:45

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

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?

1:45-12:35

**Lloyd Leva Plaine Distinguished Lecture - Money in Politics: A Hydraulic or a Legal Issue?**
Trevor Potter

For over a century federal law has attempted to regulate the sources and amounts of money in elections. The result proves to some that money is a hydraulic force: efforts to channel it only result in broken dikes and washed away dams. Others believe that the problem is inartful drafting, failed regulators, partisan greediness, the leveraging of the tax code to subvert the campaign finance laws, and a Supreme Court which has no understanding of how politics and the legislative system actually work. Which is it?

12:35-2:00    Lunch

2:00-2:50

**Estate Planning in Anticipation of a Contest or a Difficult Beneficiary [LIT] [TRU]**
S. Andrew Pharies

This session will focus on practical issues in structuring an estate plan to withstand a potential
contest or a beneficiary likely to disrupt the post-death administration. It will focus on enhancing the enforceability of no contest clauses as well as structuring an estate plan to mitigate fiduciary risk.

2:50-3:40

**Buy-Sell Agreements: A Critical Part of Any Business Formation [CHB]**
Louis A. Mezzullo

This session will discuss the objectives and key tax and non-tax issues when drafting a buy-sell agreement for a closely-held business.

3:40-3:55  Break

3:55-4:45

**Beyond the Private Foundation [CHR]**
Martin Hall

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

4:45-5:35

**The 1846 Last Will of John Sutton - What's Not So New in Will Drafting and Contests [LIT]**
Terrence M. Franklin

Will drafting, the role of the attorney as counselor and witness, and pleading and the presentation of facts in a will contest trial will be addressed on the eve of the anniversary of the signing of the last will and testament of the speaker’s ancestor, a Florida slave owner whose will emancipated the mother of his children and their offspring.

**WEDNESDAY, JANUARY 24**

9:00- 9:50

**Will You Still Need Me, Will You Still Feed Me, When I’m Sixty-Four? [ELD]**
Bernard A. Krooks

Not sure that the Beatles were thinking about financing long-term care, but you and your clients should be! Seventy percent of Americans age 65 and older will need some form of long-term care during their lifetime. Unfortunately, the U.S. has no health insurance system for long-term care. To many, this comes as a rude awakening as their health declines and the need for care arises. This presentation will address the myriad of options available to people in need of long-term care, how to finance such care, and other issues that should be addressed during this process.
9:50-10:40  
Theory Meets Reality: A Practical Look at the U.S. Income Taxation of U.S. Grantors and Beneficiaries of Foreign Trusts [INT][TRU]  
M. Read Moore  

Differences in trust law and trust administration outside of the United States often make advising U.S. clients on U.S. tax issues related to foreign trusts quite challenging. This presentation will address the principal U.S. income tax issues affecting U.S. settlors and beneficiaries of trusts administered outside the United States with an emphasis on frequent conflicts between U.S. tax law and the realities of trust law and trust administration outside of the United States.

10:40-10:55  Break

10:55-12:35  
Question and Answer Panel  
Carol A. Harrington + Steve R. Akers + Jeffrey N. Pennell

12:35-2:00  Lunch

2:00-5:20  
FUNDAMENTALS PROGRAM #2

(Runs concurrently with Special Sessions I and II)  
Selected Subchapter J Subjects: From the Plumbing to the Planning, Preventing Pitfalls with Potential Payoffs [TRU]  
Alan S. Halperin + Amy E. Heller

Understanding the rules of Subchapter J is essential for every estate planner. The program will provide an overview of Subchapter J, including the rules related to grantor trusts and non-grantor trusts. The panelists will address potential pitfalls and planning opportunities that permeate this area.

2:00-3:30  SPECIAL SESSIONS I

Session I-A  
Building Basis, Beyond the Basics: Effective and Efficient Basis Building Strategies for Your Client [FIN]  
Paul S. Lee + Turney P. Berry + Ellen K. Harrison

The panel will explore today’s timely techniques to maximize and concentrate basis, including practical steps required to implement these strategies. The discussion will include upstream planning, powers of appointment to create basis, using leverage, using partnerships to move basis to where you want it, and planning that benefits charity while capturing new basis for the family.
Session I-B
Special Issues in Drafting (and Administering) Buy-Sell Agreements [CHB]
Louis A. Mezzullo + Nancy G. Henderson

The panelists will share best practices in drafting buy-sell agreements in contemplation of divorce, creditors, ownership by charitable and non-charitable trusts and other entities, transfer tax audits, and disputes among business owners.

Session I-C
Two Systems Separated by a Common Language: U.S. Tax Law Meets Non-U.S. Trust Law [INT][TRU]
M. Read Moore + Alec R. Anderson

This session will consider the application of U.S. income tax laws to trusts administered outside the United States in the context of non-U.S. trust law and typical administrative practices of non-U.S. trustees, including issues related to the establishment and settlement of non-U.S. trusts, trust administration outside the United States, distributions from foreign trusts, and termination of foreign trusts.

Session I-D
Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases (at least it seems to me) [LIT][TRU]
Dana G. Fitzsimons, Jr.

This session will review recent cases from across the country to assist fiduciaries and their advisors in identifying and managing contemporary challenges.

Session I-E
Beyond the Special Needs Trust: Essential New Developments in Special Needs Planning [ELD][TRU]
Katherine N. Barr + Kristen M. Lewis + James M. McCarten

This panel will discuss new laws, regulations and options that estate planners must know to plan effectively for a secure quality of life for a person with a disability.

Session I-F
Structuring Philanthropy: What Works When [CHR]
Martin Hall + Erik Dryburgh + Michele A.W. McKinnon

A critical question for philanthropic clients is what structure or combination of structures should be used to fulfill their goals. This session will consider not only the more standard options of private foundations, private operating foundations, donor-advised fund accounts and supporting organizations, but will also review the use of section 501(c)(4) social welfare organizations and LLCs to meet the needs of different donor profiles.
3:30-3:50    Break

3:50-5:20    SPECIAL SESSIONS II

Session II-A
Show Me the Money! Settlors, Beneficiaries and the Dynasty Trust [TRU]
Diana S.C. Zeydel + Todd A. Flubacher + Barry F. Spivey

Flexibility or no flexibility for dynasty trusts? Can we solve for settlor intentions, beneficiary predilections, tax considerations, and state law limitations without fiduciary litigation? This session will examine the options.

Session II-B
Family LPs and LLCs: The Unwind [CHB]
Thomas W. Abendroth + Robert R. Pluth, Jr.

This session will examine the income tax issues that may be overlooked in unwinding a family LP or LLC, particularly if the advisor’s expertise is more concentrated on estate planning than income taxation.

Session II-C
Technology and Estate Planning: The Rise of the Machines
Bruce M. Stone + Eliam Medina + Suzanne Brown Walsh

First it was word processing and desktop calculators. Then document assembly systems, spreadsheets, and actuarial software. Mail delivery was replaced by faxing which was replaced by email which is being replaced by cloud storage and shared access. The internet provides access to vast troves of knowledge. Wills prepared online, executed with remote witnesses and existing only as electronic records are here. The only thing not yet replaced is the human brain of the estate planner. Will artificial intelligence replace us eventually? Do we have professional and ethical duties to embrace the fullest use of advances in technology? Ethics and Technology Credits Applied For

Session II-D
Bernard A. Krooks + Robert B. Fleming + Lawrence A. Frolik

The bad news is that during later life individuals often encounter legal problems arising from health concerns, long-term care, and the need for appropriate housing. The good news is that elder law often provides answers by crafting solutions that permit clients to live as well as possible in the last decades of their lives. The panel will discuss hypothetical, but realistic, problems often faced by older clients, and demonstrate how to “solve” or at least alleviate them, by applying the precepts and knowledge of elder law.
Session II-E
Case Studies in Preventing Post-Death Administrative Nightmares [LIT][TRU]
S. Andrew Pharies + David A. Baker + Jo Ann Engelhardt

This panel discussion will examine real and hypothetical cases that resulted in post-death administrative nightmares and attempt to reverse engineer those cases to determine what, if any, preventative measures could have been taken at the estate planning stage.

Session II-F
Dying for Fame in the Age of Celebrity: From Neverland Ranch to Paisley Park [LIT]
Linda J. Wank + Edward H. Rosenthal + David Sleeman

Using the Estates of Michael Jackson and Prince as case studies, this panel will explore the unique, hot-button issues confronting fiduciaries and heirs of celebrity estates.

THURSDAY, JANUARY 25

9:00-9:50
Stranger in a Strange Land: Dealing with Foreign and Domestic Community Property Issues in Your State [INT]
Joshua S. Rubenstein

People are becoming increasingly peripatetic in today’s mobile society. Sometimes people from different countries marry. Sometimes couples change domiciles. Sometimes individuals have property in more than one country. And sometimes individuals have close family members, even spouses, who live in different countries. This program will consider the issues presented when an individual from a community property jurisdiction has connections to a common law property jurisdiction.

9:50-10:40
Trust Administration Takes a Village? The New Uniform Directed Trust Act Paves the Way for Creative and Thoughtful Divided Trusteeship [TRU]
Robert H. Sitkoff

The duties and liabilities of directed trustees and trust directors remain a source of confusion. This session will canvass the new Uniform Directed Trust Act, explore how the Act simplifies drafting and administering directed trusts, and highlight some of the most common and helpful uses of directed trusts in the current planning environment.

10:40-10:55    Break

10:55-1:45
What’s a Donor to Do? Planned Giving in a Changing Tax Landscape [CHR]
Michele A.W. McKinnon
This program will cover the manner in which donors should approach planned giving under uncertain or new tax laws as well as changes affecting the charitable deduction and their impact on planned giving techniques. It will also explore other reasons donors make gifts and whether these considerations are likely to outweigh new tax limitations in a donor’s gift considerations.

1:45-12:35
**Dishing the Dirt on Planning for Real Estate Investors [CHB]**
Farhad Aghdami

This program will focus on the income tax and wealth transfer tax planning opportunities (and pitfalls) associated with planning for real estate investors, including a discussion of non-tax considerations and obstacles, such as obtaining third-party consents. The program will also explore valuation discount planning, freeze, and leveraging strategies for specific types of assets and ownership structures typically found in real estate deals.

12:35-2:00 Lunch

2:00-5:20

**FUNDAMENTALS PROGRAM #3**

(Runs concurrently with Special Sessions III and IV)
**Demystifying International Tax Planning for Individuals - A Primer for the Domestic Estate Planner [INT]**

N. Todd Angkatavanich + Scott A. Bowman + Carlyn S. McCaffrey + Edward Vergara

This program will focus on tax issues practitioners should be familiar with when dealing with families who have multi-national members and assets, including U.S. income and transfer tax rules relevant to residents and non-residents, inbound and outbound investments, foreign trusts and their U.S. beneficiaries, corporate anti-deferral regimes, and expatriation. We will also discuss information exchange regimes such as FATCA, CRS and more.

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]**
Robert H. Sitkoff + Turney P. Berry + James M. Marion + Susan D. Snyder

After three years of collaborative effort, last summer the Uniform Law Commission approved the Uniform Directed Trust Act. This panel will explore 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.

Session III-B
**Trust Asset Protection Through a Tri-Focal Lens [LIT][TRU]**
Daniel S. Rubin + Terrence M. Franklin + Michael M. Gordon
This program will address 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.

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

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 will cover 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.

Session III-D  
Creative Use of Planned Giving Techniques in an Uncertain Tax Environment [CHR]  
Michele A.W. McKinnon

This program will look at specific planned giving techniques and their continued benefits to donors under new or proposed tax law changes with a focus on charitable gift annuities, remainder trusts, and lead trusts.

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]  
Charles D. “Skip” Fox, IV + J. Lee E. Osborne + Mary F. Radford

Through the use of case studies this session will examine 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 to be examined are 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. Ethics Credit Applied For

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

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 will focus on issues unique to family (domestic) employees such as the Fair Labor Standards Act, classification as an employee versus independent contractor, and liability. It will also address issues related to more high-level employees of the office, including hiring, compensation, performance reviews, terminations, and liability. Finally, it will address issues related to
employing non-U.S. citizens.

3:30-3:50 Break

3:50-5:20

**SPECIAL SESSIONS IV**

**Session IV-A**
*The Magic Age Is 70½ [ELD][FIN]*
Natalie B. Choate

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.

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

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.

**Session IV-C**
*Getting Your Hands Dirty with Real Estate Investors [CHB]*
Farhad Aghdami + Sarah Moore Johnson

This program will focus on practical tax and non-tax considerations when representing real estate investors, such as choosing the right trustees after the Aragona case, dealing with negative capital accounts, managing capital gains and avoiding “dealer” status, valuation and transfers of promote interests, and much, much more!

**Session IV-D**
*How Much and When? A Panel Discussion on the Legal and Practical Considerations of the Exercise of Discretion [TRU]*
Amy K. Kanyuk + William T. Hennessey + R. Hugh Magill

This session will provide practical advice and guidance from the perspective of an estate planner, a litigator, and a trust officer regarding the exercise of a trustee's discretion and the scope of a beneficiary's rights with respect to a discretionary trust.
Ethical challenges arise in any negotiation, especially when intertwined with thorny trust and estate issues. The panel will address the ethical and strategic implications in negotiating with counsel, clients, and advisors. This program will include a mock mediation in which the participants grapple with common yet intriguing – and even entertaining – problems.

FRIDAY, JANUARY 26

9:00-9:50
Doth Thou Roth? [FIN]
Natalie B. Choate

Roth IRAs offer significant planning opportunities but are surrounded by pitfalls. This session will cover basic to expert tips, including tax-free Roth conversions, beneficiary conversions, estate planning angles, and what trustees must know.

9:50-10:40
Trustee Discretion: The Better Part of Valor or Vulnerability? [TRU]
Amy K. Kanyuk

This session will focus on the challenges trustees face with respect to discretion over distributions, examining the scope and meaning of different types of discretion, and the interplay between a trustee's discretion and a beneficiary's rights and interests.

10:40-10:50 Break

10:50-12:00
The Best, the Most Intriguing, and the Scariest Ideas Culled from the 2018 Institute and Elsewhere and How to Make Them Work for You and Your Clients
Jonathan G. Blattmachr + Martin Shenkman

An eclectic survey of drafting ideas, planning tips, new developments and random thoughts each of which has practical implications to estate, financial and related planning. A collection of the most practical, nettlesome or just unexpected planning nuggets gleaned from this year’s Institute and elsewhere (professional literature, list serves, and cocktail parties).
Heckerling 2018 - Report No. 1

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 begins our coverage of the proceedings.

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**ERRATA: Introduction No. 2** left out a Special Session that was added after the initial brochure for this year's Institute was released. It is **Special Session IV-F** that will be held on Thursday afternoon from 3:50 to 5:20 PM entitled **Why Your Partnership and LLC Agreements Need a Tune-Up in 2018: The New Partnership Audit Rules [CHB]**. It is to be presented by Richard B. Robinson of Robinson, Diss and Clowdus, PC in Denver, Colorado. It is described as follows: Every partnership (including large, small, and family partnerships) must amend its agreement beginning with its 2018 tax year. Partnerships with trusts, grantor trusts, limited liability companies, other partnership or disregarded entities as partners, cannot elect out of these new rules, and every partnership must appoint a Partnership Representative for each tax year. The new rules create complexity and decisions that must be discussed with every partnership. This program will provide an overview of the new rules as well as practical advice on how partnership agreements should be amended to address the issues.

**Summary:** This Report #1 begins our coverage of the proceedings of the 52nd Annual Institute and starts with our coverage of the first of three Fundamentals programs, this one being all about the formation of closely-held businesses that was held on Monday morning. Following that is our coverage of the traditional Recent Developments session that was held on Monday afternoon.

Report #2 will begin our coverage of the Tuesday morning general sessions.
FUNDAMENTALS PROGRAM #1

Starting Off on the Right Foot While Avoiding Foot Faults - Issues at the Formation of the Closely-Held Business [CHB]

Presenters: Stephanie Loomis-Price + Samuel A. Donaldson + Ivan Taback
Reporter: Craig Dreyer

Clients launching new business ventures need a lot of guidance, whether they know it or not. This program covered most of the important tax and legal issues related to the formation and ongoing maintenance of a new business entity, including understanding the federal tax implications of the various types of business entities, negotiating the documents related to management, coordinating the business capital structure with the estate plan, and optimizing entity maintenance to minimize IRS attacks. Here are some of the more significant highlights from this session.

21% Corporate Tax Rate

The panel opened by discussing the new 21% flat rate tax on C corporation income effective for 2018 and later. The panel noted that there is no longer a special 35% tax rate for personal service corporations, as they pay the same 21% flat rate. There is still the same rate structure on dividends. The former concern about double tax has been substantially mitigated by the new corporate 21% rate. The idea for the new 2017 Tax Act was to make the tax rates similar for C corporations and pass through entities. However, a C corporation allows the ability to defer tax, but be cautious about converting to a C corporation since there may be tax consequences in trying to unwind them and the tax law may change. In general, C corporations are difficult to unwind, but easy to get into. However, the C corporation is not as bad as it used to be from a tax perspective.

New IRC Section 199A Deduction

The Second Issue the panel discussed was the new Section 199A deduction for qualified business income (“QBI”). The panel then discussed the top 10 things you need to know about the new QBI deduction.

1. **Who qualifies.** A partner in partnership, shareholder in S corporation, and sole proprietor qualify.
2. **Who doesn’t qualify.** C corporations, C-Corporation shareholders, and employees don’t qualify.
3. **Taxable income zones.** Amount of deduction and eligible business is a function of taxable income indexed for inflation. Zone 1- taxable income does not exceed 157,500 single or 315,000 married filing jointly (“MFJ”), you get full QBI deduction from taxable income. Zone 2- taxable income 157,500-207,500 single or 315,000-415,000 MFJ the size of the QBI deduction could be limited if the compensation paid or the unadjusted basis in depreciable property tests are not met. Zone 3, if taxable income is more than 207,500 or 415,000 MFJ, the QBI deduction may be entirely eliminated if they don’t meet the wage and unadjusted basis in depreciable property tests.
4. **Specified Service Business.** If business is in zone 2, the deduction is phased out, in zone 3 there will be no deduction. If performing services in health, law, accounting, actuarial science, performing arts, consulting, financial services, or brokerage services, these are specified services (engineers and architects are notably absent). Regardless of the title if you are a business where
the principal asset is the reputation or skill of one or more of its employees or owners, you are a specified service business. It may be beneficial to spin off separate businesses to enable them to qualify for the QBI deduction, but be careful in planning as the law may be temporary.

5. **U.S. Trade or Business.** The business must be engaged in the conduct of a United States trade or business. Foreign businesses do not qualify, and investment and personal activities do not qualify. Must actively participate. Spinning off property into and LLC may be difficult to take QBI deduction since it must meet the definition for an active trade or business.

6. **Deduction amount.** Zone 1- you can deduct 20% of QBI. Zone 3 – you can deduct either 20% of QBI or, if less, 50% of the wage basis limitation (W2 income or basis in depreciable property). If no wages and no depreciable property, you get no deduction. Zone 2 - your QBI deduction starts at 20% but is phased out. The deduction for each trade or business is calculated separately.

7. **Qualified Business Income.** Net amount of your income, gain, loss, and deduction from an eligible trade or business, except for items of capital gain, loss, and certain dividends from REITS, cooperatives, and publicly traded partnerships. Essentially, this is the net amount of income from ordinary business operations. If net amount of all eligible businesses is a loss, net loss carries over to next taxable year as a loss from a separate qualified trade or business. No limit on carryover. Compensation and guaranteed payments paid to taxpayer are not QBI.

8. **The Wage Basis Limit.** 199A(b)(2) applies to zones 2 or 3.
   a. 50% of W-2 Wages paid by business to employees; or
   b. 25% of W-2 wages plus 2.5% of unadjusted basis immediately after acquisition of all depreciable property used in the business still on hand at year end.

9. **Eligibility for Estates and Trusts.** Estates and trusts with interest in partnership and S corporation are eligible for the deduction. The 2017 Tax Act instructs Treasury to issue regulations explaining how the deduction is to be apportioned between fiduciaries and beneficiaries.

10. **Sunset, Sunrise.** Individual benefits sunset in 2025. This is a benefit to individuals and not C-corporations since they are not eligible for the QBI deduction.

**Conversion from S to C-Corp**

Transition from S corporation to C corporation. It all depends if it will make sense. Generally, it will be a tax-free event, but you may lose the ability to use cash method of accounting. Switching from S corporation to C corporation may also force accrual method of accounting, but you will need Service permission to do this. In doing so, you may also need to make an IRC Section 481 adjustment.

**ENTITIES AND ATTRIBUTES**

**Sole proprietorship**

**Tax.** For tax purposes, a sole proprietorship is a tax nothing, and is reported on Schedule C of the Form 1040.

**Business Issues.** The owner has personal liability since there is no liability protection. The panel noted that is imperative that owners of these entities obtain proper insurance coverage.

**Creation.** There is no formal creation mechanism and generally has no state registration requirement. Municipalities often have some registration requirements. Sole proprietor will have to register fictitious name requirement if they want to operate under a name other than their own.

**Succession Planning.** This can be challenging in sole proprietorship. It can be done by sale or gift and business would consist of all business assets including intangible assets. It can also qualify for IRC Section 6166 deferral for estate taxes. Goodwill is a major part of planning, and you may be able to transfer or not
transfer goodwill. *Bross Trucking* case discusses how to potentially set up transfer of business between generations to lessen the impact of good will.

*Family Considerations.* Minimal in sole proprietor context. In community property states, there may be more than one owner in a sole proprietorship. These issues also come up unexpectedly as people move.

*Overall.* Easiest business to form, but also has no liability protection for its owners.

**C-Corporations**

*Tax.* Only C-Corporations qualify for Qualified Small Business Stock IRC Section 1202. If stock qualifies and was acquired after Sept 28, 2010, entire amount of gain on sale of stock can be excluded. This is good for angel investors who want to hold stock for 5 years and cash out. 2017 Tax Act does not prevent 1045 like kind exchange for qualified small business stock. In the past, the double tax had us advise to distribute wages rather than dividends since wages were deductible. Now that we have a 21% corporate tax rate, you must run the numbers to see if the 21% and 23.8% rate creates a push. Since compensation has self-employment tax, it may be better to pay dividends under the new law to avoid self-employment taxes. However, paying generous interest is also usually preferable over dividends if the shareholder is also a creditor of the corporation. Similarly, if the shareholder is also landlord, paying generous rent is still a benefit especially if real estate business qualifies under new IRC Section 199A. One must be careful to avoid the accumulated earnings tax - it is a penalty imposed when the Service says a company has too much retained earnings (avoiding a double layer of tax). It is imperative for corporations to document reasons for retaining earnings. The 2017 Tax Act also got rid of corporate AMT. The bottom line is that being a C-corporation under the 2017 Tax Act is more beneficial than it used to be.

*Business Issues.* Liability protection to shareholders of corporation if corporate structure is respected. Shareholder should not be responsible for debts and liabilities of corporation. It is imperative that rules be followed so as to not be treated as an alter ego.

*Family Considerations.* A properly run corporation should have a shareholder agreement and lays out transfer restrictions. Should have succession plan - with a C corporation it generally involves transferring stock to others and its important to plan for this.

*State Law Issues.* Formation is done by authorized person filing Certificate or Articles of Incorporation with state entity. If doing business in another state you must also file application to do business in the other state. Delaware is one of most popular states to form a corporation. Corporation also generally have by-laws and lay out how entity will be managed. It is important to stay up with corporate formalities to avoid liability to the shareholders.

*Litigation Issues.* It is important to follow C-Corporation regulations to protect from liability. It is also an advantage on the family side to have a C corporation since the service doesn’t attack them as often as on the estate side since they are not as common.

*Overall.* The C corporation may be beneficial over S corporation if people want different classes of stock.

**S corporations**

The panel noted that the eligibility requirements for an S corporation all have practical work arounds. The panel then went through the requirements: 1. Only U.S. Corporation can be an S corporation, but if dual registered can be treated as a U.S. S corporation. 2. Can’t have more than 100 shareholders (but you can
also count all members of a family as 1 shareholder even after divorce). 3. Can’t have non-resident alien shareholders. 4. S corporation can only have one class of stock (can’t differ on distribution or liquidation rights but can differ on voting rights). 5. Corporations, partnerships and LLC’s and other entities are not permissible owners of S corporation stock.

**Tax Considerations.** You must affirmatively elect S Corporation Status. Income flows through to shareholders in pro rata ownership. Entity character of income, loss, and deduction flows through to shareholders. Liquidation of an S corporation remains a taxable event. One benefit of an S corporation over a C corporation is in the funding and the purchase of shares. When a shareholder borrows money to buy stock in an S corporation it is treated as though they borrowed the money to buy the underlying business assets allowing them to deduct the interest as a business expense instead of as an investment expense. There is a limitation on business interest deduction that kicks in at over 25 million of gross receipts, but for all others business interest can be deducted in full. Traditionally, paying compensation to a shareholder employee was minimized under the old rules, since it was subject to self-employment tax. S corporation also requires the shifting of tax attributes, which in most other contexts the service would disallow.

**Business Issues.** Succession is similar to C corporation planning, but one must be careful not to violate the one class of stock rules. Most planning involves recapitalizing into voting and non-voting stock for control and discount planning. Be careful when transferring ownership to ensure an employee does not lose tax free benefits by becoming more than a 2% shareholder.

**Family Considerations.** Who can be a shareholder. Holding shares of stock in trusts for family is a common issue. It is important to note that in order to hold S corporation stock, the trust must be a QSST, ESBT, grantor, or Testamentary Trust (for a limited period of time). The election must be made within 2.5 months of the transfer, except for a grantor trust where no election is necessary. The ability to recapitalize stock is very common to transfer non-voting shares for family planning. Must also be careful that buy/sell provisions for an S corporation do not to violates the one class of stock provision.

**State Law Issues.** Similar issues to C corporations, formalities must be followed. By-laws and minutes are important to maintain. You must file with the state regulatory authority. State and local taxation may differ from one state to another. S corporation is just a C corporation that makes an S election.

**Litigation Issues.** IRS does not allow tax affecting for S corporations. The IRS has taken the position they will not take this into consideration. So far there is not a case that allows tax affecting in a valuation case for an S corporation. The *Cecil* case is pending showing tax affecting in this construct. However, with new tax rate it may not matter anymore and be more of a symbolic victory. As with the other entities, the formalities of the entity must be followed to protect form shareholder liability.

**Partnerships**

**General Partnership (“GP”).** GP is an unincorporated business and all partners have management interest and all partners have full liability. Converting to another entity is rather straightforward and painless. Downside to GP is personal liability. General partners are assumed to have equal ownership and decision-making ability if there is no operating agreement.

**Limited Partnerships (“LP”).** LP has general and limited partners. Limited partners have limited liability to capital contributed. General Partners have unlimited liability and are obligated to run company and have all issues with management. In addition to limited partnership filing with state, the required formalities of partnership must be maintained to keep limited liability of limited partners not being involved in management. Nature of obligations and liabilities for general partners to limited partners can create friction
on how entity is run. L.P. often used on one off investments or private equity fund as entity of choice (use has generally been mitigated by LLCs).

**Limited Liability Partnership ("LLP").** LLP is an entity were several partners share management and limited liability. Advantage is all partners are protected by some form of limited liability protection. Must file papers with state. Many states do not allow some professions to form LLC or corporations, which is why you still see many of these. Some states also may not respect LLP formed in another state, so they are not as good for protecting partners in all cases.

**Limited Liability Company ("LLC").** LLCs became very popular in 1990’s as their use increased. They are treated like a partnership for income tax purposes, but you get limited liability to all the members. To form an LLC, you must file an article of formation in most states. LLC’s can be member managed or manager managed. Member managed LLC’s have management done by members with limited liability. Manager managed LLC’s have Managers who have essentially full management control. Manager does not even need to be a member in most states. A multi member LLC can elect to be taxed as corporation rather than partnership. LLCs should have operating agreements among the members that lay out rules regarding ownership, contributions, distributions, management, and the effect of withdrawal, retirement, or death of a member. Operating agreements should also govern restrictions on transfer of interests.

**Tax considerations/State Law Issues.** Most tax consideration are state law specific. States may tax differently. Some states limit certain types of partnerships.

**Business Issues/Family Considerations.** LLC’s allow partners to be general or limited without subjecting them to additional liability. This allows other family members to learn how to operate the business before turning it over, unlike other types of partnerships. Flexibility in allocation of income rather than straight allocation based on ownership. On death, S Corp stock gets step up in basis, but partnership gets step up in all the assets if a 754 election is made. There is also IRS scrutiny to LLC’s regarding valuation issues.

**Litigation Issues.** LLC’s formalities must be followed to prevent an argument for piercing the corporate veil as with other entities.

**Overall.** Advantages of LLC is flow through taxation (if not elected otherwise), limited liability which is subject to piercing of the corporate veil, and allocation of economics among partners. In an LLC you can have capital, profit, and preferred interests. In general, there aren’t many downsides to an LLC.

2:10-5:15

**Recent Developments 2017**
Carol A. Harrington + Steve R. Akers + Jeffrey N. Pennell

Materials by: Steve R. Akers, Samuel A. Donaldson, Charles D. "Skip" Fox, IV, Jeffrey N. Pennell, and Howard M. Zaritsky
Edited by: Ronald D. Aucutt

This panel analyzed the most significant developments of 2017, including the planning implications of enacted and anticipated legislation. The Reporter has focused most of his report
on the panel's discussion of the Tax Cuts and Jobs Act which was covered in a 45 minute extended session at the end, for which Carlyn McCaffrey joined the panel.

**A. General Discussion of Recent Developments**

**Withdrawal of Proposed Section 2704 Regulations**

These regulations were only proposed and never temporary. The panel doesn’t think they’ll come back in another form.

**Consistent basis rules - IRC Form 8971 and Schedule A**

The basis consistency rules have been subject to numerous criticisms, including:

1. Need to provide information to beneficiaries 30 days after 706 is filed. The panel noted the requirement is in the statute.
2. The requirement to inform subsequent transferees of carryover basis property of the property’s basis is not well thought out. The statute only imposes a reporting requirement on the executor, not on heirs.
3. Zero basis rule.

*Estate of Powell v. Commissioner*

Mr. Akers stated this might be the most important case since the *Bongard* case in 2005. It extended section 2036(a)(2) to decedents with only limited partnership interests and raised the possibility that partnership assets could be included under section 2036 and the partnership interest could be included under section 2033.

Section 2036(a)(2) was applied because the decedent in conjunction with all other partners could have dissolved the partnership. Mr. Akers noted that this could apply to any form of co-ownership and is very troubling from planning standpoint.

The possibility of double inclusion was raised by the majority on its own, although the majority only included seven of the 16 regular Tax Court judges plus Judge Halpern, a senior judge. Seven judges rejected the double inclusion analysis in a concurring opinion and two concurred in the result only. Prof. Pennell said that he raised the double inclusion issue with IRS attorneys 15 years ago and they said that did not raise it because the result was so ugly for taxpayers that they were afraid they would lose the 2036 argument. The workaround suggested was to dispose of the assets transferred to the FLP.

**Notice 2017-73, Guidance on Donor Advised Funds**

With TCJA increasing interest in donor advised funds, the panel noted that the guidance in Notice 2017-73, released December 4, 2017, may be more important. The Notice states that the IRS is considering proposing rules that if a DAF pays for a dinner, sports, or other ticket, it results in more than an incidental benefit to the donor that is subject to an excise tax. The use of a DAF distribution to satisfy a donor’s pledge does not result in a benefit that is more than incidental if the DAF distribution does not refer to the pledge and other requirements are met.

**B. 2017 Tax Cuts and Jobs Act (TCJA)**
TCJA is the first major tax reform since 1986 with provisions affecting individual, business, and transfer taxes. The transfer tax changes and the individual changes generally expire in 2026 while most business changes are permanent.

Transfer Tax Provisions

Although the transfer tax changes are not extensive as the individual and business changes, the panel noted that there are two significant questions:

1. The exact amount of the basic exclusion amount. Inflation adjustments are now computed using the chained CPI, which has a lookback provision. A panelist noted that we are hoping to get some official guidance on whether the chained CPI look-back provision will apply in determining the basic exclusion amount.
2. Whether a future law change reducing the basic exclusion amount would result in the clawback of gifts that exceed the basic exclusion amount at the donor’s death.

Prof. Pennell said that in 2012, when the basic exclusion amount was scheduled to drop from $5.25 million to $1 million, most commentators thought that clawback would not apply. He doesn’t think it will apply now. TCJA added section 2001(g)(2), directing Treasury to prescribe regulations to carry out this Section, reflecting differences between the basic exclusion amount at a decedent’s death and the basic exclusion amount at the time of a gift.

Ms. McCaffrey noted that even if there is a clawback, making gifts will remove all income and appreciation on the property from the decedent’s estate.

Ms. McCaffrey noted that nonresident aliens continue to suffer. Their exemption is stuck at $60,000 with no gift tax credit.

Possible Planning Approaches

The panel then discussed the impact of the increased basic exclusion amount on estate planning. Ms. Harrington noted that it’s difficult to balance all of the various considerations in planning for a client. It is important to build flexibility into the plan and delay final decisions as long as possible.

Prof. Pennell reviewed two ways to build flexibility into an estate plan – disclaimers and QTIP elections. He thinks disclaimer planning is risky because of potential problems, including acceptance of property before a disclaimer; an heir not following through with the disclaimer; and an heir becoming disabled and not receiving court approval for the disclaimer. He believes that QTIP elections are better:

1. The decision can be made 15 months after death rather than nine months for disclaimer
2. With the uncertainty over the basic exclusion amount available at death, the ability to make formula election is important
3. Reverse QTIP elections can be made for GST purposes, and
4. Some states allow state QTIPs

He noted that the big disadvantage of relying on QTIP elections is the requirement to distribute all post-mortem income. A Clayton QTIP could be an alternative.

In a friendly family, Prof. Pennell thinks most people will make 100% QTIP election and portability election. The belief is that it is better to cannibalize marital property than non-marital property

Size of estate:
1. Different themes for couples with under $5.5 million; Need to worry about basis adjustment

2. For couples with $5.5 -10 m, need to worry about estate tax and portability

3. Over $11m, look at gift issues and basis adjustment

The panel agreed that this is a window of opportunity to make gifts significantly greater than $5 million. There is no new benefit to make gifts of $5m or less. The biggest impact could be the cushion effect so that there is no taxable gift even if valuation discounts are lost upon audit. Defined value gifts may be very attractive.

Ways to use the increased basic exclusion amount include:

1. Forgiveness of outstanding loans
2. Equalizing gifts
3. Save state estate tax
4. Get assets into trust to roll out of split dollar agreements
5. Use non-grantor trust. Get property into non-grantor trusts for children
6. Bigger seed money into trusts or to existing trusts to help make payments on notes

Income tax planning

The panel noted several items concerning the income tax changes.

1. With the state and local tax deduction limited and an increased standard deduction, the use of donor advised funds becomes more attractive to fund charitable contributions. A client can fund a DAF in one year with several years of contributions and itemize deductions that year. In subsequent years, the client can claim the standard deduction and make contributions from the DAF.

2. Trust or estate deductions unique to trusts or estates aren't subject to the suspension. Prof. Pennell says this takes all trust or estate deductions out of miscellaneous deductions except investment advisory fees.

3. The personal exemptions for trusts and estates were not changed.

4. The section 691(c) deduction for income in respect of a decedent was not suspended.

Business tax changes

The panel noted several items concerning business tax changes:

1. There were two good ESBT changes. Non-resident aliens can be potential current beneficiaries. Charitable deductions for ESBTs will be determined under the general rules of IRC Section 170 rather than the trust charitable contribution rules of IRC Section 642(c). This allows the deduction to include unrealized appreciation.

2. The simplicity of the 21% rate for C corporations compared to the complexity of new IRC Section 199A may mean clients look to switching to C corporation status, especially if they are not making distributions to owners.

3. Most of the IRC Section 199A limits don’t apply to taxpayers below the $157,500/$315,000 limits. All they have to do is show that they’re engaged in a business.

4. There are many questions about how IRC Section 199A works or is intended to work.

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, Trrant & Combs, LLP in Louisville, Kentucky, Bruce A. Tannahill Esq., a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and Patrick J, Duffey Esq., an attorney with Holland & Knight in Tampa, Florida.

The Report 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.
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/heckering.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

**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
Reporter: Beth Anderson
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 highlight 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 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, Trant & 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.
Heckerling 2018 - Report No. 3

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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptyl.html.

Announcement: The Real Property, Trust and Estate Law Section is among the exhibitors at this year's Institute. They are holding forth at Booths 225 and 227. In addition to special show prices on many of the Section's publications, information about the many activities and resources the Section offers is available there, as is information about how to become a member of the Section and how to subscribe to its ABA-PTL Discussion Listserv. Unfortunately you have already missed the chance to get a free ticket to their free breakfast that was held this morning.

Summary: This Report #3 continues our coverage of the general sessions that were held on Tuesday, those being managing tax basis, money in politics (Lloyd Leva Plaine lecture), buy-sell agreements and will drafting and contests.

The next Report #4 will begin our coverage of the Wednesday morning general sessions and afternoon special sessions 1 and 2.

Tuesday, January 23, 2018 (cont.)

9:00-9:50
Putting It On & Taking It Off: Managing Tax Basis Today for Tomorrow [FIN]
This lecture refreshes us on the “free basing” methods introduced by Paul Lee at Heckerling in 2014 with “Venn Diagrams” and with “Modern Uses of Partnership” in 2016. In addition to highlighting how to effectively manage tax basis to avoid unnecessary capital gains tax or create basis in partnership assets, today’s lecture provides a foundation for deeper consideration in the small special session panel that will be held Wednesday January 24 at 2:00 pm. The power point used during the presentation is now available for download on the Heckerling App.

With the higher Applicable Exclusion Amounts (“AEA”) ushered in by ATRA starting in 2010 and doubled under the new Tax Cuts and Jobs Act of 2017 (“new Tax Act”), planners have a lot of room to maximize the step up in basis upon a client’s death to minimize income tax consequences on low basis assets.

Using the AEA during life. Mr. Lee advises caution in using available AEA during the client’s life. Be aware there could be a claw back under a new subsection of IRC §2001 once the higher AEA sunsets in 2026. Perhaps limit lifetime use to the $5M indexed for inflation from 2010 or use a GRAT to avoid the use of the AEA during life. A wait and see approach may be best.

Distinguishing Various Assets Classes: It is important to identify which assets will benefit most from a step up and organize the client’s estate to maximize this benefit. Using a chart to illustrate this, assets such as IRAs, cash or high basis stock would benefit the least from a step up, while a step up in depreciated commercial real estate, copyrights and low basis stock would offer significant benefits. Mr. Lee predicts an increase in the use of Qualified Small Business Stock (“QSBS”), discussed below.

Using Grantor Trust Swaps. Benefits under the new Tax Act include no change to the step-up in basis at death and grantor trust rules. Mr. Lee recommends using the Grantor's swap power to exchange high basis assets for low basis assets, cash for a loan, and to execute a promissory note for appreciated assets.

Use of a General Partnership. In an example where a senior partner holds a 40% interest and a younger partner has 60% interest, get low basis assets to the senior partner’s share. Contribute assets to an LLC Holding Company, then convert entity to a general partnership to maximize the step up in basis because we are no longer trying to achieve valuation discounts. Use a §754 Election to achieve a step up. For advanced planning, create a separate entity for assets benefiting the most from §754 election to minimize the administrative complexity.

Use Debt to Multiply the Step Up in Basis. Qualified liability results in an estate deduction under §2053(a)(4); qualified debt can be created with zeroed-out transfers or a private split-dollar loan.

Double Step Up. Suggestions to achieve a double step up, as enjoyed by those in community property states, may be done with a Joint Exempt Step-Up Trust (JEST) or, preferably, a Section 2038 Estate Marital Trust. This trust creates estate inclusion under §2038 by allowing the
deceased spouse to terminate and is also a completed gift because assets do not go back to such spouse. However, inadvisable if divorce is a potential risk.

QSBS (§1202) – the Tenfold Basis Option. Contribute the assets of an LLC for C-Corporation stock, looking for attain high basis on the conversion. Be careful to avoid capital gains tax on conversion if possible. Sec. §1202 allows the fair market value (FMV) of the asset to become the new basis on the conversion. New §199A uses §1202 definitions so they work well together. Example: adjusted basis is $10; FMV is $100; §1202 allows you to adopt $100 as the new basis upon conversion to C-corporation.

Contract Derivatives to Achieve Step Up. Sell the appreciation to a grantor trust (IDGT) and retain the asset. There is a risk if the contact is not completed before the Grantor dies, as the appreciation may be considered ordinary income. Consider the effect of new §1061, but not yet fully understood.

Installment sale to IDGT and Outstanding Promissory Note. If Grantor sells an asset to an IDGT ($50M), he holds a note and accrues interest over many years. Asset FMV grows to $100M. Under §1001 (Crane v. Commissioner), there is a potential gain of $50M when there is a conversion from a Grantor to a non-Grantor trust on death. To avoid this result, create an LLC and contribute both the promissory note and the asset to the LLC. If the LLC owns both the asset and the liability, the liability disappears. No transfer tax because the Grantor owned both. See Rev. Rul. 99-5 regarding this kind of transfer. Use a §754 election and a 743(b) adjustment to strengthen the transaction.

The Magic of Partnerships. The Wednesday special session will go in depth on how to strip and shift basis among partnership assets. The ideal partnership has mixed basis “old and cold” assets, being in the entity for more than 7 years. The partnership distributes a high basis asset through an in kind distribution to a senior partner, resulting in a zero basis to the partner and allowing allocation of the remaining basis to the other partnership assets. This allows the partnership to change the basis of assets without a taxable event.

1:45-12:35
Lloyd Leva Plaine Distinguished Lecture - Money in Politics: A Hydraulic or a Legal Issue?
Presenter: Trevor Potter
Reporter: Herb Braverman

For over a century federal law has attempted to regulate the sources and amounts of money in elections. The result proves to some that money is a hydraulic force: efforts to channel it only result in broken dikes and washed away dams. Others believe that the problem is inartful drafting, failed regulators, partisan greediness, the leveraging of the tax code to subvert the campaign finance laws, and a Supreme Court which has no understanding of how politics and the legislative system actually work. Which is it?
This presentation was this year's **LLOYD LEVA PLaine distinguished lecture** and was presented by Mr. Potter, the President of the Campaign Legal Center. He has had a great deal of experience with the subject matter, having served as a Commissioner and Chairman of the Federal Election Commission, among other related duties and positions, perhaps the most well known of which is his having been the advisor for Stephen Colbert and his Super PAC and his involvement with the **citizens united** case during the last election cycle.

Mr. Potter reviewed the history of money in politics, beginning as far back as 1913 and tracing it through the current period, which I felt he clearly considers as a terrible blot on our democracy and a potential serious risk to its future survival. He provided a lengthy and detailed outline, and I would recommend your obtaining his materials if you are interested in this very important issue—if not as an estate planner or related professional, then perhaps at least as a concerned American.

The gist of the story here appears to be that money once had a role in our governing processes that was disclosed to the public and limited (by amount and by purpose) in various ways by various agencies, including the FEC, the IRS, the SEC and, of course, Congress. Unfortunately, while the process was already somewhat strained, it became “broken” when Justice Alito replaced Justice O’Connor on the US Supreme Court and the Court decided the well-known **citizens united** case in 2010. Thereafter the cases have essentially removed any sense of limitations on political contributions, making undisclosed contributions in various USC 501 devices in unlimited amounts the basic fuel of the very expensive campaigns we are experiencing at the federal and state levels today. Hence the term “dark money” and Mr. Potter’s concerns that this system will only get worse unless somebody (I think he meant us) stands up enough to get the foxes out of the hen house.

2:50-3:40

**Buy-Sell Agreements: A Critical Part of Any Business Formation [CHB]**

Presenter: Louis A. Mezzullo
Reporter: Kimon Karas

This session discussed the objectives and key tax and non-tax issues when drafting a buy-sell agreement for a closely-held business.
Reasons for such agreements include, setting value for estate/gift tax purposes, establishing where funds will come from to pay estate taxes, restrict lifetime/death transfer, income tax considerations, where will interest pass at death. Most often a CPA is the initial contact with clients regarding the need for such an agreement. The planning team will include CPA, attorney, insurance consultant, trust officer, investment adviser. Lou insists at formation stage that clients consider as part of engagement a buy/sell agreement.

I. **Definition.** Agreement between owners of a business, or owners and entity, to purchase and sell interests of the business at price determined upon future events arising. Events include death, disability, divorce, outside offer, bankruptcy, or termination of employment. Considerations will be the same irrespective of business form.

II. **Items of significance regarding agreements.**
   A. Due to repeal of General Utilities increased use of S corporations and partnerships.
   B. LLC as a preferred form of business entity.
   C. Section 2703.

III. **Objectives.**
   A. Avoid disputes among owners. From perspective of entity avoid termination for example of S corporation status.
   B. Attorney must avoid conflicts of interest and advise that owners need to seek separate counsel.

IV. **Buy/sell may be a cross purchase agreement between owners or a redemption agreement with the entity.** If using a redemption agreement with a C corporation with a mandatory obligation to purchase make certain corporation is obligated party and not shareholders. If corporation purchases the shares that shareholders were obligated to purchase the shareholders will receive a constructive dividend.

V. **If agreement is insurance funded a large number of shareholders may make cross purchase cumbersome requiring multiple policies. Consider use of partnership or trust to purchase and hold policies.**

VI. **Premium payments on life insurance policies used to finance the purchase are not deductible whether premiums are paid by the entity or owners.**

VII. **Watch transfer for value rule.** Exceptions include policy transferred to an insured, a partner of the insured, a partnership in which insured is a partner, or a corporation in which insured is an officer or shareholder. A solution with a cross purchase agreement is to use the partnership. Caveat, IRS will no longer rule whether a transfer of a life insurance policy to an unincorporated entity will be exempt from transfer for value rule when substantially all of entity’s assets consist or will consist of life insurance policies. Rev. Proc. 2017-3. Lou suggests the transfer for value rule should not apply if the trust owns policies pursuant to a cross purchase arrangement.

VIII. With repeal of corporate alternative minimum tax, a C corporation owner of policy will not be subject to alternative minimum tax on receipt of life insurance proceeds. C corporation must be mindful of accumulated earnings tax exposure; however accumulating funds for purchase of minority shareholder may be considered reasonable needs of the business as well as accumulations in the year of death to redeem a shareholder under Section 303.

IX. Credit consideration may dictate who is the purchaser, entity or owners.

X. **Capital gain treatment is assured in a cross purchase transaction and may not be due to family attribution rules when corporation is redeeming shares.** If redemption by a C corporation fails to qualify as a capital gain the result is a dividend with the consequences the purchased party cannot use installment method of reporting gain and no basis offset.
XI. State law may restrict corporation’s ability to redeem shares. Consider if that is an issue that shareholders take action to make acquisition satisfy state law requirements or mandate shareholders be purchasers if corporation is prohibited from purchasing.

XII. In a redemption transaction the basis of remaining shareholders shares is not affected; whereas in a cross purchase the purchasing shareholders obtain cost basis in shares purchased. Basis is not an issue if the entity in question is a flow through since owners of flow through obtain basis regardless of the form of agreement.

XIII. In a C corporation interest paid on an installment obligation to purchase the shares under a cross purchase agreement will be treated as investment interest. If C corporation is redeeming the shares the interest is deductible; however, 2017 Tax Act limits interest deductibility. In the case of a flow through interest paid by owners on a cross purchase will need to run through interest tracing rules, either deductible as business interest, investment interest or passive interest.

XIV. Other considerations. Under a cross purchase if excess life insurance proceeds are received they are retained by the owners; however in a C corporation context in order for shareholders to get at excess proceeds requires most likely a dividend payment. In a buy sell scenario if other family members hold equity, consider in the agreement allowing the family to purchase the interest to retain its percentage ownership.

XV. Triggering events. Triggering events may include, death, retirement, disability, attempted sale to outside 3rd party, termination of employment, divorce, or bankruptcy. If employment termination is for cause or owner is associating with a competitor, consider a reduction in the price paid. In bankruptcy context a price that is not reflective of fair market value may not be enforceable.

XVI. Setting the price. Best is an outside appraisal. Others are fixed price (with automatic adjustment if price not fixed within identified time period, i.e. 1-year of triggering event), book value or adjusted book value, capitalization of earnings (but may need to adjust if earnings are not reflective of true earning capacity, i.e. high or low compensation paid to owner/employees), put & take (“Texas standoff”) works only if both sides have equal bargaining power. Be cognizant of price and impact on marital deduction. If price is not respected by IRS, marital can be reduced or denied. See Estate of Rinaldi (1997) QTIP did not qualify where son had right to purchase stock held by marital trust at less than FMV.

XVII. Payment terms generally if not sufficient cash to affect purchase will be evidenced by promissory note. Consider security for note, pledges.

XVIII. Whether purchase is mandatory or optional. What is agreement’s purpose? If ownership is limited to active owners, death, other departing event should trigger a mandatory obligation to sell. If withdrawing owner is a minority owner, will want a mandatory obligation to be purchased-will not want family to stay in a minority position. In the event of death to establish price for estate tax purposes there needs to be a mandatory obligation to purchase; if only an option price not likely to be accepted by IRS.

XIX. Restrictions should consider voluntary transfers during life to family, trusts for family.

XX. Pre-Section 2703, under regulations purchase price under agreement is respected to fix value if the i)price is fixed or determinable; ii) estate must be obligated to sell at fixed price; iii) restrictions apply both during life & death; iv) agreement must be bona fide and not device to pass interest to decedent’s natural bounty without full consideration.

XXI. TRA 1990 enacted Section 2703 intended to preclude related parties from depressing value in family controlled entities. Rule under Section 2703, for purposes of transfer taxes, value of property is determined without regard to any right or restriction relating to the property.

XXII. Exception to Section 2703’s application. A right/restriction is disregarded if: i) bona fide arrangement; ii) not a device to transfer to family (regulations expand family to include “natural objects of transferor’s bounty”); and iii) terms are comparable to similar
arrangements entered into by persons in arms’ length transactions (regulations adding “at the
time right/restriction is created”).

XXIII. Comparability considerations include: i) expected term of agreement, ii) current FMV of
property; iii) anticipated changes in value during agreement term; and iv) adequacy of
consideration given in exchange.

XXIV. Non family member exception. A right/restriction satisfied the 3 statutory tests if more
than 50% by value of the property subject to right/restriction is owned by parties who are not
members of transferor’s family.

XXV. A pre Section 2703 agreement will be subject to Section 2703 if it is substantially modified
after 10/8/1990, the effective date of Section 2703. The regulations provide guidance on
what is a substantial modification and exceptions that are not substantial modifications.

4:45-5:35

The 1846 Last Will of John Sutton - What's Not So New in
Will Drafting and Contests [LIT]
Presenter: Terrence M. Franklin
Reporter: Herb Braverman

Will drafting, the role of the attorney as counselor and witness, and pleading and the presentation
of facts in a Will contest trial were addressed on the eve of the anniversary of the signing of the
last will and testament of the speaker’s ancestor, a Florida slave owner whose Will emancipated
the mother of his children and their offspring. Here is the story.

This is a very personal and poignant story told by an African-American litigator
who took an interest in probate matters regarding his family and its origins in the
Deep South before the Civil War. He brought the story to life with slides of
documents and photos that cannot be reproduced here for you to appreciate.

The story involves a will contest in Florida, in which the plaintiff is trying to
recover the property of his deceased brother—property which included a number
of slaves, whom the deceased had freed by the terms of his Last Will, prepared in
1846, at a time when freeing a slave in Florida was not a simple matter. More
specifically, this is the story of how John Sutton freed his “partner” Lucy and her
offspring in his Will. Lucy is Mr. Franklin’s ancestor. After a will contest and a
helpful decision by the local judge, the executor, Mr. Adams, took his fiduciary
tasks very seriously and got Lucy and her family to Illinois, where being a freed
slave was more easily accomplished at the time. For more details on the story and
the documents and photos he showed, I suggest that you “google” Mr. Franklin and
read the article(s) he has written on the subject...or you might wait for the novel he
is writing to bring the story to life, a portion of which he read as a part of his
presentation.
While, in many respects, the details of the story might not be important to those simply seeking a technical education at the Heckerling, Mr. Franklin did point out the importance of what we do when we prepare documents and administer estates, etc., because the process is a part of someone’s history and, more generally, our collective history. He hoped that in the end we would appreciate our tasks as well and what we are doing for others . . . making an effort to “bend the arc of history toward justice.”

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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.
Heckerling 2018 - Report No. 4

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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Announcement: If you have not subscribed to it yet, you ought to take a look at the Wills, Trusts & Estates Prof. Blog that is hosted by FeedBitz and edited by Prof. Gerry W. Beyer of the Texas Tech University School of Law. There is a daily post each day with (typically) 4 to 5 highlighted items of current interest which can be opened up and read in more detail if of interest. This is a free service. For more information and to subscribe, go to https://app.feedblitz.com/f/fbz?Sub=8995.

Summary: This Report #4 contains our coverage of the two general sessions that were held on Wednesday morning, those being on long term care and US taxation of US grantors and beneficiaries of foreign trusts.

The next Report #5 will cover the traditional Q&A session that was held on Wednesday morning and the Fundamentals #2 session on Subchapter J issues that was held Wednesday afternoon concurrent with special sessions #'s 1 and 2.

Wednesday, January 24, 2018

9:00-9:50
Will You Still Need Me, Will You Still Feed Me, When I’m Sixty-Four? [ELD]
Not sure that the Beatles were thinking about financing long-term care, but you and your clients should be! Seventy percent of Americans age 65 and older will need some form of long-term care during their lifetime. Unfortunately, the U.S. has no health insurance system for long-term care. To many, this comes as a rude awakening as their health declines and the need for care arises. This presentation addressed the myriad of options available to people in need of long-term care, how to finance such care, and other issues that should be addressed during this process. Here are some of the more significant details.

Introducing Mr. Krooks, Stacy Eastland noted that the Joint Committee on Taxation said that only 1800 of the 26 million people who die annually will be subject to estate tax. He pointed out that 100% of people have the possibility of growing old, developing dementia, or needing long-term care (LTC) assistance.

After playing a portion of the Beatles “When I’m 64,” Mr. Krooks said that 84 is the new 64 and reviewed statistics on the aging of the United States populace. Forty million (13% of the population) are now over 65 with 25% expected to live past 90 and 10% past 95. By 2050, 20% of the population (88.5 million) will be over 65.

Over five million people currently have Alzheimer’s disease with the number expected to triple by 2050. It doesn’t just affect persons over 65 – 200,000 people under 65 have it. It is the most expensive disease in the nation, with an annual cost of $259 billion, with the government paying about 68% of the cost. The cost is projected to rise to $1.1 trillion by 2050. In comparison, cancer costs $66 billion annually.

**Elder Law Myths and Reality**

Mr. Krooks addressed some elder law myths and the realities.

**Myth:** It won’t happen to me, I’ll never go to a nursing home.

**Reality:** 70% of people turning 65 will need LTC and 50% will need nursing home care.

**Myth:** Even if I have to go into a nursing home, Medicare will take care of me.

**Reality:** Medicare doesn’t pay for LTC. It provides some coverage for skilled nursing home care if certain requirements are met, custodial care and LTC costs for chronic illnesses are not covered.

**Myth:** LTC isn’t that expensive.

**Reality:** The average annual LTC cost in U.S. is $100,000 and can exceed $200,000 in major metropolitan areas.

**Myth:** I’m not responsible for my spouse’s care.
Reality: You are responsible for your spouse’s care. The law generally deems spouses as one entity, but does provide some protections for spouses. Pre-nuptial agreements and separate accounts are generally disregarded.

Myth: I can make my own decisions.

Reality: You may not be able to make your own decisions. You can address who can make those decisions for you through powers of attorney and health care directives.

Where LTC is generally provided

Most long-term care is provided in one of four different settings:

1. **Home.** Most people would prefer to receive LTC at home. It is estimated that 80% of home care is unpaid. Any payment arrangement should be written to minimize conflicts between the caregiver and other family members. There are significant tax issues involved, including whether the caregiver is an employee or independent contractor and employment tax obligations.

2. **Assisted living facility (ALF).** These facilities are generally not licensed to provide medical care and are not subject to federal regulation. A portion of ALF expenses qualifies for the medical expense deduction and the facility should be able to provide information on the amount attributable to medical care.

3. **Nursing home.** Skilled nursing facilities participating in Medicare or Medicaid must meet requirements under federal law, giving nursing home residents far more resources in dealing with the facility than residents of other facilities not subject to those rules.

4. **Continuing care retirement community.** These offer a continuum of housing options, from independent housing, to assisted living, to nursing home care. They can allow spouses with different care level needs to remain near each other.

Mr. Krooks noted that ALFs and nursing homes often seek to have a third-party, such as a child, guarantee payment and require binding arbitration to resolve disputes. Nursing homes cannot require a third-party guarantee. He recommended that the admission agreements be reviewed carefully.

Ways to Pay for LTC

Mr. Krooks reviewed the options to pay for LTC expenses.

1. **Private pay.** Persons paying for LTC using their own funds should take advantage of the medical expense deduction to the extent possible. In addition to income and savings, resources to pay the expenses personally include reverse mortgages and life insurance accelerated death benefit features.

2. **Medicare.** Medicare pays for very limited short-term rehabilitation care after being admitted to a hospital for a qualifying stay. It does not cover custodial care. There are numerous deductibles and co-pays that must be considered.

3. **Medicaid.** Often confused with Medicare, Medicaid is a federal/state program that allows standards to vary by state. It is not easy to qualify for eligibility. Mr. Krooks reviewed some of the eligibility rules, exempt assets, spousal planning, and trusts that can be used in planning.

4. **LTC insurance.** Long-term care insurance covers LTC costs, including custodial care. Obtaining it generally requires a rigorous physical and cognitive exam and pays benefits based on a daily rate. Mr. Krooks recommended working with an insurance person who specializes in LTC coverage because the coverage is complicated and specific on what is and isn’t covered. Hybrid policies
combining LTC coverage with life insurance coverage or an annuity benefits avoid the perceived waste of money if LTC benefits are not used.

5. VA benefits. Mr. Krooks noted that few people receive VA LTC benefits and that they are very hard to qualify for.

9:50-10:40
Theory Meets Reality: A Practical Look at the U.S. Income Taxation of U.S. Grantors and Beneficiaries of Foreign Trusts [INT][TRU]
Presenter: M. Read Moore
Reporter: Beth Anderson

Differences in trust law and trust administration outside of the United States often make advising U.S. clients on U.S. tax issues related to foreign trusts quite challenging. This presentation addressed the principal U.S. income tax issues affecting U.S. settlors and beneficiaries of trusts administered outside the United States with an emphasis on frequent conflicts between U.S. tax law and the realities of trust law and trust administration outside of the United States. This Report covers some of the more significant parts of this presentation.

This presentation discussed the income tax recognition and reporting differences between grantor and non-grantor foreign trusts.

The presentation started with a few important definitions such as what does it mean to be a foreign trust. A foreign trust must meet two tests – court test and control test. If no US court has jurisdiction over the trust and a non-US person has decision making control over the trust (for example the ability to remove and replace the trustee), then the trust is a foreign trust for US income tax purposes.

I. Determining the Grantor of a Foreign Trust

This presentation discussed the difficulties of tracking and identifying the grantor of a foreign trust. The grantor of the trust is the person who makes a gratuitous transfer of assets (not necessarily a taxable gift) to the trust. Determining the grantor of a foreign trust can be tricky because foreign trusts are often created by declaration or deed of transfer and may not name the grantor or describe where the assets in the trust came from.

Offshore trusts may have a nominal grantor such as a lawyer or a friend that creates the trust as an accommodation to the true grantor. There may be some due diligence and investigation behind the trust to see who made the gratuitous transfer of assets.
Decanting by trustee can result as the trustee becoming the grantor because foreign trust was created by a decanting from one trust to another. Regulations direct that the grantor of the original trust is the grantor of the new trust.

II. US Income Tax Treatment of a Foreign Grantor Trust and Establishing Grantor Trust Status

The presentation discussed the benefits and reporting requirement when a US beneficiary receives a distribution from a foreign grantor trust. The non-US resident foreign grantor of the foreign trust is responsible for the income generated on the assets in the trust, and the US beneficiary receives a tax-free distribution.

Although the US beneficiaries are not taxed on distributions, they must report the distributions to the government on a Form 3520 showing why the trust is a foreign grantor trust and why income taxes are not paid. There is a 35% penalty for failing to report non-taxable income. Form 8938, which is used by US person who have to declare interests in Foreign trusts, does not apply to foreign grantor trusts.

Congress knows this is a good deal, so there are completely different rules for foreign grantor trusts that make it more difficult to create foreign grantor trusts and US grantor trusts. For example, Sec. 678 does not apply to allow a beneficiary to be a deemed grantor. A beneficiary of a foreign trust can only be a grantor of the trust, if the beneficiary exercises a general power of appointment over the assets and creates a new trust.

Grantor Trust rules are different for Foreign Trust. They follow Sec. 672(f), and only two kinds of trusts qualify. First, Grantor or Grantor’s spouse is the sole beneficiary of the trust (sole benefit trust). The other is a “revocable trust”. If a non-resident alien has the power to reinvest the property either alone or in conjunction with another party. What does it mean to have the power to reinvest the trust assets. Most other countries do not have revocable trusts. Revest is the key word instead of revoke. Look for a direct or indirect power to control the assets and get the assets back. Look for the power to revest either because the settlor is a beneficiary and the settlor has the power to control the trustee or has an unlimited power to remove/replace trustee and can appoint themselves as trustee.

Cannot toggle back and forth between grantor trust status, once it is lost is it is gone forever. Can still have a foreign grantor trust if the grantor is incapacitated so long as agent can exercise powers on grantor’s behalf.

III. US Income Tax Treatment of a Foreign Non-Grantor Trust

Most of the time foreign trusts are not a US tax payers, but beneficiaries that are US tax payers and distributions from a foreign non-grantor trust are subject to tax based on Subchapter J. The trust’s DNI must be computed but the rules for DNI are different for foreign non-grantor trusts, and the throw back tax applies, as do more reporting obligations.
Generally compute DNI just like a domestic trust but must include realized capital gains. Also add back foreign tax paid and include foreign source income (world-wide income not just US income). Throwback Tax is a tax that existed for domestic trusts when tax rates were lower than individuals. This created a bracket game between accumulating income or making distributions to individual. This tax still applies to any distribution from a foreign non-grantor trust and any distribution from a domestic trust that was once a foreign trust. Applies when a beneficiary of non-grantor foreign trust gets an accumulation distribution. An accumulation distribution is a distribution in excess of DNI or the fiduciary accounting income. Based on UNI (undistributed net income). When a trust makes a distribution of UNI, then tax is triggered based on the UNI received. The computation is complex, and includes an interest charge on top of the throwback tax at the federal underpayment rate compounded daily. Total taxes cannot be more than 100%.

The foreign non-grantor trust rules are very specific about transactions that look for characterize distributions in another manner. Loans can be deemed distributions if specific rules are not followed. Use of property held in the trust is a deemed distribution unless rent is paid. Step-transactions or using an intermediary (non-resident family member) to received distributions then make gifts to the US beneficiary are collapsible and deemed distributions to the US beneficiary.

US beneficiaries receiving distributions of any amount must disclosed the value and tell the IRS how the distribution should be treated. If not defined, the assumption is that the distribution was UNI with a set premium tax. Computing DNI and UNI can be very difficult because trustees of foreign non-grantor trusts do not file 1041, or issue K-1. Often Trustee’s don’t keep the correct accounting records so it may be very different to compute US income taxes.

**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.

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Heckerling 2018 - Report No. 5

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Announcement: Stacey Eastland, in his opening remarks about the Question and Answer panel (see below re), paid tribute to attorney Dennis Belcher, who passed away at the height of his legal carrier in 2017. The American College of Trust and Estate Counsel has published a tribute to Dennis in Volume 43, No. 1 of the Fall 2017 issue of the ACTEC Law Journal. This entire issue is dedicated as a festschrift in his memory. As is pointed out in the Forward, a festschrift is a collected volume of scholarly essays or reflections on an individual's contributions to his or her field and are often used to honor the memory of a colleague who has died. This issue is divided into two parts. Part I is a transcription of Dennis's 2016 ACTEC Joseph Trachtman Memorial Lecture and his 2008 written testimony to the US Senate Committee on Finance regarding ways for simplifying estate planning, many of which still have vitality today. Part II includes professional and personal reflections from 20 different people who knew Dennis in a variety of capacities. Further information is available at www.actec.org.

Summary: This Report #5 continues our coverage of the general sessions that were held on Wednesday, the same being the Question and Answer session. In addition, the Fundamentals #2 session that was held concurrently with Special Sessions 1 and 2 in the afternoon on Wednesday is also included.

The next Report #6 will begin our coverage of the Wednesday afternoon Special Sessions.

Wednesday, January 23, 2018

10:55-12:35
Question and Answer Panel

Presenters: Carol A. Harrington + Steve R. Akers + Jeffrey N. Pennell + Carlyn S. McCaffrey
Reporters: Michael Sneeringer and Bruce Tannahill

Stacy Eastland, a member of the Institute's Advisory Committee, introduced the panelists and then acknowledged the passing last year of his dear friend and our fellow trusts and estates attorney, Dennis Belcher of Richmond, Virginia. See our Announcement above about the *festschrift* that has recently been published by the ACTEC Law Journal in his memory.

Carol A. Harrington (“Carol”) moderated the panel question and answer session.

Steve R. Akers (“Steve”) discussed the ways the Tax Act continues the marriage penalty. These include the 37% tax bracket beginning at $400,000 for single taxpayers but $600,000 for joint returns (only 150% of the single amount) and the $10,000 limit on the state and local tax (SALT) deduction for all taxpayers, which allows two single taxpayers to claim a total of $20,000 in SALT deductions while a joint return is limited to $10,000.

Steve discussed the *Powell* case that he had addressed earlier in the week regarding incomplete gift analysis. He noted that he spoke to an attorney that indicated the judge vacated that opinion.

Carol explained she made a mistake earlier in the week discussing the home mortgage deduction. She discussed the new rules that limit the interest deduction on debt incurred after December 15, 2017 to the interest on $750,000 of acquisition indebtedness and suspends the deduction for interest on home equity debt from 2018-2025, regardless of when the home equity debt was incurred. Interest on acquisition indebtedness incurred before that date and refinanced loans up to the amount of the refinanced debt remain deductible.

Jeffrey Pennell (“Jeff”) discussed Clawback and who would pay the estate tax when the exclusion amount snaps back. He opined that state law and most estate planning documents do not address it.

Carlyn S. McCaffrey (“Carlyn”) discussed ESBTs and charitable deductions. The Tax Act provides that the charitable contribution for ESBTs will be determined under section 170, which governs charitable deductions for individuals, rather than section 642(c), which controls charitable deductions for trusts. This eliminates the governing instrument and distributions from current income requirements and allows deductions for gifts of property. This allows a deduction for unrealized appreciation. The potential downsides include applicability of the percentage limitations and the substantiation requirements.

Steve described a discussion with John W. Porter that Code Section 2036(a)(2) is being raised more frequently by the IRS in audits and how it is being applied by Tax Court Judges. Carol joked that Steve was hinting that clients should go to District Court.

Carol discussed re-characterizing Roth conversions made in 2017, which is permitted until October 15, 2018. Roth IRA conversions occurring in 2018 or later cannot be recharacterized.
She said QTIP elections should be made on Form 706 rather than sending the IRS a letter or some other way. She and the panel agreed that the IRS is set up to deal with IRS forms unless the form instructions or regulations provide for a different method.

Steve indicated the best estate planning going forward in 2018 may be a QTIP’able trust because it provides the most flexibility for clients. The decision on whether to make the QTIP election can be delayed until 15 months after death by extending the time to file the 706.

Jeff discussed Code Section 67, its amendment and how it affects fiduciary administration. Jeff noted that the legislative change was a shortcut approach, simply suspending the deductions through 2026. He discussed Code Section 67(e) and deductibility subject to the 2% floor. He opined on that most trust administrative fees are still fully deductible (including legal and fiduciary fees).

Carol opined that estate planning practitioners need to think through gift tax issues when transfers occur or changes are made to documents. Jeff reminded the audience that a gift tax applies to gratuitous transfers.

Carol discussed family offices, deductions and structuring investment management fees. She noted that it may be possible to turn investment management fees into Code Section 162 deductions.

Jeff discussed estate planning and taking advantage of the increased exclusion amount. He suggested that non-qualified disclaimers may be useful for gifting purposes. However, you must be careful because many states have laws designed to prevent inadvertent gifts arising from non-qualified disclaimers.

Steve answered a question on how long a Code Section 645 election can be kept opened. Section 645 provides that treatment of a revocable trust as part of an estate under the section 645 election applies until two years after the decedent’s date of death if no estate tax return is required to be filed. If an estate tax return is required to be filed, the election applies until six months after the date of the final determination of the estate tax.

Carlyn discussed Code Section 199A and whether it is available in certain employment fields, such as athletics (i.e., does it apply to ownership of a sports team as opposed to the athlete). She discussed its applicability to a sports team owner and someone in the field of the performing arts. She noted that with all the questions she is asking, that there are no clear answers.

Carlyn discussed the effective date rule and the alimony provisions. She noted the importance of signing a marital separation agreement before 2019 to qualify for the alimony deduction.

Jeff discussed portability and that Clawback probably should not apply to the DSUE if portability is used because the decedent’s estate tax exemption was available at the time of death.

Carol discussed GST and automatic allocation. She noted there are many problems with automatic allocation, including GRATs and irrevocable life insurance trusts and allocation,
including trusts holding a joint and survivor life insurance policy. She discussed decanting and trust modification related to GST allocation and GST exempt status. She noted there are gift tax risks associated with decanting and trust modification. She believes that State common law is helpful.

Jeff discussed buying a dwelling inside a trust as opposed to a trust giving a child the money to buy the dwelling and other related trust tax issues.

Carlyn discussed non-resident aliens and foreign trusts. She discussed domestication of the trust and that the answer of domestication depends on the purpose of the trust (Is the trust going to end? Domesticate it. Is the trust a long-term dynasty trust? It may be best to keep the trust a foreign trust).

The panel closed with comments from Steve about some portability questions.

2:00-5:20

FUNDAMENTALS PROGRAM #2

(Runs concurrently with Special Sessions I and II)

Selected Subchapter J Subjects: From the Plumbing to the Planning, Preventing Pitfalls with Potential Payoffs [TRU]

Presenters: Alan S. Halperin + Amy E. Heller
Reporter: Kristin Dittus

Understanding the rules of Subchapter J is essential for every estate planner. The program provided an overview of Subchapter J, including the rules related to grantor trusts and non-grantor trusts. The panelists addressed potential pitfalls and planning opportunities that permeate this area.

Selected Subchapter J Subjects: From the plumbing to the planning, preventing pitfalls with potential payoffs. Presented by Alan Halperin and Amy Heller.

Reported by Kristin Dittus

This 3-hour class focused on developing a framework to assist in analyzing subchapter J of the Internal Revenue Code (IRC or “code”) §§641-685.

Purpose of Subchapter J and Tax on Trusts. The purpose of Subchapter J is to allocate the tax burden among the persons who receive an income benefit from the trust or estate. Gross income does not include gifts or bequests, however the income created by such gift or bequest is taxable
income. The tax of trusts and estates is a hybrid system, sharing attributes of an entity and pass through or conduit tax. Distributable net income ("DNI") calculates which distributions carry-out gross income and appropriately taxes such beneficiaries. DNI has both a (1) quantitative element which determines how much tax is allocated between the trust or estate and the beneficiary, as well as a (2) qualitative element for the character of the tax. DNI is similar but different from fiduciary accounting income ("FAI"), which is based on state law concepts. It is important to distinguish between defined terms, such as these, because they affect the rights of the parties involved.

Under the old system, trustees were concerned about balancing benefits between current and future beneficiaries. Whereas with modern trust administration and the Uniform Prudent Investor Act 1994, trustees are more concerned with total return rather than the specific allocation of income and principal.

**Simple or Complex.** Trusts can be either simple (distributes all FAI to beneficiaries, no charitable contributions, and no distributions in excess of income) or complex (all non-grantor trust that are not simple or Charitable Remainder Trusts ("CRT")). It is possible for a trust to be simple one year and complex the next. Unsurprisingly, a simple trust has a simplified tax calculation.

**Tax Calculations.** Calculating the income tax of a non-grantor trust or estate involves taking deductions from gross income, determining the tax rate and applicable credits. Tax and other tax attributes can be applied at the entity level, or pass through to the beneficiary. For complex trusts there is a two-tier system, under Tier 1 income is required to be distributed currently and tier 2 includes any other amounts paid, credited or distributed. Tier 1 absorbs DNI to the extent of the distributions, and if any DNI is left it is proportioned among tier 2. Mr. Halperin then went into more detail regarding the specifics of DNI and FAI calculations, as well as the application of DNI among the tiers.

**Charitable Deductions.** Charitable contribution deductions are taken under §642(c). There is a 100% deduction up to the amount of taxable trust income. The trust should take this deduction if possible, since it is more generous than for an individual. Sec. 642(c) must be made out of income and done under the terms of the trust. There have been two recent developments concerning 642(c), a chief counsel memorandum, CCA 201747005 and the case of Green v. U.S. (10th Cir. Jan.12, 2018). The CCA was not favorable to the taxpayer and the presenters question process on the determination. The Green case considered the charitable deduction amount allowed for the donation of appreciated property. After considering four points, the court allowed the appreciation as the deduction.

**Itemized Deductions of §67.** Miscellaneous itemized deductions, previously subject to the 2% haircut, are no longer deductible under the new tax act. The speakers agree the new §67(g) does not appear to affect §67(e) because §67(e) is no longer subject to the 2% rule (regarding the costs that would not otherwise be incurred if not for estate or trust specific work). To maximize deductions for a family office, Mr Halperin recommends using an entity that allows deductions at the entity level, rather having such deductions pass through to the individual who may be disallowed from taking certain deductions. There is less reason to be afraid of C Corps under the
new tax regime. Under the new legislation, excessive deductions taken in the final year that exceed income or characterized as miscellaneous, carried out to beneficiaries cannot be deducted.

**Important Accounting Highlights.**

- DNI will not be carried out on gifts made under §667(a)(1), the distribution of a specific gift of assets or property, or under §663(a)(1), a gift or bequest that can be made in three payments or less.
- The 65 day rule allows income distributed in the first 65 days of the taxable year to be attributed back to the accounting of the previous year. This does not apply to simple trusts because such income must be distributed in the current year.
- The Separate Share Rule requires the allocation of tax among those who are the beneficiaries receiving the income.
- For distributions in kind, the beneficiary generally receives carryover basis which is the same basis the trust holds. The deduction to the trust is limited to the basis. Under §643(e) the deduction between the trust and the beneficiary cannot lead to a loss.
- Under §645, the Trust can be treated as part of the estate.

**Grantor Trusts**

Amy Heller took over to discuss grantor trust rules starting on the outline at page 32. Grantor trust rules were introduced in 1954 by Subpart E under Subchapter J part 1 (§§671 - 679).

Under the grantor trust rules, the grantor holds certain strings where she is deemed the owner for income tax purposes, but NOT for estate inclusion. Historically high-income taxpayers wanted to shift income to lower tax bracket family members through the use of trusts. It is easy to create a grantor trust because the IRS wanted to ensure individuals were not avoiding tax by using trusts. With an intentionally defective grantor trust (IDGT) the grantor generally pays the income tax on the growth of trust principal and such payment is essentially a tax free gift to the trust annually. This is a huge advantage to clients with large taxable Estates.

**The Grantor Trust Rules.** See pages 32 - 61 of the outline for more detail and highlighted sections are below.

1. Under **672(c)**, any related or subordinate party will link the grantor through the family attribution rules. An attorney is not considered linked to the grantor, however see the Wiley case where the attorney acted at the complete direction of the grantor may bring into this independence into question.
2. Under the spousal attribution rules of **§672(e)**, a grantor trust will be created if the grantor's spouse serves as trustee, yet there is no risk of estate inclusion.
3. To avoid classification as a grantor trust under **§674**, the power to control beneficial enjoyment, do not have the spouse serve as trustee or allow the spouse to make distribution decisions.
4. The grantor's ability to swap assets of equal value, will not cause estate inclusion, even with the ability to reacquire life insurance under **§675(4)**. See section §2042 and Rev. Rul. 2008 - 22.
It is not advisable, however to allow the grantor to reacquire voting stock covered by §2036(b) because the guidance is unclear on this asset.

5. 5. Under §676, if the grantor can revoke it will be a grantor trust but it will also be included in the grantor's estate, so to not use revocation for wealth transfers out of the estate.

6. 6. Sec. 675(2), the grantor's ability to borrow trust assets creates grantor trust status. If the loan requires interest, but not collateral, it will avoid estate inclusion. If the grantor does borrow, the loan will trigger grantor trust status. This can be helpful to avoid capital gains tax if the grantor sells an asset to the trust but it's not a grantor Trust. Allowing a grantor to release the right will remove grantor trust status for this rule.

7. 7. Grantor trusts generally do not include the grantor as a beneficiary, however it may be permissible under the laws of a domestic asset protection trust state. If the spouse is a beneficiary, this allows by assets to flow back to the marital unit for the grantor’s benefit.

8. 8. Under §677(a)(3), the grantor's ability to pay life insurance premiums may create a grantor trust, but there is insufficient support to rely on this. Do not include if you are trying to avoid grantor trust status.

9. 9. Sec. 678, discusses the creation of ownership to a beneficiary in the case of a 5x5 power or withdrawal rights. Guidance is unclear, so do not add crummy rights if you're concerned about this.

10. The new tax act repeals §682, which provided relief in the event of a divorce, so add provisions to your documents in the event of divorce.

Two important doctrines for grantor Trusts:

- Rev. Rul. 85 - 13 allows transactions between the deemed owner and grantor trust to be disregarded. This avoids the implication of tax on transfers.
- Rev. Rul. 2004 - 64 allows for reimbursement to the grantor for the payment of income tax. Avoid requiring reimbursement and review state specific law on this matter.

With the new high exemptions, grantors may want to turn off grantor trust status so they no longer have to pay the income tax. This conversion is not likely to generate tax, however if trust assets have liability in excess of basis there may be gain to the grantor. See page 59. Additionally, these rules may provide guidance for transfer taxes if a trust is decanted which the IRS has not addressed. See Pages 61 - 66 from for more on decanting.

Charitable Trusts

Mr. Halperin picked up the mic to cover charitable remainder Trusts (CRT) and charitable lead trusts (CLT).

CRT. There are various CRTs (CRAT, CRUT, NIMCRUT, NICRUT) where the lifetime beneficiary is an individual and the remainder beneficiary is a charity. Section 664 covers specific rules for CRTs. These trusts are generally tax exempt except for unrelated business transaction income (UBTI), which is important to avoid due to extremely negative tax consequences. There is no tax at the CRT level, and tax passes to the beneficiary.
CLT. Rev. Proc. 2001-45 and 2001-46 are the bibles for drafting CLTs. Under §642(c), CLT can deduct 100% of the income to the extent of it passes to charity and the rules are not as draconian if you have UBTI. Be aware there may be recapture if the grantor dies before the term ends because the charity may not have received all assets they are entitled to under the code.

QSSTs and ESBTs.

Subchapter S corporations: have limitations on ownership by trusts, often limiting non-grantor trusts to only 2 years or less of ownership. QSSTs are similar to QTIPs, and the provisions were drafted in the code during the same time period. The similarities include having a single current beneficiary to whom all income is payable and the QSST election must be in effect. The QSST is treated as a grantor trust and deemed owned by its income beneficiary.

Electing Small Business Trust (ESBT): An ESBT may only have certain types of beneficiaries, including individuals, estates, trusts and certain charitable organizations. The ESBT election must be in effect. ESBTs are subject to tax on allocable share of income from the S corporation and there is no distribution deduction. Major changes under the new Tax Act include allowing a trust to qualify as an ESBT even if there is a NR as a potential current beneficiary. If an S corporation makes a charitable contribution, the ESBT gets a charitable deduction under §170 rather than §642(c).

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, Trant & 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.
Heckerling 2018 - Report No. 6

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/heckering.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Announcement: Leimberg Information Services, Inc. (LISI) has recently announced the addition of a new Analyzer to its suite of web-based products. According to them, It is designed to answer the following three questions that have arisen as a consequence of the enactment of new Code Section 199A as part of the Tax Cuts and Jobs Act of 2017: (1) What will a client's pass-through deduction look like; (2) Is a particular client better off being a C Corporation or a pass-through entity; and (3) Is a client better off staying as an employee or switching to independent contractor status. More information is available at www.leimbergservices.com/analyzers. While you are at it, consider subscribing to the LISI Newsletter Service if you have not already, which costs $30 per month and currently offers newsletters covering up to nine different topics of your choice. See www.leimbergservices.com.

Summary: This Report #6 begins our coverage of the Special Sessions that were held on Wednesday afternoon. The ones included here are 1-A on basis, 1-B on buy-sell agreements, 1-C on US - Non-US tax issues, and 1-D on fiduciary cases.

The next Report #7 will continue our coverage of the Wednesday afternoon Special Sessions.

Wednesday, January 24, 2018 (cont.)

2:00-3:30 SPECIAL SESSIONS I

Session I-A
Building Basis, Beyond the Basics: Effective and Efficient Basis Building Strategies for Your Client [FIN]
Presenters: Paul S. Lee + Turney P. Berry + Ellen K. Harrison
Reporter: Patrick Duffey

Building on Paul Lee's Tuesday General Session (Report #3), the panel explored today’s timely techniques to maximize and concentrate basis, including practical steps required to implement these strategies. The discussion included upstream planning, powers of appointment to create basis, using leverage, using partnerships to move basis to where you want it, and planning that benefits charity while capturing new basis for the family.


Turner Berry discussed the use of general powers of appointment in basis planning or what he called “upstream planning.” Berry discussed the range of powers of appointment, generally, and those that would generally be used to manipulate basis. In crafting powers of appointment, it is important to keep in mind that the goal of these powers of appointment is to trigger tax consequences without the powerholder actually exercising the power. Therefore, the power used in Berry’s examples was a testamentary power of appointment limited to the creditors of the holder’s estate. What is a “creditor” is outside the scope of the presentation, but the panel noted that there can be some gray area and it is worth exploring if you intend to use this technique. The example power is also exercisable only with the consent of a non-adverse person. The goal is to extend the power over appreciated (not depreciated) assets to avoid getting a step-down in basis. Broadly, this is about income tax planning so it is important to avoid estate tax—in order to do so, the extent of the power is capped at roughly $1,000 less than the remaining applicable exclusion amount of the power holder taking into account their other assets.

Berry outlined an example using his grandmother’s trust as the owner of appreciated assets and his mother as the holder of the general power of appointment. By giving his mother a testamentary general power of appointment to the extent of her remaining exclusion about, Berry achieved a significant step-up in basis on trust assets without giving his mother a taxable estate.

Creditor issues are worth considering. At common law, the general rule was that creditors could not access assets subject to a testamentary general power of appointment unless the power was actually exercised. Berry expressed practical concern about “sympathetic” creditors causing a court to find a way to get around what is a correct but technical argument.

Conceptually, upstream planning is about recognizing that a family member with a net worth under the applicable exclusion amount (now roughly $11 million) have an “asset” that can be used to help with step-up in basis for those with taxable estates or even for those with longer life expectancies. Berry discussed using non-relatives who might not have notice of the power of appointment, but concluded using upstream planning with strangers was ill advised.

Berry then discussed a product that he developed called an UPSPAT: an upstream power of appointment trust. Essentially, the UPSPAT is an intentionally defective grantor trust with a
testamentary general power of appointment as outlined above. The trust begins unfunded but the grantor then transfers in assets in exchange for a promissory note that is guaranteed by a more senior family member who has a testamentary general power of appointment over the assets in the trusts. Berry believes that the trust assets would get a step up in basis. The question, said Berry, was the extent to which those assets should be included in the gross estate of the more senior family member. While one might take the position that there is no inclusion, Berry takes the more conservative position that the assets are fully included.

Part II – Basis Planning with Non-U.S. Grantors, Trusts, and Holding Companies.

Ellen Harrison lead the discussion on the international aspects of basis planning. Broadly, international basis planning takes advantage of the general principal that U.S. Estate tax does not apply to non-resident aliens—it applies only to their U.S. situs assets. Harrison noted that it is important to keep in mind that the definition of U.S. situs is not the same for U.S. Gift Tax purposes as it is for Estate Tax purposes. Furthermore, planners must always consult the applicable treaty to ensure that it does not overrule the code rules.

Harrison discussed a private letter ruling obtained by her in 2012, PLR 201245006. There, the Grantor was Canadian with a trust that held stock in a Canadian company. The grantor sought grantor trust status by virtue of being the sole beneficiary of the trust during his life. Harrison noted that in drafting the ruling, it appeared that the Service cited the wrong subsection in 1014, which ended up causing quite a bit of confusion in the industry. Subsequently, the Service issued a no-rulings policy on similar issues.

Harrison then moved on to a discussion on basis step up for assets held by foreign holding companies. A liquidation of a foreign corporation at the date of death of a non-resident alien who leaves assets to U.S. persons can be used to step-up the basis of those assets. Before the recent tax reform, if a foreign holding company was liquidated within thirty days of decedent’s death, the basis of the assets owned by the company would be stepped-up to fair market value. This result is changed by new tax law.

If eligible, Harrison recommends that foreign companies make a “check-the-box” election. If a check-the-box election is made, the company either becomes a disregard entity (in the event of a single shareholder) or a partnership (in the event of multiple owners). When you file the election for an 8832, you can choose the effective date of the election that is retroactive for up to seventy five days before you file the form. Where the classification of a foreign holding company was relevant for U.S. tax purposes prior to the check-the-box election, the election is a deemed liquidation. The check-the-box election has the advantage of being a U.S. tax event only that has no consequences under foreign law.

Part III – Basis Shifting Techniques with Disregarded Entities.

Paul Lee discussed basis shifting with two types of disregarded entities: partnerships and grantor trusts. In each case, he outlined specific structures of the contemplated transactions that comprise those techniques using hypothetical examples.
When using partnerships to shift basis, Lee looks for three distinct things: the entity must be taxed like a partnership, there must be some low basis assets, and there should be a group of partners that have a low outside basis (perhaps as low as zero). The partnership should be “old and cold” with assets contributed at least seven years prior or the assets could have been purchased by the partnership more recently.

In Lee’s example, one group of partners owned ten percent of the partnership (minority partners) and one group of partners owned the remaining ninety percent of the partnership (majority partners); each had an outside basis of zero. The first step of the technique was a loan to the partnership that was guaranteed by the outside assets of the minority partners. The loan proceeds are then used to purchase a diversified portfolio of assets within the partnership. After that, the minority partners then have a significant upward adjustment to their outside basis due to their guarantee of the loan. Next, the high-basis diversified portfolio is distributed to the majority partners (who still has an outside basis of zero); that distribution results in basis being stripped from that high basis property because of the outside basis of the majority partners. Finally, a 754 election is used to move basis over to the only other partnership asset, the low basis asset (perhaps stock in a start-up) that the partnership began with. Conceptually, the majority owner has exchanged their interest in that low-basis stock (perhaps in a start-up) for a low-basis diversified portfolio.

Lee pointed out that the 2017 tax reform act eliminated 1031 like-kind exchanges for all property other than real property—thus, it is no longer permissible to have like kind exchanges for things like artwork or collectables. But, Lee posited, because the above-described transaction functions much like an exchange, it might be used to facilitate such exchanges where (i) the property could be borrowed against and (ii) there was enough built-in gain to justify such a structure.

Harrison then pointed out that Berry’s technique—that is, using general powers of appointment for “upstream” basis planning—could be combined with the technique outlined by Lee to get a basis step-up in the resulting low-basis diversified portfolio.

Lee then described a transaction to accomplish basis shifting with a grantor trust. In that example, the partnership was owned by an S-Corp. (<1%) and an intentionally defective grantor trust (essentially 100%) and held a low-basis asset. Another, higher basis, asset is contributed to the partnership by the trust and the grantor (50/50). This implicates the unitary basis rule and Lee outlined the application of that rule to the transaction. The next step is to turn off the grantor trust status of the trust which should be a deemed transfer of assets owned by the trust. As a result, half of the interest in the high-basis asset is deemed to be transferred to what is now the non-grantor trust. Now, a distribution of the high-basis asset to the non-grantor trust results in half of the basis in that asset being stripped and shifted to the low basis asset. Assuming the asset was contributed at least two years prior, the transaction wouldn’t trigger gain.

In closing, Berry discussed PLR 201633021, which he described as a once-in-a-generation PLR. Generally, the ruling provided that if one trust has the ability to withdraw all income from a second trust, the first trust will be treated as owning the second trust. Berry shared an example of the application of the PLR, which involved a formerly terminated trust that owned some later-
discovered tangible personal property and therefore needed to be “revived” in order to determine ownership of that property.

Session I-B
Special Issues in Drafting (and Administering) Buy-Sell Agreements [CHB]
Presenters: Louis A. Mezzullo + Nancy G. Henderson
Reporter: Kristin Dittus

The panelists shared best practices in drafting buy-sell agreements in contemplation of divorce, creditors, ownership by charitable and non-charitable trusts and other entities, transfer tax audits, and disputes among business owners. This presentation builds on Mr. Mezzullo's General Session that was presented on Tuesday (Report #3)

The panel used a hypothetical for their presentation. The hypothetical involved a family, husband and wife who owned a limited partnership each with a 1% GP interest and 25% LP interest held by their revocable trusts. Their two daughters each are 10% LPs, wife’s son owning a 4% LP interest, an irrevocable exempt trust for the two daughters owning 10% each, and a 4% interest in irrevocable exempt trust for wife’s son. There is an estranged son of husband’s who is married. Husband’s estate plan provides for discretionary bypass trust for wife and his descendants with exempt and non-exempt QTIPs. Husband specifically disinherits his and wife’s son. Wife’s trust creates bypass trust for husband and her descendants and exempt and non-exempt QTIPs. Upon death of survivor, husband’s trust creates GST exempt trust for daughters and descendants and distributes outright the non-GST exempt portion. Wife’s trust upon survivor provides for GST exempt trust divided into shares for daughters and son and non-exempt portion passes outright to the three. Wife’s trust specifically disinherits husband’s son.

Using this hypothetical the panelists discussed a number of issues to consider regarding buy-sell agreement drafting. Important that the agreement integrate the business terms with client’s estate planning documents.

In the family context client’s goals are to maintain control by family members, protect family member from impulsively disposing of their interest, and if possible save or defer transfer and other taxes. From the business perspective it is to protect it from estranged family members, former spouses or hostile family members, creditors, interference from non-family members and disruptive family members, and avoid disputes among family members.

Some non-tax considerations include trusts and entities as family owners, addressing ex-spouses, creditors and involuntary transferees, buying out disruptive or unpleasant owners, and rights arising from non-cash or gratuitous transfers.

In drafting for trust owners, who is considered the business owner for purposes of the agreement, settlor, beneficiary, and trustee? In the trust context what is a transfer. Who is the target person for triggering the agreement, i.e. death, incapacity, divorce? Is it settlor, beneficiary, trustee, spouse.
Regarding permitted transferee, who so qualifies as a permitted transferee. Generally allow transfers to family members. Who is a family member? Does a family member include a family trust? Does the term include descendant, spouse and how is spouse defined. Does term descendant include a person that estate planning documents may disinherit or a family member that client would not desire to end up with an ownership interest. A family trust may depend upon whether the trust is revocable or irrevocable. In a revocable trust a family member generally relates to grantor, trustee being the family member. In an irrevocable trust how is the family defined.

With trusts what constitutes a transfer. In a revocable trust generally the death of grantor unless the interest passes to a defined permitted transferee. In an irrevocable trust possibly the death of grantor or a certain beneficiary or some other identified event. Trusts in general must consider what constitutes a transfer, i.e. change of trustee unless a family member or a person approved by family is the trustee.

In agreements also need to consider when entities other than trusts are owners, such as LLCs, that may have its own built-in buy-sell provision. If there is an entity owner, how does that qualify as a family member? What changes at the entity level trigger a transfer? For example, change in ownership or change in management or control of the entity.

How does the agreement address a divorce or death of a non-family member spouse irrespective of how spouse acquired interest, during marriage, voluntary permitted transfer, or death? If divorce is a trigger event valuation and terms must be reasonable and if not, family court will factor that value against the family member in property division between the spouses.

Address how to purchase a problem owner or family member. Generally this will be someone with a minor interest; if it is a party with a significant interest generally liquidation will be the exit mechanism. A vote or decision of a significant ownership group, i.e. super majority may trigger such a purchase.

If the triggering event is an owner with creditor issues, valuation and terms must be reasonable. Consider the impact, if any, of the Uniform Voidable Transactions Act. Comment 8 to Intent in the Act states in part, that a simple exchange by a debtor for a less liquid asset may be voidable. Example, could the exchange of an ownership interest in a business for a promissory note with deferred payment terms be a voidable transaction.

Typical transfer trigger is a right of 1st refusal when party receives an offer from an outside 3rd party. How does the agreement, if any, address a proposed transfer that involves non-cash consideration. Same consideration when the transfer is gratuitous.

If a marital trust is the seller must be concerned that the value is fair market value. If value pursuant to the agreement is understated, it impacts the marital deduction as that will be limited to the agreement value whereas estate tax value may be significantly greater; could disqualify the QTIP trust entirely; and open a possible Section 2519 issue. The Section 2519 issue may be addressed by granting spouse a limited power of appointment in the QTIP.
If the business may qualify for Section 6166 relief, run the numbers to make certain if death is one of the trigger events that the estate is left with sufficient ownership and value so as to qualify for Section 6166. If the estate initially qualifies, and then sale occurs, the Section 6166 estate tax deferral may be accelerated.

In the agreement address dispute resolution, such as mediation, arbitration (whether mandatory), and if arbitration, will discovery be permitted, is decision appealable, and how are costs allocated.

The agreement must identify how valuation is determined, agreed price, book value, appraisal or other fixed or objectively determinable value. Provide instructions to valuation person, i.e. are discounts to be considered.

The panelists did not favor charities as potential owners especially not for a long term.

The session concluded with discussion of the Amlie case, TC Memo 2006-76 where family agreed upon price for shares in bank stock was upheld even though after death the purchaser, son, sold the same shares at almost twice the price paid for the shares. This is a Section 2703 case. Compare this with Blount, 428 F.3d 1338 where case failed both pre Section 2703 law and Section 2703, where the purchaser was a non-family member an ESOP.

Session I-C
Two Systems Separated by a Common Language: U.S. Tax Law Meets Non-U.S. Trust Law [INT][TRU]
Presenters: M. Read Moore + Alec R. Anderson
Reporter: Michael Sneeringer

This session considered the application of U.S. income tax laws to trusts administered outside the United States in the context of non-U.S. trust law and typical administrative practices of non-U.S. trustees, including issues related to the establishment and settlement of non-U.S. trusts, trust administration outside the United States, distributions from foreign trusts, and termination of foreign trusts. It builds on the Wednesday morning General Session presentation by Mr. Moore (Report #4)

I. Introduction
   A. M. Read Moore (“Read”) introduced the topic and noted that it is a spinoff from his earlier talk. He indicated that Alec R. Anderson (“Alec”) and he would discuss four factual scenarios, and the issues that arise. He noted that half of his outline is obsolete, specifically anything on controlled foreign corporations.

II. Example 1
A. Read described the first example: daughter from Sweden is now a U.S. citizen with a U.S. spouse, living in the U.S. with her U.S. kids. Her Swedish parents are now in the U.K. She will get an inheritance; should a trust be used?

B. Read turned over the jurisdictional discussion to Alec. He stated that the preference for Alec’s response should be a jurisdiction other than the U.S. or U.K. (or Bermuda, because Alec practices in Bermuda and the panel wanted objectivity).

C. Alec noted that Jersey, Guernsey and the Cayman Islands are his best picks (besides Bermuda) for trust situs jurisdictions. He noted the importance of dealing with advisors in those countries. He noted the importance of the judges in those jurisdictions (quality of appellate judges too). He stressed the importance of a high quality judicial system. He stressed the importance of the flexibility of the trust law and case law from the jurisdiction.

D. Read noted the importance of regulated trust companies in the English trust world. He asked Alec to opine on the choice of law issues. He queried what would happen if an inheritance dispute arose. He asked how that would interplay with forced heirship laws.

E. Alec discussed how forced heirship would interact with Bermuda trust laws. He discussed using entities for this planning (and transferring the shares to a trust). He indicated that you can defeat forced heirship laws placing assets outside the jurisdiction.

F. Read discussed foreign grantor trusts. He discussed the ways a non-resident alien may be treated as a grantor.

G. Alec explained the structuring of an offshore trust. He discussed the intricacies of the law and how one country might treat a trust as more like a nominee arrangement as opposed to a trust.

H. Read asked whether the family would need to surrender all personal information for the Swedish family to become a client in Bermuda. Alec noted that KYC information (“know your client” information) is important. Read noted that in the U.S., grantor information KYC is required but in foreign jurisdictions, grantor and beneficiary KYC is required. Alec noted that just the corporate fiduciary has this information due to the stringency of the bank regulators in those offshore trust jurisdictions.

III. Example 2

A. Read described the second example: investment assets wrapped into a foreign corporation with the goal of deferring U.S. tax until assets are taken out of the foreign corporation. He discussed the history of how taxation was introduced to prevent tax abuses using such planning (anti-deferral rules and PFIC rules, and the year those rules became effective). He noted that his outline was out-of-date here. He indicated that there is no easy solution. He asked Alec what he would recommend.
B. Alec noted that it depends on what the client is trying to do. He indicated the importance of knowing if there were any U.S. assets in the trust.

C. Read noted the effect of making a check-the-box election on this planning. Read asked Alec how this planning is done practically. Alec discussed the interplay of non-operating businesses and directors. He noted the difference in planning when it is a non-operating company. He indicated that DNI calculations and other income tax issues are done by U.S. based accountants and that his firm would look to the client’s U.S. advisors for this work to be done. Read and Alec discussed the importance of different sets of books (U.S. accounting and the country of trust domicile accounting). Read noted the importance of keeping fiduciary accounting records. Read noted that with a grantor trust, there is no DNI or UNI.

D. Read highlighted the importance of dealing with trusts with company interests; he stressed the importance of discussing with the client whether business interests comprise the assets of the trust (especially where an Australian client is involved).

IV. Example 3

A. Read explained the third example: Paul from South Africa, now a U.S. person, is a beneficiary of a trust. Paul has international siblings. The perpetuities period is shorter. The family is all around the world (Canadian, U.S. and Australian). The family is worried about the trust terminating and the throwback tax. The client comes to the advisors looking for solutions.

B. Alec discussed modification of the trust. He noted it depended on the tax goals at play. Read asked if the trustee can do anything. Alec noted that in Bermuda, there is a statute whereby a trustee can apply to a court to amend or vary the trust for such purposes. He highlighted the notice to beneficiaries and representation that must be accomplished. He spent time discussing Section 47 of the Trustee Act (Bermuda) and how that relates to modifying/amending trusts. Read indicated that this provision is remarkable. He noted that this is for a trust with non-U.S. settlors. He stressed this planning does not work where there are U.S. settlors.

C. Read discussed that in Bermuda, there are trust “acts” (in America there are trust “codes”). Alec highlighted the trust cases in his materials that talk about the perpetuities periods. He noted that trust cases are held in camera (in the judge’s chambers). He discussed a case in Bermuda where an opinion was rendered after the Panama/Paradise Papers. He indicated that the case highlighted the public policy of privacy in Bermuda. He noted that in the Cayman Islands and Jersey, this same public policy probably applies (although it has not been announced via a court decision as it has in Bermuda).

D. Read noted the issue in the U.S. with a beneficiary consenting to trust modifications and the gift tax consequences.

V. Example 4
A. Read explained the fourth fact pattern: Michael and family live in Los Angeles and are beneficiaries of a Bermuda trust. Michael comes to seek our advice on the tax and legal implications of terminating the discretionary Bermuda trust early.

B. Alec noted that the facts and circumstances are important. He discussed the importance of whether the termination is fair to the beneficiaries. He stressed a multitude of factors. Read asked whether Alec would have to go to court to terminate this trust. Alec noted that yes, clients can go to court for the court’s blessing, but note the consequences: what if the trust owns a family business that is about to be sold and liquidating? He noted the case of Public Trustee v. Cooper.

C. Read asked about terminating the trust and distributing all assets to Michael (from the hypothetical example). Alec noted the importance of an indemnity. Read discussed releases and indemnities. He noted that releases and indemnities are routine in the offshore world and take a lot of time to negotiate.

D. Read discussed the importance of knowing the trust’s income for purposes of gains and DNI (using the factual scenario of Michael). He noted the throwback tax and the necessity of records to calculate such tax. He indicated that if the trustee did not have such information, the default method would be used.

E. Alec noted that in Bermuda, if the trustee exercises a power that acts to create a bad result for the beneficiaries, there is a case noting that where a court acts under his discretion and did so without taking into account all of the facts and circumstances, the court can set aside that exercise of that power as a nullity. Alec explained that another U.K. case changed that result, requiring a breach of trust to be proven before the court will set aside the exercise. Alec noted that the rationale for this is protecting the beneficiaries. Read noted how this doctrine is applicable in the U.S. He described that due to the annual accounting period in the U.S., if this is done in the same year, it would be okay (but typically the errors are found in subsequent years). He indicated that Gideon Rothschild mentioned to him that there may be a private letter ruling coming out with regards to this issue; stay tuned.

F. Read finished the presentation discussing trustee to trustee distributions from foreign to U.S. trustees. He queried whether the throwback tax applies. He noted to pay attention and read the tax forms on point in this area. Alec discussed indemnities related to such trustee to trustee distribution.

Session I-D
Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases (at least it seems to me)
[LIT][TRU]
Presenter: Dana G. Fitzsimons, Jr.
Reporter: Michelle Mieras
This session reviewed recent cases from across the country to assist fiduciaries and their advisors in identifying and managing contemporary challenges.

Mr. Fitzsimons kicked off his whirlwind tour of 2017 fiduciary cases by noting that society was particularly dysfunctional last year – oh, and there was fiduciary litigation, too. He noted that he would be walking the audience through others’ failures to help the audience understand how to be a fiduciary or an advisor to a fiduciary. Cases were presented by topic, some of which are summarized below. His comedic presentation appealed to the audience accustomed to dealing with death and taxes.

**Elder Abuse:**

The first case, *Cumming v. Cumming*, 2017 Cal. App. Unpub. LEXIS 6129 (2017), arose from particularly sickening facts of neglect and starvation of a mother by her son, who also served as mom’s agent under a power of attorney and as co-trustee (with mom) of a trust established at the death of mom’s spouse (son’s father). Son’s neglect of mom resulted in a laundry list of ailments culminating in the mother’s death. Son’s siblings sued to obtain access to trust records, breach of fiduciary duty as trustee, and to have the son disinherited under California Probate Code Section 259 for financial elder abuse. The trial court ordered the son surcharged for nearly $400K and ordered that the son be completely disinherited under mom’s will, any trusts, and intestate succession. On appeal by the son, the appellate court upheld the surcharge, but reversed the order of disinheritance, stating that the statute did not permit disinheritance beyond what the abuser is found to be liable for (i.e., the surcharge amount). Mr. Fitzsimons suggested taking note of this result and considering whether steps should be taken in your state to be able to treat an elder abuser as akin to a slayer for purposes of disinheritance.

Mr. Fitzsimons also discussed *Chapman v. Wilkinson*, 2017 Iowa Sup. LEXIS 16 (2017), which addressed the question of what makes a person “vulnerable” under an elder financial abuse statute.

**Powers of Attorney:**

Mr. Fitzsimons introduced the section on powers of attorney by referring to them as the “most effective tool for burglary since the invention of the crowbar.” He then reviewed a trio of cases, including *Estate of Bronson*, 2017 SD 9 (2017), finding that when a signature is made *amansesis* (i.e., a mechanical act), it is not an exercise of a power of attorney. If the person signing *amansesis* is also an agent under a POA, the court may presume that the act is covered by the self-dealing prohibitions attaching to an agent under a power of attorney, but the presumption may be rebutted.

**State Taxation:**

Moving on to states’ ability to tax trusts with limited or no nexus to the state, Mr. Fitzsimons began with *Fielding v. Comm’r of Revenue*, File Nos. 8911-8914-R (Minnesota Tax Court 2017), which held that a Minnesota statute taxing income of a trust based on the settlor’s domicile when
the trust became irrevocable violated due process. Mr. Fitzsimons pointed out that a petition for appeal has been filed in this case.

*T. Ryan Legg Irrevocable Trust v. Testa, 73 N.E. 3d 381 (Ohio Sup. Ct. 2016)* turned out in favor of taxing the trust, although the underlying facts and recent caselaw would have suggested otherwise. Mr. Fitzsimons encouraged anyone interested in the subject to read the brief prepared by the trustee in this case in the petition for writ of *certiorari* to the US Supreme Court, which was denied.

**Decanting:**

Mr. Fitzsimons warned against overreacting to decanting decisions that come out. He described the law on new topics, such as decanting, as a pendulum that swings back and forth until the pendulum’s swing centers on what becomes “settled law.” He then discussed *Ferri v. Powell-Ferri*, 2013 Conn. Super. LEXIS 1938 (2013); 2015 Conn. LEXIS 161 (Ct. Supreme Court, 2015); SJC012070 (Mass. 2017); 2017 Conn. LEXIS 234 (2017) which ultimately upheld decanting where there was no decanting provision in the trust agreement or state law, relying on a facility of payment clause, specific fiduciary powers, and a settlor’s affidavit. *Hodges v. Johnson*, No. 2016-0130 (New Hampshire Supreme Court, Dec. 12, 2017) voided a trust decanting calling it a violation of the trustee’s duty of impartiality, despite what appeared to be decanting language in the trust agreement. On the other hand, decanting was upheld in *Matter of Hoppenstein*, 2017 NY Slip Op 30940(U)(2017), where the trustee essentially decanted the contents of a life insurance trust after the settlor’s threats to stop funding the policy.

**Changes to Fiduciary:**


**Directed Trusts:**

Mr. Fitzsimons noted that the law with regard to the use of directed trusts in the context of planning with businesses is another still widely-swinging pendulum. He reviewed *Beardmore v. JPMorgan Chase Bank*, 2017 Ky. App. LEXIS 60 (2017), noting that this case provides a good roadmap on how to move a trust to Delaware to save state income taxes and modify a trust into a directed trust; *Davis v. Davis*, 2017 Nev. LEXIS 39 (2017), upholding Nevada’s personal jurisdiction over a trust protector of a Nevada trust; *Estate of Zeid* 2017 IL App (1st) 162463-U (2017), approving a trustee’s increased fees in light of litigation duties; and *Ebling v. Hasken*, 2017 IL App 11th 162463-U (2017), approving a trustee’s increased fees in light of litigation duties.
2017 Iowa App. LEXIS 1176 (2017), differentiating between the wishes of beneficiaries and the interests of beneficiaries during the course of overturning a summary judgment removing the trustee.

Miscellaneous:

Mr. Fitzsimons then took a “break” by launching into a smattering of unrelated cases covering topics from a minimal (and humorously ineffective) pro se complaint, a case with comical trust amendments that bring into question our educational system, and an attempt to sue for tortious interference of inheritance before the testator died. Mr. Fitzsimons then turned his attention to cases related to distributions, before moving on to alternative dispute resolution cases, wherein he noted a distinction between cases attempting to bind beneficiaries to ADR versus cases where co-trustees were bound by ADR terms of a trust, which they accepted when they agreed to serve as trustee.

Continuing on his topical parade of recent fiduciary cases, Mr. Fitzsimons reviewed cases related to standing to litigate issues with revocable trusts, charitable trust issues, spendthrift protection, powers of appointment, information and privileges (with a special note to determine from your clients whether they have clear feelings on their fiduciaries being able to access contacts versus content of emails and texts and to draft that position into the will and trust), and releases. After another rapid-fire list of cases, some with ridiculous facts, Mr. Fitzsimons concluded by encouraging the audience to consider the practice of fiduciary litigation. He noted a deep need for people who understand and want to help facilitate a positive outcome versus applying scorched-earth techniques that are more commonplace in traditional types of litigation.

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.
Heckerling 2018 - Report No. 7

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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

ERRATA Re Fundamentals #2 (Report #5): In the section on charitable deductions, it was reported regarding the recent (1/12/18) 10th Circuit Green case that the Court had allowed the appreciation in the property as a deduction. As has been pointed out by our PTL readers, Russ Willis, Ed Morrow and Phillip Jones, that was what the lower Court held. According to Russ, "The 10th Circuit "emphatically did not allow a deduction for appreciation." Per Phil "the 10th Circuit ruled that the charitable fiduciary income tax deduction for in-kind contributions by a trust is limited to adjusted basis, thus the fair market value of the donated property could not be used as the deductible amount." We stand corrected.

Announcement: Ultimate Estate Planner announced today that the Heckerling promotions they were offering during Heckerling are available for those who could not attend the Institute if they are ordered by the end of the day today. These include their 2018 Tax Reform Survival Kit with downloadable education packages, a pre-sale of the 2018 Keebler Tax Planning Chart Bundle, and The Successor Trustee Manual. For more information, see www.ultimateestateplanner.com.

Summary: This Report #7 continues our coverage of the Special Sessions that were held on Wednesday afternoon, the same being 1E on special needs planning, 1F on structuring philanthropy, 2A on dynasty trusts, and 2B on Family LPs and LLCs.

The next Report #8 will continue our coverage of the Wednesday afternoon Special Sessions.

Wednesday, January 24, 2018 (Cont.)
Session I-E
Beyond the Special Needs Trust: Essential New Developments in Special Needs Planning [ELD][TRU]
Presenters: Katherine N. Barr + Kristen M. Lewis + James M. McCarten
Reporter: Bruce Tannahill

This panel discussed new laws, regulations and options that estate planners must know to plan effectively for a secure quality of life for a person with a disability. This Report covers the more significant highlights of this session.

Special needs trusts are sometimes considered the planning tool for individuals with special needs. Because planning for those individuals involves much more than special needs trusts, this session was devoted primarily to special needs planning other than special needs trusts (SNTs). Each speaker focused on one aspect of special needs planning.

As an introduction, Ms. Barr noted that individuals with special needs are common – one in 6 children today have a disability. As an example, one in 48 boys are on the autism spectrum, while one in 189 girls are on the autism spectrum.

Katherine Barr – Recent Laws Affecting Special Needs Planning

ABLE Accounts

ABLE accounts started out in the public’s eyes to be a single solution for special needs planning. As enacted, they don’t replace good special needs plan with separate SNT.

Limitations on ABLE accounts mean they are not for everyone. These include:

1. Onset of disability must start before age 26
2. Annual contributions limited to gift tax annual exclusion amount
3. Account can’t hold more than $100,000 without excess being considered a resource for Medicaid
4. Subject to Medicaid payback, regardless of who funded the account
5. Payments for non-qualifying disability expenses are subject to income tax on the income and a 10% penalty tax.

Differences from SNTs include:

1. Inexpensive to set up and operate. In Alabama, the annual cost is $45.
2. Contributions must be made in cash.
3. A competent individual in control of the ABLE account can have autonomy over the account and it may be linked to a debit card.
4. Can’t be named beneficiary of retirement accounts or life insurance

Disabled Military Child Protection Act
Passed in December 2014, this Act allows a military retiree to designate a SNT established at death as the beneficiary of their military pension without the pension disqualifying the beneficiary for SSI. Although the trust must be a Medicaid payback trust, Ms. Barr said that this is not a problem because the money will be spent every month.

**Special Needs Fairness Act**

This Act allows a competent individual under 65 with special needs to create their own SNT and put their own money into it. The individual can’t be their own trustee.

**Uniform Decanting Act**

The Act includes a special section dealing with decanting to SNT. Whether it needs to go to a first-party or a third-party trust depends on trust provisions and state law.

Ms. Barr observed that the trend is to move away from guardianship/conservatorships and move to supported decision making.

**Kristen Lewis – Planning for Beneficiaries with Special Needs**

Doing a SNT is not comprehensive special needs planning, which requires a team of professionals.

Many benefits for individuals with special needs are conditioned on SSI eligibility and cannot be accessed otherwise. Many families want their family members to have access to those programs or services so eligibility for SSI is important, regardless of the family’s means.

Members of the Dream Team:

1. Special needs planning attorney. Most traditional estate planning attorneys aren’t familiar with special needs planning. Ms. Lewis recommended using a member of the Special Needs Alliance.
2. Trustee willing to serve as trustee of SNT. Not all professional trustees will take SNTs.
3. Accountant or CPA familiar with SNTs.
4. Government benefit advocate who assists family apply for government benefits cost effectively. Government is generally not the family’s friend and family may be encouraged to apply for benefits family member isn’t eligible for.
5. Care manager.
6. Life care planner – a professional who puts together objective, arms-length assessment of cost to fund individual’s lifetime costs. Should determine how much is needed in the SNT.
7. Special education planner or litigator -- helps family work with schools to get free and appropriate education.
8. Investment advisor. It’s not inherently obvious how you invest money for individuals with special needs. The individual may have a lower risk tolerance but a normal or substantially normal life expectancy. Many trustees have investment manager familiar with special needs planning.
9. Guardian. Either the guardian or attorney generally coordinates the team. Clients generally need a network of SNTs:

1. Testamentary SNT. For clients under 60, normally use testamentary 3rd party SNT.
2. First party SNT, even if no money to go into it immediately, just in case something slips through the cracks.
3. Receptacle SNT designed to receive inheritance intended to benefit the person with special need. Once the trust is drafted, the attorney normally prepares letter to family members that provides assistance to them on how to make gifts or bequests to the individual with special needs.
4. Gifting SNT. Include secondary beneficiaries who have withdrawal right to avoid gift tax issues.
5. Divorce SNT. 90% of parents who have children with special needs end up in divorce. This trust is designed to receive anything set aside for an individual with special needs as part of the divorce.
6. Community SNT. Designed to receive community contributions for the individual. Cardinal rule of SNT funding is DO NOT COMMINGLE first-party money and third-party money.

James McCarten

Mr. McCarten spoke from the perspective of a special needs planner who has an adult child with special needs. He said that special needs planning turns tax logic on its head.

Individuals with special needs are the same as everyone else – they want to do the same things that everyone else does.

He said that the most important part of helping families is helping them understand the need for financial planning. They often spend everything available to help child with special needs get help and don’t think about what happens in the future. A change in caregiver is most traumatic change a child with special needs will go through.

Individuals with special needs want to live independently if possible. The most important consideration is who is going to pay for it. Home and Community Based Services (HCBS) may be available but availability may be limited and requires that the individual be in a group home with less than six residents.

There are ways to get children services and into the community. Funding the resources and understanding the rules, including tax and employment laws can be challenging.

Session I-F
Structuring Philanthropy: What Works When [CHR]
Presenters: Martin Hall + Erik Dryburgh + Michele A.W. McKinnon
A critical question for philanthropic clients is what structure or combination of structures should be used to fulfill their goals. This session considered not only the more standard options of private foundations, private operating foundations, donor-advised fund accounts and supporting organizations, but also reviewed the use of section 501(c)(4) social welfare organizations and LLCs to meet the needs of different donor profiles. This session is a follow up to Mr. Hall's Tuesday morning General Session (Report #2). Here are some of the highlights from this session.

This panel of legal counsel presented a follow up to the general session presentation of Mr. Hall reported earlier. They took several vehicles, such as public charities, private foundations, private operating foundations, donor advised funds, supporting organizations and social welfare organizations and for each of these vehicles the panel discussed their respective (1) charitable contribution deduction limits for individuals, (2) qualified charitable distributions from IRAs, (3) controlled/prohibited activities subject to excise taxes, (4) entity level taxation, (5) distribution requirements, (6) disclosure of donor identity and (7) degree of donor control. The clear indication is that this field of activity has become far more complicated than it may have been in its past.

The panel then ran through several hypotheticals, which were not in the materials per se, but were available on the conference app, along with other supplemental materials. The overall message was that these vehicles would serve in each of the hypotheticals, but not with the same degree of satisfaction for the donors who, of course, have different objectives. Some are focused on having control and ownership of assets, so a donor advises fund may not be desirable. On the other hand, a private foundation would probably be better suited, but a supporting organization tied to a public charity may also suffice.

This type of analysis continued through several “hypos” and lead the panel to conclude that donor and advisor may well have to look at “all of the above” vehicles and, of course, make changes among the vehicles over time as objectives change. For example, the members of a donor family may change over time, mission creep may occur and, of course, there may be (and have been) changes in the applicable tax and other laws that would suggest alterations.

The panel spent time on funding with closely held business interests and on income tax considerations. There was also a discussion of what was or was not a “charitable purpose”, noting for example that scholarships to individuals were not a charitable purpose for at least some of these vehicles. Of additional interest was the discussion about how other vehicles have been or could be created to solve problems, for example, the changes to Sec. 501(c)(4)s, once limited to “social welfare” purposes.
Session II-A Show Me the Money! Settlors, Beneficiaries and the Dynasty Trust [TRU]

Presenters: Diana S.C. Zeydel + Todd A. Flubacher + Barry F. Spivey
Reporter: Joanne Hindel

Flexibility or no flexibility for dynasty trusts? Can we solve for settlor intentions, beneficiary predilections, tax considerations, and state law limitations without fiduciary litigation? This session examined the options. This session builds on Ms. Zeydel's General Session on the same topic (Report #2). Here are some of the significant highlights from this presentation.

**Part I – Reasons for and advantages of dynasty trusts**

Todd started the discussion by suggesting that the advantages of dynasty trusts are bigger and better than ever. He said that the drafting attorney should determine which states authorize dynasty trusts, that is: which states have abolished the rule against perpetuities. He said that there are 20 states that authorize perpetual trusts and 14 states that still have the rule against perpetuities. He said that the dynasty trust helps to prevent the dissolution of the settlor’s wealth. He said that these trusts provide for creditor protection, the protection against in-laws, the preservation of wealth, the ability to hold family businesses, the ability to restrict information about wealth, retain confidentiality and protect against future tax uncertainty.

**Part II- Judicial changes to existing trusts in order to create dynasty trusts**

Barry then talked about various aspects of petitioning a court for judicial modification or reformation of existing trusts. He addressed jurisdictional considerations such as is the forum state in which an action can or may be brought also the place of principal administration of the trust. He discussed the parties that should be joined in a court proceeding and discussed the concept of virtual representation and the UTC authority to have certain parties represent others as long as no conflict of interest exists in the representation. He described the types of judicial actions that can be brought under the UTC: Section 411 authorizing modification or termination upon consent of the settlor and all beneficiaries and the role of the court in those actions. If the settlor is unavailable, the beneficiaries can still seek modification or termination under Section 411 but then the court must determine that continuance of the trust is not necessary to achieve any material purpose of the trust.

Barry also reviewed judicial actions under Section 412, when a court may modify administrative or dispositive terms of a trust to terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination would further the purposes of the trust. Finally, Barry talked about Section 415 that provides for reformation of the terms of an irrevocable trust by a court due to unilateral mistake of law or fact that results in a misstatement of the settlor’s intent.

**Part III- Nonjudicial Settlement Agreements**
Diana discussed the increased use of non judicial settlement agreements (NJSA), made statutorily available in the states that have adopted the Uniform Trust Code. An NJSA is generally authorized by a statute that provides settlors, beneficiaries and fiduciaries with a tool for resolving matters arising with respect to the administration of a trust without the time and expense of court involvement. An NJSA is an extremely useful tool to address flexibility in changes and can be used for matters such as correcting errors or resolving ambiguities, dividing a pot trust or merging trusts, modernizing outdated trust provisions, ratifying trustee actions and even changing interests of beneficiaries. She did caution, however, that if non judicial changes to beneficial interests are undertaken there may be tax ramifications which should be understood before the changes are implemented.

Finally, the panelists discussed the statutory authority to decant now available in a number of states. They described decanting as a trustee power that often requires advance notice to trust beneficiaries before the decanting is undertaken. They also discussed whether the exercise of decanting by the trustee could run afoul of the trustee’s duty of impartiality to the trust beneficiaries. They also noted that the IRS has not issued any guidance on the tax ramifications of decanting.

Conclusion

The panelists concluded by reiterating that dynasty trusts are important planning tools for families and if discussed and drafted carefully will preserve family wealth for many generations.

Session II-B
Family LPs and LLCs: The Unwind [CHB]
Reporter: Beth Anderson

This session examined the income tax issues that may be overlooked in unwinding a family LP or LLC, particularly if the advisor’s expertise is more concentrated on estate planning than income taxation. This session builds on Mr. Abendroth's Tuesday General Session presentation on business succession. This Report covers the more significant highlights from this session.

This breakout session examined the income tax consequences of different contributions and distributions from family limited partnerships and limited liability companies. The speakers used set a fact pattern and altered the facts through a series of examples.

The presentation started with a few necessary definitions and brief refresher of partnership tax terms include inside basis, outside basis, pre-contribution gain (the difference between the contributing partner’s basis in the assets and the assets fair market value), “step in the shoes” and capital accounts.

The key takeaway of the presentation is that knowledge of the history of the partnership is a must for avoiding tax traps. Good records are important to understanding the tax history and business history of the entity.
I. Gain recognition of formation

Generally contributions to a partnership on formation are nontaxable events, however, if the contribution is to an “investment company” and run afoul of the diversification rule, then the contributing partners will have to recognize the pre-contribution gain. But you can combat the diversification rule with a cash contribution by one of the contributing partners.

II. Non-liquidating Cash and Non-Cash Distributions

Generally distributions of cash do not cause gain recognition. Cash distribution reduces the partner’s outside basis (but not below zero) by the value of the cash distribution. Any cash in excess of the outside basis must be recognized.

If the distribution is of cash and other property, then first reduce basis by value of the cash, then the property receives a carry-over basis equal to the lesser of the partnership’s basis in the property or the partner’s remaining outside basis. When the property is later sold, the partner will recognize the gain but can tack the partnership’s holding period to determine the character of the gain (ordinary income, short term or long term cap. gain).

If the partnership distributes marketable securities, then must review Sec. 731(c) to determine whether the marketable securities are treated like cash or like property. If the partnership is an investment partnership and the partner receiving the marketable securities is an “eligible partner” then distribution is treated like property and typically no gain and carry over basis deferring gain recognition until the partner sells the assets. An investment partnership cannot have been engaged in a trade or business ever. The trade or business taint cannot be washed away not even on a technical termination. History of the partnership from formation to distribution is very important. For example, the partnership may have been formed with commercial rental property that was subsequently sold and the proceeds were invested in marketable securities.

A partnership that is not an investment partnership and does distribute marketable securities must complete a before and after gain calculation to determine the amount of the asset that will be deemed cash and the amount treated as property. Cash distribution triggers a recognition of gain but that value is added to the outside basis and increases the basis of the securities so that there is not a double recognition of the gain when the property is later sold.

III. Seven Year Rule

If a partner contributes assets with pre-contribution gain to the partnership, the partner’s gain stays with the partner for seven years from the time the asset was contributed (not from the time the partnership was formed). If the asset is sold or distributed to another partner during the seven year period the contributing partner must recognize the pre-contribution gain. This may come to the surprise of the contributing partner because that partner will have a taxable event without receiving anything from the partnership. Most often the partnership agreement does not have a provision for mandatory tax distributions for pre-contribution gain recognition events. No expiration of the pre-contribution gain if the asset is sold within the partnership, and all the pre-contribution gain should stay with the contributing partner. Most partnership do not follow this rule, but the presentation
panelists cautioned that with the new partnership tax rules there may be an increase in the partnership audits.

IV. Terminating/Liquidating Distribution

The presenters ran through several examples of typical ways to terminate and distribute all the partnership assets to the partners.

The first example was to sell all of the assets within the partnership and distribute the cash proceeds. Gain would be recognized on the sale, but that gain would increase the partners’ outside basis and then cash would be distributed thereby reducing the outside basis to zero. Only one level of gain recognition.

Another example was a distribution of property in kind, which the presenters cautioned against doing especially if the partnership is not an investment partnership but will be making distributions of marketable securities because there could be substantial immediate recognition of gain.

A third example discussed non-pro rata distributions of property. In this example, it is very important to set client expectations and an understanding that depending on the assets each partner receives, each partner may have very different tax consequences. Some partners may be able to defer gains and others may have an immediate recognition event.

The take home message of liquidating distributions are setting client expectations, knowledge of historical facts are necessary to determine whether a transfer is taxable or not, and managing the income tax liabilities with the transfer tax vehicles.

V. Partial Liquidating Distributions/Redemptions

When buying out or redeeming one partner it is important to discuss prior to the redemption that client expectations as to whether the buyout will occur at full value or a discounted value. Also, if assets must be sold to generate cash necessary to complete the buyout, then the other partners may have a recognition event and should those partners receive a distribution for tax purpose as part of the redemption. For example if the redemption value is $2 million but each non-redeeming partner is subject to $20,000 in taxes, then should the redeeming partner receive $2 million less (x*20,000) where x is the number of non-redeeming partners.

If assets must be sold can more of the gain be shifted to the redeeming partner in an effort to increase and zero out that partner’s capital account? Yes, if the partnership agreement allows for it. Also yes if the partnership agreement doesn’t allow for it, but does have a savings provision referencing Sec. 704(c) because a partnership agreement may be amended up to the date the tax return is due.

The Reporters:

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Heckerling 2018 - Report No. 8

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Announcement: Relevant to Special Session II-C that is reported on in this Report, people ought to obtain a copy of "Using Technology Ethically: A Legal Ethics Guide to Data Security, Metadata, Cloud Computing and Other Tools of the Modern Trade," a myLawCLE coursebook that was delivered live by Federal Bar CLE on 1/26/18 and can be purchased as an on-demand video from myLawCLE. See https://www.mylawcle.com.

Summary: This Report #8 concludes our coverage of the Special Sessions that were held on Wednesday afternoon, the same being 2-C on technology and estate planning, 2-D on elder law, 2-E on post-death administrative nightmares, and 2-F on celebrity estates.

The next Report #9 will contain coverage of the Thursday morning General Sessions.

3:50-5:20  SPECIAL SESSIONS II (Cont.)

Session II-C Technology and Estate Planning: The Rise of the Machines

Presenters: Bruce M. Stone + Eliam Medina + Suzanne Brown Walsh
Reporter: Patrick Duffey
First it was word processing and desktop calculators. Then document assembly systems, spreadsheets, and actuarial software. Mail delivery was replaced by faxing which was replaced by email which is being replaced by cloud storage and shared access. The internet provides access to vast troves of knowledge. Wills prepared online, executed with remote witnesses and existing only as electronic records are here. The only thing not yet replaced is the human brain of the estate planner. Will artificial intelligence replace us eventually? Do we have professional and ethical duties to embrace the fullest use of advances in technology? Read all about it in this Report.

The panel explored current developments in technology related to estate planning, with a focus on the development and proliferation of electronic will products and laws. The presentation began with Bruce Stone writing and executed a (limited) will on his tablet that was witnessed by Eliam Medina and Suzanne Walsh.

Part I – Electronic Wills

Stone began with a news story about a draft text message that was never sent, but included detailed information about assets and the disposition of the decedent’s body. An Australian court declared the draft text to be a valid will. The use of the words “my will” and the detailed information was enough for the Court to make the unsent text a will.

The materials included a story of a hypothetical couple that executes electronic estate planning documents one night after work. Using that example, Stone discussed the legal and practical issues arising from electronic wills or eWills. Ultimately, Stone opined that the wills would be valid in other states, but perhaps not in Florida.

By definition, an electronic will is a record created by electronic means that includes the same information that would normally be in an ordinary paper will. The panel looked to the Uniform Electronic Transactions Act of 1999 (UETA) for several key definitions and concepts—Stone noted that at present UETA does not under its terms apply to wills.

Stone then further broke down the definition of an eWill, beginning with the phrase “a record created by electronic means.” Under UETA, a “record” is information inscribed on a tangible medium or stored on electronic medium and is retrievable in perceivable form. An “electronic record” is a record created generated, communicated, received, or stored by electronic means. “Electronic” is defined to mean relating to technology having electrical digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

Stone pointed out that there is no “one” or “original” electronic will. There may be copies, but no single original. That aspect of eWills has positives and negatives. While it may be difficult to revoke an eWill via destruction (because there is no single original), it also is much more difficult to lose an eWill and far easier to identify whether a decedent has a will as all.

The main case on electronic wills is In Re: Estate of Castro, a 2013 probate court decision out of Lorain County, Ohio. That case involved a decedent who died without a paper will but who executed an electronic will that was drafted by his brothers on an electronic tablet and executed in
a hospital room. The will was drafted at the direction of the decedent prior to getting a blood transfusion. It was eventually signed by the decedent and his brothers as witnesses using a stylus. One month later, the decedent succumbed to his illness and died. A printed copy of the will was submitted for probate. The will made devises to persons other than the decedent’s heirs at law. Importantly, those heirs—the decedent’s parents—were represented by counsel and did not contest the will. Ohio law, which controlled, required that a will be in writing but did not specify a medium nor define what a “writing” is. Because the execution formalities had been met, the court found that the document was a valid last will and testament. Stone opined that it would have been inequitable under those circumstances not to admit the document as a will. The panel noted that the result might have been different had the electronic will been contested by the heirs.

**Part II – Willing.com**

Medina, a founder of the eWill website Willing.com, shared his personal experience with estate planning and shared his frustration with the complexities involved in even basic estate planning. Medina views Willing.com as “Turbotax” for wills. Since launching in 2015, Willing.com has raised $8 million, expanded to 50 states, and provided services to nearly 400,000 people. The panel then discussed next-step questions in the area including the application of artificial intelligence, block-chain technology, and identity authentication technology.

**Part III – Electronic Wills Act**

Walsh discussed the Uniform Law Commission Electronic Wills Act, which was approved as a project in 2017 and fast-tracked to be ready for states in Fall 2019. The first reading of the Act is scheduled to be in July 2018. Walsh is chair of the committee, Turney Berry is Vice Chair, and Susan Gary is the Reporter.

The committee has been tasked by the Uniform Law Commission with drafting a uniform act or model law “addressing the formation, validity, and recognition of electronic wills.” The Act will not cover trusts (except for testamentary trusts) because those are not subject to the same formality requirements as wills.

Walsh noted that the UETA has been enacted in all but 3 states and should smooth the transition to electronic wills because it puts in place the necessary legal framework. In fact, the UETA would permit eWills under its general terms, but the act currently contains a specific carve out for wills.

Turning towards the committee’s analysis, Walsh explored the current state of the law with respect to wills. Most state laws on wills, Walsh explained, are based on Wills Act of 1837 which lays out three distinct requirements:

1. The will must be in writing
2. The will must be signed by the testator, and
3. The will must be attested to by witnesses (typically two).

Some states allow oral or holographic wills.
The committee looked at what the relevance of those requirements are to wills, generally, in order to determine how the substantive goals of those requirements might be applied to eWills. Those functions are:

1. Evidentiary
2. Cautionary
3. Protective (protect against fraud and undue influence) and

Will formalities are strict, but in some instances may be relaxed. For example, the harmless error rule (UPC 2-503) permits courts to overlook minor errors in formalities under certain circumstances. Generally, proponents of a document that needs the harmless error rule to be admitted must prove by clear and convincing evidence that the decedent intended the document or writing to be a will or codicil.

Walsh pointed out that as the law has developed since the Wills Act of 1837, there are far more instances in which testamentary transfers are permitted to occur without any of these formalities. For example, a lady bird deed or a beneficiary designation on a brokerage account. Stone noted that those transfers can be done completely electronically and for many people would have a more significant financial effect.

In 2017, eWills Acts were introduced in five states and the District of Columbia, two of which were enacted. The states were Arizona, Indiana, New Hampshire, Virginia, and Florida. Walsh expects some of the states that did not enact those laws to revisit eWills statutes next year. Others may wait for the Electronic Wills Act, which is expected to be ready in Fall of 2019.

Finally, Walsh outlined some of the issues that the committee is grappling with, including

1. Recognition of “foreign” wills (comity, choice of law)
2. Revocation
3. Undue influence,
4. Electronic file integrity
5. Remote witnessing/notarization, and
6. Format of the ewill when it is submitted to probate.

**Part IV – Blockchain Technology**

Walsh closed with a discussion of the possible application of blockchain technology to eWills and other legal documents. The technology, Walsh explained, works through a network of decentralized computers known as “nodes,” which each record transactions across a distributed ledger. Those transactions are time stamped, cryptographically “signed” with math, and validity by a “consensus” mechanism (which is meant to prevent tampering). Those qualities, noted Walsh, would each be useful for an eWill.

A blockchain can be “permissioned” which would keep certain data private while leaving other date public. For example, the terms of the will could be made private but the name of the decedent and the fact that the document is a will could be kept public. Walsh discussed the potential benefits
of a system that increased the security of wills while also allowing for an easy determination of whether someone ever had a will. Walsh analogized the technology to provenance of artwork.

Session II-D
Presenters: Bernard A. Krooks + Robert B. Fleming + Lawrence A. Frolik
Reporter: Bruce Tannahill

The bad news is that during later life individuals often encounter legal problems arising from health concerns, long-term care, and the need for appropriate housing. The good news is that elder law often provides answers by crafting solutions that permit clients to live as well as possible in the last decades of their lives. The panel discussed hypothetical, but realistic, problems often faced by older clients, and demonstrated how to “solve” or at least alleviate them, by applying the precepts and knowledge of elder law. This Special Session builds on the General Session presentation Mr. Krooks gave on Wednesday morning (Report #4). Here again the significant highlights are being reported.

Dealing with family situations and dynamics and how to pay for medical care and LTC is an important part of elder law. In this session, the speakers discussed several case studies presenting different issues that arise in elder law and how they would approach the situations.

Ethical issues

Elder law situations often present attorneys with the dilemma in determining who their client is and they may represent multiple people. Children or other relatives may bring the senior to the meeting. Mr. Fleming said it’s best to meet with the senior before hearing the story from the children.

Even if you tell the relatives that you do not represent them, they may reasonably think you are their attorney. Prof. Frolik said that when adult children disagree, you don’t want them as your clients.

The panel discussed Model Rule 1.14, which states that you should have as normal a relationship with clients who have diminished capacity. They agreed that it seems to be drafted to deal with an existing clients and Mr. Krooks is unsure how it applies to potential clients. The speakers recommended reviewing the ACTEC Commentaries on the Model Rules and the National Academy of Elder Law Attorneys’s Aspirational Standards for guidance on the ethical issues involved in elder law practice.

Financial Powers of Attorney and Health Care Directives
Clients should always have backup financial and health care agents. Keeping the documents up-to-date is important. Agents may die, become incompetent themselves, or the relationship between the principal and the agent may change so the agent is no longer an appropriate choice.

Having different people as health care durable agent and financial agent can cause problems. The financial agent may refuse to pay for expenses incurred by health care agent. It may be necessary to use a guardianship to resolve the problem.

Having a health care agent who does not live in the same area (or even same country) as the principal should not be a problem as long as the agent can stay in contact with the attending physician. The principal needs to give the agent specific information on the type of medical she does or doesn’t want.

**Supporting Adult Children**

Clients often provide their adult children with financial support for numerous reasons, sometimes potentially reducing their ability to meet their own future expenses.

In some situations, you may need to explain to your client that she needs to take care of herself first. This may call for some tough love between you and your client followed by tough love between the client and the child. A panelist said that you’re about 50% social worker in dealing with these cases.

There are numerous ways for clients to help adult children without providing unlimited assistance, either while the client is alive or after the client’s death. Options include establishing a discretionary trust or a unitrust providing income for the child’s life and the child’s children as the remainder beneficiaries. A single premium immediate annuity or deferred income annuity may be a simple, efficient way to accomplish same result as a unitrust. The value to the client is the psychic value of taking care of the child.

**Medicaid Issues**

Medicaid planning for couples involves planning to maximize the assets and income available for the community spouse (the spouse not in or expected to enter a LTC facility) without affecting the institutionalized spouse’s Medicaid benefits. Mr. Fleming noted that not every state requires you to spend down. You want to keep as much as possible in joint property until one spouse is institutionalized. Assets above the limit can be spent to buy a larger residence or improve the current residence.

There is “terrific variability” between states on the treatment of gifts within the five-year period prior to applying for Medicaid, according to Mr. Fleming. Depending on the situation, you may be able to argue that the need for Medicaid only arose after an unexpected event, such as the disability or death of a caregiver. It might be possible to recharacterize a payment that appears to be a gift to be a loan or prepayment for care to be provided by the recipient.

**Being Knowledgeable about Medicare**
The panel agreed that clients assume you understand the basics of Medicare. They don’t generally look to their attorney for advice on the Medicare rules and are unlikely to pay for it. Choices a client makes can significantly impact the care they receive and the cost of that care. Failure to sign up for Medicare within specified enrollment periods may cause delays in coverage, permanent premium increases, or both.

**Long-term Care Insurance**

One case study involved a client who has long-term care (LTC) insurance, goes into nursing home, and payment is denied. The panel said that LTC insurance is consistently a nightmare to get claims paid. Problems include submitted forms being lost and claims being denied without providing a reason or citing incorrect information. This has led to a cottage industry of people who help clients collect for a percentage of the amount recovered. One panelist suggested that the best approach when faced with this problem is to involve an aggressive litigator. Prof. Frolik said that there are successful cases awarding punitive damages against insurance companies for failure to pay LTC claims.

One problem is that clients may fail to pay the LTC insurance premiums, causing the policy to lapse. To deal with this problem, a lot of states now require third-party lapse notification for LTC policies. If not required by the state, the client can specify someone to receive the notification. Hybrid policies providing both life insurance or annuity benefits and LTC coverage may be the best approach. A potential problem is that these policies may not qualify under the Long Term Care Insurance Partnership Plan, which reduces the amount of assets that must be spent down to qualify for Medicaid.

**Session II E Case Studies in Preventing Post-Death Administrative Nightmares [LIT][TRU]**

Presenters: S. Andrew Pharies + David A. Baker + Jo Ann Engelhardt
Reporter: Michelle Mieras

This panel discussion examined real and hypothetical cases that resulted in post-death administrative nightmares and attempted to reverse engineer those cases to determine what, if any, preventative measures could have been taken at the estate planning stage. This Special Session builds on the General Session presentation Mr. Pharies gave on Tuesday (Report #2). This report covers the significant highlights from this session.

The panel presented nine scenarios and suggested proactive methods to prevent potential issues down the road.

**Scenario 1** will be familiar to many practitioners: multiple children receiving unequal shares of an estate and one child being disinherited entirely. Assume the planning documents contain a standard in terrorem clause. The disinherited child will not be dissuaded from litigation, as that child has nothing to lose, and his case settles after prolonged litigation. Additional litigation is
brought by another child receiving a smaller share, this time as an intentional tort claim. The
court allows the tort case to proceed, and a significant settlement is reached. The panel
suggested that the practitioner should have broadened the no contest clause to include the tort
cause of action as a triggering event.

Additionally, the panel reminded the audience that in order for a no contest clause to dissuade
litigation, the person must be given something that they’re not willing to forfeit. Ms. Engelhardt
suggested that another way to make a beneficiary hesitate to litigate is to include a strong
provision stating that any legal fees incurred will be assessed against their share. She also
suggested encouraging clients to have these conversations during life rather than leaving
potentially contentious estate plans as a surprise that comes to light at death. Mr. Baker added
that the in terrorem clause could provide for third party defense fees to be allocated against the
litigant’s share.

Scenario 2 addressed a wealthy family with children who think wealth is their birthright and a
second marriage with a less wealthy spouse. Over the course of the marriage, through loans and
joint investments, the less wealthy spouse accumulates significant wealth. Wealthy spouse dies
with no marital agreement, and the kids sue for an accounting and to disgorge the wealth from
the surviving spouse. Ms. Engelhardt recommended including specific provision into the
planning documents, stating the history, that the wealthy spouse has made transfers freely to the
other spouse, and directing fiduciaries not to pursue the surviving spouse. Mr. Baker noted that
in most jurisdictions, the spouses could enter into a contract where the wealthier spouse releases
the second spouse for any liability to pay back funds, thereby barring the fiduciary and other
legatees from claiming the surviving spouse’s wealth.

Scenario 3 centered around an elderly, wealthy gentleman with a marital and charitable
deduction-driven estate plan. Shortly before death, he is coaxed into making inter vivos
leveraged transfers to his descendants. No changes are made to the testamentary documents.
The IRS attacks the death bed transfers and asserts that significant gift taxes are due. Because
the planning documents don’t contain clear direction on how payments will be made, the marital
and charitable deductions are jeopardized. Ms. Engelhardt cautioned the audience that you need
to run the numbers, and keep running the numbers with different scenarios to ensure that the
client understands. Explain how the consequences may vary if the client dies now or dies later
with changed tax laws and different values, and discuss abatement scenarios. Mr. Pharies
suggested getting a contribution agreement between the donor and recipient.

Scenario 4 involved multiple children receiving unequal portions and one child being in charge
of the estate/trust administration. The beneficiaries have years of public litigation, a result
directly opposite of the private settlor’s wishes. Mr. Baker suggested including ADR provisions
in the estate planning documents. He stated that 9 of 10 states that have passed on whether this
can be binding on beneficiaries determined that it was binding. (The 10th state, California, is
split on the type of issue that can be governed by the ADR provision.) He advised that the type
of ADR (e.g., mediation or arbitration) and whether it will be binding or non-binding should be
specified. Remember that binding arbitration would effectively waive appellate rights, but can
offer certain benefits such as being able to include fee-shifting language (e.g., loser pays all
fees).
After working through Scenario 5 (post death non-judicial settlements and Mr. Baker’s “Don’t Touch my Document Clause” covered in the Plenary Session), and Scenario 6 (dueling estate plans), the panel turned to Scenario 7, which involved residual gifts to charity. If this happens in a state with an active attorney general’s office, the AG will file an appearance and scrutinize every fee and expense paid, as this will reduce the residue/charitable share. Mr. Baker suggested instead leaving a fixed amount to charity to prevent these issues, and also to minimize the risk of losing the charitable deduction.

Scenario 8 involved naming someone who is generally business savvy but not knowledgeable in the realm of trusts and estates as fiduciary. To try to persuade them to act, exoneration and exculpation clauses are included in the documents. After death, the person declines to serve. Ms. Engelhardt stated that the fiduciary is being set up to fail. One way to incentivize a fiduciary’s service may be to include a contingent bequest to the named fiduciary to ensure that he is compensated appropriate for serving in cases where there will likely be litigation. Another option may be to waive potential conflicts of interest (to the extent permitted by law). Mr. Baker commented on the limited ability to waive conflicts, particularly if the named fiduciary is a business associate already involved in a business that will be part of the estate. He thinks that the best option is to expressly acknowledge potential conflicts of interest in the document and state how they should be handled. Mr. Pharies took a different view, stating that if someone is reluctant to serve as trustee, don’t try to incentive them; pick someone else.

The panel concluded with Scenario 9, involving children battling over running the family business. Bad blood boils over into the “good” child’s service as fiduciary after the parent’s death. Because the child is distracted with the fights in the estate/trust, the business starts to falter, adding fuel to the fire. Mr. Pharies suggested structuring the gift to the “bad” child as a pecuniary gift, thereby limiting that child’s ability to complain about estate administration. Also consider exculpatory language, lowering the fiduciary duties, or subjecting the business/trust to more advantageous jurisdictions. Mr. Baker commented on whether the person running the business controlled by the trust is subject to the business judgment rule or if the more rigorous fiduciary duties are tacked on, and suggested that this is yet another reason to use a professional fiduciary. The panel was divided on the usefulness of getting the parent and children together before death to discuss how this would work and to enter into an agreement.

Session II-F
Dying for Fame in the Age of Celebrity: From Neverland Ranch to Paisley Park [LIT]
Presenters: Linda J. Wank + Edward H. Rosenthal + David Sleeman
Reporter: Herb Braverman

Using the Estates of Michael Jackson and Prince as case studies, this panel explored the unique, hot-button issues confronting fiduciaries and heirs of celebrity estates. This Report covers the highlights of this session.

This panel used a combination of fascinating slides to present information about some of our most well-
known celebs, some of whom have estates making more money than the celebs made when living, hence, the term “Delebs”, which stands for dead celebs. Among those discussed in this fashion were Michael Jackson, Prince, Marilyn Monroe, Elvis, Steve McQueen, Robin Williams, etc. The presentation was quite entertaining, but unfortunately I cannot reproduce the many images for you that were shown to us and made it so.

Mr. Rosenthal did discuss the importance of intellectual property law in this area, including the many trademarks, patents and copyrights, creative persons obtain and hold (often in their estates). He also discussed the “right of privacy”; that is, the right to be left alone in spite of ones celebrity. He made it clear that, other than the Constitutional right of privacy, there were no federal laws covering the subject and no uniformity among state laws dealing with the area. There appears to be more concern about the commercial aspects of this right which we all have it to some extent.

Ms. Wank and Mr. Sleeman discussed a number of related issues, such as valuation and appraisals, provenance, the effect of new technologies (for example, holograms of celebs doing what they did when they were alive and kicking). Without their slides, I can hardly convey the essence of their presentations here, except to say that Ms. Wank showed several lists of annual earnings by “delebs” and discussed why some of them are no longer on the lists and why others are excelling beyond their wildest living expectations!!

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 Liifman 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, Truant & 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..
Heckerling 2018 - Report No. 9

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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Announcement: In Report #5 we referred to the new Leimberg Analyzer suite of web-based products designed for use with new IRC Section 199A. ACTEC Fellow Daniel Evans has recently announced he has created an on-line calculator that shows the impact of the new Tax Cuts and Jobs Act by calculating the federal income tax for both individuals and estates and trusts under both the old law and the new law. For more information, go to http://www.webcalculators.com. Also

Summary: This Report #9 contains our coverage of the Thursday morning General Sessions, those being on community property, the Uniform Directed Trust Act, planned giving, and planning for real estate investors.

The next Report #10 will begin our coverage of the Thursday afternoon Special Sessions.

THURSDAY, JANUARY 25

9:00-9:50

Stranger in a Strange Land: Dealing with Foreign and Domestic Community Property Issues in Your State [INT]
Presenter: Joshua S. Rubenstein
Reporter: Beth Anderson
People are becoming increasingly peripatetic in today’s mobile society. Sometimes people from different countries marry. Sometimes couples change domiciles. Sometimes individuals have property in more than one country. And sometimes individuals have close family members, even spouses, who live in different countries. This program consider the issues presented when an individual from a community property jurisdiction has connections to a common law property jurisdiction. As usual, this report will cover only the significant highlights of this session.

I. Introduction

The presenter started this presentation with a general synopsis of why community property issues exist and why estate planners do not do a good job of addressing and tracking the issues.

Real estate and the US stock market are attractive investments to people outside of the US. Locally, people are moving more within the US (for example, from high tax to low tax states) which may result in community property to non-community property states or some combination.

There should be conflicts every time an estate plan crosses state lines, but estate planners often don’t think about the issues because the states don’t have walls or noticeable changes in language or other barriers, thus border crossing isn’t noticeable.

The presenter then described the different types of community property systems within and outside of the US.

II. Types of Community Property

Community property is based on one of three systems, UK, Spanish or French systems of property, and each system has different considerations and treatments of property interests.

Even within the US there are different types of community property. There are common law community property states and elective opt-in states. Although only 15% of the states are community property states, those states include California and Texas which means that there is a high population of US residents with community property.

Universal Community is from the old French civil code and provides that upon marriage all of property (even premarital property) is community property. Community of After-acquired property is the typical community property in the States and is also applies to most of Europe and South America. Community on Dissolution is followed in much of Central America and provides that title controls until the marriage ends. Marriage can end by death or divorce.

The presenter then explained how to determine what law controls the community property issues. The Restatement of Property presumes the character of property stays the same unless there is an agreement to the contrary or it falls into an exemption. The Uniform Disposition of Community Property Rights as Death Act only applies to death transfers; it doesn’t address lifetime transfers. Often to determine which law applies there must be a conflict of laws analysis. This analysis may start with when and where the property interest was acquired, which typically turns on the marriage
of the spouses. When determining which law governs the marriage, you have to determine if it is the law of the place of celebration, the domicile at the time of the marriage or the current domicile.

If dealing with international law, you also have to determine whether the property interest in question is similar to a real property interest or a personal property, tangible or intangible interest. Under US law real property interests are generally governed by the law of the location of the property and personal property interests are governed by domiciliary law. Civil law countries do not have real and personal property interests; instead they have movable and immovable property interests. The presenter offered the example of a mortgage being personal property subject to domiciliary law in the US, but in France a mortgage secured by a property interest is an immovable interest that would governed under French law.

III. Tax considerations

Historically, income from community property is taxed equally between the two spouses. Sec 879 provides exceptions for this division of taxable income such that earned community property income typically belongs to the earner and only passive investment income is divided between the spouses.

As for transfer tax considerations, only one-half of the community property is included in the first to die spouse’s estate, so that is only a marital deduction on one-half of the property. No tracing issues regarding the amount each spouse contributed, and the property receives a full basis adjustment at the death of each spouse.

There are some negative issues with community property. Gifting requires spousal consent because the donor spouse does not have sole ownership of property. Divorce typically ends up in a 50:50 split. With respect to transfer taxes, the estate can only deduct 50% of expenses. It may be harder to satisfy the 35% test for closely held business interests for a Sec. 6166 election. Cannot use community property to create GRATs, QPRTS, and term interest with remainder to spouse because this could result in inclusion in the spouse’s estate.

IV Conclusion

The presenter wrapped up this presentation with a few suggested techniques for preserving community property. An accurate accounting and tracing of the couple's property and history of ownership is desirable. The accounting should identify premarital and potentially separate property from property acquired during marriage.

The couple could use joint revocable trusts to keep their property interests separate. Assets should not be retitled if the couple moves. A community property agreement may be used to identify community property. The presenter suggested that if a community property agreement is used, it should identify the portion of premarital property that will be treated as community and the portion of marriage property that will be treated as community. It should provide that survivorship rights vest on death and that the terms of the agreement do not apply to divorce.
Trust Administration Takes a Village? The New Uniform Directed Trust Act Paves the Way for Creative and Thoughtful Divided Trusteeship [TRU]

Presenter: Robert H. Sitkoff
Reporter: Joanne Hindel

The duties and liabilities of directed trustees and trust directors remain a source of confusion. This session canvassed the new Uniform Directed Trust Act, explored how the Act simplifies drafting and administering directed trusts, and highlighted some of the most common and helpful uses of directed trusts in the current planning environment. Here are some of the more significant highlights from this session.

Part I – Introduction

Robert Sitkoff served as the chairman of the Uniform Law Commission committee that promulgated the Uniform Directed Trust Act. He started his presentation by stating that directed trusts have remade the field of trust administration.

He said that the fundamental policy question addressed in the Act (UDTA) and arising from the emergence of directed trusts is how the law of trusteeship should be divided among a directed trustee and trust director.

His presentation covered the four areas of improvement developed with UDTA. The first concerns the fiduciary duties of a trust director and a directed trustee. The second addresses the non-fiduciary matters in the subsidiary law of trust administration. The third innovation of the UDTA is to reconcile the law of co-trusteeship with the broad settlor autonomy recognized with respect to a directed trust. The fourth and final innovation is a carefully thought-out system of exclusions that preserves existing law and settlor autonomy with respect to a host of issues that are collateral to the emergence of directed trusts.

Part II – Scope and Exclusions

Robert started by saying that understanding the UDTA begins by considering the statute’s scope. The purpose of the UDTA is to promote settlor autonomy by validating directed trusts. The scope of the statute depends largely on which powers qualify as “powers of direction.”

The term "power of direction" includes both a power to direct a trustee to act as well as a power in a director to act on his or her own. The broad definition also covers powers to veto to consent in advance to a trustee’s actions or a power to release a trustee from liability for prior conduct.

The UDTA Committee addressed the issue of enabling versus off-the-rack statutes. Enabling statutes authorize creation of a directed trust by validating terms of a trust that grant to a trust director a power of direction, but they do not prescribe any specific powers by default. Off-the-rack statutes provide for one or more statutory forms of directed trust, with particular sets of powers given to a type or kind of trust director by default. The drafting committee opted for an enabling structure.

There are however exclusions with UDTA where persons holding powers do not come within the definition of trust directors such as nonfiduciary powers of appointment, the power to appoint or remove a trustee or
trust director; the power of a settlor over a revocable trust and powers of a beneficiary if exercised solely in the interest of that beneficiary.

**Part III – Allocating Fiduciary Responsibility in a Directed Trust**

The core of the UDTA’s contribution is the act’s allocation in §§ 8 through 11 of fiduciary responsibility among trust directors and directed trustees. The UDTA’s basic approach is to place the primary fiduciary responsibility for a power on the person who holds the power. Thus, if a power belongs to a trust director, then the primary fiduciary responsibility for that power belongs to the director, rather than the directed trustee who merely facilitates the director’s exercise of the power.

The UDTA thus relieves a directed trustee from the full fiduciary duties of a unitary trusteeship, and leaves a directed trustee with only a reduced duty to avoid “willful misconduct” in deciding whether to comply with a director’s directions.

The basic rule of § 8(a) is that “a trust director has the same fiduciary duty and liability” as a “trustee in a like position and under similar circumstances.” A settlor could construct a trust director’s power to be springing.

UDTA § 9(a) says that “the trustee is not liable” for taking “reasonable action to comply with a trust director’s exercise or nonexercise of a power of direction” except as provided in § 9(b). Section 9(b), in turn, provides that a “directed trustee must not comply with a trust director’s exercise or nonexercise of a power of direction … to the extent that by complying the trustee would engage in willful misconduct.” The UDTA thus generally requires a trustee to comply with a director’s direction and relieves the trustee from liability for so doing, unless by complying with the direction the trustee would engage in willful misconduct, in which case the trustee has a duty not to comply.

**Part IV- Cotrusteeship under the UDTA**

The UDTA preserves the distinction between a directed trust and a cotrusteeship. Under the UDTA, a “power of direction” cannot be held by a person while the person is serving as a trustee, nor can a person be a “trust director” while the person is serving as a trustee. In consequence, a cotrustee with a power to direct another cotrustee is not a trust director, and the other cotrustee is not a directed trustee. Instead, relations between multiple trustees remain subject by default to the law of cotrusteeship.

Under the UDTA, however, the terms of a trust can opt out of the default law of cotrusteeship, and instead subject cotrustees to the more permissive rules of a directed trusteeship as prescribed by §§ 9, 10, and 11. The drafting committee reasoned that, because a “settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee,” there was little reason not to allow the settlor to apply “the fiduciary rules of [a directed trust] to a cotrusteeship.”

**Conclusion**
Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee is called a “power of direction.” The holder of a power of direction is called a “trust director.” A trustee that is subject to a power of direction is called a “directed trustee.” The main contribution of the act is to address the many complications created by giving a power of direction to a trust director, including the fiduciary duty of a trust director and the fiduciary duty of a directed trustee.

10:55-1:45

What’s a Donor to Do? Planned Giving in a Changing Tax Landscape [CHR]

Presenter: Michele A.W. McKinnon
Reporter: Joanne Hindel

This program covered the manner in which donors should approach planned giving under uncertain or new tax laws as well as changes affecting the charitable deduction and their impact on planned giving techniques. It also explored other reasons donors make gifts and whether these considerations are likely to outweigh the new tax limitations in a donor’s gift considerations. This report covers the more significant portions of this session.

Part I – Introduction

Michele started her presentation by saying that millennials are going to change the world. She indicated that the new tax Act will not really change the way donors approach their philanthropy and donors give because they think their gift can make a difference – this resonates with the younger generation.

Part II – Current Income Tax Charitable Deduction Rules

Michele discussed the current income tax charitable deduction rules by reminding the audience that donors must itemize deductions in order to be entitled to an income tax charitable deduction for contributions to qualified charitable organizations. She said that under the new law a donor is generally entitled to deduct the full amount of the contribution up to 60% of the donor’s contribution base for a gift of cash. She also reviewed the top income tax rate for individuals under the new Act ($500,000 at 37%) and for families ($600,000 at 37%).

Part III – Effects of Tax Reform and Economic Factors on Charitable Giving

Michele then discussed what effect, if any, Tax Reform has had on charitable giving and determined that basically donors will still want to make charitable gifts. She said that current market conditions should favor charitable giving and in particular tax efficient charitable giving through the use of appreciated property gifts. She also indicated that perceived and real cuts in government funding for certain programs and activities may be a motivating factor for some individuals to increase charitable giving as social needs increase.
Michele discussed why donors engage in philanthropy and said that while many donors are not able to use the income tax charitable deduction due to percentage limitations or other reasons they are still giving. She also reviewed a 2016 U.S. Trust study of high net worth philanthropy which shows that 28% of high net worth individuals plan to increase their giving in the next three years. This same study also revealed that 33% of high net worth individuals participate in impact investing and 34% of these do this in place of some of their charitable giving. She said that the greatest challenge faced by wealthy donors is identifying causes they care about and where to donate. Other reasons donors give include religious reasons, appreciation for a particular organization such as a hospital or college, emotional connection with an organization’s story and mission and in order to share good fortune or give back to the community.

**Part III – Use of traditional planned giving techniques in current tax and economic environment**

Michele concluded her presentation by reviewing some traditional planned giving techniques including gift annuities. She said that in periods of low interest rates, many donors favor the security of fixed payments offered by a charitable gift annuity as well as the simplicity of establishing a gift annuity. She also discussed the gift or a remainder interest in a personal residence or farm and said that these are enhanced by a lower section 7520 rate.

She said that while charitable remainder trusts remain attractive for donors who wish to avoid capital gains on appreciated property, particularly for those facing an income realization event, the low interest rate environment will require the exercise of caution.

**Conclusion**

Michele reiterated her initial emphasis that donors are motivated by more than just tax benefits and estate planners should be having the right conversation with their philanthropically motivated clients.

1:45-12:35

**Dishing the Dirt on Planning for Real Estate Investors**

[CHB]

Presenter: Farhad Aghdami
Reporter: Kimon Karas

This program focused on the income tax and wealth transfer tax planning opportunities (and pitfalls) associated with planning for real estate investors, including a discussion of non-tax considerations and obstacles, such as obtaining third-party consents. The program also explored valuation discount planning, freeze, and leveraging strategies for specific types of assets and ownership structures typically found in real estate deals. The report on this session covers the significant details.

Real estate for the owner generates income, depreciation deductions, cash flow, if managed by a professional the losses generated are deductible, through refinancing transactions provide a way for the owner to access appreciation through cash distributions, and when the owner dies he receives a basis adjustment in the asset at death. In today’s environment with high exemptions consider whether a gift with a carryover basis makes sense. Steve Akers has noted that a gift of a $1M asset with 0 basis would have to appreciate to approximately $2.47M (247% of current value) in order for the estate tax savings on future appreciation to start to offset the loss of basis.
step up for high bracket taxpayers. If real estate is in a valuation discount vehicle, consider unwinding it to position for a basis adjustment.

Valuation issues germane to real estate include the following:

1. Lack of marketability.
2. Lack of control.
3. Fractionalization. Discount applied to ownership of an undivided interest. Partition is the only remedy. A co-owner has the right to use and possess the property so long as interests of other owners are not adversely impacted. See Estate of Williams, T.C. Memo 1998-59, (court allowed a 44% discount for undivided ½ interest in timberland).
4. Market absorption where seller is forced to sell a large block at one time.
5. When structuring ownership consider discount planning at the outset. For example if client owns both a general and limited partnership interest, for valuation purposes the ownerships will be aggregated and impact the size of the discount.

Valuation discount planning generally includes entity structures such as LLCs and partnerships. See Pierre, where transfers of interests in a single member LLC were treated by the Tax Court as the transfer of LLC interests and not the proportionate interest of the underlying LLC interests. See also, Rev. Rul. 2004-77, where IRS held that where an eligible entity has two owners under local law, but one of the owners is, for federal tax purposes, as a disregarded entity, the eligible entity cannot be classified as a partnership and is disregarded as an entity separate from its owner. If the client has a property with a negative capital balance an alternative is to transfer the property to a grantor trust.

Real estate entity should avoid the litany of IRS challenges to LLC or limited partnership planning due to the significant non-tax purposes for creating a real estate entity. If the client is engaging in gift transfer planning, make certain in the gift context to adequately disclose the gift. Generally valuation for the real estate investor is commonly based on appraisals required for loans. If there is a question of value consider using defined value clause or Wandry clause.

Common techniques a real estate investor may use in the family context.

1. Make an outright gift of interest. Easy to accomplish, shifts income and value. Watch Hackl issue if underlying property is not income producing. Consider in that context of adding a put right with the transfer; although that put right will sacrifice some valuation discount.
2. Make a loan to children to give them cash to invest in the entity.
3. Alternatively children borrow from outside 3rd party with parent guarantee of debt obligation. Case law has held that guaranty is not a gift. Service issued a PLR that was later withdrawn, that held a parent’s guaranty of a child’s debt was a gift. The issue of the tax treatment of guarantees is on the 2017-2018 IRS Priority Guidance Plan.
4. Sale to an intentionally defective grantor trust under the authority of Rev. Rule 85-13. Under Rev. Rule 2004-64, grantor’s payment of income tax is not a gift to the trust. Typical arrangement is to provide trust with a 10% seed funding. Trust utilizes cash flow to repay the note. The grantor obtains all of the income tax benefits from the trust. The downside is that there is no basis adjustment. That can be addressed with a substitution power whereby grantor can substitute high basis assets for low basis assets. There is very little by way of case law on this technique. The two cases are Karmazin and Woebling that were settled without addressing the effectiveness of the technique.

5. In order to address the grantor dying with the note, consider structuring the transaction with the grantor retaining either a SCIN or private annuity. Generally these structures will require a risk premium. Estate of Davidson, T.C. No. 13748-13, involved a SCIN, (where IRS argued transfers to SCINs were made based on an unrealistic life expectancy) but the case was resolved by stipulated decision.

Other techniques but not favored by the presenter include a GRAT (creates valuation challenges plus real estate is generally a long term play and GRATs are usually short term to address mortality risk) and BDIT. Another technique that could be used, but does not seem to be that popular which would make sense in the real estate environment is the preferred partnership complying with Section 2701.

Transactions one may wish to consider with a personal residence.

1. Fractionalization, but watch if converting property that qualifies as a tenancy by the entirety ownership that would be creditor protected.

2. Use of LLCs to purchase for privacy purposes

3. Use of residence, vacation home by a child opens up issue of gift. If child is living in a residence owned by parent, consider fractionalizing giving the child a 1% or greater interest. As a tenant in common the child has occupancy rights to the property.

4. Transfer property to a trust for the benefit of the spouse. The transferor spouse, as spouse would have the right to use and occupancy. However, if the beneficiary spouse dies, the donor spouse can no longer reside there rent free. See Rev. Rule 70-155.

5. QPRT, generally better when interest rates are high.

6. Sale/leaseback with a grantor trust. Technique is the sale of residence to a defective grantor trust in exchange for note, followed by a leaseback of the residence for fair market rent.

Considerations as to how a real estate investor will pay estate taxes. Generally real estate owners will not prefer either Sections 6166 or 6161. Problem with Section 6166 is IRS lien that will impact existing credit facilities. Alternative consider a Graegin loan. Most efficient may be to acquire life insurance.

In addition to tax issues with the real estate investor do not overlook non tax issues. Make sure one follows the underlying entity governing documents, i.e. do documents allow transfers, what are transfer requirements. Follow bank and loan agreements where transfer of any size may require advance consent of the lender. A transfer without lender consent may trigger a “bad boy
clause”, where the transfer without consent causes allows a nonrecourse loan to be converted to recourse loan.

**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.
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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-pltl.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(ering) 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.

Session III-D
Creative Use of Planned Giving Techniques in an Uncertain Tax Environment [CHR]
Presenter: Michele A.W. McKinnon
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:

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Heckerling 2018 - Report No. 11

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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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

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.

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
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,
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 (respondeat 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 faxes, 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 paper work 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. 1. Not a charity.

2. 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.

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Heckerling 2018 - Report No. 12

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**Announcement:** The Purposeful Planning Institute based in Denver, Colorado held a Primer on Purposeful Trusts and Gifts Workshop in Orlando on Monday morning, January 22nd, the opening day of the Heckerling Institute. Their promotional materials said how these Trusts are "antidotes for the toxicities of long-term trusts and large gifts." They said you would learn "what wealth psychologists are suggesting our clients need to be doing to avoid negative outcomes in the next generations of their families when designing and implementing dynasty and asset protection trusts or large gifts," all built around the 5 "toxicities" of trusts and the 7 keys of Purposeful Trusts. A 130 page handbook and related materials were made available to those who paid the fee to attend. Sounds pretty interesting, especially given the recent changes in the tax laws. For more information, contact the PPI at www.purposefulplanninginstitute.com.

**Summary:** This Report #12 completes our coverage of the Thursday afternoon Special Sessions, those being an errata reprint of 4-A on the magic age of 70 1/2 that was in report 11, plus 4-C on working with real estate investors, 4-D on the exercise of discretion, and 4-F on the new partnership audit rules.

The next Report #13 will contain our coverage of Fundamentals #3 on demystifying international tax planning and the three Friday morning final General Sessions.

**ERRATA RE REPORT 11:** We mistakenly published the report for Natalie Choate's Friday morning General Session on ROTHs as the report for her Thursday afternoon Special Session 4-
A on the Magic of Age 70 1/2, that was in Report #11. Below is the correct report for her Special Session 4-A. The report on her Friday General Session will be reported again at that time.

3:50-5:20 SPECIAL SESSIONS IV

ERRATA
Session IV-A - REVISED REPORT
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.

The Tax Act made no changes to the law regarding RMDs.

Computing RMDs.

1. List all retirement plan and accounts as one - will need to compute RMD separately for each plan/account.

2. Separate plans that do not have an RMD requirement.
   a. Roth IRAs. Roth owner not required to take distributions from Roth IRA during lifetime.
   b. A participant in a qualified plan who is still working and is not a 5% owner.
   c. Annuited IRA.
   d. The first distribution year is the year the person attains 70 ½.

Computing the distribution.

1. Determine prior year-end balance. Value is fair market value. If the account has hard to value assets it will be more difficult to determine FMV. IRS requires IRA provider to report to IRS each year (Form 5498) whether IRA holds assets that do not have readily ascertainable market value. Note, if one fails to satisfy the year’s RMD it comes with a 50% penalty for each year that one fails to take RMD.

2. Watch year-end adjustment if funds are being transferred at year end from one account to another. It is possible that there may be a zero balance in account at year end. Special rule for such a transfer - it must be added into the prior year-end balance of the account that receives the transfer for purposes of computing RMD.

3. The computation is determined by dividing the year end account balance by one’s age. Age is determined to be one’s age at end of applicable year. For most people they will refer to IRS Table III, IRS Pub 590-B. However, if the sole beneficiary of IRA is a spouse, and spouse is more than 10 years younger, then computation will be based on IRS Table II.
4. Although rare, the RMD cannot exceed the account balance. For example account value can drop between year-end and when distribution is made. Another example is if a big portion of IRA was awarded to ex-spouse in a divorce after prior year-end and prior to taking RMD.

**When to take RMD.**

Once RMD for the year is determined must take RMD sometime during that calendar year, by December 31. Distribution must be taken between 1/1 and 12/31. Exception in the year one turns 70 1/2, person can take distribution during the year or anytime up until April 1 of following year. The decision then is when in the year to take the distribution and from.

1. Take distribution early in the year.
2. Take distribution in monthly installments.
3. Take distribution late in the year.
4. As to when in the first distribution year, one can take distribution during the first distribution year or at any time up until April 1 of the following year. April 1 date is the required beginning date, RBD. If one is still working and not a 5% owner, the first distribution year is the year one retires if later than the date one reaches age 70 ½. In that case the RMD for the company plan with be the later of April 1 of the year after reaching age 70 ½ or April 1 of the year after retirement. This special rule does not apply to an employee who owns more than 5% of the employer who sponsors the plan. The question whether to take the distribution in the first distribution year or defer until and up to April 1 of following year “depends.” It is not an all or nothing, so one can take a portion in first distribution year and remainder by April 1 of following year. Remember postponing the first year’s distribution means there will be a double RMD in the second year. Also, note one cannot rollover an RMD. If for example one is retiring from a company once person has reached 70 ½, need to take RMD prior to any rollover.

From which account should one take RMD. Generally, one has no choice as must take RMD for each plan or account. Exception when one has multiple IRAs or multiple 403(b)s. However, inherited IRAs cannot be lumped together for this exception.

**Distributions can be made:**

1. In cash.
2. In property in kind. Assets received by owner will obtain tax cost basis.
3. Use RMD to pay estimated taxes. Income taxes withheld from retirement plans (similar to income taxes withheld from wages) are treated as if paid equally on the estimated payment dates.
4. Qualified charitable contribution (QCD). This is a tax favored way for certain individuals to transfer funds directly from IRA to charity.

How the QCD works in operation. An over age 70 ½ IRA owner can, in any calendar year transfer up to $100,000 directly from an IRA to one or more charities. The amount transferred is not includible in gross income of IRA owner and counts towards satisfying owner’s RMD. A
QCD counts towards one’s RMD. Except for that there is no relation between QCD and RMD. Consequently the QCD bypasses IRA owner’s tax return completely. A benefit of a QCD since it does not count toward one’s gross income and consequently one’s AGI which can increase one’s taxes and Medicare premiums. With the new Tax Act and the increase in the standard deduction, the QCD can in effect act as “deductible contribution” for someone who does not itemize. The IRA owner can satisfy charitable gifts with QCD, exclude that distribution from income, and still take the standard deduction against other income.

**Requirements to qualify for a QCD.**

1. Only individuals who are age 70 ½ can make QCDs.

2. QCD can only be made from an IRA, not from any other form of plan.

3. Maximum amount anyone person can give is $100,000 in any one calendar year. A husband and wife who each have separate IRAs and are both over 70 ½ can each transfer up to $100,000.

4. QCD must be made directly to a charity, i.e. a charity that one can make a tax-deductible contribution. Exception - a donor advised fund nor a supporting organization qualify as charities for this purpose.

5. The QCD must be made to charity with no right by owner to “get anything back” from the charity for the gift.

6. Money must go directly from IRA to charity.

A couple of concerns with QCD. The IRA provider has no reporting obligation. The obligation to account for the QCD and report it to IRS falls on the IRA owner. Also, do the projections to determine whether the QCD is an effective way to make donation.

**Vehicles to consider in reducing RMDs, more appropriately deferring the RMD.**

1. If individual is still working and less than 5% owner, roll the IRA into plan.

2. Continue making contributions to employer plan.

3. If individual is self-employed with no other employees consider a solo 401 k plan. A solo 401k plan could also allow for Roth accounts. Although that does not reduce current income tax it allows for future tax-free growth. Same with voluntary nondeductible employee contributions and in plan conversions.

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**Session IV-C Getting Your Hands Dirty with Real Estate Investors [CHB]**

Presenters: Farhad Aghdami + Sarah Moore Johnson
Report: Craig Dreyer
This program focused on practical tax and non-tax considerations when representing real estate investors, such as choosing the right trustees after the Aragona case, dealing with negative capital accounts, managing capital gains and avoiding “dealer” status, valuation and transfers of promote interests, and much, much more! This session builds on Mr. Aghdami's Thursday morning General Session on the same basic topic. Here is the reporter's report on the highlights of this presentation.

The panel opened noting that the focus of the session would be on the income tax and legal issues for dealing with real estate. The main change in the 2017 Tax Act is 199A. 1st issue is what qualifies as QBI. It only includes ordinary income from an active trade or business. They went on to discuss how real estate investors can avail themselves to the 20% deduction under 199A. Next, they went through the calculation to determine whether a real investor meets the QBI deduction threshold if they make over the specified amount. They noted that the reference to 167(a) is not entirely clear what depreciation number they are referring to under the statute. The panel also discussed some potential workarounds to allow real estate developers to allocate employees in the 199A context by using section 3306 regarding common pay master with S-corps, or a common pay agent under section 3504.

Under both new and old law, depreciation is still 15 years for improvements, 27.5 years for residential property, and 39 years for commercial property. Nothing changed here. However, before the 2017 Tax Act, businesses could make leasehold improvements, retail improvements, and restaurant improvements to property that could be depreciated over 15 years instead of 39 years if it was done pursuant to a lease and the building had been in service for over 3 years. Under 168(k) businesses could deduct 50% in year 1 of the cost incurred, and the remaining amount over the next 15 years. In 2015 qualified improvement property was added. Qualified improvement property had a 39-year life. The 2017 Tax Act increased qualified improvement property deduction from 50% to 100%, and qualified improvement property has no term of years under the 2017 Tax Act, but the intent was to make it 15 years. Any depreciable property held for 20 years or less is now eligible for 100% expensing. Therefore, it combined all the previous improvements into one category. The panel discussed that businesses earning more than 25 million per year may be limited to an interest deduction of 30%, or they may have to give up bonus depreciation.

The promote or carried interest portion of an investment is now only available for capital gain after three years rather than the old rule of one. The panel also noted that the 1031 exchange applies only to real estate, and no longer applies to other types of property. The panel also noted it may important to account for fixtures separately in a 1031 exchange under the 2017 Tax Act.

The panel then discussed various scenarios to implement with real estate investments. They began by discussing what is the best ownership for a primary residence. They noted tenants by the entirety (“TBE”) is usually the best option for married couples. They discussed that TBE is a full bar to creditors in some states like FL, MD, Washington DC where neither spouse can act unilaterally on TBE property. However, in states such as NY, MA, and NJ either spouse can alienate TBE property which is a modified bar state. In a modified bar state, creditors must accommodate the remaining spouse (i.e. if the house is rented the creditor must give the spouse half the rent), and there is little else the creditor can do to get repaid.

**Vacation house.** The panel then discussed the ownership of a vacation house owned by multiple siblings as tenants in common. They discussed various expenses on rental property, and generally if one person pays all the expenses for their siblings they can only deduct portion to their actual interest, but with expenses
that run with the land they can often deduct the full amount since they are joint and several in most states, though as some states override this joint and several liabilities by statute. The panel then discussed the benefit of transferring to an LLC, or if the clients want to do a joint tenancy agreement is another option. The panel went on to note that if you want someone to use a house without the risk of gift tax you could always give them a small tenant in common interest to avoid any gift tax issues. The panel then discussed ways to ensure you could deduct the property taxes by renting it out and using it for 14 days or less, or alternatively, no more than 10% of the time the property is used as a rental. Meeting this requirement allows them to deduct property taxes, even if an individual already has used up their 10,000 SALT deduction.

**Investment Property.** The panel then discussed the typical real estate deal that involves three parties: The Developer, Equity investor, and Lender. The panel also discussed various types financing for investment deals such as mezzanine loans, A&D loans, and construction loans. The panel then went on to discuss the role of preferred returns and promote interests. Preferred loans get a return of capital and a return on capital. Then there is the promote return which is commonly referred to as the carried interest portion. In addition to the preferred return and promote fee most deals involve development fees, which is treated as ordinary income and not capital gains. In dealing with debt, the panel also noted the difference between recourse and non-recourse debt, and how recourse debt may provide additional basis to take losses, while nonrecourse debt does not give this ability to a developer. The panel then went on to discuss various types of financing.

**Dealer v. Investor.** The panel discussed how a dealer gets ordinary income treatment while and investor does not. They noted that 1221(a)(1) does not include property held in ordinary course of trade or business. They went on to discuss the factors that differentiate a dealer v. investor such as what was the nature of the investment and purpose and whether there are property sales over an extended period. The panel then discussed whether the actions of a co-tenant could be imputed to another co-tenant. Evaluate the extent of the sale transition. (9th Cir case held motives of other owners are not imputed to the owner). Real Estate investment dealer can hold investment property, but it must be treated differently from other property.

**Deductibility of Losses.** Passive investors in real estate losses are disallowed. Section 469 was designed to prevent offsetting losses of one activity against another. 469(c)(2) rental activity is always passive; however, 469(c)(7) does not apply if taxpayer is a real estate professional and the taxpayer materially participates in the asset. The test for real estate professional says taxpayers performs 750 or more hours in real estate activity, and more than half activity is in a real estate trade or business. This includes development, rental, brokerage, or leasing. This means a lawyer will have difficulty deducting losses from a real estate enterprise. If you put over 500 hours into a rental property you can aggregate activities and deduct losses.

**1031 Exchange.** The panel went on to discuss 1031 exchanges which provide no gain on the sale of real estate if reinvested in a like kind exchange. The panel noted that residential real property and commercial real property are treated as like kind. The 2017 Tax Act however now only applies to real estate.

**2701 and Derivate Contacts.** The panel then discussed how gifting preferred interests is tempting but runs afoul of the section 2701 rules, unless you use a vertical slice (by taking an equal slice of the common and preferred interests is one exception to 2701). However, liquidation and vesting issues may also cause problems. One option is to use a derivative carry contract that the trust enters for distributions over a certain threshold. The panel noted that there is a lot of opportunity and risk in this area.
**Net Investment Income Tax (NIIT).** How to make trust property not subject to NIIT by making sure the trustee is active in the trade or business. The panel went on to discuss the section 469 material participation rules and several court cases.

The panel wrapped up by discussing principal and income act issues that come up with real estate investors, and how the 754 election is great for small issues but has significant costs moving forward in accounting fees.

**Session IV-D How Much and When? A Panel Discussion on the Legal and Practical Considerations of the Exercise of Discretion [TRU]**

Presenters: Amy K. Kanyuk + William T. Hennessey + R. Hugh Magill

Reporter: Patrick Duffey

Using a series of hypothetical examples covering a range of topics, the panel provided practical advice and guidance from their respective perspectives—that of an estate planner, a litigator, and a trust officer—regarding the exercise of a trustee’s discretion and the scope of a beneficiary’s rights with respect to a discretionary trust. Discretionary trusts create an expectancy and not a specific right. Trustees face significant and extensive considerations in determining whether to make a distribution and, when making distributions, how much to distribute.

**Example 1: A beneficiary with a potential substance abuse issue.** The trust provides for mandatory income with discretionary principal distributions under a “best interests” standard. The beneficiary has been acting strangely and was recently arrested with drugs in his car. The trustee is aware of all of the behavior and the arrest, but has no “medical proof” of a substance abuse issue. Bill Hennessey discussed the general principles of the exercise of fiduciary standard.

The trust, Hennessey noted, has some common problematic provisions: specifically, in order to withhold distributions, the trustee must “reasonably believe” that a beneficiary is abusing drugs or alcohol. Some questions raised include whether the trustee could condition distributions on the beneficiary entering into rehab or requiring the beneficiary execute a limited HIPAA release to give information to the trustee. Hennessey opined that the answer to both of those questions is “yes,” provided that the trustee was acting in the beneficiary’s best interest and not acting in its own interests.

Amy Kanyuk discussed the circumstances where substance abuse or other problems were not anticipated. The issue here is that the income beneficiaries are mandatory and those could be substantial. Kanyuk mentioned that she always provides in her trusts that an independent trustee has a “second bite at the apple” with respect to otherwise mandatory distributions.

Hugh Magill weighed in on the practical considerations of “intrusive responsibilities” such as requiring the fiduciary to look into whether a beneficiary is abusing drugs or alcohol. These types of provisions put a trustee in the position of acting in an almost law enforcement-type capacity. That complicates already difficult family dynamics and can be difficult as a practical matter.
Example 2: Distributions subject to consideration of a beneficiary’s other resources. A credit shelter trust benefits the spouse and provides for distributions to her of income based on an ascertainable standard. The settlor’s children are also beneficiaries and may receive income not paid to the spouse. Principal distributions are allowed to both classes of beneficiaries based on an ascertainable standard. In making distributions the trustee “may, but need not, consider the beneficiaries’ other resources.”

Kanyuk discussed the meaning of support and maintenance and noted that the standard is subjective, insofar as it requires a fiduciary to look at the beneficiary’s current standard of living. She opined that the trust was primarily for the benefit of the surviving spouse, which should guide the trustee’s analysis. After considering a beneficiary’s current standard of living, Kanyuk would advise the fiduciary to do some due diligence in getting financial information from the beneficiary in order to determine the extent of that beneficiary’s resources. Under the facts of the hypothetical, Kanyuk would advise making distributions to support the surviving spouse but would not make such extensive distributions to the children.

Kanyuk suggested that a better approach—from the planning stage—might be making the spouse the sole beneficiary of the trust and providing her with a power of appointment in order to allow her to direct trust assets to the children. That would permit the trustee to focus on her interests (as she is the primary beneficiary) rather than those of the children (who would be remainderman).

Hennessey read the example differently and opined that the trust—at least, under its terms—was actually for the primary benefit of the spouse. Rather, he believed that an attorney for the children would argue that the spouse and children should be treated essentially equally.

Magill pointed out that at common law, an assumption could be made that more senior generations of beneficiaries had priority over less senior generations. While it would be clearer to name the surviving spouse as the primary beneficiary in the trust instrument, a fiduciary could rely on that common law in making distribution decisions.

Example 3: Beneficiary circumstances and the duty of impartiality. One beneficiary of a family trust benefiting five adult siblings sought a distribution to cover his bail. The distribution standard was “best interests.” The panel took a vote and decided to make the distribution. Subsequently, the beneficiary was arrested again and the panel voted to leave him in jail. Context ended up being important and the trustee in this example (which is based on a real-life case) got more information about the arrested beneficiary after making disclosure of the original distribution to the other beneficiaries.

Magill discussed the challenge inherent in balancing the duty of impartiality with the duty to disclose. In this instance, Magill felt that disclosing the distribution and quoting the purpose for which it was made (i.e. “best interests”) was enough to preserve the arrested beneficiary’s privacy while still making adequate disclosure to the remaining beneficiaries.

Kanyuk commented that, in drafting, she often waives the duty of impartiality—typically expressly in the instrument. Doing so, she feels, helps with administration from a practical perspective.

Hennessey noted that in advising fiduciaries, he considers whether he would rather defend making a given distribution or not making that distribution—the circumstances would guide that analysis.

Example 4: Hostility between trustees and beneficiaries. The Trust was a QTIP trust benefiting the surviving spouse during her life and then children from a prior marriage as remainders. The trustee of the
trust was one of those children. The distribution standard required income, with principal distributions based on an ascertainable standard and the ability (but not duty) to consider the surviving spouse’s other resources.

Hennessey focused on sticking to a process in administration, including making distributions. As a practical matter, client management becomes important in such an emotionally charged situation. Often communications should go through the attorney. There should be a thought-out process so that any decisions can later be explained through documentation.

Kanyuk points out that a conflict is virtually inevitable in this situation. In drafting a trust, it’s important to capture the grantor’s intent and may be advisable to avoid “boilerplate” language—including the ascertainable standard used here.

Magill was struck by the imbalance here between the interests due to the differentiation in ages of the beneficiaries. During the planning process, it’s important to structure it in such a way as to avoid pitting beneficiaries against one another.

**Example 5: Distributions for a personal residence.** The surviving spouse is the primary beneficiary of a trust that provides for income and principal distributions in her best interests; descendants are secondary beneficiaries under the same standard. The spouse sought a distribution to purchase and furnish a new home.

Kanyuk felt that such a distribution would be appropriate as would distributions for maintenance of the home. Distributions for improvements to the home are a “closer call” but would likely be permissible. One alternative, Kanyuk suggested, would be for the trust to purchase the home and hold it in trust while permitting the surviving spouse to live there rent free. In her practice, Kanyuk has done this subject to a “use agreement” for the beneficiary, requiring them to pay basic carrying costs such as taxes, repairs, and maintenance.

Magill discussed the difficulties in dealing with improvements to trust property where the trust instrument is silent. Another issue that has come up in his experience is that a beneficiary seeks to make an improvement to a residence that is held in a GST exempt trust—such an improvement would be a contribution to the trust for tax purposes and create significant complexities.

**Example 6: Trust funding is incompatible with the distribution standard.** The trust is a general power of appointment marital trust funded with assets that would allow for about seven years of distributions to the surviving spouse based on her proposed budget. Magill notes that this can be common in circumstances where a settlor with a significant income has an untimely death. The surviving spouse then has a very high standard of living and insufficient funds to maintain it.

Magill discussed how important disclosures were in these circumstances. Not just for protection of the fiduciary but also to manage the beneficiary’s expectations. Disputes can be almost inevitable where a trust is under-funded with respect to its stated purpose.

Kanyuk noted that this situation almost requires the involvement of a professional fiduciary that is able to act independently and make sufficient disclosures.

**Example 7: Beneficiary budgets.** A substantial trust provided for mandatory income distributions and discretionary principal distributions based on the ascertainable standard. The beneficiary led an extravagant
lifestyle, so at the settlor’s death the trustee worked with the beneficiary to put together a budget and made distributions on that basis.

Hennessey opined that it would be a permissible exercise of trustee discretion to make distributions based on a budget rather than looking at individual expenses. Years later, the trust is cut by about a third but the trustee continues to make the same distributions. Hennessey noted that could be problematic for the trustee, because it was not responding to the change in circumstances.

**Example 9 (#8 was skipped): Distributions to augment the surviving spouse’s estate.** The trust provides for mandatory income distributions to the surviving spouse and principal distributions in the trustee’s “sole and uncontrolled” discretion as appropriate for the surviving spouse’s “comfortable support and care.” That standard, Kanyuk noted, is an ascertainable standard. The beneficiary is seeking larger and larger distributions in order to shift wealth to her son from a prior marriage.

While the distribution standard would allow for distribution to maintain the surviving spouse’s lifestyle would be appropriate, Kanyuk opined that excessive distributions (that “augment” her estate) would not be supported under that standard.

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**Session IV-E Ethics and Negotiations [LIT]**

Presenters: Steven K. Mignogna + Jo Ann Engelhardt + Terrence M. Franklin + Richard W. Nenno + Robert D. Steele + Matthew H. Triggs

Reporter: Herb Braverman

Ethical challenges arise in any negotiation, especially when intertwined with thorny trust and estate issues. The panel addressed the ethical and strategic implications in negotiating with counsel, clients, and advisors. This program included a mock mediation in which the participants grapple with common yet intriguing – and even entertaining – problems. Here is the reporter's summary of these proceedings.

This rather large panel was very interesting; it was primarily a “skit” in which the participants played roles in a scenario designed to highlight proper and improper behavior by attorneys and others in a required mediation process. The important role of the mediator was covered at some length. He/she must not judge the matter, must not give legal advice, must protect confidential information, must be as clear a possible about any bias he/she might bring to the role...all in an effort to settle a conflict and to reduce the terms of such a settlement into a writing that will allow the parties to move on.

The Model Rules of Professional Conduct apply in this setting and were referenced or discussed during the program. The participants got well into their respective roles and were quite entertaining as well as informative.

The materials were of interest also. There was an excerpt from a book, **MEDIATION FOR ESTATE PLANNERS**, that looked as if it would be quite helpful to a full understanding of this
set of issues. Similarly, there was some discussion of certain threats in the process, such as the kind of bullying that some counsel sink to in some difficult situations. This included reference to the Uniform Mediation Act, promulgated in 2001 and adopted in many states, so be sure to review the statutes in your state that impact mediation.

Other issues that must be considered were mentioned without resolution; for example, who pays the mediator and how much, attorney fee arrangements, the value of break-out sessions with each side of the dispute, etc.

**Special Session IV-F Why Your Partnership and LLC Agreements Need a Tune-Up in 2018: The New Partnership Audit Rules [CHB].**

Presenter: Richard B. Robinson (Robinson, Diss and Clowdus, PC in Denver, Colorado)
Reporter: Beth Anderson

Every partnership (including large, small, and family partnerships) must amend its agreement beginning with its 2018 tax year. Partnerships with trusts, grantor trusts, limited liability companies, other partnership or disregarded entities as partners, cannot elect out of these new rules, and every partnership must appoint a Partnership Representative for each tax year. The new rules create complexity and decisions that must be discussed with every partnership. This program provided an overview of the new rules as well as practical advice on how partnership agreements should be amended to address the issues.

New partnership audit rules went into effect as of January 1, 2018. The presenter recommends amending your partnership agreements and operating agreements in 2018 because there are decisions and consequences that must be addressed in 2018. If you wait until the law is settled, the facts and parties may have changed and you may not be able to address all the issues.

Proposed regulations have been released but do not cover all issues. The Service has requested comments on some of the issues. In late December 2017 a portion of final regulations were released.

This presentation started with three observations. First, the purpose of these regulations is for easier audits of partnership income tax returns, and if it’s easier to audit then there will be more audits. Second, partners will likely pay more in taxes as a result of audit than under current rules. Third, these new rules add complexity to handling partnership audits with new elections and new notices. Complexity creates more potential liability and lawsuits.

I. New Changes with the New Rules

A. Default Rule
The new rules set the deficiency and payments at the partnership level. In the past, the Service has had to track down individual partners in order to assess deficiencies and tax payments. Now it is a partnership level audit and payment of tax deficiency (“imputed underpayment”). Tax is computed by using the highest individual or corp. rate regardless of what the individual partner rates are. There are three modifications that can be requested depending on the nature of the partners: amended return modification, tax-exempt partner modification, and tax rate modification.

1. **Amended Return Modification.** The amended return modification allows a partner to file an amended return for the review year and report share of adjustments arising under the imputed underpayment. The partnership then gets to request a reduction in the underpayment be accessed in the adjustment year. The partnership almost always wants the partner to make the amended return and file the adjustments because this reduces the partnership liability. The speaker suggested that the amended return option should be a mandatory requirement of all partners if requested by the partnership.

2. **Tax-Exempt Partner Modification.** If one of the partners is tax-exempt and income is not UBTI to the partner, then the partnership can request a reduction in liability payment to the extent of that partner’s share. The speaker recommends that the Partnership Agreement should mandate partners to supply necessary information upon request by partnership.

3. **Tax Rate Modification.** A partnership cannot claim a rate adjustment solely because the individual partners’ ordinary income rates are lower, but the partnership can claim a modification if the individual partners income is either qualified dividends (not ordinary income) or if the partner is a c-corp. subject to 21% rate.

**B. Administrative Adjustment Requests**

Under the new rules, a partnership cannot file an amended return. The partnership must file an administrative adjustment request (AAR). This request must be filed by the Partnership Representative. If there is a deficiency as a result of the AAR, the deficiency is treated as an imputed underpayment payable by the partnership unless the partnership files an election out or push-out election. Then the partners must report the adjustment and there is no imputed underpayment.

**C. Partnership Representative**

In the past there was a “tax matters partner” who was tasked with handling all audits of the partnership. The tax matters partner had to be a partner, but the authority was not exclusive. A notice partner had the ability to intervene in an audit or tax court case. Under the new rules, the old tax matters partner has been replaced with the Partnership Representative. The Service communicates with only the Partnership Representative. The Service has no duty to communicate to other partners and no one can intervene in an audit, and no one has a right to demand notice or information. Determining who should serve as Partnership Representative is very important because the Service notices will only be sent to the Partnership Representative, and the regulations provide that the Service will not recognize the resignation or removal of a Partnership Representative until an audit has commenced. Partnerships could be under a review and have
notices sent to a person that was formerly the Partnership Representative during that year in review but who is not currently serving as Partnership Representative. Partnership cannot file an AAR merely to change the Partnership Representative.

The Partnership Representative does not have to be a partner. It may be an entity but will need to designate a person to act on behalf of the entity. The Partnership Representative must have a substantial presence in the US, a valid Tax ID, address, and availability to meet with the Service. Do get your Partnership Representative to sign in writing that they meet the substantial presence rules. The speaker suggested putting the requirements in the partnership agreement and having the Partnership Representative sign the partnership agreement certifying that they agree to serve and that they meet all audit and substantiation requirements. The speaker did not recommend having a law firm or CPA firm serve as Partnership Representative for the partnerships they represent because the risks and liabilities are too great.

II. Elections

The audit procedure for partnerships under the new rules stays relatively the same as under the old rules. Then partnership will receive notice of proposed partnership adjustment which opens the widow for negotiations. Notice of final adjustments (like a deficiency notice) gives the partnership the ability to contest the matter in tax court. When the tax court decision is final, then the deficiency must be paid.

Push Out Election. In 90% of the cases, this election is a good idea. This election can help prevent economic distortion because it relates back to the partners at the time the audit started, not the current partners. It must be made within 45 days of receipt of notice of final partnership adjustment and there is no extension period. There must be a separate election for each year under audit and the Partnership Representative has 90 days from receipt of the final partnership adjustment to decide to challenge the adjustment in court. If the Partnership Representative does not challenge the adjustment, then the adjustment becomes the final determination. The Partnership Representative has 60 days to send out the Push-Out Election to the Service and to each partner information. The Partnership Representative must provide all information necessary for partners to determine and report amount of payment on their returns.

Election Out. Final regulations have been released on this election. This is an annual election filed by Partnership Representative when the Partnership files its tax return. If the partnership files to elect out, then there is not a partnership level tax and determination. Not every partnership is eligible to make this election. The partnership must have 100 or fewer partners. The number of partners is determined by number of K-1 issued to eligible partners. Eligible partners are individuals, corporations, certain foreign entities, S corporations (shareholders are counted separately for the 100 partners requirement), and estates of deceased taxpayers. Ineligible partners include partnerships, trusts, disregarded entities and other types of estates (bankruptcy estates). The partnership cannot elect out if partnership has ineligible partners. With respect to S-corp. partners, the regulations provide that you only look through for the number of partners not the type. A s-corp. partner with shareholders that are trusts or other ineligible partners does not make the s-corp. an ineligible partner.
III. Drafting Considerations

The speaker commented that the easiest part of this process is understanding the rules. It’s much harder to draft provisions to apply or draft around these provisions. He then discussed whether a partnership agreement should address certain topics related to the new audit rules. The speaker recommends having different provisions in different kinds of partnerships based on number and types of partners and assets held in the partnership.

The speaker recommended making amendments to the Partnership Agreements to address the following areas:

- Resignation, Removal, Responsibilities, Authority, Indemnification, Standard of Care, Liability, etc. of Partnership Representative
- Election Out and Push-Out Elections
- Imputed Underpayment Modifications
- Economic Distortions Including Responsibility for Imputed Underpayment, Basis and Capital Account
- Duties of Partners to Partnership Representative and to the Partnership

With respect to elections, the speaker recommends mandatory election so long as there is an eligible partnership and partners because it eliminates many problems and complexities. The partnership agreement needs to contain restrictions on transfers to ineligible partners especially if the election is going to be mandatory. Make an ineligible transfer null and void so that the Partnership Representative does not have to worry about rogue transfers.

The Partnership Agreement should address anomalies when the review year Partnership Representative is different from the adjustment year Partnership Representative and cannot resign because audit has not commenced. The Partnership Agreement should require the review year Partnership Representative to be contractually bound to represent the partnership in the audit until resignation or removal. Consider whether the Partnership Representative’s decisions can be made alone or in conjunction with the consent of others. The Partnership Agreement should provide that the Partnership Representative has a duty to provide audit information to the partners or former partners that might be affected by the outcome of the audit.

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.
Heckerling 2018 - Report No. 13 and Fund. #3

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/heckering.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Announcement: The Technology Lawyer BlawgWorld eNewsletter has recently published two blogs of special interest to those of us who are interested in technology matters, those being The Best Laptops of 2018 and the Top 25 Legal Technology Products of 2017. These blawgs can be accessed for free at the Technology Lawyer's website at https://www.technolawyer.com/blawgworld.asp.

Summary: This Report #13 contains the report for the Thursday afternoon Fundamentals #3 on demystifying international tax planning that was held concurrently with Special Sessions 3 and 4 that were presented that same day and the reports for the final three General Sessions that were held on Friday morning, those being on Roth IRAs, trustee discretion and the Institute Review.

The next Report #14 will be our last report and will contain our coverage of the Vendors who were in attendance at this year's Institute.

THURSDAY, JANUARY 25, 2018 (CONT.)

2:00-5:20

FUNDAMENTALS PROGRAM #3

(Ran concurrently with Special Sessions III and IV)
Demystifying International Tax Planning for Individuals - A Primer for the Domestic Estate Planner [INT]

Presenters: N. Todd Angkatavanich + Scott A. Bowman + Carlyn S. McCaffrey + Edward Vergara
Reporter: Kristin Dittus

Introduction. The world is getting smaller and clients are getting more global. Knowledge of the international rules can assist practitioners in avoiding any traps for unwary if they have a client with international ties through residency, citizenship, their family or a foreign business or investment interests.

Todd Angkatavanich led the discussion with an overview. Three preliminary questions are: Who is subject to the U.S. Federal estate, gift, GST, and income taxes; which assets and income are subject to these taxes; and is there an overriding treaty?

Jurisdictional Principles: It is important to determine the status of the client (and the client’s family members). The U.S. applies transfer taxes to the worldwide assets of U.S. citizens or domiciliaries. If a person is neither, the U.S. applies tax on situs property (actually here or deemed to be U.S. property). The discussion covered various domicile-determining factors, which is not unlike determining the state of domicile in the U.S. The residence test to determine income taxation is more clear, based on counting specific days (with exceptions) or if the person holds a green card. A resident may still avoid income tax if there is a closer connection to another jurisdiction. Non-resident aliens (NRA) are taxed on assets situated in the U.S. Use caution with “strings” attaching trust assets where the grantor is an NRA and avoid mixing U.S. and non-U.S. assets. NRAs get limited deductions. The above rules may be different if otherwise determined by a treaty, which the taxpayer may elect to apply.

Non U.S. Spouses. Transfers to a non-U.S. citizen spouse do not get the marital deduction unless made through a Qualified Domestic Trust (QDOT). The technical rules are laid out under §2056A. Jointly held property may create gift tax issues. An NRA can transfer tangibles without transfer tax, but will have tax applied if in the NRA’s estate at death. Gift splitting is not allowed with an NRA spouse. Gifts by an NRA are not subject to GST tax unless the transfer was subject to estate and gift tax, which makes room for significant planning. See PLR 200123045.

Income Tax of NRA, with Carlyn McCaffrey.

FDAP Income. NRAs are taxed on (1) U.S. source Fixed or Determinable, Annual or Periodical (FDAP) income. This includes U.S. source interest dividends, rents, wages, etc. It generally does not include capital gains to encourage investment in the U.S. There is a 30% withholding on FDAP usually withheld at the source with no deductions.

ECI Income. Tax is also applied on (2) income effectively connected (ECI) to a U.S. trade or business (USTB). The new §864(c)(8) subjects a portion of the income from the sale of a pass-through entity interest with some USTB as ECI.
**Taxation on Foreign Trusts.** It is very easy to create a foreign trust; one is created for example, if a person who holds a veto power expatriates. See §7701(a)(31) for rules regarding classification, including the Court Test and Control Test. The trust income is taxed as if it were an NRA (re. FDAP or ECI), but generally not on capital gains even if a trust person is a resident in the U.S. Distributions to NRA beneficiaries receive pass-through treatment with the usual allocation of DNI. DNI includes capital gains and amounts in excess of DNI may be subject to the throwback rules. UNI (or accumulated income) is taxed at ordinary rates, losing the lower tax rates normally applied to LTCG and dividends. A charitable contribution of UNI will not excuse other beneficiaries from paying the associated tax, so consider splitting the trust to avoid this result.

**Indirect Distributions.** Distributions to a U.S. person made through an intermediary are disregarded if the principal purpose was tax avoidance. Use of personal property (residences, jewelry, artwork) is a deemed distribution unless rented for fair market value. This can be tricky to value on some property, but easy with real estate. Loans can be deemed a distribution if adequate interest is not charged.

**Throwback Rules.** These draconian rules apply whenever accumulated income is made in excess of the current tax year’s DNI or trust accounting income. The intent was to recapture tax that was deferred offshore. Prior accumulations, capital gains and dividends treated as income. The throwback tax can be calculated with either the “exact” or “default” methods, discussed in the outline. Some of the methods to handle or avoid UNI discussed were:

1. Including the use of the §645 and §643(e) elections;
2. Decanting to purge the UNI;
3. Creating a foreign grantor trust where NRA has a general power of appointment;
4. Distributing out current income;
5. Providing for specific gifts or ones that can be completed in three payments or less (with more ideas in the outline).

**Taxation of Foreign Corporations,** with Edward Vergara. Business entities hold assets to avoid estate inclusion for the holder; to limit liability for the owners and there may be non-tax reasons for formation as well. There are often significant reporting requirements and complex tax rules under the “controlled foreign corporations” (CFC) or “passive foreign investment companies” (PFICs) regimes. For entity classification, think of tax in one of two ways:

1. **Inbound:** where U.S. assets are held by an entity for a foreign person. Corporations should function as a “blocker” of U.S. situs assets for U.S. estate tax and blocker of ECI. A pass-through entity is not likely to be an effective blocker and treats the individual owner as direct participants of underlying activities, which has drawbacks (significant U.S. tax and reporting if there are assets covered by Foreign Investment in Real Property Tax Act (FIRPTA) or ECI assets) and also benefits (allows for LTCG rates)
2. **Outbound:** where a U.S. person holds foreign assets. U.S. persons are generally only subject to tax when the foreign corporation makes a distribution or is sold, but CFC or PFIC rules may apply. Permits deduction of foreign taxes paid within corporate entity. Allows a generally more efficient credit of foreign taxes paid within pass-through.
Controlled Foreign Corporations. A “CFC” is a foreign corporation where a U.S. person owns more than 50% with each shareholder owning at least 10% of vote or value. U.S. owners are taxed at ordinary income rates even without a distribution. Sec. 318(a) family attribution rules apply. They are subject to generally onerous reporting requirements. U.S. persons are allowed deferred income, unless categorized as “bad income.” Unfortunately most of the income is categorized as bad income, with same application as Subpart F to foreign personal holding company income (FPHCI), foreign base company sales and services income. Depreciable real estate gives more for income with less tax. The new Tax Act allows for a one time repatriation.

Passive Foreign Investment Companies. PFIC status applies in a year where (i) 75% or more of its gross income for a taxable year is passive income or (ii) at least 50% of its assets produce passive income. Tax is only on actual distributions or dispositions, absent an election to be treated as “Qualified Electing Fund (QEF).” There are draconian rules on “excess distributions” and upon disposition of PFIC shares. PFIC rules do not apply to a CFC. Look through rules apply when PFIC owns more than 25% of the corporation. A QEF election avoids penalty interest charge.

Scott Bowman, begins with **Entity Identification and Classification.** Assess if assets are held as a trust or a business association. Corporations, or “per se” entities, help the client achieve more opaqueness or serve as a blocker. Pass-through “default” entities, including disregarded entities for one owner or a partnership for more than one owner, allow for more transparency. More opaqueness can be achieved with checking the box on form 8842.

Foreign Investment in U.S. Real Property. “FIRPTA” was enacted in 1980 to eliminate the perceived tax advantage of foreigners purchasing U.S. real property over U.S. taxpayers. It treats gain on the disposition of any U.S. Real Property Interest as ECI. REITs can be exempt. The interests/entities covered are very broad (life estate, options to acquire, leasehold, etc.), as are the dispositions covered (any sale or exchanged, capital contributions, gifts with boot, etc.).

Expatriation. Expatriation is increasing (5,954 in 2017, up from 972 in 2012). The Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) governs tax of U.S. expatriates. Once you give up citizenship, you are treated like everyone else entering from that country. Under the Reed Act, if you expatriate to avoid tax you may be barred from reentry. This is rarely used, partially because information held by the IRS is generally protected. Citizenship is given up by visiting the consulate over two interviews, with a required waiting period between them. This creates problems with timing with regard to certain assets if trying to avoid Covered Expatriate status.

Covered Expatriates. This status needs to be determined due to the rigorous tax regime applied to them. A Covered Expatriate is one who meets one or both of the “tax liability test” and the “net worth test,” or who fails the “tax certification test.”

1. **Tax Liability Test:** average annual tax liability for the years before leaving is more than $165,000.
2. **Net Worth Test**: Net worth is more than $2 million (property includes anything that would trigger gift tax upon transfer; a trust interest is included)

3. **Tax Certification Test**. The person must certify she has satisfied all U.S. tax obligations for the five preceding years with documentation on Form 8854. This can be very hard to accomplish.

**Taxes on Expatriates**. Covered expatriates are subject to an exit tax. Under §684, gain recognition is triggered on exit, with a 30% withholding tax on non-grantor trust income. Tax computation looks at various factors guided by the transfer tax rules of §§2701-2704, with a chance to exclude up to $713,000 of gain. Timing and volition on the value of certain assets can be a challenge for minimizing or avoiding tax because there can be long delays in getting the exit appointment with the consulate.

The §2801 Tax. A U.S. person is generally subject to a 40% tax on “covered” gifts or bequests from a covered expatriate under §2801. A long term plan before exit can avoid covered expatriate status with planned gifts, using the citizen exemptions, devaluation by discounting assets and gifts to a §2801 trust.

**FATCA**. The Foreign Account Tax Compliance Act (FATCA) was enacted in 2010 to enlist Foreign Financial Institutions (FFI) to assist the U.S. with disclosure of foreign assets because in voluntary disclosure was insufficient. Lack of compliance may result in a 30% withholding tax. See §§1471-1472. The act is far reaching, and private clients are often swept up as part of an FFI if they have assets in a, (1) manager investment entity, (2) managed investment entity; and (3) fund investment entity. FATCA inspired a lot of bilateral treaties with the U.S., but no cohesive framework. The Organization for Economic and Cooperation Development (“OECD”) used FATCA with some modifications to develop a multilateral compliance agreement with many nations, but the U.S. has chosen not join in at this time.

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**FRIDAY, JANUARY 26 2018**

9:00-9:50

**Doth Thou Roth? [FIN]**

Presenter: Natalie B. Choate

Reporter: Kimon Karas

Roth IRAs offer significant planning opportunities but are surrounded by pitfalls. This session cover basic to expert tips, including tax-free Roth conversions, beneficiary conversions, estate planning angles, and what trustees must know. **NOTE: This Report was originally mistakenly reported as the report for Special Session 4-A also presented by Ms. Choate in Report #11. That error was reported as an errata in Report #12 and the correct SS 4-A report was included in Report #12. For continuity purposes the text of the correct report for this session is being repeated here.**

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. 1. Not a charity.
2. 2. Young beneficiary. If concerned young beneficiary may dissipate funds, use a see through trust for the beneficiary.
3. 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. 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. 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. 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. 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. 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. 5. Another way to create Roth IRA assuming 401k plans have a Roth feature.
6. 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 made 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.

9:50-10:40

**Trustee Discretion: The Better Part of Valor or Vulnerability? [TRU]**

Presenter: Amy K. Kanyuk
Reporter: Patrick Duffey

This session, which supplements the Special Session 4-D panel presentation on the same subject that Ms. Kanyuk was a participant on (Report #12), focused on the challenges trustees face with respect to discretion over distributions, examining the scope and meaning of different types of discretion, and the interplay between a trustee's discretion and a beneficiary's rights and interests. This Report covers the more significant items from this particular presentation.

Amy Kanyuk began with a discussion of the history of trust law as it relates to distributions. In the past, trusts were essentially life estates providing income to the lifetime beneficiary and distributing principal to the remainder. As our economy and law has developed, trusts have become far more complex instruments and the trend is to provide far more discretion to trustees. That discretion is largely a gray area in the law, with few clearly defined rules.

**Part I - Grantor Intent.**

In exercising its discretion, a trustee is guided by a grantor’s intent as it is expressed in the trust instrument. If the trust agreement is unclear or contains conflicting
evidence of grantor intent, problems arise for the fiduciary. Kanyuk noted that the forms and boilerplate that often are the basis for trust drafting do not always adequately communicate a grantor’s intent.

One common issue facing trustees is the existence of a residence in the trust. Use of the residence and its carrying costs become questions for the fiduciary. So-called “sprinkle trusts” with multiple classes of current beneficiaries can also be problematic for fiduciaries that must navigate the duty of impartiality. Kanyuk frequently drafts trusts that give a surviving spouse the ability to appoint trust assets to children rather than making children beneficiaries themselves; that avoids the duty of impartiality (at least with respect to current beneficiaries) and can simplify administration.

**Part II – Trust Distribution Terms.**

Trustees will likely be more conservative in making distributions if they feel less secure in the trust distribution standard. Kanyuk pointed out that it can be very difficult to recover an “over” distribution—you can’t, she said, get the toothpaste back in the tube.

Kanyuk has shifted her view in drafting and now believes that trusts should contain as much detail as possible regarding the grantor’s intent. The comment to the relevant Uniform Trust Code provisions specifically states that the phrase “terms of the trust” goes beyond the four corners of the document. Thus, letters of wishes drafted by grantors can be useful. But there are limitations. For example, Kanyuk noted that the Internal Revenue Service might view a letter of wishes as a modification of the trust. In drafting these documents, practitioners should make clear that the letter of wishes is not binding on the trustee, not part of the trust agreement, and not discoverable by the beneficiaries.

When a so-called ascertainable standard (health, education, maintenance, and support) is accompanied by discretionary-type language (for example, “sole discretion”), there is ambiguity. Some states maintain a strict distinction—for creditor purposes as well as beneficiary purposes—between ascertainable standard language and purely discretionary language.

**Part III – Tax Considerations - Ascertainable Standards and Other Issues.**

The ascertainable standard is primarily a creature of the tax law—a method of avoiding characterization of a distribution power as a general power of appointment. But there are state law implications of such distribution standards for creditor
protection as well. Moreover, the distribution standard exists solely in state law with respect to decisions about actually making distributions.

Kanyuk discussed the specific terms of an ascertainable standard, beginning with health. The Regulations do not define “health” and there is little case law on the subject. This can create an issue for fiduciaries with respect to distributions on the margins. For example, a Michigan court found that a trustee breached its fiduciary duty by including distributions for the benefit of a beneficiary’s soul within the meaning of “health.”

Support and maintenance are generally considered together. By default, they refer to distributions made to keep a beneficiary in his or her accustomed standard of living. This can shift depending upon the circumstances of the trust, however—for example, the trust may have insufficient assets to support a beneficiary’s accustomed standard of living if any assets are to be preserved for the remaindermen. In that situation, a support and maintenance standard can be particularly problematic when applied to a surviving spouse where the remaindermen are children from the grantor’s prior marriage.

Comfort is a common modifier that adds little practical meaning to the standard. Kanyuk opined that nobody really knows what “comfort” means. Happiness is a much broader term that confers significant discretion on fiduciaries.

**Part IV – Scope of Trustee Discretion.**

Broadly, trustees have two types of trustee discretion. Simple discretion is discretion is created where a trustee is granted discretion to take an action but that discretion is not modified by terms such as “sole,” “absolute,” or “unlimited.” Those terms would grant a trustee extended discretion. While broader, extended discretion still has limits.

**Part V – Fiduciary Duties in Decision Making.**

Generally, trustees have a duty to act. They must administer the trust in good faith and may not simply sit idly. Generally, a trustee must act in the interests of the beneficiaries as those interests are defined in the trust agreement. Kanyuk noted that the Uniform Trust Code does not provide that the trustee must act in the beneficiaries’ best interests, because the trustee draws guidance from the trust instrument and not from the whims of a beneficiary. Moreover, a trustee may not abuse its discretion.
Trustees have a duty to be informed. They must understand the trust agreement as well as applicable law. Kanyuk noted that she advises trustees to read the entire trust agreement and create an abstract of that trust agreement.

Trustees have a duty of impartiality. This duty covers the obligation to balance the interests of various current beneficiaries as well as the duty to balance interests of current beneficiaries against remaindermen. It does not require the trustee to treat all beneficiaries equally, only equitably under the terms of the trust.

**Part VI – Other Resources of Beneficiaries.**

Kanyuk believes that trustee consideration of beneficiary resources is an important and often overlooked issue—in fact, documents are often silent on the point. If the instrument is silent, the general rule is that a trustee must consider the other resources of beneficiaries but has some discretion in determining how those resources affect distribution decisions. The Trustee should be diligent in its determination regarding other resources of beneficiaries, but it may generally rely on documentation provided to it.

10:50-12:00

**The Best, the Most Intriguing, and the Scariest Ideas Culled from the 2018 Institute and Elsewhere and How to Make Them Work for You and Your Clients**

Presenters: Jonathan G. Blattmachr + Martin Shenkman
Reporting: Kimon Karas

An eclectic survey of drafting ideas, planning tips, new developments and random thoughts, each of which has practical implications to estate, financial and related planning. A collection of the most practical, nettlesome or just unexpected planning nuggets gleaned from this year’s Institute and elsewhere (professional literature, list serves, and cocktail parties).

The presenters did not refer to the printed course materials but instead used a power point covering planning aspects as a result of the tax act. For those wishing a more complete description of the concepts, the power point presentation together with a written summary prepared by Marty is to be posted to the Heckerling website.

As an overriding consideration in any tax act planning is that a majority of the provisions sunset after 2025, very few of the changes are permanent. Who knows how long these provisions may be in effect. These provisions could change sooner than the 2025 sunset with the 2020 election if there is a change in administrations, including change in the composition of Congress.

Temporary increase in exemption. With the increased exemption it is a “use it or lose it” proposition. For high net worth client planning continues-business as
usual. For the moderately wealthy client they will want to use the exemption with completed gifts but retaining access to it.

Common plan is to use doubled exemptions. For the moderately wealthy family client may want to consider non-reciprocal, grantor SLATs. Single client should consider self-settled trust. If there is a concern with the DAPT, may consider not naming the grantor a beneficiary at the outset but rather grant a person in a non-fiduciary capacity to add grantor as beneficiary at a later date. May want to consider a borrowing power in addition to the swap power to add additional flexibility.

Asset protection and irrevocable trusts. With larger exemptions clients may desire to move larger sums into these trusts. Consider as part of the planning obtaining solvency affidavits from grantor. For the high net worth client may want to consider in addition to grantor trust a non-grantor trust and fractionalize a sale to both trusts. Planning will involve multiple trusts for different purposes.

New trust structure, “salty slat.” Consider a variation a non-grantor trust SLAT. Clients facing SALT limitations of property tax deductions may want to consider multiple trusts. For example, fractionalize a residence into multiple trusts to take advantage of the $10,000 limitation. Make certain you fund the trust with sufficient assets to generate income to pay real estate taxes. Consider if Section 643(f) is relevant. To date no regulations have been issued. See SIIH Partners, 150 TC No. 3.

BDIT. This is a grantor trust as to the beneficiary. Use it to take advantage to shift income to a beneficiary in a low/no income tax state.

ING. Consider a completed gift ING to use exemption.

Charity. Many clients will not be able to take advantage of the charitable deduction. Create simple nongrantor trust for family members including a 642(c) power. This would be in addition to traditional concepts of DAFs, bunching of deductions, using IRAs after 70 ½.

Section 199A and service businesses. The qualified business income tax deduction is 20% of qualified business income with a myriad of exceptions and limitations. However, consider whether professional service business can be segregated to create non service business income. Create separate entities to own real estate, tangible assets-equipment and lease to service entity. Consider gift of ownership to nongrantor trusts irrevocable trusts.
Section 199A and Section 704(e). Watch the 704(e) limitations on gifts of interests to heirs.

Large law firms and CPA firms may want to consider forming REIT for leasehold interests.

C corporations and accumulated earnings tax. Consider if existing buy/sell agreements that are insurance funded with term insurance ought to use permanent insurance.

Kiddie Tax and NIIT. Act applies the trust tax rates to the unearned income of a child. However a child will qualify for the $200,000 threshold under Section 1411.

Tax preparation fees are no longer deductible as miscellaneous itemized deductions.

Matrimonial changes. These are permanent. Starting in 2019, alimony is no longer deductible. That is the major change; however other considerations. Section 529 plans may now be used for elementary and secondary schools. Many marital agreements contemplated a spouse paying for college and structured 529 plans to address the costs. What if funds are now used for elementary and secondary schooling and no funds are remaining for college.

Review standard language in powers of attorney especially as it relates to the gift powers.

Finally, the presenters discussed how to notify clients of the tax act changes.

The Institute concluded with Tina announcing a record attendance of 3,391 attendees.

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, Trrant & Combs, LLP in Louisville, Kentucky, Bruce A. Tannahill Esq., a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and Patrick J,
Duffey Esq, an attorney with Holland & Knight in Tampa, Florida.

The Report 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.
Heckerling 2018 - Report No. 14 - Vendor Reports A to Z

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.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Announcement: The ABA's annual technology show, TECHSHOW 2018, will be held in Chicago on March 7-10 at the Hyatt Regency Chicago. Early bird discount registration ends on Monday, January 29th. For more information, go to http://www.techshow.com. Also, see the January/February 2018 issue of Law Practice, the ABA LPM Section's magazine, as this is the annual TechShow issue and contains a whole host of useful articles about the Show as well as technology for lawyers in general.

Summary: This Report #14 is our final one and consists of a combined report from four of our Reporters (Craig Dreyer, Patrick Duffey, Michelle Mieras and Michael Sneeringer) on the vendors who were in attendance all week long at this year's institute in the exhibition hall. A complete list of those vendors and their booth locations, along with the identification of which vendors were Institute sponsors (Diamond, Platinum, Gold and Silver) is contained in Introduction Part 1 that was sent out on January 11, 2018.

Closing Remarks: In closing, we hope those of you who read some or all of these Reports found them useful and helpful to your law practice even though you could not attend Heckerling 2018 in person. So that we can continue to improve on what we do each year, we encourage those of you who have comments or suggestions for improvements to send them to us by the end of this month so we can take those up at our Reporters post mortem review meeting in February. Send them to me, the Editor, at jghodges@jghlaw.com, or to my assistant editor, Bruce Tannahill, at Tannahill, Bruce <BTannahill@massmutual.com>, or to my reporter assistant, Joanne Hindel, at Hindel, Joanne <Joanne.Hindel@53.com>.
REPORT ON THE HECKERLING INSTITUTE VENDORS

By necessity, since there were over 130 vendors in residence and only four reporters who were assigned only part time to cover as many of them as possible in four days, some vendors were missed and, thus, are not included in this report. As for the ones who are listed, they are listed here more or less in alphabetical order for easy of reference. Also, be on the lookout for special offers some of the vendors are offering to people who could not attend the Institute, as these generally expire within a few days or by the end of this month.

NOW FOR THE REPORT

Reporter Michael Sneeringer (A through C)

ABA – Section of Real Property, Trust and Estate Law
www.americanbar.org/groups/real_property_trust_estate.html
The ABA Section of Real Property, Trust and Estate Law (RPTE) is a diverse community of around 22,000 U.S. and international lawyers, paralegals, real estate and financial services professionals, law students, and legal educators. It provides leadership and subject matter expertise on current regulatory and legal issues, trends, and best practices with the singular goal of empowering its members to better serve their clients. The Section of Real Property, Trust & Estate Law provides value to a broad range of practitioners including:
• Lawyers in private practice
• In-house counsel
• Young lawyers
• Law students
• Paralegals
• Academics
• Real estate professionals
• Financial services professionals

Alliance Trust Company of Nevada
http://alliancetrustcompany.com
Alliance Trust Company of Nevada works with attorneys, financial advisors, CPAs and insurance professionals around the world to provide flexible trustee services and the benefits of Nevada trust situs. Recent tax law changes are making the use of Nevada Trusts even more attractive for clients. Founded in 2005, Alliance Trust Company of Nevada is fully-independent and 100% employee owned.

American Academy of Attorney-CPAs
www.attorney-cpa.com
The American Academy of Attorney (“AAA”)-CPAs specializes in protecting the rights of professionals who have qualified to practice as both an attorney and a CPA. The AAA-CPA is an organization comprised of individuals who have dually-qualified as attorneys and certified
public accountants. Its mission is to provide its members with quality education, opportunities to connect and the professional resources to support and develop their practices. It is committed to safeguarding the right of the public to access the unique expertise of its members.

**American Heart Association**
http://www.heart.org/HEARTORG/
The American Heart Association is the nation’s oldest and largest voluntary organization dedicated to fighting heart disease and stroke. Its organization includes more than 22.5 million volunteers and supporters. It funds innovative research, fights for stronger public health policies, and provides critical tools and information to save and improve lives. Its nationwide organization includes 156 local offices and more than 3,000 employees. It has combined forces with Verily and AstraZeneca, through a $75 million investment in a diverse team of scientists, together with the latest technologies and scientific advances, to set out to find the weapons and strategies to win the fight against coronary heart disease (“One Brace Idea™”).

**American Society of Appraisers**
www.appraisers.org
The American Society of Appraisers is a multi-discipline, non-profit, international organization of professional appraisers representing all appraisal disciplines: Appraisal Review and Management, Business Valuation, Gems and Jewelry, Machinery and Technical Specialties, Personal Property and Real Property. Their mission is to foster the public trust of their members and the appraisal profession through compliance with the highest levels of ethical and professional standards. They offer the “Accredited Senior Appraiser” credential. Members of the ASA go through testing, reaccreditation, and continuing education.

**Appraisers & Planners, Inc.**
www.appraisersandplanners.com
For over 75 years, Appraisers & Planners, Inc. has been one of New York City’s leading, most respected and prominent firms with regard to expert valuation of commercial real estate. It offers a full spectrum of appraisal and valuation services in New York and Philadelphia, from real property and portfolio appraisal to litigation support, expert testimony and arbitration, to superior expertise in estate valuation. It has evaluated property in excess of $30 billion in value.

**Ashar Group, LLC**
www.ashargroup.com
Ashar Group is a nationally licensed life settlement broker and policy valuation expert. The Ashar Secondary Market Valuation (SMV) is an independent appraisal of life insurance fair market value (FMV) based on the IRS definition of "willing buyer - willing seller." Estate and tax attorneys choose the SMV whenever an alternative appraisal of FMV could benefit their clients. Ashar has witnessed a 32% increase in their life settlement business in 2017 due to introductions from planners and fiduciaries. There has also been a recent uptick in SMV request as a result of the increased estate tax exemption. For additional information, look for the upcoming article by Jason T. Mendelsohn, President of Ashar Group, in the February issue of T&E Magazine titled "Willing Buyers Change the Face of Life Insurance Valuation.”
Asset Life Settlements
http://www.assetlifesettlements.com
Asset Life Settlements is an Orlando based secondary life insurance brokerage firm that negotiates with multiple secondary market funding sources to find buyers for unwanted life insurance policies. With over 30 years of combined secondary market experience, Asset Life Settlements has the knowledge and industry relationships to help clients achieve the highest possible life settlement offers. Attorneys can utilize Asset Life Settlement’s Policy Pre-Price Form by visiting their website for more information.

BDO Private Client Services
https://www.bdo.com
BDO is the world’s 5th largest accounting firm with services in the areas of tax, audits and consulting. They currently serve more than 400 publicly traded domestic and international clients. Although they are a very large national and international firm, they pride themselves on providing individualized service with a small boutique feel. They stress their services for athletes, entertainers and executives. BDO is excited in 2018 to be exhibiting at the meetings of the American College of Trust and Estate Counsell for the first time.

Berdon LLP
http://www.berdonllp.com
Berdon LLP, founded in 1917, is consistently ranked by trade and consumer publications among the nation's top CPA and advisory firms. With nearly 400 professionals and staff, clients access a comprehensive array of accounting, tax, financial, and management advisory services. It has offices in in Manhattan and on Long Island. Its services include: assurance and accounting; business advisory/mergers and acquisitions; claims administration; fund administration services; internal controls and risk management; international advisory services; litigation valuation and dispute resolution; personal wealth services; state and local taxation; and tax and advisory services. Berdon employs multiple partners who have been with the firm for decades. Scott T. Ditman, a tax partner and Chair, Personal Wealth Services at Berdon LLP, presented on Thursday at special session IV-B titled: “All Present and Accounted For: Proactively Preparing Fiduciary Accountings to Facilitate Pre- and Post Mortem Planning and Mitigate Risk.”

Bloomberg Tax
https://www.bna.com
Bloomberg Tax offers a Btax research solution. Its essential resources pair the proven expertise and perspectives of leading tax practitioners in its renowned Tax Management Portfolios™ with integrated news, in-depth analysis and insights, primary sources, practice tools, and more — all delivered on an advanced technology platform that quickly gets practitioners to the information they need. It offers a complete analysis of the new H.R.1.

BNY Mellon Wealth Management
www.bnymellonwealthmanagement.com
BNY Mellon Wealth Management is a leading wealth manager. In 2017, it was ranked as a Top 10 U.S. Wealth Manager by Barron’s. It was also awarded Best Private Bank for Customer Service in the U.S. by Financial Times publications Professional Wealth Management and The
Banker. The firm has more than two centuries of experience in providing services to clients who today include financially successful individuals and families, their family offices and business enterprises, planned giving programs, and endowments and foundations. At the 52nd Annual Heckerling Institute on Estate Planning, BNY Mellon Wealth Management hosted a 2018 economic outlook luncheon featuring their Chief Investment Officer, Leo P. Grohowski.

**BOK Financial**
https://www.bokfinancial.com
BOK Financial began as a small energy bank founded in Tulsa, Oklahoma over 100 years ago. Today, it is a top 25 U.S.-based bank with more than $30 billion in assets. BOK Financial has successfully diversified into a variety of industries, businesses and geographies throughout the U.S. It offers extensive services and solutions to help clients protect and manage wealth, including: private banking, trust services, specialty asset management, investment management, insurance, and financial planning. BOK Financial prides itself on unmatched personal service from a team of local professionals, with over 135 trust, fiduciary and investment officers.

**Bonhams Auctioneers & Appraisers**
www.bonhams.com
Founded in 1793, Bonhams is one of the world's oldest, largest and most trusted international auctioneers of tangible personal property. Bonhams values and sells Asian Art, Fine Art including Post-War and Contemporary, Impressionist and Modern Art, Hollywood Memorabilia, Jewelry, Motor Cars, Fine Books and Manuscripts, Modern Decorative Art and Design as well as other important collectibles in more annual sales than any other house. While Bonhams' main salerooms are in London, New York, Los Angeles and Hong Kong, Bonhams also has a worldwide network of regional offices and representatives offering valuation services and sales advice in 60 specialist areas. Bonhams’ Trusts and Estates Department provides high-touch client service – with a Director acting as the single-point of contract – for attorneys, fiduciaries, executors and beneficiaries to ensure that they have a seamless client experience. Bonhams’ art services for trusts and estates include initial property assessments, formal appraisals for estate planning, administration and other purposes as well as assistance with consignment sales for single items and entire estate sales.

**Brentmark Software, Inc.**
www.brentmark.com
Brentmark® Software provides personal financial planning products and services for professionals and consumers: estate, financial, and retirement planning software; informational web sites (such as NewRMD.com and RothConversions.com); and online calculations (CalcTools.com). Software products include Retirement Plan Analyzer, Estate Planning Tools, PFP Notebook™, Retirement Distributions Planner, Kugler Estate Analyzer™, Income Strategy Generator™, Charitable Financial Planner, Estate Planning QuickView, and Savings Bond Toolkit. Brentmark will also build custom products for corporations. Contact Nicole Maholtz, using Nicole@brentmark.com, for more information.

**The Bryn Mawr Trust Company of Delaware**
http://www.bmtcwealth.com
Bryn Mawr Trust can serve as trustee or agent of the trustee for Irrevocable and Revocable Trusts, Tax-Planning Trusts, and Special Needs Trusts. With the highest ethical standards as well as objective perspective, Bryn Mawr Trust ensures the proper administration of trusts in accordance with the grantors’ instructions. It has a Designated Special Needs Trust Unit headed up by a team of professionals with expertise in the practical, personal, financial, medical, and legal issues of special needs individuals and their families.

**CAF America: Global Donor Advised Funds**

[www.cafamerica.org](http://www.cafamerica.org)

A global donor advised fund with more than 25 years of experience, CAF America makes giving abroad and domestically easy, efficient, and tax-effective. By engaging with CAF America's expert staff, wealth advisors can break down the barriers to international giving and see how practice can expand. CAF America takes on all administrative burdens, guarantees regulatory compliance, mitigates risks, and protects donors' reputations. With tailored giving and investment solutions, the ability to transfer complex assets, and unparalleled client dedication, CAF America ensures that a donor's philanthropic success becomes their advisor's success.

**CFP Board**

[http://www.cfp.net](http://www.cfp.net)

CFP Board is a non-profit organization acting in the public interest by fostering professional standards in personal financial planning through its setting and enforcement of the education, examination, experience, ethics and other requirements for CFP® certification. The CFP® certification marks identify professionals who have met the high standards of competency and ethics established and enforced by CFP Board. CFP Board's Standards of Professional Conduct require CFP® professionals to act in their clients’ best interests. Attorneys may qualify for a “fast-tracked” certification process.

**Charles Schwab & Co., Inc.**

[www.schwab.com](http://www.schwab.com) and [www.schwabcharitable.org](http://www.schwabcharitable.org)

*Charles Schwab Trust Services and the firm’s charitable arm, Schwab Charitable, were both present at Heckerling. The combination of these offerings under one roof allows for a seamless transition as their clients’ needs and donative intent grow over time. Charles Schwab provides comprehensive offerings for trusts, investments and charitable planning. To complement its Delaware-based trust services, which provide trust administration in partnership with independent advisors who manage trust assets, the firm also offers personal trusts services that include both trust administration and investment management by Schwab through the Nevada-based Charles Schwab Trust Company. Schwab Charitable is an independent, public charity that was created to help increase charitable giving in the United States. Schwab Charitable helps families and their advisors maximize the impact of their philanthropy by applying a similar approach to charitable giving as they do to investing. Its donor-advised fund is a tax-smart, flexible and efficient charitable giving vehicle that can be used alone or in conjunction with other giving vehicles. Schwab Charitable accepts donations of public and private assets such as interests in private businesses (C-Corp and S-Corp), real estate, bitcoin or private equity.*
Christiana Trust  │ WSFS Wealth  
https://www.wsfsbank.com/Wealth/Trust-Services

Christiana Trust is staffed by experienced, knowledgeable and caring professionals committed to personal service. It offers traditional, directed and administrative trustee services. Christiana has extensive custodial services including the ability to execute and process all buy and sell orders in accordance with client’s instructions. In addition to online access, Christiana provides timely and accurate statements that detail all income and principal transactions and list assets held, their tax basis, current market value and estimated income. Christiana handles securities and performs all the administrative tasks with a penchant for detail and a level of individualized service that is unsurpassed. Attorneys can use Christiana for its services in both Delaware and Nevada.

Christie’s  
http://www.christies.com

Founded in 1766 by James Christie, Christie's has since conducted the greatest and most celebrated auctions through the centuries providing a popular showcase for the unique and the beautiful. Christie’s offers around 350 auctions annually in over 80 categories, including all areas of fine and decorative arts, jewelry, photographs, collectibles, wine, and more. Prices range from $200 to over $100 million. Christie’s has been selected as the global auction house for the Collection of David and Peggy Rockefeller. The vast collection will be offered for sale in May 2018 at Christie’s flagship auction rooms in Rockefeller Center in the heart of New York City.

Chubb Personal Risk Services  
https://www2.chubb.com/us-en

Chubb is the world’s largest publicly traded property and casualty insurer with a focus on high-net worth insurance. With operations in 54 countries, Chubb provides commercial and personal property and casualty insurance, personal accident and supplemental health insurance, reinsurance and life insurance to a diverse group of clients.

CIBC Atlantic Trust Private Wealth Management  
http://www.cibcatlantictrust.com

CIBC Atlantic Trust provides private wealth management for individuals, families, foundations and endowments. The have robust family offices services, working from a multi-faceted approach. As of December 31, 2017, they had $41.1 billion in assets under management and 97% client retention. CIBC Atlantic Trust's 370+ professionals work together in multi-functional teams, with an 18:1 client-to-employee ratio.

City National Rochdale  
www.cnr.com

City National Rochdale is an investment management firm specializing in intelligently personalized portfolio management for high-net-worth individuals, families, and foundations. It is a wholly owned subsidiary of City National Bank. Neal Rubin is the Managing Director of City National Rochdale’s International Custody & Asset Protection Solutions. City National
Rochdale’s International Custody & Asset Protection Solutions offers clients legally compliant and cost effective solutions along with market leading investment performance in traditional and alternative asset classes.

**Client Care Academy**
http://www.clientcareacademy.com/index.php
Client Care Academy, founded by Vinnie Bonazzoli, has transformed the practice of estate planning. The Academy trains attorneys and their staff in Vinnie’s revolutionary client care program model. Successful attendees of the Academy learn to build a practice that focuses clients to understand that the key is aligning assets with their estate plan, verifying the correct alignment with their financial institutions and tracking changes in asset value and ownership over time so that their families will be taken care of at the time the client dies. To date, the Academy has trained nearly 60 firms nationally on the creation, communication and delegation of their customized, profitable and sustainable client care programs. The Academy’s next Client Care Foundations Workshop will be held at the Hyatt Regency Orlando Airport from April 26 through April 27, 2018. Vinnie’s book, How an Ordinary Lawyer Creates and Sustains an Extraordinary Client Care Program, is available online on the Academy’s website. For 2018, the Academy is also excited about The 5 to 500 Challenge™. For registration and more information, contact: info@clientcareacademy.com or 888-637-3055.

**CollectorIQ**
https://collectoriq.com
CollectorIQ offers proprietary data, valuation, and liquidity tools for fine art & collectibles. CollectorIQ combines traditional collection management with real-time valuation tools allowing collectors and advisors to save time and money versus the traditional appraisal process. Collectors provide collection details once and valuation is continuously updated. CollectorIQ's deep public and private data allow collectors and advisors to make better buying and selling decisions with instant auction price comparables and sale trends. Its iOS application enables users to have collection access anywhere. Its uses include: Optimization of Risk Exposure; Tax Planning; Estate Planning and Strategic Philanthropy. CollectorIQ has bank-level digital security and is trusted with over $1 billion in collection assets. For a 15 minute demo, email info@collectoriq.com.

**Collectrium**
http://www.collectrium.com
Collectrium is the only platform to integrate all collection-care and management tools in a single experience that is comprehensive, engaging, mobile, and secure. Founded in 2009, the company was acquired by Christie’s in 2015 but continues to operate independently, with offices and clients in the Americas, Europe and Asia. The company offers clients the ability to find collection-care providers through its complimentary referral service, shared collection details with trusted professionals, and located collection care providers like insurers, appraisers and estate attorneys to help manage the client’s assets. Everything entered into the platform is encrypted, backed-up and stored at data centers protected by industry-leading security.
Comerica Bank & Trust, N.A.
www.comerica.com
Through its trustee alliance group, Comerica can serve as administrative trustee of any domestic trust while allowing the local family investment manager to continue to manage the trust assets. Visit its website for more information on its services and fees.

Commonwealth Trust Company
http://www.comtrst.com
Commonwealth Trust Company, founded in 1931, is a privately-held boutique trust company located in Wilmington, Delaware. Commonwealth partners with a client’s existing advisor(s) to provide sophisticated and professional directed or administrative trustee services.

Coral Gables Trust
http://www.cgtrust.com
Coral Gables Trust Company is a leading provider of investment management and trust and estate services in South Florida. Founded in 2004 as a locally owned and operated independent trust company, CGTC serves a client base, ranging in size from $1 million to over $30 million; which includes affluent individuals and families, small to medium sized companies, foundations, and pension and endowment funds. It has 3 offices located in South Florida.

Corporate Valuation Services, Inc.
http://www.corporatevaluationservices.com
Corporate Valuation Services, Inc. (“CVS”) provides valuation and forensic services for the following: Tax, Estate, and Gift Planning; Marriage Dissolutions; Corporate Litigation; Shareholder Buyout; Fairness Opinions and Solvency Opinions; Matters before the SEC and IRS; and any other issues requiring financial analysis. Their professionals, including Tony Garvy, ASA, CPA/ABV/CFF, CVA, FCPA, CDFA, and James S. Arogeti, CFA, CVA, hold accreditations by the American Society of Appraisers, American Institute of Certified Public Accountants, and the National Association of Certified Public Valuation Analysts. CVS is committed to Chicago and Naples’ business community with its participation in the Illinois CPA Society, Association for Corporate Growth (ACG), Chicago Estate Planning Council, DuPage County Estate Planning Council, Northwest Suburban Estate Planning Council, Greater North Shore Estate Planning Council, Divorce Illinois, Naples Estate Planning Council and other professional organizations. Contact Cynthia McNally, DMKT, for more information, cmcnally@corporatevaluationservices.com.

Cowan’s Auctions
https://www.cowanauctions.com
A full-service auction house, with offices in Cincinnati, Cleveland and Denver, Cowan’s holds over 40 auctions each year, with annual sales exceeding $16M. It reaches buyers around the globe, and takes pride in its reputation for integrity, customer service and great results. It has multiple specialty areas, including American Indian Art, Furniture, Paintings and Decorative Art, Jewelry, Antique Firearms and 20th century Modern Ceramics. It has set record prices for American Indian Art, Modern Ceramics, American History and Fine Art. In 2017, it held 50 auctions across 10 departments and sold over 14,500 lots from consignors all over the globe.
Cumberland Trust
http://www.cumberlandtrust.com

Cumberland Trust is an independent trust company experienced in guiding the wealth transfer process to help families protect their legacies. The firm provides comprehensive trust services, partnering with third party advisors seeking these focused services for their own clients. Cumberland Trust primarily acts as a fiduciary and trusted advisor to manage and protect families and their wealth. It provides trust and estate administration, customizing strategies to bring peace-of-mind to clients and to advisors seeking lasting solutions to not only managing fortune, but family. In keeping the core of the business focused on fiduciary services, Cumberland Trust welcomes a relationship with the family’s financial or legal advisors, a collaborative approach which re-introduces choice and control to clients. Since its establishment in Nashville in 2001, Cumberland Trust’s people-first services and open trust architecture have attracted $3 billion in assets under administration with nine offices serving clients in 48 states.

Reporter Michelle Mieras (D through L)

www.directivecommunications.com

Directive Communication Systems (DCS) is where service and easy-to-use technology meet the world of Trusts and Estates. With the average person now having over 150 accounts and the increasing importance of new digital property like Bitcoin in our lives, DCS is the first and only service streamlining digital asset and online account directives management. DCS provides an easy to use service for identifying, organizing and cataloging directives and all types of digital assets in preparation for estate affairs. It’s not enough to simply address today's accounts; DCS is prepared for your clients’ future enrollments and downloaded apps. DCS does not take account passwords nor does DCS know the contents of an account, and the service is compliant to site owner Terms of Service Agreements along with new and existing statutes. In short, DCS does all the work for you.

Donlevy-Rosen & Rosen, PA
www.protectyou.co

Donlevy-Rosen & Rosen, PA is a boutique firm focused on providing offshore asset protection planning. The firm is based in Coral Gables, Florida, but prides itself in its availability to clients nationally and internationally. Its website contains numerous articles, videos, white papers and commentary on asset protection and current issues. Look for the contact button on their website to sign up for a print or electronic version of their newsletters. Contact them at 1-800-417-7134 to see how they might be able to benefit your clients.
Doyle
www.doyle.com

Doyle Auctioneers and Appraisers specialize in providing services to estates all over the country, including valuations for estate tax purposes. They will handle one piece or an entire collection. From photographs, they will provide complimentary preliminary auction estimates. Doyle recently expanded into Los Angeles, where they specialize in jewelry sales and provide access to Pacific Rim collections. Their New York office continues to handle full estate sales across the country. Contact them for a tailored proposal.

EisnerAmper LLP
www.eisneramper.com

EisnerAmper provides services to a broad and diverse base of clients, including family offices, closely held companies, and high net worth families. They form deep relationships with clients and their clients’ other advisors. Visit their updated, easy-to-navigate website for substantive articles on current topics or to register for a webinar. You can also find general and industry specific newsletters – sign up to receive what interests you. EisnerAmper continues to expand into new locations such as Dallas, Boston, Singapore, and internationally to better serve your needs.

ElderCounsel
www.eldercounsel.com

ElderCounsel provides legal technology and education for elder law attorneys. They provide state-specific information regarding long-term care planning, Medicaid, Veterans’ benefits, special need trusts, and other planning specific to the aging population. ElderCounsel can help you stay current with legal changes in the elder law arena. They offer monthly case law and state of the law updates free to their members. Other special events are available to their members and to non-members for a fee. Visit their website to schedule a demonstration. Contact Jim Wolverton, Membership Advisor, at jim.wolverton@eldercounsel.com or (866) 789-9908 ext. 596, or John Shickich, Senior Membership Advisor, at john.shickich@eldercounsel.com, for more information.

ESI-APPRAISE
www.appraisenj.com

APPRAISE, by Evaluation Services, Inc., provides stock and bond valuations for trusts and estates. In Q1 2017, they will introduce a 1040/1041 tax allocator. They offer a variety of secure online methods to use APPRAISE. For quick and easy valuation, use their web-based
platform, APPRAISE-WEB, which will store portfolios for 10 months for altering or viewing. Payment can be made via credit card as the service is used, or monthly invoices are available. They also offer APPRAISE Plus, which provides historical cost basis with tax allocation factors, corporate actions and transfer/paying agents. For those lacking the DIY gene, ESI offers an outsourcing solution, performing securities valuations for you. Report samples are available on their website. While you’re there, sign up for their free monthly newsletter. For a limited time, mention Heckerling to have your initial set-up fees waived!

ESOPMarketplace.com
www.ESOPmarketplace.com

ESOPMarketplace.com provides access to the wide variety of expert service providers needed to service ESOPs from start to finish, such as attorneys, valuation experts, trustees, and ESOP feasibility analysis. Create a free login on their website to gain access to their pipeline of providers and to view educational materials on ESOPs and other resources for estate and succession planning. Certain tools are available for subscription fees. ESOPmarketplace.com is part of a family of websites serving businesses with ownership succession. Visit their website or contact Jack Veale at JackV@ESOPMarketplace.com for more information or to purchase Jack’s Sudden Death Checklist, and his new checklists for trustees and executors. Contact Daniel Zugell at dzugell@bta.us.com for a free copy of An Introduction to ESOPs, a complimentary case consultation, and other information.

Estate Valuations & Pricing Systems, Inc. (EVP)
www.evpsys.com

Estate Valuations & Pricing Systems, Inc. (“EVP Systems”) offers a suite of products in their EVP Office software suite, including the popular EstateVal software program (Version 8.1.0 now available including primary or composite pricing options!) for use with the Form 706 and GiftVal, providing gift valuations for use with the Form 709. EVP Systems continues to improve their mutual fund daily accruals (mill rates) systems and obtains information from Lipper. Their programs interface with the most popular tax preparation software for your ease of use. As always, EstateVal and GiftVal programs are free (download at their website), and fees are based upon pay per usage, with discounts based upon monthly volume. Additional information is available on their website or call Christina Ramirez, VP, at 1-818-313-6300.

EstateBuyers.com
www.estatebuyers.com

EstateBuyers.com purchases jewelry across the United States, but are located in Southern Florida where they are strong supporters of estate planning councils and local bar associations. Their bidders have the credentials and expertise to understand what makes certain gems extraordinary and others just average. Expert witness services are also available. For more information about
their services or to discuss jewelry your client may be trying to sell, visit their website or email info@estatebuyers.com or call 305-722-2753. You may also contact Art Samuels, President, at art@estatebuyers.com or Alon Ruschin, CEO & Chairman at alon@estatebuyers.com.

EstateWorks Systems
www.estateworks.com

EstateWorks provides a platform for workflow management, communication, and collaboration focused on estate planning and administration. Attorneys often depend on EstateWorks to improve the efficiency, transparency and overall productivity of their trust and estates operation. In addition to functionality that streamlines the day-to-day work of individual team members while incorporating specific institutional requirements, EstateWorks provides customizable analysis and reports that enhance the active management of the overall business. For further information contact sales@estateworks.com or go to their website,

Everything But the House
www.ebth.com

Everything But The House is an online auction site for estate sales. They are expanding across the country, with physical locations in over 20 existing markets. Each sale lasts five to seven days, and every item starts at $1. EBTH can also assist with coordinating removal of property for donation or for disposal. Visit their website or email sales@EBTH.com to see sales in progress or request a free consultati

EY (formerly Ernst & Young)
www.ey.com

EY provides a multitude of specialized services. Its Fiduciary/Trust & Estate Accounting Services dedicated group offers comprehensive trust and estate accounting services, helping trustees, executors, banks, law firms, and family offices manage risk. Contact Francine Lee (francine.lee@ey.com or 212-773-7933) for information. Other specialized departments include Family Enterprise Business Services (contact James C. Bly, Jr. at james.bly@ey.com or 724-933-6600), Family Office Advisory Services (contact Robert A. Stover, Jr. at bobby.stover@ey.com or 214-969-8321), and Cross-border Tax Advisory Services (contact Justin Ransome at Justin.ransome@ey.com or 202-327-7043).

FairSplit.com
www.FairSplit.com
FairSplit.com offers a web-based program to facilitate the transparent and fair division of assets of an estate, trust, or even a downsizing family. After uploading the assets and assigning values (which may include emotional and monetary values), the interested parties can be invited to review and express interest in items. The system allows unselected items to be organized and lists printed for sale or donation. This is a wonderful solution for geographically diverse families, or situations where it’s best to keep family members apart while allowing full participation in the division of assets. Adjustments can be made by rooms or by items, and photos and appraisals can be uploaded. FairSplit.com’s services are tiered. The first tier – including the uploading and division of assets – is free, and customizable with your company logo. Other tiers offer additional services, such as photography, listing and valuing. Visit their website to register for the free first tier and learn more about their services, or contact David MacMahan at david@fairsplit.com or 855-583-7828.

Fidelity Charitable
www.fidelitycharitable.org

For over 25 years, Fidelity Charitable has helped donors fulfill their grant-making wishes. Fidelity Charitable’s donor advised fund program continues to grow, with over $25 billion of grants made since inception. Clients can easily and quickly create a Giving Account online with a $5,000 minimum donation by visiting www.fidelitycharitable.org, where they can also find information about how Fidelity’s Giving Account works and what types of assets can be donated. Advisors will also find information on how to use charitable giving to deepen client relationships.

FileCenter
www.lucon.com

FileCenter offers a cost-effective and easy-to-use document management system. Predefined document types and folders ensure consistent methods and organization across the company, even with multiple people creating and storing documents. They also offer services to make existing files fully text searchable, allowing you to locate those mislabeled or misfiled documents. Their highest-level license costs $249.95, but FileCenter is offering a $50 discount through January 31, 2018 if you mention Heckerling. Visit their FileCenter website at www.lucon.com/filecenter-overview.html to learn more, and schedule a demo to see how FileCenter can help your office become more organized and efficient.

First PREMIER Bank
www.firstpremier.com

First PREMIER Bank serves as South Dakota trustee for dynasty trusts, domestic asset protection trusts, and directed trusts, and provides investment management for charitable
foundations. Strongly capitalized First PREMIER will remain independent well into the future, providing continuity and certainty for your clients. Contact Jeff Rodman, jrodman@firstpremier.com to talk about how First PREMIER may be able to help your clients take advantage of favorable South Dakota trust and tax laws.

First State Trust Company
www.fs-trust.com

First State Trust Company, located in Wilmington, Delaware, is part of a family of companies under the financial technology company, Fi-Tek, LLC. First State provides both institutional and personal trust services, taking advantage of Delaware’s progressive tax and fiduciary laws. Visit their website or contact Kelly Brockstedt, Managing Director, at kbrockstedt@fs-trust.com or 302-270-9053 for information about First State’s services. For information regarding Fi-Tek’s trust accounting software, visit www.fi-tek.com or contact Frank Judisch, Managing Director, at fjudisch@fi-tek.com.

Foundation Source
www.foundationsource.com

Foundation Source provides comprehensive services for private foundations, including outsourcing service options for existing foundations and structuring and creating new foundations. Their fully searchable website includes updated materials on many topics including donor advised funds. A new demo for Foundation Source Online, with an updated web interface, is available online. Foundation Source also works with entrepreneurial philanthropists to implement a more creative approach to giving. With a strengthened presence in the field and regionalized teams, Foundation Source private client advisors and philanthropic directors are available to provide expertise in philanthropy to clients and host webinars and events. They are ramping up their webinar offerings soon, so look for opportunities to earn various types of CE credit while getting the information you need. Contact Foundation Source at 1-800-839-0054 to connect with a service team in your area.

Gillett Publishing LLC/GEMS – Gillett Estate Management Suite
www.gillettpublishing.com

Gillett Estate Management Suite (GEMS) provides popular tax return preparation software for Forms 706 and 709 as well as trust accounting software. They now offer robust interfaces with multiple brokers and Quicken, allowing you to download assets and transactions and automatically post them in GEMAcct, slashing the time it takes to prepare accountings. Gillett Publishing is offering a 25% discount on new licenses through the end of January 2018. Contact them at sales@gillettpublishing.com to take advantage of this great offer. Visit their website to download a free demo, and look for a cloud application coming out later this year.
**Gurr Johns, Inc.**
[www.gurrjohns.com](http://www.gurrjohns.com)

For over a century Gurr Johns has provided expertise to help private and institutional clients navigate the global art market. They provide appraisal services for all tangible assets, and advise on the sale and purchase of personal property. Visit their website to locate their services in New York, Los Angeles, Palm Beach, London, and now Chicago, and inquire about a cost-free proposal for your client.

**HeirSearch.com**
[www.heirsearch.com](http://www.heirsearch.com)

Look for heirs a better way. HeirSearch.com, a division of International Genealogical Search Inc. (IGS), provides international beneficiary and heir location services. Unlike other search firms, HeirSearch does not charge a percentage of the estate, keeping them above recent litigation around other firms’ billing practices. HeirSearch strives to provide education to attorneys, trust officers, financial planners, and anyone else who needs information about finding beneficiaries and heirs. To see seminars offered by HeirSearch or to request a no-obligation quote, visit their website or contact Kathy McCourt, 1-800-663-2255.

**Henley & Partners**
[www.henleyglobal.com](http://www.henleyglobal.com)

Henley & Partners focuses on citizenship and residency planning, helping high net worth and ultra-high net worth clients obtain a second citizenship. The expanded options available to dual citizens include access to the EU and safer travel. They also assist Americans seeking a second citizenship without a residence requirement, and have depth of knowledge about countries permitting such second citizenship. Visit their website to learn more about how Henley & Partners can assist your clients.

**Heritage Auctions**
[www.ha.com/trusts](http://www.ha.com/trusts)

The Trusts & Estates department of Heritage Auctions can help fiduciaries and advisors and their clients value and dispose of personal property. Their specialists are experienced in numerous fields, including collectibles, historical items, luxury lifestyle personal property, and fine and decorative arts. Whether you need help with a single item or an entire collection or estate, visit their website to see how they can help you navigate the auction and appraisal process.
IKOR International
www.ikorglobal.com

IKOR International is a life management company focused on assisting trust and elder law attorneys and financial advisors with their clients’ needs. IKOR’s focus is on the client, and the psychosocial, environmental, medical and other intangible factors that lead to better quality of life. For example, IKOR can recommend vetted in-home care service providers for your client, or assist with determining which wheelchair will best meet the client’s needs. IKOR will serve as guardian and as agent under a medical or financial power of attorney. They also provide bill pay services. IKOR works with a broad spectrum of clients, including aging parents needing to ensure the care of their special needs children. Go to their website or call 877-456-7872 for more information.

InterActive Legal
www.interactivelegal.com

InterActive Legal provides comprehensive planning and drafting solutions, and now offers a cloud-based solution in addition to their desktop software. In addition to new dispositive options within all of their packages, they have launched an offering of practice development tools, with webinars on promoting your practice, business development, branding, referral building, and practice management to help you get the most out of your business efforts. Their website has recently been overhauled for a more user-friendly experience. Visit the site to see a demo of their solutions, or email info@interactivelegal.com to learn more. Through February 2018, InterActive Legal is offering a 10% discount and complimentary six-month subscription to their EstateView Estate Tax Planning Software.

ITM TwentyFirst
www.itm21st.com and www.lifeinsurancetrustco.com

ITM TwentyFirst can help you review and analyze life insurance policies. Recently, ITM TwentyFirst launched its own trust company, the Life Insurance Trust Company, to administer life insurance trusts. Whether you are an administrator holding an orphaned life insurance trust or are looking to exit ILIT administration altogether, the Life Insurance Trust Company may be your answer. The Life Insurance Trust Company is a welcome resource for attorneys and accountants who may struggle to find ILIT administrators. For additional information on the Life Insurance Trust Company, contact Leon Wessels, Corporate Development Manager, 605-574-1703 or lwessels@lifeinsurancetrustco.com.

The Lackner Group, Inc.
www.lacknergroup.com
Say goodbye to duplicate entry systems! The Lackner Group offers 6-in-1 Estate & Trust Administration software, which conveniently uses information entered once to produce state administration and tax forms and federal tax forms. Go to their website to see how their 6-in-1 system could help you. Try it out with a 60-day money back guarantee.

**Lawgic, LLC**  
[www.lawgic.com](http://www.lawgic.com)

The Lawgic patented document drafting software for wills and trusts offers estate planners a reliable and efficient method of customized document production while saving time and boosting profitability. They offer state-specific products for multiple states such as California, Colorado, Florida, Georgia, and New York, which are kept up-to-date by renowned practitioners in those states. Lawgic subscribers are supported with training, updates and technical support. For a demo and pricing information, please visit their website or contact Allison Grewell Carboneau, Executive Director, Marketing & Business Development, at [allison@lawgic.com](mailto:allison@lawgic.com) or 877-252-9442 ext. 103.

**Reporter Craig Dreyer (L through S)**

**Leslie Hindman Auctioneer**  
[www.lesliehindmman.com](http://www.lesliehindmman.com)

Leslie Hindman Auctioneers is a fine art auction company with global outreach. They provide auction appraisals to clients. Headquartered in Chicago, Leslie Hindman Auctioneers has regional offices across the country in Denver, Atlanta, Milwaukee, Naples, Palm Beach, Miami, Scottsdale, and St. Louis. They are at the forefront of technology and serve a global client base. For more information, visit their website or contact them at (312) 280-1212.

**Lexis Nexis**  

Lexis Nexis is a broad provider of legal research and tools for the estate planning professional. They over a voluminous amount of online resources, text resources, and drafting programs. The Lexis Nexis Advance platform has been expanded to many of their services. This year have implemented Lexis Practice Advisor, which provides practical guidance through a module based platform with documents, practice notes, Q &A, and forms with expert commentary. They have evolved from legal research into more of an amazon themed search process, and away from the old terms and connectors searches of the past. For more information, please visit them at their website or by telephone at (888) AT-LEXIS.
**Lion Street**  
[www.lionstreet.com](http://www.lionstreet.com)  

Lion Street is a leading financial services company comprised of 150 independent Owner-Firms in 34 states and 100 cities that specialize in design and planning for high net worth and corporate clients. Each advisor in Lion Street is a stockholder in Lion Street similar to being a partner in a law or tax firm. This allows their advisors to be fiercely independent. They do not provide proprietary products in order to maintain complete objectivity and product agnostic advice. For more information visit their website or contact them at (512) 775-8400.

**Mariner Wealth Advisors**  
[www.marinerwealthadvisors.com](http://www.marinerwealthadvisors.com)  

Mariner Wealth Advisors is a national registered investment advisor with 20 locations across the country and over 44 billion assets under management. They focus on high net worth individuals and often serve as a family office for high net worth individuals. For more information visit [www.marinerwealthadvisors.com](http://www.marinerwealthadvisors.com) or contact them at (913) 904-5700.

**Material Culture**  
[www.materialculture.com](http://www.materialculture.com)  

Material Culture is an Auction and Appraisal house of art, collectibles, and general estate goods. They understand the unique challenges and opportunities of auctioning large single owner collections and estates. While others may seek to cherry pick a limited group of high value items, Material Culture specializes in making the whole greater than the sum of its parts. For more information visit their website or call (215) 438-4700.

**Morphy Auctions**  
[www.morphyauctions.com](http://www.morphyauctions.com)  

Morphy Auction house specialize in fresh to the market collections of all sizes. They do free evaluations and have experts in a variety of fields to assist clients. They provide a wide range of expertise in valuing a wide array of items and collections including firearms, toys, advertising, and automobiles. They are based in Denver, PA and Las Vegas, NV. For more information visit their website or call (877) 968-8880.

**MPI**  
[www.mpival.com](http://www.mpival.com)
MPI is a business valuation and advisory firm providing valuations for a variety of tax, financial reporting and other business applications, as well as corporate advisory services to business owners and their representatives. They are headquartered in NJ but also have offices in Boston, Chicago, Philadelphia, and New York. They often service the following areas: gift and estate tax, ESOPS, income tax, 409A valuations, expert testimony, blockage discounts, restricted and preferred stock, buy sell agreements, charitable contributions, and marital dissolutions. For more information, visit their website or contact them at (609) 924-4200.

**National Christian Foundation**  
[www.nefgiving.com](http://www.nefgiving.com)

National Christian Foundation is a donor advised fund that helps facilitate gifts to charity. They specialize in gifts of non-cash assets including real estate, business interests, and intellectual property amongst others using various transfer techniques. They work with clients’ advisors to facilitate tax leverage gifting since 80-90% of all giving is done in cash, yet cash represents less than 10% of the assets people hold collectively. In 2017 they facilitated about 375 million in non-cash gifts. For more information visit their website or call (800) 681-6223.

**National Philanthropic Trust**  
[www.nptrust.org](http://www.nptrust.org)

National Philanthropic Trust is a 501(c)(3) public charity and the largest independent provider of donor advised funds. They accept a broad array of assets including real estate, alternative investments, private company interests, credit default swaps, and cryptocurrency to name a few. They are a global organization that can assist advisors in meeting their clients’ philanthropic goals. They can be visited at [www.nptrust.org](http://www.nptrust.org) or contacted at (888) 878-7900.

**The National Underwriter Company** [www.nationalunderwriter.com](http://www.nationalunderwriter.com)

The National Underwriter Company provides tax, insurance, and financial planning information and resources for professionals through various reference materials. They are a tested, trusted tax authority that estate planners can rely on to keep Current and Changing Tax Regulations. New for this year they also include App for their Tax Facts subscribers. For more information, you can visit their website or call them at (800) 543-0874.

**NFP**  
[www.nfp.com](http://www.nfp.com)
NFP Corp. is a global insurance broker and consultant that provides tailored employee benefits, property & casualty, retirement, life insurance, and wealth management solutions through licensed subsidiaries and affiliates. They focus on their tailored approach to each client’s needs. For more information, you can visit their website or contact them at (512) 697-6000.

Nixon Peabody Fiduciary Services
www.NixonPeabody.com

Nixon Peabody Fiduciary Services offer clients full-service fiduciary management without having to establish, support and staff “back-office” financial operations. They also assist their clients by serving as trustees, executor, and personal representative. They can be visited at www.Nixonpeabody.com or contacted at (617) 345-6115.

Northern Trust Company
www.northerntrust.com

Northern Trust offers investment management, asset and fund administration, fiduciary and banking solutions to corporations, institutions and affluent individuals. Northern Trust also provides information to professionals through their wealth advisor portal. Here you can sign up for newsletter and they even provide sample high quality estate planning forms and provisions at no cost through this website. For more information, go to the Northern Trust website at https://www.northerntrust.com/wealth-management/united-states/wealth-advisor. For general information you can go to www.northerntrust.com or call (312) 630-6000. R. Hugh Magill, a fiduciary trust officer with Northern, was a panel speaker at this year’s Institute in Special Session IV-D about the exercise of fiduciary discretion.

O’Toole-Ewald Art Associates Inc.
www.otole-ewald.com

O’Toole-Ewald Art Associates Inc. is an independent fine art and personal property appraisal company that provides multipurpose art and personal property appraisals having a focus on insurance and estate appraisals. They commonly handle complex appraisals including fair rental valuation. They work nationwide and have international associates to assist clients as well. For more information, visit their website or contact them at (212) 989-5151.

OC Consulting Group
www.oc-lic.com

OC Consulting Group is a fee-based life insurance consulting practice that is brought in by and works closely with estate planners, attorneys, CPAs, trustees, non-profits and high end financial and insurance advisors to bring expert, third party insurance information to the table. Their
website even gives some examples of sample scenarios were there services are helpful. For more information, visit their website or contact them at (616) 456-1000.

Parasec  
www.parasec.com

Parasec is a global document filing and retrieval service. They work to simplify the process of creating estate planning entities in all 50 states and the District of Columbia. They handle the following matters: Corporate Research, Formations, Mergers, Acquisitions and Dissolutions; Corporate and LLC Kits; Business Licensing Compliance/Gap Analysis; Nationwide Registered Agent for Service of Process; Commercial & Residential Real Estate; UCC Typing, Filing & Tracking; County Records Filings & Retrievals; Court Records Filings & Retrievals; Investigation & Litigation Research; Intellectual Property; and Apostilles, Legalizations, Authentications and Translations. For more information, visit their website or contact them at (800) 533-7272.

Parkinson’s Foundation  
www.parkinson.org

The Parkinson Foundation helps those with Parkinson’s lead a better life through funding research, treatment, and care of individuals living with Parkinson’s. They also provide a community to provide support and help to individuals, family, and care givers to live the best lives possible. For more information, visit their website or call (800) 473-4636.

Peak Trust Company  
www.peaktrust.com

Peak Trust Company serves individuals, families, and advises by offering tax favored trust situs in Nevada and Alaska. They also administer various forms of trusts including irrevocable life insurance trusts, asset protections trusts, special needs trusts, charitable remainder trusts, self-directed IRA’s, employee benefit trusts, dynasty trusts, and self-directed IRAs. They have many self-settled spendthrift trusts and have billions under management. Their director of estate planning, Jonathan Blattmachr, also assists counselors in setting up estate plans for high net worth clients. They were formerly known as Alaska Trust Company. For more information visit their website or call (907) 278-6775.

Phillips  
www.phillips.com

Phillips is the destination for international collectors to buy and sell the world’s most important 20th Century & contemporary works of art. In addition to Phillips’s unparalleled momentum in 20th Century & Contemporary art, we have also been established as the worldwide market leader
in Watches auctions. Phillips has been around since 1796 and has a global presence offering appraisals for estate and gift tax, charitable donation, insurance, collateral loan and financial planning purposes to families, executors, solicitors and other professional advisors. For more information visit their website or call (212) 940-1272.

**PNC Bank, National Association**  
[www.pnc.com](http://www.pnc.com)

PNC Asset Management focuses on high/ultra-high net worth clients with a focus on family office services and institutional asset management. They offer a full range and integrated approach to fiduciary services, private banking, and investment management services. They also provide tax and estate planning guidance. For more information visit their website and select the wealth management services link.

**PragerMetis CPA’s, LLC**  
[www.pragermetis.com](http://www.pragermetis.com)

Prager Metis is a Top 10 international firm and top 100 US accounting firm with twelve offices worldwide including New York, New Jersey, Miami, Los Angeles and London. They provide expert advice that protects and grows the value of a client’s world. Their practice areas include Advisory Services, Audit & Accounting Services, Tax Services, and International Services. For more information visit their website or call (212) 643-0099 or (212) 972-7555.

**Premier Trust**  
[www.firstpremier.com](http://www.firstpremier.com)

Premier Bank Trust and Investments is a community bank that focuses on directed trusts and are located in Sioux Falls, South Dakota. They offer services, in trust administration, investment management, dynasty trusts, conservatorships, and retirement plan administration. The bank is owned by one individual whom upon death passes to foundation for philanthropic purposes. For more information visit their website or call 1 (866) 951-6800.

**The Presser Law Firm, P.A.**  
[www.AssetProtectionAttorneys.com](http://www.AssetProtectionAttorneys.com)

The Presser Law Firm P.A. specializes in integrating asset protection both domestically and internationally that is integrated into a client’s estate planning. They work with clients and their attorneys to assist with the implement of various asset protection strategies from how to title
assets to more exotic offshore asset protection devices. They can be contacted at (561) 953-1050 or by visiting their website.

**PWC Family Enterprises**

PWC Family Enterprises focus on setting up a family office to support the strategy and legacy of your family. The family office strives to achieve the balance between professional management, responsible ownership, and a healthy family dynamic. They assist with income tax planning and compliance, property ownership planning, philanthropy, lifestyle investments, estate, trust and gift planning, investment and tax planning, residency planning, and insurance and risk management. For more information visit their website.

**Rago Arts & Auction Center**
[www.ragoarts.com](http://www.ragoarts.com)

Rago Arts and Auction Center is a leading U.S. auction house serving thousands of sellers and buyers internationally with a singular blend of global reach and personal service. Rago’s Trusts, Estates and Appraisals team is a valued partner to banks, wealth managers, attorneys, executors, beneficiaries, museums and institutions, providing comprehensive support in the valuation and disposition of personal property assets, from fine art to jewelry coins, furniture and decorative art. Whether handling the disposition of a single piece of property or a large and varied estate, their team offers access to a wealth of company resources, including expert specialists in a wide range of collecting fields. Serving clients throughout the United States with exceptional service and the utmost discretion, Rago’s Trusts, Estates and Appraisals team stands ready to help you achieve your goals. For more information you can visit them at their website or contact them directly at (609) 397-9374.

**Raymond James Trust N.A.**
[www.raymondjamestrust.com](http://www.raymondjamestrust.com)

Raymond James Trust, N.A. is an alternative to a bank-owned trust company. They provide trust services in all 50 states with more than 5 billion in trust assets with offices in Los Angeles, Chicago, Memphis, Ft. Lauderdale, Miami, Orlando, Houston, and Tampa. They have an open investment platform so they can individually tailor investments to a client’s needs. With over 120 trust professionals on staff, they administer traditional trusts, as well and considering special needs and substance abuse provisions. You can contact them at their website or call them at 1 (800) 248-8863 ext. 72300.

**RBC Trust Company (Delaware Limited)**
[www.rbctrust.com](http://www.rbctrust.com)
RBC Trust Company provides complete personal trust and custody services through partnerships with professional advisors throughout the country. They specialize in Delaware trusts. They can be visited at their website or by telephone at (800) 441-7698.

**The Real Real**  
[www.therealestate.com](http://www.therealestate.com)

The Real Real is an online luxury consignment site with fully authenticated luxury goods. They have 8 offices throughout the country and have representatives through all 50 states. They provide valuations and will sell personal property from estates. For more information please visit their website or call (415) 516-5040.

**Right at Home**  
[www.rightathome.net](http://www.rightathome.net)

Right at Home is a senior in home care organization that operates through individually owned and operated independent care franchisees. They assist with the home care of the elderly and with transitioning clients back to their home after hospital visits. You can visit them at their website or call them at (877) 697-7537.

**Ruby Receptionists**  
[www.callruby.com](http://www.callruby.com)

Ruby Receptionists provide remote reception services based in Portland, Oregon. They have discounts available through many bar and financial organizations. For more information visit their website or call (866) 611-7829.

**Shapiro Auctions**  
[www.shapiroauctions.com](http://www.shapiroauctions.com)

Shapiro Auctions provides appraisals, auctions, and estate planning consultations in personal property and fine art. They are based on the upper east side New York City with representatives throughout the United States. They also work across a diverse range of collecting categories. For more information please visit their website or call (212) 717-7500.

**Shriners Hospitals for Children**  
[www.shrinershospitalsforchildren.org](http://www.shrinershospitalsforchildren.org)
Shriners Hospital for Children is a 501(c)(3) that has 22 hospitals throughout the United States, Canada, and Mexico. They treat children regardless of the families’ ability to pay. Their four specialties are orthopedics, spinal cord injuries, burns, and cleft lip and palate. For more information visit their website or call 1 (844) 739-0849.

**Skinner, Inc.**
[www.skinnerinc.com](http://www.skinnerinc.com)

Skinner, Inc., is an auction and appraisal house for tangible personal property. They have over 20 specialty areas including fine wine, historic military, and fine arts and hold over 70 auctions annually. They have locations in Coral Gables, New York, Marlborough Mass, and Boston MA. For more information please visit their website or call (508) 970-3000.

**Reporter Patrick Duffey (S through Z)**

**Tiedemann Wealth Management** (Per Jim Bertles, Managing Director)
[https://www.tiedemannwealth.com](https://www.tiedemannwealth.com)

Tiedemann Wealth Management ("Tiedemann") is an independent investment and wealth advisor serving individuals, families, trusts, endowments, and foundations across the country. Founded in 1999, Tiedemann now serves more than 400 families with $18 billion in assets under management. With seven offices—New York, San Francisco, Seattle, Dallas, Palm Beach, Washington D.C., and Delaware—the firm has nationwide reach.

Jim Bertles, who works primarily out of the Palm Beach office, is managing director of Tiedemann, having joined the firm in 2008. With an open architecture, Bertles explained, Tiedemann is able to serve the needs of sophisticated high-net-worth clients who may use multiple independent investment advisors across the world. Tiedemann prides itself on low turnover—both of staff and clients. In fact, Bertles shared that the firm’s very first client is still with Tiedemann.

In some ways, Tiedemann is almost a multi-family office. The firm is able to provide investment advice, act as a fiduciary (through the affiliated Delaware Trust Company), and provide wealth and family planning. Tiedemann takes a balance sheet approach and coordinates with clients’ existing advisors, often diagramming existing estate plans in a way that clients find intuitively understandable.

Often, though, its Tiedemann’s flexibility that sets it apart—each client receives a customized set of services depending upon their individual needs. In one instance, Bertles shared, a client chose to bring in Tiedemann after a $5 billion liquidity event. Given the scope of the client’s assets, the team at Tiedemann advised the client to open his own family office and, when he agreed, the team helped build out a ten-person team for the client. Tiedemann still works closely with that family office, consulting on investments and planning strategy. For more information visit their website.
Winston Art Group (Per Courtney Christensen, Marc Hajjar, and Rachel Doorly)
http://winstonartgroup.com

Winston Art Group (“Winston”) is the nation’s largest independent art appraisal and advisory firm—a distinction that took on even more importance with the recent Tax Court decision in *Kollsman v. Commissioner*. In Kollsman, Courtney Christensen explained, the Tax Court rejected the estate’s valuation of two paintings in large part because of the conflict of interest that existed as a result of the appraiser estimating fair market value while simultaneously seeking to auction the paintings at a subsequent sale.

Because Winston does not conduct auctions, it is able to render independent advice to clients looking to buy and sell virtually any type of tangible personal property for a flat hourly fee. With a deep and experienced talent pool, appraisers at Winston are often called upon to testify as expert witnesses in high-stakes cases involving valuable artwork or other tangible personal property. Winston has extensive experience with fiduciaries in various capacities. Besides providing appraisals for gift and estate tax returns, Winston often works with Trustees that hold art on an ongoing basis to establish up-to-date values for the works that are included in annual accountings. For estate planners looking to take advantage of more exotic planning techniques, Winston has experience rendering opinions on art leasing rates. Executors can engage Winston as an agent to advise on the storage and maintenance of fine art before it is liquidated or distributed.

Recently, a significant estate in the southeastern U.S. retained Winston to assist with the liquidation of a substantial antique furniture collection. Marc Hajjar highlighted the meticulous process that Winston advisors went through to catalogue and evaluate the collection before putting together a comprehensive sale strategy. In this case, explained Hajjar, the goal was to minimize expenses of moving the delicate collection to auction while still capturing as much value as possible. Winston identified the most marketable pieces and sent those for auction in a larger market while most of the collection was set to a local auction house. The estate saved on costs and, in the end, actually was able to capture substantial value from both auction houses.

The breadth of services offered by Winston has lead the firm to develop its suite of comprehensive collection management services, which allows collectors (and their advisors) to use the firm as a one-stop-shop. This can be valuable for collectors looking to intelligently expand their collection or for fiduciaries looking to judiciously liquidate a large collection. For more information visit their website.

Valbridge (Per Rick Armalavage, Chief Executive Officer)
https://www.valbridge.com

Valbridge Property Advisors (“Valbridge”) is a national real estate appraisal and consultant. While the firm specializes in valuation of real estate, Rick Armalavage, CEO, explains that Valbridge has extensive capabilities to value other assets, including machinery, equipment, and businesses. Founded in 2011 with more than 70 locations across the United States, Valbridge is one of the largest and most experienced players in the industry.
Valbridge has a strong focus on estate planning and their experts are experienced in all aspects of that kind of valuation—from consultation with a client’s advisors to testifying in court. Often, says Armalavage, Valbridge is brought in to consult on the liquidation of significant land holdings. Unlike many of its competitors, the firm is not a broker-dealer and so it is able to provide independent advice. For more information, visit their website.

**Tax Bird** (Per Jim Simon, Co-Founder)

Launched just this past October, Tax Bird is an app—for Android and iOS—that is designed to automate and replace the time consuming chore of day counting that all dual-state residents must endure. Co-Founder Jim Simon explains that Tax Bird was born from his own experience splitting time between Florida and Connecticut after selling his first company. There must be, he was sure, an app that could help automate the day-counting chore. As it turns out, there was no app—at least not until October of 2017 when Tax Bird launched.

For an annual fee of $19.99, Tax Bird keeps track of how many days the user spends in each state. Using GPS data from the smart phone’s sensors, the app encrypts the data which can later be accessed in a detailed end-of-year report that can be provided directly to tax advisors and, if needed, taxing authorities. Also included in the annual fee are reminders—via text, in-phone alerts, or e-mail (or any combination of the three)—that warn users when they approach relevant targets. Users can manually enter data to cover dates prior to day the app was downloaded.

As Tax Bird gains subscribers, Simon and his co-founder look at expanding the app’s capabilities while staying true to their mantra of simplicity. Tax Bird can be downloaded in both app stores.

**Veralytic** (Per Barry Flagg (Inventor and President))

http://www.veralytic.com

Veralytic provides consumers and their advisors with a patented five star independent rating system for individual insurance products. The system is unique in that, unlike traditional ratings systems that focus solely on the insurer, it measures the objective quality of a given insurance product against the universe of peer group products in relation to the client’s goals and objectives. While irrevocable life insurance trust trustees often use the service to document their investment decisions, Veralytic is a valuable tool for anyone purchasing life insurance and anyone giving advice about buying a policy.

The industry’s practice of using internal projections, says inventor and President Barry Flagg, has been criticized by leading actuarial authorities as “fundamentally inappropriate.” Veralytic departs from industry practices by rating across five separate measurements covering the claims paying ability of the carrier, the cost of the policy, the stability of pricing representations, the insured’s access to cash value, and the carrier’s actual historic investment performance. With rising litigation over life insurance, Flagg cautions that fiduciaries and advisors should be careful to rely on insurance industry practices that have been criticized by regulators.
With the recent changes to the tax code, warns Flagg, fiduciaries and advisors should have a new concern: what to do with legacy insurance policies that were purchased to fix a tax problem that no longer exists. Flagg sees this issue as a significant trend in insurance moving forward and believes that planners will be “on the front lines” in this process, which is already occurring. In one instance, Flagg assisted an advisor in converting a client’s traditional life insurance plan (which was originally purchased to fund a now non-existent estate tax liability) into a long-term care insurance policy. Solutions will be specific to the client, says Flagg, so planners will need to bring their creativity to bear on what will certainly be the next big trend in insurance.

Veralytics has begun to roll out a new service for its fiduciary clients, providing (through Veralytics subscribers) an independent insurance advisor for trusts holding life insurance. Much like an investment advisor, these insurance advisors work with fiduciaries to identify proper trust investments—in this case, insurance policies that are highly rated by Veralytics’s proprietary rating system. This, explains Flagg, provides a risk-management solution for fiduciaries of trusts that own low rated policies. Sometimes fiduciaries are faced with a grantor that is simply uninterested in obtaining a different policy, often for personal reasons. In those cases, fiduciaries can protect themselves from frustrated beneficiaries with grantor election forms that document the grantor’s (who is also the insured) refusal to submit to a physical to purchase a new, more highly rated policy. While still new, this service has been an instant success, says Flagg.

South Dakota Trust Company (Per Pierce McDowell, President and co-Founder)
http://www.sdtrustco.com

South Dakota Trust Company LLC is a Diamond sponsor of the 2018 Heckerling Institute. That relationship, says Pierce McDowell, President and co-Founder of the company, goes back more than fifteen years. South Dakota Trust Company’s rise to national prominence as a boutique trust shop actually began in 1983—before the company was founded—when the South Dakota legislature passed the nation’s first dynasty trust statute. Trust law would change forever, but the company was just getting started.

In 1994, co-Founders Pierce McDowell and Al King met at Heckerling and shortly thereafter founded the precursor to the South Dakota Trust Company. Formally founded in 2002, South Dakota Trust Company now counts more than $40 billion in assets under administration and is a pioneer in the field of family-owned private trust companies, even opening an office in Wyoming to take advantage of its private trust company laws. In some ways, though, South Dakota Trust Company has not changed at all since it was founded; it remains a “pure” trust company that can work with any asset custodian, financial advisor, or insurance professional. That flexibility has paid off, as Pierce reports that the company currently works with more than 200 banks and other financial institutions as investment advisors and custodians.

South Dakota Trust Company has offices in Sioux Falls, South Dakota, Rapid City, South Dakota, and New York, New York. For more information, see their website.
STEP USA (Per Joseph Kellogg, board member emeritus)
https://www.step.org

STEP—the Society of Trust and Estate Practitioners—was founded in 1991 in London and while still headquartered there, it now boasts more than 21,000 members across more than 70 countries. It is a global professional association for practitioners who work in the field of family inheritance and succession planning. Joseph Kellogg explains STEP is an “international group of local advisors.” Unlike similar organizations, STEP is multi-disciplinary and includes attorneys, accountants, fiduciaries, and financial advisors.

Membership in STEP is by application only. In order to apply each, practitioners must meet certain education and experience requirements which, of course, vary by discipline. Full members are known in the organization as a “TEP”—a trust estate practitioner. There are also associate members and student members. All members must pay dues and keep current with relevant continuing education requirements. For more information, see their website.

The University of Miami Heckerling Estate Planning Graduate Program (Per Anson Cain and Lindzey Cain)
https://www.law.miami.edu

For Anson and Lindzey Cain, the Heckerling Estate Planning Graduate Program turned out to be more than just career-changing. Lindzey shared the story of how the recently married couple met: after Anson had graduated from the program but before Lindzey enrolled, she went to interview at his firm. The Estate Planning LLM, Anson explained to Lindzey, was a must for any serious practitioner in the area. So like Anson did a few years prior, Lindzey left her home in California to attend the prestigious Heckerling Estate Planning Graduate Program.

Before the Heckerling Institute, there was the Heckerling Graduate Program in Estate planning. Phil Heckerling founded the program and adopted the signature structure that it maintains today. In the Fall, the University of Miami’s Heckerling Estate Planning LL.M. program is a traditional academic program with semester-long classes taught by tenured faculty. In the Spring, though, the program’s students have exclusive access to a series of sixteen single credit “modules”—one each week—taught by leaders in the field, most of them practitioners.

Each year the program accepts fifteen to twenty full time applicants who begin a yearlong “deep dive” into the world of estate planning. While part-time students are accepted on a limited basis, both Anson and Lindzey experienced the program as full-time students, which they said allowed them to really absorb the deluge of sophisticated material. Working students can actually “split” the semesters—taking the Fall semester full time...
while enrolling part-time in the Spring semester and completing those classes over the course of several years.

Unlike many other LL.M. programs, the Heckerling Estate Planning Graduate Program is practice oriented. Students are exposed to a practical curriculum with classes like Drafting for Estate Planners (taught by Bruce Stone), Generation-Skipping Transfer Tax (taught by Carlyn McCaffrey), and Valuation (Taught by Ed Koren). In the drafting class, students are each paired with a different local practitioner who works with them to develop an actual estate plan using form documents developed by the program. Another class, called Introduction to Probate, focuses on the oft-ignored administrative process that is central to so many practices.

Classes are kept intentionally small, which leads to a warm collegiality among students and professors that extends beyond the program. Anson’s class was on the larger side with 22 full-time students while Lindzey’s class was just over a dozen. The professors truly do care about their students, explained Anson and Lindsey. One of the practitioner professors got Lindzey her first job and another helped with last-minute advice on her first CLE presentation. Anson found that his class remained tight after graduation, even maintaining a listserv where they can go to for technical (or not-so-technical) advice.

For more information, visit http://www.law.miami.edu/academics/llm/heckerling-graduate-program-estate-planning

TEAM Risk Management Strategies (Per Joshua Greenberg, Chief Executive Officer)
http://team-risk.com

“TEAM,” it turns out, is an acronym that actually means something (unlike, for example SAT), explains Joshua Greenberg, Chief Operating Officer of TEAM Risk Management Strategies. It stands for Trusted Employee Administration Management Risk Management Strategies and the company operates as something of an out-of-house human resources department for fiduciaries looking to outsource administration of household employees. In performing that function, Josh says, the company also does something that those fiduciaries might find even more valuable: it acts as a liability shield to the trust and the institutional fiduciary by serving as the employer of record for what would otherwise be trust employees. That service has proved to be valuable for TEAM’s cadre of blue chip clients, which include Wells Fargo, Northern Trust, SunTrust, and BNY Mellon. Those clients are loyal and grateful—Josh reports that 92% grade TEAM Risk as a 9 or 10 in its annual client satisfaction survey.

So what, I asked Josh, does TEAM do, exactly? That depends. For a trust with an elderly beneficiary, it might coordinate the employment of in-home caregivers, handling everything from the on-boarding process to termination (they have a dedicated HR specialist for that—I asked). For a trust holding a sprawling Great Gatsby-esque estate, it might bring the gardeners, maid, and stable hand into a direct-deposit payment system. For
a trust that maintains a rambling Montana cattle ranch, it could streamline the semi-annual chaos of hiring seasonal ranch hands. What it doesn’t do, said Josh, is actually source the employees; that is still up to the fiduciary or, in some cases, the family.

In one success story that Josh shared, a family discovered that a long-term household employee had stolen from them on several occasions. Avoiding a potentially messy situation, TEAM stepped in, coordinated with the police, handled the termination of the employee, and reimbursed the family for the stolen property using TEAM’s theft insurance policy.

TEAM is based out of San Diego, California, but operates in all fifty states. It provides its services for a flat monthly administrative fee (charged per employee), with the trusts covering salary and all other costs of employment. For more information, visit their website.

The SouthPac Trust (Per Tarita Hutchinson, Managing Director)

http://www.southpactrust.com

Founded in 1982, SouthPac Trust was the original trust company in the Cook Islands. Today it also operates in Nevis and New Zealand, though most of its resources are located in the latter. SouthPac still provides foreign asset protection trust services, but views its role in the modern age as a partner for all of a client’s offshore needs. For example, client’s with precious metal can take advantage of the SouthPac’s dedicated vault, one of just a hand full located in a secure facility in remote—and geopolitically stable—New Zealand.

For more information visit their website.

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, Trant & 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.