HECKERLING INSTITUTE 2001
REPORT #2

As we did in January of the last four years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting to this list throughout the coming weeks highlights of the proceedings of the 35th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 8-12, 2001 at the Fontainebleau Hilton Resort and Towers in Miami Beach, Florida.

Our on-site local reporters there in Miami this year will include:

Steve Leimberg Esq. of Bryn Mawr, PA - leimberg@home.com
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Again this year a complete listing of the proceedings and speakers is available on the Institute's Web site. The new URL for that site is http://www.law.miami.edu/heckerling
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REPORT NO. 2 - Tuesday, January 9, 2001

First, some quick additional news from the Exhibition Hall:

A. Lawgic has just made three significant announcements [www.lawgic.com]:

(1) The upcoming release of the Advanced Package for its Florida Wills & Trusts estate planning software package is expected to be available in February of 2001. The initial release of this Package will include Qualified Personal Residence Trusts (QPRTs), Grantor Retained Annuity Trusts (GRATs) and Intentionally Defective Grantor Trusts (IDITs). Charitable Trusts and Joint Trusts will be made available later in 2001. In addition the GRAT form currently is being modified to take into account the recent Tax Court Walton case.

(2) Later this year they will be releasing a new package called New York Wills & Trusts. This product will be authored by none other than Carlyn S. McGaffrey, a partner in the New York City law firm of Weil, Gotshal & Manges LLP, in conjunction with the authors of the Florida Wills & Trusts system, who are John Arthur Jones,, Edward F. Koren, Richard L. Stockton and Bruce Stone, all of whom are partners of Holland & Knight LLP. This product will include a fully searchable library, including selected Internal Revenue Code sections and cases.

(3) Versions of the Florida Wills & Trusts system modified for additional east coast state are planned for release later on. Those states include Virginia, Maryland, Georgia and the District of Columbia in late 2001 and Massachusetts in early 2002.

B. Power Presentations LLC (tm) of Mesa, Arizona is exhibiting ten separate estate planning PowerPoint Presentations that will retail for $399 each, or you can buy five of them for $1,749 or all ten of them for $2,499. Further information can be obtained from their Web site at www.power-presentations.net.

C. zCalc is exhibiting its popular zCalc Excel spreadsheet program which comes with the zCalc Tool Box that allows you to analyze various estate planning strategies and the zCalc Function Library that allows you to install over 100 custom functions into your Excel spreadsheets. You can download the program from their Web site at www.zcalc.com for $99.

D. WealthTec is exhibiting its WealthMaster (tm) financial and estate planning software, which combines enhanced versions of its two leading-edge products, AdvancePro Series (tm) and ProPrimerPro Series (tm). Your can download it for $1,095 or obtain it by mail on a CD for $1,195. Current modules include estate planning, qualified plans and IRAs, charitable planning and tax and financial planning. Further information can be obtained from their Web site at www.wealthtec.com.

E. ProDoc is now marketing Lipman's Wills and Trusts, which includes a wide spectrum of estate planning documents from the simple to the complex, including FLPs and dynasty ILITs and has been written to conform to state laws. For $95 per month, Florida residents can purchase their Plan D Estate Planning package, which includes the ProDoc document assembly engine, Lipman's Wills and Trusts, FLSSI Probate, FLISSI Guardianship and Small Estate Wills. Further information is available on their Web site at www.prodoc.com.

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Next, Reporter Gene Zuspann reports the following about Tuesday morning's Question & Answer Session One staring Jonathan G. Blattmachr, Carlyn S. McCaffrey, Frances Schafer and Pam H. Schneider:

Francis Schafer - Discussed the reorganization in the service effecting Estate and gift tax work.

Pam Schneider - She started by relaying that the Mellon Case discussed on Monday has been appealed. She then took up marital deduction questions. She addressed language that the trustee would distribute additional funds for the purpose of making "equal" gifts. Pam has language that the trustee has no right to verify use of the funds, and that the spouse can use the money for anything he or she wants to avoid the negative inference under 2056 that anyone other than the SS has a right to distributions. Planning for a QDOT can be done by the surviving spouse, post-mortem.

Carlyn McGaffrey discussed the new definition of a grantor in the 678 regs.

Jonathan Blattmachr responded to a number of questions came as a result of Natalie's presentation. Jonathan answered these with the caveat that any controversy should be referred to Natalie.

Q - is there a 691 problem with using a CRT as a remainder beneficiary. A problem exists if there are also human beneficiaries. The 5 year rule must be used if there any non-human beneficiaries. Fran said that one inquiry the service gets is that people want to pass thru the 691 deduction to the beneficiaries. Carlyn and Jonathan agreed that the use of a CRT is only used if you have no better alternative.

Fran commented that the IRS is trying to get a number of reg projects out in a hurry before the change in the administration so that someone familiar with the project can review it. Apparently, when the Clinton administration came in, some regs were pulled that had already gone to the Federal Register to be published and were again reviewed. Some projects are 643 Regs and 645 Regs. She also announced that Treasury has requested suggestions for any new projects that need to be done. The due date for submitting these is January 16.

Pam discussed charitable issues. She clarified the Atkinson trust from yesterday. The trust was properly drafted but improperly administered. She also discussed the regs in 4940 and 4942 and the Ann Jackson case on 4942 (that a PF distribute 5% of its net assets each year).

Carlyn then discussed some GRAT questions: Now that example 5 has been declared invalid (if not appealed and reversed), zero-ed out GRATs should become much more popular. If clients have open years, they should file an amended gift tax return. (Fran said this seems appropriate because the Adequate Disclosure Rev Proc refers to an amended return). Carlyn and Jonathan suggested filing an amended return even though the statute of limitations has run to recapture the unified credit reported on the oldreturns. Pam believed that this could be avoided and corrected on a schedule explaining the change attached to the 706.

Jonathan then discussed Strangi, Knight and Shepherd. He does not believe that story is all in on gifts on formation. See the comments in the Monday proceedings. Pam and Carlyn are not sure there is that much of a problem but agree that since it is easily solved, why take the risk. Pam questioned what waiting period should be used. Jonathan said his clients like 10-15 minutes, he likes one year. Shepherd case - additions by moneyed partner - to avoid the problem, Jonathan creates a new partnership. Does a 5x5 power in itself, without being tied to the donation, entitle the donor to an annual exclusion? Carlyn said that the panel had debated this issue. They agreed that this should not be relied on to get the exclusion.

Pam discussed a CLT where children have a vested interested and they assign that interest to their children (the grantor's grandchildren). Fran said that timing of gift would be an issue. If done shortly after creation, the value of the gift by the children would be the value of the remainder at that time. Pam respectfully disagreed with this position. Carlyn hedges the bet by making a transfer by the children to a new trust that includes the grandchildren and the child's spouse (a non-skip person). There will still be GST if distributed later to the GC. However, this will avoid an acceleration of the GST tax.

Fran discussed ESBTs and the problems with distributions and from which portion of the trust the distribution would be treated - S-corp or non-S-corp portion. Looking for comments on proposed regs. Also, If an S-corp makes a charitable donation, the service will deem that the governing instrument (the trust) allows such deductions for the S-corp contributions and allow the fiduciary to deduct its share of the contribution on its return.

General Discussion - Client transfers an income or annuity interest to the spouse. Simultaneously, client sells remainder to her children. What are the tax consequences? Client gets a marital deduction. 2702 does not apply because T had to have retained an interest - this was simultaneous. Allows you to create an old style GRIT. The transaction must be simultaneous to avoid 2702. Fran thinks the service will try to figure out some way to keep this from working. Carlyn suggested that this is for the aggressive client, but the panel believes it works.

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Next, Reporter Gene Zuspann reports the following on Milford B. Hatcher's Tuesday morning session entitled "Planning for an Existing FLP":

Milford started with a show of hands to see how many people think that the death tax laws will be repealed. Most people do not think they will be repealed.

The first part of the presentation dealt with operational issues.

Clients must recognize the entity as separate and distinct from its partners. If clients run afoul of this rule, they are putting a bullseye on their chests. Examples

- pay personal expenses from the partnership

- put personal use property in the partnership and use it rent free

- deposit partnership income in the personal account of the general partner.

Milford set forth 3 morals:

-Practitioners must carefully explain to clients that there will be material operational differences.

-Transfers of personal use assets should, at a minimum, be accompanied by a lease and FMV rental payments, and if possible, be avoided altogether.

-a transfer of almost all of an individuals assets to an FLP may invite closer scrutiny by the IRS

Strangi and Knight courts were impressed that you "dot your i's and cross your t's."

Timing of the gifts are relevant. There should be a waiting period between formation and gift to avoid the Shepherd case. He uses one month, but there is nothing supporting this in the law.

Strangi and Knight are considered as taxpayer victories, however, the discounts allowed were lower than those previously allowed. This may be a case of bad facts make bad law. Milford believes that the battle is going to be in valuation.

There is no one method that is always right. He discussed (very broadly) the following:

Installment sales to grantor trusts:

- Advantages are low interest rates, use of a grantor trust - grantor pays tax but this is not a gift, and GST planning.

- Disadvantages are required "seed" gifts or guarantees, possible adverse income tax consequences at grantor's death, and higher valuation risks.

The Walton case has made him reconsider GRATs, especially where there are volatile assets.

He did not get to preferred partnerships other than that Milford regards this to be the best vehicle where the grantor has and wants a compulsion to control.

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Next, Reporter Gene Zuspann reports the following on Dennis I. Belcher's Tuesday morning session entitled "How to Tie a Tight Knot with Marital Agreements":

Dennis questioned why anyone prepares these documents. It is a lose-break even situation. The best scenario is that you never hear about the agreement after it is completed. If the matter goes to litigation, the attorney preparing the document will be a witness, and maybe, a defendant.

He first reviewed the issues. The first issue is what law will be applied to the agreement. It is best to be in a state that has adopted the Uniform Premarital Agreement Act. Agreements in these states are more likely to be enforceable. He then discussed the provisions of the Act.

The presentation and materials also addressed the requirements under ERISA.. The benefits may be waived by the spouse if all requirements are met, however the regs take the view that this can not be done in a premarital agreement because at that time, the person is not a spouse.

Dennis discussed a number of cases and the procedures that should be taken or followed in view of the same.

Next he covered planning for divorce and then planning for death. Some agreements do not provide for divorce, but almost every agreement covers death.

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Next, Reporter Gene Zuspann reports the following on Beverly R. Budin's Tuesday afternoon session entitled "College Funding: New Kid on the Block":

Beverly first set out the general history of QSTPs. Each state develops their own plan. For this reason, no 2 plans are alike. There are two kinds of plans - Prepaid Educational Assistance (where the donor purchases tuition credits) and Educational Savings accounts, where the money is typically invested in mutual funds.

The two parties to the plan are the person contributing the funds - the account owner - and the beneficiary of the plan - the designated beneficiary (DB). The account owner retains full control, including the right the terminate the plan and withdraw the funds. The DB has not control at all (and may have negative tax effects that he also cannot control).

There are several rules set out in IRC 529:

1. The contribution by the account owner must be in cash.

2. There will be a penalty (with few exceptions) if the distributions are not used for education expenses

3. The account owner may not direct investments (other than the initial investment in some states).

4. There can be no excess contributions.

5. The interest in the QSTP may not be pledged.

Since plans vary from state to state, a donor needs to investigate different plans to determine what is best for the donor's facts andcircumstances. Many states do not require the donor to be a resident, so this gives a lot of flexibility in selecting a plan. Beverly then summarized the various distribution alternatives and taxeffects of each. The discussion included various income and estate tax results for both the account owner and the designated beneficiary and the gift tax consequences for the donor.

Finally she concluded with some case studies to determine what clients are best suited to this strategy. The optimum client is one that is moderately wealthy, not making annual exclusion gifts already, wants to provide education funding for another, yet either needs or feels the need to have the right to reclaim the funds.

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That is it for Report No. 2. The full text of all the Reportswill be posted on the ABA RPPT Web site at http://www.americanbar.org/groups/real_property_trust_estate.html beginning early next week.

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