# INTRODUCTION

As we have done in January for the last five 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 week highlights of the proceedings of the 36th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 7-11, 2002 at the Fontainebleau Hilton Resort and Towers in Miami Beach, Florida.

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

Stephan R. Leimberg Esq. of Bryn Mawr, PA - Steve@leimbergservices.com Bruce Stone Esq. of Miami, FL - BruceStone@aol.com Theodore B. Atlass Esq. of Denver, CO - TAtlass@atlass.com as well as others yet TBD

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Again this year a complete listing of the proceedings and speakers is available on the Institute's Web site. The URL for that site is http://www.law.miami.edu/heckerling For those of you without access to the Web, here are the core parts of the schedule:

**SCOPE:**

The "Miami Institute" is widely recognized as the premier estate planning program in the country. It is designed for sophisticated attorneys, trust officers, accountants, insurance and financial planners who, through years of experience and practice, are familiar with the principles of estate planning. The Institute offers something of interest to every member of the estate planning team.

A recent developments panel on Monday afternoon, featuring three of the nation's foremost estate planning experts, kicks off the Institute and will guide us through last year's developments on the tax front.

Tuesday's program features the beginning of the Institute's general session lectures. These lectures, which run through Friday noon, provide in-depth analysis of topics of timely interest to experienced estate planners, and are presented by some of the nation's leading estate planning authorities.

On Wednesday and Thursday afternoons, the Institute offers a wide variety of workshops and panel discussions, including case studies that will illustrate and provide practical guidance on how to implement sophisticated estate planning techniques.

Finally, this year's Institute once again includes the popular Fundamentals Programs. The first two fundamentals sessions will provide a thorough review of two topics central to the estate planning process: planning for the orderly devolution of the closely held business, and what every estate planner should know about the securities laws. The final session will explore basic estate planning for non-U.S. persons and U.S. persons with foreign connections.

Because of the scope and quality of its educational programming, the Institute has grown to be the largest meeting of estate planning professionals in the country, with a record number of over 2,500 individuals from around the nation in attendance. As the regular attendees know, this concentration of talent has led the Institute to have some of the better characteristics of a national convention of estate planners. The week long program provides the opportunity to exchange ideas, to network, and to review the latest in technology, products, and services displayed by over 100 vendors in an exhibit hall dedicated entirely to the estate planning industry. We invite those of you who have never attended this program, or who have been absent in recent years, to join us in Miami Beach January 7 - 11, 2002, to take advantage of this unique event.

**THE INSTITUTE 2002 FACULTY:**

Prof. Mark L. Ascher
University of Texas School of Law

Brian T. Atkinson Esq.
Moore & VanAllen, PLLC

Ronald D. Aucutt Esq.
McGuire Woods LLP

Dennis I. Belcher Esq.
McGuire Woods LLP

Jackson M. Bruce Jr. Esq.
Dunwody, White & Landon, P.A.

Richard B. Covey Esq.
Carter, Ledyard & Milburn

Henry Christensen III Esq.
Sullivan & Cromwell

Lauren Y. Detzel Esq.
Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A.

S. Stacy Eastland Esq.
Goldman, Sachs & Co.

Charles D. Fox IV Esq.
Schiff, Harden & Waite

Eileen Gallo
The Gallo Institute

Jon J. Gallo Esq.
Greenberg, Glusker, Fields, Clayman, Machtinger & Kinsella, LLP

Robert W. Goldman Esq.
Goldman & Felcoski, P.A.

Max Gutierrez Jr. Esq.
Brobeck, Phleger & Harrison

Carol A. Harrington Esq.
McDermott, Will & Emery

T. Randolph Harris Esq.
McLaughlin & Stern, LLP

Jerome M. Hesch Esq.
Greenberg Traurig

Zoe M. Hicks Esq.
Hicks & Hicks, P.C.

Linda B. Hirschson Esq.
Greenberg Traurig

Marcia Chadwick Holt Esq.
Davis, Graham & Stubbs, LLP

Prof. Christopher R. Hoyt Esq.
University of Missouri School of Law

Mildred Kalik Esq.
Simpson, Thacher & Bartlett

Beth S. Kaufman Esq.
Caplin & Drysdale

Curtis R. Kimball
Willamette Management Associates

Robert C. Lawrence III Esq.
Cadwalader, Wickersham & Taft

Mary Ann Mancini Esq.
Steptoe & Johnson, LLP

Neill G. McBryde Esq.
Moore & Van Allen, PLLC

Carlyn S. McCaffrey Esq.
Weil, Gotshal & Manges LLP

Jerry J. McCoy Esq.
Law Office of Jerry J. McCoy

Howard M. McCue III Esq.

Mayer, Brown & Platt

Louis A. Mezzullo Esq.
Mezzullo & Guare, PLC

Malcolm A. Moore Esq.
Davis Wright Tremaine, LLP

Richard W. Nenno Esq.
Wilmington Trust Company

Prof. Jeffrey N. Pennell
Emory University School of Law

Lloyd Leva Plaine Esq.
Sutherland, Asbill & Brennan, LLP

Beth Clerk Rodriguez Esq.
J. P. Morgan Private Banking

Bruce S. Ross Esq.
Holland & Knight, LLP

Sterling L. Ross Jr.
Esq. Robb & Ross

Gideon Rothschild, Esq.
Moses & Singer, LLP

Edward S. Schlesinger Esq.
Hofheimer, Gartlir & Gross, LLP

Kathleen R. Sherby Esq.
Bryan Cave LLP

Bruce Stone Esq.
Holland & Knight, LLP

D. John Thornton Esq.
Thornton & Byron, LLP

Ralph C. Wileczek Esq.
Wilmington Trust Company

**THE PROGRAM SCHEDULE:**

Monday, January 7

8:00 a.m. 2:00 p.m.

Registration
8:00 9:00 a.m.
Complimentary Continental Breakfast

9:00 10:30 a.m. /
10:45 a.m. 12:15 p.m.
OPTIONAL PRE-CONFERENCE FUNDAMENTALS PROGRAM Planning or the Orderly Devolution of the Closely Held Business
Louis A. Mezzullo

10:30 10:45 a.m.
Break

2:00 2:10 p.m.
Introductory Remarks
Tina Hestrom Portuondo,
Institute Director

2:10 3:30 p.m.
Recent Developments in Estate, Gift and Income Taxation 2001 - Part One.
Dennis I. Belcher
Carol A.Harrington
Prof. Jeffrey N. Pennell
Materials by Richard B. Covey

3:30 3:45 p.m.
Break

3:45 5:15 p.m
Recent Developments in Estate, Gift and Income Taxation 2001 - Part Two.

6:00 7:00 p.m.
Complimentary Reception for Registrants

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Tuesday, January 8

7:30 - 8:30 a.m.
Complimentary Continental Breakfast

8:30 - 9:15 a.m.
Navigating the Single Stock Monetization and Diversification Tax Maze
S. Stacy Eastland

9:15 10:90 a.m.
The New Minimum Distribution Rules

Marcia Chadwick Holt

10:00 - 10:45 a.m.
The Family Wins When IRD is Used for Charitable Bequests
Prof. Christopher R. Hoyt

10:45 11:00 a.m.
Break

11:00 11:45 a.m.
Understanding Your Client's Money Personality
Jon J. Gallo

11:45 a.m. 12:30 p.m.
Choice of Law and Trusts
Malcolm A. Moore

12:30 2:00 p.m.
Lunch Break

2:00 3:30 p.m.
Planning and Drafting in a New Statutory Environment - Part One
Ronald D. Aucutt
Max Gutierrez Jr.
Mildred Kalik
Beth S. Kaufman
Lloyd Leva Plaine

3:30 - 3:45 p.m.
Break

3:45 - 5:15 p.m.
Planning and Drafting in a New Statutory
Environment - Part Two

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Wednesday, January 9

7:30 - 8:30 a.m.
Complimentary Continental Breakfast

8:30 - 9:15 a.m.
Life Insurance as the Life Preserver for the Closely Held Business
Mary Ann Mancini

9:15 - 10:00 a.m.
Non-Tax Considerations in the Succession of Closely Held
Businesses
Charles D.Fox IV

10:00 - 10:45 a.m.
Uses of Installment Sales, Private Annuities and SCINs
Jerome M. Hesch

10:45 11:00 a.m.
Break

11:00 a.m. - 12:30 p.m.
Question & Answer Session
Dennis I. Belcher
Carol A. Harrington
Prof. Jeffrey N. Pennell

12:30 2:00 p.m.
Lunch Break

2:00 3:30 p.m. /
3:45 5:15 p.m.
FUNDAMENTALS PROGRAM
What the Estate Planner Must Know About the Securities Laws
(Runs concurrently with the Special Sessions.)
Neill G. McBryde
Brian T. Atkinson

2:00 3:30 p.m.
Special Sessions I

I-A CASE STUDY Navigating the Single Stock Monetization
and Diversification Tax Maze
S. Stacy Eastland

I-B Children, Family Wealth and Estate Planning
John J. Gallo
Eileen Gallo

I-C Minimum Distribution Rules
Marcia Chadwick Holt

I-D Life Insurance and the Closely Held Business
Mary Ann Mancini

I-E Choice of Law and Trusts
Malcolm A. Moore

3:30 3:45 p.m.
Break

3:45 5:15 p.m.
Special Sessions II

II-A CASE STUDY Business Succession Planning
Charles D. Fox IV

II-B What's New in Ethics for the Trust and Estates Lawyer?
Jackson M. Bruce Jr.
Bruce S. Ross
Kathleen R. Sherby

II-C Asset Protection Planning: Protection vs. Control
Gideon Rothschild

II-D IRD and Charitable Giving
Prof. Christopher R.Hoyt

II-E Planning With Installment Sales, Private Annuities and SCINs
Jerome M. Hesch

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Thursday, January 10

7:30 -8:30 a.m.
Complimentary Continental Breakfast

8:30 - 9:15 a.m
Subchapter J - Recent Developments Relating to the Income Taxation of Trusts and Estates
Prof. Mark L. Ascher

9:15 10:00 a.m.
The State Income Taxation of Multi-Jurisdictional Trusts
Max Gutierrez Jr.

10:00 10:45 a.m.
Implementing Total Return Trust Statutes
Richard W. Nenno

10:45 -11:00 a.m.
Break

11:00 -11:45 a.m.
Generation-Skipping Transfer Tax Planning
Lloyd Leva Plaine

11:45 a.m. 12:30 p.m.
Special Needs Trusts
Sterling L. Ross Jr.

12:30 p.m. 2:00 p.m.
Lunch Break

2:00 3:30 p.m.
3:45 5:15 p.m.
FUNDAMENTALS PROGRAM
Basic Estate Planning for Non-U.S. Persons
and U.S. Persons with Foreign Connections
(Runs concurrently with the Special Sessions)
Carlyn S. McCaffrey
Robert C.Lawrence III

2:00 3:30 p.m.
Special Sessions III

III-A CASE STUDY Implementing Total Return Trusts
Richard W. Nenno
Ralph C. Wileczek

III-B Advanced LP, LLP and LLC Valuations
D. John Thornton
Curtis R. Kimball

III-C When Charitable Trusts Go Off The Track
Jerry J. McCoy

III-D Florida Law Update
Lauren Y. Detzel
Robert W.Goldman
Bruce Stone

III-E Future of the Profession
T. Randolph Harris
Zoe M.Hicks
Howard M. McCue III
Beth Clark Rodriguez

3:30 3:45 p.m.
Break

3:45 5:15 p.m.
Special Sessions IV

IV-A CASE STUDY Special Needs Trusts
Sterling L. Ross Jr.

IV-B Advanced LP, LLP and LLC Valuations
(repeat of Session III-B)
D. John Thornton
Curtis R. Kimball

IV-C What To Do With Life Insurance After the Hearse

Leaves With Your Client In It
Edward S. Schlesinger

IV-D How to Succeed in (the) Business (of Practicing)
Without Really Trying
Stephan R. Leimberg

IV-E Income Taxation of Trusts and Estates
Mark L. Ascher
Linda B. Hirschson

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Friday, January 11

7:30 - 8:30 a.m.
Complimentary Continental Breakfast

8:30 - 9:15 a.m.
Are Tax Havens on Life Support
Henry Christensen III

9:15 10:00 a.m.
Ethical Solutions to the Estate Planner's Dilemma
Howard M. McCue III

10:00 10:15 a.m.
Break

10:15 a.m. 12:00 p.m.
CASE STUDY -Wrapping it Up - Applying What We
Have Learned
Louis A. Mezzullo

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**GENERAL INFORMATION:**

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University of Miami School of Law
Center for Continuing Legal Education
P.O. Box 248087
Coral Gables, FL 33124-8087
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Headquarters Hotel - Fontainebleau Hilton, Miami Beach, FL
Telephone (305) 538-2000, FAX (305) 674-4607
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Joseph G. Hodges Jr. Esq., Denver, CO

ABA-PTL Discussion List Chief Moderator
jghodges@jghlaw.com
http://www.jghlaw.com/

# Report #1

As we have done in January for the last five 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 week highlights of the proceedings of the 36th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 7-11, 2002 at the Fontainebleau Hilton Resort and Towers in Miami Beach, Florida.

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

Stephan R. Leimberg Esq. of Bryn Mawr, PA - Steve@leimbergservices.com
Bruce Stone Esq. of Miami, FL - BruceStone@aol.com
Theodore B. Atlass Esq. of Denver, CO - TAtlass@atlass.com
as well as others yet TBD

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Again this year a complete listing of the proceedings and speakers is available on the Institute's Web site.  The URL for that site is
http://www.law.miami.edu/heckerling
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REPORT NO. 1 - Monday, January 7, 2002

The following preliminary report has been filed concerning the vendors who are in the Exhibit Hall this year and other technology news:

As the size of the institute grows, so does the number of vendors, and there are multiple vendors in almost all categories, including the following:

Administration support services, such as deed preparation
Appraisal and valuation companies
Auction houses and services
Book and reference material sales, including the latest edition of Natalie Choate's Retirement Plans book
Missing persons and heirs locators
Software sales - these include software for planning and administration and document assembly
Trust departments/companies and other companies managing assets and investments

And now for some news highlights from the vendors:

**First**, the following statement has been issued recently jointly by Lawgic and the authors of the Florida Wills and Trusts system:

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"Dear Subscriber:

As many of you have become aware, Lawgic has been affected by the economic downturn and has had to curtail much of its operations, including sales, training and customer support. We apologize if you have tried but been unable to contact us, and want to assure you we are doing all we can to move forward and preserve the Lawgic program you have come to rely upon. The program should operate normally during 2002, but if you receive an expiration notice, you may download a patch off our website to extend your use.

Currently we are in the midst of negotiations with several large legal publishers to sell the Lawgic system, and hope to have a resolution in the very near future. The authors of Florida Wills and Trusts are aware of this process and agree with the approach. We anticipate you will be able to use and enjoy this wonderful program for many years to come. We will keep you advised of developments."

Edward F. Koren, Holland & Knight LLP, ekoren@hklaw.com
Co-Author, Lawgic Florida Wills and Trusts Software Program
Ste 2300, 400 N. Ashley Dr., Tampa, FL 33602, (813)227-6655
92 Lake Wire Dr.,Lakeland, FL 33815, (863) 499-5314
>>>>

**Second**, ACTEC Fellow, Larry Katzenstein, has recently updated his TigerTables program. It seems to have some nice new additional features that can be checked out at www.tigertables.com. We hope to post a more detailed review of this new software update on one of our later reports.

**Third**, Estate Valuations & Pricing Systems, Inc. has recently announced the release of the latest version of its industry-leading historical securities valuation software: EVP Office XP (Version 6.4.0). Included in this release are new versions of EstateVal, CostBasis, and CapWatch. The programs can be downloaded from http://www.evpsys.com/software. The most significant feature of the new version of EstateVal, allows estates affected by the market closures in the wake of the attacks on the World Trade Center to be re-evaluated, at no cost, with full pricing. Also included is EVP's new pricing structure, and the ability to re-print old billing records with the appropriate data. These billing records can now be exported to a spreadsheet, as well. All the changes can be found on EVP's Web site.

**Fourth**, a recent issue of Steve Leimberg's e-mail based Charitable Planning Newsletter [http://www.leimbergservices.com/] contained a Review by subject matter of 2001 IRS Charitable TAMs/PLRs by LISI commentator Johni Hays, co-author of the just released book, Tools and Techniques of Charitable Planning. Steve Leimberg's Charitable Planning Newsletter.  A recent issue of Steve's Estate Planning Newsletter dealt with the new IRS Guidance on Split-Dollar Life Insurance that were issued on January 3 [Notice 2002-8, 2002-4 IRB 1 revoking Notice 2001-10 which was issued in January of 2001.  In a recent issue of his Employee Benefits and Retirement Planning Newsletter, LISI Commentator and Technical Editor Barry Picker, the author of "Barry Picker's Guide to Retirement Distribution Planning" shares important information on a recent IRS safe harbor notice [Notice 2002-3] which requires written notice on Certain Qualified Plan Distributions to reflect the changes that were made by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), P.L. 107-16. Information on how to subscribe to this and other LISI E-Mail Newsletters can be found at http://www.leimbergservices.com/.

**Fifth**, WealthCounsel's new significantly expanded Document Assembly System is being introduced at **Heckerling** this year. It offers a complete estate planning system for Advanced Estate Planning Law. It is programmed to be used with HotDocs 5.X, which makes it easy to use and modify the standard text. The systems now includes forms and supporting documents for:

*** Family Limited Partnership Module**
*** Charitable Planning Module**
*** Revocable Living Trust Module**
*** Irrevocable Trust Module**
*** Testamentary Will Planning Module**
*** Split Interest (QPRT)**

This system has been designed using plain English drafting, but gives the user the ability to modify it to the user's own writing style with great ease. Stop by their booth in the Exhibition Hall and give this document assembly system a good look-see, as they are offering it at a special sale price if it is ordered during Heckerling. More information can be found at www.wealthcounsel.com.

**Next,** on the news front, the following IRS SS-4 news has recently been released:

> Does anyone know if the the new non-Draft
> SS-4 is going to be available over the internet?

Date: Mon, 7 Jan 2002 15:20:07 -0500
From: "Joseph B. Schimmel" <joetax@MINDSPRING.COM>
Subject: Re: [ABA-PTL] ID #
To: ABA-PTL@MAIL.ABANET.ORG

The IRS website lists the target release date as January 10, 2002, so maybe the wait will be over then.

See http://www.irs.treas.gov/plain/bus_info/tax_pro/formsch.html

By the way, I believe the hold-up is that the drafts have to be sent to the Office of Management and Budget for some fixed length of time before they can be released in final format.

Joseph Schimmel, Attorney
Miami, Florida

**Lastly, for announcements, the American Association of Attorney-Certified Public**

**Accountants has issued the following e-mail invitation:**

**From:** Leonard Weiner <lweiner@LWEINERLAW.COM**>**
**Subject:** If you are both an Attorney and a CPA

The American Association of Attorney-Certified Public Accountants (website: http://www.attorney-cpa.com/) is hosting several events for attendees of the University of Miami's Heckerling Estate Planning Institute in January 2002.

Complimentary LUNCH for prospective members:
Wednesday, January 9, 2002, 12:15-2:00 PM, Fontainebleau Hotel

Members & Guests Reception and Dinner: Tuesday, January 8, 2002, 6:30 PM
Luna Rossa Café at The Indian Creek Hotel, Miami Beach, toward South Beach.

The luncheon on Wednesday is relaxed. If asked, we can acquaint non-member Attorney-CPAs with the advantages, services, and benefits of AAA-CPA membership. There is no charge to prospective members to attend.

The dinner on Tuesday is subsidized and provides an opportunity for AAA-CPA members and their guests who are in south Florida then to get together and enjoy a delicious buffet dinner while networking with colleagues. We will dine in a historic art deco setting in Miami Beach. The dinner is $20 per person paid in advance ($30 at the door) with a cash bar.

To RSVP or get information, please contact Ron or Gai at:

**888-ATTY-CPA (288-9272)**
**Fax: 888-272-2889**
**Email: aaacpa@attorney-cpa.com**

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**That is it for Report No. 1. The full text of all the Reports will be posted on the ABA RPPT Web site at http://www.americanbar.org/groups/real_property_trust_estate.html.**

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**MIAMI INSTITUTE GENERAL INFORMATION:**

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# Report #2

Monday, January 7, 2002

The below Report was compiled by our on-site Reporter, Bruce Stone, who is also a distinguished member of the Institute's Advisory Committee and a partner in the Miami, Florida law firm of Holland and Knight, LLP.

2:00 2:10 p.m.

Introductory Remarks

Tina Hestrom Portuondo,

Institute Director

Tina Portuondo convened the 36th annual University of Miami Heckerling Institute on Estate Planning by welcoming approximately 2,400 registrants.

After some brief remarks by Law School Dean Dennis Lynch, Tina introduced the panel that presented this year’s review of recent developments: Dennis Belcher, Carol Harrington, and Jeff Pennell.

2:10 5:15 p.m.

Recent Developments in Estate, Gift and

Income Taxation 2001 - Parts One and Two

Dennis I. Belcher

Carol A.Harrington

Prof. Jeffrey N. Pennell

Materials by Richard B. Covey

Dennis gave a brief overview of key provisions of the transfer tax changes made in the 2001 tax act. He noted that advisers and clients should not automatically assume that with the increase in the applicable exclusion amount from $675,000 to $1 million, an additional $325,000 can be gifted without incurring gift tax liability. Clients who had made adjusted taxable gifts in excess of the former applicable exclusion amount will owe some small amount of gift tax on a gift of $325,000. In fact, if adjusted taxable gifts of about $3 million have already been made, the additional amount that can be gifted now free of gift tax is only about $250,000.

Dennis briefly viewed what he regarded as other significant changes: the reduction in state death tax credit (which he predicted will cause a number of states to adjust their revenue laws fairly quickly and which will lead to more jurisdiction shopping for domicile); the repeal of section 2057 (QFOBI) and the expansion of benefits for conservation easements and estate tax deferral.

Carol reviewed some of the changes made to the GST tax in the 2001 legislation. She noted that the GST tax is de-unified from the estate tax for 2002 and 2003. The GST exemption for 2002 is $1.1 million, and it may be adjusted for inflation in 2003, but it will be identical to the estate tax applicable exclusion amount beginning in 2004.

In Carol's view, the most significant of the GST changes is the ability to accomplish downstream splits or severances in trusts which have an inclusion ratio of something greater than zero and less than 1. She noted that a good bit of activity can and should be expected in trust reformation to take advantage of this, but also cautioned that this remedy is not a substitute for good estate planning.

Other significant GST changes were the extension of section 9100 relief for allocation of GST exemption, the new automatic allocation rules (which she described as very complex, and potentially very dangerous), and the allowance of a late allocation of GST exemption if a nonskip child dies after creation of a trust but before the occurrence of a taxable termination. With respect to the last change, Carol was not sure how this will tie in with the ETIP rules.

Carol noted with some humor that with all the inflation adjusted exemptions and exclusions being rounded to multiples of thousands, tens of thousands, and hundreds of thousands of dollars, the 2002 amount of gifts which a US person can receive from a NRA without reporting is now $11,642.

Jeff Pennell reviewed the IRS business plan for pending projects. He noted that the IRS plan year is now on a fiscal year ending June 30, which is why there was no major flurry of regulations issued in December 2001 (unlike in prior years). Chief among the new projects will be new regulations defining income under section 643(b), the anticipated issuance of new model charitable remainder trust forms, the supposed issuance of section 2057 regulations (which Jeff doesn’t think we will see because of the repeal of section 2057 itself), and regulations under section 2519 dealing with whether net gift rules will apply when a surviving spouse triggers acceleration of the remainder interest in a QTIP trust. The key question under section 2519 is whether the 2207A right to recover gift tax from the remainder beneficiaries will reduce the amount of the taxable gift, and Jeff believes the answer to that question should be "yes."

Dennis discussed the Mellon case (Federal Circuit, 265 F.2d 1275) which held that the 2% floor under section 67 applied to payments made by a trustee to outside investment advisers and for accounting and tax services. He noted that the IRS is now treating the deduction of those expenses as an audit item for trust 1041's. But he also noted that there is a case pending in the 4th Circuit which will address raises the same issue. The Service's position (and the holding of Mellon) is that to be deductible, expenses must be paid in the administration of the trust, and they must be incurred only because the property is held in trust.

Dennis also briefly discussed split dollar developments, which will be addressed later in the week in more detail. He noted the issuance of Notice 2002-8, which revokes Notice 2001-10. Notice 2002-8 sets forth positions expected to be found in the pending regulations. In essence, if the employer owns a split dollar policy, the arrangement will be characterized as an employment arrangement. If the employer is not the owner (which is more typical in estate planning situations), the arrangement will be treated as a loan arrangement subject to section 7872. January 28, 2002 will be a grandfather date for split dollar arrangements: inside build up will not be taxed annually, and the insurer's alternative rates (one year term) can be used. There will be a 2-year correction period allowed for rollout of split dollar arrangements.

Carol discussed the final charitable lead trust regulations governing measuring lives, and PLR 200127023, which analyzed the tax consequences of terminating a charitable remainder unitrust on an actuarial basis. She also discussed PLR 200140027, in which a donor who proposed to accelerate the charitable remainder by assigning his unitrust interest to the charitable remainder beneficiary. The ruling followed Rev. Rul. 86-60 in holding that the partial interest rule of section 170(f)(3) does not prevent the allowance of an income tax deduction for the released interest.

Dennis covered two rulings not in the seminar materials. In PLR 200150027, a charity formed a single member LLC to receive a gift of real estate which it did not wish to own directly, and the Service ruled that the LLC would be disregarded as a separate entity. Although the ruling did not address tax consequences under section 170, Dennis felt that a deduction should be allowable to the donor. PLR 200152018 addressed a charitable remainder unitrust in which the donor had retained the right to change the charitable beneficiaries. The donor proposed to exchange his 5% unitrust interest for a charitable gift annuity. The PLR addresses the income tax consequences to the donor arising out of the exchange.

Carol discussed the 2001 legislative changes to section 529, and Notice 2001-55 which liberalized the restrictions on making changes in investment strategy for 529 plans. Dennis noted that the definition of "education" under section 529 is broader than it is for gift tax purposes, because it includes room and board, which often are more significant than tuition payments.

Jeff discussed the proposed regulations under section 643(b). He noted that with respect to the inclusion of capital gains in DNI, the only really significant departure from prior law in the proposed regulation is that the governing instrument itself can now be the source of authority for allocation rules. He also noted that gains and losses must be netted out against each other before allocation under the DNI rules. He also cautioned that even though capital gains may be included in DNI, an in kind distribution of assets to satisfy a fixed amount (such as income) will trigger gain under the standard Kenan rules.

Carol discussed the conversion of GST grandfathered trusts to unitrusts under the proposed regulations. She noted that the proposed regulations had not addressed the consequences of moving a grandfathered trust from a state which does not have law authorizing an income interest to be defined in unitrust concepts to a state which does have such a law. Carol has asked the Treasury Department to address this in the regulations.

Dennis observed that in drafting unitrust clauses in total return trusts, rolling averages of fair market value should be used to avoid rapid and severe upswings or downswings in distributions to income beneficiaries due to market fluctuations.

Carol discussed the Read case (114 T.C. 14), which was recently affirmed by the Eleventh Circuit. The case involved the redemption of stock owned by a wife pursuant to a divorce decree, and at her husband's election the wife's stock spouse was redeemed by an ESOP. The redemption was treated by both courts has having been made on behalf of the husband.

In a general review of family limited partnership cases, Jeff stated that in the last 18 months, the government's arguments challenges to partnerships as bona fide arrangements that can achieve valuations discounts have failed. In addition the government's argument seeking to apply sections 2703 and 2704 have failed. Jeff noted that in FSA 200049003 the government still seeks to argue for gifts upon creation of FLPs, but he noted that the government has lost those arguments in Strangi (115 T.C. 478, which was appealed to the Fifth Circuit) and in Jones (116 T.C. 121).

Jeff observed that it is more accurate to state that the government is losing more valuation arguments based on its appraisals than that taxpayers are winning their arguments. In summary, Jeff believes that we are where we were 6 years ago: namely, that the governing rule is still "willing buyer, willing seller" – but that most people tend to focus only on the willing buyer and not the willing seller. Would the seller really sell at the appraised price?

Jeff noted that a New Jersey court has refused to allow a valuation discount for employee benefits because of the income tax liability that must be paid by the recipient. He stated that the public policy really should be that section 691(c) provides relief for this in the contest of estate tax valuations.

Carol discussed the 1997 Mitchell case (74 TCM 872) in which the burden of proof shifted to the IRS because its position in an estate tax deficiency notice was arbitrary and excessive.

Dennis discussed the 1999 Gross case (78 TCM 201), which dealt with the issue whether valuations of subchapter S stock should be "tax affected" by assumed corporate tax rates. The case was recently affirmed by the Sixth Circuit. Both the Tax Court and the Sixth Circuit rejected the taxpayer’s argument in favor of discounts. Dennis noted that this should not be a stand-alone issue. Depending upon which valuation methodology is being used (EBITDA, comparison to C corporations, inside asset valuations, etc.), tax effects may or may not have direct relevance, and should be address by a qualified appraiser in an overall composite manner.

Jeff said that there are now at least 3 cases where lottery winner with nonassignable winnings died before complete payout. One case (Shackleford, 262 F.2d, 9th Circuit) allowed a valuation discount, but two cases did not: Gribauskas (116 T.C. 142) and Cook (83 TCM 154).

Jeff also discussed the Schwan case (82 TCM 168), which involved a double evaluation, first for estate tax inclusion, and second for estate tax charitable deduction purposes. That led to a discussion among Jeff, Dennis, and Carol whether spendthrift clauses in a trust could produce a discount when valuing an the interest passing to a beneficiary. Jeff observed that this could be a double edged sword, and that perhaps spendthrift clauses should not be used automatically in boilerplate provisions, especially in marital deduction trust.

Jeff touched quickly upon some recent cases dealing with deductibility of administration expenses after the Hubert regulations, and he cautioned drafters to include language in governing instruments that will allow debts, expenses, and taxes to be paid from income or from principal.

Carol noted that in the current low interest rate environment, QPRTs and charitable remainder annuity trusts are not as attractive. Dennis commented that by the same token, charitable lead annuity trusts and GRATs are excellent tools now. Carol observed that the 7872 regulations were proposed in 1985 and have not been finalized. Under those regulations prepayment options are to be ignored. So in restructuring transactions that have already been completed in order to take advantage of the current low rates, refinancing should be a viable option. Dennis queried whether you can use long term rates if there is a prepayment option. Both he and Carol believe the answer is yes.

Jeff discussed the Armstrong case (132 F.Supp.2nd) where there had been a net gift in which the donees had agreed to pay gift taxes if the asset was valued over a certain amount. The IRS valued the asset in excess of that amount, and because the donor died within three years, the gift tax was also grossed up into the estate. the taxpayers argued that there should be a valuation discount because of the possibility of a gift tax liability and the potential for estate tax gross-up. The court ruled that the potential liability was too speculative to affect the value of the gift. Jeff commented that tax apportionment clauses in wills and trusts should be reviewed to see how they deal with gross-up of gift taxes. He also noted that net gift transactions should be carefully structured and clear, because the Armstrong court had characterized the transaction before it as "suspiciously confusing."

Carol and Dennis commented on the Trotter case (82 TCM 633), another case in which the government was successful in imposing estate tax under section 2036 where the decedent had continued to live in a residence that she had transferred to a trust of which she was not a beneficiary.

Jeff discussed PLR 200101021, which involved a joint revocable trust in which the first spouse to die would have a general power of appointment over the surviving spouse’s share of the trust assets. The objective was to achieve a 100% basis step up upon the death of the first spouse, in the same manner as community property. The ruling said that there would be no 100% basis adjustment, and Jeff said no one should be surprised that the government wouldn’t concede this in a ruling. However, he said that the ruling had a number of favorable points, and that it actually shows a valuable planning tool for married couples whose estates are less than two applicable exclusion amounts. The IRS ruled that 100% of the trust assets were included in the deceased spouse’s estate, which meant that a credit shelter trust could be created for the benefit of the surviving spouse without further inclusion of that credit shelter trust in the estate of the surviving spouse. The value of this as a planning technique is that you don’t need to worry about severing jointly owned assets into the separate names of each spouse to ensure use of the full unified credit. Jeff said that the most questionable part of the ruling was the IRS’s ruling that the surviving spouse’s grant to the deceased spouse of the general power of appointment over the surviving spouse’s share of the trust qualified for the gift tax marital deduction. Nevertheless, Jeff said that he feels planners can feel comfortable in relying on this ruling. Dennis pointed out that the estate planner should be aware of the conflicts of interest issues between the spouses, and also should make sure that there are no creditors (in states where assets subject to a general power of appointment can be reached by the decedent's creditors).

Carol discussed the 1997 Smith case (108 T.C. 412) in which the Tax Court allowed an estate tax deduction for a contingent claim based upon the amount of a settlement reached 15 months after death. That decision was reversed by the Fifth Circuit (198 F.3rd 515). She then discussed later cases raising these issues: McMorris (77 TCM 1552) and O'Neal (102 T.C. 666).

Jeff reviewed the handout materials which note that state law generally provides for interest on an outright bequest and for a share of income to be paid on bequests in trust. A choice between the two approaches can be made in a will or trust. When dividend yields on investments are low, it might seem preferable instead to provide for payments of interest. But the IRS position is that interest paid to the beneficiary is taxable as income but is not deductible by the estate or trust, whereas if the beneficiary receives an allocable share of estate or trust income, that will be deductible by the estate or trust under the DNI rules.

Carol discussed some recent GST developments. She cautioned the audience to remember the Cottage Savings case – even though the 2001 tax legislation and the laws of many states now allow GST trusts to be reformed and reorganized, if the beneficial interests before and after the reformation are materially different, there may be an income tax recognition event.

Carol reviewed PLR 200143019, which held that a loan from a grandfathered trust to beneficiaries did not cause the trust to lose its grandfathered status, because the loan was secured. Carol believes that the presence of absence of security is irrelevant, if the loan is bona fide.

In PLR 200107105, a child assigned a remainder interest in a charitable lead annuity trust to her children (who were skip persons), in hopes of avoiding GST tax by becoming transferor over the trust because of the gift of the remainder interest. The ruling concluded that the child became the transferor for GST purposes of a portion of the trust equal to the present value of her remainder interest, and that the original grantor remained such for the balance of the trust. Carol said that the ruling does not make a thorough or careful analysis of the issues, and that if you advise clients in carrying out such a transaction, be sure they understand there are risks and that the desired results might not be obtained.

Dennis reviewed the Cook case (269 F.3rd 854), in which the 7th Circuit affirmed that revocable spousal interests in a GRAT do not reduce the value of the taxable gift because they are not "qualified interests." Of course, that holding is not so important in light of Walton, which allows GRATs to be zeroed out for gift tax purposes, even though the IRS has appealed Walton. Carol does not expect Walton to be reversed on appeal.

Carol observed that it is important when zeroing out a GRAT to have the balance of the interest payable to the grantor’s estate. But what do you do with that interest once it is in the estate? One way to deal with it is to have the annuity paid to the surviving spouse by a specific devise in the will or revocable trust. This certainly works. If the remaining term interest is devised to a QTIP trust, the QTIP trust should require payment to the surviving spouse of the greater of the annuity interest or the QTIP trust income. Having the grantor's estate retain the reversionary interest in the GRAT avoids the nondeductible terminable interest rules under section 2056, if the annuity interest is then devised to the spouse.

Jeff very briefly mentioned the True case ((82 TCM 27), a 270 page opinion dealing with the effect of a buy-sell agreement in fixing values for estate tax purposes. Jeff said that the opinion is of some relevance to older buy-sell agreements but that case is mostly a testament to an arrogant taxpayer.

Dennis mentioned PLR 200129018, which allowed a change in the operation of a business from a trust to an LLC without adverse effects under section 6166.

Jeff discussed savings clauses and FSA 200122011. The FSA said that a formula clause awarding any "excess" value in a transaction to charity was void as against public policy. However, Jeff felt that not all savings and formulas clauses are invalid. He contrasted the Procter case (142 F.2d 824), which invalidated a savings clause, with the King case which upheld the validity of a clause which required the parties to restructure the transaction if the values found by the government were not in accord with the values set by the parties. But Jeff also referred to the McLendon case (TC Memo 1993-459) in which the Tax Court said King was specifically clear in that there was no donative intent, and further that the Tax Court likely would not reach the same holding in King if it were presented again. So Jeff says that there is uncertainty about tax savings clauses and formula clauses today. Carol commented on how inconsistent it is for the government to take this position in this context, whereas it specifically blesses formula clauses in matters such as QTIP elections. Jeff said that he was not defending the government's position, but that the FSA and the McLendon cases are clear warning signs, but he supposes that including such clauses in documents doesn't hurt. Carol disagreed somewhat, saying that clients can get whipsawed – the result would be that a document would require an interest to be transferred to a charity or other party based upon an adverse valuation determination, whereas the government would not give recognition to the interest actually being transferred.

Jeff closed the presentation with a brief review of an equitable recoupment case (Mueller, 107 T.C. 189),which held that equitable recoupment can be used defensively against a valid claim but not offensively to collect a time barred underpayment or overpayment of tax. Carol observed the very need to resort to equitable doctrines in Tax Court is somewhat humorous, and that a better technique is to file protective claims for refund while there is still time.

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

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# Report #3

Tuesday, January 8, 2002

The below Report was compiled by our on-site Reporter, Ted Atlass, who is a distinguished member of the Colorado Bar Association practicing in Denver, Colorado.

TUESDAY, JANUARY 8, 2001

SINGLE STOCK MONETIZATION AND DIVERSIFICATION TECHNIQUES

S. Stacy Eastland, Esq., Goldman, Sachs & Co., Houston, Texas

I. INTRODUCTION

Discussed were tools for monetizing or diversifying concentrated stock holdings while delaying the imposition of income taxes. There is no one magic bullet - it is often necessary to combine the use several strategies.

II. WHY DIVERSIFY?

A properly diversified portfolio will both reduce the risk and enhance the expected return to be achieved.

III. NON-TAX FACTORS TO CONSIDER

Tax considerations cannot be considered in a vacuum. Business laws - such as state and federal securities laws, and the Hart-Scott-Rodino Act, need to be considered, as well as the client's non-tax objectives (e.g., generating immediate cash or ongoing cash flow, simplifying his or her investments, desires to get funds to family or charity in immediate or long term, desire to control the investments, unrelated business taxable income, and the market's sensitivity to the client's disposition of shares, etc.).

IV. SELECTED DIVERSIFICATION TECHNIQUES

A. Issues involving the use of traditional charitable remainder trusts were discussed, including CRATs, CRUTs, and NIMCRUTs - including their being non-amendable and irrevocable, the impact of inflation of a CRAT payments, the impact of raising and falling asset values on CRUTs, the tax disadvantages of CRTs (re the tier system under IRC Sec. 664, the problems re unrelated business income investments, etc.), and the risk of premature death causing a charitable windfall. Also discussed were the added advantages of traditional NIMCRUTs, especially their flexibility.

B. An innovative variation on the spigot NIMCRUT was discussed, involving the gifting of non-callable preferred limited partnership interests (representing perhaps 90% of all of the partnership's outstanding units) to a NIMCRUT. Management and growth units in the partnership would be kept in the family. An appreciated asset would first be given to a partnership, the partnership units then gifted to a NIMCRUT (structured to provide at least the minimum 10% charitable deduction), and the appreciated asset subsequently sold by the partnership. Such gifted non-voting preferred limited partnership units would provide that all payments be deferred for many years (perhaps 20 years) before becoming due shortly before the NIMCRUT is to end. Most of the gain from the sale of the asset would thus be deferred for 20 years under the tier rules of IRC Section 664.

C. Also discussed was a technique where appreciate property would be exchanged for an annuity from a partnership owned mostly by a public charity (perhaps a donor-advised fund) - where the partnership would subsequently sell its assets for a long-term note to a different limited partnership consisting of the donor's children, with interest at the AFR rate. Such note could be a SCIN if it were desired to eliminate the mortality risk associated with the early deaths of the donors.. The children would get the benefit of any investment return that beat the AFR rate, and the parents would get the favorable IRC Sec. 72 tax rules relating to annuity payments (rather than less favorable IRC Sec. 453 installment sale treatment). There were a lot of details and issues relating to this technique which were covered in detail in the outline.

D. Public or multi-client exchange funds were discussed as a means of diversifying one's stock holdings (although the stock ultimately received would not have a stepped-up basis). Such partnership must stay in existence for 7 years, and no cash can be received in the first two years, in order to avoid disguised sale rules. Also, such partnerships must be formed other than strictly with public securities.

E. A derivative technique, called a "collar", combines the purchase of a put option and the sale of a call option - where the price received and paid for such options offset each other (i.e., a "zero-cost" collar). Economic risk must exist, but is limited - and most of the owner's equity can thus be immediately borrowed out and redeployed in other investments, even though income taxation is postponed because the original stock has not yet been sold.

F. Another derivative technique, called a "prepaid variable rate forward", combines a collar structure with a loan in a single transaction - the shareholder's risk is limited, and the shareholder gets about 85% of his or her equity out up front - and, in 3 or so years, is obligated to tender an appropriate amount of stock to close out the deal (less shares need be tendered if the stock goes up, and income taxes are postponed until such stock is tendered).

G. Another technique, called the "mixing bowl example," involved the use of appreciated stock , a partnership, and a c corporation, was discussed that may allow a family to achieve results not unlike those obtained with a public exchange fund.

V. COMPARISON OF TECHNIQUES

Extensive spreadsheet were attached to the outline and compared the different diversification discussed diversification strategies with each other - and which indicated that there is no one technique which is always better than the others.

THE NEW MINIMUM DISTRIBUTION RULES

Marcia Chadwick Holt, Esq., of Davis Graham & Stubbs LLP, Denver, Colorado

I. THE 2001 PROPOSED REGULATIONS

Proposed regulations relating to minimum distributions were released on January 17, 2001, and issuance of final regulations is expected in the near future - possibly February. The required minimum distributions (RMDs) under the 2001 Regulations are generally smaller than those required by prior law,

II. CAVEAT RE BENEFICIARY DESIGNATIONS

The preemption of ERISA over state law was emphasized, and the need to designate a new beneficiary after becoming divorced was discussed - in the Engelhoff case, the state statute cutting out an ex-spouse from non-probate assets upon divorce was held inapplicable where the decedent had not changed the beneficiary designation that named his former spouse as beneficiary.

III. QUALIFIED PLAN DISTRIBUTION OPTIONS

Remember that ERISA requires that married participant in a pension plan, including a money purchase pension plan: (a) at retirement is required to take a qualified joint and survivor annuity, and (b) at death prior to retirement must take a qualified pre-retirement survivor annuity.

The plan may, but need not, offer optional benefit forms with spousal consent.

IV. DISTRIBUTIONS DURING LIFE OF PARTICIPANT OR OWNER

The required beginning date (RBD) is generally April 1st of the calendar year following the later of the year the participant attains age 70-1/2, or, unless a 5% owner or IRA owner, April 1st of the calendar year the participant retires.

The 2001 proposed regulations provide a new lifetime uniform table for determining required minimum distributions (RMDs) which must be taken after the RBD. Such tables can be used even where there is no Designated Beneficiary. No life expectancy recalculation is required. The participant's age is used to get the divisor. An exception to the new tables applies if the spouse is a designated beneficiary and is more than 10 years younger than the participant - and meets certain other requirements - in which case a "joint life and last survivor expectancy table" can be used to computed the MRD.

A controversial provision in the proposed 2001 regulations would require "IRA trustees, issuers, and custodians" to report RMDs annually to the IRS, the IRA owner and the IRA beneficiary. Many comments were made to the IRS regarding this requirement, and no effective date has yet been set for it. Additionally, new aggregation rules for multiple IRAs will now apply.

V. DESIGNATED BENEFICIARIES

The proposed 201 regulations provide that during the life of an IRA participant or owner, the new uniform table (or exception re 10 year younger spouse) applies - whether or not there is a Designated Beneficiary. The Designated Beneficiary's life expectancy only matters after the death of the participant or IRA owner.

The Designate Beneficiary is determined on December 31st of the calendar year following the calendar year of the participant's or IRA owner's death. The interim or shakeout period after death can thus be used to get rid of unwanted beneficiaries (i.e., cash them out, do disclaimers, eliminate beneficiaries who die in common disasters, etc. - although not all plan administrators will recognize disclaimers) - so that the remaining beneficiary qualifies for favorable stretched out RMDs.. Individuals, not estates or charities, can be Designated Beneficiaries. If there are multiple beneficiaries, use the factor for the beneficiary with the shortest life expectancy. Certain trusts can be designated beneficiaries.

VI. POST-DEATH DISTRIBUTIONS

There are two rules that may govern how quickly distributions must be made from a qualified plan and IRA where death is before the RBD or before distributions commence - (a) one allows use of the life expectancy of the Designated Beneficiary per Reg. Sec. 1.72-9, Table V), and, (b) the other requires that all distributions be made by the end of the calendar year in which occurs the 5th anniversary of the death of the participant or owner. The plan controls which applies - but if the plan is silent, then: (1) the life expectancy rule applies if there is a Designated Beneficiary, and (2) the five-year rule applies if there is no Designated Beneficiary. A special rule applies if the surviving spouse if the Designated Beneficiary and the sole beneficiary of the account. - and allows use of the surviving spouse's life expectancy, which is automatically recalculated. An "at least as rapidly" rule applies where death occurs after the RBD, or after distributions commence - and an exception applies where the deceased participant or IRA owner had no Designated Beneficiary.

VII. SUMMARY CHART FOR DETERMINING RMDs

A very useful summary chart for determining RMDs was provided in the outline.

VIII. SPOUSAL ROLLOVERS

It was pointed out that the proposed 2001 regulations require that a surviving spouse, who is age 70-1/2 or older, must first take the RMD for that year as owner - and only the balance may be rolled over. Also, it was pointed out that EGTRRA of 2001 expanded permitted spousal rollovers to be made to IRC Sec. 401(a) plans, Sec. 457 plans, and annuities under Sec. 401(a) and (b). Additionally, in certain circumstances, the Secretary can now waive the 60 day rollover requirement.

USE OF IRD FOR CHARITABLE BEQUESTS

Prof. Christopher R. Hoyt, University of Missouri School of Law, Kansas City, Missouri

I. GIFTS THAT PRODUCE THE BEST TAX RESULTS

Generally, the best tax results come from the lifetime gifts of appreciated long-term capital gain property to charity, as a charitable deduction for the full fair market value results, and the built-in capital gain is avoided. Reduced tax benefits apply to charitable gifts of ordinary income property, such as inventory, and to gifts of tangible personalty, such as paintings.

At death, it is best to give so-called "IRD" (income in respect of a decedent) assets to charity, as the estate is reduced for death tax purposes by the full amount of the IRD, the charity is not subject to being income taxed on receipt of the IRD (as would be a non-charitable beneficiary), and other assets (which will not be income taxable to non-charitable beneficiaries, and which will qualify for basis step-up, if appreciated) are thus freed to be gifted to non-charitable beneficiaries.

It was interesting to learn that of the roughly 2% of decedents who are required to file estate tax returns, only 17% to 19% of the estate tax returns filed in several selected years in 1986 to 1998 claimed a charitable deduction.

## II. FUNDAMENTAL PLANNING POINTERS

Testamentary charitable gifts should be made from IRD assets. Even persons not inclined to make charitable bequests may consider gifting retirement plan assets to charity at death, due to the high double tax on such assets if such assets pass to individual beneficiaries. Also, naming a charitable remainder trust to be the testamentary beneficiary of a retirement plan or of other IRD assets at death is a way to defer the income taxation on such IRD.

## III. OVERCOMING OBSTACLES

Ideally, IRD assets will go directly to charity at death - so that the IRD never hits the estate's income tax return (e.g., charity will be the direct beneficiary of the retirement plan or U.S. Savings Bonds having accrued but untaxed interest). Otherwise, if the estate collects the IRD, it is necessary that the state qualify for the charitable income tax deduction via a well-timed payment to charity, or via the permanent charitable set-aside deduction under IRC Sec. 642(c).

The executor/trustee should be given authority to make non-pro rata distributions (so IRD assets can be distributed to charity), and there should be language in the document (which, it is hoped - but not guaranteed - that the IRS will respect) that any charitable bequests are deemed funded first from IRD.

Additionally, under the 2001 proposed regulations dealing with required minimum IRA distributions (which provide that the Designate Beneficiary is determined on December 31st of the calendar year following the calendar year of the participant's or IRA owner's death - see summary of Marcia Holt's talk for more details) - it will be advisable, if charity and individual beneficiaries are to share an IRA, that the charity be paid in full by December 31st of the calendar year following the account owner's death, if a separate account is not established for the charity, so that the remaining individual beneficiary can get maximum deferral.

IV. LIFETIME CHARITABLE GIFTS FROM IRAs AND QUALIFIED PLANS

Lifetime gifts from retirement plans result in the participant having both income from a retirement plan distribution and an offsetting charitable income tax deduction - so contributing appreciated stock during life is a better deal, from income tax standpoint. But income tax savings can result from the lifetime charitable gift of a retirement plan distribution in certain circumstances involving lump sum distributions (either of employer stock, or which qualify for forward-averaging tax).

V. STRUCTURING CHARITABLE BEQUESTS UNDER THE 2001 PROPOSED REGULATIONS DEALING WITH RMDs

The outline contains a detailed analysis of how to structure charitable bequests under the 2001 proposed regulations dealing with required minimum distributions.

VI. LEGAL AUTHORITY ON POINT

Useful as a reference, a number of private letter rulings dealing are cited in the outline which deal with the issue of charitable gifts and IRD.

UNDERSTANDING YOUR CLIENT'S MONEY PERSONALITY

Jon J. Gallo, of Greenberg, Glusker, Fields, Clayman, Machtinger & Kinsella LLP, Los Angeles, California

I. IMPORTANCE OF CLIENT VALUES

Every client has values and desires, separate from saving taxes, that must be considered. We must humanize are approach to estate planning - i.e., be both "high tech" and "high touch."

II. REDUCTION OF STRESS

Planners don't realize how stressful the estate planning process is to clients - e.g., how stressful thoughts and discussions of his or her own death, the death of a spouse or child, divorce, financial calamity, disability, sale of one's business, etc., are to the client.

Client stress can be reduced by: (1) Listening (i.e., more human interaction, rather than mail and e-mail contacts, etc.), (2) Normalizing (i.e., explain the estate process and that most clients don't like to think about such things, have trouble making decisions, have to revisit the estate plan every few years, etc.); and (3) Reframing (i.e., rather than talking about death and taxes - instead focus on a family vision statement, goals, and values). It was suggested that the concept of the "ethical will"be looked at in this regard.

III RELATIONSHIP WITH MONEY

Estate planners must understand the client's relationship with money - i.e., how they feel, how they think and how they deal with it. Attitudes towards the acquisition of money (could they not care less about it, or would they do anything to get more of it), the use of money (is the client a miser, or do they spend everything they get), and the management of money (do they micro-manage every dime, or are they disorganized and hate being involved in money management).

# CHOICE OF LAW IN TRUSTS: HOW BROAD IS THE POSSIBLE SPECTRUM?

Malcolm A. Moore, Esq., of Davis Wright Tremaine, Seattle, Washington

## I. INTRODUCTION

The governing law with respect to the validity, construction, administration, and meaning and effect of a trust was reviewed. Due to policy reasons, a settlor has historically had the least amount of flexibility (re choice of laws) with reference to issues of validity. Section 403 of the new Uniform Trust Code would eliminate the traditionally differences in rules relating to trusts with land and trusts with other assets, relating to the determination of the trust's validity and meaning and effect - thus granting more authority re choice of law matters than has historically existed.

Questions of validity (e.g., public policy issues such as the rights of creditors or surviving spouses) involving trusts holding land have historically been governed by the law of the land's situs - at least while such land continued to be held by the trust. Questions dealing with the validity of other trusts have historically be decided by the law of the testator's (or settlor's domicile), or (if no public policy in the testator's or settlor's domicile is violated), by the law of the state with the most significant relationship with respect to the particular issue at hand.

Questions of construction, absent a choice of laws clause, seem to be less well-settled. They may be decided by the law of the settlor's (or decedent's) domicile, or where the trust is administered, or the law where the most significant relationship to the matter at issue exists, depending upon the circumstances. The key is that these are default rules that can generally be overridden by a specific choice of laws clause in the document. Such choice of laws clause may mandate what law is to apply, or may give the trustee (or trust protector) some flexibility to choose what law is to apply.

II. SITUS

Situs generally means the place of the trust's administration. Where the choice of law is tied to situs, moving the place where the trust is administered (typically where the trustee is located) may change applicable law as to the rights of creditors of settlors or beneficiaries, accounting requirements, availability of non-judicial settlement provisions, state income tax consequences, etc.

III. WHEN CAN A SETTLOR/TESTATOR CHOOSE THE APPLICABLE LAW?

Historically, there is little law re the ability of settlors and testators to choose what law governs the validity of a trust of land. The Uniform Trust Code will presumably create such an ability where there is some nexus between the trust and the jurisdiction whose law is chosen. Settlors and testators of trusts of movables have historically had broader rights to designate a choice of law governing the validity of a trust of movables,, at least provided that there is some nexus with the chosen jurisdiction and where no strong public policy of the settlor's or testator's law of domicile is violated.

Testators and settlors have long been able to make choice of state laws provisions re construction and administration (e.g., trustee powers , compensation, indeminficiation and succession; trust investments and termination; and principal and income issues). It was suggested that they should also be able, via incorporation by reference, to cause a uniform act (such as the Uniform Trust Code or Uniform Principal and Income Act) to govern a trust.

IV. MOVING A TRUST

Trustees may be given directly given the right to move a trust's situs or its principal place of administration to a different jurisdiction, or such a change of jurisdiction may happen indirectly by reason of a change of trustee occurring (via resignation, removal, or the exercise of a power of appointment), a trustee moving, etc.

V. WHY MOVE A TRUST

Moving a trust's situs to a different jurisdiction could be desirable for a number of reasons, including more favorable income tax consequences, to have different rules re the availability of court oversight or alternative dispute resolution, to allow the application of different principal and income rules (including a total return investment concept), etc.

VI. CHOICE OF LAWS FROM STATES OTHER THAN THE STATE OF SITUS

The trustee or a third party, such as a trust protector, could be given the power to adopt the laws of other jurisdictions (including the laws of different jurisdictions for different issues), so long as the chosen jurisdiction has some relationship to the trust where matters of validity are concerned), so long as the state whose laws are being adopted does not have limitations that have not been met (such as requiring that a trust's principal place of administration be in the state in order for such power to apply to a trust).

VII. LIMITATIONS MAY NEED TO EXIST

Trustees, protectors, and beneficiaries should not be given such broad discretion as will cause potential gift and estate tax problems (e.g., causing a taxable power of appointment to occur, etc.), or which could defeat the objectives of the settlor/trustor. Additional, attempts to grant powers which would violate strong public policy (encourage divorce, limit spousal rights, defeat creditors, etc.) would presumably be ineffective.

VII. DRAFTING CONSIDERATIONS

It was suggested that validity of the trust be covered by whatever applicable law would support such validity, and that the trustee be given broad authority to select what laws (including laws of jurisdictions and uniform acts) are to govern questions of construction, the meaning and effect of the trust's terms, and the administration of the trust - including moving the trust, or not exercising such powers. In default of such an exercise of discretion, the laws of the place of administration would apply. Additionally, the trustee would be prohibited from any exercise of discretion that would cause the trustee to be deemed to possess a general power of attorney for federal gift and estate tax purposes.

NEWS FROM THE IRS:

>The IRS has just publishes the New Form SS-4, Application for Employer

>Identification Number

>(PDF). It is a Two-page PDF document. (Internal Revenue Service).

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>The instructions are also there in a separate file - iss4.pdf

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That is it for Report No. 3. The full text of all the Reports

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# Report #3a

REPORT NO. 3A - Friday Afternoon, January 11, 2002

This report is brief and is being sent to all of you mainly to let you know that there is a lot more to come, so stay tuned. It takes time for our reporters to compile their stories and send them in to the Editors, then some more time for the Editors to compile those stories into the Reports that are being transmitted to all of you.

We are running behind at the present time, but Report #4, dealing with the vendors who were at Heckerling this year and a lot of other interesting "techie" news, will go out sometime tomorrow morning (there will be some great stuff in that one). This will be followed soon thereafter, Saturday afternoon and Sunday, with Reports #5, #6, etc. covering the sessions that were held Tuesday afternoon (Drafting for EGERTA), as well as Wednesday through Friday mornings, and some of the Special Session presentations that were given in the afternoon on Wednesday and Thursday. We hope to have all of the Reports for 2002 out by no later than the middle of next week at the latest. The last Report will be denoted as the "Final" one so you will know you have been sent all of them.

**In the meantime**, here from Report #3 is a reminder about one of the previously announced HECKERLING SPECIALS (and there will be some more great ones coming soon), and more late-breaking news from the IRS...........................

**HECKERLING SPECIAL (a repeat announcement):**

Stephan Leimberg <steve@leimbergservices.com> has recently informed us that his Company [Leimberg & LeClair] is willing to offer a Heckerling Special for anyone who sees this announcement and subscribes to his LISI Newsletter service during the time the Institute is taking place and before the Final Report is issued. All you have to do is send an e-mail to service@leimbergservices.com and include the words HECKERLING DISCOUNT in the subject. Bob LeClair will get back to you and handle the sign-up. They will give those people a monthly price of $13.95 rather than the $14.95 regular price. They also can take a free look at the site and its many services by going to http://www.leimbergservices.com/ and clicking on the blue FREE TRIAL button on the top right.

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That is it for Report No. 3A. The full text of all the Reports will be posted on the ABA RPPT Web site at http://www.americanbar.org/groups/real_property_trust_estate.html.

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**MIAMI INSTITUTE GENERAL INFORMATION:**

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# Report #4

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REPORT NO. 4 - The Vendors and Other Techie News

This report is usually Report #1, but it took us longer than expected to gather up all the information we could from the vendors who were in the Exhibit Hall at Heckerling this year and compile it into this Report.  In addition, it took us much longer than we expected to compile this Report.  Due to these delays, we have been able to negotiate extensions of some of the special show deals and prices that were being offered by the vendors at Heckerling (**see further below re**).

We are indebted to **Jim Eidelman** of Eidelman Associates (President of the Company that markets the EP Expert software system that is built on top of his WinDraft system and Microsoft Word - further details on this product are below) and **Alan Rothschild**, the current Co-Chair of the ABA RPPT Sections Public Web Site Committee and former Chair of the PT Division's Technology Committee) for carrying the laboring oar on the below "Reports from the Exhibit Hall."

**First, a list of who was (and, interestingly, was not) there (in alpha order):**

BNA Software - www.bnasoftware.com
Brentmark Software - www.brentmark.com
Cowles Legal Systems - http://www.cowleslegal.com/
Crescendo Software - www.crescendosoft.com
CCH Inc. - www.tax.cch.com
Eidelman Associates - www.lawtech.com
Lackner Computer Group - www.lacknergroup.com
Leimberg & LeClair, Inc. - www.leimberg.com
ProBATE Software - www.probate-software.com
ProDoc Will Forms - www.prodoc.com
Schumacher & Co. - www.estplanning.com
TEdec Systems - www.tedec.com
US Trust Company of New York - www.ustrust.com
WealthCounsel LLC - www.wealthcounsel.com
West Group - www.westgroup.com
Zane & Associates - www.zanenet.com
ZCalc

**And among the missing (we were told) were:**

ACTEC Quicken Templates - www.actec.org - but then they still only sell this to lawyers according to their Web site
Advanced Logic Systems DPS - no Web site, but you can e-mail sales@dpsbyals.com
Appraise - www.appraisenj.com
Estate Valuations & Pricing Systems (EVP) - www.evpsys.com
FastDraft
Financial Data Service - www.financialdata.com
Lawgic Publishing - www.lawgic.com
The Technology Group, Inc.
Tiger Tables - www.tigertables.com **but** see further below

**Next, here is the Report that was filed by Alan Rothschild:**

Report on Current Technology at Heckerling Estate Planning Institute
by Alan F. Rothschild Jr. Esq.

The Institute again offered a broad array of technology vendors and products, from online research services to sophisticated document assembly and estate forecasting software. The major research services, such as **RIA & Lexis-Nexis**, had impressive exhibits of their latest product offerings—primarily online research services. Both were pushing their practice-oriented pricing plans at the meeting. Lexis also exhibited its limited, **state-specific Wills & Trusts forms**, which I think are the old Matthew Bender products.

**CCH's** primary focus was its newly redesigned **ViewPlan**, which is CCH's primary planning software today (it previously offered Vista as well). Initial cost is around $925, renewal $535. The new version appears to offer simpler interface and the ability to automatically adjust for new tax law or to manual insert exemption amount and tax rate. CCH is also in the process of merging some of its other planning programs and rolling out a new program in 2002. Although not exhibited at Heckerling, it is also pushing a product by an affiliated company called **ProSystem FX**. This is a new "tax compliance" package that will prepare Forms 706, 709, etc.

Some of the vendors that seem to have their regular exhibits included **Crescendo's Planning Giving** program (seems to be more oriented to development rather than attorneys), **Lackner's 6-in-1** system, and **US Trust's E-Plan** software and **Practical Drafting** series, both in hard copy and CD-ROM.

One trend that seems to be gaining ground is client communication and interaction via the Internet. **Connect2A.com** exhibited their site which boasts of such interactivity, while **PPC** and **ProBATE Systems** both marketed their new services which allowed online communication and/or information sharing with clients and other professionals on the planning team. This is either a trend to watch or an attempt to sell something that can be accomplished with a firm website and e-mail, we'll have to see.

**PPC** also exhibited its **Estate & Trust Consultant**, which for around $500 offers some very sophisticated estate planning research on CD-ROM, including material on preparing 706/709 & 1041, ILIT's and FLP's. A good value in the higher end products.

**Brentmark** and **ZCalc** were also present with their excellent forecasting and tax calculation products. Saw a new **Charitable** planning program that runs on ZCalc but did not get to review the details. Brentmark also said it had just come out with **College Funding** and **Stock Options** programs, but I did not review these either.

**Most interesting** was the **document assembly situation**. **ProDoc** was again present with its **Texas and Fla.** document assembly programs. Their president (Alan Schoolcraft Esq.) says they have over 4000 subscribers now and will be adding at least one more state this year, although sadly they have discontinued supporting the **Colorado Probate System** as of 2002. Perhaps **the really big news** from Heckerling 2002 was the **absence of** both **Lawgic** and **The Technology Group (Wealth Transfer Planning).** In prior years, these booths drew lots of attention and buzz. Both products ran into serious financial trouble in late 2001, and their futures are yet to be determined. I followed up after the conference with insiders from each of these entities, and there does appear to be both a commitment and a real interest in continuing these two fine document assembly programs somehow. However, for the time being, I understand that **Lawgic** is offering e-mail and web site support only, but is not issuing any new program updates while support for

**WTP** is now being provided by an independent contractor via the vendor's **LawOnTheWeb** Web site, which is finally back up and running again .

2002 will be a very important year for both of these products and document assembly software in general (see immediately below re the **EP Expert & WinDraft** and new **WealthCounsel** DAE software offerings).

**Next, a "virtual" report from your Editor himself from the snow-covered ski slopes of Keystone, Colorado, on some other "hot of the presses" document assembly news:**

**EP Expert & WinDraft:**

First, and although Jim Eidleman's EP Expert document drafting system is not really "new," as it has been around for some time now, there have been several recent improvements in it, and the law firms of Holland and Hart LLP in Denver and Joslyn, Keydel & Wallace LLP in Detroit (amongst others) have both installed this system recently, in one case to replace an ageing CAPS system and support the firm's permanent move from WordPerfect to Word.

EP Expert is not just a document production system - it is a practice system for estate planners that not only drafts trusts, wills, powers of attorney and related supporting documents, using either the system's model documents or the law firm's own documents and language, but it prints out an outline checklist and integrates with document management and other Windows programs. One drawback (for those of us who are loyal users of the Corel's WordPerfect software) is that this product is currently designed for use only with Microsoft Word, but one plus is that the assembled documents seamlessly end up in MS Word where they can be freely edited and revised. The underlying "engine" for this product is the Company'e proprietary WinDraft document assembly system, which can optionally integrate with DOCS Open or iManage and other document management software programs and uses an ACCESS database "under the hood."

Some highlights from the current versions are (1) a visual outline-structured dual-window front-end with wording and questions that can even be customized and allows the user to visually see all the available decisional choices, (2) the fact that favorite document patterns can be assembled and saved as a single form for later reuse, 3) its automatic handling of gender changes, and (4) its EPPeople feature that can be used for entering recurring data.

According to Jim, EP Expert is designed for use both in small firms **(see small firm show special below)** and on a network in a large firm with DOCS Open and iManage integration. The core forms that come with his system are now being supported by a reputable large "old-line" law firm [he didn't tell me who it is] and have been updated for the new tax Act. In addition, he is about to add a community property RLT for use in CP states.

Considering that Jim is considered one of the "grandfathers" of document assembly systems and technology in the ABA Law Practice Management Section, I think you can safely rely on Jim's expertise, knowledge and product development in this area.

**WealthCounsel**:

The newest, and probably most exciting, entry into the document assembly marketplace this year is the WealthCounsel Practice System. Although this Company came out with its Family Limited Partnership system in late November of 1999, and exhibited it at Heckerling in January of 2001, this system alone seemed to be very expensive for the price, and this was so even though the whole system is designed to work with HotDocs 5.1and above (HotDocs 5.3 is required for PCs running Windows XP). It too is programmed to output documents only in MS Word (97, 2000 or XP 2002), although, presumably, the resulting Word documents can then be saved out as RTF or lesser version WordPerfect documents and ported over to Corel WordPerfect for final touch up and printing without a whole lot of lost Word special formatting.

However, since the 11/99 introduction of their FLP system, WealthCounsel has since introduced (or will soon) five more practice systems, all of which function exactly the same, and all of which are sold as a single practice system for a single price that has made the relatively high price for this product seem much more reasonable. Those systems are for **Living Trusts** (4/01), **Irrevocable Trusts** (9/01), **Charitable Trusts** (CRTs in 9/01 - others to come) and **Wills** (11/01). The addition of a **Split-Interest** practice system that will do QPRTs, GRATs, GRUTs, Split-Dollar agreements, Private Annuities, SCINs, GRITs and Split-Interest trusts, is in the works now and is scheduled for release in the fall of 2002, all as part of this single one-price software package.

As for pricing, **for those who attended Heckerling, or those who order this product before the end of January of this year AND MENTION when they do that they heard about this offer on the ABA-PTL or the CBA-TES lists**, the costs is $7,000 annually payable either (a) $0 down plus $575 per month for 24 months, or (b) $1,500 down plus $575 per month for 12 months, or (c) $3,500 down plus $350 per month for 12 months, or (d) a one-time payment of $7,000. Otherwise, and after 12/31/01 for all other customers, the cost is $8,150 annually payable either (a) $1,675 down plus $675 per month for 12 months, or (b) $3,900 down plus $390 per month for 12 months, or (c) a one-time payment of $8,150. This annual fee gives you the software, technical support, any software additions, updates or improvements, and access to the **Knowledge Base** that is on the private side of the WealthCounsel Web site at http://www.wealthcounsel.com/ as well as discounted pricing on their periodic **Curriculum and Study Group** offerings. Although the annual fee for this system is high, it is my understanding (but don't hold me to this - ask them) that your annual fee thereafter will remain at the same level forever (presumably with the same monthly payment options) regardless of any future price increases for new subscribers.

I was privileged to be able to try out a beta version of the FLP system in December of 1999 (quite impressive once I got it up and running) and to see the updated version of this system in actual operation first-hand in mid-December of 2001 (also quite impressive). I picked up a free credit-card sized DEMO CD from them then, but I have not had the time to install and run it yet, so I highly recommend getting one of those demos and trying it out first before you buy. Since this program uses HotDocs to make it all happen, I sure am glad I have the Corel Legal Office Suite loaded, as it comes with HotDocs 5.1 already built in. Makes you wonder why this system can't be redesigned to output the finished documents in a modifiable WordPerfect or RTF format too. I am told this is due to some of Microsoft's proprietary format code programing that is used by and forms a core part of the proper functioning of this system.

**And here from Jim Eidelman and me (in no particular order) are some further random tidbits of useful vendor and software information:**

**The Technology Group [WTP]** - has unplugged its answering machine, but it's **LawOnTheWeb** Web site is back up and running again, and updates to WTP 2.4 can be downloaded from there. Discussions are currently under way to try and salvage this Company and/or its software.

**Lawgic (CA and FL Wills & Trusts - Promised to Add NY in 2001]** - you can't reach them by phone either, but we are told that tech support is answering e-mails, and license extensions of their existing products for current subscribers can be downloaded from their Web site. Here again, discussions are currently under way to try and salvage this Company and/or at least its estate planning and Delaware incorporation software offerings, as the Miami, Florida law firm of Holland & Knight has a substantial amount of time and expertise invested in Lawgic's **Florida Wills & Trusts** system and was going to help Carlyn McCaffrey [ACTEC President Elect] build the promised **New York** system.

**West Group [Bob Wilkins' DWTA]** - still there and still being updated and maintained, but it still runs in CAPS vs. HotDocs, and Bob wants to retire from this project (we don't blame him given all the years of time away from his law practice he has devoted to technology improvements for lawyers), so the DWTA system is UP FOR SALE to anyone who wants to buy and continue to maintain it, provided (last we heard) they keep Bob on as a consultant for few years and keep Joy employed on staff as a programmer.

**West Group [Don Kelley's IEP]** - a new and improved Version 4.0 was released in December of 2001. FYI, this product comes with its own customizable set of slides for use in building client and group presentations.

**CCH Inc. [ViewPlan & Vista]** - they have revamped the program, added Factuary to it, and started issuing it on CD's in 2001. One big problem with it is the rather novel way they chose to handle the repeal of the estate tax in 2010 and its re-enactment in 2011.

**Tiger Tables** - they did not have a booth this year, but the word on the Internet is that the author and sole tech supporter for this product, St.Louis attorney Larry Katzenstein, has just released a new version of his **Tiger Tables** calculation software. You can obtain a copy at http://www.tigertables.com/. Larry reports "I have put my interrelated estate tax calculator (**Intertax**) in the program as a utility, along with my amortization program. The program has a totally new look and feel, along with various additions and enhancements. For example, the self-canceling installment note will now figure the principal or risk premium for interest-only and equal principal notes as well as self-amortizing notes, and the CRAT and CRUT programs will calculate factors for a term of years or until the prior deaths of from 1 to 10 individuals." If you don't have this software program on hand, you are missing something you really need to have in your estate planning bag of tricks

**Client and Group Presentation Programs** - seems everyone is headed in this direction in one way or another, including attorney Matt Dana and his **Power Presentations** product that he was demonstrating in Miami. **Crescendo** similarly has a charitable gift planning presentation program, and their's even comes with built in audio. As was noted above, the West Group **IEP** product ships with a built-in set of over 100 presentation slides that can be individually or group selected for use in a specific client or group presentation, and you can even produce and add you own additional slides if you want to. **PPC** and **ProBATE** similarly have introduced client presentation and contact software products, and **ConnectA2.com**, which is "an application service that lets accountants, attorneys, financial professionals, and their clients, securely gather and share personal and financial information over the Internet during the planning, lifetime maintenance, and after-death administration of a client's wealth strategies plan," was back at Heckerling again this year for the second year in a row. **Leimberg & LeClair** and **Crescendo** also have several video and PowerPoint presentation products available for sale.

**Tax Return Preparation** - not a whole lot new here. The same all-in-one integrated software system players are still in business: **West Group's EPS**, **Zane & Associates**, the **Lackner Group (6-in-1)**, and **ProBATE**. **US Trust** still offers, in addition to their **Practical Drafting** quarterly publication that is edited by Richard Covey of NYC and is now available on a Folios-searchable CD-ROM, and their **Factors** tax calculation software, their **EPlan** software for doing sophisticated estate planning calculations and software that will prepare the **Forms 706 and 709**, but they still do not have a Form 1041 program, nor a fiduciary accounting program (but then, as a trust company, why would they develop one?). **BNA** similarly is still limiting themselves to software only for preparing the **Forms 706 and 709**, but new 2002 versions of their **Estate Tax** and **Income Tax** calculation and planning programs have just been released, and they have added many handy bells and whistles to these two long-standing programs over the years.

**Tax Calculations Software** - we have mentioned some of these already (see above), but we don't want to overlook **Brentmark Software** out of Orlando, Florida. Although this Company has been through a couple of ownership transitions over the years, they are solidly in business now under the able leadership of Greg Kolojeski, who is now ably assisted by none other than Jane Schuck. We just received their 2002 Catalog, and their offerings of estate planning, financial planning a retirement planning software products is quite impressive. New to their lineup of software product offerings in 2001are their **College Planning Tools** ($395), **Stock Options Risk Analyzer** ($695), and **RetireNow** ($349) programs. They also offer on-line retirement plan publications [ www.goldbergreports.com], three informational Web sites for ROTH IRAs [ http://www.rothira.com/], the new Required Minimum Distributions (RMD) rules [ http://www.newrmd.com/] and for ROTH 401k

[ http://www.roth401k.com/], plus a custom Web Page Design service (with license pricing for that service starting at $15,000, it had better be a pretty fancy Web site offering).

**NOW FOR SOME HECKERLING SPECIAL OFFERS:**

**Offer #1:** According to Jim Eidelman, **EP Expert**, which is designed for use both in small firms (1 to 5 users) and on a network in a large firm with DOCS Open and iManage integration, will be made available in the small firm version only for a show-special price of $2,495 until the end of next week **PROVIDED** you mention the 2002 Heckerling Reports when you order.

**Offer #2:** As was mentioned above, **WealthCounsel** is offering all of their WealthCounsel Practice Systems for the pre-2002 Heckerling show-special price of $7,000 annually, payable either (a) $0 down plus $575 per month for 24 months, or (b) $1,500 down plus $575 per month for 12 months, or (c) $3,500 down plus $350 per month for 12 months, or (d) a one-time payment of $7,000, **PROVIDED** you mention you heard about this offer on the ABA-PTL list (or, for those of you from Colorado, the CBA-TES list). Otherwise, and after 12/31/01 for all other customers, the cost has been increased to $8,150 annually.

**AND ANOTHER HECKERLING SPECIAL (a repeat announcement):**

**Offer #3:** Stephan Leimberg <steve@leimbergservices.com> has recently informed us that his Company [**Leimberg & LeClair**] is willing to offer a Heckerling Special for anyone who sees this announcement and subscribes to his **LISI Newsletter** service during the time the Institute is taking place and before the Final Report is issued. All you have to do is send an e-mail to service@leimbergservices.com and include the words HECKERLING DISCOUNT in the subject. Bob LeClair will get back to you and handle the sign-up. They will give those people a monthly price of $13.95 rather than the $14.95 regular price. You also can take a free look at the site and its many services by going to http://www.leimbergservices.com/ and clicking on the blue FREE TRIAL button on the top right.

**CONCLUSION:**

We are sure we have forgotten to mention someone or some new software product or some jucy bit of vendor news, and for that we apologize in advance, but your Editor is running out steam and way too late in getting this Report out today as previously promised, so we are going to call it quits here for now. If any other vendors or attendees at Heckerling have any information they want us to cover in later Reports, just e-mail it to us c/o jghodges@jghlaw.com in the next day or so.

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That is it for Report No. 4. The full text of all the Reports will be posted on the ABA RPPT Web site at http://www.americanbar.org/groups/real_property_trust_estate.html.

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# Report #4a

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REPORT NO. 4A - The Vendors and Other Techie News

This report is a supplement to Report #4 that was sent out on Saturday, 1/12/01, as we have a couple of corrections we need to make in the information that is in Report #4 and a few additional tidbits of information to pass along.

FIRST, with regard to WealthCounsel and their special offer, which is good for the rest of this month, we had the pricing information wrong. The information below is official from their CEO, Lew Dymond.

The special offer pricing is $3,500 for the initial cost ($3,900 after the special offer pricing ends) plus $350 a month, which is the continuing monthly fee. The continuing monthly fee can be paid $3,000 in advance each year, for which the user receives a $500 discount. Also, and as was noted in Report #4, the initial fee and monthly maintenance can be paid for in a variety of ways, which are (a) $0 down plus $575 per month for 24 months (that's a total of $13,800), or (b) $1,500 down plus $575 per month for 12 months (that's a total of $8,400), or (c) $3,500 down plus $350 per month for 12 months (that's a total of $7,700), or (d) a one-time payment up front of $7,000, and all PROVIDED you mention that you heard about this offer on the ABA-PTL list (or, for those of you from Colorado, the CBA-TES list). Otherwise, and after 12/31/01 for all other customers, the total minimum initial cost has been increased to $8,150, with the monthly fee being $390.

SECOND, with regard to Schumacher & Co. [technically Schumacher Publishing, Inc.], we incorrectly listed the URL for their Web site as - www.estplanning.com. Actually, that URL belongs to the 6 lawyer San Antonio, Texas law firm of Bayern & Aycock. The correct URL for Schumacher is www.estateplanning.com. This Company, which used to be owned and managed by Jim and Vickie Schumacher, is now being run exclusively by Vickie, who was in Miami with her tech people taking orders for their books, pamphlets and lawyer Web sites.

The consumer side of their Web site lists links to such things as their own Directory of estate planning lawyers and related financial planners and service providers with user-posted (presumably unsolicited) 1 to 10 ratings and client reviews (we couldn't find any negative ones) of some of these lawyers, along with links to the CLE content and articles many of these lawyers have either written or placed on their Web sites, a schedule of client seminars across the country, information about the 5th Edition of their best-selling book, Understanding Living Trusts, and an order form for all of their books, Mini-Reports and Financial Organizer.

The professionals side of their Web site lists links to such things as pamphlets and PowerPoint presentations, Internet content (including how they can build a site for you [for $1,900 plus an $89 per month hosting fee for the Full Edition] or add their educational content to your existing site, resources for such professionals, access to their professional Directory where you can add your own name or firm listing for free, and a direct link to the International Genealogical Search Inc.

THIRD, for those of you who might be wondering if that special LISI Newsletters pricing offer from Leimberg & LeClair is really worth it, below is the full text of a sample issue.

>>>>>>>>>

Steve Leimberg's Estate Planning Newsletter

Subject:PLR 200150020 Beware of Jointly-Held Powers Over Trusts

LISI Commentator Jerry Kasner uses PLR 200150020 to illustrate a "trap for the

unwary" in drafting or recommending trust provisions which give individuals who

may not even be named as beneficiaries of the trust a power to determine who

receives distributions from the trust.

Jerry warns that such powers could be classified as fatal general powers of

appointment.

KEEP READING IF:

You plan estates or review or draft wills and trusts

You advise clients who wish to structure multi-generational trusts

for their

descendants, and seek to give younger generation family members control

over the

distributions.

BUT FIRST, A LISI LawThreads® ALERT:

IRS RULING APPROVES CRT TO CGA EXCHANGE: A discussion on the GIFT-PL list

analyzes PLR 200152018 which approved a taxpayer's exchange of a life interest

in a charitable remainder trust for a gift annuity issued by the same

charity.

Our LawThreads review also links to a couple of articles on the Web discussing

the ruling.

HECKERLING INSTITUTE REPORTS BEGIN: As in past years, Moderator Joe Hodges and

his volunteer reporters attending the 2002 University of Miami Philip E.

Heckerling Institute on Estate Planning will post brief summaries of the proceedings. LISI's LawThreads review will serve as a link to the reports

in the

list archives and also to the Reports as posted on the Web pages of the ABA

Real

Property, Probate and Trust Law Section. To read these and other recent

LawThreads items, log into LISI at http://www.leimbergservices.com, then

click on

the blue LawThreads tab under Special Services.

Remember that LawThreads also provides an easy way to sign up for ABA and other

practical, highly informative, and well-run discussion groups. Once you are

logged into LISI at http://www.leimbergservices.com, click on the blue

LawThreads tab at the top right hand side of the page. Then click on List

Resources. Scroll down and you'll find an easy way to sign up for one or more

professional discussion groups.

NOW BACK TO JERRY KASNER'S CAUTIONARY TALE:

EXECUTIVE SUMMARY:

At some date prior to January 1, 1977, the decedent created a trust for his

grandchildren and their descendants. The trust gave his two children the joint

power to "close the class" of grandchildren who would be eligible

beneficiaries.

(This is legal jargon which means that the children can exercise their power to

provide that any grandchildren born after a certain date are not eligible

beneficiaries.) The children now propose to release that joint power, and are

concerned that such a release will be a taxable gift by them. The IRS ruled it

would not be so long as joint power holders have interests which are

adverse to

each other, they do not have general powers of appointment, and the release of the joint non general power has no gift tax consequences.

FACTS

The decedent created an irrevocable trust. Only his grandchildren and their descendants were named as beneficiaries.

He gave his two children a power, which they could only exercise jointly while both are alive, to close the class, in which case grandchildren born after the date that power is exercised would not be beneficiaries. If one child dies, the survivor can exercise the power to close the class.

THE PLOT THICKENS:

However, there are no grandchildren, nor descendants of grandchildren! If the children exercised their joint power now, who would get the assets in the trust?

Under the trust terms, it will terminate on the death of the last child, and be distributed to the descendants of the decedent who created the trust. Outside of a small interest which might pass to a cousin, it appears the trust would be distributed to the grantor's children, or surviving child, who are not even named beneficiaries, but who are the lineal descendants of the decedent.

IS THIS A GENERAL POWER OF APPOINTMENT?

So if the children exercise their joint power to close the class, then the trust will be distributed to the descendants of the decedent. In effect, the children could exercise their joint power and the trust assets would be distributed - to them! Since the effect of their joint power is to permit them to direct distribution of the assets to themselves, it would appear to be a general power of appointment over the trust. And if they release that power, that release would itself be a taxable gift.

However, as the ruling points out, Code Sections 2041(b)(1)(C)(ii) and 2514(c)(3)(B) provide that for gift and estate tax purposes, a jointly held power

is not deemed to be a general power of appointment so long as the joint owners must agree on the exercise, and each has a substantial interest in the trust property which could be defeated by the exercise of the power.

THE ADVERSE INTEREST ARGUMENT:

The taxpayers argued, and the IRS agreed, that under the terms of the joint power, if one child died, the other child could exercise the power and direct distribution of all or most of the trust to himself. Since either child might survive, each child has a chance of getting all of the trust. This creates an adverse interest. Therefore, the joint power is not a general power of appointment so long as both are alive. The release of a non-general power of appointment has no gift tax consequences, and that is the effect of the ruling.

Note the cousin who had a possible interest in the trust was permitted to disclaim that interest within 9 months of the date he became aware of the trust interest. Since the trust was created prior to January 1, 1977, IRC §2518 would

not apply which means the 9 month disclaimer period starts with the date the disclaimant first becomes aware of the interest in the trust, not the date of transfer to the trust under IRC §2518.

COMMENT:

Clearly, this is an unusual fact pattern. But the issue of joint powers does come up in practice. Some years ago, the author was consulting with an attorney who had been asked to review a multi-million dollar trust created years before in which the five children of the grantor who were the income beneficiaries could jointly agree to invade the trust for their own benefit. They were clearly adverse to each other, since any exercise of that power in favor of one would reduce or eliminate the interests of the others, and at the death of a child, the remaining children could exercise the power. At the termination of the trust, it would pass to their issue. It was clear that the intention here was that the trust would skip the generation of the children, and that the attorney who drafted the trust assured the parties that this would be the case. No problem, right?

Guess what? Four of the five had died. This left the sole remaining child with a general power of appointment over the entire trust. Fortunately for the heirs of the attorney who drafted the trust, he had died some years before, and could not be sued.

DON’T RELY ON ADVERSE INTEREST!

I feel the adverse interest rule that applies to joint powers should never be relied upon to avoid general powers of appointment. Further, it is important to remember that the mere fact a certain individual is not named as the beneficiary of a trust does not mean he or she could not have a general power of

appointment

over it. The most common example is where the person named as trustee has the

power to make trust distributions to satisfy his or her own legal obligations,

including the obligation to support dependents. That is why many states have

adopted statutes which prohibit a trustee from making such distributions.

Be careful out there!

HOPE THIS HELPS YOU HELP OTHERS!

Jerry Kasner

Edited by Steve Leimberg for Steve Leimberg's Estate Planning Newsletter



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CITES:

PLR 200150020 ; IRC §2514, §2041 IRC §2041(b)(1)(C)(ii), §2514(c)(3)(B), IRC

§2518. See also the just released book, Tools and Techniques of Estate

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>>>>>>>>>>>>>

FOURTH (AND LAST), here from the Weinberg Group is a sample of one of their

Current Developments e-mails, this one dealing with the Split-Dollar IRS

Notice 2002-8 that was issued on 1/3/02:

>>>>>>>>>>>>>

Dear Current Developments Subscriber,

As you are probably aware, on January 3, 2002, the Treasury and IRS issued Notice 2002-8, the long-awaited new rules for taxing split-dollar life insurance. This new Notice radically changes the tax treatment of split-dollar for the future, subject to some very important transitional "grandfather" rules. On January 7th, AALU issued Washington Report No. 02-1 analyzing the new rules in detail. Rather than repeat that analysis, attached is the AALU Washington Report in its entirety. [Ed: This attachment is not attached to this Report]

The new Notice will have to be studied in the days ahead to fully understand its ramifications. In addition, the IRS solicits written comments on the Notice by April 28, 2002. After that, proposed regulations will be issued, comments will be solicited on the proposed regs., and then final regulations will be adopted. This process will take some time, and, obviously, the final rules on split-dollar may differ markedly from those of the Notice. Therefore, what I would like to do here is make some preliminary observations about Notice 2002-8.

1. The most important date for the moment is Jan. 28, 2002.

Split-dollar arrangements entered into before Jan. 28th are entitled to the limited grandfather protection provided for existing plans under the Notice's "safe harbor" rules. Thus, there remains a very limited period(less than three weeks) to implement new split-dollar plans that will have the same grandfathering provided for existing plans.

2. Existing split-dollar plans (pre-Jan. 28th plans) may continue in split-dollar mode and terminate before January 1, 2004, and the employee will not be taxed on then existing policy equity, i.e., on cash surrender value received in excess of basis. I think this grandfather provision will be meaningful for "matured" split-dollar plans, meaning plans near or at the time of rollout. However, for "unmatured" plans, where substantial future premium payments are yet to be made, I don't think it will be meaningful in most situations to be able to terminate the plan without adverse tax consequences.

3. Alternatively, for existing split dollar plans (pre-Jan. 28th plans), the plan may continue in split-dollar mode until 2004. Then, for all periods beginning on or after Jan. 1, 2004, the plan must be converted to a loan from employer to employee in order to avoid taxation of employee equity upon later termination of the plan. (It's not clear whether "all periods beginning on or after Jan. 1, 2004" refers to January 1, 2004, employer or employee taxable years beginning on or after that date, or the policy year that begins on or after that date.) All pre-2004 employer outlays for premiums must be picked up as the beginning loan balance, and subsequent premiums paid by the employer will be treated as additional loans. Presumably, the loan may be either interest-free and taxed as a "below-market" loan under IRC sec. 7872, or interest-bearing and taxed under the usual tax rules without the complexities of sec. 7872. (Interest-bearing loans at the appropriate AFR are not taxed under the imputed interest rules of sec. 7872.) I believe this will be the grandfather clause most used by existing split-dollar plans as a practical

matter. Questions remain to be answered, such as the effect of the different tax treatment between demand and term loans, the applicability of the Original Issue Discount (OID) rules, etc. These, as well as other possible issues, are identified in the Conclusion of the AALU Washington Report.

4. As indicated previously, new split-dollar plans entered into before Jan. 28, 2002, can be treated as existing plans and entitled to the grandfather protection offered existing plans. In my opinion, implementing a new plan before Jan. 28th will provide maximum future flexibility and preserve the most favorable options for the plan. To enter into a new split-dollar plan means clients and their advisers must move very quickly to comply with the Jan. 28th deadline. A logical question is what does "entered into" mean?" The Notice does not address this question. In my opinion, it means that the ILIT (or other entity that is to own the policy) must be in place, the policy must be issued and paid for, the split-dollar agreement and the collateral assignment must be signed (and, hopefully, the collateral assignment filed with the insurance company), all before Jan. 28, 2002! This is a tall order, and in many cases the Jan. 28th deadline will not be met.

5. For all existing plans (including new plans entered into before Jan. 28th ), I would be very cautious about amending the terms of the plan if you want to preserve the limited grandfather protection provided by the Notice. In effect, we have been given a two-year grace period by the Treasury and IRS to figure out what to do with existing plans. Unfortunately, complete grandfathering of existing plans was not

forthcoming, although the insurance industry, and particularly AALU, worked very hard for that result.

6. For plans entered into on or after Jan. 28, 2002, it looks like the plan can be designed in two mutually exclusive ways. The plan can be structured as an endorsement split-dollar plan, where the employer owns the policy and the death benefit is endorsed to the employee (or his or her ILIT). The consequence will be the familiar annual economic benefit ("term cost") method of taxation. However, any rollout from policy values to end this continuing and increasing term cost will result in the entire policy equity being taxed at the time of rollout ( for income tax purposes and also for gift-tax purposes if the policy is owned by an ILIT). Consequently, an endorsement split-dollar plan is a plan without an exit strategy, assuming the coverage is to continue for life. In this connection, the annual economic benefit cost will be measured by the new Table 2001 rates, or some other later-derived IRS term rates. However, existing insurance company alternative term rates can be used (apparently for the life of the plan) if the split-dollar plan (you guessed it) is entered into on or before Jan. 28, 2002. Otherwise, after 2003, carrier alternative term rates must meet tough new standards applicable to commonly-sold term policies in order for the alternative rates to be used instead of the table rates (assuming the IRS doesn't do away with alternative term rates altogether).

7. Alternatively, for post- Jan. 28th plans under which the employee or trust owns the policy, employer premium payments will be treated as loans, with the tax consequences discussed above. In other words, collateral-assignment split-dollar as we now know it will become extinct.

However, there is a question in my mind of whether some more favorable tax regime may apply for the period between Jan. 28, 2002, and the date final regulations are adopted. AALU seems to assume not, but I'm not so sure. We'll have to wait and see whether there are different rules during this transitional period.

8. There are a host of other questions left unanswered by the Notice. For example, the Notice states that the "same principles" will apply to split-dollar arrangements in non-employer/employee contexts, including private split-dollar and corporation/shareholder split-dollar, but it doesn't elaborate. The Notice says nothing about reverse split dollar, although it permits the continuing use of actual PS 58 costs to measure annual economic benefit for split-dollar arrangements entered into before Jan. 28, 2002, where the agreement provides that such rates will be used. Insofar as survivorship term rates are concerned, the Notice leaves it up to taxpayers to figure it out, based on the Table 2001 individual rates, for split-dollar arrangements entered into before the date of "future guidance" (whatever that means),. Hopefully, insurance companies will help us in determining the survivorship term rates to be used before future guidance.

9. As a practical matter, what are we doing at the present time about split-dollar plans? First, we're attempting to implement as many new plans as possible before the Jan. 28, 2002 deadline. Second, we're being very careful not to disturb the grandfather protection of existing plans. Finally, we're developing models that are aimed at minimizing income and gift taxes in the future, both for existing plans and for new plans.

10. A final caveat: the preceding comments are based on our

preliminary views of Notice 2002-8, compiled just a week after the Notice was issued. They reflect our own opinions, which may not turn out to be correct in all respects in light of later developments. I hope you found our comments useful.

Nothing contained in this communication is to be considered as legal or tax advice.

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That is it for Report No. 4A. The full text of all the Reports will be posted on the ABA RPPT Web site at http://www.americanbar.org/groups/real_property_trust_estate.html.

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ABA-PTL Discussion List Chief Moderator

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# Report #5

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REPORT NO. 5 - Wednesday, 1/9/02

We haven't received a report yet on the Tuesday afternoon EGTRRA Drafting session, so, rather than holding everything else up for that, we are going ahead and reporting on the following Wednesday CLE sessions at this time, at least to the extent we have received information to report on them:

8:30 - 9:15 a.m.
**Life Insurance as the Life Preserver for the Closely Held Business**
Mary Ann Mancini

No materials received yet, but they are coming. In the meantime, see the **Weinberg Group** report on **IRS Notice 2002-8** that is included at the end of Report #4A.

9:15 - 10:00 a.m.
**Non-Tax Considerations in the Succession of Closely Held Businesses**
Charles D. (Skip) Fox IV

Skip Fox has reported the following to us on his session:

My presentation on the non-tax aspects of family business succession on Wednesday morning was not technical. The following were the major points that I tried to make:

1. Between 30% and 40% of family businesses will have a transition in leadership in the next several years. This is a considerable number since there are 20 million family businesses ranging anywhere from mom and pop stores to Fortune 500 companies.

2. 85% of the crises faced by family businesses arise from succession issues. Because of the conflict involved, however, most families attempt to ignore or fail to plan for succession.

3. Three models of business ownership can help planners advise families on succession issues:

a. Controlling owner (dictatorship) in which one person has control and makes the decisions. This is often the format at the first generation. However, many companies, such as Forbes and Beretta have used the controlling owner format for several generations

b. Sibling partnership. Two or more siblings or others have control. Sometimes there is one acknowledged leader and sometimes all have responsibilities for different aspects of the business.  This is often found at the second generation.

c.   Cousin consortium.  Different family members from different branches and generations work in the company.  This is often found at the third generation.

4.  The likelihood of problems is greatest when the leadership changes from a simpler form (such as controlling owner) to a more complex form (such as sibling partnership).

5.  The agreement of all the family members is necessary.

6.  Even if a succession plan is in place, one critical function of the planner is to make sure the family implements the plan and watch out for signs of trouble or failing to adhere to the transition plan.

7.  The succession plan should be developed first and then and only then should the planner take the steps to minimize the tax consequences.  Tax considerations should not drive a succession plan.  That can be a recipe for disaster.

8.  The planner has to listen to all family members in order to come up with a viable succession plan.

10:00 - 10:45 a.m.
**Uses of Installment Sales, Private Annuities and SCINs**
Jerome M. Hesch

No report.

11:00 a.m. - 12:30 p.m.
**Question & Answer Session**
Dennis I. Belcher
Carol A. Harrington
Prof. Jeffrey N. Pennell

No report.

2:00 3:30 p.m.
**Special Sessions I**

No reports

3:45 5:15 p.m.
**Special Sessions II**

II-A CASE STUDY **Business Succession Planning**
Charles D. (Skip) Fox IV

*See above* re his Wednesday morning general session.

II-C **Asset Protection Planning: Protection vs. Control**
Gideon Rothschild

Gideon has reported the following to us on his Special Session:

My workshop on Wednesday afternoon revolved around 2 case studies focusing on asset protection.

The **first case study** dealt with the domestic solutions, including self-settled trusts in Delaware., Alaska, Nevada and Rhode Island, tenancy by the entireties, estate planning with spendthrift, discretionary trusts, and QPRTS and other split interest trusts. We discussed how the self-settled trust can be a useful tool to utilize a client's annual exclusion or lifetime exemption amount where clients aren't sure they can divest themselves of such amounts and particularly with the looming repeal (?) in 2010. These trusts can be established as completed gifts in the4 states (or offshore) and removed from the settlor's estate while the settlor can still be a discretionary beneficiary thereof in the event he/she should need access thereto. Similarly, I noted the utility of Sec. 529 plans. We also discussed special needs trusts and why planners should encourage their clients to leave their estates in trust for as long as possible with flexible provisions therein - to thwart off claims of spouses and creditors.

I noted a few recent cases wherein divorce claims and child support claims were made and where the creditor-spouse sought to receive a share of a spendthrift trust where the debtor-spouse was a beneficiary (and where the trust was settled by debtor's parents, one parent was still living, the trust could be invaded by her and revoked by her and he was merely a remainder beneficiary (yes - the court awarded the creditor spouse an interest therein) and another case where the beneficiary was also the trustee (of a trust settled by his parents) and the spouse attempted to reach it for application of his child support obligations.

The **second case study** was a discussion of foreign situs trust considerations, with discussion of a recent case (**Bank 0f Americas v. Weese**) in which the debtors (after they already defaulted on a bank loan) established a Cook Island trust and the court granted an injunction against the parties and found they had jurisdiction over the trust since the trust owned realty in the state and a co-trustee resided therein. We discussed the considerations of trustee selection, protector considerations, and fraudulent conveyance issues using a case study approach with the background of the **Weese** case and other decisions. I emphasized that if planners wish to use
foreign trusts they should ensure that they are not assisting the client in any fraudulent conveyance as it may cause them to be exposed to litigation or disciplinary action. Attorneys must engage in adequate due diligence to ensure that their clients are not intending to defraud existing or probable creditors nor looking to avoid their tax obligations.

**EDITOR'S NOTE:** An interesting case [***Gorman***] involving a child's remainder interest in a parent's revocable living trust for purposes of determining what portion of that trust is considered marital property that is subject to equitable division in the child's divorce proceedings was recently decided by the Colorado Court of Appeals. The decision, which is seen by most commentators as being contrary to the applicable laws, could have significant adverse ramifications for dealing with such interests in the future, even for attorneys who are not licensed to practice law in Colorado but who are drafting such trusts for parents of children who might reside in Colorado, since it was not appealed further up to the Colorado Supreme Court. It is reported here since it also could have serious implications for people doing asset protection planning for Colorado residents absent a statutory amendment to overrule or modify the holding of this case. The authors of this report are Eugene Zuspann Jr. Esq. and John DeBruyn Esq. of Denver, Colorado (Gene has been a reporter for us in prior years).

First John DeBruyn reports:

The Colorado Court of Appeals finds in Gorman, October, 2001, that a child's remainder in the parent's funded revocable trust is property for purposes of the division of marital property in the child's divorce. Since the child's property rights were gratuitously conferred by the parent, only the appreciation in value during the marriage will become part of the marital property to be subject to equitable division with the child's spouse as part of their divorce. The case is at:

http://groups.yahoo.com/group/tDocs/files/gorman.html

The Court of Appeals observed: "While attempting to place a present value upon these interests may be difficult, we see no reason why it cannot be done. Further, we see no reason why the trial court, after determining the present value that is subject to division, cannot postpone the physical division of that value until the [spouse with the interest] comes into possession of the property, and make such distribution subject to its not being defeated."

We have had all those situations over the years where the estate plan with a will has worked better than a funded revocable trust for income tax purposes. And here we have a situation where the funded revocable trusts of the parents gets their property entangled in a child's divorce.

Certainly the parent can revoke the interest. But would the Courts, having taken us this far, with form over substance, be tempted in the case of a revocation to nevertheless tag the eventual distribution of the parent's property via will or another trust to the child even though the trust had been revoked in the mean time.

Gene Zuspann replies to John and the closed CBA-TES list as follows:

I agree that John's Gorman case is certainly interesting.

I am not sure where the court is going in these cases. The courts seem to be going down the path that if there is any vested remainder subject to divestment or defeasance, no matter how certain or remote the condition subsequent, that the interest is marital property under 14-10-113, C.R.S. The significant question in the divorce then becomes whether a valuation of the asset should be undertaken now, or whether, as Gorman suggests, that the division of the trust assets be postponed until the beneficiary spouse comes into actual possession of the property. Talk about the mere expectancy discussed in Jones and Rosenblum!

I believe that the court is correct under Colorado law in holding that the interest of the beneficiaries is a vested remainder. This result has been reached before.

<u>See</u>
Brenner, 37 Colo App 271 (1976)
DNB v Von Brecht, 322 P.2nd 667 (Colo 1958)

Also, check out Wallis Campbell's article on future interests in Krendal, Colo Practice Methods, at 2319.

For further reference, check out the following materials.

Balanson - Colo 2001
Jones - Colo 1991
Rosenblum - Colo App 1979
*In re Question submitted by the United States Court of Appeals for the Tenth Circuit*, 191 Colo. 406 (Colo. 1976)

Several *Colorado Lawyer Articles* also discuss the developments:

<u>See</u>, Nancy Crow "What does *Balanson* mean to Estate Planners? - Drafting Trusts to deflect the Spousal Creditor," 30 *The Colorado Lawyer* __ (October, 2001) discussing the impact of the portion of the decision involving the family trusts;

Steve Lass and Matt Seidman, "Property or Expectancy: the Division of Trust Assets as Dissolution of Marriage," 30 *The Colorado Lawyer* 63 (February, 2001) a discussion of the appellate court opinion in *Balanson*; and

David Kirch, "Avoiding Appreciation in Trust Assets Being Treated as Marital Property," 27 *The Colorado Lawyer* 58 (March, 1998) regarding trusts to avoid having the trust considered as marital property.

Finally, the Restatement (Second) Trusts at 150 to 156, and the UTC at 501 to 506.

Also check out Scott and Bogert on trusts, and Am Jur, Trusts, and Estates.

Under Gorman, I do not believe the divorce restrictions Karen suggested work any longer. I agree this is a substance over form issue, but the law, probably both here and in the common law, seems to be that the beneficiary's interest vests at the creation of the trust.

Therefore, for the moment, and until/hopefully this gets appealed, it seems prudent to either use a will or a discretionary GST trust as used in Jones and Rosenblum.

To which John Debruyn replies, and Gene responds in place, as follows:

John, my comments are in the text below - Gene

At 10:13 AM 11/26/01 , John wrote:
>Thanks doing and sharing the research and your observations
>about vested remainder interests in the context of the definition
>and division of marital property in divorce.  Your read of Gorman
>has appeal.  It would be most efficient (since the interest is likely
>to be revoked, no :) to postpone the heavy lifting on the valuation
>and division process of the remainder until it matured upon the
>death of the parent as the Gorman may be suggesting.

I think that Gorman is leaving this as an option of the judge.  In other words, divide all other property now, and leave the non-beneficiary spouse a percentage, to be received upon possession of the beneficiary spouse, if any still exists.  This seems to be an easy solution for the judge.  However, from a practical standpoint, if the parent is not incompetent, the trust will need to be amended or revoked as soon as the marriage starts.  (Hey, this has potential) Now, surely, the judge cannot order that the in-law has an interest in the estate. And further, I would assume that the valuation of the interest of the child, where the parent can amend or revoke, has to be about zero.

>Let me, for the sake of discussion, take a different cut on what
>Gorman may mean here. The trial court is stuck doing some kind
>of valuation as a threashold matter just to determine whether
>there is any marital property at all--that is the appreciation during-
>the-marriage component of gift remainder property.
>
>To do that the court probably needs to determine the.acquistion
>(or if later, marriage) value of the property and the date of
>dissolution value of the property of the trust subject to the
>remainder interest.

Agreed.  They probably need three numbers - basis of trust to determine income tax (a Davis issue), value at date of marriage or date of creation, to determine the separate property, and value at date of dissolution.

>The property of the trust may not even be the same at the
>beginning and ending dates.  This process of determining
>appreciation in the property which is subject to an interest in trust
>creates some good questions in itself.  For example, how does the
>determination of appreciation on an asset by asset basis
>(depreciation in one asset is not offset against appreciation in
>another) play out.

I am not sure this is necessary - the interest is the remainder interest in the trust, not in each asset. It seems to me that the value is the value of the whole, not of each asset.

>Without the beginning and ending valuation the trial court does not
>know whether there is any appreciation in value (of particual
>assets ?) needed to find that marital property exists. As along as
>the Court needs those values, then it may as well, efficiency in
>mind, determine quatum of the fraction that is to be marital
>property.

It should still need those values to determine the fraction. Assuming no other assets are allocated to try to compensate for the interest in the trust, the formula seems to be:

$s$ = value of trust at time that it is separate property (either date of marriage or date of creation, whichever is later)
$d$ = value of trust at time of divorce
$p$ = percentage of trust that is marital property

$p = \mathrm{Max}(0,d-s)/d$

As a check, see if you agree with the following scenarios

Number 1
$s = 500$
$d = 750$
$p = 33.3\%$

Number 2
$s = 500$
$d = 500$
$p = 0$ (there is no marital property, because no appreciation between s and d)

$s = 500$
$d = 450$
$p = 0\%$ (because marital property cannot be less than zero - the max function)

After determining p, the court has to determine what portion belongs to each spouse. I assume this is normally 50% of p to each in a long term marriage.

>Then, going down this road a bit farther for the sake of discussion:
> there is the next step, how much of the marital property fraction
>is to be awarded equitable to each spouse. Perhaps the Gorman
>court, when it suggested postponement of the "division," was
>thinking that the spouses would divide the future interest in trust
>that was marital property on a fifty-fifty basis. Whether a
>particular asset (or group of assets?) should be divided one what
>or another would seem, since the division is equitable , to implicate
>the division of all of the other property.

I agree.

>If one takes the foregoing route, then the division that the Gorman
>court is postponing is just the partition of the future interest when
>it becomes a present interest between the maritial and nonmarital
>fractions and the marital fraction between the spouses.

I think maybe the Gorman court thought they were avoiding some work. The quality of the opinion certainly avoided any work. The Gorman opinion states that the father's trust "is substantially identical to the trust involved in *Balanson*." However,

- The Gorman case does not identify the trustee, but with the powers enumerated, it is assumed that an independent trustee was used or the mother would have a general power of appointment. The father in Balanson was the sole trustee.

- Gorman said that each trust provided that no beneficiary had any interest in any of the trust property and each trust contained a spendthrift power. Balanson never addresses this issue.

- In *Balanson*, the distribution of corpus was limited to standards, but in Gorman the standard includes the spouse's welfare.

>Before I get back to some real work, here is another thought.
>
> Unter the Imel case (don't recall at the moment whether there
>are one or two Ms) the spouse of the remainder-person spouse
>has an inchoate undivided property interest in the remainder upon
>the filing of the petition for divorce. Where does that take us :)

I will have to check that one out.

To which John replies back to Gene as follows:

Thanks for threading through the argument for three different value dates assuming the Gorman suggestion of putting off the division of the remainder till the death of the parent.

I agree with your examples on the calculation of the fraction. I have not formed an opinion yet on whether the trust fund would be one property or multiple properties based on what the trustee actually held, which is important for whether gains and losses in a group of assets should be aggregated or just the gain assets taking into account.

I am wondering whether the remainders in Gorman and Balanson were subject to the condition of survivorship or not. I think most of
the forms out there use survivorship language and avoid vested remainders.
However, I got my Simes out and find that contingent

remainders are today generally alienable but that this was not always the case.

The distinction between vested vs. contingent "'nonvested" remainders is important for purposes of the rule against perpetuities. Contingent remainder's must vest within the period, subject to some recent amendments here in Colorado, if at all.

If a contingent remainder interest is alienable in Colorado, that needs some more research, is it property eligible to become marital property for purposes of the division of marital property in divorce.

- - - - - - and

Here is an up date on contingent remainders, vesting et cetera.

The opinion in In re Question Submitted by United States Court of Appeals for Tenth Circuit, 553 P.2d 382, 191 Colo. 406 (Colo.
08/23/1976) concludes:

Therefore, we answer the question certified to us by the Court of Appeals for the Tenth Circuit, viz., as follows: under Colorado law,
the interest of William Arthur Martinson (taxpayer) in the trust created in his name under his father's will, is not a future interest
subject to a condition precedent. The condition of survival is a condition subsequent. Taxpayer has a vested right to the moneys
designated for him, but that right is subject to complete defeasance in the event he does not survive the life tenant,
testator's widow.

It did not jump out at me as I read the facts whether the interest of son was in fact conditioned upon his survival of his mother whose
life estate preceded his remainder.  I found the Tenth Circuit Court of Appeals case at 76-1 USTC para 9691.  The provisions of the
trust did require the son to survive and provided for alternate takers in the event that he did not survive her.

To which Gene replies as follows:

The question now becomes whether I should change my drafting to avoid having a vested remainder at all, to keep the interest from being property in a divorce?

As indicated earlier, Gorman is apparently not being appealed.  Gorman, along with Balanson, are going to assign some value to that property interest.  The judge is going to have to decide what to do - divide the trust, with possession delayed in both spouses, or take the value into consideration in dividing up existing assets.  Neither is a satisfactory situation with the client/parent.

To which John replies as follows:

The remainder interest in the CA 10 case where the Colorado Supreme Court

said the interest was vested was a contingent
remainder interest. The beneficiary had nothing unless he survived till the end of the preceding interest. If contingent remainders are
vested, then what--a gift to a purely discretionary trust with an independent trustee.

But some people are not that enamored with trusts in perpetuity and the like. Perhaps you make the gift of the residuary to the
Salvation Army subject to a retained power of appointment exercisable by will. And then exercise the power in favor of the
child by will. What have you thought about doing.

And tax attorney Nancy Crow Esq. of Denver interjects as follows:

What a wonderful, spirited discussion! I've been too bogged down with work to enter into the fray. But, since I did write about Balanson recently, I should probably put a word in.

Gorman was the logical extension of Balanson; I don't think the Court of Appeals had much choice but to come out the way it did. From the drafting perspective, the decision renders wills a better estate planning tool than revocable trusts for the parents who are truly concerned about their children's divorce proceedings. Following death, having the trust wholly discretionary is the best bet, for people who have a trusted trustee and like the idea of trusts. Parents who are concerned about spousal creditors are likely to be concerned about their children's other potential creditors, so they are generally receptive to long-term trust arrangements.

Some tougher questions revolve around disclosure and discovery. Children don't necessarily know, or have a right to know, what their parents' revocable trusts say. Parents are not parties to their children's divorce actions and discovery could be intrusive, to say the least.

From the family law viewpoint, valuation is going to be a significant problem. Modification of the definition of marital property to exclude amounts to be received in the future is one possibility, with the recognition that a contingent vested remainder could still be an "economic circumstance" to be taken into account by the court in dividing property and awarding maintenance. In any event, courts are likely to adopt a wait and see approach to these future interests, just as they have for retirement plans.

To which Gene responds to Nancy and John as follows:

I agree with everything that Nancy says, except that a rev trust with purely discretionary trustee powers after death, a la Jones and Balanson, would not be property either.

Our problem seems to one of semantics. A vested remainder subject to a condition subsequent and a contingent remainder both have conditions attached. However, the former vests subject to the event happening to divest the interest, where the latter is not vested until and unless the event occurs. The difference is whether the condition is a condition subsequent or a condition precedent.

The facts in the CA-10 case were that the remainder was vested subject to divestment by a condition subsequent. The following is the Court's headnote 4. Also, I am not sure the facts in CA-10 support the conclusion of the court.

The document provided - life estate in mom, followed by life estate in Taxpayer (T), remainder to 3 other trusts subject to whole of trust corpus paid out earlier (a condition subsequent).

I do not understand why T does not have a life estate. Especially in this case, where mom elected against the will and there would not be any distributions out of the trust for any beneficiary before the T.

4. Taxpayer - Vested Right - Moneys - Trust - Subject to Defeasance.
Question certified to Supreme Court of Colorado by Court of Appeals for Tenth Circuit is answered as follows: Under Colorado law, interest of the taxpayer in the trust created in his name under his father's will is not a future interest subject to a condition precedent; the condition of survival is a condition subsequent; taxpayer has a vested right to the moneys designated for him, but that right is subject to complete defeasance in the event he does not survive the life tenant, testator's widow.

This is a property interest under the law. A contingent remainder is one subject to a condition precedent, and does not vest until the event occurs. In the case of a contingent remainder, there is no property interest.

Of course you realize, THAT THIS IS MY OPINION, WHICH COULD VERY WELL BE WRONG, but I don't believe so after reading several articles on vesting. (But I cant find any of my old hornbooks or other references which specifically address future interests). I have looked at Am Jur, Krendal and some old (30's and 40's) articles by Leach and Casner.

So my conclusions are:

Contingent remainders are not vested. See above. However, Jones and Rosenblum confirm that a purely discretionary trust is an expectancy - so this is what I prefer.

As above, I like the purely discretionary trust, but I still have some remainderman down the road - grandchildren, great-grandchildren. During the SS or the child's life, a special power of appointment could do the job. Discretionary but SS could change to a vested remainder. You could always draft these as a contingent remainder to eliminate vesting after the death of both spouses.

And (finally) John responded to Gene as follows:

I agree with your read of what the law of remainders was and should be, which was that a remainder that required survivorship of the life estate in order to take was a contingent remainder and that contingent remainder did not vest until the termination of the life
estate. I read the Colorado Supreme Court to say in their response to the CA 10 back in 1976 that a condition requiring survivorship in order to succeed to the remainder interest is not a condition precedent, contrary to all that good old stuff that you and I have

been reading elsewhere, but that such a condition is a condition subsequent.

The head note you quoted said:

> will is not a future interest subject to a condition precedent; the
> condition of survival is a condition subsequent; taxpayer has a
> vested right to the moneys designated for him, but that right is
> subject to complete defeasance in the event he does not survive
> the life tenant, testator's widow.

If I were a betting man, I would bet that the language conferring the remainder in the parent's trust on the child in both Balanson and
Gorman is, more or less, "to my child, if he or she survives me" or some other tried and true phrase, which under the good old stuff
that we have been reading about contingent remainders, would have been a contingent unvested remainder.

That is it for Report No. 5. The full text of all the Reports
will be posted on the ABA RPPT Web site at
http://www.americanbar.org/groups/real_property_trust_estate.html.

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# Report #6

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REPORT NO. 6 - Thursday, 1/10/02

We still haven't received a report yet on the Tuesday afternoon EGTRRA Drafting session, so we are going ahead and reporting on the Thursday CLE sessions at this time. The bulk of this Report #6 was prepared and submitted by reporter Bruce Stone of the Holland & Knight law firm in their Miami, Florida office, and reporter Steve Leimberg submitted the report for his afternoon Special Session.

**Thursday, January 10, 2002**

8:30 - 9:15 a.m
**Subchapter J - Recent Developments Relating to the Income Taxation of Trusts and Estates**
Prof. Mark L. Ascher

Joe Gorman of Los Angeles convened the Thursday proceedings by introducing Professor Mark Ascher of the University of Texas School of Law.

Mark began with a discussion of the separate share rules, which until 1997 applied only to trusts. He used an example of an estate with two equal beneficiaries (A and B) and with DNI of $25,000. The estate distributes $25,000 to A and nothing to B during the taxable year. Under prior law all of the estate's DNI was deemed to be distributed to A. Under the new law and regulations, DNI is allocated equally to the separate and equal shares for A and B, and thus A receives $12,500 of DNI, the estate has DNI of $12,500, and B has no DNI for that year.

If the estate contains a specific bequest of IBM shares to beneficiary C, that is a third separate share. Under state law income on specifically bequeathed assets passes with those assets. If the IBM shares yield $5,000 in dividends, the estate now has $30,000 in DNI, with three separate shares. However, expenses are not necessarily allocated to all three shares, because if deductible expenses relate solely to one of the separate shares, they will be allocable solely to that share and will not affect the DNI of any other share.

Now suppose that the decedent's spouse makes an election to take an elective share under state law, and the share is a pecuniary amount based on date of death values and does not share in the estate's income. The estate now has four separate shares, but because the spouse's share is not entitled to any income, no DNI will be attributable to it. If state law provides for payment of interest on the elective share amount, the spouse will have taxable income but the estate gets no deduction for the interest paid to the spouse (at least according to the regulations). In Mark's view this conclusion is wrong, but he notes that it is a final regulation.

Mark then used another example where an estate has two equal beneficiaries: child A and the decedent's revocable trust. A section 645 election is made. There are two separate shares of the estate, those of A and the trust. Because of the 645 election, the trust is taxable on the estate's DNI not allocated to child A. If a non pro rata distribution is made during administration, the separate share ratios must be adjusted.

Mark called attention to the regulation which states that if the estate has IRD, it must be allocated among all of the separate shares that could potentially be funded with the IRD irrespective of whether the share is entitled to receive any income under the governing instrument or under local law.

Mark then briefly discussed the proposed regulations under section 645. He pointed out Notice 2000-26, which states that until the effective date of the final regulations, taxpayers can choose to follow either the original guidelines in Rev. Proc. 98-13 or the proposed regulations. He also pointed out that under the proposed regulations, not all former grantor trusts will be qualified revocable trusts upon the death of the grantor, and that not even all trusts which were revocable by the grantor will be qualified revocable trusts. Mark said that one of the most intriguing parts of the regulations provides that at the end of the election period, the combined estate and trust are deemed to distribute to a new entity.

Mark then moved to the proposed section 643 regulations, which in theory cannot be relied upon. Mark agreed with Jeff Pennell's observation from Monday that the proposed regulations do not make major changes to existing law, but they do make some changes. Overall they are an improvement over current law. The IRS is trying to mesh section 643 with developments stemming from the **Uniform Prudent Investor Act** and the **Uniform Principal and Income Act**. Because those acts are not a source for tax abuse, the IRS has recognized that it does not have a "dog in the fight." There are two principal areas of change: the definition in fiduciary accounting income (FAI), and when capital gains will be included in DNI.

Section 643 itself defers completely to the governing instrument and governing local law. But the IRS has long said that governing instrument provisions will not be recognized if they depart fundamentally from general principles of law. The new proposed regulations add the word "generally" to the phrase "will not be recognized." But then the proposed regulation goes on to add 5 additional sentences, and Mark says to think of them as examples. He said that because a majority of states have now adopted the uniform acts, there will be no fundamental departure from general principles of law when governing instruments define income in unitrust amounts or allow discretionary allocations or include capital gains in income.

One objective of the proposed regulations was to make it easier to include capital gains in DNI. Under current law, capital gains are not included in DNI, but there are three exceptions (although there have been some liberal interpretations of those three exceptions).

The first exception (if capital gains are allocated to income by the governing instrument or by local law or by the fiduciary on its books) is modified by the proposed regulations to impose a new requirement of reasonableness and consistency if gains are allocated to income by the fiduciary. (Indeed, the requirement that a fiduciary's exercise of discretion be reasonable and consistent applies to all three exceptions, not just the first exception.) The second exception (if capital gains are allocated to corpus and actually distributed during the taxable year) is changed in a major way: the requirement of actual distribution is eliminated. The focus instead is on whether the fiduciary treats the gain as part of a distribution to a beneficiary on the fiduciary's books, records, and tax returns. The third exception (if gains are utilized under the terms of the governing instrument or by the practice of the fiduciary in determining the amount which is to be distributed) by dropping the requirement of a "practice" by the fiduciary. In the past the IRS has taken the position that there cannot be a "practice" in the first year of an entity's existence. The omission of a "practice" requirement may mean something.

When appreciated property is used to discharge fixed-dollar obligations to beneficiaries, the **Kenan** gain that results will likely not be deemed to have "been paid" to the beneficiaries under the second exception in the proposed regulations. The question then is whether those gains nonetheless might enter into DNI under the first exception (where capital gains are allocated to income by the governing instrument or by local law or by the fiduciary on its books). Under unitrust statutes it would seem reasonable to expect that any gains would be included in DNI, but (as stated in Mark's outline materials) the analogy to **Rev. Rul. 68-392** is so close that the failure of those gains to enter into DNI would cause a cautious analyst to pause.

9:15 10:00 a.m.
**The State Income Taxation of Multi-Jurisdictional Trusts**
Max Gutierrez Jr.

Max Gutierrez, who hails from San Francisco, California, began his presentation with a general overview of some general rules and constitutional considerations. The constitutional ability of a state to tax trust income is limited by the due process and interstate commerce clauses.

The 1987 **Swift** case from Missouri (727 S.W.2d) was seminal in a line of cases which establish six points of contact that support the nexus to tax a trust's income: (1) domicile of the settlor, (2) the state where the trust was created, (3) the location of the trust property, (4) the domicile of the beneficiaries, (5) the domicile of the trustees, and (6) the location of administration of the trust.

The Swift line of cases was challenged in the 1997 **D.C. v. Chase** case from the District of

Columbian (689 A.2d 539). The court found that residency of the grantor was alone sufficient contact for a jurisdiction constitutionally to exercise its taxing authority. This was reasoning was further extended in 1999 in five Connecticut cases under the heading of **Chase v. Gavin** (733 A.2d 782), where the only connection to Connecticut consisted of three of the five trusts having one or more beneficiaries resident in Connecticut, plus the fact that two of the trusts were required to submit regular accountings.

The 1990 **Blue** case from Michigan (Court of Appeals, No. 116666) held that Michigan could not tax a trust that had been created in Michigan by an individual who died while a resident of Michigan. The trustee and beneficiaries were all Florida residents. The only connection to Michigan was one parcel of real estate there, which did not produce income.

Residency of the trustee alone generally is a sufficient nexus to tax a trust. Nine states tax on this basis. But California taxes on the basis of "fiduciary" residence which raises questions such as whether a trust protector or someone who holds veto powers of trust administration matters is a fiduciary for tax purposes.

Situs of trust administration alone is sufficient nexus to tax. Generally this should require more important functions than merely keeping books and records, although in some states that alone is held to be enough connection to impose tax on all trust income.

The mere presence of beneficiaries in a state is generally not enough connection to tax the income of a trust, which has no other nexus with that state, but eight states do impose an income tax where the only contact with the state is that one or more beneficiaries reside in the state.

No state imposes income tax solely on the basis that the law of that state is the governing law of the trust.

In planning, great care must be given to the selection of trustees. Clauses should be used that limit the selection of trustees to jurisdictions that will not impose an income tax, or at least which require state income taxes to be considered in the selection of trustees. Provisions allowing trust situs to be moved should be included. Beneficiaries should be required to notify the trustee of change of residence, and the trustee should be exonerated from losses for failing to pay taxes resulting from a change of residence without notice to the trustee.

10:00 10:45 a.m.
**Implementing Total Return Trust Statutes**
Richard W. Nenno

Dick Nenno of Wilmington, Delaware noted that most states have now adopted the **Uniform Prudent Investor Act**. He also noted that 90% of long-term investment returns are attributable to asset allocation, and that only modest returns are attributable to security selection, sector selection, and market timing.

Dick used an example of an income beneficiary of a classic income only trust who demands a higher rate of income than would be produced by a 50-50 allocation between equity and debt investments in today’s markets. He said that under the old prudent man rule, you could usually safely invest 100% in bonds, because this did "preserve" principal for remainder beneficiaries, but this is clearly not permissible under the prudent investor rule. Of course, if the document allows principal invasions or allows what would normally be principal to be allocated to income, the income beneficiary’s needs can perhaps be met using those techniques. Alternatively, the trust could perhaps be converted to a unitrust.

Dick reviewed the **power to adjust** under sections 103 and 104 of the **Uniform Principal and Income Act**. He noted that some states have gone beyond the uniform act by allowing income to be defined as **a unitrust amount**, and he briefly reviewed the law of those states: Delaware, Missouri, and New York (and he also reviewed the provisions of the proposed legislation in Pennsylvania).

Dick identified five situations where it is generally inadvisable to convert to a unitrust: when a higher payout can be reached by creditors; when the trust assets consist of illiquid interests which then would have to be liquidated to pay out the unitrust amount and which would require appraisals; when conversion in a generation-skipping trust would unnecessarily increase the amounts to be paid out to nonskip persons; where the trust is not likely to last for a long time (because the advantages of a total return trust typically increase with the length of the trust term); and where the current beneficiary has a low tolerance for fluctuations in trust distributions.

Dick then turned to a discussion of the **federal income tax treatment of total return trusts**. The proposed regulations under section 643 give three examples of unitrusts, but none, which deal with the power to adjust under sections 103 and 104 of the uniform act. He discussed unitrust statutes (Delaware and the proposed Pennsylvania statute) which contain ordering provisions which would enable the trustee to distribute capital gains to the current beneficiary, and he contrasted those statutes to the New York and Missouri statutes which do not contain any ordering rules. It is generally thought that statutes with ordering provisions will be more likely to be recognized as allowing capital gains to be distributed to the current beneficiary than statutes without those provisions. There is also some doubt whether the exercise of the power to adjust under sections 103 and 104 of the uniform act will allow the trustee to distribute capital gains to current beneficiaries for income tax purposes.

Dick reviewed the GST consequences of total return trusts. He broke those trusts down into three categories: grandfathered trusts, exempt trusts, and nonexempt trusts. He cited **two PLRs (200148034 and 200150016)**, which have given favorable treatment to grandfathered trusts even in the absence of state statutory authority.

Dick cautioned practitioners not to ignore the possible **gift tax consequences of converting income trusts to total return unitrusts**, under the possible broad scope of the **Dickman** case. He also reminded the audience of the **Cottage Savings** case and its potential reach to recharacterize reorganizations of trusts as recognition events for federal income tax purposes. He pointed out that the private letter rulings which have addressed trust reorganizations have not ruled upon income tax consequences. Dick suggested making disclosure for federal income tax purposes under section 6501 to commence a three-year statute of limitations. In some cases, conversion to a unitrust might be made contingent upon obtaining a favorable private letter ruling, although this will often be unsatisfactory because of the delay or because of the possibility that a favorable ruling simply might not be issued.

Finally, Dick drew the attention of the audience to the very detailed provisions in his written outline that provide guidelines for the conversion of an income trust to a unitrust which his employer (Wilmington Trust Company) uses.

11:00 -11:45 a.m.
**Generation-Skipping Transfer Tax Planning**
Lloyd Leva Plaine

Lloyd Leva Plaine, who hails from Washington, D.C., began her discussion with a summary of the **GST provisions in the 2001 tax legislation**. She said that the legislation was meant to be helpful, but that in many cases taxpayers will want to elect out of the new automatic allocation rules. She reviewed the new terms introduced in the 2001 legislation indirect skips and GST trusts and noted that the legislation applies to transfers made in 2001. She cautioned the audience to be aware of this in the preparation of 709s for 2001.

Lloyd began an extended discussion of **what GST trusts are under the new definition**. In general, the statute defines GST trusts (to which the automatic allocation rules apply) too broadly. Some common trusts which are included in the definition of a GST trust should be elected out of the automatic allocation rules. She gave an example of a spray trust, which provides for a parent and that parent's children until the parent's death, which then holds the trust property in trust until children reach a specified age. Another example is an insurance trust which provides for distribution of the trust assets on the later of the insured's death or when the insured's child reaches a specified age (even if that age is under the age of 46, which is the age used in the statute).

Lloyd pointed out that trusts which use **hanging powers** where the amount that can be withdrawn in a particular year exceeds the annual exclusion amount will <u>not</u> be excluded from the definition of a GST trust, and thus GST exemption must be allocated to these trusts if desired. On the other hand, if the amount that can be withdrawn under the hanging power for a particular year is not greater than the annual exclusion amount, the trust will be a GST trust and the automatic allocation rules will apply.

Lloyd noted other reasons that you might not want the **automatic allocation rules** to apply: such as where trust assets values are expected to decline, or where a large distribution will be made to nonskip persons. She noted that the automatic allocation rules apply to trusts created before 2001 if the ETIP period for such a trust ends after 2000.

You must **elect out of the automatic allocation rules** on a timely filed form 709. Is an election to treat a trust as a GST trust irrevocable? No one knows for certain. The new automatic allocation rules have made it less likely that a failure to make a timely allocation of GST exemption will cause more GST tax to be paid. But they have created another problem, namely that in many cases it will be inappropriate to have GST exemption allocated to a particular trust or to have it allocated on a timely basis. The failure to elect out of the automatic allocation rules in those cases will cause GST exemption to be wasted.

Lloyd suggested **an approach to dealing with an ETIP trust**, or with a trust where it is expected that children will survive to an age specified as a condition precedent for distribution to them, but where a child in fact dies before then. The trust can provide for the assets to remain in a spray trust for the benefit of the deceased child's spouse or siblings (nonskip persons) in addition to the deceased child's descendants for a fixed period of time such as six months. During that period, GST exemption can be allocated to the trust, which can then be divided in a qualified severance, so that the portion for the deceased child's descendants will have a zero inclusion ratio and the other portions will have an inclusion ratio of one.

Lloyd also discussed the **relief from late GST exemption allocations**, which is now available under **section 9100**. She described that and the automatic allocation rules as being the two most important parts of the legislation from the perspective of GST tax planning. She noted that the IRS has indicated in **PLR 9718020** that the 6-month extension period for a form 706 may be available to extend the time in which to allocate GST exemption. It is **critical** that the return or other filing includes the statement "filed pursuant to section 301.9100-2" written across the top. The existing section 9100 regulations contain many definitions and set forth detailed rules when relief will and will not be appropriate. She discussed the critical need for affidavits, and how sometimes those affidavits might work at cross purposes from the point of view of the practitioner who might be accused of professional negligence.

Lloyd discussed the new rules in the 2001 legislation, which allow **retroactive allocation of GST exemption** when a descendant dies before the transferor. This is a beneficial change in the law, but it isn't clear how it ties in with the ETIP rules.

In conclusion, Lloyd advised that estate planning advisers **take a careful look at all existing trust arrangements** and determine how the new automatic allocation rules should apply. Because of the applicability to transfers made in 2001, and to ETIP periods terminating after 2000, that review has **some degree of urgency**. Finally, as always, wills and trust agreements should be drafted clearly having in mind an understanding of the new GST rules.

11:45 a.m. 12:30 p.m.
**Special Needs Trusts**
Sterling L. Ross Jr.

Terry Ross of Mill Valley, California began his presentation with a discussion of some of the basic rules that apply to planning with persons with special needs, such as what SSI (supplemental security income) is. He emphasized **the need of traditional estate planning lawyers** (as opposed to that branch of the practice traditionally referred to as "elder law") to have an understanding of these rules. As an example, he postulated a client who is well to do financially and who asks his or her estate planning lawyer to prepare an estate plan which will preserve resources for the client's child with special needs. The typical estate planning lawyer might be tempted to respond, "that's something that 'elder law' attorneys do." But a sophisticated client will care about preserving his or her estate and to make sure that the needy child receives as many public benefits as possible.

For example, an estate planning lawyer should be prepared to question a client who says that his or her child is receiving SSI and to ask instead whether that child is receiving SSI or SSDI (as there are no resource limits on entitlements to SSDI). He also discussed the **basic differences** between first party special needs trusts (settled by the recipient of public benefits) and third party special needs trusts (settled by a parent or someone other than the recipient of the person receiving benefits). The object of a special needs trust is to make funds available for a beneficiary without disqualifying that beneficiary from governmental benefit. The laws differ from program to program and from jurisdiction to jurisdiction.

Terry discussed whether a **"wide open" trust** (one with the broadest possible discretionary powers) would work as a special needs trust. The basic answer, if the trust is a third party special needs trust, is yes but the trust will not give guidance to the trustee. Furthermore, no matter what the niceties of trust law provide, administrators and other persons who work with public benefits programs have come to have a de facto (and almost intuitive) understanding of what a traditional "special needs trust" (a term which Terry coined back in the 1970's) is. In fact, if a caseworker sees a trust with the phrase "special needs trust" in its title, that's as far as the caseworker will usually go.

Terry stated that in 27 years of his practice, there have been no fundamental changes in the rules that govern third party special needs trusts. On the other hand, there have been a myriad of changes governing first party special needs trusts.

If a judge questions the **public policy justifications** for creation of a third party special needs trust, Terry observed that the parent of a disabled child over the age of 18 (if the disabled child is 18 or older, parents' assets are not counted as available resources of the child) functions as a special needs resource. Why should the death of that parent change the ability to preserve that parent's assets for the child's special needs? In reality, good planning merely substitutes a trust in the parent's place after the parent's death.

Terry stated that if there was **one essential point** for estate planning lawyers to remember from his presentation, it is that the common terminology **now equates a special needs trust with a (d)(4)© trust**. A (d)(4)© trust (under OBRA 1993) must have a "payback" provision which requires the trust to pay to the state the amount of medical assistance on behalf of the beneficiary under that state's Medicaid program. Third party special needs trusts do not have to include such a provision, and many such trusts are being erroneously drafted with payback provisions included because of the inaccurate equation of all special needs trusts with (d)(4)© trusts.

2:00 5:15 p.m.
Special Sessions III and IV

A variety of workshops were presented on Thursday afternoon **(see listing below)**.

Your reporter participated with Lauren Detzel (of Orlando, Florida) and Bob Goldman (of Naples, Florida) in a workshop discussing **recent developments in Florida trust and estate law**. The workshop was very well attended, with perhaps as many as 400 people present. Approximately 50 minutes was devoted to discussion of the planning and administration aspects of Florida's **new elective share law** (which became effective on October 1, 2001). Approximately 20 minutes was devoted to discussion of the complete overhaul of the **Florida Probate Code**. The chief point made there was that many provisions that formerly were found in the statutes are being moved to the **probate rules** promulgated by the Florida Supreme Court, and that practitioners not versed in day to day practice in Florida should not be misled into believing that the statutes set forth all of the essential rules governing administration of estates. Approximately 20 minutes was devoted to a review of **recent appellate cases of significance**. The chief case involved the assessment of punitive damages against a corporate trustee for conflicts of interest and damages which resulted to a trust when the lending side of the corporate trustee made loans to the trust to engage in commercial ventures which ultimately failed. The appellate court ruled that the attorney-client privilege did not protect communications between the corporate trustee and its attorneys in structuring and administering the transaction.

III-A CASE STUDY **Implementing Total Return Trusts**
Richard W. Nenno
Ralph C. Wileczek

III-B **Advanced LP, LLP and LLC Valuations**
D. John Thornton

Curtis R. Kimball

III-C **When Charitable Trusts Go Off The Track**
Jerry J. McCoy

III-D **Florida Law Update**
Lauren Y. Detzel
Robert W.Goldman
Bruce Stone

See summary above.

III-E **Future of the Profession**
T. Randolph Harris
Zoe M.Hicks
Howard M. McCue III
Beth Clark Rodriguez

IV-A CASE STUDY **Special Needs Trusts**
Sterling L. Ross Jr.

IV-B **Advanced LP, LLP and LLC Valuations**
(repeat of Session III-B)
D. John Thornton
Curtis R. Kimball

IV-C **What To Do With Life Insurance After the Hearse Leaves With Your Client In It**
Edward S. Schlesinger

IV-D **How to Succeed in (the) Business (of Practicing) Without Really Trying**
Stephan R. Leimberg

Steve reports on his own session as follows:

My talk was fully entitled, GETTING THE FISH TO CHASE THE HOOK: How to Succeed in (the) Business (of Practicing) Without Really Trying!

The thrust of the talk was the importance of a systematic approach to letting others know who you (and your firm) are - and how good you are! IQ, hard work, caring for the client, knowledge of tax and other laws, and even mastering tools and techniques will not alone suffice in the harsh economic climate of this decade; practitioners must pro-actively and ethodically determine who they want as clients, how to reach them, how to attract them, and how to keep them. Six steps are necessary to accomplish these objectives:

(1) Identify your target market,
(2) Expand your knowledge ("product") base,
(3) Develop a value-added strategy,
(4) Perpetually project positive imagery,
(5) Develop efficient planning systems, and
(6) Create a "quality control" culture.

The talk stressed the importance of identifying, differentiating, interacting, and customizing client contacts, of understanding the importance of making it a practice to help others see and solve their problems, of "sweating the small stuff", of understanding that marketing is a "contact" sport and that the more often we communicate with and are seen or heard by potential and present clients, the more opportunities we have to help them. We need to make it easy to contact and do business with us and impossible to forget how to refer business to us.

Getting the fish to chase the hook also requires that people see and think of you as a human being and puts a premium on the ability to project yourself as an individual and of giving the unexpected.

Because it is impossible for prospective clients (and even most fellow professionals) to judge our real ability or experience, the selection of a professional is more often based on perceptions - and feelings and personalities - or exposure - than on true value.

We must - more often - and more tangibly - show we care about our clients and those who provide us with clients - and learn what they want - and thank and reward them more frequently and more effectively. We must also create a focused, organized, written marketing plan in which specific people in the firm are given specific tasks. This requires a relationship oriented, effectively targeted, and professional nurtured plan.

Finally, we need to realize that until or unless we differentiate ourselves positively and constantly in the minds of our targeted audience, no matter how bright, dedicated, or experienced we are, we will remain an easily replaced - or overlooked - or undervalued - commodity.

IV-E **Income Taxation of Trusts and Estates**
Mark L. Ascher
Linda B. Hirschson

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That is it for Report No. 6. The full text of all the Reports will be posted on the ABA RPPT Web site at http://www.americanbar.org/groups/real_property_trust_estate.html.

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