Report #7

This report from Glen Yale covers several presentations. Also, a later report from John Warnick does the same. Joe Hodges has provided a copy of the full institute program that sent in a separate e-mail. If you have questions about the programs referred to in this report, please see the program description.

- Gene Zuspann

As we have done in January for the last six 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 37th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 6-10, 2003 at the Fontainebleau Hilton Resort and Towers in Miami Beach, Florida.

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.
==========
REPORT NO. 7

The following report was sent by Glen A.Yale. It covers **Estate Planning With GRATs and Near-GRATs – Opportunities and Pitfalls of a Cloudy Crystal Ball by John R. Price, What Do You Mean, Subpoena? I'm a Lawyer! by Russell G. Allen**, and **One Percent, Two Percent, Three Percent, Four – No Matter What, You Pay, the Bene Wants More by Susan Porter**

Russell Allen gives superb coverage of the issues involved in his two sentence titled topic "What Do You Mean Subpoena? I'm a Lawyer!" After reviewing the attorney-client privilege, the attorney work product doctrine and the tax practitioner's privilege, Allen shows that under the common law there was a fiduciary exception to the attorney-client privilege under the notion that advice given the trustee was ultimately for the benefit of the beneficiaries and could be discovered. Recent cases in Texas and California in addressing situations in which the attorney-client privilege is codified take the better approach that the attorney represents the trustee and the beneficiaries are better served by permitting the attorney to seek privileged advice. He gives proposed language to draft around the problem in states that do not follow the Texas and California approach.

In Federal tax controversies the attorney-client privilege is often unavailable because of the view that advice for tax preparation was not for purposes of litigation and that business advice or communication to prepare a tax return was not legal advice. The work product doctrine suffers particularly under the anticipation of litigation requirement. Some recent cases that take a more reasonable approach are discussed. Communications that involve advice may be protected if there is no waiver and documents

that explain a transaction but does not contain legal advice will also not be privileged.

In Estate Planning with GRATs and Near-GRATs ? Opportunities and Pitfalls of a Cloudy Crystal Ball, the learned Prof. John R. Price proposed a new device after stating the two gambles of a GRAT, (1) the value of the property transferred will appreciate at a rate greater than the §7520 rate and (2) the grantor will survive the reserved term; and giving his argument that the IRS position is highly questionable that IRC §2039 applies to bring into the grantor's estate the entire trust property when the grantor does not survive the trust term. Prof. Price proposes eliminating some of the risks of the GRAT by a sale to an income tax defective trust in exchange for an annuity for a fixed term. His article gave more detail on the device:

1. Client creates an IDIT, from which discretionary distributions can be made to his children and grandchildren.

2. Client transfers a significant amount of property, say $100,000 to $1,000,000 to the IDIT. Client's GSTT exemption is allocated to the transfer so the IDIT will be completely exempt.

3. Client transfers assets that qualify for a substation valuation discount (e.g., closely held stock or units of an FLP or LLC) to the IDIT in exchange for payment of an annuity for a fixed term. Payments are to be made to the client as long as he lives. If the client dies before the end of the term any remaining payments are to be made to his estate. The annuity agreement should be drafted to meet the requirements of §2702.

Prof. Price proceeded to set forth the income, gift, GST and estate tax consequences of his device. With Waltan and his new devise, the advantages are "almost irresistible."

Susan Porter with U.S. Trust Company gives the independent trustee's perspective on how to approach the income beneficiary's and remainder beneficiary's high expectations as to investment returns and allocation of income and principal as well as distribution expectations in One Percent, Two Percent, Three Percent, Four?No Matter What You Pay, the Bene Wants More. In her paper and her oral presentation she explained how an ascertainable standard limited to "health, education, maintenance and support" might not meet the grantor's expectations of distributions to the income or residuary beneficiaries. Further, ascertainable standards may require distributions that are not desired, such as funds that disqualify for government assistance. Independent trustees favor "wide-open" discretionary distribution standards so expected distributions can be made. Through three cases, McNeil I, McNeil II, and Hinrichs, the distribution decision-making where the trustee has sole discretion were explored by Ms. Porter. Trustees must give full communication to the beneficiaries to avoid liability, but after doing so the discretion at most will be subject to a reasonableness standard.

_____

GENERAL INFORMATION:

Inquiries/Registration:
Philip E. Heckerling Institute on Estate Planning
University of Miami School of Law
Center for Continuing Legal Education
P.O. Box 248087
Coral Gables, FL 33124-8087
Telephone: 305-284-4762 / FAX: 305-284-6752
Web site: www.law.miami.edu/heckerling
E-mail: heckerling@law.miami.edu
==========
Headquarters Hotel - Fontainebleau Hilton
4441 Collins Avenue
Miami Beach, FL 33140
Telephone (305) 538-2000, FAX (305) 674-4607
==========
_____

//----------

Eugene P. Zuspann II

Denver, Colorado Mail: ezuspann@zuspann.com
Goodland, Kansas WWW: www.zuspann.com
To search the ABA-PTL archives online or manage your subscription, go to
http://mail.abanet.org/archives/aba-ptl.html