Introduction, Pt. 1

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of L. Paul Hood Jr. (APLC) in Manderville, Louisiana, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Scope of the Institute:

Now celebrating its 40th year, the Heckerling Institute on Estate Planning is the nation's leading conference for estate planning professionals. The program is designed for sophisticated attorneys, trust officers, accountants, insurance advisors, and wealth management professionals who are familiar with the principles of estate planning.

• The recent developments panel on Monday afternoon, featuring three of the nation's foremost estate planning experts, will guide you through the year's most significant developments in estate planning, including the latest developments on the tax front.

• Our general session lectures, which begin on Tuesday morning and continue throughout the week, will provide in-depth analysis of topics of timely interest to experienced estate planners. Of special interest this year, is a Tuesday afternoon panel addressing the unique planning and drafting issues that arise at the midway point between the enactment of EGTRRA in 2001 and its scheduled “sunset” in 2011, as well as the issues presented by any new legislative developments.

• On Wednesday and Thursday afternoons, a wide variety of workshops, panel discussions, and case studies will examine and provide practical guidance on sophisticated estate planning techniques, including our popular series on planning with financial assets. Sessions in the financial assets series are designated:

• A second series of afternoon programs will focus on trust and estate litigation, including the tax

aspects of settlement agreements and avoiding litigation with respect to total return trusts. The series will also feature a mock trial presentation offering practical tips, strategies and suggestions from a panel of experienced trust and estate litigators.
Sessions in this series are designated:

• Our fundamentals program is of interest to not only entry-level practitioners, but also to experienced planners who would benefit from a thorough review of three important topics. The programs will cover retirement plan beneficiary designations, asset protection planning and elder law.

As the largest gathering of estate planning professionals in the country, the Institute offers a unique 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. Please join us in Miami Beach, January 9 -13, 2006, to help us celebrate 40 years of excellence in continuing education!

THE INSTITUTE 2004 FACULTY:

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Sonnenschein Nath & Rosenthal
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McLean, Virginia

Martin E. Basson
Internal Revenue Service - Estate and Gift Fort Lauderdale, Florida

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Introduction, Pt. 2

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In Introduction Part I we summarized the Scope of the Institute, introduced the Faculty for 2006, and listed the Institute's Director and the members of the Advisory Committee.

In this Introduction Part II we are listing the **Substantive Program Schedule and Highlights** so everyone will know what sessions will be presented next week and when and approximately when the various Reports on the same can be expected to appear on the ABA-PTL discussion list. The below Schedule was prepared and formatted with the assistance of Reporter Gene Zuspann.

2006 HECKERLING SUBSTANTIVE PROGRAM SCHEDULE AND HIGHLIGHTS:

Monday, January 9

9:00 – 12:15 P.M. OPTIONAL PRE-CONFERENCE FUNDAMENTALS PROGRAM – Anatomy of Plan Beneficiary Designations - Natalie B. Choate Now learn exactly what to do with retirement benefits in the estate plan:
Who should (and should not) be named as beneficiary, and why (or why not).
Learn how to name your chosen beneficiary: how to fill out the beneficiary designation and get it accepted by the plan, how to draft a trust that's guaranteed to pass the IRS see-through trust rules, and when to ignore those rules. Includes designation forms and interview checklist. Plus a review of 2005 developments, and a preview of 2006 (including what estate planners need to know about the NEW "Roth 401(k)s").

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

2:10 – 5:15 p.m. Recent Developments – 2005 Dennis I. Belcher, Jeffrey N. Pennell and Carol A. Harrington Materials by Richard B. Covey and Dan T. Hastings

6:00 – 7:00 p.m. Complimentary Reception for Registrants Fontainebleau Resort

Tuesday, January 10

9:00 – 9:45 a.m. - Grantors Are From Mars, Grantor Trusts Are From Venus Samuel A. Donaldson Once the ugly duckling, the grantor trust has become the beautiful swan – a centerpiece in many contemporary estate plans. Attractive because of its simplicity and flexibility, the grantor trust often makes traditional estate planning strategies that much better, solving some of the practical barriers that limited the benefits of traditional plans. This session will address emerging issues and innovative techniques involving grantor trusts, analyzed from the perspectives of the income, gift, and estate taxes.

9:45 – 10:30 - Growls or Gratitude? Practical Guidelines for Trustee Selection and Succession Kimbrough Street This presentation will highlight practical, non-tax issues our clients need to consider in choosing individual trustees and will emphasize the advisor's role in helping the client structure creative and flexible plans for trustee succession.

10:45 – 11:30 A.M. - Relieving Your Situs Headache: Choosing and Rechoosing the Jurisdiction for a Trust Richard W. Nenno Notwithstanding the emergence of the Uniform Trust Code, the tax and trust laws of U.S. jurisdictions are quite different, and clients can benefit from careful situs selection. This program will explore factors to consider in choosing a jurisdiction for a new trust, the advisability and practicability of moving an existing trust to a more favorable jurisdiction, and related ethical and legal issues.

11:30 a.m. – 12:25 P.M. - The Trustee's Duty to Provide Information to
Beneficiaries: When Can The Settlor Say "Don't Ask, Won't Tell"?
Anne J. O'Brien
This program will focus on the settlor's ability to keep information out of the hands of beneficiaries. It will include a discussion of different state approaches to Section 105 of the Uniform Trust Code, the Duty to Inform and Report.

2:00 – 3:30 - A Wild Decade at Midlife
Ronald D. Aucutt, Carlyn S. McCaffrey, Ann B. Burns & Lloyd Leva Plaine At the halfway point between the enactment of EGTRRA in 2001 and its scheduled "sunset" in 2011, this panel will explore the resulting challenges of planning and drafting, the patchwork of state laws in various stages of "coupled-ness", and the portent of carryover basis just over the horizon, as well as any current developments in Washington that could affect any of this.

3:45 – 4:30 p.m. - Marital Planning While the Rules Are Changing Eric A. Manterfield Selecting credit shelter and marital deduction provisions is difficult when the only certainty is that the tax laws will change. This discussion will focus on marital planning under a variety of circumstances, including funding provisions, alternative marital trusts and disclaimers.

4:30 – 5:15 p.m. - We're Sorry, Our Charitable Gift Has Gone South. Please Revoke the Gift and Protect Our Tax Savings and Other Benefits Winton C. Smith, Jr.
Recent developments provide practical ways to revoke or modify gift plans and obtain a more favorable result for both the donor and the charitable organization.

Wednesday, January 11

9:00 – 9:45 a.m. - Foreign Affairs 101: Planning for U.S. Clients with Foreign Property M. Read Moore This program will address basic succession law and tax planning issues for U.S. clients with foreign property such as foreign real estate, shares in foreign corporations, foreign inheritances, and interests in foreign trusts, with a discussion of related federal income tax issues that will affect these clients while they are living and that will affect their families after their deaths.

9:45 – 10:30 a.m. - The Beauty and the Beast: Partnership Interests in Your Estate or Trust Administration Carol A. Cantrell Marrying partnership interests into an estate or trust administration can bring out the best and the worst in both. Don’t get caught off guard when blending partnership and fiduciary tax law concepts by critical differences between them in timing of income, elections, special allocations, separate shares, inside/outside basis, accounting issues, equitable tax adjustments, flow-through basis adjustments, compensation, distributions and more.

10:45 a.m. – 12:15 p.m. Question & Answer Session Dennis I. Belcher, Jeffrey N. Pennell & Carol A. Harrington

2:00 – 5:15 - FUNDAMENTALS PROGRAM – Creditor Wars: Asset Protection Strikes Back – Protection from Predators and Creditors in the 21st Century Gideon Rothschild This session will examine the techniques and legal strategies used to obtain maximum wealth protection, including exemption planning, limited liability entities, discretionary trusts, domestic and offshore self-settled trusts. The program will cover the effect of the recently enacted Bankruptcy Act on self-settled trusts and exemption planning, fraudulent transfer principles and case law developments.

2:00 – 3:30 - Special Sessions I

I-A – Uncle Sam: The Silent But Ever-Present Party at the Estate and Trust Dispute Settlement Table Donald R. Tescher & Laird A. Lile Most estate and trust disputes are resolved through negotiation and mediation. Tax considerations attendant to a proposed settlement can have a significant effect on the ultimate financial outcome and can enhance the positions of the parties. Failure to consider the potential tax consequences can have disastrous consequences to the client and to the attorney. The more consequential tax issues will be examined as well as practice aides to achieve the intended tax consequences.

I-B – Transfer Tax Audit Issues: What's Hot Norman J. Benford, John W. Porter, Martin E. Basson & James L. Gulley This panel, representing the views of the practitioner and Internal Revenue Service (represented by the Estate and Gift Tax Supervisory Attorneys of South Texas and South Florida – two of the busiest jurisdictions in the country), will take a practical approach to the discussion of significant current issues in estate, gift and generation-skipping tax audits, including valuation matters (available discounts and adjustments, impact of post-death events, defined value issues and Section 7520); use of appraisers; adequate disclosure considerations; Graegin notes, unresolved claims and other deduction issues; increased use of summonses; and settlement considerations.

I-C – The 7 Habits of Highly Effective Grantor Trusts Samuel A. Donaldson & M. Read Moore This session will use case studies to present several strategic uses for grantor trusts in contemporary estate planning, with an emphasis on drafting issues and participant questions.

I-D – Ethics – What's a Lawyer to Do?
Frank A. Thomas, III
A discussion of the ethical and professionalism issues which may arise in family and intergenerational representation.

I-E – The Trustee's Duty to Provide Information to Beneficiaries: When Can the Settlor Say "Don't Ask, Won't Tell"?
Anne J. O'Brien, Gail Cohen & Dennis I. Belcher An expanded discussion of the settlor's ability to keep information out of the hands of beneficiaries. The program will include a discussion of different state approaches to Section 105 of the Uniform Trust Code, the Duty to Inform and Report.

I-F – Alternative Investments: Promise or Peril?
Susan M. Mangiero
Endowments, foundations and other tax-exempt organizations are increasingly investing in hedge funds, private equity and other alternative investments.
This program will address the risk-return trade-off of various types of alternatives, suitability for tax-exempt organizations, early warning signs and unique characteristics such as valuation, risk management and transparency.

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

II-A – The Prophylactic Approach for Total Return Trusts: Avoiding Unwanted Litigation Margaret E. W. Sager & Paul S. Lee This program will address potential litigation hot points under the new total return options, and how to avoid them in advance, considering "real world" situations and recent developments.

II-B – Transfer Tax Audit Issues: What's Hot (Repeat of Session I-B)

II-C – More Marital Planning
Eric A. Manterfield
This workshop will explore a number of fact situations and will present alternative solutions to commonly encountered problems.

II-D – Charitable Giving Exit Strategies Jerry J. McCoy & Winton C. Smith, Jr.
Case studies illustrate a variety of charitable gift plans and the exit strategy that is appropriate for each type of gift.

II-E – How to Keep From Throwing Uncle Joe (and His Successors) to the Dogs Kimbrough Street This session will explore how to educate the client as to the challenges trustees face, and will elaborate on planning for trustee succession in both short-term and long-term trusts.

II-F – Reinventing Yourself After Estate Tax Repeal or Higher Exemptions:
Using Estate Planning Techniques for Income Tax Planning Jerome M. Hesch & Neill G. McBryde If there is no tax-free basis step-up at death, the elimination of taxable gains upon death can no longer be relied upon as an income tax solution.

Preservation of capital gains, exclusions from gross income and deferral of income will become more important. This session will examine how to use common estate planning techniques to accomplish these income tax planning objectives. Even under an estate tax with higher exemptions, these techniques can still be useful.

Thursday, January 12

9:00 – 9:45 a.m. - Prefer to Defer? 409A May Make You Pay!
Donald O. Jansen
Transition is over! 409A is in full effect! This is the most significant change in taxation of non-qualified deferred compensation in over thirty-five years. This presentation will review the statute and IRS guidance concerning the new constructive receipt and funding rules, the definition of deferred compensation and grandfathered plans.

9:45 – 10:30 a.m. - They Lived Happily Ever After and Other Family Business Fairy Tales: Non-Tax Issues That Can Paralyze Succession and Estate Planning Mike Cohn This session will walk through the issues large family business clients face during succession and estate planning and explore why they often get stuck in the planning process. Non-tax issues that cause procrastination also create opportunities for the estate planner who wants to provide intergenerational solutions for clients.

10:45 a.m. - 11:30 a.m. - Business Succession Planning: The Charitable Options Daniel L. Daniels & David T. Leibell A discussion of the role of charitable planning in a comprehensive business succession plan, including split-interest charitable trusts, private foundations, supporting organizations and other alternatives. The program will compare charitable and non-charitable options for succession planning, discuss how to integrate charitable vehicles into the plan, explore income and transfer tax opportunities and problems, and cover planning for the private foundation excise taxes and the unrelated business income tax.

11:30 a.m. – 12:15 p.m. - Life Insurance Due Diligence or Everything You've Always Wanted to Know About Life Insurance but Were Afraid To Ask Jon J. Gallo A look "under the hood" at common life insurance products. The program will provide an overview of term, whole life, blended, universal and variable products, as well as an introduction to understanding life insurance illustrations and useful insurance industry sources of information.

2:00 – 5:15 p.m. - FUNDAMENTALS PROGRAM –Elder Law: “Be Comfort to My Age!”
Lawrence A. Frolik
Elder law answers Shakespeare’s request as it brings comfort to those of great age. An integral aspect of later life planning, elder law attempts to answer the essential needs of older clients. This session will delve into just what is “Elder Law”. We’ll examine its key aspects including planning for mental incapacity, planning for appropriate housing, advance health care directives, dealing with dying, paying for long-term care including planning for Medicaid eligibility, and a quick overview of Medicare.

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

III-A – Trust Law and Order: A Mock Trial Demonstration Ripped From the Headlines Terrence M. Franklin, Bruce S. Ross, Dominic J. Campisi, Robert N. Sacks & Steven K. Mignogna Experienced trust and estate litigators will present a mock trial demonstration highlighting tips, strategies and suggestions for developing and offering evidence, and for making arguments in scenarios based on actual contested trust and estate trials. The program will also assist estate planners in anticipating litigation issues and testifying when called as witnesses.

III-B – The Nuts and Bolts of Changing the Situs of a Trust Richard W. Nenno, Joshua S. Rubenstein, Carol A. Johnston & W. Donald Sparks, II Determining that a trust should be moved to another jurisdiction is only the beginning. This session will explore the procedural and practical considerations that must be addressed in connection with moving a trust.

III-C – Case Studies in Succession Planning: Addressing Generation-Specific Issues with Family Business Clients Mike Cohn As family business clients grow, the next generation can become smart owners without personal careers in the family business. An investor-model of ownership, emphasizing family governance, can help the estate planner integrate non-tax issues with multigenerational planning.

III-D – How Does 409A Work?
Donald O. Jansen
Examples will be discussed concerning equity deferred compensation (stock options, SARs, restricted stock and phantom stock), the new deferral rules and permissible distribution events.

III-E – The Gathering Storm – Circular 230: What Does It Mean and What Do We Do?
Charles A. Redd
What is the difference between a plan having as its "principal purpose”, as compared to "a significant purpose", the avoidance or evasion of federal tax? What constitutes "advice"? Should every item of paper and electronic mail generated by a law or accounting firm contain a statement that it cannot be used to avoid tax penalties? These and similar questions will be explored.

III-F– Evaluating Insurance Products
Jon J. Gallo & Lawrence Brody
An examination of the use of life insurance in estate and business planning.

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

IV-A – Trust Law and Order: A Mock Trial Demonstration Ripped From the Headlines (continued)

IV-B – Avoiding “Oops” With Partnerships in Your Estate or Trust Administration Carol A. Cantrell Blending partnership tax law with fiduciary concepts can spell disaster for the uninitiated. This workshop presents examples of what not to do and also how to maximize the efficiency of both during your estate or trust administration.

IV-C – Ich Glueckspilz...! What To Do When Your Clients Inherit Foreign Property or Become Beneficiaries of Foreign Trusts M. Read Moore & Samuel A. Donaldson U.S. citizen and resident clients who inherit foreign property and who are beneficiaries of foreign trusts will all have one thing in common: U.S.
federal income tax issues. This workshop will address important substantive U.S. federal income tax rules and reporting requirements that affect these clients.

IV-D – More on the Charitable Options in Business Succession Planning Daniel L. Daniels & David T. Leibell This session will provide more detail on the use of charitable strategies in business succession planning.

IV-E – Coke without Sugar; Coffee without Caffeine; Estate Planning without
Taxes: We Do Live in Interesting Times!
Mark B. Edwards
Estate planning in a tax-free environment will return to its roots: wills, trusts, powers of attorney and targeted gifts. We will look at planning in this context and at the issues of the older client with potentially diminished capacity.

IV-F – We Interrupt This Program to Bring You a Special Announcement: The CEO is Now Reporting to You Robert S. Stolar A quantitative look at the peculiar problems that affect a corporate executive's estate and financial planning. Included in the discussion will be a review of low basis stock diversification strategies for the corporate insider and SEC issues affecting 16 (b) officers and directors. Also, planning around non-qualified and incentive stock options will be thoroughly reviewed. In addition, various charitable giving alternatives will be discussed.

Friday, January 13

9:00 – 9:45 a.m. - Interests in Trusts in Divorce: What the Settlor Giveth the Divorce Court May Taketh Away Marc A. Chorney Many divorce courts have expanded the pool of divisible assets in property divisions to include beneficiaries' interests in trusts. Various state court decisions, valuation of interests and drafting issues will be considered.

9:45 – 10:30 a.m. - Circular 230: A Nine-Hundred Pound Gorilla Roy M. Adams Revised Circular 230, even after the last minute IRS "clarifications", imposes onerous new standards for the giving of written tax advice. Some believe a "common sense" interpretation will prevail. Are you prepared to bet your right to practice before the IRS on that? Could a Circular 230 transgression constitute a violation of state ethics rules?

10:45 a.m. – 12:00 noon - Wrapping It Up Louis A. Mezzullo A practical discussion of the estate planning techniques covered during the Institute using a real life hypothetical fact situation designed to illustrate the application of the techniques.

The End...........................

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Preliminary Report

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We also will be posting the full text of each of these Reports on the ABA RPPT Section's Web site, as we have since the 2000 Institute. Those Reports can be found at URL http://www.abanet.org/rppt/meetings_cle/heckerling. In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive at URL http://mail.abanet.org/archives/aba-ptl.html.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of L. Paul Hood Jr. (APLC) in Manderville, Louisiana, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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The start of the 40th Institute is only a few days away now and, as we prepare for that, we want to pass along a few news items we have received recently or need to broadcast.

Institute Opening Reception

The Heckerling Institute staff reminds everyone to attend the Complementary Reception for Registrants that will be held in the exhibition hall at the Fontainebleau Hotel from 6:00 to 7:00 p.m. on Monday evening. This is a don't miss function - plenty of food and lots of things to drink, plus a great place to meet a lot of people.

News from the Exhibit Hall:

The vendor's list this year includes the following (in alpha order) which may be of particular interest to many of our readers and will be covered in more depth as the Institute progresses:

ABA Section of Real Property, Probate & Trust Law Attorney's Will Registry BNA/Tax Management, Inc.

Brentmark Software, Inc.
CCH Inc.
Connect2A
Eidelman Associates - WINDRAFT
Estate Valuations & Pricing Systems, Inc. [EVP] EstateWorks FASTER Systems, LLC Bronze Sponsor Fast-Tax Financial Data Service Gallo Institute Gillett Publishing LLC [GEMS] Heritance System by DataTech Software InterActive Legal Systems The Lackner Group, Inc.
LAWGIC LLC
LexisNexis
PPC
Schumacher Publishing, Inc.
Thomson RIA
Thomson West
University of Miami, Office of Estate and Gift Planning U.S. Trust and Practical Drafting ® Platinum Sponsor WealthCounsel

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Report #1

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

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First, a news item of interest from Reporter Paul Hood - he has just joined the law firm of Dickenson, Peatman & Fogarty in Napa, CA. Congratulations Paul.

Next, since we are having to cover the vendors a little differently this year, reports from the exhibit hall will be included at the end of most of the Reports as information becomes available rather that as a separate Report just on that subject.

Lastly, some news from the Institute. About 2,650 people are registered this year. close to what it was in 2005, The staff is excited about the new Orlando, Florida venue for the 2007 Institute.

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This Report contains coverage of the Monday morning **Fundamentals Program #1 on the Anatomy of Plan Beneficiary Designations**

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Anatomy of Plan Beneficiary Designations Monday Morning, 1/9/06
Presenter: Natalie Choate

Reporter: Merry Balson Esq.

Natalie Choate was, as usual, a wonderful speaker. She turned the complicated subject of estate planning for retirement plan benefits into a straight-forward and interesting presentation, full of practical suggestions and examples.

Overview

Ms. Choate began by reviewing the chart entitled "Estate Planning for Retirement Benefits, in One Page" (pg. 74). The initial question is who should your client name as the plan beneficiary? This chart demonstrates that there are only 6 possible choices: 3 are tax favored and 3 are less tax favored. The tax favored options are: 1) young individuals (or a "see-through trust" for younger individual beneficiary), who can take advantage of long-term income tax deferral because payouts are based on the beneficiary's life expectancy; 2) surviving spouse, who can roll over an inherited IRA to her own IRA or other eligible plan; and 3) charity, because it is income tax-exempt and pays no income tax on the retirement plan benefits it receives. The less-tax favored options are: 1) older individuals (or a "see-through trust" for older individual beneficiaries), who have a shorter life expectancy; 2) trust for surviving spouse, which must take benefits over the single life expectancy of the spouse (at best), cannot roll over benefits, cannot defer distributions until spouse is 70 1/2, cannot use the Uniform Lifetime Table, and cannot extend deferral over the children's life expectancy after spouse's death; and 3) estate (or a non-see-through trust), which does not qualify for the life expectancy of beneficiary payout method, is not income tax exempt, and is often in a higher tax bracket than other family members.

Generally, Ms. Choate stated that estate planing for retirement benefits can generally be boiled down to this: 1) name the spouse as beneficiary, and 2) if the client is wealthy, name a charity as contingent beneficiary, and if they are not wealthy, name the children. However, she pointed out that there is no one-size-fits-all beneficiary designation, and that the appropriate designation will depend on many factors.

The MRD is determined by dividing the account balance by the beneficiary's life expectancy, then reducing the denominator by 1 each year. For example, if the beneficiary was a newborn baby, the first year MRD would be 1/80 of the account balance, the second year MRD would be 1/79, third year would be 1/78, etc.

Naming Minors as Beneficiaries (pg. 4)

There are 5 options when leaving retirement benefits to minors: 1) to the minor outright (not recommended, primarily because it subjects assets to guardianship, delays and fees); 2) to the UTMA custodian (recommended for some beneficiaries if the sum is relatively small, but not so good for larger sums because UTMA terminates at young age and parents often want to delay distributions beyond that age); 3) to "conduit trust" for the benefit of a minor (recommended where sum involved is large enough to justify a trustee's fee, where qualifying for life expectancy payout is a high priority, and the client is comfortable with all distributions from the plan being paid directly to the minor beneficiary); 4) to a see-through "accumulation trust" for the minor (recommended for larger sums, where the pass-through of a conduit trust is not acceptable and the life expectancy payout is important goal); and, 5) to a non-see-through "accumulation trust" for the minor (recommended for larger sums, where the client does not feel see-through status is worth the compromises, and/or the life expectancy payout is either not available or not suitable).

A trust will qualify as a "see-through" trust only if it complies with 5 IRS trust rules. Three of the rules are ministerial and easy to satisfy (the trust must be valid under state law and must be irrevocable when the plan owner dies, and certain documentation must be provided to the plan administrator). The tougher trust rules are that all trust beneficiaries must be individuals, and you must be able to identify the oldest beneficiary. As a "see-through" trust, the IRS will look through the trust and use the oldest beneficiary's life expectancy when determining the MRD.

Only two trusts clearly qualify as see-through trusts: a conduit trust (described on page 47); and an "accumulation trust" Ms. Choate calls an O/R-2-NLP Trust (described on page 49), which passes outright at the life beneficiary's death to one or more individuals who are living at the participant's death and not to a trust. The main advantage of a conduit trust is that it automatically qualifies under the trust rules, and remainder beneficiaries of the trust are disregarded. In "accumulation trusts" all beneficiaries must be individuals, the oldest life expectancy is used to calculate the MRD, and the IRS looks to all beneficiaries (including contingent beneficiaries) when determining whether all beneficiaries are individuals. The O/R-2-NLP Trust qualifies as a see-through trust because all beneficiaries who are counted by the IRS as trust beneficiaries are individuals. Trusts other than the conduit trust and O/R-2-NLP potentially qualify for see-through treatment, but that qualification is less certain.

Note that most 401(k) plans do not allow a life expectancy payout, and instead require the beneficiaries to take a lump sum distribution.

Naming Disabled Persons as Beneficiaries (pg. 13)

Those who need a special needs trust to preserve government benefits can not use a conduit trust, and must instead use the O/R-2-NLP trust that qualifies as a special needs trust. Those families who are wealthy and who are not concerned about qualification for government benefits can use conduit trust.

Naming Multiple Beneficiaries (pg. 9)

When naming multiple beneficiaries, the life expectancy of the oldest beneficiary is used to calculate the MRD for all beneficiaries named, unless the beneficiaries divide the IRA (i.e. establish separate accounts) post-death by the required deadline. If separate accounts are established, each beneficiary can use his or her own life expectancy.

Practical Tip: When a trust terminates owning an IRA, the trustee transfers the entire IRA in tact to the beneficiaries, and does not need to terminate the IRA. The trustee simply writes the IRA provider, as trustee of trust, instructing them to change the title to the IRA to the beneficiary with his social security number. The statute is clear that this is permissible, and there are letter rulings that allow this kind of transfer, but some providers are reluctant to change title in this manner. IRA providers that are willing to change title at trust termination are listed on Ms. Choate's website at www.ataxplan.com.

Naming Spouse or Trust for Spouse (pg. 15)

Naming the spouse is very tax favored, but naming a trust for the spouse is not at all tax favored. The difference in tax treatment is significant, particularly when you consider that when the spouse rolls over a plan, she can defer payments until age 70 1/2, and use the Uniform Life Table to calculate MRDs each year, which essentially means she will never run out of money (assuming she takes only the MRD). There is a very high cost for using a trust as opposed to naming the spouse outright and clients should be aware of this cost.

Note that if a trust is named as beneficiary, then any beneficiaries who take through that trust can not use the separate account procedure discussed above, and instead, the IRS requires the oldest beneficiary's life expectancy be used to calculate MRDs (pg. 13). If the client's goal is to use separate life expectancy tables for the beneficiaries, and you are using a trust as a beneficiary, name the trust "if the owner's spouse survives him," and if the spouse does not survive, name the children as direct beneficiaries.

GST Issues (pg. 26)

We briefly discussed how a trust for a child for life, and then to grandchildren becomes more difficult with retirement plans. Ms. Choate sets out 5 ways to deal with this when starting on page 27 of her outline. Her favored approach is number 4 (pg. 28), which gives the child a power during life to withdraw assets of trust with the consent of a nonadverse trustee (which is treated as a general power).

Miscellaneous Issues

Page 42 of the outline sets out 17 things you need to know if you're doing work in this field. Additionally, the client needs to understand the trust accounting treatment of retirement benefits (in UPAIA states that often means only 10% of the MRD is income), and you as an advisor need to know what the client intends when he/she says they want an IRA to be paid to a trust for the spouse in which the spouse will receive "all income."

Beneficiary Designation Form (pg. 70)

Ms. Choate included a Beneficiary Designation Form which starts on page 70.
The form includes a provision allowing the transfer of the account by the beneficiary, and requiring the plan administrator to provide information to the personal representative of the owner's estate.

Practice Tip: To gain cooperation from a plan administrator that refuses to provide information to the personal representative that is necessary for preparation of the estate tax return, send a letter stating that you have for the information, that the plan administrator refused to provide it, and notifying them that under section 6018(b) the obligation to file an estate tax return for this asset now shifts to the plan administrator.

New Developments and Trends

Ms. Choate discussed several new developments and trends that are so new they are not in the outline. PLR 2005-37055 deals with the possibility that a trust protector could switch between a conduit trust and an accumulation trust, and modify the trust to limit the remainder beneficiary to persons who were younger than the current beneficiary. While the IRS approved this transaction, and Ms. Choate believes the concept might work under certain circumstances, she believes the ruling was questionable.

Generally, the obligation to take the MRD for the year of death falls on the beneficiary (to the extent the owner had not taken the MRD for that year). In Rev. Rul. 2005-36, the IRS concluded that a surviving spouse named as beneficiary who took the MRD would not be prevented from later disclaiming the IRA account, because acceptance of the MRD did not constitute acceptance of benefits for purposes of Section 2518 disclaimer.
Note that once the beneficiary exercises investment control, she cannot disclaim.

One hot trend is the self-directed IRA that invests in real estate. Ms.
Choate sees potential future problems for the general public engaging in these self-directed IRAs given the numerous traps for the unwary in this area, including UBTI, and a myriad of potential prohibited transactions which could disqualify the plan.

Prior to 2002 there were no extensions of the 60 day period for rollovers given by the IRS. In 2003, the IRS began granting hardship waivers allowing an extension of time in any case that doesn't violate equity or good conscious. Although you can use your IRA as a source of short term financing, you must have the funds back in the IRA within 60 days, or the IRS is unlikely to give an extension of time for "hardship." PLRs give examples of permissible hardship waivers.

In several 2005 PLRs, the IRS allowed (for the first time) the post-death rollover of a pre-death distribution by persons other than the spouse (e.g., the personal representative). When you are administering estates, you need to look at whether the decedent took any distributions from his plan and determine whether you need to seek permission to complete an intended rollover.

The IRS dealt with abuses in the area of valuation of life insurance and annuity contracts by issuing Rev. Proc. 2005-25 setting out the formula for determining fair market value of a life insurance policy (premiums paid less earnings minus reasonable charges), and issuing final regulations that state that when a plan distributes or sells a policy, the value for income tax purposes or the value for the sale must be the fair market value.
Additionally, abuses with variable annuities held in IRAs led to Rev. Proc.
2006-13, which addresses valuation rules for conversions from IRAs to Roth IRAs when the plan holds variable annuities.

Clients holding variable annuity contracts with guaranteed death benefits that contain a "high water mark" guarantee should consider pulling out most of the cash value and converting the annuity to a Roth IRA. The death benefit would have to be actuarily valued, and income tax would be paid now, but the beneficiaries would receive the death benefit tax free.

Consider recommending to clients who are retired, and over 60 but under 70
1/2 that they use up their income brackets converting their IRAs to Roth IRAs. Future MRDs will be reduced, as will future taxable income, and the client will have a tax-free source of income from the Roth. Also consider an IRA conversion to a Roth if the client has a short life expectancy.

Roth 401(k) plans are available to high income workers in a 401(k) or
403(b) plan. Clients should check with their employer to set this up.
Clients (or surviving spouse of clients) with net operating losses from a business should also consider participating in Roth IRA or converting existing IRAs into Roth IRAs as the net operating loss could offset the cost of the conversion.

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News From The Exhibit Hall
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Wealth Transfer Planning is now being marketed by Interactive Legal Systems [info@ILSDocs.com] is here again, this time with a fully operational HotDocs version of their WTP assembly engine. In fact WTP has developed some special proprietary HotDocs functionality just for their program. They had a choice of going with HotDocs or GhostFill and chose HotDocs. The user can modify the language in the forms and the system now comes with community property forms that were developed by Michael Graham, a co-owner, who practices law in Dallas, Texas, a community property state. Nicole Splitter formerly of US Trust has now joined the WTP sales staff, and Patricia McLelland, who has been with WTP since its inception, is still with the Company and here in Miami.

The hot talk of the day is all about GEMS, the tax return and fiduciary accounting software that was

developed by Gillett Publishing, LLC www.gillettpublishing.com. Currently they have three programs, GEM706,
GEM709 and GEMAcct. Mark Gillett, the President of the Company, advises that they have decided not to do a GEM1041 program even though Mark produced one for years for Shepards, then West, so we will have to look elsewhere for such a program. Hopefully we can cover some of the available options in that regard in later Reports. People who have purchased the GEMS system (it is not sold in separate modules) have been very pleased with it and how user friendly it is, which is no surprise given how well Mark developed the comparable programs for Shepards, then West, in the past. This is one set of programs that are well worth a look-see if you do not have one or are using ones you do not like, and the company is offering a discount price of $895 during the Institute and until January 15th, including for our readers.

Trusts & Estates magazine has just announced the premier (1/9/06) issue of the "Trusts & Estates Newsletter" and is making it available on-line exclusively to subscribers to Trusts & Estates magazine and for free. More information about this new publication can be obtained from Prism Business Media at Booth #103 at Heckerling.

Cannon Financial Institute has just announced the lineup for its monthly Estate Planning Teleconference Series for 2006. This series starts off on, Tuesday, January 24th, with the topic "Understanding Beneficiaries' Rights Under Trust Documents and Local Law." The presenters are none other than Roy M. Adams and Charles ("Clary") A. Redd, both of Sonnenschein, Nath & Rosenthal, LLP. Both Roy and Clary are presenters at this year's Institute. Roy is doing the Friday morning session on Circular 230 and Clary is doing the Thursday afternoon Special Session 3-E on Circular 230. For more information about the Teleconference Series, go to www.cannonfinancial.com/telecong.htm.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Report #2

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

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This Report contains coverage of the Monday afternoon **Recent Developments Program**

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Recent Developments in Estate, Gift and Income Tax Monday Afternoon, 1/9/06
Presenters: Dennis Belcher [DB], Prof. Jeff Pennell [JP] and Carol Harrington [CH]

Reporter: Jeff Weiler Esq.

As required by regulations at Title 31, Part 10 of the Code of Federal Regulations which comprise Treasury Department Circular 230, the statement that follows is made pursuant to Section 10.35(b)(5)(ii) of Treasury Department Circular 230:

(a) Any advice set forth in this email memorandum is not intended or was not written by the author to be used, and it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer;

(b) The advice in this email memorandum was written to support the promotion or marketing of the transactions or matters addressed by this email memorandum; and

(c) Any taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

DB: No one block buster development but practice has changed. Since we are mid way through the phase in of the 2001 tax act now need to address certain issues: state death tax deduction rather than credit; 4 years from 2010 cliff and what should be done. DB thinks repeal is unlikely but lower rates and higher exemption was proposed. Planning today is more difficult and challenging.

CH: In debate in Congress concerning transfer tax law changes, gift tax was not to be coordinated with the estate tax -- gift tax exemption was to be kept at $1,000,000 and 45% rate. There was concern that liberalizing the gift tax would allow avoidance of income tax. There was to be no phase in of proposed changes as has occurred with prior changes in transfer tax laws. Immediate effective date was to be used -- a cliff.

DB: Chance of reform in 2006 but DB has been wrong many times before. As exemption goes up, fewer estate tax returns are being filed
(Exemption/Returns: 1,000,000/60,000, 2,000,000/30, 3,500,000/less than 15,000). While only rates and exemptions are supposed to be modified, there could be "revenue raisers". The Joint Committee on Taxation has five proposals that Congress could consider: limit perpetual dynasty trusts, limit valuation discounts, curtail Crummey powers, require consisting reporting of basis on 709 and 1040, modify transfer tax provisions that apply to Section 529 plans. Suggests planning now for 2010 cliff. DB prefers gifts now and not waiting for developments.

JP: Treas Dept Business Plan provides predictor of what is coming concerning new Regs. Items on list include: Final Regs under 671 regarding reporting requirements for widely held fixed income trusts, guidance concerning transfer tax issues and use of family owned company as trustee of trust -- private trust company, Section 2053 and post death events, sample charitable lead trust forms, final Regs under 2642 for qualified severance of a trust, and guidance under Section 2704 regarding restriction on liquidation of an interest in a corporation or partnership.

DB: Thirty six pages of outline are devoted to state death tax provisions.
There are wide variances state to state. It is now more difficult for persons to advise on estate planning matter is other states -- a good reason to avoid advising on law in states in which you are not licensed to practice. One problem area: client domiciled in state with a state death tax and owns real estate in state without death tax, e.g. Florida. In past we advised to avoid probate by having out of state real estate put into FLP or FLLC with result being nexus in state of domicile. This approach today could subject the real estate to state estate tax in state of domicle.

CH: Structuring estate plan document: planning now is more complex and this results in more complex documents. Family trust (by pass trust, Trust B) is now several layers to account for state death tax implications. As asset value is higher, more of the layers of trusts are funded. CH is using Clayton flips with an independent executor.

DB: Section 691 (c) deduction for estate tax on IRD is not applicable to state death taxes. An article by Gans/Blattmachr (citation not provided) suggests pre death planning should consider accelerating IRD e.g.
withdrawing IRA to create pre death income tax liability that reduces federal estate tax.

JP: Section 67 (e) 2% floor for miscellaneous trust deductions, investment management fees. This issue applies to every trust that files a Form 1041.
Tax Court decision in Rudkin, 124 TC 304 states a two part test: to avoid the 2% haircut. The expense must be proper for the entity and must be unique to the fiduciary administration (the problem "but for" test).
Problem: corporate fiduciary fees are fully deductible but if individual fiduciary hires an investment advisor 2% haircut is imposed. This is one reason why there is an increase in use of family trust companies.

DB: Section 643, unitrust distributions and classification as ordinary income or capital gain. Must look at state law concerning unitrusts

JP: Section 664 Charitable Remainder Trust application of ordering rules.
The Regs adopt first in first out, and worst in first out approach.

JP: Surviving Spouse's Right of Election, Rev Proc 2005-24. There has been much negative comments. The panel thinks there will be some moderation but not revocation of this Rev Proc. Since Rev Proc grants a safe harbor, the safe harbor must be retained. Problems with safe harbor: taxpayer may not be married at time of CRT so spouse can not waive rights, clients move to states that may create rights after CRT formed. There could be retroactive disqualification of the CRT. Suggestion: wait for the fix before doing a CRT. ACTEC comments: if surviving spouse does exercise right of election and assets in CRT become subject to election, then under Sections 4941 and 4945, self dealing and taxable expenditures, the surviving spouse may be subject on excise taxes. Speaker does not know what IRS will do with this Rev Proc.

JP: New Unitrust Forms, Rev Proc 2005-52 through 2005-59. Turn off state law if it is inconsistent with the form. If two life unitrust and second life is not spouse, you must find a source other than CRT to pay estate tax at death of first beneficiary. Even if calendar year used as taxable year for unitrust, the annual valuation date does not need to be Jan 1.

JP: Non prorata distributions of IRD to charitable beneficiary as part of residuary estate, PLR 200520004 and 200526010. Section 691(a)(2) acceleration event can be avoided if either state law or document authorizes non prorata fractional division.

JP: Section 691(c) deduction for income tax on IRD subject to federal estate tax. Who gets the deduction? The deduction follows the income. Problem: person paying the estate tax may not be the person receiving the income. Document could require an equitable adjustment for this situation.

DB: Noble decision, 89 TC 649, valuation and significance of post death sale. Sale of asset 15 months after death at price higher than used on 706 impacted the fmv at death. Lower pre death sales where disregard as not comparable to assets held at date of death. Five factors used by court for adjusting the fmv from earlier sales to value a date of death.

JP: State lottery payments. Not assignable and rights owned at death. Issue is whether Section 7520 tables apply or whether there should be a discount since payments are not assignable. Donovan, 95 AFTR 2d 2005-2131 (DC Mass) valued rights under Section 7520 tables.

DB: Undivided interests in real estate, award of fees under Section 7430.
Baird 416 F3d 442 (CA 5) reversed Tax Court and allowed fees where IRS would allow only a 3% partition discount.

JP: IRA Proceeds, Kahn 125 TC __ No 11, a reviewed decision. Gross estate value of assets in IRA is not reduced by anticipated income tax liability on distribution from them.

DB: Final Alternate Value Regs Section 2032. Planning suggestion: if partnership or corporation can make a distribution after date of death and before alternate valuation date, do it. If distribution is not made then value of interest in the entity owned by the estate is higher on alternate valuation date. Consider use of derivatives to protect economic position and risk of decrease in value. Estate bears 100% of risk after alternate valuation date.

DB: Several FLP cases in 2005. Observation: carefully formed and operated entities with significant business purpose with non financial assets should be OK. Post formation facts are important and are being reviewed by the courts. Courts are looking at the governing instrument for things that are out of the ordinary. Avoid personal use assets in entity and have client retain sufficient assets for standard of living.. To avoid Section 2036(a), a significant non tax reason for entity is needed. Some taxpayers have won cases with bad facts and do not rely on such cases.

CH: Kelly, 90 TCM 369. Does not understand why Section 2036 was not raised in this decision. Entity formed 8 months before death with liquid assets.
Tax Court allowed 12% lack of control and 20% marketability discounts.

CH: Bongard, 124 TC 95, Section 2036 to be avoided, need 1. Bona fide sale, and 2. full and adequate consideration -- two separate tests must be met. For bona fide sale, need legitimate and significant non tax reason with "objective" standard being applied by the court. Decision had multiple opinions. Status and result per speaker = chaos!

JP: Strangi, 417 F3d 468 (CA 5) aff'd Tax Court. To avoid Section 2036 application, two test approach (as above - Bongard) used and taxpayer failed the second test -- bona fide sale; lacked significant non tax reason or other business purpose (note use of "or"). JP does not know what is required concerning substantial business purpose, non tax reason. The "objective test" per court seems to be a subjective smell test to JP.

JP: Schutt, 89 TCM 1353. Taxpayer victory in Section 2036 case was attribution to good facts fully documented by the taxpayer.

DB: Senda, 88 TCM 8 (2004) on appeal to CA 5 concerning discounts for gifts of FLP interests. DB is troubled by Judge Cohen's position that what is valued is what is donor relinquished not what was received. This is not the current law and would be a major change if adopted.

JP: Smith, 2005-2 USTC Para 60,508 (DC Pa) dealt with application of Section 2702 to a partnership agreement. The facts failed the pre Section
2703 tests and contractual arrangement did not fix value. Taxpayer could unilaterally amend the contractual arrangement.

Panel: FLP what should you do now?

CH: Do not go to Tax Court if you can pay tax and go refund route.
Restructuring: take control test seriously and give up control. Wind is not blowing in the right direction for taxpayers and concern about unresolved application of Section 2036 (a)(2). To avoid control, taxpayer could transfer control interest to an irrevocable trust with an independent trustee and to avoid taxable gift retain a power of appointment. This will not avoid estate tax on the assets in the trust but cuts off the control
issue. Note the 3 year look back under Section 2035 (a) for giving up a
Section 2036 right.

JP: Watch out if sale of interest to avoid Section 2035 3 year look back!
Allen case (citation not provided) states that full and adequate consideration to avoid Section 2035 is measured by what would be in the gross estate under Section 2036. If this amount was paid, it could be a current gift since it would exceed fmv for gift tax purposes.

DB: Get rid of control. Do not create a new entity unless there is a significant business activity. Generic reasons used in the past will not be sufficient today. Watch the formalities.

DB: Greagin [56 TC 387 (1988)] loans, up front interest deduction on 709
for funds borrowed to pay estate tax. TAM 200513028 IRS would not allow
interest deduction because partnership that loaned funds had liquid assets and was controlled by estate beneficiaries.

CH: Jackson, 2005-2 USTC para ____ (DC W. Va). Trust was not reformed, and at termination assets went directly to charity -- Section 2055 (e) not followed. Per court, charity got the funds so no problem and deduction allowed.

JP: Marital deduction and income requirement. Davis, 85 TCM 944 (2003) deduction denied because of restrictions on spouse's right to trust income, aff'd by CA 9. Survivorship requirement should be based on time and not closing of estate - Sowder, 2005-2 USTC para ___ (DC Wash).

DB: Qualified disclaimers, Section 2518, Rev Rul 2005-36. Beneficiary's acceptance of RMD after death of participant did not prevent disclaimer of balance of IRA.

CH: Final Reg under 2632(c)(5)(A)(i). Speaker humorously stated that she is one of the 5 persons who are guardians of the generation-skipping transfer tax rules. Regs give a lot of flexibility to electing out and electing in.
She suggests do not rely on automatic application. Attach statement to Form
709 stating what you are electing and identifying the applicable trust. Can be adoption by grandparent of grandchild if requirements met. Also, if a grandchild is adopted by a non lineal descendant (second spouse of deceased child), the adoption does not cut off lineal descendant relationship with grandparent.

JP: Blount, 87 TC 1303 (2004) affi'd by CA 11 (citation not provided) deals with valuation of corporation that owned life insurance on decedent's life and had obligation to purchase decedent's shares in the corporation. CA 11 reversed TC on valuation. CA 11: we conclude that the insurance proceeds are not the kind of ordinary nonoperating assets that should be included in the value of the corporation under the treasury regs.

DB: Chawla, 2005 US Dist. LEXIS 3473 (ED Va). Insurance company refused to pay death benefits alleging fraud in the life insurance application and lack of an insurable interest. Court held for insurance company on both arguments. Problem now: does trustee of an irrevocable insurance trust have an insurable interest (probably no if it is considered an entity and yes if there is look through to qualifying beneficiaries). Decision is on appeal to CA 4 which probably will affirm on fraud argument and not get to insurable interest argument. This issue creates problems in other states since many states have statutes similar to statute involved with this case.

NOTE: We are also suppose to receive a report on this session from Reporter Bruce Stone. In the interests of sending this one out as soon as possible, we are sending it now. When and if Bruce's report arrives, we will send it out separately at that time.

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News From The Exhibit Hall
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From WealthCounsel (www.wealthcounsel.com) comes the news that they are demonstrating the latest version of their document drafting system, WealthDocs 6.2, which is being released this quarter at Heckerling. WealthDocs 6.2 is an upgrade of WealthDocs 6.1 that was first released at Heckerling in 2005. More details on this new release will be forthcoming later. The main reason for this announcement is to let you all know about the "Thriving in Estate Planning Practice Model" presentation that WealthCounsel is presenting on Wednesday, January 11th, from 6:00 to 7:00 p.m. in the Imperial I room of the Fontainebleau Hotel. To attend, contact the WealthCounsel booth at Heckerling (Nos 18 and 19) or fax your name and phone number to 1-888-292-6126. This presentation is going to be done by Stan Miller of Miller & Schrader, PA in Little Rock, AR. This is described as a simple yet exciting Practice Model for working more effectively as an attorney-advisor team using the power of collaboration between the attorney and financial advisors in together designing solution sets that can include both insurance and financial products as well as legal solutions. Sounds interesting.

Schumaker Publishing, Inc. has some Year 2006 specials currently going on. One, they are selling a value pack of 250 copies of one of their Quick-Read brochure of your choice for only $212.50 plus $20 s/h (a savings of $49). Two, they are selling 250 copies of their Client Newsletter for $212.50 plus $20 s/h (a savings of $49). Third, they are selling 100 of their brochures or newsletters free with every one of their Powerpoint Seminars that is purchased, a $100 value. These offers are good until 1/31/06. For free samples and pricing information, visit www.estateplanning.com/specials.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

GENERAL INFORMATION ABOUT INSTITUTE
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Brought to you by the ABA-PTL Discussion List Moderators

Report #3

Each report can also be accessed at any time from the ABA-PTL Discussion List's **Web-based Archive**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of the Tuesday morning Programs on **Trustee Selection and Succession, Trust Jurisdiction and the Trustee's Duty to Provide Information**

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Growls or Gratitude? Practical Guidelines for Trustee Selection and Succession Tuesday Morning, 1/10/06
Presenter: Kimbrough Street

Reporter: Merry Balson Esq.

This presentation focused on helping clients select appropriate individuals to serve as trustees and successor trustees. In addition to the outline, the materials include a list of additional resources (pg. 2-32), a checklist for clients regarding choosing a trustee at Appendix B (pg. 2-41), and the ACTEC guide for clients regarding the duties of a trustee at Appendix C (pg. 2-65). This presentation involved non-tax issues only. An excellent reference for tax traps and issues is Steve Akers 2004 Heckerling paper, Selection of Trustees: A Detailed Review of Gift, Estate and Income Tax Effects and Non-Tax Effects, cited on page 2-32 of the outline.

The primary challenges in this area for advisors are in counseling the client to appreciate the day-in and day-out duties of a trustee, as well as the state and federal tax issues and fiduciary responsibilities. Use of individual trustees is prevalent, and it is important that we help clients thoughtfully consider the choice of trustees and trustee succession. Once clients understand the realities of daily trustee life, they sometimes opt for a professional fiduciary. Trustee provisions should not be boilerplate language. That language needs to be drafted with flexibility in mind, even when the trustee named is a professional fiduciary.

Ms. Street said there are a number of similarities between the relationship between a puppy and the puppy's owner, and a trustee and beneficiary.
First, the relationship is very personal. Second, the relationship is not static. Third, the relationship is not easy and is time-intensive. Fourth, the relationship is likely to be long-term. Success or failure of the relationship depends on subjective factors (the people involved and their personalities), the succession plan (whether it is flexible and tailored to the trust), and objective factors (the governing document, governing law and assets).

There is no copyright on the checklist at Appendix B (pg. 2- 41) and can be provided to clients, rearranged, or edited as the advisor deems appropriate. Ms. Street generally gives the checklist to the client at the initial meeting, and then has a follow-up discussion with the client regarding who should serve as trustee of the trusts they create.

It is important to remind clients how important interpersonal skills are for a successful trust relationship. The trustee must also be able to say "no," and deny beneficiary requests when appropriate, or must have a co-trustee who is willing to do so. The trustee needs to have sufficient time to devote to the trust and to trust duties, such as communicating with the beneficiary. The client should be aware of the "ghost players" who may not be named in the document, but who can have profound impact on the trust relationship (e.g., a spouse of a beneficiary, or other family member who can pressure the beneficiary into asking for more money from the trust).
The client should also be alerted to the possibility of conflict of interest and favoritism, and should consider whether to include provisions to compensate individual trustees. The ACTEC guide for clients regarding the duties of a trustee (attached as Appendix C) is a superb resource, but it is copyrighted. Obtain consent from ACTEC if you want to release that article to clients.

Trustee succession planning is important in both dynasty trusts and shorter term trusts. Flexibility is key here. The conceptual framework for trustee succession can be laid out in the document, describing who will have the power to name or replace a trustee (long term trusts should describe the person by position or relationship to the beneficiary and not by name, see pg. 2-16 for some options), whether more than 1 person should be involved in the appointment process, and defining the pool from whom the trustee can be chosen.

Consider giving the spouse a power to name a successor trustee or co-trustee, so that she can choose the best person to serve at the time the vacancy occurs. Allowing a spouse to appoint a co-trustee can also help the spouse transition out of serving as trustee when the time comes. Consider setting out who holds the "trump card" or who should always be in the voting majority (see pg. 2-5). A child is often not the best choice to serve as trustee for his or her parent (or step-parent), but that child might instead be given a role in replacing or appointing independent trustee. Similarly, rather than naming the sibling of a child as trustee, that sibling can be given a role in choosing or replacing an independent trustee. Providing someone with the power to designate a trustee in the future (rather than naming the successor in the document) is often a key component of a flexible plan, and allows parties to consider whether a person is capable of handling the job at the time of appointment.

The considerations in choosing a child or grandchild as trustee are set forth on page 2-8. Adding a child as co-trustee upon reaching a certain age for investment matters can be very beneficial for the child, but keep in mind that the interpersonal skills of those who will be serving as co-trustees are important. The existing trustee could be given the power to veto the child becoming co-trustee if the child is particularly ill-suited to being a co-trustee. Alternatively, a child could be given sole investment authority over a smaller sum of money.

Ms. Street's preference is to allow the beneficiaries and trustee to choose a successor trustee. The trustee and beneficiary are also required annually to update the successor trustee designation which is kept with the trust records. If either the trustee or beneficiary cannot be involved in trustee succession, she lists third parties (referring to those parties by description where possible) who can step in as a second person to designate a successor. Even if both the beneficiary and trustee are able to participate, either one may invite participation by the third party, and that participation is required if one party has a concern about the appointment process. Finally, she sets out her state's method for appointing new trustees through the court, but establishes a process to handle this outside of court.

Finally, trusts for pets (especially those that have long life
expectancies) need special attention to provide for long term care givers, and trustees who are appropriate, in addition to a succession of people to enforce the trust.

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Relieving Your Situs Headache: Choosing and Rechoosing the Jurisdiction for a Trust Tuesday Morning, 1/10/06
Presenter: Richard W. Nenno

Reporter: Herb Braverman Esq.

Mr. Nenno explores (1) the advisability of creating trusts, (2) the testator's or trustor's latitude in selecting the law of a state other than that of his or her residence to govern a new trust, (3) the ability of a court in the home state (resident state of testator or trustor) to disregard such a selection, (4) factors that a testator or trustor should consider in selecting a state for a trust, (5) ethical considerations that apply if an attorney recommends that a client create a trust under the law of a state where the attorney is not licensed and (6) whether an existing trust can and should be moved to a more favorable state. He also provides a series of appendices providing various information in support of his presentation. These include (1) the states that have adopted the Uniform Trust Code ("UTC"); (2) the perpetuities rules in the states; (3) the states that tax trust income and their bases for doing so; (4) citations for statutes dealing with spendthrift protection for trusts created by 3rd parties; (5) citations for statutes that deal with creditor protection for domestic asset-protection trusts ("DAPTs"); (6) citations for statutes that empower trustees to make adjustments between income and principal under Section 104 of the 1997 UPAIA and (7) a ranking of the liability systems for the states. The information provided and discussed will help planners make a variety of decisions.

Mr. Nenno begins by giving us the many NON-TAX reasons one might NOT create a trust, including (a) not having enough money to justify a trust; (b) failure to learn about trusts ; (c) gets advice but not about these options and is sent in other directions; (d) does not care about what happens after death; (e) leaves all decisions to children (post death); (f) does not wish to tie up assets; (g) finds subject to complicated; (g) does not devote sufficient time to subject; (h) finds docs to long and complicated or (i) too expensive. But adds the reasons one might do so, including (a) investment management needs; (b) asset protection; (c) protection from divorce proceedings; (d) protect beneficiary(s) from various mishaps; (e) manage assets for minor or handicapped person; (f) incentive arrangement for one or more persons; (g) asset preservation (community property -v- common law issues) or (h) voting interests in closely-held entities.

Then he lists various TAX considerations that might lead one to NOT create a trust, including (1) use of annual exclusion gifts and tax-free medical and tuition payments to reduce estate; (2) death tax credits; (3) use of marital deduction and expense deductions to avoid estate tax in first estate (of couple); (4) use of GST exemption planning; and (5) use of disclaimer planning is certain situations. The TAX considerations that might lead one to create a trust are also provided, including (1) use of exempt trusts and grandfathered trusts for as long as possible to avoid federal transfer tax; (2) equal exemptions and rates for GST and estate tax eliminates bias in favor of subjecting assets to estate tax; (3) Transfer of interest in non-exempt trust without payment of GST tax;
(4) deferral of payment of GST tax; (5) the generation skipping value of trust to avoid tax payment for one or more generations; (6) reduce or avoid state death tax; (7) use of trusts to effect gift tax free

distributions in 2010; (8) grantor trust allowing tax free gifts as grantor pay income taxes attributable to trust and (9) avoid state and local income and intangible taxes with trusts. Mr. Nenno observes from this information that the planner should have a bias in favor of creating trusts.

Now that we are sold on trusts, Mr. Nenno suggests that our clients should select governing law to the extent permitted to favor the operation of his/her trust. The ability to do this is a function of whether the trust is inter vivos or testamentary, whether it contains personal or real property, and whether the issue involves the trust's validity, construction or administration details. Mr. Nenno asserts that a client can and should designate the law of the state that will govern these matters and then explores the effect of such designations, reviewing mostly the Second Restatement of Conflict of Laws and the UTC provisions in this area.

For example, Section 107 of the UTC provides that the law of the designated jurisdiction applies unless it is contrary to a "strong public policy" of the jurisdiction having " the most significant relationship " to the matter at issue. See also UTC Section 108(a).

Mr. Nenno then dealt with the four obstacles that home courts must overcome before they can disregard the designated trust state laws chosen by the client. These include (1) lack of jurisdiction; (2) willingness or duty to decline jurisdiction; (3) legal requirement to apply trust state law; and (4) home state judgment may not get full faith and credit from trust state court. Mr. Nenno provides a great deal of case law and statutory analysis to support his conclusion that selecting trust state law in a document has a substantial (even probable) chance of prevailing in litigation. This is an extensive section of the outline and bears close examination.

Mr. Nenno, having convinced us (or at least himself) of the value of designating a trust state in our document, turned his attention to the factors to be considered by the client selecting a trust state. The factors discussed were (1) status of trust legislation (updated, revised regularly); (2) client objectives and goals; (3) trust duration; (4) state income/intangible tax; (5) authorization to divide responsibilities; (6) investment returns; (7) asset protection- 3rd party trusts; (8) asset protection--self-settled trusts; (9) power to adjust and unitrust statutes; (10) allocation rules; (11) nature and effectiveness of court system; and (12) surviving spouse's right of election. Mr. Nenno would require that the planner use these factors to evaluate the various state statutes, etc., and thereby determine the "right" state to be the trust state designated. He does walk through the analysis to some extent and this portion of the outline is quite extensive and worthwhile. Of course, those attending did get a sense that Mr. Nenno has a great deal of confidence in his home jurisdiction, Delaware, as the preferred state in many instances, though others are cited for comparison.

Mr. Nenno did spend a few moments on the important ethical considerations that a planner must deal with as a part of suggesting a trust state in which he/she is not licensed to practice. The use of local counsel is recommended in these circumstances.

Mr. Nenno indicated that the decision to move a trust from one jurisdiction to another requires the consideration of 3 issues: (1) whether it is possible with or without court proceedings; (2) whether the available benefits justify the costs and risks of the effort; and (3) whether the steps taken will be respected by the original state and by the federal government. He analyzes the issues for a number of "moves", including (a) to create a perpetual trust; (b) to avoid state income or intangible taxes; (c) to increase investment flexibility; (d) to avoid accounting requirements and/or administrative costs; (e) to convert to a total return unitrust; (f) to facilitate amendment or termination of a trust; and (g) to carry out client objectives. Where an analysis of the circumstances and the law allows, the move should be made.

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The Trustee's Duty to Provide Information to Beneficiaries: When Can The Settlor Say "Don;t Ask, Won't Tell"?
Tuesday Morning, 1/10/06
Presenter: Anne J. O'Brien

Reporter: Gene Zuspann Esq.

This program discussed the Uniform Trust Code's (UTC) mandatory requirements for notice and reporting. Initially, Anne explained the rules under section 813 that are made mandatory under sections 105(b)(8) and (b)(9).

By the end of 2004, 10 states had enacted the UTC. Of these, only 2 had enacted these sections unchanged and the other 8 had either not enacted
105(b)(8) and (9) or had modified them in some way. By the end of 2005, 5 more states have enacted the UTC and all had modified these duties in some way.

Anne then discussed the changes that occurred in the 2004 amendments because of the amount of controversy caused by these sections and indicated that the provisions relating to these duties will not be uniform throughout the states. She pointed out that in the comments to Section 105 as amended in 2004, NCCUSL acknowledged that its efforts to bring uniformity in this area will not likely succeed.

Some of the compelling policy considerations for and against mandatory duties to inform and report are:

1) The right of the settlor to draft as he/she wishes weighed against the needs of beneficiaries to be able to protect and enforce their interests

2) The case of a quiet trust is compelling when the circumstances surrounding the beneficiary's ability or capacity are impaired - the mere knowledge of the trust could affect the management of the trust. Further, the beneficiary may not be a current recipient of income.

3) On the other hand, Professor Langbein (pg 4-6) argues that a trust term abrogating fiduciary duties or preventing the beneficiary from obtaining information could render the trust unenforceable

and illusory.

4) The primary argument in support of the mandatory rules is that they protect the beneficiaries from dishonest or inept trustees.

Several cases were discussed:

Fletcher v Fletcher p4-9
The Trustee would not give a copy of the trust instrument to a beneficiary because only one provision applied to the beneficiary requesting the information. The trustee testified that the Settlor had directed that the dealings be kept confidential even from the beneficiary, however nothing was set out in the instrument directing the silence of the trustee. The court held that all information (including a full copy of the trust) be given to the beneficiary.

Taylor v Taylor p4-10
Again, the trustee stated that settlor had directed the trustee not to disclose anything, but there was nothing supporting this position in the trust instrument. The Court directed full disclosure of the trust instrument. Dicta in the Taylor case suggests that if the trust document contained a provision directing the trustees not to inform the beneficiaries about trust matters, that the case may have been decided differently.

What happens to the trustee when there is not direction in the trust instrument?
McNeil case - p4-11 originally discussed by Susan Porter in the 2003 Institute.
The Court held that a beneficiary was entitled to notice about his interest is his mother's trust. The complaining beneficiary had received substantial distributions from another trust for his benefit. However, he was also a beneficiary of the trust for his mother (along with his other siblings). There was no evidence that he was harmed, only that he was misinformed. The court surcharged the beneficiary for part of the trustee fees paid over a 9 year period. Anne said that the problem in this case is a difficult beneficiary.

Anne summarized a 2001 Rhode Island case. She was not sure of the name of the case.
There were two sets of beneficiaries under the trust. One, the Beneke(?) family, were permissible beneficiaries of income, principal and the remainder. The other were only permissible beneficiaries of income. At a time when the trust was not worth much, the trustee terminated trust. It contained a business that later became very successful. The beneficiaries entitled only to income were not informed. Upon discovery of the termination, they sued because of early termination and lack of notice. The problem was the lack of certainty in the trust instrument.

Finally, Anne reviewed the relevant UTC provisions and the elements of the UTC's duty to inform and report. Some provisions are mandatory because of
105(b)(8) and (9). She pointed out that it is not clear whether the first sentence of 813(a) is mandatory. 813(b) provides that the trustee must furnish a copy of the entire instrument, along with certain other information. The rest of rules in section 813 are default rules that may be overridden. She also discussed definition of a qualified beneficiary in section 103(13) and section 110, which effectively enlarges the definition of a qualified beneficiary to include other beneficiary who has sent the trustee a request for notice.

She also discussed the D.C. version (where she was active in enactment) D.C. adopted the concept of a trust protector to receive notices for qualified beneficiaries. The trust instrument may include a provision that waives or modifies the duties to give notice during the settlor's life or the life of the settlor's spouse, specifies a different age or designate a trust protector to receive notices. D.C. also added a section (c) to 105. She pointed out the criticism that all this provision does is to substitute one fiduciary for another fiduciary, but still feels this is a worthwhile alternative. Maine has followed D.C.

Conclusions
What do you do if you are not in one of these states and your clients wish to modify the duty to give notices, copies of documents or report? Choose another situs to create the trust or move the trust to another jurisdiction. Allow the trust protector to add or subtract beneficiaries (this is common in foreign trusts) as Article 3 of the UTC regarding virtual representation seems to allow defining the person who can receive these notices.

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News From The Exhibit Hall
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Brentmark Software [www.brentmark.com]:

They are working on an enhanced version of their popular EP Tools program to include a module that will calculate the state inheritance or estate taxes for each of the 50 states, realizing that some of those state were gap tax states never decoupled from the federal credit, such that they no longer have a death tax. When this module is does , it will also be integrated into their Kugler financial planning program.

Intuitive Estate Planner [www.west.thomson.com]

Version 9 was released in December of 2005. The most significant enhancement is the ability to calculate state death taxes for up to three states. The best part of the program is the handling of decoupled states. The program also now has the ability to look at the cash flows of numerous trusts and pension alternatives all at once and then integrate the effect of this into the calculations for taxes and liquidity. The results can be printed to PDF or RTF files for editing or electronic transmission to clients.

CCH ViewPlan Advanced [www.cchgroup.com]

At the present time this product is on hold except for fixing any problems or basic enhancements, as they are waiting for Congress to decide on the future of the death tax. We assume this means than any updates that are shipped out between now and then will be nominal in cost since they will not be a full annual update.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

We will be posting the full text of each of these Reports on the ABA RPPT Section's Web site, as we have since the 2000 Institute. Those Reports can be found at URL www.abanet.org/rppt/meetings_cle/heckerling. In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive at URL mail.abanet.org/archives/aba-ptl.html

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Heckerling Institute 2006
Reports from the event, as posted to the ABA-PTL List Serve

Report #4

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of the Tuesday morning Programs on **A Wild Decade at Midlife, Marital Planning While the Rules are Changing and Charitable Gifts that Have Gone South**

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A Wild Decade at Midlife
Tuesday Morning, 1/10/06
Presenters: Ronald D. Aucutt [RDA], Carlyn S. McCaffrey [CSM], Ann B. Burns [ABB] and Lloyd Leva Plaine [LLP]

Reporter: Jeff Weiler Esq.

AAB: Referred to this topic as the "Quagmire Panel".

RDA: Impact of EGTRRA. The impact of the repeal of the state death tax credit has been underestimated. It is adding complexity and confusion to estate planning due to the impact of state death taxes and the different approaches being used by states. State tax revenue has been reduced significantly with a fairly small decrease in federal revenue. The decrease in the federal transfer taxes (rate down and exemption up) is being financed by increasing the economic burden on the states. The combined federal and state transfer tax rates today is still over 50% (and for persons domiciled in some states approximately 54%). For budgeting by Congress, today the cost of repeal is higher than it was in the past. Since the state death tax credit has been repealed, reducing it longer provides federal revenue.

CMC: States are becoming independent concern death taxes. The rules are much different state to state. For this panel, definitions - Coupled means equal to federal credit for state death taxes which now is zero (e.g.
Florida); decoupled means equal to what the state tax would have been if state death tax credit was not repealed; and super decoupled means uses old state death tax credit but state has tinkered with it. Types of state death
taxes: inheritance, or estate tax, and some states have both types.

LLP: Issues today and how to deal with them. Traditional approach for husband and wife has been A-B Trust, zero estate tax at first death, and estate tax at second death. Where federal and state exclusion amounts differ, now planning is required for death of first spouse to die. Should full federal exclusion be used and state death taxes be paid? Should there be more marital deduction and state death taxes reduced with higher estate tax at second death? Crystal ball is needed to know what death taxes will be in the future. Need to draft for flexibility. LLP has recommended paying estate tax up front (at first death) to assure assets will be fully exempt at the second death. However, a state QTIP could be used without a federal QTIP for by pass trust to reduce state death tax at the first death.
Additional techniques to provide flexibility include use of anticipated disclaimers or Clayton elections.

CMC: The size of the estate has a bearing. If it is a large estate, the state death tax may be a smaller percentage of the estate. (Reporter's
comment: The state taxes still are going to be high in larger estates). In states with an inheritance tax, unmarried couples will have high taxes of bequests to the surviving partner.

RDA: In planning, we sometimes favor the best tax approach which may not be consistent with the client's wishes. We need to ask the clients what they would want if there were no estate tax and try to implement their wishes with consideration of tax issues. Result may be a marital deduction trust and by pass trust that are similar or identical. There will be pressure on titling of assets to get the best tax results. Equalizing assets of spouses will be important for tax planning. As Jeff Pennell observed on preceding day, the transfer tax is flat. At $2,000,000, the rate is 46% for 2006 and 45% thereafter. Could provide a flexible estate plan by having the surviving spouse take action. Have 100% to surviving spouse with opportunity for surviving spouse to disclaim and have disclaimed asset go to a by pass trust. Drawbacks: surviving spouse may not disclaim, disclaim results in limits on powers of disposition that could be available to the surviving spouse.

CMC: Plans are more complex now. Consider a marital deduction formula to zero out state death taxes and use QTIP to have 15 months (after extension of time to file) for a decision. The previously taxed property credit may be important if the surviving spouse dies within the 15 month period. QTIP allows 15 months for planning and disclaimer allows only 9 months. Also, use of QTIP does not impair surviving spouse's powers of disposition which occurs with a disclaimer. Reg 20.2056 (b)(7) deals with Clayton technique
- permits conversion of marital deduction trust to pot trust for surviving spouse and issue. Independent executor makes the decision to trigger the conversion. Could give the surviving spouse a 5 and 5 power in the pot trust. Could get longer than 15 months for planning by having a child (an 18 year old) as a 1% beneficiary of what otherwise would be qualifying marital deduction QTIP trust. The 18 year old has until age 21 plus 9 months to disclaim the 1% interest and after disclaimer the trust would qualify for a marital deduction. Death tax would be paid up front and a protective claim for refund filed. Note: this technique depends on child actually doing the disclaimer and child may not cooperate.

LLP: Differences in state death tax laws. If there is a change in domicile, then there is a risk that more than one state could assert that death tax is due. Now there would be an estate tax deduction for the death taxes paid to both states. With credit available under prior law, only the death taxes from one state would qualify for an estate tax benefit. Putting assets in LLC to avoid nexus in state with an estate tax makes since (e.g. person domiciled in Florida without a death tax owning real estate and tangible person property located in New York could put the New York assets into an LLC to try to avoid New York death tax and have the LLC be considered a Florida asset of the person for state death tax purposes).

CMC: If above LLC technique is used, the LLC should be real - do not use a single member LLC, follow rules, have an LLC bank account and pay LLC expenses from it.

Gift tax issues.

RDA: Should we be making more gifts? Yes. Usual reason is to move future appreciation out, a form of freeze. Reducing net worth may reduce exposure to state death tax in some states -- and in these states a death bed gift could be helpful. Consider a death bed gift that creates a gift tax. At date of death there will be a liability for gift tax that should reduce taxable estate for state death tax purposes. IRC 2035 will bring the gift tax into estate for federal purposes.

CMC: While a durable power of attorney could be used to make death bed gift, its use could be prevented by complications with financial instructions. Suggestion: client establishes a typical funded revocable trust and gives two advisors the power to terminate the client's interest in the trust and thereby make a gift. This makes it much easier to make a death bed gift -- no financial institutions involved and only one document needs to be signed by the advisors.

LLP: If making a death bed gift, it should be high basis assets and low basis assets should be retained to get a basis step up at death.

CMC: Generation skipping transfer tax planning is more difficult due to uncertainty of tax laws. Flexibility is desired in planning. Issue:
outright gift to child or gift to child in trust. Now a trust is better. If child has assets, the to get assets to grandchild requires a taxable gift by child. If assets are in a trust then some distributions (Reporter:
tuition and medical) without a taxable gift by the child. (Reporter:
speaker appears to be dealing with a very high net worth family). Note, the generation-skipping transfer tax rate of 46%/45% is lower than the maximum estate tax rates (federal and state of 50% or higher). (Reporter: speaker did not mention state generation-skipping transfer tax concerning the 46%/45% rates). May want to pay generation-skipping transfer tax rather than estate tax. Consider using a pot trust for all the children do delay time when non skip person ceases to be a beneficiary. (Reporter: warning - the following is interesting and complex). The IRS may try to disregard the interest of a child in a trust for generation-skipping transfer tax purpose. The IRS can disregard such an interest. However, the IRS can not disregard an "non interest" -- that is a right of the trustee to distribute say 1% per year to a charity selected by the trustee. Since there is no specific charity with an interest, there is no interest of a beneficiary that can be disregarded by the IRS yet a non skip person is a beneficiary.

RDA: What will the transfer tax laws be in the future? Won't be permanent repeal of the estate tax due to fiscal realities. Political reality: in Senate there may be 56 or 57 votes for repeal but not the 60 votes that are needed. Persons who favored repeal in the past are seeing problems with repeal at the state level. There is a problem with an income tax replacing a repealed estate tax -- carry over basis. People misjudged the impact of the repeal of the state death tax credit and they misjudge the problems that will be caused by carryover basis. The new campaign is for a dramatically reduced estate tax rate --15% and a higher exemption (maybe $5,000,000). While work in the Senate was put on hold after Katrina, the short term affect of Katrina will fade and there will be attention given to transfer tax. This could occur in the Summer of 2006. To get some additional Senators to approve changes, there may need to be some concessions like rates higher than 15%. The higher rates may result is loss of support from some of the 56/57 Senators that now support changes. Bottom line: nothing may happen but RDA can predict that it will be June, July or August 2006 when nothing happens. However, RDA notes that a major tax bill was passed in 1986 which was a mid term election year.

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Marital Planning While the Rules Are Changing Tuesday Morning, 1/10/06
Presenter: Eric A. Manterfield

Reporter: Barbara Dalvano Esq.

This session was a follow-up presentation to the immediately preceding panel discussion by A. Burns, R. Aucutt; C. McCaffrey and L.L. Plaine on estate planning in an era of federal transfer tax uncertainty.

Notwithstanding the uncertainty in the federal estate tax system and the potential reality that the estate tax burden will be eased or eliminated for clients of modest means, there are at least 6 reasons why we nonetheless need to encourage our clients of modest means to engage in thoughtful estate planning: (1) clients have old estate plans that can be simplified; (2) assets will continue to appreciate and clients could move into the very wealthy or super wealthy categories; (3) Congress could freeze or reduce the applicable exclusion amount; (4) the Congressional Budget Office estimates that charitable giving would decline by 6-12% if the federal estate tax was totally repealed which would result in a shift to the government of work that charities now do; (5) clients desire marital trusts for non-tax reasons; and (6) thoughtful non-tax planning is still required. Mr. Manterfield commented that we need to educate our clients that the federal estate tax has not yet been repealed and may never be repealed and that our clients still need to engage in estate planning for non-tax reasons.

Mr. Manterfield reviewed the historical changes in the credit equivalent amount and the effect of these changes on clients’ documents, particularly documents drafted years ago. Mr. Manterfield noted that when the unlimited marital deduction was first enacted in 1981, the law contained a construction provision which served to protect clients’ estate planning intentions as they existed prior to enactment of the unlimited marital deduction. That provision provided that references in wills/trusts to the “maximum marital deduction” were to be construed under the law in effect at the time clients’ documents were put into place thus avoiding unintended changes in clients’ plans resulting solely from Congressional action. There is no similar construction provision with respect to the gradual increases in the applicable exclusion amount (either before or after EGTRRA) and thus, documents that contain “reduce to zero” and similar funding clauses may no longer reflect clients’ wishes.

Since clients are driven to act by emotional issues (divorce of children; the effect of sudden wealth on family members; succession of management and ownership of the family business and charitable giving), Mr. Manterfield begins estate planning conversations with those issues rather than tax issues. When he does address the topic of taxes, Mr. Manterfield focuses the discussion on: (1) the nature and extent of the clients’ assets; (2) the extent to which the credit shelter trust should be funded; and (3) the different forms of marital transfers.

Mr. Manterfield grosses up the figures clients furnish about their assets to take into account assets that clients can’t spend today but which may subject the clients’ estates to taxation, including retirement assets and life insurance.

On the topic of the extent to which the credit shelter trust is funded, Mr. Manterfield discussed a variety of strategies, depending upon the wealth and age of clients, as follows:

A. Husband and Wife with total estate of less than $2M

Young husband and wife both work and spend all of their income. Expenses include student loans and credit card debt. If one spouse died unexpectedly, what would be the effect of the reduction in family income? Here, Mr. Manterfield would discuss life insurance as a means to replace the lost compensation. He would also discuss wills to create trusts for minor children and guardianship and similar arrangements. If this couple signed their estate planning documents years ago which provide for credit shelter trusts (when the exclusion amount was much lower), the estate planning for them could be simplified by deleting the credit shelter trusts.

B. Husband and Wife with total estate between $2M and $4M

Mr. Manterfield believes that the planning for this couple will present the most challenges. Here, a credit shelter trust and marital trust plan that the clients established in their documents may no longer reflect their intentions given the changes in the exclusion amount. One solution might be to prepare new wills for the clients (or codicils to their existing wills) capping the funding of each credit shelter trust to an amount that the couple thinks is appropriate.

C. Husband and Wife with total estate between $2M and $4M and in their 80’s

Should they use a plan that incorporates a credit shelter trust? The challenge is to determine the estate tax consequences when the second spouse dies. If husband and wife both die before 2009, the applicable exclusion amount will shelter only $2M and there will be tax at the death of the second spouse. Mr. Manterfield would discuss a mandatory credit shelter trust plan with them and re-titling jointly owned assets so that a credit shelter trust can be funded no matter which spouse dies first. If husband and wife resist re-titling jointly owned assets, document their decision to forego estate tax savings. Mr. Manterfield would try to persuade clients to re-title assets 1/3 in husband's name, 1/3 in wife's name and leave 1/3 in joint names. This will typically be sufficient to shelter all assets from estate tax on the death of the surviving spouse.

D. Husband and Wife with total estate between $2M and $4M and in their mid-50's

Here, assume one spouse dies prematurely. Absent health issues, you can assume that the surviving spouse will live for 20-30 more years. Traditional estate tax planning would call for a mandatory credit shelter trust plan and re-titling assets to minimize estate tax at the subsequent death of the surviving spouse. Note that this could result in a credit shelter trust being in existence for 20-30 years or more. Since we can't predict what the federal estate tax laws will be 20-30 years from now, even for a young couple with wealth in this range, a better approach might be an optional credit shelter trust funded by disclaimer. If husband dies prematurely Mr. Manterfield stated he might advise the wife not to disclaim because the tax laws could change dramatically during her remaining life expectancy. If, however, the wife was injured in the same accident and has a vastly shortened life expectancy, the advice might be for the wife (or her legal representative) to disclaim some assets so that they are sheltered from taxes on her later, premature death.

E. Husband and wife with total estate greater than $4M

If the clients are young, Mr. Manterfield would discuss both the optional disclaimer plan and the mandatory credit shelter trust and document the clients' preferred course of action. If the clients are older, or if the couple has an estate in excess of $10M, he would emphasize the mandatory credit shelter trust.

Should we discuss possible permanent repeal with clients? If primary driver for the client is estate tax savings, then you can create a mandatory credit shelter trust. The documents could provide that if there is no federal estate tax at the death of the first spouse, 100% of the assets of the first deceased spouse would be used to fund the credit shelter trust which could be drafted as a long term generation skipping trust to maximize tax savings. If the primary driver for the client is income tax savings, then consider the possibility of carryover basis. Here, the credit shelter trust would be funded at the death of the first spouse with the "largest amount of property to which the personal representative can allocate the aggregate basis increase allowed by federal income tax law for property not acquired by the surviving spouse." The balance of the property would constitute the marital gift.

Mr. Manterfield discussed designing the proper marital gift and compared and contrasted the four forms of marital gifts; namely the estate trust; the power of appointment trust, the QTIP trust and outright gifts. The difference between these four types of marital gifts comes down to the amount of control retained by the first spouse to die. With the estate trust, there are tighter controls during the surviving spouse's lifetime because the estate trust need not require distribution of all of the income to the surviving spouse; income and principal distributions during the surviving spouse's lifetime are discretionary with the trustee. At the death of the surviving spouse, the estate trust assets are paid to the surviving spouse's estate. A power of appointment trust can limit the surviving spouse's access to principal during lifetime but requires that all net income be distributed; this trust gives the surviving spouse complete control of the assets at death due to the general power of appointment. QTIP trusts provide the tightest control over the surviving spouse's access to trust funds.

An estate trust was historically used when the surviving spouse was in the highest income tax bracket; the trustee could accumulate income in the trust where it would be subject to lower income taxes. With the inversion of income tax rates for individuals and trusts, the income tax play no longer exists. However, an estate trust may still be used in cases where non-income producing property is involved and the first spouse to die does not want the surviving spouse to have the right to force the trustee to make the trust assets income producing, as is required with the QTIP and power of appointment trusts (for marital deduction purposes). An interest in a closely-held business that does not pay current income is an example of an asset for which an estate trust may be appropriate.

With a power of appointment trust, anticipated lifetime gifts by the surviving spouse can be anticipated with the use of an inter vivos limited power of appointment. Mr. Manterfield's outline suggests that a power of appointment trust may be preferred to a QTIP trust where possible assignment of a portion of the trust income during the surviving spouse's lifetime is anticipated and the surviving spouse is in a high income tax bracket and does not need additional income from the trust. This situation is contrasted with a QTIP trust where IRC section 2519 provides that an assignment of any portion of QTIP income will trigger a gift of the entire value of the QTIP trust property.

QTIP trusts enable the first spouse to die to control specific assets and can be combined with one or more of the other forms of marital gifts. For clients without children who have charitable intentions, clients can choose between a charitable remainder trust and a QTIP trust. A QTIP trust provides more flexibility because unlike a charitable remainder trust, all net income of a QTIP trust is paid to the surviving spouse and principal can be invaded for his or her support. However, a QTIP is not a tax-exempt trust during the surviving spouse's lifetime so the surviving spouse will be subject to income tax on capital gains of the trust.

QTIP trusts can be used to obtain transfer tax valuation discounts in business succession planning. To position the business for valuation discounts at the death of the surviving spouse, clients need to divide ownership of the business so that husband and wife each own 49% or less of the business (with a small interest owned by other family members). The estate planning documents utilize a QTIP marital gift. The credit shelter and QTIP trusts are funded at the death of the first spouse and when the surviving spouse subsequently dies, his or her ownership of 49% of the business is not aggregated with the portion of the business held in the QTIP and/or credit shelter trusts created upon the death of the first spouse. (See Estate of Mellinger case and the IRS acquiescence).

Mr. Manterfield concluded his presentation with comments similar to those made in his opening remarks; clients of modest wealth need to focus on estate planning during this time of estate tax uncertainty. Lawyers must reach out to clients to engage in thoughtful estate planning even if the clients are not likely to be affected by estate tax reform.

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We're Sorry, Our Charitable Gift Has Gone South. Please Revoke the Gift and Protect Our Savings and Other Benefits.
Tuesday Morning, 1/10/06
Presenter: Winton C. Smith Jr.

Reporter: Joanne Hindel Esq.

Winton Smith started his lecture by saying that he has spent 30 years talking about making gifts and finds it a bit unusual to now be talking about exit strategies. He emphasized that charitable gift planning provides enormous satisfaction to donors who wish to help their charitable interests and it can also help donors accomplish their objectives when the gift goes south.

The current outright gift: donors who object to the charity's use of their gift:

- the charitable contribution is irrevocable if the donor claimed the deduction
- the donor may be able to sue the charitable organization
- while the general rule has been that a donor cannot sue to enforce a gift restriction, only the Attorney General, this rule may be changing
- the presenter discussed three cases at length:
- Herzog Foundation v. University of Bridgeport, 243 Conn. 1 which held that the donor did not have standing to sue the charitable organization; Smithers v. St. Luke's-Roosevelt Hospital Center, 281 AD 2d 127 where the court allowed the donor's widow to have co-existent standing with the AG; and Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University, No. M2003-02632-COA-R3-CV allowing the plaintiff charity to challenge the university's decision to rename a particular hall.
- The rule seems to be changing to allow either the donor or affected charity to sue if the donor has special circumstances or a special interest in the gift restrictions
- The agreement should state how the contributed funds are to be used and should give the donor the right to judicial relief if the gift agreement is breached. In this fashion, the suit can be brought as a breach of contract.

Gifts that provide income

- the general rule is that one cannot make a gift of a partial interest unless the interest retained is insubstantial (presenter gave two examples: retaining the ability to use gifted land to train a hunting dog and continuing to influence investment decisions of gifted assets)
- gifts that provide income include: CRUT, CRAT, Charitable gift annuity, pooled income fund
- benefits to donor include: increased spendable income, current income tax charitable contribution deductions for the present value of the remainder interest, donor bypasses capital gains tax on the sale of the appreciated property

Charitable remainder unitrust exit strategies

- the donor makes a charitable gift of all or a part of the unitrust income interest to the charitable remainder beneficiary
- PLR 9721014 approves such a gift

- Be sure to check whether the governing instrument
permits such an assignment and it is permitted by state law
- Donor may receive an income tax charitable
contribution deduction for making a gift of the income interest in a charitable remainder unitrust (special considerations when making a partial gift of the income interest)
- Donor receives a gift tax charitable contribution
deduction for a gift of the charitable remainder trust income interest.
- Materials contain four very useful fact patterns
that describe the above for CRATs and CRUTs and gifts of income interests.
- Note that the donor's income tax charitable
deduction for a gift of a unitrust income interest is a gift of a capital asset.
- The valuation of the deduction is based on the
present value of the gift of the income interest based on the methodology described in the Treasury Regulations.
- Note that the trust may not qualify as a charitable
remainder trust exempt from income tax if the donor makes a gift of the income interest to a charity that is not designated as the remainder beneficiary.
- Donor could also terminate the CRUT and make a
direct distribution to the charity if the trust document provides a power to assign the trust principal to the charity. Presenter listed PLRs 200525014, 200441024, 200324035, 200252092 and 200220839.
- Donor could also seek partition of the existing CRUT
into two separate unitrusts if required by state law.
- The donor and the charity can terminate the trust
and divide the trust property according to their actuarial interests; but note that state law must permit termination of an irrevocable trust and must have appropriate parties to action.
- The donor can sell the income interest – see PLR
200441024.
- The donor and charity can also join together and
sell the entire trust to a third party.
- The donor can also exchange the income interest for
a charitable gift annuity.
- The parties can seek reformation of the CRUT.

Charitable remainder annuity trust exit strategies

- Donor can make a charitable gift of the annuity
trust income interest to the charity.
- Donor may be able to make a current gift of the
growth in an annuity trust to the charity if the property retained in the annuity trust is sufficient to pay the annuity income.
- Donor may be able to amend the trust to authorize
gifts of income and principal to the charity.

Charitable gift annuity exit strategies

- Donor can make a gift of the annuity contract back to the organization that issued the gift annuity.

Deferred payment gift annuity exit strategies

- Donor can make a gift of the deferred payment gift annuity contract back to the organization that issued the deferred payment gift annuity.

Pooled Income Fund exit strategies

- Donors might give their income interest to the charitable remainder beneficiary in exchange for a charitable gift annuity.
- The charity might merge multiple pooled income funds.
- Charity might use Section 104 (adjustment power) of the Uniform Principal and Income Act (if adopted in that state) and provide a more attractive income stream.

Exit strategies for gifts with retained life estates

- Donor and charity can enter into a joint sale. They can agree to sell the property and divide the proceeds.
- Donor can contribute the life interest in the property to the charitable remainder unitrust.
- Donor can contribute the life interest in the property to a charitable organization in exchange for a charitable gift annuity.

Charitable Lead trust exit strategies

- Prepay the charitable annuity without discount and terminate the charitable lead annuity trust.
- See PLR 199952093 and 200226045.

The presenter managed to make an end of the day presentation both informative and entertaining.

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News From The Exhibit Hall
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Lawgic [www.lawgic.com]

Lawgic now has forms modules for Florida, California, New York, Maryland and Georgia. Additional state modules are under consideration. The price normally is $1,500 per year, but the show price is $1,350 for the first year. You can also purchase this on the monthly plan at the rate of $150 per month ($137.50 during the show). A sample CD is available at their booth.

Authoritative.net [www.authoritative.net]

This company is new this year. They produce a file management system for small and medium size firms. It works with your existing file system and they can integrate that system into their program. It allows the user to preview documents just by pointing to them in the system to identify the file without opening the native program. It has a very good search tool and will use one of theirs or allow the user to select a different search tool such as Google, Microsoft and others. They have two versions, standard and professional. The cost is under $200 for the professional version and about $75 for the standard version.

Attorney's Will Registry (AWR) [www.attorneyswillregistry.com]

This company is also new this year. Their Web site is advertised as a worldwide registry of wills, trusts and other legal documents that is centrally located and accessible at any time. They do not store the actual document, only the information that is submitted by the attorney or the client (typically name, date of birth and address), which can be done on-line or by fax or mail. While clients can do this directly, they encourage the use of an attorney to do this. The Registration cost is $15 per document. Searches cost $10 per search and there is no charge for an unsuccessful search. Their Privacy Statement on their Web site is understandably three pages long. Their contact information is c/o Salt Lake City, but as far as we can tell this registry is in no way connected with the Mormon Church family registries that are also located there. The "About Us" link on their Web site is currently not active, so we are not able to find out anything more about this company and its principals by that method. For those of you who are familiar with DocuBank [www.docubank.com] and how it provides access to living wills and health care documents for your clients will find the AWR model to be very similar except AWR will not have the actual documents on file and currently does not charge an annual membership fee.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Heckerling Institute 2006
Reports from the event, as posted to the ABA-PTL List Serve

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

Report #5

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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First an errata - the Reports that are included in Report #4 were all for sessions that took place Tuesday afternoon, not Tuesday morning. We apologize for any confusion this may have caused.

Next, from the Seminar Director: The Heckerling Institute will be held January 8 through 12, 2007 in Orlando, Florida at the World Center Marriott and thereafter for 2008 and 2009. After 3 years, the Institute will determine whether to continue at that location or go elsewhere. The hotel has 2000 rooms.
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This Report contains coverage of the Wednesday morning **Programs on Partnership Interests and the Q&A Session**.

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The Beauty and the Beast: Partnership Interests in Your Estate or Trust Administration Wednesday Morning, 1/11/06
Presenter: Carol A. Cantrell

Reporter: Merry Balson Esq.

Partnerships are the beast in any trust and estate administration, particularly those that do not distribute all of their income. Prudent investor rules and principal and income statutes significantly impact fiduciary duties.

Mandatory Basis Adjustment Rules

The American Jobs Creation Act of 2004 created 3 new mandatory basis adjustment rules that can trap unwary family limited partnerships (FLPs)(see pg. 22 for a full discussion). First, a new Sec. 704(c)(1)(C) now provides that built-in losses on assets contributed to a partnership after October 22, 2004 can only be used by the contributing partner (prior law allowed built-in losses to be used by the donor and donee). The solution to this problem is not to contribute built-in loss property to a partnership.

Second, after October 22, 2004, partnerships are required to adjust the basis of its other assets under Sec. 734(b) when a distribution of cash or property results in a taxable loss to the partner or the partner receives a stepped-up basis in the property greater than $250,000. The most common application of this new rule is when the partnership makes distributions of low basis property to a high basis partner. Thus, if you are cashing out an estate with low basis property, the partnership has to make a negative basis adjustment if the liquidating partner gets a basis step-up. The solution is to make a Sec. 754 election, so that when the property is distributed it is no longer low basis property.

Third, Sec. 743 now provides that when a partner dies (or transfers a partial interest) after October 22, 2004, and the adjusted basis of assets exceeds the fair market value by more than $250,000 on the date of death (or transfer), the partnership will be forced to make a Sec. 754 election and step-down the inside basis of those partnership assets with respect to decedent to the discounted (not market) value of the assets. Ms. Cantrell's advice to deal with this problem is to get a better investment advisor, so that you are not stuck with losses in the partnership when you die.

Ms. Cantrell did not discuss the "mixing bowl rules" but the outline covers this in detail.

Investment Management Issues

Ms. Cantrell discussed investment considerations at length. The trustee's fiduciary duties under the Uniform Prudent Investor Act, including the duty to diversify, duty to monitor the portfolio, duty of loyalty to the trust beneficiaries, and duty of impartiality, make it difficult for the trustee to hold an FLP interest as its sole asset. The fiduciary has what equates to a duty to delegate if the fiduciary is unable to meet the prudent investor rule duties (e.g., if the trustee is not skilled in investing). If the trustee relies on an agent hired by the FLP to make all investment decisions, the trustee has not really fulfilled his duties. The trustee is fully liable for decisions by the FLP investment advisor even though that advisor is investing for all partners, and not necessarily for the sole benefit of the trust beneficiaries. The IRS will allow the trust to deduct fees where the trustee carries out investment duties himself (even if he is negligent in doing so), but where the trustee delegates those duties to the FLP's investment advisor, the IRS does not allow a full deduction for the investment management fees.

Section 67 applies a 2% haircut from miscellaneous itemized deductions.
However, Sec. 67(e)(1) provides an exception for trusts and estates. Under Sec. 67(e)(1), the 2% haircut does not apply to "administration expenses"
of trusts and estates that ". . . would not have been incurred if the property were not held in such trust or estate..." While investment management fees are administrative costs, the second prong of the exception under Sec. 67(e)(1) is that those costs must have been incurred because they were held in "such trust or estate." The IRS' position is that the expenses must be "unique" to trusts to be fully deductible, and because individuals commonly incur investment advisory fees, those fees will be subject to the 2% rule. Trustees argue that they would not have incurred the investment management fees but for the trustee's prudent investor duties. The Courts and commentators are split on this issue (See Mellon Bank N.A. v. U.S., 265 F3d 1275 (Fed. Cir. 2001) (holding investment management fees paid to a third party are subject to the 2% rule); O'Neill v. Comm'r, 994 F.2d 302 (6th Cir. 1993) (holding fees paid by an unskilled trustee were fully deductible because those fees are required as part of the trustee's fiduciary duties under the prudent person standard); and, Scott v. U.S., 328 F.3d 132 (4th Cir. 2003) (holding fees are subject to the 2% rule)).

Ms. Cantrell was personally involved in the recently decided case of William K. Rudkin

Testamentary Trust v. Comm'r, 124 T.C. 19 (2005), appeal docketed, No. 05-5151 (2nd Cir. Sept. 26, 3005). In Rudkin, the trust was subject to the uniform prudent investor act (unlike the cases cited above), and based on the duty to diversify, and duty to delegate, the trustee (who was a CPA) hired a NY registered investment advisor, paid them a fee and deducted that fee in full on its return. The IRS audited the return and determined the fee was subject to the 2% rule. The trustee tried his own case and lost, and Ms. Cantrell became involved at that point. The case is currently on appeal to the 2nd Circuit and the American Banker's Association recently submitted an amicus brief in support of the trustee's position which focused on the fact that the prudent investor act requires the trustee to incur these fees. Ms. Cantrell discussed the legislative history of Sec. 67(e)(1) in some detail, and noted that the second prong of the Sec. 67(e)(1) test was not in the House or Senate version of the statute and was added in a conference session late in the process. Ms.
Cantrell stated that if the trustee takes an active role in investments, or is a party to the contract with an investment manager, the trust should be able to pass the test.

Fiduciary Income from Partnerships

There is some dispute over the meaning of Sec. 401 of the Uniform Principal and Income Act (UPAIA). The UPAIA describes the portion of distributions from an "entity" that will be allocated to income. Generally, cash distributions to a trustee are income, unless the distribution exceeds 20% of the gross assets of the entity in which case the distribution is allocated to principal. In Thomas v Elder, 21 Cal. Rptr. 3d 741 (Dec. 2,
2004) the Court wrestled with whether the distributions are allocated to principal when the shareholder actually receives 20% or more of the gross assets of the entity, or when the entity distributes 20% or more of its gross assets to all shareholders collectively. In Thomas the Court reviewed the statutory language and determined that where an S corporation distributed 50% of its gross assets to its shareholders, and a marital trust (holding only 16% of the shares) did not receive 20% or more of the gross assets, the trustees could not allocate that distribution to principal. Following this ruling, California immediately passed an amendment to their UPAIA statute inserting the words "money received by all owners collectively" to cure this problem. Note that every state other than Florida who has adopted Sec. 401 of UPAIA has the same language as the statute in the Thomas case.

Allocating Taxes on Partnership Income

When partnerships do not distribute all income there can be significant taxable income in the trust creating a number of problems. UPAIA Sec.
505(d) requires a trustee who holds an interest in a pass through entity to allocate taxes generated by the entity between income and principal based on the character of the receipts coming from that entity. Most entity distributions will be income, and the tax liability for those distributions will also be income. The trust must pay the tax liability on undistributed income from the entity before making a distribution to the beneficiary. An algebraic equation must be used to determine the amount distributable to the beneficiary and the amount the trust must retain to pay its tax on remaining taxable income from the entity. The formula for this calculation is set out on the bottom of page 70 of the outline.

Ms. Cantrell included several excellent flow charts addressing partnership tax issues as exhibits to her outline.

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Question & Answer Sesion
Wednesday Morning, 1/11/06
Presenters: Dennis I. Belcher [DIB], Prof. Jeffrey N. Pennell [JNP] and Carol A. Harrington [CAH]

Reporters: Jeff Weiler Esq. and Gene Zuspann Esq.

DB: Use of parallel GRAT's. Husband and wife establish identical GRAT's.
Term could be 2 year GRAT interest and 20 year revocable interest for spouse with revocation by grantor in Will. For use by person that wants to make a gift but needs funds and person has poor health. Problem areas: 1.
IRS maintains that the right to revoke is only for the initial term (here the 2 year GRAT term), and 2. Application of reciprocal trust doctrine.
Covey says that on 1 IRS is wrong and on 2 there should not be a problem.
However, advisors should arrive at their own conclusions. Authority to review is example 8 of final IRC Section 2702 regs. Taxable gift is made based on GRAT calculations. Play is that one of the parties will die during the term of the GRAT's.

JP: Getting a valuation discount for a built in gain is going to be difficult. Courts will not consider the built in gain if projected payment of tax is too far in the future.

CH: Grantor trusts. IRC Section 674 (4) and reacquiring property in a non fiduciary capacity. Jordahl decision involved a fiduciary capacity situation. IRS will not rule in this area. Is there a problem with this approach? CH's view, from a legal perspective, there should not be an inclusion in gross estate problem. As to suggestion that the power should be given to someone other than the grantor, CH is concerned. The phrase "any person" in the statute and "reacquire" does not fit, "other person"
can not "reacquire" an asset that the other person did not put into the trust.

JP: Comments on Grantor trusts. IRC Section 675 power to buy assets at fmv can not trigger IRC Section 2036. Should multiple approaches be used to get grantor trust status? Note that different grantor trust provisions cause different inclusion in income. Some include ordinary income and some include capital gain. See "portion" rules in regs for IRC Section 671. Note the rules use a Distributable Net Income model - can not get losses out of trust in excess of gains in JP's view without citing authority for this view. Another approach to grantor trust status that is good today is grantor borrowing from the trust.

DB: Corporate insider and impact of SEC 16 (b) rules on GRAT's and CRT's.
Problem is with stock in publicly held corporation going to insider under right to reacquire or a principal distribution for payment of annuity.
Suggests use power for insider other than the right to reacquire. Also, do not use insider as trustee of GRAT or CRT.

JP: Application reciprocal trust doctrine (Est of Grace) outside of IRC Section 2036 area. One suggestion that doctrine can be avoided merely by having a cap on distribution to one spouse in one of two husband and wife reciprocal irrevocable life insurance trusts does not in JP's view work. More difference are needed. Levy decision and a PLR (citation not
provided) state having a non general power of appointment in one of the trusts and not the other is sufficient to avoid the doctrine.

Panel: Doctrine can apply outside of IRC Section 2036 like applying concerning IRC Section 2042 (life insurance). To avoid IRC Section 2042, if spouses are trustees, have them resign as trustees and disclaim benefits. (Speakers did not mention application of IRC Section 2035).

CH: Family limited partnerships, future planning, existing partnerships.
Suggests respect governing instrument rules, avoid donor's unilateral right to liquidate. Try to avoid being an IRS target and avoid audit. Have donor give up general partnership interest (or manager of LLC). Give up 100% of control and do not keep a minority interest. It is OK for donor to be involved with investment decisions - IRC Section 2036 should not be applicable to involvement with investment decisions. The problem is the IRS and the courts are applying a "smell test". Ownership of limited partnership interests and right to vote on liquidation is a stretch for IRC Section 2036 application but IRS agent could raise the issue. Better to get rid of all interests - general and limited.

DB: Agrees with CH concerning getting rid of control. If there are financial assets in the FLP, want to avoid control as general partner at death. Putting interests into an irrevocable trust with an independent trust, and retaining a power of appointment to avoid a current gift is an approach that could be used to get rid of control. Less worried about entities with active real estate or operating business. Read the cases and you will see a difference between treatment of entities with financial assets and entities with business assets. The "bar" is getting higher each year for taxpayers. There always is risk involved.

JP: IRC Section 2043 and application to FLP's (Reporter: warning this is real bad news!). If taxpayer loses on FLP IRC Section 2036, estate may not be back to square one and may be in much worse shape. JP has provided the following information to IRS agents at classes that he has presented. He notes that the IRS has not pursued this issue to date. He speculates that the results are so bad for the taxpayer that the IRS may be concerned that a court will back off on the IRC Section 2036 arguement to avoid having the taxpayer subject to the application of IRC Section 2043. This involves the relationship between the purge and credit rule in IRC Section 2001 (b) where an asset is brought back into the gross estate and the previous gift of the assets is eliminated from the estate tax calculation. Assume IRC Section 2036 applies. First the asset owned at the date of death is included in the gross estate under IRC Section 2033. Then under IRC Section 2036, the transfer of assets is brought into the gross estate due to retained control or enjoyment. There is a double inclusion of assets in the gross estate unless there is an adjustment. IRC Section 2043 provides an adjustment but it does not work correctly for the taxpayer. The value of the adjustment, or offset, is based on the value at the time of transfer.
The taxpayer's benefit is based on the value of assets at the time of transfer. If the assets brought back into the gross estate have appreciated since the time of the original transfer the "offeset" is only the original value. If there is death shortly after the original transfer, with little appreciation is assets, the impact should not be too bad. However, in older FLP where time has elapsed and the value of assets has appreciated, the estate will get hit hard. Solution: get rid of FLP so no IRC Section 2033 inclusion at death.

DB: Look at value of inside assets relative to basis of inside assets before making an IRC Section 754/743 election. If value is below basis, do not make election since is will result in a step down in basis. Consider revocation of IRC Section 754 election.

CH: Generation-skipping transfer tax matters. Normal legal adoption of a minor person results in relationship like blood line lineal descendant (rather than analysis of generation placement based on age differential). Comparing exposure to generation-skipping transfer tax to estate tax will probably show that the generation- skipping transfer tax is lower even after consideration of state generation-skipping tax. Trusts last for a long time and tax laws will be different many years from now. Exposure to generation-skipping tax (if it still exists) with a limited power to a trust beneficiary may be better than giving the beneficiary a general power of appointment and having the assets exposed to creditors of the child.

JP: Planning for persons in decoupled states. Like use of partial QTIP election and may be a Clayton technique. Feels this is better than a disclaimer approach.

CH: In using a Clayton flip, use an independent executor to make the election. Could require that the executor follows the instruction of an independent trustee and trustee can appoint an independent trustee for this purpose. This approach eliminates probate court involvement in the process.
CH agrees with Ron Aucutt that the power to make tax elections should not be a basis for applying IRC Section 2036 and property rights should be determined after tax elections have been made. However, CH suggests avoiding the risk even though IRS has not raised this issue.

DB: Avoid drafting Wills for persons outside of your state. May not be unauthorized practice of law but the new complexity from state death tax could cause malpractice exposure.

CH: For generation-skipping transfer tax planning, likes to use separate trusts and spells out the split with a direction to sever the trust.

CH: In marital deduction formulae, reference to state death tax "credit"
should be changed to "deduction".

JP: Selection of fiduciary. For QPRT, could be child, spouse and during the initial term only even the settlor. If trustee is beneficiary, a HEMS ascertainable standard is needed. Watch obligation of support and do not permit trustee to make distributions that fulfills the trustee's obligation of support (such as support of a child of trustee where the child is a trust beneficiary). Ascertainable standard will not save the obligation of support problem.

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News From The Exhibit Hall
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Wealth Transfer Planning ["Interactive Legal Systems" <info@ILSDocs.com>]

They are working Brentmark to integrate their Estate Planning Tools and NumberCrucher programs with WTP. Phase I will be completed in January and shipped to WTP users as no charge then.

Subscribers must be using the 2006 version of the Brentmark programs. They will also have an automatic updating service by February. New features include an extensive no-contest option for wills and revocable trusts and completely updated planning memos. Lastly, they have added a SNT to their forms library.

BNA Estate and Gift Tax [www.bna.com]

Their calculation program now has state calculations for decoupled states included in it. This program is very popular for its's spreadsheet look and feel and how easy it is to do three-column what-if comparisons for a given set of facts for a married couple, including with an instant reverse order of deaths calculation feature. BNA also has a feature that comes with a subscription to its Tax Management EGT Portfolios whereby the user can gain instant on-line access to the portfolios, Code and regulations.

Lexis/Nexis [www.hotdocs.com and www.lexisnexis.com]

No word on any pending upgrades to their current line of HotDocs products, which are HotDocs 2005 and HotDocs 6.1 and 6.2. Maybe the folks over at Wealth Transfer Planning or WealthCounsel know something we don't know. Lexis does have a flat rate Tax Library that allows a user to ahve access to all the primary sources, administrative materials from the IRS, and state administrative codes, as well as dozens of secondary sources. The cost for a single user is 225 per month.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Heckerling Institute 2006
Reports from the event, as posted to the ABA-PTL List Serve

Report #6

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of some of the Wednesday afternoon **Special Session #1 Programs on Transfer Tax Audit Issues, Ethics and the Trustee's Duty to Provide Information to Beneficiaries**

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Transfer Tax Audit Issues: What's Hot
Wednesday Afternoon Special Session 1-B, 1/11/06
Presenter: Norman J. Benford, John W. Porter, Martin E. Basson and James L. Gulley

Reporter: Paul Hood Esq.

1. FLP-LLC/2036 cases.

John Porter led off with a discussion of FLP/2036. He feels that 2005 cases gave us clarification-but little guidance, in part because the cases were so fact-intensive cases. 2703 arguments are being resurrected. Can we ignore the buy-sell provisions? Blount.

Bongard: Every judge on Tax Court weighed in on this matter except Judge Cohen. Bongard partnership was not operated as a piggy-bank-no distributions to Bongard. 2036(a)(2) argument turned into a 2036(a)(1) argument. No real business purpose required, just a non-tax purpose.

Korby: Sr. Gen got all distributions-court found distributions to have been made as needed-and not as a managerial fee.

Porter noted the following bad facts that the IRS keeps litigating:
Personal use assets in entity; fiduciary duties negated in governance documents; percentage of assets contributed to the entity versus assets retained; commingling; non-pro rata distributions.

Basson stated the he feels sympathy for innocent taxpayers who have watched the facts and results change in this area of the caselaw over the past few years. Attorneys involved in the planning and now the audit clearly are under pressure, and his auditors see that. The IRS hasn't given up on 2001 guidance. Look for continued aggressive enforcement. Still looking at business purpose. Signed more summons lately than ever before. 73 cases in his inventory. Not every entity is being audited, though, as the audits consider matters on a coordinated case by case basis.

Gulley noted that there were 206 cases in Appeals. 74 cases docketed. Mary Lou Edelstein is telling Appellate conferees to give zero discounts in "strong 2036 cases." Per Basson: No meaningful average discounts for cases being settled," even after Benford pushed him on the recent caselaw. But then Basson said something about a 25-35% discount.

Had 100% discount case (multi-tiered entities). And a 90% case. Gulley said "you're going to get a discount, but its going to be fact-driven."

2. Impact of post-valuation events-Noble.

Post-death sale. Okerlund. Basson-"These cases prove that you can get any number you want out of the appraiser-even prominent appraisers." But then he took that statement back. Basson stated that the IRS will make an attempt to get a sale into evidence, no matter how pre- or post-valuation date it is.

3. Discount for Built-in capital gains-Jelke.

C corporation-lots of marketable securities. The IRS appraiser used a DCF approach to value the discount for built-in capital gains-but used net asset value approach for enterprise (entity) value. Taxpayer filed appellate brief three weeks ago. Government brief is due shortly.

4. Lottery winnings/stream of payments. Basson-IRS will continue to rely upon 7520.

5. Defined Value Transfers.

McCord-pending with Fifth Circuit for coming on two years. Defined value disclaimer case-stipulated to Tax Court for about a year-maybe awaiting McCord.

6. Forum shopping/taxpayers. The IRS noted that there seems to be some attempts to get cases moved around to affect appellate venue, which they don't believe works under the rules.

7. IRS Discovery-Enforcement.

Basson: IRS Enforcement budget is up from 25% of overall budget to 60%.
More summons enforcement in transfer tax matters. Call the manager if you're feeling overburdened. Porter chimed in not to forget privileges before just turning materials over-especially if the client has to waive that privilege first.

8. Graegin Notes.

Nothing going on per John Porter. IRS settling cases.

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Ethics - What's a Lawyer to Do?
Wednesday Afternoon Special Session 1-D, 1/11/06

Presenter: Frank A. Thomas III

Reporter: Gene Zuspann Esq.

Ethical Issues in Multigenerational Representation or Pork is a Four letter word

"Or fun with the dysfunctional family"

Frank starts with a lengthy fact situation, followed by a number of questions.

The patriarch, Bubba, is the sole owner of Hooo Pig, Inc., a successful distributor of pork rinds and chitlins. Drudge is his lawyer and was a childhood friend. He has always represented Bubba, Hooo Pig, and all of the family.

He has put into place a complex estate plan for Bubba, his wife and their children. He did obtain engagement letters allowing free sharing of all information. Part of the plan is to set up irrevocable trusts for their children and grandchildren funded with Hooo Pig stock. Later, Hooo Pig goes public and Bubba finds that his net worth and that of his family has increased substantially.

Many of the answers to the questions are straight forward. For instance, Bubba asks Drudge to change the beneficiary designation on his IRA to a long time paramour from the business, and not to tell his wife.

As to the issue of disclosure, Frank has 5 choices to the question - can he tell the wife about the paramour?

They range from yes because they are joint clients, yes because the action is detrimental to the wife, to no - the IRA was going to charity and does not effect the wife and no - it will be harmful to Bubba. Frank summarized that there is no right answer. The case law comes down across the board. He pointed out that a consent to disclose is revocable, and in the case law "confidence trumps loyalty almost every time." The choices are to get consent from all parties or to withdraw.

Other topics include: Representation of one former client when another one has a new attorney. The conclusion was that generally, an attorney cannot represent one client against another. An exception occurs if a substantial amount of time has passed, however, he also concludes that "you are a brave sole if you are going to try that one."

On one client wanting to take action against another's wishes - the attorney needs to stop the suggestion immediately and if the client in the office continues talking, then the attorney must disclose the conversation to the other client.

Frank suggested that the engagement letter in a case such as this should indicate that Bubba is the primary client, that he will continue to represent Bubba, and that anyone else choosing to have him represent them do so at their own peril.

In a situation where the representation is a successive relationship, and if something adverse happens, "cut the cord quickly and cleanly" and be as neutral as possible.

In a situation where a trustee intends to take some action adverse to the trust and the beneficiaries, the attorney needs to immediately advise the trustees of the possible breach of trust. Conflict between two trustees, when the attorney has jointly represented them involving the trust, requires immediate withdrawal.

As to the question of incompetence of the client, an issue is to whom may the attorney make disclosure. Frank indicates that it is clear that Drudge could disclose Bubba's incompetence to his doctor. This varies from State to State.

Frank also has an outline with the materials. He pointed out that, when things go south, the first thing to go in the joint or mutual representation is consent to disclosure. If there is an issue, you must get a new, informed consent from all parties to continue, or withdraw.

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The Trustee's Duty to Provide Information to Beneficiaries: When Can the Settlor Say "Don't Ask, Won't Tell"?
Wednesday Afternoon Special Session 1-E, 1/11/06
Presenters: Anne J. O'Brien, Gail Cohen and Dennis I Belcher

Reporter: Joanne Hindel Esq.

Definitions under the UTC

Anne O'Brien started the discussion and explained that this would be an expanded discussion of the settlor's ability to keep information out of the hands of beneficiaries with a review of different state approaches to Section 105 of the Uniform Trust Code, the Duty to Inform and Report.

She reviewed the definitions of types of beneficiaries under the UTC Section 103:
- Beneficiary: a person that has a present or future
beneficial interest in a trust, vested or contingent or, in a capacity other than that of trustee, holds a power of appointment over trust property
- Qualified beneficiary: a beneficiary who, on the
date the beneficiary's qualification is determined:
- (A) is a distributee or permissible distributee of
trust income or principal
- (B) would be a distributee or permissible
distributee of trust income or principal if the interests of the distributees described in (A) terminated on that date without causing the trust to terminate; or
- (C) would be a distributee or permissible
distributee of trust income or principal if the trust terminated on that date.

Under Section 813 of the UTC, trustees are required to (I) notify "qualified beneficiaries" (current beneficiaries and first-line remainder
beneficiaries) who have attained age 25 of the existence of the trust, the identity of the trustee and the right to obtain copies of the trustee'
reports and (ii) to respond to the request of any beneficiary for trustee's reports and other information reasonably related to the administration of a trust.

The duty of a trustee under Sections 813 (b)(2) and (3) to provide notice and information to "qualified beneficiaries" is mandatory to the extent such beneficiaries are 25 years of age or older, regardless of whether the beneficiaries have requested any information from the trustee. Section 105(b)(8) ensures that any "qualified beneficiary" will learn of the trust's existence and have the ability to request further information about the trust no later than age 25. In contrast, a trustee's duty under Section 813(a) to provide "beneficiaries" with all information reasonably related to the trust's administration becomes mandatory only upon the request of a beneficiary.

The UTC protects trustee who abide by the Code's information and reporting requirements by providing that an action for breach of trust may not be commenced more than one year after the trustee provided a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the one year time limitation. In the absence of a report that adequately discloses a claim, a five year statute of limitations period applies, and the five-year period does not begin to run until the trustee is removed, resigns, or dies; the beneficiary's interest in the trust terminates; or the trust itself terminates.

Case law addressing trustee reporting duties

Dennis Belcher then discussed the Fletcher v. Fletcher decision (480 S.E.2d 488) in which he represented the defendant and appellant. In that case, the settlor provided under the terms of her revocable trust that, upon her death, three separate trusts, one for her adult son and one for each of her two grandchildren, be established. The settlor appointed another son to serve as trustee of each of these trusts with a bank serving as co-trustee.

Apparently, the settlor, on her deathbed, had asked the trustee-son to not disclose any terms of the trust to the trust beneficiaries and the son had agreed. A year after the settlor died, the beneficiary son brought a proceeding against the trustee asserting that their refusal to comply with his request for a copy of the entire trust agreement precluded him from determining whether the trustees were fulfilling their duties as trustees.

The trustees had provided sections of the trust agreement, namely the section designating each beneficiary as such and the administrative provisions applicable to the trustees but the beneficiary-son wanted a copy of the entire trust agreement. The trial court ruled in favor of the beneficiary and the appellate court did also, stating in its opinion that the trustees had placed too much emphasis on the duties of the trustees and not enough on the rights of the beneficiaries. Dennis Belcher did mention, that, in hindsight, it might have been better to bring a separate action rather than a demurrer to the action brought by the beneficiary-son so that the trustees could have introduced testimony showing that the decedent had not wanted information conveyed to her beneficiaries.

Settlor flexibility under the UTC

Anne O'Brien then emphasized that like the Fletcher decision, the UTC requires a trustee under Section 813 to furnish a copy of the entire trust agreement. She suggested that drafting attorneys should therefore consider changing documents to clearly reflect the settlor's intention regarding the purposes of a trust, as well as the ability of a beneficiary to change the trust situs.

She also mentioned, however, that unlike Fletcher, most trustees will want to disclose information about the trust in order to commence the one-year statute of limitations period for actions against the trustee for matters revealed to a beneficiary.

Situs shopping to avoid notice requirements

Gail Cohen then discussed some aspects of the reporting and notice issues from the perspective of the corporate trustee. She said that her institution had done an inventory of their trusts to see whether the documents identified what law governed administration of the trust. She said that under common law, settlors had broad discretion to determine the situs of trust administration.

She pointed out that under the UTC 107, the settlor is given the ability to select the jurisdiction for administration of the trust unless the law is contrary to the jurisdiction having the most significant relationship to the trust. She cautioned that if a settlor wanted to designate a jurisdiction more favorable to his or her trustee reporting choices, the settlor would have to be sure that the rules governing trustee situs and administration meshed or be sure that the trust had substantive contacts in the jurisdiction chosen.

Questions from the audience

The panel then took question from the audience that included the following:

- Whether UTC Sections 105 and 107 were in conflict with each other since 105 seemed to require certain notices to beneficiaries but 107 would allow a settlor to choose a different trust situs that might not have such notice requirements (the panel agreed that this appeared to be internally inconsistent).
- Whether a purpose trust (used primarily with off-shore trusts) would be subject to beneficiary notice requirements (the panel determination was that it might not)
- Whether personal information about a beneficiary gathered by a trustee in the course of administration could be subjected to disclosure under the reporting rules (the panel consensus was that it could not)
- Whether the beneficiary surrogate concept available in some jurisdictions could serve as a substitute for problematic beneficiaries (the panel indicated yes but explained that the surrogate concept has undergone much criticism and cited a recent article in Trusts and Estates magazine)
- Whether a contingent beneficiary (alternate to the named beneficiary if that beneficiary did not survive the trust term) could obtain trust information (the panel indicated no since this beneficiary did not fall within the qualified beneficiary category)

States responses to the UTC notice requirements

The panel mentioned the chart included in the outline that identifies each state's status regarding adoption of the UTC and its position on the notice requirements.

By way of summarizing some aspects of the chart here is the following excerpted from Anne O'Brien's outline:

By the end of their 2004 legislative sessions, ten jurisdictions had enacted the UTC: D.C., Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah and Wyoming. With the exception of New Hampshire and New Mexico, each had altered the mandatory notice and reporting provisions in some way.

During 2005, five additional states adopted the UTC: Arkansas, North Carolina, South Carolina, Oregon and Virginia.

Of these states, only New Hampshire and New Mexico have adopted UTC
105(b)(8) and (9); eight (Arkansas, Kansas, North Carolina, South Carolina, Tennessee, Utah, Virginia, Wyoming) have omitted these sections entirely.
Nebraska omitted (b)(8) but adopted (b)(9), and four others (D.C., Maine, Missouri, and Oregon) have retained both (b)(8) and (b)(9) but have changed them in some way.

D.C. and Maine have created a role for a "trust protector" to receive notice on behalf of "qualified beneficiaries."

Some jurisdictions have cut back the scope of the notice provisions by narrowing the definitions of "qualified beneficiary" which could be described as including current beneficiaries, secondary beneficiaries, and presumptive remaindermen.

In Kansas, the definition of "qualified beneficiary" does not include secondary beneficiaries but does include presumptive remaindermen. In Wyoming, however, "qualified beneficiary" excludes both secondary beneficiaries and presumptive remaindermen. Maine has adopted the definition of "qualified beneficiary" but has added a provision stating that it does not include a contingent distributee or a contingent permissible distributee of trust income or principal whose interest in the trust is not reasonably expected to vest.

This reporter found the panel discussion interesting and informative and was particularly appreciative of the fact that, unlike some of the other presenters, these speakers did not unfairly criticize corporate trustees and in fact, included a representative of a corporate trustee on the panel.

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News From The Exhibit Hall
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GEMS

Talk about timely technical support, take a look at this little GEM that hit the airwaves today:

Date: Thu, 12 Jan 2006 14:22:13 -0600 (CST)
From: "GEMS" <gems@neb.rr.com>
To: <Support@gillettpublishing.com>
Subject: GEMS UPDATE NOTIFICATION - GEMS 709

To all GEMS Users,

Yesterday afternoon we discovered a minor calculation issue in our newly released GEM709 program and have posted an update to our website this morning to correct the issue. The update makes a correction to the tax computations on the 709, page 1, lines 4 and 5 for amounts LESS than $10,000 on lines 2 and 3. We apologize for this inconvenience. Our corporate policy is to immediately update GEMS if an issue is discovered and to inform our users as quickly as possible. We appreciate your understanding and will continue to strive to give you the very best products and support.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Heckerling Institute 2006
Reports from the event, as posted to the ABA-PTL List Serve

Report #7

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

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This Report contains coverage of some of the Wednesday afternoon **Special Sessions #1 and #2 Programs on Grantor Trusts and Total Return Trusts**

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The 7 Habits of Highly Effective Grantor Trusts Wednesday Afternoon Special Session 1-C, 1/11/06
Presenters: Samuel A. Donaldson and M. Read Moore

Reporter: Barbara Dalvano Esq.

This special session is a continuation of the general session program presented by Samuel Donaldson on Tuesday morning on Grantor Trust rules. The materials consist of a table/grid with a listing of a number of powers that parties, including grantors, may hold and during the session, the presenters will discuss whether such powers create grantor trust status for income tax purposes and/or result in the trust property being included in the grantor's gross estate for estate tax purposes.

If the goal is to make a wholly grantor trust, it is important to have the right powers included in the instrument. In an era when the federal transfer tax regime is uncertain and clients don't want to make taxable gifts, together with the positive development in Rev. Rul. 2004-64 (grantor's payment of income taxes on income of the grantor trust does not result in taxable gift), forming a grantor trust is a favored estate planning technique and is a good way to make tax free gifts. Also, due to the lower income tax rates on qualified dividends, the income tax aspects of grantor trusts are less painful than were such trusts in the past.

First Power: Power of grantor to revoke the trust exercisable with the consent of the remainder beneficiary. This does not create a grantor trust because the remainder beneficiary is an adverse party. The section 676 regulations make clear that if the consent of an adverse party is required, no grantor trust status exists. The statute does not specifically provide for this result, so it took the promulgation of regulations to get this result. Holding this power will trigger gross estate inclusion per section 2038. Pursuant to regulations section 20.2038-1(a)(2), you need the consent of all beneficiaries that have vested and contingent interests in the trust to avoid gross estate inclusion under section 2038 for this power.

Second Power: Grantor's spouse has the inter vivos power to allocate the remainder among the grantor’s children. This does create grantor trust status under section 674(a) as a power to control beneficial enjoyment – section 672(e) says that for income tax purposes, any power held by the grantor’s spouse is deemed to be held by the grantor, so this power does result in grantor trust status. What if the instrument limited the grantor spouse’s power by some reasonable standard - the result will not make the trust a grantor trust because regulations section 1.674(a)-1(b)(3) says that if the trust has an ascertainable standard limitation on the power, it is not a sufficient power to make the trust a grantor trust. If the power relates to a power to allocate income only, this is no longer a grantor trust per regulations section 1.674(b)(1) as it is not a significant power for grantor trust purposes. Does this power cause gross estate inclusion? No, no inclusion because the power is not held by the grantor who is the transferor unless grantor lives in a community property state that says something different. Section 672(e)(1) provides the spousal attribution rule only for income tax purposes. The regulations under section 2038 – 20.2038-1(a)(3) specifically say this.

So, this power would be good for structuring an “intentional defective grantor trust” (an “IDIT”) but note that giving this power may be some practical non-tax issues that make its use unacceptable. For example, the grantor may not want his or her spouse to have this power.

Third Power: Grantor’s spouse has a testamentary power to allocate the remainder among the grantor’s children. Does this create grantor trust status? This does not create grantor trust per section 674(b)(3) and also does not create gross estate inclusion. But check rules as to accumulated income – it may be that if the trust has accumulated income and grantor had a testamentary power as to the accumulated income, then grantor trust status might be created.

Fourth power: Grantor has power to add charitable beneficiaries to the trust? This power does create grantor trust status. This is a pretty vanilla example under section 674(a). Does this cause gross estate inclusion? Yes, it does cause inclusion. This is why the power must be held by a non-adverse party (rather than the grantor) to avoid gross estate inclusion; there is no imputation back to the grantor of a non-adverse person holding this power for federal estate tax purposes.

Fifth Power: Unrelated party (neither trustee, beneficiary, grantor, adverse party or a person related to any of the above) has power to add beneficiaries to the trust. This will create grantor trust status where someone has absolutely no interest in the trust; they are defined under statute as a non-adverse party. Literally, could open up the white pages and pick someone from the white pages and draft the trust instrument giving them the power because there is nothing in the statute that says you cannot do this and even may not need to tell the power holder that they have the power, but under the “smell” test, this may be a bit over the line and Mr.
Donaldson suggests that you would need to inform the person that they have this power. Gross estate inclusion does not result. Note that holding this power could possibly create a problem for the unrelated party if they could name themselves as additional beneficiary of the trust, so limit the class of beneficiaries that can be added to charities so that the power is not a general power of appointment; could also add an ascertainable standard or some other restriction that would not result in the power holder having a general power of appointment.

Can power holder be a corporation? Mr. Donaldson has not seen any example of this, but strikes him that it should work.

Sixth Power: Grantor may vote the shares of closely-held stock transferred to the trust. Does this make it a grantor trust? It is a grantor trust as to the stock only and not other assets that may be held in the trust. We need to be careful as section 675(4)(a) provides the combined voting power held by the grantor and the trust should be significant – if the combined voting power held by the grantor and the trust is significant, then it is a grantor trust. The regulations give no guidance on what combined voting power of the grantor and trust constitutes a "significant" amount and could be a small threshold. For gross estate inclusion, there is more definitive guidance on "significant" - if a grantor retains 20% or more of stock vote per section 2036(b), it will cause gross estate inclusion. Don't play game of designing a vote that relates to less than 20% voting power of the entity (to avoid gross estate inclusion) but more than minimal amount to try to achieve grantor trust status.

Seventh Power: Grantor may sprinkle trust income among a designated class of beneficiaries, not including the grantor. Creates grantor trust and gross estate inclusion per section 2036(a)(2).

Eighth Power: What if three trustees (including grantor and two independent trustees) who act by majority vote, who can sprinkle trust income among a designated class of beneficiaries not including the grantor.
Here, under section 674(d), the grantor's presence is enough to taint for all, so it will be a grantor trust. The consent of independent people does not preclude grantor trust status. Only the consent of an adverse party would render it a non-grantor trust. What about for gross estate? This causes inclusion per section 2036; regulations section 20.2036-1(b)(3)(i) says that it does not matter if other people, with or without grantor, have the power, gross estate tax inclusion results.

Ninth power: Grantor may cause the trust to make unsecured loans to grantor, but only if the grantor pays interest in an amount necessary to avoid the application of any imputed interest rules. Section 675(2) says a wholly grantor trust is created. Does it create gross estate inclusion? No, section 2036 should not apply. Grantor should pay at least adequate interest and maybe more to make sure trustee feels comfortable to make the unsecured loans so that trustee is not considered to violate fiduciary duties to the beneficiaries. Also, charging high interest on the loan might be a way to pump in more money to the trust without gift tax consequences. Mr. Moore has used this power and indicated that when the value of the loan is appraised, the valuation shows that there is a basis to have higher rate on the loan than the AFR and that no income tax consequences on receipt of interest and no gift tax, but Mr. Moore cautions to avoid being greedy and charging exorbitant rate of interest.

Discussion of Hypothetical Fact Patterns

The session then turned to a review of a few hypothetical examples applying the grantor trust principles. The first fact pattern involves grantor swapping assets of equivalent value for the trust assets.

Facts: The grantor created an IDIT to which she sold nonvoting interests in an LLC that owns rental property. At the time of sale, the LLC interests were worth $1M and grantor's basis in the LLC interests was $300,000. The independent, non-adverse trustee gave the grantor a promissory note of $1M requiring payment of annual interest at AFR rate. The note was paid off during the grantor's lifetime and at the time the note was paid, the LLC interests are worth $2M. (The payment of the note does not change the status of the trust as a grantor trust). The grantor has the power to reacquire trust assets by substituting assets of equivalent value. The grantor believes she will live only for another 2 years. She owns other assets directly as follows: life insurance with $5M face and FMV of $1M and AB of $800,000; United Airlines stock with FMV of $1M and AB of $1.4M; personal residence of $1M and AB of $650,000 and one share of Google stock with FMV of $1M and AB of $250,000.

Issue: Should the grantor exercise the swap power and if so, what assets should be swapped in exchange for the LLC interests?

Discussion: Grantor may want some or all of the LLC interests back because they have a low tax basis and grantor would want to put high basis assets into the IDIT so that when the grantor dies within 2 years, the low basis assets she gets back get a basis step up under section 1014.

Should the grantor swap the life insurance policy? Look to see if section 2035 applies – in this case the 3 year rule is not triggered because per section 2035(d) the swap would be for full and adequate consideration. So, $1M life insurance for $1M LLC interests will not trigger section 2035. Here, grantor can get the life insurance out of her estate for no tax consequence. But for income tax purposes, would this trigger section 101 transfer for value rule to make some portion of the life insurance death benefit subject to income taxes? No, for income taxes, there no sale or transfer due to Rev. Rul. 85-13 which essentially would provide that there was no transfer of the life insurance policy because the trust is a grantor trust. There could be gift tax issues – the issue is the proper valuation of the LLC interests that are exchanged by the trust for the life insurance policy. The valuation issues make the swap difficult. Also, due to the ability to swap the life insurance, does the grantor have incidents of ownership in the life insurance policy under section 2042? Jordahl case would say no section 2042 issues present and the Jordahl case involved a swap of life insurance in an ILIT. So, some lawyers just rely on the Jordahl case that this swap works. Others say Jordahl case can't be relied upon because the swap power in Jordahl case was held by the trustee and not the grantor. So, want to be careful with regard to the life insurance policy on the section 2042 issues and do due diligence given the lack of consensus on the section 2042 issue.

United Airlines stock – should the grantor swap this built-in loss stock? There would be a step down in tax basis at death if the grantor held this stock until death so to avoid this step down and preserve the built in loss, could swap this stock for the LLC interests so that the trust obtains a carryover basis and the built-in loss is preserved for income tax purposes. If the grantor would otherwise plan to hold on to the built-in loss stock until the grantor's death, this may be a way to preserve the built-in loss stock assuming there is a power over principal exists for grantor trust status. If the IDIT trustee is independent, trustee will think about this carefully and trustee has a duty to make sure trustee is getting back equivalent value in what trustee is giving up. Trustee would be acquiring asset with a built-in loss and is essentially buying the ability to shelter future capital gain on other assets. This might be an interesting swap because of the additional tax benefit of using the built-in loss to shelter future capital gains in the trust (assuming the income tax law is not changed). Effectively this is a built-in loss premium assets that trustee might not need to pay a separate price for.

Principal Residence: Usually, grantor would use a QPRT (qualified personal residence trust). Here though, there is higher tax basis in the residence than in the LLC interests so grantor would be getting back LLC interests with greater capital gain exposure for income tax purposes. If the grantor of the trust occupies the home, and the home is subsequently sold, the built-in gain might go away per section 121. If rent is being paid to the grantor trust, the trust gets extra cash on a transfer tax and income tax free basis without the need to use a QPRT (which eliminates the concern about the grantor surviving the QPRT period; also a QPRT has to actually prevent this type of transaction). This could be like a zeroed out QPRT when the grantor makes this swap. This involves an appraisal and proper valuation. This is a way of achieving a freeze without using a QPRT. Also need to make sure appropriate rent is paid and get good valuation comparables. Here, would want to pay more rent than fair rental value for the use of the residence although should not go too overboard, but erring on high side may work well. Lawyers should exercise due diligence in reviewing all aspects of this possible transaction.

Can grantor buy the same stock as IDIT holds (assuming IDIT holds marketable securities) and then swap the new block of fresh basis stock with old basis stock that is held by the IDIT? Here, if grantor could buy stock, then grantor has cash and should really just swap the cash and IDIT could buy its own stock and it is a cleaner transaction.

Google stock: If idea is to preserve basis, LLC interests have less gain than Google stock, so why do this swap? Particularly if the Google stock will outperform the LLC interests – so, initially, thought is that would want date of death step up in tax basis for the Google stock that is believed will outpace the LLC interest growth. However, upon further reflection, the income tax capital gain rate might be 15% and state death tax rate for the grantor might be higher. So, death tax cost may be high to get a date of death tax basis step up for the Google stock, so if capital gain tax rate is only 15%, the rate difference as compared with the state death tax rate may make it worthwhile to swap the Google stock to avoid the state death tax; later, can generally come up with ways to deal with the income tax liability on the LLC interests that are exchanged out. So, if Google stock will really take off in value, it might be worth paying the income tax on capital gain rather than the state death tax if the grantor had retained the Google stock in the grantor's estate.

If grantor has cash that will not be invested in the short term, swapping cash might also be a good idea. If grantor does not like any of the strategies above due to concerns discussed, then grantor could borrow cash to conduct the swap and pay off the loan (or grantor's estate pay off the loan). Also, could swap in a promissory note of the grantor for the LLC interests (a "reverse IDIT installment sale") and the grantor agrees to pay principal and interest on her note to the IDIT in the future. Rev. Rul.
85-13 says there is no tax consequence in making the note. But, what if grantor dies and her note has not been paid off? From a federal estate tax perspective, perhaps there is not transfer tax consequence to this transaction, as the grantor may get a debt deduction for the promissory note obligation to offset the inclusion of the exchanged trust assets.

Cautionary note: If have an old trust that is GST exempt, be careful not do anything that would be considered as an exercise of a pre-1942 power.

Facts: Grantor owns a small apartment building that generates substantial rental income. The building is worth $3M and has AB of $1M. Grantor is thinking of transferring the building to his kids. Grantor has other assets (about $10M) so grantor can afford to transfer the building to his kids, but grantor wants to retain cash flow from property. So, some folks have recommended a zeroed out GRAT vs. installments sale to IDIT. Lots of commentary on advantages of each, including GRATS more settled in the law and no need for seed gift and have re-valuation protection. With an IDIT, relative advantages are: lower interest rate, flexibility as to payments to grantor and no risk of estate tax inclusion (there is no annuity term that grantor has to survive).

Is there a preference? Mr. Moore has used GRATs more frequently – a
zeroed- out GRAT can be done a lot faster than an IDIT and valuation is less of an issue at the time of the creation of the GRAT. Also, lawyer can tell the client what the rules are with a GRAT and rules are not clear on income tax consequences if the grantor dies prior to the note being repaid in an IDIT transaction. GRATs also have other benefits – if the GRAT property declines in value, it just comes back to the grantor per the annuity payment. With an IDIT, if the property declines in value

and there is insufficient value to repay the note, the trust bears the downside in the value of the property purchased as the note is a recourse note. Technically, the presenters mused that perhaps the IDIT promissory note could be a non-recourse note, but the interest rate on the note would have to be higher and the freeze would not be as effective. Can you combine the GRAT with a GRAT sale to IDIT? Here is how this would
work: The hard to value property would be gifted to a GRAT (for the re-valuation protection) and the GRAT would then sell the property to the IDIT. Perhaps this combines benefit of both techniques – lawyers to review due diligence of this possible transaction.

Is there a preferred grantor trust power for the IDIT? Power to add charitable beneficiaries could be fine, but want to identify exactly who the non-adverse party is that holds the power and there is always a risk that the power would be exercised, so this power is less in control of the grantor. Power to borrow without adequate security is becoming more favored and Mr. Donaldson feels that this won't generate section 2036 exposure for the grantor. If this power is added to the trust instrument it creates a grantor trust and if it is not expressly permitted in the trust instrument, the grantor can do an actual borrowing to create grantor trust status. Mr. Moore thinks that there are other ways to get grantor trust status. The power to swap assets is the one that seems to be used most often and there is tremendous flexibility with this power to swap.

But, there may be other powers that work also. Per Mr. Moore, he looks for something that he can take right from the IRC that is comfortable and almost self-executing and this is having the spouse as beneficiary of the trust under section 677. Also, having a related or subordinate party who is subservient to the grantor act as a trustee of a discretionary trust (no ascertainable standard exists) who is not also a beneficiary of the trust. In a GRAT, Mr. Moore provides for the payment of all the income of the GRAT, in addition to the annuity, to the grantor; although you can only back out the present value of the annuity for gift tax purposes the payment of the additional income is beneficial for the grantor. Finally, most dangerous power is to make the trust a foreign trust under section 679. If the trust is a foreign trust and has at least one US beneficiary, trust will be a grantor trust. Can still administer the trust in US; just need someone in Canada to make it a foreign trust. This power is one that merits a separate workshop to explore further.

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The Prophylactic Approach to Total Return Trusts: Avoiding Unwanted Litigation Wednesday Afternoon Special Session II-A, 1/11/06
Presenters: Margaret E. W. Sager and Paul S. Lee

Reporter: Joanne Hindel Esq.

Margaret Sager started the presentation with the statement that the total return trust represents a paradigm shift and that the trust world has changed because of it. She stated that we do not yet have much developed case law in this area but that she anticipates it will develop as courts and beneficiaries start to realize that a trustee's duty to invest for total return now exists under the UPIA, UPAIA and modern portfolio theory.

Margaret then reviewed how potential litigation involving total return trusts falls into three broad categories:

1. Transitional which arises from the initial decisions
to convert or exercise the power to adjust or not to convert or adjust.

2. Operational which arises as a result of the choice of
investments, asset allocation and valuation.
3. Estate planning which arises from the terms used in
wills and trusts regarding total return concepts.

Paul Lee discussed the three sets of rules that he believes provide a simple framework for evaluating and implementing total return trusts. These
are:

1. a determination of the appropriate investment
strategy for the trust, given the guidelines set out by the UPIA
2. the determination of an appropriate distribution
policy given the parameters of the UPAIA or the version adopted by the governing jurisdiction
3. and a determination of that portion of income taxes
to be paid either by the trust or the current beneficiary, given the parameters of the recently finalized Treasury Regulations.

Throughout the presentation, both speakers discussed their view of the twelve areas of potential transitional and operational litigation:

1. Disappointing trust investment performance
- The emphasis should be on a prudent process as that
may protect a trustee from liability
- How the trustee got there is probably more important
than where the trust ends up.

2. Imprudent delegation of investment authority
- Section 9 of the UPIA allows a trustee to delegate
investment authority but the delegation itself must be prudent.
- The trustee must exercise reasonable care, skill and
caution in selecting the agent, defining the terms of engagement and monitoring performance.

3. Disappointment after an adjustment or conversion
- As with any discretionary decision, the process is
paramount
- It is critical for the trustee to engage in a
thought process and make a considered decision, even if the result of that process is to take no action and make no change.

4. Failure to inform or notify beneficiaries of their
rights and failure to ascertain the needs of the various beneficiaries
- The UPAIA requires a trustee to consider many
factors including circumstances of the beneficiaries when considering whether to adjust or convert.
- UPIA requires the trustee to consider other
resources of the beneficiary when making investment decisions for the trust.
- The presenters discussed the McNeil v. Bennett, 792
A.2d 190, decision where the court held that a trustee must communicate essential facts, such as the existence of the basic terms of the trust.

5. The lawyer’s obligation to inform clients of the new unitrust and power to adjust options
- A critical determination is whether the client is active or dormant.
- The most likely plaintiff in a malpractice action arising from estate planning or representation of a fiduciary is a beneficiary

6. A change of circumstances after the exercise of discretion to convert to a unitrust
- Generally, statutes allow a permanent revision of the trust so that the income beneficiary will receive a fixed percentage of the fair market value of the trust each year. Conversion to a unitrust, once accomplished, is a permanent change to the trust.

7. Liability of the trustee for damages incurred by a beneficiary as a result of the tax effects of a conversion to a total return trust
- The part of the Final Regulations which leaves the most discretion in trustees, and therefore the area where disputes are most likely to arise, pertain to the allocation of capital gain to DNI

8. Effective defenses to a beneficiary suit for breach of fiduciary duty
- Consideration should be given to the standard of care, burdens of proof, exculpatory provisions, standing and privity and applicable statutes of limitations periods
- Most courts will respect exculpatory clauses and retention provisions in documents as long as there are no significant changes in the market

9. Removal of a trustee for failing to adjust or convert when the beneficiary wants it
- Neither the UPIA or the UPAIA provide for removal of the trustee as a remedy
- The presenters discussed the case of In the Matter of Jacob Heller, 800 N.Y.S.2d 207, in which the appellate court upheld the trustees decision to convert a trust to a unitrust even though the trustees were remainder beneficiaries and the conversion benefited them and was to the detriment of the current beneficiary.

10. Available damages if a trustee fails to adjust income or principal or fails to convert to a unitrust
- UPAIA 105 limits damages to an adjustment between principal and income unless the beneficiaries cannot be placed in the position they would have been absent the abuse of discretion.
- Generally no surcharge against the trustee is available.

11. The calculation of damages if the trustee is determined to have imprudently invested
- The UPIA does not contain a limitation on damages.
- Courts however, are starting to look at market place comparisons to determine damages
- The presenters reviewed the case of In re Estate of

Scharlach, 809 A.2d 376 in which a fund under management by a guardian had not lost value however the court found damages for the profit that should have accrued due to the fiduciary's failure to exercise due care.
- By contrast, they also discussed the case of
Suntrust Bank v. Merritt, 612 S.E.2d 818, in which the court held that the trustee did not breach their fiduciary duty when all they had done was preserve and protect the trust corpus but not protect it against inflation.

12. Calculation of commissions if the trustee has adjusted
income or a trust has been converted
- Fee arrangements should be re-examined once a trust
is converted to a unitrust or once the trustee starts exercising the power to adjust.

The presenters then reviewed aspects of sample litigation scenarios by discussing the effect of a trustee's inertia when the trustee is not even aware of the ability to adjust or convert a portfolio, counsel's inertia in doing nothing to alert a client trustee of options under the UPIA and UPAIA, the potential liability of a trustee who makes a conversion of a trust to a unitrust but then does not adjust the investment allocation and the potential liability of the trustee who makes a conversion to a 4% unitrust and then the market shifts to low income and growth.

The presenters were very thorough in their review of both the concept of total return trusts and the potential liability trustees face due to the adoption of the UPIA and UPAIA. Their written materials are also excellent and a valuable resource to any practicing trustee.

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News From The Exhibit Hall
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None for now so we can get this report out tonight.

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Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

GENERAL INFORMATION ABOUT INSTITUTE
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Heckerling Institute 2006
Reports from the event, as posted to the ABA-PTL List Serve

Report #8

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of some of the Wednesday afternoon **Special Session #2 Programs on Marital Planning, Charitable Giving and Estate Tax Repeal**

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More Marital Planning
Wednesday Afternoon Special Sessions II-C, 1/11/06
Presenter: Eric A. Manterfield

Reporter: Barbara A. Dalvano, Esq.

This is a continuation of the general session program presented by Eric Manterfield on Tuesday, January 10, 2006 on Marital Deduction Planning in an Era of Transfer Tax Reform. The Workshop consisted of a series of fact patterns Mr. Manterfield developed and participant discussion on the planning issues presented. The fact patterns addressed a variety of fundamental estate planning issues.

Fact Pattern #1

Husband and wife are in first marriage. H is 43 and W is 42. They have 3 kids, 18, 15 and 12. Both work outside home and H earns $275,000 and W earns $85,000 annually. They travel frequently with kids. Goals include providing for well being of each other and assets thereafter distributed to kids in a thoughtful manner. Assets include residence with FMV net of mortgage of $450,000; cash and investments of $250,000 jointly owned (H also owns $35,000 and W also owns $15,000 individually). H has $1M life insurance and W has $500,000 of life insurance. H has retirement assets of $350,000 and W owns $200,000 of same type asset. Total joint owned is $700,000; H owns $1,385,000 and W owns $715,000.

Discussion/Observations: Is there sufficient life insurance if H died; would W's income be sufficient for support of the family? Additional life insurance may be needed and ownership of the life insurance should be discussed with client, including ownership by an ILIT. Perhaps a disclaimer trust plan would be developed for this couple. Some lawyers think the couple is too young to have a mandatory credit shelter trust forced upon the surviving spouse notwithstanding the mix of assets and possible appreciation.

Fact Pattern #2

Husband and Wife are in second marriage that has lasted for 14 years. H is 62 and W is 58. H owns a tool and die shop in Ohio where he works with his two sons, ages 37 and 32. The eldest son is “heir apparent” for the business. The business is worth $4M. H also owns business real estate worth $1M and other assets. H’s daughter is 28 years old. W has 37 year old son who is divorced and a 32 year old daughter with three kids of her own. No premarital agreement exists. H owns assets worth $6,175,000; W owns assets worth $75,000 and they jointly own assets worth $1.1M.

Discussion/Observations: Mr. Manterfield always worries about earnings and cash flow to surviving spouse at death of H who is the business owner. Also, if H wants control of the business to pass at his death to his son, conflicts of interest arise if that son is also a trustee of the credit shelter trust. Estate plan could be developed with $2M worth (1/2) of the business funding the credit shelter trust (the other portion of the business assets would be allocated to the QTIP trust for the W). However, if fund the QTIP with business assets, surviving spouse can force sale of the business interest to generate sufficient cash to pay surviving spouse income. This may not be what the H desires. If any portion of the business is held in the credit shelter trust, since it does not (and is not intended to) qualify for the marital deduction, surviving spouse won’t have ability to force a sale of the business interest.

Perhaps can you give W a minority interest in the business with a “put” option so that the W can require son to buy her interest out and protect her cash flow. With some of the business interest in a credit shelter trust and some in a QTIP trust, there could be valuation discounts available on the later death of the W. Also, perhaps could recapitalize the business to create voting and non-voting stock, but still would need to give the holders of the non-voting interests a “put” option and/or also develop a “call” option for the voting stock holders to buy out the non-voting stockholders.

Also, H could leave 100% of the business interests to the active eldest son and H could buy life insurance to equalize the inheritance. Problem is that insurance could be very expensive for H and/or H could be uninsurable.

Some attorneys would call a family meeting and discuss exactly what the family wants with respect to the estate and whether the “heir apparent” actually wants the business. Also, does lawyer represent both H and W in the planning and what conflicts exist? W would have rights of election against estate that should be discussed. Some attorneys say that it is often difficult to represent both H and W. There are too many issues that present conflicts among H and W and the business. Some feel it is unlikely that there would be open discussions of the estate plan, so they would not proceed without W being represented by separate counsel. If H wanted to make some lifetime gifts of the business interest to the son and H asked W to consent to split gifts, W should get separate counsel to advise her on gift splitting in favor of her stepson.

Also, H owns the business real estate worth $1M and leases it to the business. If that asset is not handled separate from the residue of H’s estate, the successor to the business will have to deal with spouse, siblings and/or step-siblings regarding the business real estate. To avoid the inevitable conflicts and problems that would arise, the business real estate could be contributed to an LLC and “puts” and “calls” in the LLC operating agreement established to enable the inactive owners to liquidate their interests and enable active owners to buy-out the inactive owners.

If W is not active in the business, but some portion of the business passes to the credit shelter trust, should W be designated as the trustee? If the asset funding the credit shelter trust is a debt position with respect to the business (rather than voting or non-voting stock), conflicts could be reduced; during H's life, some of H's business interest could be converted into a debt position which could then be used to fund the trusts.

Fact Pattern #3

Husband is 91 and Wife is 89. H and W has been married for 71 years. They live in the same home where W was born. Their health is good. They have one daughter, aged 69, who is divorced. Daughter has three kids of her own. Daughter visits H and W and stays in the residence when she does so. H and W are active supporters of the orchestra in their town and the orchestra has approached them about a gift of the home. Orchestra would also like a cash gift that could be used as an endowment to pay operating expenses of the home.

Discussion/Observations: H and W should talk to their daughter about the proposed gift of the house. If daughter wants the house, H and W could consider creating a life estate for the daughter in the house. H and W could form a CLAT for a term of years for the cash gift which would give the orchestra some period of time to raise endowment funds to fund the operation costs of the house.

Fact Pattern #4

Husband and Wife are young and have one young child. Both are employed outside the home and have modest earnings. They have student loans and other expenses to pay.

Discussion/Observations: This young couple should focus on acquiring life insurance to replace lost income if one of them dies prematurely. Also, this couple needs to start their retirement savings; with their income under $100,000 per year they would be eligible to establish Roth IRAs. This couple obviously needs to select a guardian for their minor child. If they name a couple as co-guardian, problems could arise. If the couple named as co-guardian subsequently divorce – a custody fight for the minor child could ensue. Also, it was pointed out that with a client of modest means and several children, if a trust for minor children is provided for in the wills of H and W and is funded as a result of the premature death of H and W, Mr. Manterfield commented that the instrument should provide guidance to the trustee of the trust regarding the extent to which the trustee can spend trust funds for the education of each child so that the trust is not depleted by the costs of educating the older children to the detriment of the younger children.

Also, consider whether the person named as guardian for the minor children should also be the trustee of the trust for the children – a lawyer remarked that there would be no oversight of the trustee actions. If a guardian takes custody of the children and purchases a new home to accommodate the additional children in its custody, the trust and guardian could take title to the new home as tenants in common to extent of costs that the trust pays for the new home.

Should guardians be paid? Some lawyers draft provisions so providing.

Fact Pattern #6 (skipped fact pattern #5)

Husband and Wife are in a first marriage. H is 57 and W is 55. They own a large farm in Kansas which they farm with their daughter (age 35) and son-in-law (age 35) and unmarried son age 32. They want to keep the farm in the family and desire their daughter to be in charge at their deaths. The farm real estate is valued at $8M, the farm house is valued at $250,000, the farm equipment is worth $750,000 and accounts receivable are worth $2M. Total estate, all of which is jointly owned, is $11,000,000.

Discussion/Observations: Assets are illiquid. H and W may need life insurance to equalize the distribution of the estate among the active and inactive children. H and W could contribute the farm to an entity and have an operating agreement that develops “put” and “call” rights to manage realization of inheritance and minimize conflicts among family for the operation of the farm. Perhaps there is an agricultural program to enable the family to retain “agricultural preservation rights’; this is a sale into perpetuity of development rights and could result in lower appraisal for valuation discounts for estate tax purposes. Would need a government entity involved. Could also consider conservation easement for valuation reduction. Also, family could consider a state partition action to equalize estate assets among family members.

It is clear that the illiquidity creates a problem for estate tax payment purposes. Valuation discounts will likely play a key role in the estate plan to reduce the tax burden. Others commented that H and W could fractionalize the interest in the farm between H and W to below 50% each and transfer a small interest to the daughter. The estate plan of H and W would then provide for a credit shelter and a QTIP marital trust so that the fractional interests would not be aggregated. Also, position the farm to qualify for section 2032A special valuation treatment and installment payment of estate tax liability.

Fact Pattern #7

Husband and Wife are in a first marriage. H is 58 and W is 54. They have four children who are all adults. H is a business owner and plans to retire in four years. H owns an IRA valued at $1,350,000 and other assets. H and W own jointly $1.6 M. Aggregate value of estate is approximately $3.6M.

Discussion/Observations: If H dies first, W is still young and if W rolls over the IRA and then starts withdrawing from it, the pre-59-1/2 penalty will apply due to W being under age 59-1/2; however W could treat the IRA as an inherited IRA rather than roll it over as her own and start taking withdrawals without the age 59-1/2 penalty applying. H and W need to consider re-titling their jointly owned assets, but if they resist doing so, they can consider a disclaimer plan coordinated with the IRA assets.

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Charitable Giving Exit Strategies
Wednesday Afternoon Special Session II-D, 1/11/06
Presenters: Jerry J. McCoy and Winton C. Smith Jr.

Reporter: Gene Zuspann Esq.

Jerry McCoy and Winton Smith presented a number of short scenarios in which there is a problem with an existing plan due to unforseen consequences. (The problem number below follows the order of the presentation rather than the order in the materials.

Problem 1 - the Overgenerous Charitable Lead Trust

A charitable lead trust is set up then the investments appreciate significantly (in the example, the investments were worth 3 times the initial value).

The Service allowed the payment to the charity of the undiscounted income stream that the charity would have received and to terminate the trust early.

Both Jerry and Winton pointed out that the current rulings regarding early termination, modification and other changes would not have been granted 10 years ago. This is a significant change in attitude by the IRS.
ha

Problem 2 [not covered]

Problem 3 - The disappointed donor

Donor (D) makes a gift to a university for the creation of a specific program without a gift agreement. Due to a change in the leadership of the school, the program is not considered appropriate for the university and the program is severely curtailed and modified. D wants the university to either make the university continue with her initial wishes or to give her money back.

The general rule is that donors do not have standing to bring suits against the charity, citing Herzog Foundation in the materials at 7-2. The attorney general is the only party with standing to sue the charity for compliance or remedies.

Jerry and Winton both suggest, that if the D wants to make a substantial gift of any kind, that a gift agreement be entered into with the terms of the gift and specifically giving the D the right to sue to enforce the agreement. The action to sue will be brought in contract. The contract may also wish to provide an alternate beneficiary in the event that the charity breaches to terms of the agreement.

Note that in some states, the AG is the only party with the right to sue, but this seems to be changing, and the gift agreement gives one more argument to the D that there is standing.

Problem 4 - CRT and the request for an immediate contribution

D creates a charitable remainder trust and the trust is operating as intended. It may have appreciation in the portfolio. The charity approaches D and asks for an immediate contribution for capital improvements and D wants to help.

They discussed the problems for a partial distribution or if D relinquishes an interest in the trust. The planner must be careful that the arrangement qualifies for both the income and the gift tax charitable deduction.

Accomplishing this goal depends on the amount of the gift. If the need is for a substantial amount and D does not need the income, D can simply assign the entire interest to the charity and the doctrine of merger will terminate the trust. D will get a charitable deduction for the present value of the remaining income stream.

Winton indicated that he has not done so, but would look at providing the power to make gifts from income or principal to his documents in the future. He would also add the power to make gifts for income in excess of distribution needs.

Problem 5 - a two life CRT and trouble in the marriage

Two married donors created a CRT and the remainder beneficiary is designated. One party wants to add a new beneficiary and the first objects.

The best way is to partition the trust into 2 trusts. State Law may have provisions aiding or rejecting this approach.

Problem 6 - Financial troubles of the Donor

D creates a CRT and afterwards, D's net worth decreases to the point that D needs more money to live.

D can sell the income interest to the remainder beneficiary. This has been approved. If there is an early termination, or if the remainder beneficiary is a private foundation, there may be a self dealing issue. Note that the beneficiary will have a capital gain without basis under IRC. Section 1001(e)(1).

There are a number of current PLR's on termination of the trust due to mistake. Often these involve 'scrivener error.' They allow the trust to be modified without self-dealing penalties and without loss of the CRT status. One of these occurred because the attorney used a sample form, and did not add some additional requested language. Jerry recommends that his charitable clients not send sample forms.

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Reinventing Yourself After Estate Tax Repeal or Higher Exemptions: Using Estate Planning Techniques for Income Tax Planning Wednesday Afternoon Special Session 1-F, 1/11/06
Presenters: Jerome M. Hesch and Neill G. McBryde

Reporter: Paul Hood Esq.

They began by reminding us that clients are still interested in income tax planning, and discussed the following methods in that vein:

1. Deferral of income tax: income shifting is still good to do.

2. Converting OI into CG.

3. Avoiding AMT. Shifting income to children can reduce/eliminate AMT phase-outs, even if they attract the "kiddie tax."

4. Deferral of CG.

The remainder of the talk was devoted to going through the use of estate planning techniques to achieve income tax planning objectives:

A. Inter-family installment sales to irrevocable, non-grantor trusts, followed two years later by a sale of the company stock.

B. CRT for income tax-free diversification.

C. Non-grantor charitable lead trusts to create income tax charitable contribution deduction to offset ordinary income.

D. Use IRA's to continue income tax-deferral after death.

E. Use life insurance to shelter income from taxation.

F. Use life insurance as an IRA substitute.

G. Create IRC Sec. 529 plans to create "educational dynasty trusts" with tax-deferred income.

H. Use partnerships/LLC's to create income tax-freeze for C corporations.

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News From The Exhibit Hall

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See Report No. 9, etc.

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Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

GENERAL INFORMATION ABOUT INSTITUTE

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Report #9

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of some of the Thursday morning Programs on **Section 409A, Family Business Fairy Tales and Life Insurance Due Diligence.**

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Prefer or Defer? 409A May Make You Pay
Thursday morning Program, 1/12/06
Presenter: Donald O. Jansen

Reporter: Merry Balson Esq.

The American Jobs Creation Act added a new section 409A to the Code.
Effectively January 1, 2005, Sec. 409A is the most significant change in the taxation of nonqualified deferred compensation since the addition of Sec. 83 in 1969. It is important that estate planners and advisors to be familiar with 409A because many of our clients may have deferred compensation according to the government.

The pre-2005 deferred compensation doctrines are (1) the constructive receipt doctrine, in which compensation must be deferred before the employee is entitled to receive it without substantial limitations or restriction; and (2) the economic benefit doctrine, codified in Sec. 83, where the employee can avoid income taxation with an unfunded, unsecured promise to pay compensation in the future by the employer, or with a funded plan held in a escrow or a trust fund (i.e., nontransferrable) so long as there is a substantial risk of forfeiture. While these two rules continue to apply, Sec. 409A adds new hurdles to ensure deferred compensation treatment.

Thumbnail Sketch of 409A

Section 409A expands the constructive receipt doctrine by adding 3 new restrictions: restrictions on distributions; no acceleration of benefits; and restrictions on deferral and redeferral elections. Distribution events from the plan are limited to separation from service (or 6 months after separation of service for key employees of public corporations), disability, death, specified time or pursuant to a fixed schedule, change in ownership or control of a corporation, or an unforseen emergency. For example, if a distribution is permitted when a child enters college, the compensation will be taxed immediately even if the employee has no children because there is a

possibility of an impermissible event. Neither the employer nor the employee can exercise discretion to accelerate benefits.
Note that there is no prohibition on acceleration of vesting, only on acceleration of benefits. Generally, the initial deferral election must be made in the year before the services are performed, specifying the amount and the payment form. The 2 exceptions to this rule are (1) the employee may join the plan within 30 days after his initial eligibility; and (2) in certain performance based deferred compensation plans (i.e., if the employee meets certain goals they receive compensation) the employee is permitted to elect to join in the first 6 months of the service year. Once the employee has deferred and elects to redefer, the Code requires that (1) the election must be made within 12 months of the deferral (i.e., the effective date of the change), (2) the election cannot be effective until 12 months after making the election, and (3) the election must defer the payment for at least 5 years (except in cases of disability, death, or emergency distributions).

The second major impact of 409A is in the expansion of the funding rules.
Section 409A adds 2 new funding requirements: (1) offshore rabbi trusts are taxed immediately as deferred compensation unless substantially all of the services are performed offshore (note that domestic rabbi trusts are not affected); and (2) if the plan provides for a transfer based on the employer's financial health all deferrals will be taxed even if the trigger has not occurred (e.g., transfer of funds to a rabbi trust if the employer's net worth drops below $x).

The third significant change under 409A relates to when the deferred compensation is taxed, the application of interest, and additional tax imposed. Deferred compensation is taxed on the later of the date of violation of 409A, or the date of lapse of a substantial risk of forfeiture (if one existed). The employee is now taxed on the interest on deferred compensation from the date of the initial deferral through the date of taxation equal to the underpayment rate plus 1%. Additionally, there is a 20% penalty (additional tax) on deferred compensation included in gross income. Section 409A was effective January 1, 2005, but if amounts were deferred before January 1, 2005, those deferrals and their earnings are grandfathered. Note that only vested beneficiaries' deferred compensation are grandfathered. Additionally, if the grandfathered plan is materially modified after October 3, 2004, then 409A will apply to the grandfathered benefits.

Changes in Nonqualified Deferred Compensation Rules

Section 409A was effective January 1, 2005, the IRS issued Notice 2005-1 in December 2004 giving preliminary guidance on some items, and issued proposed regulations on September 29, 2005. The proposed regulations failed to address several important issues. A deferred compensation plan is defined very broadly under the statute and proposed regulations as anything that defers compensation from one year to another year. Section 409A applies to both employees and independent contractors. Section 409A applies to any document or arrangement that has the effect of deferring compensation, not only to documents entitled "deferred compensation." Thus, there are many applications with executives involving fringe benefits where 409A might unexpectedly apply. Note that two types of plans are exempt from
409A: defined benefit plans (e.g., 401k, 457 eligible plans, etc.), and welfare plans (e.g., vacation time, sick time, disability leave, etc.).

Section 409A contains rules relating to the aggregation of plans.
Compliance with 409A is determined on a participant-by-participant basis, thus, a violation by one employee of 409A does not affect other participants in the same plan. The proposed regulations apply a partial aggregation rule where a participant is in several deferred compensation plans. Plans

are divided into 4 categories: account plans (e.g., defined contributions); nonaccount plans (e.g., defined benefit plans); separation pay plans; and all others (including equity based plans, SARs, and discounted stock options). All plans in the same category are taxed together, such that a violation of 1 plan in that category will cause a violation in the other plans in the same category.

Exceptions from Deferred Compensation Under Proposed Regulations

The key exceptions to 409A under the proposed regulations are as follows.

(1) Short-Term Deferrals. Under Prop. Reg. Sec. 1.409A-1(b)(4), if compensation is paid out within 2 1/2 months after the end of the tax year in which the deferred compensation is vested, then the payment is not subject to 409A.

(2) Statutory Stock Options. Incentive stock options under Sec. 422 and employee stock purchase plans under Sec. 423 are not generally subject to 409A.

(3) Non-Statutory Stock Options and Stock Appreciation Rights (SARs).
Certain non-statutory stock options and SARs are excluded if they meet 3
conditions: (i) the exercise or measurement price for SARs cannot be less than the fair market value (FMV) of the stock on the date of the grant of the stock option; (ii) when the stock option or SAR is exercised, compensation cannot be greater than the spread between the FMV of the stock on the date of the grant of the SAR and the FMV on the date the SAR is exercised; (iii) the option cannot have any other feature that might be define compensation (eg, the option to swap stock option spread for a deferred compensation plan will subject the option to 409A). Basically, stock options and SARs are subject to 409A if they are discounted from the FMV price.

(4) Restricted Property. Stock subject to a substantial risk of forfeiture is not subject to 409A. Note that the employee must actually receive the property (i.e., the stock certificates, not restricted stock units) to qualify for this exception.

(5) Separation Pay Arrangements. Severance pay (referred to as severance pay in 409A) has 2 broad exemptions from 409A: (i) collectively bargained plans that cover separation pay; and (ii) non-collectively bargained separation pay arrangements that are paid upon involuntary separation or pursuant to a window program, where the separation pay does not exceed two times the lesser of salary for the prior year or a statutory dollar limit ($220,000 in 2006), and the funds are received no later than December 31 of the second calendar year following the year of separation.

Substantial Risk of Forfeiture

Substantial risk of forfeiture applies in two areas: (1) when using the short-term deferral exemption, the 2 1/2 month period does not begin to run until the later of the end of the employer's taxable year, or the time the is vested in the deferred compensation (i.e., the compensation is not subject to the substantial risk of forfeiture); and (2) plans subject to 409A are not taxed until the substantial risk of forfeiture lapses. The Sec. 409A definition of "substantial risk of forfeiture" is different from the Sec. 83 definition. Under Sec. 409A a substantial risk of forfeiture requires either the performance of significant services in the future, or other conditions relating to the purpose of compensation (i.e., performance based conditions). Note that a noncompete clause can be a substantial risk of forfeiture under Sec. 83, but can never be a substantial risk of forfeiture under 409A. Additionally, under 409A you can not extend a substantial risk of forfeiture (i.e., there are no rolling risks of forfeiture).

Constructive Receipt Rules

The proposed regulations provide that the plan document must state when the payment is to be made (e.g., by x date of the year in which death occurs, or 3 months after the employee is determined disabled). Delays in the payment date are permissible under 4 limited circumstances: (1) when payment is not administratively practical; (2) when the payment jeopardizes solvency; (3) when there is a disputed payment; and (4) when the payment is made in the same calendar year or within 2 1/2 months of the due date.

Plans often use the employee’s "separation from service" (aka separation from employment) as a distribution event. An employee is separated from service when he or she dies, retires, or otherwise terminates employment.
Employment is not terminated while the person is on a bona fide leave of absence (including sick leave or military leave) if the leave does not exceed 6 months, unless the leave is mandated by contract with the employer or mandated by law and the employee is entitled to get his or her job back at the end of the leave. The proposed regulations set out 2 anti-abuse rules, providing bright-line tests for termination of employment where the employee intends to ease into retirement, where the employee becomes a consultant, and where the participant is an independent contractor.

The proposed regulations modify the percentages for determining when change of control occurs. This is important where change of control is a distribution event. The proposed regulations do provide that the definition applies to partnerships, but it is unclear whether it applies to LLCs as they are not specifically mentioned.

Mr. Jansen discussed the major exceptions to the anti-acceleration rules, including the narrow exceptions for termination of a plan by the employer.

The regulations define "payment" for purposes of redeferrals (e.g., the first installment of an installment payment is the first payment).

Transition Rules

Section 409A establishes 7 transition rules, which were all scheduled to terminate December 31, 2005. The regulations extended some of these rules, and 4 continue to be available. The 2 year transition and grace period rule applies if you operate a plan in good faith compliance under the statute, notice, proposed regulations, and under the terms of the plan (to the extent the plan is not contrary to the statute), and if you amend the plan to comply with 409A no later than 12/31/06, with the amendment being retroactive to 1/1/05, then there will be no violation of 409A.
Additionally, the proposed regulations extended the transition rule for amendments to provide new payment elections or conditions to December 31, 2006. However, those amendments cannot accelerate a payment in 2006 that would not have been paid in 2006, and you cannot defer beyond 2006 a payment that would have been due in 2006. Substitution of non-discounted stock options and SARs for discounted stock options and SARs remains available and the regulations describe the methods for accomplishing this.
Finally, in 2005 and 2006 only, the employee can make the same payment elections for nonqualified deferred compensation plans as he does for qualified plans (they are often tied together), but the employee will be required to follow the election requirements under 409A beginning in 2007 and the plan may need to amend its payment rules.

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They Lived Happily Ever After and Other Family Business Fairy Tales:
Non-Tax Issues That Can Paralyze Succession and Estate Planning Thursday morning Program, 1/12/06
Presenter: Mike Cohn

Reporter: Barbara Dalvano Esq.

What might appear like a “fairy tale” is the Pritzker (spelling?) case. What could the estate planning attorney do to avoid the types of conflicts that appeared in this case (disputes over investment policies; trustee duties and related issues)? What checks and balances could the estate planning attorney add to the legal documents to make family business succession occur more smoothly.

Need to look at why clients procrastinate and what motivates clients in the family business succession arena. It is notable that 70% of first generation companies don’t survive beyond the second generation. Reason for the failure is that the structure of the succession was not proper. Also, the estate and tax planning documentation is not integrated with the succession planning and the related family issues concerning business succession.

Four main points will be discussed in this general session on family business succession planning, as follows:

(1) the need for a multi-generation planning process with the family business;

(2) the benefits of a unifying structure for the family enterprise that will last for very long time;

(3) the need for governance provisions that can be embedded in the unifying structure that, in part, serves to create checks and balances and exit strategies; and

(4) the need for the family members to organize themselves in a fashion to continue forward, such as a family council

There are two aspects of succession planning: (A) ownership succession and management succession which are two distinct issues. Estate planning is not the same as business succession planning. Estate planning deals with issues of equalization, cash flow reinvestment vs. distribution, fiduciary obligations and beneficiary rights and similar issues.

Start with ownership succession. The founder generally does not understand how difficult succession of ownership is for the next generation. Governance and collaboration does not happen automatically – it needs to be discussed and built into the estate planning documents. On the management side, if the management succession is not handled properly, conflicts arise about decision-making, usage of excess cash, growth of the business, etc.

Procrastination in engaging in succession planning is high. Why is there procrastination? Founder does not want to give up control and resists letting go; founder has insecurity about retirement and finances; confusion over choices and the succession is personalized rather than considered as a business matter, among other similar reasons. The only way to change the procrastination treadmill is to change the process or paradigm by which the succession planning takes place. What does this mean? It requires a review of the four principles listed above.

First, in multi-generational succession planning, the client needs to be identified. There needs to be a clear picture of the representation. This involves considering the needs of the next generation – for example, how can they exit or cash out of the business? The next generation may have its own novel solutions that the founder has not considered – for example, “put” rights for inactive children and “call” rights that the active children could use to buy out the inactive. These can be fallback or safety valve arrangements if the children cannot otherwise get along.

Second, what can be the unifying structure? Here, can focus on ownership responsibilities and separate the day to day operational responsibilities. Also, may need different entities for different operations – looking for a bucket to be used to hold all the family assets so members can understand the interrelated parts. Also, need an effective tax structure to get the family assets into the unifying structure. The unifying structure should encourage engagement by all family members and this is where the attorney can play a large role – to address the challenge of getting next generation to participate. Also, the documentation can address how the unifying entity actually works. The unifying structure should not be disruptive to current operations and should not necessarily change the current control. Finally, the structure should provide for exit strategies.

What type of unifying structure could be considered? Perhaps a family owned trust company but for most clients this is too complex. An LLC might work and there are advantages to that form of structure. Mr. Cohn’s preference is an irrevocable trust that can hold non-voting assets (non-voting stock; LLC interests, etc.) which bifurcates the control from value. In creating the unifying structure, the non-voting assets could even be given the right to vote on some major decisions such as sale of the business or the underlying assets. Also, another benefit of using a trust is that it can be converted to a grantor trust in the future if it makes sense to do so. Another aspect of a trust is that sub-trusts can be funded under the pot trust umbrella to operate separate segments of the business. The sub-trusts can be created and funded immediately and can provide autonomy to family beneficiaries. Also, sub-trusts can separate legacy assets (family values) from financial assets (excess cash flows). Non-voting shares are ideal for the trust. Often with aging parents, the non-voting ownership can be very attractive. The parents/founders can move substantial value into the entity and can retain voting rights with opportunity to gift the voting interests later.

What are the advantages of this type of unifying entity? Beneficiaries can exercise autonomy immediately and yet founder can retain the vote and see if the next generation can work together. This may be key feature of what founder may be looking for.

Ex. Founder was the settlor of the trust and sold the non-voting interest in multiple entities that he owned for installment note. The three kids who were active in the operations were charged with mission to generate cash flows. They got 20% of the business. Those who ran the company had to generate enough pre-tax earnings to pay the amounts due on the promissory note to founder and if they meet this goal, it affected the kid’s compensation. If the trust had excess cash, the family members sitting on the investment committee of the trust were then able to decide whether there should be reinvestment of assets in other enterprises, distributed to beneficiaries, etc.

The third point is developing an effective governance system which could be defined as the right people coming together to do the right thing at the right time. It should involve a system of accountability and preserve and grow family capital consistent with family values and purposes. If

the family practices the governance model it develops, smart decisions can occur within the unifying structure that is formed. Unifying structures change trustee's traditional roles. Trustees and beneficiaries may communicate better with a governance and unifying structure. For example, one of the trustee expectations might be to mentor the next generation – is the trustee equipped to carry out this activity? The use of committees like investment committees (which may include family beneficiaries and
outsiders) to create investment policy statements and similar decision-making responsibilities are very valuable. A legacy committee that creates family identity and institutionalizes family values and a distribution committee to interpret and make decisions regarding distribution of earnings are also valuable parts of a governance model.

The fourth point is organizing the family in a family council which is a type of organization for the family to begin to focusing on its own rules and policies for succession. The family council needs to be integrated in the documents the lawyer prepares. For example, a family council can create "white papers" as guidelines to the trustee – a "white paper"
identifies goals and objectives for the growth and management of the assets of the trust. The council is a recommendation body, but it may also provide the family's expectations for the operating businesses, including valuation goals, risk levels, performance levels, etc. The council could also be used as a way to elect board members for the enterprises. The council can organize the family voice. The council does not replace the buy-sell agreements among the owners or the exit strategies, but it can address family employment policies; pre-nuptial agreements and establishing other policies for the next generation to join the family business. Another aspect of the council is that it can address conflicts of interest policies or statements regarding outside business activities of the owners.

In summary, succession planning is a fragile process and can get stuck in a variety of ways. Succession planning is really about defining a change in the system of the founder and his or her relationship to the business. Founders know succession planning needs to be done, but how actively the client listens to the advice that is provided depends on the process that the planner uses to get the succession planning underway. Mr.
Cohn believes that following the four steps described in this outline will likely motivate the founder to make the necessary changes. The business succession case presents lots of opportunities for integrating the legal work with the business succession planning.

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Life Insurance Due Diligence or Everything You've Always Wanted to Know About Life Insurance but Were Afraid to Ask Thursday morning Program, 1/12/06
Presenter: Jon J. Gallo

Reporter: Paul Hood Esq.

Gallo started with example of client who walks in with replacement policy proposals for an ILIT with a ten year old policy, and asks for help. He intimated that the stakes for getting the right policy from the right carrier are high, citing life insurance carrier failures since 1991.

Gallo advised all to not solely rely upon carrier ratings. Lots of rate inflation in recent years. Make sure that you have the right carrier evaluation-lots of name confusion.

Gallo referenced the Insurance Forum publication, which recommends selecting a carrier in the top two tiers by two ratings companies. Exclude any carrier ranked in the fourth tier or below by any ratings service. Pick a carrier licensed in the state of New York.

Using a clever William Shakespeare analogy to turn to consideration of life policies, Gallo stated that life insurance by any other name is still life insurance. He went on to state that policies all boil down to (a) how is the premium funded and (2) the extent to which the carrier retains the risk or shifts the risk to the policy owner.

Variables in policy pricing: risk factors-mortality/claims experience, persistency/lapse, estimated expenses and investment experience–all combined in policy illustration. What are the hypothetical assumptions? An as-sold illustration is a “best case scenario” snapshot. Worst case illustration. Ask for illustrations in 100 basis point breakpoints from the as-sold scenario down to the minimum or guaranteed crediting rate scenario.

Ask what are underlying mortality assumptions. Industry standards. Ask that the illustration use “industry standards” mortality. Games also can be played with lapse supported illustrations. Ask whether the carrier planning to maintain interest crediting rate for the foreseeable future. Get Insurance Questionnaire (set forth in Life Insurance Due Care (2nd Edition-ABA Publishing) filled out by the carrier.

Cost of insurance goes up annually-no matter what projections say.

Went through history of interest rates and how that affected life insurance companies-disintermediation of carrier reserves.

He concluded with a brief discussion of the types of life insurance.

Whole life-available in the 1980's. Carrier absorbs all risk.

Universal life-new money based upon portfolio method of accounting.
Accumulation Accounts. Flexible policy. As long as enough funds in the AA, the policy remains viable. Look at annual in-force ledger statement. Gallo has no problem with UL.

Variable insurance. Cash account invested in stock market as per choices in mutual funds. Not for the faint of heart. Like investing in stock options that mature when the client dies. Unlike other forms of insurance, the fund is owned by the policy-unaffected by carrier insolvency. Downside: investment risk.

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TEdec Systems Inc. [www.tedec.com]

TEdec has just announced the release of Version 6.2 of it's Windows based Fiduciary Accounting System. Their Web site provides additional information, sample reports and a slide show showing how easy TEdec is to use. For the first time, TEdec is building bridges to the Lacerte Form 1041 (1/06) and Form 706 (9/06) programs, a very welcome addition to their product line. The software is designed for ease of use by legal assistants. This is accomplished by such things as one-time entry, standard transaction descriptions, pre-coding of all transactions, and point and shoot menus. For training TEdec provides both a hands-on tutorial and on-side and regional training sessions. A single use version costs $545. Network versions are also available ranging from $795 (2 to 5) up to $1,145 (10 or more). The President and CEO of TEdec, Teddar Brooks, has been in this business almost since the inception of software for preparing fiduciary accountings and the fact that he has stayed the course all this time is a testament to the quality and longevity of the product his Company provides.

WealthCounsel LLC - WealthDocs - [www.wealthcounsel.com]

Highlights from their 2005 year include the introduction of the WealthCounsel asset Transfer System (WDATS), the introduction of the joining of forces with the Business Enterprise Institute, and updated and improvements in their WealthDocs document assembly software. The current version of their software is 6.1, which has included since inception documents for revocable living trusts, ILITs, QPRTs, Intervivos QPRTs, Third-Party Special Needs trusts, Charitable Lead Trusts, Charitable Remainder trusts, Private Foundations (both trust and corporate) and FLPs. During 2005 the software was updated with Retirement Trusts and family Limited Liability Companies. The release of Version 6.2 is anticipated in February of 2006. When that is released, the system will also include business succession planning documents, including Buy-Sell Agreements, Employ Purchase/Bonus Agreements, Section 83(b) elections, deferred compensation agreements, Top Hat IRS Letters and a Stay Bonus Agreement. In addition, it will include modifications to the standalone Retirement Trust to include provisions granting a trust protector the authority to switch a conduit trust to an accumulation trust. Finally two new features will be included that will simplify the assembly of documents, Express Interview and Library File Folders.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Brought to you by the ABA-PTL Discussion List Moderators

Heckerling Institute 2006
Reports from the event, as posted to the ABA-PTL List Serve

Report #10

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of some of the Thursday afternoon Special Sessions #3 on **Changing Trust Situs, Section 409A and Circular 230**

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The Nuts and Bolts of Changing the Situs of a Trust Thursday afternoon Special Session III-B, 1/12/06

Presenters: Richard W. Nenno, Joshua S. Rubenstein, Carol A. Johnston and W. Donald Sparks II

Reporter: Joanne Hindel Esq.

Top ten reasons people want to move trusts

1. Unhappiness with the current trustee, not due to a breach of fiduciary duty but because beneficiaries want better treatment
2. Avoidance of home state's income tax
3. Investment performance and the belief that a new trustee will do a better job or the ability to segregate administrative and investment responsibilities
4. Lower fees and costs for such matters as court accountings
5. The ability to coordinate the management of different trusts in different locations
6. The ability to engage in trust reformation
7. The ability to move to a state allowing the conversion to a total return unitrust
8. Asset protection options
9. The ability to extend the trust terms or get away from the rule against perpetuities
10. In order to avoid excessive or burdensome state regulation – particularly in the charitable trust area

Some additional reasons might be:

1. Better virtual representation statute in another
jurisdiction
2. More lenient standards to remove existing trustees –
note that states vary from best interest of trust to malfeasance
3. Moving in order to qualify for federal diversity
jurisdiction

Note that while family may have particular reasons to move, other reasons may have to be given to court having jurisdiction in order to have a successful move. Must be careful not to demean the local jurisdiction when asking for permission to move the situs.

Be careful when considering the move to another situs that grandfathered GST trusts are not adversely affected and their exempt status is lost.
Might want to obtain an IRS Private Letter Ruling on issue before seeking permission from local court to move.

Top ten roadblocks to moving trust situs

1. Conflict or lack of cooperation among beneficiaries,
the current trustee and the successor trustee
2. Absence of appropriate language in the document
3. Court intervention that makes it expensive and
time-consuming
4. Generally, fee concerns such as a termination fee or
the new trustee's fee
5. Uncooperative fiduciaries
6. Accounting requirements and attendant receipts,
releases and indemnifications
7. Choice of law issues involving the construction,
administration or validity of testamentary or inter vivos trusts
8. Conflict of interest issues among multiple
beneficiaries, trustees and even lawyers
9. Virtual representation issues such as the need to
appoint a guardian ad litem and attendant notice issues
10. Tying up loose ends with the jurisdiction one is leaving

Case studies

1. From Joshua Rubenstein

Proposed change of situs was from New York to Delaware

Fourth generation wealth family members were beneficiaries of a large number of trusts created by prior generations, some testamentary, some inter vivos. New York law governed all. Different trusts had different trustees and state income taxes on trusts were payable to at least two different states.

Family wanted to achieve convenience, uniformity and cost savings by creating a private trust company in Delaware. About 75% of the trusts could be moved pursuant to a New York statute giving the trustees the ability to move them without court involvement. The plan was to create a private trust company and fund it with a number of the trusts at issue.
The court was asked to unify administration with other family trusts already in Delaware.

The factors used to request court approval, that did not offend the court, included convenience of administration, convenience to the beneficiaries, the fact that the documents had a change of situs provisions, the fact that there already were other trusts for the same beneficiaries in the new jurisdiction, that all the affected beneficiaries consented, that there would be a significant cost savings in addition to the tax savings and the new jurisdiction (Delaware) had already provisionally accepted the trusts.

The negative factors in the situation included disagreement among the beneficiaries, disagreement with the trustees because one did not trust his family, the inability to predict if the court would grant the relief requested and the fact that the court mandated judicial accountings.

In the end, the mandated judicial accountings caused the whole matter to fail because this family had never kept written records of trust administration and could not provide the necessary accountings to get the trustee’s releases.

2. From W. Donald Sparks, II

Proposed change was from Delaware to New Jersey

This matter involved an inter vivos and testamentary trust. Different choice of law rules applied to the two different trusts but both trusts did specifically permit the movement.

The family wanted the move because of perceived poor investment performance by the corporate trustee of the closely held stock in the accounts and because they wanted to avoid state income taxes.

The primary problems in the matter revolved around unreasonable client expectations (one of the beneficiaries was a litigation attorney who just wanted to force the change and deal with the consequences later) and fees that were payable to the old trustee and the new trustee.

Ultimately, the move did take place but the outstanding trustee fee issues took more than a year to litigate and the trust ended up paying a 1% termination fee.

3. From Carol A. Johnston

Proposed change was from California to Nevada.

This matter involved the transfer of both a testamentary and an inter vivos trust for the same family. The transfers were primarily state income tax motivated and also involved a grandfathered GST exempt trust.

In this situation, the same trustee would continue to administer the trusts in the new jurisdiction because it was a corporate trustee that had an affiliate in Nevada.

The primary problem was in timing the court order so that a favorable IRS ruling could be obtained before the court order confirming that the grandfathered GST exempt trust would retain its favored status.

In the end, Carol Johnston was able to get both a favorable IRS ruling and a court order that allowed the transfer. In this case, the attorney did inform the court that the primary reason for the move was for tax savings and found that the judge was amenable to the move despite the loss of revenue to California because all the beneficiaries had consented.

Questions from the audience

At the conclusion of the case studies, the audience raised the following questions:

1. When these moves are contemplated, do the parties give any consideration to the original intentions of the settlor?
Panel indicated absolutely and mentioned that the courts usually first look to the language of the governing document to see whether the settlor contemplated a possible change by including a change of situs provision.
Generally, these are easier to do if the settlor is still alive and participate in the matter.

2. Had any of the panelists ever dealt with trusts in different jurisdictions and simply swapped assets within them in order to obtain better tax treatment of those assets? Answer – no.

3. If the change of situs matter is approached under a non-judicial settlement arrangement such as is available in UTC states, do the panelists worry about possible inclusion of the trust in the settlor's estate under 2036? Answer: usually it is not includable if state law permits the change of situs.

In addition, another approach might be to go to court and get approval for the change that way and have the settlor file a statement of non-objection.

4. If you have all the beneficiaries agree to the move by way of an amendment to the trust terms, do you have gift tax or sale issues for the beneficiaries? Answer: you might if you change the beneficial interests.

This reporter found the topic fascinating and the case studies very illuminating. One should certainly read Richard Nenno's separate outline on Trust Choice of Jurisdiction to obtain a more in-depth review of matters discussed at the beginning of the panel discussion.

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How Does 409A Work
Thursday afternoon Special Session No. III-D, 1/12/06
Presenter: Donald O. Jansen

Reporter: Gene Zuspann Esq.

Initially Donald Jansen set out 6 different stock based arrangements that the CEO has received and analyzed each of these to determine whether they were subject to 409A (i.e., are they grandfathered?) and then whether they are excluded from 409A.

The first two are vested stock options granted before 12/31/2004. The first is exercisable at the FMV of the stock at the date of the grant. This is not subject to 409A because it is vested and because it is granted before 2005.

The second are vested stock options exercisable at a 10% discount from the FMV at the time of grant. Again, these are not subject to 409A because it was vested before 2005.

The second set of stock options were subject to a substantial risk of forfeiture (not vested). The first of these is exercisable at FMV at the date of the grant and has dividend pass-through rights before exercise. These would be subject to a 409A exception if it were not for the dividend-rights. The answer to these is “maybe.” If the dividend-rights are part of the underlying grant, then these are subject to 409A. However, if the dividend rights are set forth in a separate arrangement, the separate arrangement is subject to 409A but the underlying stock option is not. p13-14 The non-vested options exercisable at a 10% discount are subject to 409A and are not subject to an exception.

The next restricted stock is not vested for another 4 years. These are covered by 409A but excluded because of the substantial risk of forfeiture.

Finally, (trick question at least to me) the taxpayer has restricted stock units with a dividend pass-through before vesting of the vesting. These are subject to 409A but are excluded because a unit is not property. A promise to pay under sec 83 is not property.

Because of 409A, many plans will have to be amended before 2007.

Non-vested rights exercisable at the FMV at the date of the grant are covered by 409A but are excluded. from its application. If there is a discount factor, the employer may substitute non-discounted options and avoid 409A. The FMV is at the date of the grant, not at the market price of the security at the exchange date.

Remember: the object is to avoid paying tax on the deferred comp, along with an additional 20% income tax and interest at 1% above the underpayment rate. The tax is due in the year that is the later of the date the employee’s deferred comp does not comply with the new constructive receipt rules or funding rules, or the date it is not subject to a substantial risk of forfeiture.

The preamble, but not the regs, suggests two remaining remedies to make the executive whole if the company does not want to amend. (There was a third, but it expired in 2005) 1. The company can give restricted stock with the same terms to the exec = in value to the 10% difference.
2 The company can set up a separate 409A def comp plan with 10%
difference in value in that plan.

The object is to come into compliance under 409A so the exec can avoid an early income tax, along with a tax penalty and interest.

Other features can cause compliance problems. The one Don discussed is the dividend pass-through.

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The Gathering Storm - Circular 230: What Does It Mean and What Do We Do?
Thursday afternoon Special Session No. III-E, 1/12/06
Presenter: Charles A. Redd

Reporter: Jeff Weiler Esq.

The speaker's outline has five components: 1. Decision tree in question and answer format without boxes and lines, 2. Glossary of Circ 230 terms with citations to Circ 230, 3. Summary of covered opinion requirements, 4. a hypo for discussion at workshop, 5. Circ 230. He states that the important sections of Circ 230 are 10.0, 10.2, 10.3, 10.22, 10.33, 10.35, 10.36, 10.37, 10.50, 10.51, and 10.52. Hereafter references to sections will be to sections of Circ 230.

The American Jobs Creation Act of 2004 authorized the Sec of Treas to issue rules concerning written opinions related to avoidance or evasion of federal tax. While the statute authorized imposing monetary fines as a sanction, the current rules do not include the imposition of monetary fines.

Government concern was that taxpayers, after losing controversies, were able to avoid penalties by maintaining that they relied on an opinion letter that stated that there was a reasonable basis for their position.
The way for the IRS to have an immediate and direct impact on the perceived problem was to proceed against tax practitioners. The new rules, Circ 230, are directed at written advice and written tax opinions. The IRS felt that opinion letters being used by taxpayers where deficient in many respects.

Section 10.35 states when a covered (one covered by Circ 230) arises. When one or more federal tax issues (a defined term) are involved with written advice from a practitioner (a defined term) and : 1. it is a listed transaction, or 2 principal purpose is avoidance or evasion of IRC tax, or 3. significant purpose is avoidance or evasion of IRC tax and it is a reliance opinion, marketed opinion, or subject to conditions of confidentiality.

Principal purpose arises if tax avoidance or evasion exceeds any other purpose. There is an important exception that removes the written advise from the formal requirement that must be met for a written covered opinion.
This is that the purpose of the claimed tax benefit is consistent with the statute and also with the Congressional purpose. This exception only applies to "principal purpose" transactions and does not apply to "significant purpose" transactions. Being consistent with the statute and Congressional purpose is of no help in avoiding a formal covered opinion for a "significant purpose" transaction. Most difficult part of Circ 230 - what is a principal purpose transaction and what is a significant purpose transaction.

Marketed opinion (under Circ 230) as applied to speeches and articles. Speaker believes that there are few instances where the Circ 230 disclosure (that eliminates the need for a formal covered opinion) is required on speeches and articles. He feels that such written material is like a treatise and is not giving advice. In his view, advice must be given before Circ 230 applies (Reporter: Your reporter is omitting a Circ 230 disclosure from this email because the subject is not federal tax advice.
However, your reporter will be putting a Circ 230 on emails that have a discussion of federal tax

issues notwithstanding this speaker's views until your reporter is convinced that Circ 230 does not apply).

Does Circ 230 apply to an attorney employed by a bank and not in private practice but having customer contact and providing written comments on federal tax matters? Speaker maintains that the statement that the bank does not give tax or legal advice is not relevant for purposes of Circ 230, and fact that the attorney is in a department other than the bank's tax department is not relevant. Speaker's analysis is based on the down side to the employee. If the employee is not practicing before the IRS, then if the IRS applies sanctions to the employee, it has little impact on the employee other than embarrassment. Note that monetary fines do not apply at this time.

Question asked about Crummey withdrawal rights and whether they are consistent with the statute and Congressional intent. Speaker thinks they are so consistent. An attendee at the session stated that a member of the IRS Office of Professional Responsibility speaking in Michigan had a view contrary to the speaker's views on this issue.

Again, speaker stated that Circ 230 is directed at advice and not merely statements.

In regard to reliance opinions, Circ 230 applies if the advice at a confidence level of more likely than not.

If a formal written covered opinion is required, the rules require attention in the written opinion to significant federal tax issues. What about issues that are not significant? The rules do not state how to handle issues that are not significant in the formal written opinion. The speaker speculates that may be issues that are not significant do not need to be addressed in the written opinion.

In the estate planning process, client may be given written a communication that reviews many estate planning techniques. This could be preliminary advice (a defined term) and would not be a covered opinion if the practitioner in good faith expects to provide a covered opinion at a future date. Even though good faith intent was to send a covered opinion at a future date, circumstances may arise thereafter that result in the covered opinion not being sent. This should not be problem if there was good faith intent up front.

One way to avoid the impact of Circ 230 is prominent disclosure that the opinion can not be relied on to avoid penalties.

A Power Point presentation can be a written opinion subject to Circ 230.

Note carefully the definition of a federal tax issue. It is narrower than anything having to do with federal taxation. For instance, a comment about a return already filed concerning adequate disclosure does not involve a federal tax issue, and excise tax issues, e.g. private foundation rules, appear to be outside the definition of federal tax issues, and late advice after action has been taken is outside the definition (speaker cites section 10.35 (b)(2)(ii) (C)).

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News From The Exhibit Hall
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Looking for CUSIP numbers? Here from a recent discussion on the PTL List are the latest suggestions for where to go.

http://www.cusip.com - not free
http://activequote.fidelity.com/mmnet/SymLookup.phtml
http://www.quantumonline.com/Index.cfm
http://www.nasdbondinfo.com/asp/bond_search.asp

DataTech Software - Heritance System [www.heritancesystem.com]

The Heritance System is a tax, probate and fiduciary accounting software system that has been developed by DataTech Software. The fiduciary accounting module seamlessly shares integrated information with the other modules in the system, including the federal and state forms, and fills out these forms from within the accounting program. The system is flexible and the individual modules can be used separately or together. Since Heckerling 2005, the new or enhanced features include the handling of community property, the ability to group asset and liability accounts together, handling for selling multiple lots, including on the FIFO method, and the addition of additional reports, all of which can be personalized and exported in a variety of formats. Additional additions and enhancements include such things as multiple year trusts and estates, the ability to specify a date range on the First and final Accounting, the option to manually calculate the number of stock shares, prices and totals, the ability to convert from principal to income and vice versa, and the ability to transfer selected accounts to a trust to create multiple trusts from one estate. In 2006 one of the additions will be of several new state modules, including appropriate state formats for the accounting reports. Heritance also provides periodic on-line Webinars of their system for anyone who might be interested in obtaining an overview of their system. These last 20 minutes plus Q&A. The link for signing up for these is www.heritancesystem.com/webinar [the next presentation will be 1/18/06]. The special show price for this software was $899 just to give you a rough idea of its retail price.

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Brought to you by the ABA-PTL Discussion List Moderators

Report #11

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of some of the Thursday afternoon Special Sessions #4 on **the Trust Law and Order Mock Trial Demonstration, Partnerships in Estate and Trust Administration, Charitable Options in Business Succession Planning, and Estate Planning Without Taxes.**

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Trust Law and Order: A Mock Trial Demonstration Ripped From The Headlines Thursday afternoon Special Sessions III-A and (cont.) IV-A, 1/12/06
Presenters: Terrence M. Franklin, Bruce S. Ross, Dominic J. Campisi, Robert N. Sacks and Steven K. Mignogna

Reporter: Joanne Hindel Esq.

Mock Trial Case Summary

Decedent, Daniel Deadinger was 75 years old on the date of his death, March 17, 2005. His assets are valued at $5 million.
He was survived by his wife of 49 years, Dolores and their only son, Sonny.
He was only married once and Sonny is his only child. He did have a lady friend, Anna Nickel, since 1990, until the date of his death.
While the decedent was an attorney, he never practiced law but was successful in the garment industry.

Although the decedent remained married to Dolores, he lived with Anna for the last ten years of his life. He had purchased an apartment in South State for Anna and lived there with her. His wife remained in their home in North State.

In 1999, he had a will drafted, at the urging of Anna, by an attorney friend of Anna's, Robert Johns.

The will provided that one-half of Daniel's assets would go to Anna and the balance would go to his wife and son.

In late 2004, after Dolores learned of the existence of this will, she insisted that her husband write a new will and leave everything to her and then to their son. Daniel typed a new will and signed it in her presence.
There were no witnesses to the second will.

After Daniel died, Dolores presented the 2004 will for probate. The clerk told her that the will did not meet the traditional formal requirements and that she would need to petition the probate judge to admit the will to probate. North State, where Dolores lived, had just adopted the UPC, which has a provision allowing a judge to admit a document as a will if he found that it was a "writing intended as a will."

When Anna learned of the 2004 will, she filed pleadings to oppose the probate of that will and asserted that:
1. the 1999 will was the last valid will
2. the 2004 will was invalid and the result of the undue influence
by Dolores
3. Daniel was domiciled in South State at the time of his death and
so any probate should be there

Dolores then asserted that:
1. the 1999 will was the product of Anna's undue influence
2. Daniel had been domiciled in North State not South State
3. The 2004 will was valid.

Neither state has elective share statutes.

The issues at trial are:

A. the domicile of Daniel at his death
B. the validity of the 1999 will and
C. the validity of the 2004 will

Trial testimony

The presenters questioned participants who were posing as the various parties and interested persons in the mock trial. They included the surviving spouse, Dolores, her son, Sonny, the decedent's accountant who had witnessed the 1999 will, the lady friend Anna Nickel and the drafting attorney of the first will, Robert Johns.

The participants did an excellent job of impersonating the characters involved in the action. They were both entertaining and iron clad in their roles.

The lawyers questioning them did a fine job of attempting to find evidence of undue influence by both the surviving spouse and the lady friend, the existence of a confidential relationship between both the attorney and the accountant and the decedent and the existence of any undue benefit by either the lady friend or the son.

The visiting judge presiding over the mock trial discussed the importance of the jurisdictional issue since North and South State had very different laws pertaining to admission of writings as wills. She also discussed the importance of determining domicile of the decedent and the presenters pointed out that the taxing authority's records might be of use in that regard.

Key issues highlighted by the trial

The presenters also discussed the key issue in proving undue influence was shifting the burden of proof. They also discussed the individual Declarations that had been signed by the parties prior to trial and how these could prove very useful during trial. They did note however, that in reality the Declarations would differ substantially in their recitation of the "facts" as seen by each party to the action.

While the outcome of the trial was not determined, the presentation raised interesting questions of proof and was very entertaining.

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Avoiding "Oops" With Partnerships in Your Estate or Trust Administration Thursday afternoon
Special Session No. IV-B, 1/12/06
Presenters: M. Read Moore and Samuel A. Donaldson

Reporter: Gene Zuspann Esq.

This presentation analyzed some of the problems in exiting FLP's shortly after the death of the parent. This has been a topic that has appeared before at the Institute, but is always timely because of the degree of difficulty in managing a partnership in an estate, especially when the beneficiaries are not amicable.

Problem 1: What taxable year end should the estate use?
There are several good answers.
If the estate owns more than 50% of the partnership, then the estate should use a calendar year. This is to avoid the partnership having to change its year to match the estate's year.
If the estate does not own more than 50% of the partnership, then:
- For the benefit of the estate, a November year end defers the reporting of the income for 11 months. The calendar year partnership's K-1 will be reported on the estate's return for the year that includes the partnership year end. For a partnership ending 12/31/05, the income will be reported on the estate's 1041 ending 11/30/05.
- For the benefit of the partners, a January 31st year end will defer reporting for 11 months. An estate owning a partnership ending 12/31/05 will report the partnership income on its 1/31/06 return and the beneficiaries will then report the income from the estate K-1 (assuming a distribution of the income) on their 12/31/06 return.

Problem 2 analyzed whether the partnerships in the example would have to make the mandatory 754 election required by the Amer Jobs Creation Act of 2004. The three instances are when there is a contribution after 10/22/04 of built in loss property, there is a 734(b) distribution of low basis stock after 10/22/04 or under 743(a) when the FMV of the property is more than $250,000 higher than the partnership's basis in property.

This is a partnership by partnership analysis. It does not accumulate all of the partnerships to make the determination and some may have to make the
754 election and some may not.

Problem 3 discussed whether either of the partnerships should make a voluntary 754 election. In one case, the partnership had little basis because all of the assets had been depreciated out and the basis was the discounted basis of the decedent's interest in the partnership. Carol felt that there was no choice because of the savings in tax and the fact that all of the assets were being liquidated.

For the second partnership, there was little potential savings based upon the inside basis and the outside basis. However, she felt that he election could be beneficial if an audit changed the values on audit (which later happened in the fact situation).

Problem 4.
What is the impact of funding the trusts with the partnerships (essentially the only remaining asset in the estate). There could be gain if the instrument made a pecuniary devise and the partnership assets had appreciated. In this case, there is no sale or exchange because the trusts received a percentage of the residuary.

The partnerships must close their books. There is still a 754 election because the estate does not own more than 50% of the partnership.

Problems 5 and 6 involved the problems in cashing out one family from each partnership. The problems were complex for a number of reasons, but involved disproportionate distributions of assets and securities and triggered 704(c)(1)(b) and 737 because the partnerships were less than 7 years old. Carol illustrated the problems involved in the distributions under 704(c)(1)(B), 731 and 737. This included the surprising result that there is income to the remaining partner as well as the liquidating partner.

Problem 7
What is the duty under the Uniform Prudent Investor Act to diversify?
She pointed out that the duty to diversify is not mandatory and that the trustee must justify its decision. This is an issue to be considered in light of the facts and circumstances. The other problem is that the trustee may not have the ability to liquidate the partnership interest.

Problem 8
She had previously discussed the problems with several professional trustees and asked whether they would take these trusts on. The response from all queried was that they would run from this trust.

Problem 9 and 10
How does a trustee determine the accounting income? UPAIA section 401 holds that the cash distribution for an entity is the trust accounting income. This is true regardless of the fact that partnership may have substantially more income and the trust would owe tax. In the event that tax is owed by the trust, there must be an allocation of the tax between income and principal.

Problem 11
Can DNI include capital gains?

Carol believes that it can in three situations
- the instrument says that capital gains are included in trust income
- the capital gains are actually distributed or
- the trust always treats capital gains as trust income.

In this case the trustee cannot adjust under UPAIA 104 because she is also a beneficiary.

Problem 12
If the IRS adjusts the values on the 706, should the partnerships amend the returns.
Yes - this will be necessary for several reasons.
One to report corrected amounts to the beneficiaries and two to make adjustments to the 754 elections and reduce the gain or increase the deductions on the partnership's return.

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More on the Charitable Options in Business Succession Planning Thursday afternoon Special Session No. IV-D, 1/12/06
Presenters: Daniel L. Daniels and David T. Leibell

Reporter: Merry Balson Esq.

This special session was a continuation of the general session entitled "Planning for the Closely Held Business Owner: The Charitable Options" that was held on Thursday morning. The presenters tailored the session to covered some of the more fundamental information on charitable planning options after receiving questions following the general session presentation.

The presenters recognized that there a number of freezing and discount techniques that do not involve charitable giving, and that those options should be considered along with charitable options, particularly where clients are concerned about completely eliminating or significantly reducing estate taxes, interested in carrying on a legacy, and concerned about the potentially negative impact of wealth on their descendants.

The presenters generally reviewed the available charitable vehicles used in business planning, including private foundations, supporting organizations, and split interest charitable trusts, which were all discussed in the general session earlier today. They noted that private foundation status is the default status, and provides the family the greatest amount of control, but that the excise tax rules apply, and that the private foundation has a 5% minimum distribution requirement. The supporting organization, as a public charity, is not subject to the private foundation excise tax rules, and a business can be run from the supporting organization. However, they noted that the IRS has become very anti-supporting organization recently and it has become very difficult to obtain exempt status as a supporting organization. Efforts to reform these organizations legislatively, which in 2005 seemed inevitable, now appear to have lost momentum and will likely not move forward.
Moving on to split interest trusts, the presenters described the structure of charitable remainder trusts (CRTs) and explained the advantages of using a charitable remainder trust (CRT) to sell low basis assets, and using a NIMCRUT or FLIP CRUT for illiquid assets. The presenters then highlighted the features of charitable remainder lead trusts (CLTs), a technique that is good for hard to value assets.

The presenters noted that under Rev. Proc. 2005-64 [sic. 2004-64] (addressed in the outline on page 12-22) a waiver of spousal election rights is required to avoid disqualification of certain charitable trusts.
They also noted the 2003 change in the 4 tier system under Sec. 664 relating to payments of income

from a CRT, which is addressed in more detail on page 12-25 of the outline.

An overview of the tax issues relating to charitable giving followed. The issues discussed included: (1) excise taxes on entities, where the major concerns are the self dealing and excess business holdings rules; (2) unrelated business income tax (UBIT), which is often seen as the charity's issue, but can also cause unexpected recognition of income to the donor;
(3) the prearranged sale rules; (4) the "ascertainability" problem, which was discussed in the general session, and essentially requires the testamentary plan to be specific as to the terms of the charitable gift; and, (5) the charitable whipsaw, where a donor devises a portion of a business to a charity but given the discounts for minority interests, the value of the charitable deduction is less than the value of the business as a whole.

The presenters spend significant time on prearranged sale issues. Privately negotiated transactions always give rise to this issue. If there was an informal agreement or understanding between a CRT and grantor to sell the contributed property to a buyer prior to transferring the asset to the CRT, and that sale actually occurs, the IRS can look through the substance of the transaction and recharacterize the sale as a transaction between the grantor personally and the buyer. Basically, if the transaction is so far along that the donor can not back out of the sale, he or she will be personally responsible for gain on sale. The IRS is very sophisticated on this topic. The presenters commend to our reading an article in the March
2004 Trusts & Estates Magazine by Laura Peebles on selling business interests for additional information. The body of law on the prearranged sales issue is well established. The general redemption exception to the prearranged sales rule is stated in Palmer v. Comm'r, 62 T.C. 684 (1974), and the IRS approved the transaction in Rev. Rul. 78-197. Rauenhorst v.
Comm'r, 119 T.C. 157 (2002) also is a taxpayer friendly decision in this area. However, see Blake v. Comm'r, 697 F.2d 473 (2nd Cir. 1982) which held for the IRS where an informal agreement existed between the taxpayer and the charity to purchase taxpayer's yacht after the taxpayer redeemed stock he contributed to the charity.

The presenters then discussed testamentary planning strategies. The morning session covered the following strategies: (1) simple bequest of business interests to a foundation, (2) bequest of a business interest to a foundation followed by a redemption, and (3) bequest to a foundation coupled with an option in the family to purchase the interest from the estate prior. The presenters discussed strategy (3) above in depth. When using this option, the presenters recommend recapitalizing the business into voting and nonvoting shares, so the donor can bequeath the nonvoting portion to the foundation, and the voting portion to the family. The family would then use the general redemption exception to redeem the nonvoting shares from the foundation. However, this strategy could implicate the charitable deduction whipsaw (see Ahmanson Foundation v. U.S., 764 F.2d 761 (9th Cir. 1981). The solution to this problem would be to have the owner gift the voting shares to the children pre-death, or use the estate administration exception instead of the redemption exemption. The bequest coupled with an option strategy will not constitute self-dealing if the transaction is for fair market value, the court approves the transaction, and the transaction is completed during a reasonable period of estate administration. Additionally, the IRS has approved a disqualified person's use of a note to fund the purchase. The risk in using a note is that the terms must be fair (AFR may not be available), court approval is not guaranteed, payments under the note must be timely made, and all payments on the note must inure to the benefit of the foundation.

A fourth strategy discussed is a bequest of the business interest to a CLAT (rather than foundation) coupled with an option by the family to purchase the business interest while it is in the estate. This strategy has similar benefits and risks strategy (3) above, with the additional benefit that the family can be the remaindermen of the CLAT. If the interest rate on the note is higher than the 7520 rate, the family could receive significant benefits. Advisors need to run the numbers to determine the appropriate term of the note, term of CLAT and annuity payment from the CLAT to fully utilize this strategy to meet the client's goals. Drafting with flexibility is key. The CLAT can be drafted to ensure that the term is long enough to produce an estate tax charitable deduction equal to the value of the assets passing to the trust. Consider giving the trustee the power to choose among CLATs with varying payout rates (see PLR 9631021 where similar strategy was approved). Note that a default provision should be included which sets the rate in the event the trustee does not make the selection within 9 months of the date of death. Also consider giving the trustee the flexibility to increase the term of the note to match the cash flow from the business and provide security to the noteholder. Consider personal guarantees if necessary to support valuation of the note, and consider structuring the trust to avoid application of GST tax, provide property management and creditor protection. This strategy is sometimes referred to as the "note CLAT."

Finally, the presenters discussed lifetime planning strategies. This too was discussed in the general session. Typically, lifetime planning involves using a CRT to accomplish sales to third parties. An asset by asset analysis is often necessary here to determine the tax issues.

C corporation stock. Excess business holdings are an issue when using CLTs and foundations. Self dealing issues exist for CRTs, CLTs, and foundations if the sale is to a disqualified person. However, an excellent business planning strategy for the mid-sized family C corporation is the wholly charitable stock bailout technique (discussed on pg. 52 of the outline) which uses the redemption exceptions to the prearranged sale and self-dealing tax to redeem shares contributed to a lifetime CRT for cash.
UBIT is not generally a problem, but under Sec. 512 (b)(13) if a charitable entity owns more than 50% of C corporation, interest, annuity, royalties and rent (but not dividends) paid from the corporation to the charity is UBIT. Additionally, if the CRT is unable to sell the stock of the business and is forced to sell the assets instead, Sec. 337(d) will tax the sale as a deemed liquidation inside the CRT, with a tax on the sale at the corporate level. Finally, when planning for ESOP qualified replacement property, the donor can transfer the low basis, low yield replacement property to a CRT, recognize no gain and receive a much higher yield.

S corporation stock. Foundations, supporting organizations and CLTs can be S corporation shareholders, but all income and gain is taxable under the UBIT rules. CLTs must make the ESBT election, or the trust must be structured as a grantor trust to be a qualified shareholder, and neither are good options. CRTs are not permissible S corporation shareholders, but the S corporation can be a CRT grantor. The benefits are that there will be no recognition of built-in gain on the transfer of appreciated property to the CRT, so long as the corporation, rather than the shareholders are the trust beneficiaries. As mentioned above, the Sec. 337(d) liquidation tax may be an issue. Other limitations with this strategy are that the trust term cannot exceed 20 years, and deductions will be limited to basis when the corporation funds the CRT.

Partnerships and LLCs. Partnership and LLCs have the same self dealing, excess business holdings and prearranged sale issues as corporations.
Additionally, advisors must look to the underlying investments of the FLP or LLC to determine whether there are debt financed issues or whether there is an active trade or business that could result in UBIT.

Real estate. The biggest problem in using real estate to fund CRT is the mortgaged property problem. The gift of mortgaged property is treated as a bargain sale rules, may cause the CRT to have UBIT when it sells the property and receives income, which may cause the CRT to be treated as a grantor trust and lose its exemption, and if the exemption is lost in the year of the sale the grantor will be taxable on the gain. If the grantor remains personally liable on the mortgage or has guaranteed the mortgage, the CRT will be a grantor trust and will also be disqualified. There are also self-dealing issues that arise when a mortgage exists. The presenters recommend that advisors get rid of the mortgage before funding the CRT.
Finally, the presenters mentioned that gifts of undivided interests in real estate to charity are probably permissible and should not be not a problem under the self dealing rules (see PLRs on this).

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Coke without Sugar; Coffee without Caffeine; Estate Planning without Taxes:
We Do Live In Interesting Times
Thursday afternoon Special Session No. IV-E, 1/12/06
Presenter: Mark B. Edwards

Reporter: Paul Hood Esq.

We do live in interesting times, Edwards began. He dealt with three questions.

1. Who will be our clients in the future, and what will they want?

Edwards believes that most clients will not be driven by estate tax considerations, so estate tax repeal/reform will be an impact driving our first question (Force No. 1). Force No. 2-the financial world is different and will remain down. Force No. 3-Aging of the baby boomers (most dominant force in society). Force No. 4-Anxiety. Clients will be extraordinarily risk averse. Clients are living longer. Capital will be appreciated not appreciating because it will be so difficult to create. He then discussed increasing important capacity issues.

2. How are we going to control our assets in order to enjoy our longevity?

Durable powers of attorney and revocable trusts. Edwards believes that planner will be spending more time fashioning and coordinating revocable trusts and durable powers of attorney. Gifting will be focused/targeted on grandchildren and will not be primarily tax-driven, e.g., a non-marital deduction trust donation, "upstream" generational gifting, annuitizing, etc.

3. How can their money be managed/controlled in light of their longevity so that they won't outlive it?

Edwards explained the concept of "rentiers" (people who live on a finite pool of money) and how economics of ebbs and flows in the market affects them. He reemphasized that little time has been spent on how to spend money as we have spent our time in either the accumulation or conservation phases. Edwards underscored the benefits of utilizing the unitrust concept to solve the problem of the squeezed rentier.

All in all, it was a wonderful presentation. Edwards is a quality, entertaining speaker, and kudos to the Heckerling Institute Advisory Board for getting him to present on such an outside-of-the-box subject.

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News From The Exhibit Hall
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Lawgic [www.lawgic.com]

Building on our earlier coverage of this document assembly product, the company representatives wanted us to know that their big addition in 2005 was the release in May of 2005 of the New York Wills & Trusts edition of the popular Lawgic software. This was made possible with the able assistance and co-authorship of New York attorney Carlyn McCaffrey. In fact, at Carlyn's urging the "federal' portions of all of the estate planning forms in the Lawgic system were revised and fine-tuned with the cooperation and supervision of Rick Stockton of Holland & Knight who oversees the Lawgic line of wills and trusts software programs.

Hot Off The Presses - Apple Goes Intel

In case you missed it earlier this week, Apple made a hugh surprise announcement on the 10th that they are releasing an Intel-based iMac and a similarly based laptop called the MacBook Pro. This is a real shift in Apple's development plans, and this announcement caught all the analysts off guard. To check this out further, go to Macworld at C/NET Digital Dispatch [www.cnet.com]. To go along with this news, for all of your iPod owners, there will not be a new iPod right now. Instead, for a mere $50, you can get a little device that adds an FM tuner to the Apple music player (how nice).

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Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

GENERAL INFORMATION ABOUT INSTITUTE
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Brought to you by the ABA-PTL Discussion List Moderators

Report #12

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of the Friday morning main sessions on **Interests in Trusts in Divorce, Circular 230, and Lou Mezzullo's Wrapping It Up.**

PLEASE NOTE that we are NOT wrapping it up with this Report. We still have several reports yet to come from sessions that were held earlier in the week and even though there were some sessions we were unable to cover for a variety of reasons. So stay tuned and we will let you know when we have filed our final report for 2006.

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First another errata in Report No. 11. The main session on Avoiding "Oops"
with Partnerships in Your Estate or Trust Administration was presented by Carol A. Cantrell, not M. Read Moore and Samuel A. Donaldson as was stated in the header for that Report. Your Editor, not the Reporter, goofed on that one. We have not yet received a report for the Moore-Donaldson main session.
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Interests in Trust in Divorce: What the Settlor Giveth the Divorce Court May Taketh Away Friday morning Main Session, 1/13/06
Presenter: Marc A. Chorney

Reporter: Herb Braverman Esq.

Mr. Chorney reviewed the status of the law in so far as it effects trust interests held by individuals who are also involved in the termination of their marriages. In some cases, the trust interest may be found to be separate, non-marital property that is not involved in the division of property between the future ex-spouses , whereas, in other cases, the trust interest may be treated as marital property and be counted as marital property for purposes of the divorce court. Mr. Chorney focused on Colorado, his home state, where he has extensive experience, but he also discussed other jurisdictions and, where he could, generalized about the status of trust interests in divorce courts in all jurisdictions.

He identified the "all property" approach by a minority of states where the courts pool all the property of the parties and proceed to divide it appropriately and the more common "separate" -v- "marital" property approach, in which the property divided by the courts is that acquired by the parties subsequent to marriage, except for property acquired by gift, inheritance or similar fashion. Some states have apparently adopted a hybrid approach, giving the court some equitable powers to mix and match according to statutory factors. There is continuing differences in the treatment states give to the appreciation of separate property that accrues during the marriage--some states treat that appreciation as part of the separate property and some treat that appreciation as part of the marital property to be divided. These issues also exist in community property states where there is a lack of uniformity in dealing with these issues, even within a state the available case law may be hard to reconcile and rely upon.

Interests in a third party settled trust have been impacted by the expanding "property" definition in divorce courts, but there are statutes in some states that seem to exclude them from the property division process. Mr. Chorney noted California, Washington, New York, Iowa and Florida, contrasting different treatment in each. The interest in trust must be "possessory" at the time of the divorce in order to be considered marital property. Mr. Chorney discussed several cases to illustrate this point, including Solomon -v- Solomon in Pennsylvania, Storm -v- Storm in Wyoming. Loeb-v-Loeb in Indiana. The interest that is merely a prospective expectancy (even a very likely one) is not part of the marital property to be divided by the court.

On the other hand, some courts have ruled that a remainder interest that will be fully distributable to a spouse at some point is subject to the court's dispositional powers even when the interest is subject to a survivorship provision or could be eliminated by a preceding beneficial interest in the trust. This approach is sometimes tempered by a notion of "vesting" but not in all courts.

In Trowbridge -v- Trowbridge (Wis.) and in Davidson -v- Davidson(Mass.), courts did not find a vested interest, but did include the interest in the property division process, presumably on their own equitable basis. Nevertheless, the "vested interest" concept has been(and is being) applied in divorce courts in various states. Mr. Chorney discussed Balanson in Colorado, where the Supreme Court of the state determined that one spouse had a "future, vested interest not within the discretion of the trustee to withhold" and that this interest was not a "mere expectancy" even though there appeared to a number of circumstances that would have prevented the spouse from ever benefiting from the trust interest. The Court, in dicta, suggested that the presence of a general power of appointment in the trust may have taken the interest out of the "property" definition. This presents a planning point in this area perhaps. Mr. Chorney did not suggest that a special power of appointment would be as helpful. Furthermore, Mr. Chorney appeared to support the position of some courts the "vested interest" approach should be replaced by a "facts and circumstances" evaluation on a case by case basis. This would require that the court look at the facts and circumstances to determine whether the interest in trust is too uncertain, remote or speculative to constitute "property" for this purpose.

Mr. Chorney also related Colorado cases suggesting that interests that were not fully distributable to a beneficiary/spouse would not be property in divorce courts for one of three reasons--the trust were discretionary, the interest in trust could not be reached by creditors or the interest was so uncertain that it could not be quantified at the time of the termination of the marriage.

As for income interests in trusts, the states predictably have gone in either direction, some states including these interests as property and other states excluding them. Check out your own state!

An interest in a third party revocable trust of a living settlor has be analogized to an expectancy in a will--neither is included as a property interest in divorce courts. Similarly, a limited power of appointment was held not to give rise to a property right in divorce court, except in one MA case that Mr. Chorney concluded actually stood for the proposition that "bad facts make bad law."

Mr. Chorney discussed the possible analogy between pensions and their treatment in divorce courts and trust interests, transfer tax valuation of temporal interests in trusts, valuation under elective share statutes in a number of states and attempts to join a trustee in a divorce action, all with interesting detail but no reliable conclusions. As he closed, he noted that what we have really learned is that, as planners, we must keep an eye on the issues that are being raised and dealt with in divorce courts in our states and, perhaps, in others.

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Circular 230: A Nine-Hundred Pound Gorilla Friday morning Main Session, 1/13/06
Presenter: Roy M. Adams

Reporter: Jeff Weiler Esq.

The speaker began with a history of Circular 230. The regulation of lawyers and agents who represent claimants before the United States Treasury Department began with the Horse Act of 1884. Apparently claims were permitted for the value of horses and other property lost during the Civil War. Some fraudulent claims are being filed and this Act permitted the Treasury Department to discipline attorneys who assisted with filing inappropriate claims. The American Jobs Creation Act of 2004 that became effective on October 22, 2004 permits the Treasury to impose standards applicable to the rendering of written advice with respect to any entity, transaction, plan or arrangement which is of the type the Secretary of Treasury determines as having a potential for tax avoidance or evasion. The Act also authorizes the imposition of monetary fines. On May 19, 2005 the Treasury Department issued final regulations on Circular 230 which became effective after June 20, 2005.

The speaker agreed with two other commentators, Howard Zaritsky and Jonathan Blattmachr that Circular 230 is a positive thing. It discourages practitioners from accepting assignments that they are not capable of doing. The need for covered opinions and the cost of the preparation of such opinions will prevent professionals from attending to some relatively modest value transactions and only very large transactions for wealthy taxpayers will be able to bear the economic costs of the complex, comprehensive covered opinions.

While the best practices for tax advisors set forth in Circular 230 Section 10.33 (hereinafter all references to Sections shall refer to Sections of Circular 230) are not mandatory, some respected commentators have stated that this Section could be used to form a basis for malpractice liability. The best practices include several requirements one of which is establishing facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law to the relevant facts and arriving at a conclusion supported by law and facts. Evaluating the reasonableness of any assumptions or representations will require work by the tax practitioners.

Section 10.35 deals with covered opinions. This refers to certain kinds of advice that, if provided by a practitioner, is subject to detailed requirements. A covered opinion arises if the advice is written (including electronic communications) and concerns one or more federal tax issues arising from: (1) a transaction that is a listed transaction, (2) a transaction where the principal purpose is the avoidance or evasion of tax, or (3) a transaction with a significant purpose of which is the avoidance or evasion of tax and the written advice is a (a) reliance opinion, (b) a marketed opinion, (c) subject to conditions of confidentiality, or (d) subject to contractual protection. A federal tax issue is a question concerning the federal tax treatment of an item of income, gain, loss, deduction or credit, the existence or absence of a taxable transfer of property or the value of property for federal tax purposes.

If the transaction is a principal purpose transaction, the detailed rules do not apply if the claiming of a tax benefit is in a manner consistent with the statute and Congressional purpose. If a transaction is a principal purpose transaction, there cannot be a Circular 230 disclosure to avoid the detailed covered opinion.

If a transaction is a significant purpose transaction, consistency with a statute and Congressional purpose will not avoid the detailed rules. However, with a significant purpose transaction, a Circular 230 disclosure can be made to avoid compliance with the detailed rules for a reliance opinion and a marketed opinion.

Preliminary advice will not be a covered opinion if the practitioner is reasonably expected to provide a subsequent written advice to the client that satisfies the requirements for covered opinions.

The speaker observes that there will be a lot of oral tax advice. There could be transcriptions of the oral advice prepared by the client and not by the practitioner.

A practitioner can provide a limited scope opinion. This is a written opinion that considers less than all of the significant federal tax issues and a practitioner and the taxpayer agree that the scope of the opinion and a taxpayer’s potential reliance on the opinion for purposes of avoiding penalties that may be imposed on the taxpayer are limited to the federal tax issues addressed in the limited scope opinion.

At this point the speaker mentioned that he gave a limited scope opinion concerning unrelated business taxable income. Your reporter asked the speaker after his presentation whether he believes that the Circular 230 rules apply to excise taxes such as those that arise concerning private foundations. He responded that he was not sure that the Circular 230 rules do apply to such transactions. However, the instance in which he gave the limited scope opinion concerning unrelated business taxable income related to an income tax deduction and the deductibility of an expenditure for federal income tax purposes.

The speaker suggested that the most likely areas involved with estate planning that may require covered opinions are the creation of family limited partnerships and limited liability companies, an installment sale to an intentionally defective grantor trust, and Crummey withdrawal powers granted to individuals who have no significant interest in the trust beyond their withdrawal powers.

Section 10.52 enumerates the penalties that can be asserted against the practitioner. These include censure, suspension, or disbarment from practice before the IRS.

The speaker’s outline states that whether a constitutional challenge against Circular 230 could succeed is questionable.

The speaker commented on unofficial guidance from IRS officials and the discussion of future regulations. One is IRS Chief Counsel Donald Korb who stated that the agency intends to "use a rule of reason or common sense in applying these rules". OPR Deputy Director Stephen Whitlock has said that the IRS will be looking for patterns of behavior and repeated conduct before imposing Circular 230 penalties. OPR Director Cono Namorato has said that the IRS is not looking to penalize practitioners for inadvertent "foot faults" and would not try to be "hyper-technical". Acting Secretary Tax Legislative Counsel Michael Desmond has stated that the government will be reasonable in enforcing Section 10.35 and that practitioners should use common sense when determining how to comply with that Section. The speaker concludes that most of these statements provide little help to practitioners as they struggle to comply with Circular 230. It appears that each of these IRS officials do not wish to provide clear guidance regarding Circular 230 through their own public statements and would rather have publications such as notices, revenue rulings and additional regulations meet this objective.

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Wrapping It Up
Friday morning Main Session, 1/13/06
Presenter: Louis A. Mezzullo

Reporter: Jeff Weiler Esq.

The speaker had a comprehensive and complex factual situation set forth in his outline. As he reviewed the hypothetical, he commented on presentations made by previous speakers at the seminar. The facts included three residences – a primary residence and two vacation residences. He suggested that consideration should be given to a qualified personal residence trust. The facts included a very valuable closely held business. He suggested getting an appraisal of the business because clients frequently think their businesses are worth much more than indicated by an appraisal. Rental real estate was owned and the speaker observed that this should be transferred to a limited liability company for a number of reasons.

In commenting on a designated beneficiary for a retirement plan death benefit, the speaker observed that a parent could name a child as the beneficiary and give the child a general power of appointment which if not exercised results in the death benefits going to the child's estate. It was the speaker's view that having the death benefits going to the estate of the deceased beneficiary (not the plan participant) should qualify as a distribution to a designated beneficiary (Reporter: the speaker did not cite authority for his position).

In regard to Circular 230, the speaker stated that he has a minority view. He does not use the Circular 230 disclosures in his written communications. He feels that the primary purpose of his estate planning work is to pass assets to younger family members and that there are not significant federal tax issues involved. In regard to his work on family limited partnerships, he thinks that the significant federal tax issues arise with Section 2036(a) and Section 2038 and he does not give any advice on the application of these provisions since there is a facts and circumstances test that applies. After documents have been signed and are being sent to his clients, he provides instructions concerning the operation of the entity but does not provide an opinion. Much of his advice is preliminary advice. If the client does not go through with the proposed estate planning techniques, he does not feel that there should be a problem. Since Circular 230 involves ethical rules, there are no bright lines and common sense should be used in determining the application of the rules. By the presence of a Circular 230 disclosure at the beginning [sic.
end] of this email, you may assume that your Reporter does not subscribe to the speaker's minority

view on Circular 230 disclosures.

In regard to the application of the reciprocal trust doctrine to irrevocable life insurance trusts where a husband and wife currently establish reciprocal trusts, he observed that the only amount that may be subject to the reciprocal trust doctrine is the initial funds placed into the trust with the future life insurance proceeds not being subject to the doctrine. (Reporter: citation not provided).

He remarked that asset protection has received a boost from the new bankruptcy law The rollover of a plan participant's account in a qualified plan to an individual retirement account now will be exempt. In the past, the speaker was concerned about telling his physician clients to rollover their qualified retirement plan death benefits to an IRA because an IRA did not have the same protection from creditors that was available to the account in the qualified plan. Now the protection that was available to the account in the qualified plan is also available to the account in the rollover IRA.

The speaker's outline listed 21 items that will be unaffected by repeal or substantial increase in the applicable exclusion amount. He discussed each of the items. One of which was planning to cope with carryover basis. He observed that the statutory implementation of carryover basis in the past was terminated before it became effective. If no action is taken, the current laws provide that carryover basis will begin with the year 2010. He is concerned that the relationship between the Democrats and Republicans in Congress is so hostile that they may not be able to agree on a change in the tax laws before 2010. The result could be that the estate tax laws are actually repealed in 2010 and carryover basis actually becomes effective.

Several areas where reform could be made concerning the transfer tax laws were mentioned. These included eliminating the ability to use Crummey withdrawal rights, reducing the annual exclusion amount or the number of annual exclusions available per donor or both, providing for portable applicable exclusion amounts between spouses, eliminating discounts for family controlled entities, and eliminating dynasty trusts.

He observed that prior to the enactment of the generation-skipping transfer tax, few of his clients were concerned about dynasty trusts. After dynasty trusts became limited by the generation-skipping transfer tax rules, client then had an interest in implementing dynasty trusts. He had the same observation concerning the estate freeze rules and GRAT's. Prior to the enactment of the estate freeze rules, few of his clients had an interest in GRAT's. After the enactment of the estate freeze rules, his clients developed an interest in GRAT's.

Suggestions were offered for reviewing current estate plans. Because of the increase in the estate tax applicable exclusion amount, current estate plan should be reviewed to determine whether the additional amount that would be going to the credit shelter trust pursuant to a formula is appropriate to a particular situation.

He observed that the generation-skipping transfer tax automatic exemption allocation rules are giving him a headache. In many cases the client will not [want] the automatic allocation made. He feels that it is usually better practice to make an independent decision regarding the allocation of the generation-skipping transfer tax exemption on an annual basis unless it is certain that the allocation should either always automatically apply or never automatically apply with respect to certain trusts.

In regard to planning for repeal of the estate and generation-skipping transfer taxes, he observes that clients may want alternate dispositions depending on whether or not their estate plan is subject to the estate and generation-skipping transfer tax at the death of the client. Conditioning an alternate disposition upon the repeal of the estate and/or generation-skipping transfer tax is not the most effective way to deal with this uncertainty since the estate and/or generation-skipping transfer tax may not be repealed but simply may not be applicable to decedent's dying in a particular year. This is what will occur in 2010 if the law is not changed before then. The estate and generation-skipping transfer taxes will not apply although they are not repealed. In some cases the client may want assets passing outright. In other cases the client may want to have assets passing to one or more trusts that will be held for an indefinite period in such a way that if the estate and generation-skipping transfer tax are reinstated the assets of the trust will not be subject to the transfer tax. This would involve not permitting the beneficiaries to have a general power of appointment. If repeal does occur, there is concern about the meaning of terms in existing documents that refer to terms currently in the IRC that may no longer be there after repeal. Because the gift tax will presumably still apply, there will be a premium on using techniques that involve little or no taxable gifts.

In regard to removing assets from the transfer tax system, some practical considerations were offered. Techniques that the speakers feels should be used include GRAT's, CLAT's, as well as other techniques. He suggested a combination of techniques such as the purchase of assets from a GRAT by a grantor trust for a SCIN is something that should be considered.

In structuring short term grantor trusts, the speaker sometimes defines the annuity as the greater of the annuity amount or capital gains.

Comments were offered about recent decisions concerning family limited partnerships and family limited liability companies. He noted the Kelly decision. (Reporter: no citation provided). Two-thirds of the assets contributed to the partnership were cash and one-third was marketable securities. The taxpayer died five months after formation. A 53% discount was claimed. The IRS was willing to allow a 24% discount. The court allowed a 32% discount. IRC Section 2036, 2038 and 2703 were raised by the IRS and dropped. The taxpayer was in his 80's, had a physical shortly before he died, and had a holiday photo taken showing him in good health before he died. He had a pension that provided sufficient funds to maintain his standard of living. The facts in this case were good but not great.

The Keller decision (Reporter: citation not provided) involved a family limited partnership funded with marketable securities. The IRS was seeking summary judgment under IRC Section 2036. The District Court denied the summary judgment request because there were too many factual issues.

The speaker suggests that when a family limited partnership is formed, it should not be merely to save taxes. There should be many other non-tax reasons for formation. He noted that in the Shutt decision
(Reporter: citation not provided) there was not "business" reason for the formation of the entity. A main reason was to carry out and invest and hold investment philosophy.
This was the last speaker of the seminar. At the conclusion of his speech, the seminar director announced that the attendance at the seminar this year was 2,617 persons.

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was not written by the author to be used, and it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer;
(b) The advice in this email memorandum was written to support the
promotion or marketing of the transactions or matters addressed by this email memorandum; and
(c) Any taxpayer should seek advice based on the taxpayer's
particular circumstances from an independent tax advisor.

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News From The Exhibit Hall
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ABA Real Property, Probate and Trust Law Section
[http://www.americanbar.org/groups/real_property_trust_estate.html]

The ABA RPPT Section was an exhibitor again this year, offering discounts on their numerous publications. Unfortunately you had to be three to partake of those discounts. One of those publications is the Section's flagship magazine. The latest issue for January/February 2006 contains an interesting article in its Technology - Property column by Gary Whittington about the eight blunders of trying to develop word processing document assembly documents. This is such good article that we thought we would list the eight blunders here as a way of peaking your interest. For in more depth treatment of these, we refer you to the article.

Blunder 1 - In The Swamp of Perfectionism Blunder 2 - Drafting by Programers Blunder 3 - The Grand Plan Blunder 4 - Taking Too Much Drafting Responsibility Away From Users Blunder 5 - Encouraging a Slave Mentality Blunder 6 - Forgetting the 80/20 Rule Blunder 7 - To Far Ahead of the Technology Curve With Web-Based Assembly of Complex Templates Blunder 8 - Too Few Documents

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Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Brought to you by the ABA-PTL Discussion List Moderators

Report #13

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains coverage of the Wednesday afternoon **Fundamentals Session #2 on Asset Protection** and the Thursday afternoon **Fundamentals Session #3 on Elder Law**

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Fundamentals Program #2 - Creditor Wars: Asset Protection Strikes Back - Protection from Predators and Creditors in the 21st Century Wednesday afternoon, 1/11/06
Presenter: Gideon Rothschild

Reporter: Herb Braverman Esq.

Mr. Rothschild was asked to present a fundamentals program on asset protection and he did so over the better part of 3 hours. He considered a wide variety of techniques, with the anticipated emphasis on various types of trusts. He added to his outline a section of drafting examples aimed at creating more "flexible" documents, though he did not discuss this section of his materials in any depth. I commend him for including such sample language in a fundamentals program, such as this, although we all recognize that the examples are not to be relied upon without our own analysis and reflection. To emphasize this point, in another fashion, Mr. Rothschild emphasized the complexity of this area and indicated that an accomplished practitioner in this field must have more than passing knowledge of other areas of the law, including, without limitation, bankruptcy, fraudulent conveyances, foreign jurisdiction(s), other states laws, estate planning, etc.

Mr. Rothschild spoke about the spreading interest in asset protection among all manner of high net worth persons, too many of whom get interested in the area when it is too late--and they are seeking to become judgment proof--something the asset protection planner does not (and can not) do. Nevertheless, with the many sources of liability "out there", we do see an increased interest in this area and Mr. Rothschild begins with a review of his Asset Protection Audit Checklist (p. 66), which he uses for client interview purposes and which he suggested that we use also. First , he determines the possible sources of liability confronting the new client, hoping that these sources represent potential problems and not those that have come home to roost already. He then reviews the basic asset protection a client may have through the use of insurances of various types, including homeowners, auto, umbrella, business risks, disability, life, etc. He pointed out that insurance is a long-standing and traditional form of asset protection that we are all familiar with and that another common technique is incorporating a business or using another business entity to reduce or eliminate liability.

Mr. Rothschild continues with his new client by review his personal planning to be sure he has maximized exemption allowances, safeguarded his Homestead exemption, if any, created an estate plan using helpful techniques. He then reviews business activities to consider reorganizing holdings and assets using limited liability entities.

At some point, Mr. Rothschild determines the solvency of the new client, since he will not typically proceed with a client who is not solvent and able to pay his current obligations as they arise. Mr. Rothschild points out, more than once and with several case law examples, the trouble that attorneys can get themselves into by participating in asset protection planning and technique implementation for the wrong client and /or at the wrong time. This could lead to malpractice actions, criminal contempt or other charges and civil contempt matters. However, assuming that the new client is solvent and "above board" in all respects, we can proceed with asset protection planning using a variety of techniques. Mr. Rothschild turned our attention primarily to domestic self-settled and non-self-settled trusts and to foreign trusts for this purpose.

To assist him with his presentation, Mr. Rothschild use a case study regarding a successful surgeon and real estate speculator who had amassed over $20 million over time, but felt he may be facing CERCLA environmental issues and/or pre-marital issues as he anticipated marriage to a woman 25 years his junior, Goldy Digger (I made that name up, but that was the implication). The doctor had other concerns about family members--chiefly his son's impending divorce. Someone had the doctor create a trust domiciled in the Cook Islands, with his sister as co-trustee with a Cook Island trust company; he also created a limited partnership with himself as the 1% GP and the 99% LP assigned to the foreign trust, along with his houses . All other assets (other than retirement plan and professional corp. stock) went into the limited partnership. Mr. Rothschild used the case study from time to time as he rendered a second opinion about this plan.

Mr. Rothschild focused first on domestic trusts in general, noting their advantages--avoiding probate, efficient asset transfers, confidentiality and protection from beneficiary creditors claims. But, there are disadvantages to many trusts also--fraudulent conveyance funding, too much settlor control, exposure created by settlor retained interest, etc. For maximum asset protection, one would use an independent trustee(s), trustee with full discretion re distributions, hold back powers in the trustee, spendthrift provisions, limited powers of appointment for beneficiaries, segregation of problem assets into separate trusts, trustee power to pay on behalf of beneficiary rather than distribute directly. He noted several specific trusts with asset protection aspects: discretionary trusts, support trusts (limited to health, support, and maintenance), credit shelter discretionary trusts, marital deduction limiting principal invasions and split interest trusts (CRTs, GRATs, QPRTs).

The speaker then pointed out that off-shore trusts in the Cook Islands and other jurisdictions around the world became haven for asset protection planning , but that 8 states now have legislation that provides such protection to a settlor-beneficiary of a discretionary trust, including Alaska, Delaware, Nevada, Rhode Island, Missouri, Utah, Oklahoma and South Dakota. He reviews and compares the statutes in these states over ten pages in the outline and I recommend those summaries to your attention. Mr. Rothschild did not speak about these statutes in his presentation, hoping that his outline would suffice. Obviously, the statutes are different in several details and therefore the choice of any one jurisdiction must take into consideration of these details and how they match up with the situation involved.

Mr. Rothschild discussed the effectiveness of offshore trusts and appeared to be a solid proponent of them. He indicated that, in his experience, those who have employed offshore trusts and were subsequently sued were able to settled suits on favorable terms, more favorable than might otherwise have been expected. For example, he cited Marine Midland -v- Portnoy, 201 Bank. 685 (1996, SDNY). The Court denied the discharge in bankruptcy, but the case has been settled favorably to the asset protected client. To increase the likelihood of successful asset protection, the plan should not involve all of the client's assets and the client should not be the trust protector (nor have control of the protector).

Mr. Rothschild indicated a preference for discretionary trusts over LLCs or FLPs for asset protection purposes in general, pointing out the value of the charging order remedy, but noting that the presence of a charging order often "freezes" distributions from such an entity, perhaps for years, whereas in a trust, the trustee can make discretionary distributions to the other beneficiaries without exposing assets to a judgment creditor of one particular beneficiary. Similarly, citing an Arizona example, he felt that a single member LLC could be vulnerable to satisfy a judgment against the member; he speculated that a court might take a similar view of a "single family" entity. He did offer that a combination of a foreign trust with a limited liability company might offer both protection and flexibility and he presented a chart of such an arrangement on page 40 of his outline, to which you might refer.

Mr. Rothschild covered some cases in which the "timing" of the planning was suspect by the courts and led to adverse consequences. See Bank of America
-v- Brian Weese, et al (2001, Cir. Ct. Baltimore County).

He noted that Dr. Ebone was in trouble on these scores also, since he is the GP of his LLP and since his sister is one of the 2 trustees on the Cook Island Trust. Mr. Rothschild that changes now might present a timing problem for Dr. Ebone, but suggested liquidation to a Swiss account in any event. He advised firing the doctor's sister and inserting a trust protector in Cook Island arrangement. He also suggested adding (or at least considering) a private placement life insurance policy offshore. He noted that changes to the Bankruptcy Code may have given a boost to foreign trusts. Section 548(e) has a 10 year provision that suggests that such trusts that are more than ten years old will not be subject to the court's powers; the advice was to get that 10 year clock running as soon as possible. Later, after the decade has run, the trust might even come back on shore without exposure, at least in one of the 8 states noted above. Finally, he suggested a Delaware QPRT for the doctor's home for both the doctor and his new spouse to put it out of his estate and beyond creditors. He even offered that giving the new spouse $2,000,000 might be a good idea, both to take advantage of her exemption amount and to start things off on the right foot. Finally, it was pretty clear that dynasty planning was assumed and sought in this case, as well as by Mr. Rothschild in generally.

The rest of the session was Q & A and while the discussion was interesting, there is little that was worth reporting on in this report.

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Fundamentals Program #3 - Elder Law: "Be Comfort to My Age!"
Thursday afternoon, 1/12/06
Presenter: Prof. Lawrence A. Frolik

Reporter: Herb Braverman Esq.

Professor Frolik of the University of Pittsburgh presented a survey course on elder law. He started his presentation by asking "what is later life?" He recalled that age 65 used to mean mandatory retirement, full social security and the gateway to old age. But now, a 65-year old woman has a 20 year life expectancy, while a man has a 16 year life expectancy on average. We have fewer years of chronic illness than previous generations. The numbers of elderly people is going up rapidly in our society. In another 10 years, as the boomers turn 60+, the trend will increase and in 20 years, the 80+ cohort will explode. Today, gerontologists refer to 65-75 as "the young old", 75-85 as "old" and 85+ as "the old old". As a result of the normal aging process, bodily functions lose efficiency, systems decrease-hearing, seeing, osteo, heart and dementia increases. Among the 85+, 20-40% will have dementia. The elderly need help from us. Even more so because of the break-up of the family. There are fewer children living in a more mobile society and because of divorce and other strains on marriage and the family, they have less and less a sense of loyalty and responsibility to their parents and other older relatives. The elderly now turn to professionals for assistance and advice---this gives rise to elder law, a cousin to estate planning with its own issues.

The first issue Dr. Frolik turned to was Medicare, because paying for health care is critically important to the elderly. A person becomes eligible for Medicare at 65 years of age, not sooner. There may be other welfare benefit programs for the younger ill person, but not Medicare. People who retire at 62 may give up their employer's health insurance program, but they cannot have Medicare until they reach 65; what do they do from 62 to 65. This issue may effect one's decision to retire. This is elder law.

Medicare has 4 parts: A,B,C and the new one, D. A is coverage for hospital and institutional medical care; B is for physicians' charges; C is now called Medicare Advantage and pays for health care delivered through managed care entities; and D is the new drug prescription program that just went into effect. Many persons who have Medicare part A also have Medigap insurance of some type. When part A pays for 80% of the care, Medigap pays for the 20% co-pay. Medicare Advantage is not as popular with the current older generation-they prefer to select their own medical care providers, but subsequent generations may be more comfortable with managed care and this program. The outline has more details on eligibility, etc., but since these are often adjusted from year to year, one should review these terms each year. Part D for prescriptions became effective on January 1, 2006. An individual who has Medicare A and B must enroll in a Prescription Drug Plan that has an agreement with Medicare to provide the statutorily defined drug benefits during the allowed enrollment period (Nov. 15 to May 15). This program indicates to Professor Frolik that as choice becomes a part of Medicare, more and more elderly will need professional advice regarding the details of choice.

Professor Frolik also spoke about housing for the elderly. He noted that people often leave their homes to retire somewhere where the weather is attractive and where they can play golf and engage in other activities. Later, when those same persons are no longer active, the retirement residence they chose with steps, etc., is no longer appropriate and they have to move again at a time when moving is not an easy exercise. The speaker suggested "aging in place" and merely adjusting one's current housing arrangement to meet future needs; he noted this often has economic, psychological and physiological advantages. He also spoke of adult day care as a tool to assist the home alone elderly or the concept of "house sharing", entering into a formal or informal arrangement with a relative who would live with the elderly and provide appropriate support.

Dr. Frolik discussed "age restricted" housing, where older persons can live among themselves without the raucous disturbances of the young. Some age controlled communities offer no services, facilities or real assistance to the resident, but some independent elderly prefer that arrangement. Of course, some day they will have to move to a more supportive environment unless they can rely upon family member or a geriatric social worker for support. The GSW is the "good daughter" many elderly wish they had--except this daughter gets paid by the hour to assist the aged. In some states, there is "congregate housing" which is age-restricted housing for the elderly that provides some level of nonmedical support services, like dining or recreational rooms. Then, "assisted living" facilities are there for those who can no longer live safely at home alone. These facilities provide meals, housekeeping, transportation, security, medication management, social and recreational services and assistance of other kinds. Those who reside in assisted living facilities have ADL deficits. ADL, activities of daily living, include bathing, toileting, eating, dressing and ambulating. If you cannot do one of these without assistance, you have a deficit. Assisted living facilities are heavily regulated by the state; more regulation, more expense. Similar to assisted living, in some states there are Board and Care homes, which are less formal, smaller and less regulated. B and C's were the forerunner of assisted living facilities. And there are Continuing Care Retirement Communities (CCRCs). These have various levels of care and one never has to move again. Start in your own apartment, move to assisted living when necessary and finish life in the nursing home section of the CCRC. These are usually inhabited by elder persons with means. The selection process is critical; due diligence is necessary. Will the CCRC be there in 25-35 years, when you really need it? These are excellent for couples, since there will come a time when they are in different areas of the facility, but still able to visit each other. Finally, there is the nursing home--heavy duty care and heavy duty cost at a time when the elder person has lost independence and autonomy. The nursing home is highly regulated by the federal and state governments (about 50% of nursing home income comes from Medicare/Medicaid). Life in the nursing home is regimented--you eat, sleep and _____to the schedule set by the home. But nursing homes are losing ground to assisted living facilities which do better with Alzheimers and because there are fewer maladies that really require the approach taken by the nursing homes. And nursing homes are truly expensive, perhaps between $60,000 and $70,000 a year. But, most residents of nursing homes are there for a very short term. The longer term residents (perhaps up to 5 years) are invariably women.

Professor Frolik noted that people are very concerned with the cost of nursing homes and with Medicaid planning which is intended to allow an elderly person to qualify for Medicaid benefits by transferring or otherwise getting rid of his/her assets. He noted that only 8% of the elderly are buying long term care insurance because coverage may be flawed and the premiums are high and increasing. For example, if one obtains a benefit of $150 a day--or $55,000 a year---for 4 years--that is $220,000. That is all you are insuring. If estate preservation is a goal, then maybe straight life insurance might be a better way to go. Of course, premiums for long term care insurance are partially deductible and having such insurance might give you priority entrance to a nursing home that can charge more to private pay residents. Dr. Frolik suggested reverse mortgage as a way to pay of costs of old age, including nursing home expense. These programs are guaranteed by the federal government and the mortgage is not repaid until the home is sold. There are other techniques noted in the outline, but Dr. Frolik wanted to spend some time in closing on Medicaid and the changes that are coming with the bill currently being debated in Congress.

Medicaid began in 1965 and it provides medical insurance for qualifying low-income individuals, including the aged, blind or disabled. It has become the largest source of funding for nursing homes. The outline should be consulted for a good deal of statistics and eligibility detail re Medicaid. Unfortunately, the new law being contemplated will mean an end to Medicaid planning such as you have been asked to provide to your clients from time to time. Why? First, the look back period for determine eligibility for Medicaid will be lengthened from 36 months to 60 months for transfers to trusts or otherwise. This is a long time period in this context. Furthermore, traditional Medicaid planning involved the "half a loaf" technique, giving $60,000 away to family and keeping $60,000 to pay for the one year period of ineligibility created by the transfer (based upon an assumed $5,000 a month cost of care X12 months= $60,000). This type of planning depended upon the period of ineligibility running from the date of the gift transfer. The new law will cause the ineligibility period to run from the date of the Medicaid application (the months one paid for with his/her own funds will not reduce the ineligibility period). No one has explained how many people will be paying for care during the ineligibility period as yet.

Professor Frolik had sections of his outline that he did not have a chance to comment upon. The outline is recommended to you for its detail and breadth of subject matter.

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News From The Exhibit Hall

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Lackner 6-in-1 Estate Administration System

Vince Lackner reports that the hottest thing with their products this year is the handling of every decoupled state estate tax return in the country
(15 of them, including NJ), plus 3 quai decoupled returns (CT, NE and WA), plus 4 inheritance/estate tax returns (IN, NJ, OH, PAF). That is 21 jurisdictions in total. They are in the process of adding IA, KY, OK and TN, which will give them coverage for all 25 jurisdictions that still impose a state death tax.

Their system also handles the calculation of the tax on property located in the non-domicilary states and the circular state death tax calculation that is required in IL, VA and WI.

Vince provided us with a three page list of features and benefits of his programs, which include the preparation of the Forms 706, 709 and 1041 and a Fiduciary Accounting. There is not enough room to list all of them here, but listed below are a few highlights that caught our attention.

1. Comes with both a basic and an advanced mode of data entry.
2. The screen displays are fully WYSIWYG.
3. It comes with a spell checker - what a plus - wish that more programs like this one had this feature
4. Draft watermarks with date and time stamps.
5. Detailed allocations of assets to beneficiaries 6. Built in library of over 91,000 securities with their CUSIP numbers.
7. Common phrase micro library.
8. Tax return forms for multiple years included.

WinDraft

WinDraft is an expert document assembly software system that was designed by the Dean of document assembly, Jim Eidelman, that works as an add-in to both Microsoft Word or WordPerfect (Word is preferred). One big plus of this system is that it is designed to use the user's own forms and language. They also sell EP Expert, which is an estate planning system for WinDraft. All the data is maintained in an Access database so the user can tell the system to track usage of specific articles or documents so that the database can be queried later to find clients who have used a certain planning strategy. WinDraft is also usable for other assembly systems, such as the Bank Loan Documents system the Company sells. While this system is relatively expensive, a discounted price of $2,495 was being offered during Heckerling as compared to the usual $4,995 price.

EstateWorks [www.estateworks.com]

EstateWorks is billed as the case management workflow solution to the estate planning and administration practice of law. The system gives professionals a simple system to track all cases, clients, deadlines, team assignments and workload, store documents, generate reports and deliver single data entry integrity. EstateWorks delivers world class workflow-based practice management solutions designed specifically for Trust and Estate professionals. It also provides bankers, lawyers, accountants and estate planning and settlement professionals with a system to track and streamline complex processes, information flow, and estate holdings. There is a free demo of their system on their Web site, and you are encouraged to go there for a lot more information than we have the time or space to provide here. The cost of this system is $900 per year per seat. The data in the system can be ported to a number of Form 706 software programs and to the state Inventory form, which eliminates the duplicate entry of data and the attendant errors that can produce. Although the data is stored on their IBM computers, users are encouraged to archive that data to their own PCs on a regular basis just to be safe. One has to question whether a system such as this makes sense economically for a solo practitioner or a small firm, but larger firms with a big T&E department can definitely benefit from a system like this.

West - Drafting Wills & Trust Agreements [www.west.thomson.com]

This document assembly software, which originally was designed to run in CAPS, was converted to GhostFill in 2004 and has been quite well received since then. To our knowledge, it currently is in Version 2.1.3 - June 2005. This update to version 2.1 of DWTA modified language related to state allocation methods offered in Plan One for the creation of shares/trusts, affecting the long-form will and revocable trust document types. In addition, certain interview dialogs were not retaining the answers provided during the interview, affecting the following dialogs: Trust B Details, Long Term GST Trust, and Add EGTRRA Item. The cost of this product starts at $895 and can be paid for monthly if that is desired.

On-Line Securities Valuation Services:

EVP - Estate Valuations & Pricing Systems, Inc. Financial Data Service, Inc. [www.financialdata.com] Wallace Historic Data CD [www.financialdata.com] Appraise - Evaluation Services, Inc. [www.appraisenj.com]

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Report #14

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains additional coverage of the Wednesday morning **Q&A Session** and coverage of the Thursday afternoon Special Session on **Succession Planning**

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Question and Answer Session
Wednesday morning Main Session, 1/11/06
Presenters: Dennis I. Belcher [DB], Prof. Jeffrey N. Pennell [JP] and Carol S. Harrington [CH]

Reporters: Jeff Weiler Esq. and Gene Zuspann Esq.

NOTE: This session was covered by two reporters to make sure we did not miss something important and to give our readers two different slants on what was said. The first report, which was done by Reporter Jeff Weiler Esq., was filed as part of Report No.5. The report below was done by Reporter Gene Zuspann Esq.

DB: Parallel GRATs - discussed on pgs 38-57 in current events material

A Revocable spousal interest - not mentioned in 2702 or the proposed regs but appeared in the final regs. The Schott case held that it had value and the Cook case that held it did not have value. The Walton case held that it did not have value and adopted the Cook approach

A parallel GRAT - Assume a $5mm estate
H and W create two $2mm GRATs for 2 year terms - one by H for W and one for W for H

After the initial term, the GRAT will continue for 25 years for spouse; will terminate at death or 25 years; Both H and W have a will that contains a provision that can terminate GRAT. A 6% GRAT has a 47% (later mentioned
37%) value. It is important that the will contain a power to revoke if the spouse dies in the 25 year term because this portion of the GRAT will not qualify for a gift tax marital deduction.

Want to have a sufficiently long term that the settlor is expected to live. The children will win if the settlor's spouse dies during the 25 year term. The Service takes the position that the settlor's right to revoke can only last during the two year term. Covey says service is wrong. Dennis sides with

Covey because he tried the Walton Case.

Parallel GRATs work where the grantors need the funds.

CH: Discussed the 675(4) power to reacquire property.

The power must not be held in a fiduciary capacity. The rumor is that the service will not rule where it is held in a fiduciary capacity. Jordahl case involved the power held in a fiduciary capacity. Carol says drafting should say the power is held in a non-fiduciary capacity. She does not know how relevant this is because service has discretion to rule.

Some suggest a third party have this power; Carol is not comfortable with this - the statute states that the someone must reacquire property and how can this happen when they did not have it in the first place.

JP: Is there a 2036 problem?

The portion rules under the 671 regs.

Different grantor trust provisions cause the owner to be taxed on different portions of the income; the drafter must be aware of what the grantor needs to be taxed on. If you only want cap gains but not ord income to be taxable to the grantor, you could use 677(a)(1), however, this would cause estate tax inclusion. Losses are captured in the entity until termination. The regs apply a DNI module. You must read the regulations. Grantor trust rules were drafted at a time when they were meant to punish the grantor.

DB: What special provisions would you include in a grantor trust if the grantor is a corporate insider.

Sec 16(b) of the SEC Exch Act of 1934 provides for the recovery of insider profits. A problem would exist under 675(4) language. Initially there is authority that the SEC would not take any action because this is a GRAT. DB believes that a power to reacquire is problematic when dealing with a corporate insider and that you use come other power to cause the grantor trust status. You could provide that an annuity payment will come from income and then principal. Issue - does the termination of the payment cause the grantor trust status to terminate - it probably should not.

JP: Reciprocal trust doctrine - whether it can apply outside the context of 2036 (Grace Case). Does it apply to reciprocal ILITs.

Q is what is necessary to eliminate the reciprocal trust status and what difference in terms is necessary. The Q dealt with a specific fact situation - each trust had distributions to the spouse under standards but one had a cap. Jeff is not comfortable with what differences are necessary to avoid reciprocal trust status..

CH: FLP's Will you continue to use them for existing planning and what do you do with the ones you have.

Respect the ones that you have. Liquidation should be honored. Give up holding any interest as a GP and get out of controlling distributions; CH does not feel that controlling investments is a 2036 power. Get rid of units to the extent possible; if the grantor needs the benefits, sell them to a IDIT and keep a stream of payments

DB: - going forward -

Can gifted partnership interests be pulled back into the estate under 2036? Yes if Senda, Abraham, etc.situations that there is an implied agreement that the grantor will receive a benefit. If the grantor holds all or substantial interest in the GP, may have a 2036 issue to the gifts. This is especially true if the partnership consists mostly of financial assets. In this case, the grantor should never have control over the GP.

Do you have to get rid of all of your GP interests to avoid 2036(a)(2)?
Maybe yes.

If the client has a business operations, then he is less worried abut 2036. The cases seem to support this view. What is happening in the last
5 years is that the bar is getting higher to qualify and you need to tell the client about the risk.

JP: Section 2043: Transfers for insufficient consideration - issue is why have they not been pursuing this tract.

Response is that they have never studied 2043. This would be applicable in the Abraham case.

If 2036 applies - transfer of underlying assets come back in because of retained control or enjoyment. Congress used 2043 to remedy the effect of double taxation. IRS worried that 2043 is so bad that they fear raising
2043 because the court may reject 2036.

Hypo: G transfers assets to an entity but only receives back 99% of the value of the assets. Under 2036, all assets are still in the estate because I missed value. If close to death, this does not work because the value is 100%. However, if the assets have doubled, there is a major problem. 200% is includible but 2043 only reduces the estate by 99% that was in the original deal. Get rid of the FLP interests so that you no longer have the 2033 inclusion.

DB: If $1m bond portfolio put in FLP and after death a 30% discount is approved, does the FLP have to elect 754?

The answer is no (unless the election has previously been made). You can revoke a 754 election - (I don't think this is correct). Be careful before you make a 754 election.

CH: GST questions

CLAT has no charity named as bene; no direct skip because no one has an interest.

Discussed the family rules and the assignment of generation. If family rules, they apply based upon the generational relationship within the family. However, if the beneficiary is not family then you use age. Family rules trump the non-family rules, so adoption will cause family rules to be applicable. The issue is what generation is a person is assigned to when there in an adoption of an adult and Carol does not know how generation assignment rules will work.

There is a glitch in the new rules regarding adoption. If a person adopts a cousin, the person will not be treated as a child. The key in all of these decisions is to put the decisions off until, hopefully, we will know the status of the tax. Realize that the system will probably be different and that flexibility is necessary.

JP: Decoupling - the question mentions NY.

Can the Grantor give the trustee the power to increase the amount passing to the credit shelter trust. Some equalizer clauses were challenged because, at the date of death, you did not know how much goes to the surviving spouse. This challenge was lost because the use of a formula determined the amount. The proposal is that the amount would be discretionary at the date of death. JP is not comfortable with this power because the amount would discretionary after the death. Better opportunity is to modify the amount under the QTIP language.

CH: Where the surviving spouse has the power to make elections; should this ever cause a taxable gift?

Yesterday, Ron Aucutt said no and Carol agrees with this. However there us no guidance available.

DB: What should an attorney do about drafting when it affects taxes in other states where the other state is decoupled?

Do you draft where the client is resident in decoupled state? (pg 36 of current events) The issue is unauthorized practice of law and your competence to draft for client in another state. If there is any question, you need to have an attorney in the other state prepare the documents.

CH: Severance.

If a document does not contain language allowing severance, then each of the severed trusts must contain the same provisions. However, if some gift tax exclusion and some GST allocations have been made, splitting each evenly creates problems. Remember that you can allocate GST exemption without using any gift tax exclusion. Carol now drafts for split up of any trust, either family or marital.

In a decoupled state, where an old formula uses the smallest amount to reduce the federal tax to zero using state death tax credit. Should the formula now say "using the state death tax deduction?" Carol does not believe so and to just ignore the credit because it no longer exists. A problem exists where there is still a state death tax yet there is no deduction in the family trust. The answer is to change the formula and decide how you need to plan. CH is putting the decision off. She believes that repeal is gone but she is not sure where the rates will be in several years. In the very wealthy, many are considering changing domicile to avoid potential state estate taxes.

JP: Jeff believes that the government use of the relief of obligation of support is wrong but it is sprinkled though out the regs. This would be not be true if the distributions by the parent must be under standards.

DB: The last question involved a QPRT under NY law. The panel responded that the questioner needed to hire a NY attorney.

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Case Studies in Succession Planning: Addressing Generation-Specific Issues with Family Business Clients Thursday afternoon Special Session III-C
Presenter: Mike Cohn

Reporter: Paul Hood Esq.

Mr. Cohn spent his time on two family business succession case studies from his experience. He demonstrated that through the use of family councils, outside directors and family "white papers" or constitutions one could solve some rather vexing intergenerational succession problems.

For more details, our readers are referred to Barbara Dalvano's report on Mr. Cohn's main session on Thursday morning that is contained in Report No. 9.

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News From The Exhibit Hall
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Now that the Institute is over, we have reviewed out notes to see what vendors we were not able to cover or who did not submit any information to us on which we could report. We wanted to list those vendors here and their Web site URLs in case any of you might have an interest in one of their particular products:

HotDocs [www.hotdocs.com] - popular document assembly engine - used by WTP and WealthDocs

GhostFill [www.ghostfill.com] - another popular document assembly engine - used by DWTA and Amicus

Connect2A [www.connect2A.com] - EP client collaboration via the Internet

Capital Trust Company of Delaware [www.ctcdelaware.com] - planning summaries and presentations

Mercer Capital [www.mercercapital.com] - business valuations and investments banking

Foundation Source [www.foundationsource.com] - back-office support services for private foundations

Leimberg Information Services, Inc. {LISI] [www.leimbergservices.com] - provider of e-Newsletters for Estate Planning, Employee Benefits and Retirement Planning, Business Entities, Asset Protection Planning, Financial Planning and Charitable Planning, as well as the LawThreads(r) news service, Actual Text, State Laws, and US Code Searchers, and Supersearcher tools. All this for only $24.95 per month (that's $300 per year rounded).

Practitioner's Publishing Company (PPC) [www.ppc.thomson.com] - tax and accounting solutions and services

ProDoc [www.prodoc.com] - estate administration document assembly system for Texas and Florida

Thomson RIA [www.ria.thomson.com] - tax research and software resources for tax and accounting professionals, including Fast-Tax Forms 706, 709 and 1041software

Thomson West [www.west.thomson.com] - tax research and software resources for tax and accounting professionals, including Westlaw research and IEP estate planning software

U.S. Trust - [www.ustrust.com] - Practical Drafting by Richard Covey, a quarterly publication available in print and on CD, plus EP Forms and Estate Planner's Toolbox

The Weinberg Group
[www.theweinberggroup.com] - Wealth Transfer Plan Design and Funding; Life Insurance Consultant and Expert Witness; and Business, Commercial, and Trust & Estate Mediation"

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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Brought to you by the ABA-PTL Discussion List Moderators

Report 14 A

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

As we have done in January for the last nine years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 40th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 9-13, 2006 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.

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This Report contains some errata to certain portions of the report that was included in the original Report No. 14 dealing with the Wednesday morning Q&A Session and Prof. Pennell's comments that were made at that time about IRC Section 2043. For the sake of completeness on this issue, we are also including below, in addition to this errata, the **additional comments that were made about this Code Section by another reporter in Report No. 5 as well as (with permission) the detailed comments of Prof. Pennell about this Section from his Recent Developments materials.**

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Question and Answer Session
Wednesday morning Main Session, 1/11/06
Presenters: Dennis I. Belcher [DB], Prof. Jeffrey N. Pennell [JP] and Carol S. Harrington [CH]

Reporters: Jeff Weiler Esq. and Gene Zuspann Esq.

1) Report filed by Jeff Weiler Esq. contained in Report No. 5

JP: IRC Section 2043 and application to FLP's (Reporter: warning this is real bad news!). If taxpayer loses on FLP IRC Section 2036, estate may not be back to square one and may be in much worse shape. JP has provided the following information to IRS agents at classes that he has presented. He notes that the IRS has not pursued this issue to date. He speculates that the results are so bad for the taxpayer that the IRS may be concerned that a court will back off on the IRC Section 2036 argument to avoid having the taxpayer subject to the application of IRC Section 2043. This involves the relationship between the purge and credit rule in IRC Section 2001 (b) where an asset is brought back into the gross estate and the previous gift of the assets is eliminated from the estate tax calculation. Assume IRC Section 2036 applies. First the asset owned at the date of death is included in the gross estate under IRC Section 2033. Then under IRC Section 2036, the transfer of assets is brought into the gross estate due to retained control or enjoyment. There is a double inclusion of assets in the gross estate unless there is an adjustment. IRC Section 2043 provides an adjustment but it does not work correctly for the taxpayer. The value of the adjustment, or offset, is based on the

value at the time of transfer.
The taxpayer's benefit is based on the value of assets at the time of transfer. If the assets brought back into the gross estate have appreciated since the time of the original transfer the "offset" is only the original value. If there is death shortly after the original transfer, with little appreciation is assets, the impact should not be too bad. However, in older FLP where time has elapsed and the value of assets has appreciated, the estate will get hit hard. Solution: get rid of FLP so no IRC Section 2033 inclusion at death.

2) Edited version of report by Gene Zuspann Esq. contained in Report No. 14 (edits in italics - supplied by Prof. Pennell)

JP: Section 2043: Transfers for insufficient consideration - issue is why have they not been pursuing this tract.

Response is that they have never studied 2043. This would not be applicable in the Abraham case, which did not involve a transfer for consideration relating to the 2036(a) application in that case. In Abraham the concept to apply would be the purge credit rule in 2001(b).

If 2036 applies in the more traditional FLP case - transfer of underlying assets come back in because of retained control or enjoyment. In addition, the interest received on creation (or their proceeds) also are includible, which constitutes double inclusion. Congress used 2043 to remedy the effect of double taxation.

IRS worried that 2043 is so bad that they fear raising 2043 because the court may reject 2036.

Hypo: G transfers assets to an entity but only receives back 99% of the value of the assets transferred. Under 2036, all transferred assets are still in the estate because I missed value. If close to death, this does not matter because the value of the consideration offset is probably no different than the amount includible. However, if the transferred assets have doubled before death, there is a major problem. 200% of the value originally transferred is includible but 2043 only reduces the estate by the fair market value that was in the original deal - the fair market value of what was received on creation - which is half the amount includible at death. To avoid this issue you should get rid of the FLP interests so that you no longer have the 2036 inclusion.

3) Detailed comments by Prof. Pennell on Section 2043 from his Recent Developments materials.

There is a final element of some apparent significance that should be addressed, although it has not been on the radar of any of these cases. It is demonstrably not well understood, involving a section of the Code that hardly ever is taught and about which most experts have limited knowledge.
In addition, it may be off the radar because (1) death occurred so quickly after any life time transfers that it didn't matter, (2) perhaps because no party thought to raise it, or (3) because the implications of it are so apparently inequitable that even the government is afraid to raise it, for fear of a backlash in the courts. Assume that §2036(a) properly applies to drag into the decedent’s gross estate the estate tax value of all assets transferred into the partnership. The critical element then becomes the rule in §2043 (the consideration offset rule) that is meant to prevent inappropriate double taxation.
The gist of this little known provision is:
if a taxpayer engages in a transaction for less than full and adequate consideration, and the transferred property is includible in the gross estate at death, then the consideration received should not also be subject to estate tax. That is, the taxpayer should be treated as if the transaction never

occurred. The double tax consequence is meant to be avoided by operation of §2043, which provides that the transferred property is brought back into the decedent's estate as if there never was a transfer, and the consideration received in the transaction is excluded from the gross estate.

The problem is that the §2043 "offset" (it really works like a deduction) does not work "properly," simply because Congress does not want to impose on anyone the requirement to trace the consideration received, to identify it at death as the property that ought to be excluded if the transferred property is included. So the rule works like this: all property owned by the decedent at death is includible in the gross estate, even the consideration received in the transaction, and then the value of the consideration received is excluded. The problem is: the exclusion is measured only by the value of the consideration received as of the date of the transaction, not the value of that consideration as finally determined for federal estate tax purposes. To do otherwise would require tracing the consideration received, which §2043 is meant to avoid.

To illustrate, assume that the property transferred was worth $100x on the date of transfer, and that the consideration received was worth $99x on the date of the transfer. Also assume that each doubled in value over the taxpayer's remaining life. Includible at death will be the estate tax value of the consideration received and still owned at death ($198x) along with the full estate tax value of the property transferred (another $200x) and the consideration offset will subtract the value of the property received at the time of the transfer ($99x), which leaves all the appreciation in the consideration received in the gross estate. Maybe that growth was minimal, because the consideration received is a partnership interest with restrictions that limit the value for federal estate tax purposes, but any appreciation in the property received is improperly includible in the gross estate. And this is the result any time the consideration received is even a peppercorn shy of full and adequate. If §2036(a) applies at all, the result is full inclusion of the transferred property, full inclusion of the consideration received, and the consideration offset using date of transfer values. The Tax Court opinion in Strangi II correctly notes that includible may be a percentage of the partnership assets at death, rather than a pure tracing of the actual assets transferred by the decedent into the partnership, but the question is not addressed in the appellate court opinion and in most cases there will be little or no difference because little time, reinvestment, or contribution by others was involved.

There is an added bit of discomfort in the way these rules operate. If the transaction was conducted in a year in which the taxpayer and the taxpayer's spouse split gifts (for example, because immediately following creation of the partnership the taxpayer made annual exclusion (or unified credit sheltered) gifts of the partnership interests received), the result of §2036(a) inclusion of the transferred property is as if no transaction had occurred. In that case both the decedent and the surviving spouse ought to be restored to the positions they would have been in had there been no transaction, and no subsequent gifts of partnership interests. The Code accomplishes this result for the decedent under the "purge and credit"
rules of §2001(b), and the Code ought to (it really seeks to) accomplish the same thing for the surviving spouse under §§2001(d) and 2001(e).
Unfortunately, those provisions fail in the objective, most notably §2001(e), which only works the intended purge and credit for the consenting spouse in a split gift situation if inclusion at the taxpayer's death is under §2035. This rule does not apply at all if the taxpayer who was the original transferor generates inclusion under any of the other string provisions, such as §2036 or §2038. In addition, the rule in §2001(e) does not work at all for the consenting spouse's subsequent gift tax purposes:
it only even purports to restore the spouse for subsequent estate tax purposes, when the consenting,

surviving spouse subsequently dies. So gift splitting in the wake of (or coincident with) a botched transaction that is caught by §2036(a) is especially ugly for the consenting spouse.

A final bit of mess is created by the Tax Court in Thompson and probably wrongly decided as well, although this element is much more uncertain. This relates to the taxpayer's subsequent gifts of the partnership interests received in exchange for the lifetime transfer that is ignored at death.
The question is whether there should be a purge of any subsequent transfer of the consideration received in the transaction, so as to put the taxpayer back in the same position as if no transaction had occurred. That is, if
§2036(a) operates to treat the taxpayer as if no transfers had been made, should the system also work as if no partnership interests had been created or subsequently given away? The Thompson Tax Court permitted a §2001(b) purge of the decedent's subsequent gifts of those partnership interests, which seems inappropriate.

Consider an "extreme" case that illustrates the point: The taxpayer transferred $100x of marketable securities and real estate to the Taxpayer Family Limited Partnership and received TFLP interests in exchange. We can assume that no gift was made on that original transfer, so there is no purge-and-credit operation of §2001(b) from this first transaction. (Let's also assume that, notwithstanding the no-gift character of this initial transfer, the government successfully argues the §2036(a) case at the taxpayer's death and defeats the taxpayer's full and adequate consideration exception argument.)

So the taxpayer has TFLP interests and, instead of giving them away, holds them until years later the taxpayer finds someone who will exchange X Corporation stock for the TFLP interests. X Corp. then declares dividends in cash, dividends in stock, and declares a stock split. Meanwhile the taxpayer acquires Y Corporation using other wealth, and then X Corp. merges with Y Corp., after which they are bought by Z Corp., which issues Z Corp.
stock in the deal. Thereafter the taxpayer sells the Z stock and invests the proceeds in Blackacre, and then swaps Blackacre for Greenacre, and finally purchases adjoining land to create Farmacre and ultimately makes a fractional interest gift of an undivided interest in Farmacre (or incorporates Farmacre and gives stock in the new farm corporation).

Meanwhile the assets in TFLP have grown and have been invested and reinvested, so nothing looks the same at the taxpayer's death as it did at the time of the original transfer. The intended operation of §2036(a) is to ignore the transfer into the partnership and include the estate tax value of the transferred assets, as if the taxpayer never engaged in any of this.
In this case the inclusion rule probably will be applied to the partnership the way it is applied to a trust in such a case, meaning that the decedent's pro rata percentage of the value of the partnership assets held at death, reflecting all the partnership investment and reinvestment changes, will be includible rather than trying to identify and trace and value the actual assets transferred. But that's not our issue.

The question raised in Thompson relates to the gift of the fractional interest in Farmacre (or the stock in Farm Corp.), the distant relative of the consideration received in the original transfer that §2036(a) is ignoring and that §2043 is going to make right. The Tax Court in Thompson said that the gift made of Farmacre or Farm Corp. stock should be removed from the taxpayer's gift tax base because, if the transaction never had occurred, the taxpayer never would have had that asset to give away during life, and treatment as if the transfer never occurred is what §2036(a) and then the purge-and-credit rule in §2001(b) is all about. That is easy to do if the taxpayer just holds TFLP interests and makes a gift of some of them and then dies. But because facts can be as complex as the illustration, this system is not meant to work as the Tax Court applied it.

The Tax Court result requires a tracing through all the permutations to identify the proceeds of the original transfer to know that Farmacre or Farm Corp. stock was the consideration received. How do we know in such a case that the gift of Farmacre was not the product of the Y stock that the taxpayer merged with X Corp. and then sold to Z Corp., or the adjoining land to Greenacre that was used to constitute Farmacre?

To avoid all this the simple rule in §2043 says to just apply all the gift and estate tax rules as if nothing was being included under §2036(a) and then, to make everything right, we'll just reduce the gross estate by the value of the consideration received in the first transaction, valued at that time so we don't need to trace or identify or revalue. That offset is meant to treat the decedent's estate as if nothing was received (or subsequently owned or given away), and that exclusion/deduction/offset is the sole mechanism that is needed or available to make things right.
Indeed, it works this way even if the consideration has declined in value rather than having appreciated or, indeed, if none of the actual consideration is still owned at death. Sure, you say, it looks like a gift of TFLP interests following creation of the partnership constitutes double taxation if the partnership assets are included in the taxpayer's estate at death as if the transfer never occurred, but as seen the system is set up to deal with that in a far more administrable manner. It just doesn't often/always work as cleanly or "fairly" as some might like. The Tax Court result in Thompson may appear to be "right," but it is improper under the rules as they are written and likely impossible to administer in complex cases.

In the FLP context proper application of §2043 could be catastrophic and may show that those who have said that these are "no lose" transactions (you either get a discount or you're no worse off than if you had done
nothing) may be dramatically wrong. Avoiding §2036(a)(2) requires that the taxpayer never had control or divested it and outlived the §2035(a) three year period, or otherwise avoided that rule, perhaps by a sale to an intentionally defective grantor trust to avoid gain, so as to trigger the §2035(d) full and adequate consideration exception. In that regard it pays to remember that, in a proper §2035(d) analysis, the evaluation whether any consideration was "full and adequate" is whether the taxpayer received an amount equal to the amount that would have been includible in the decedent's gross estate at death had no §2035(a) transfer occurred during life.[1] Any consideration received must be adequate to replace the wealth that would have been includible had the decedent done nothing during life.
For example, with a life insurance policy it is not the interpolated terminal reserve or gift tax value but, rather, an amount equal to the full proceeds that would have been §2042(2) includible.

[1]. See United States v. Allen, 293 F.2d 916 (10th Cir. 1961); Estate of Pritchard v. Commissioner, 4 T.C. 204 (1944).

We want to thank Prof. Pennell for taking the time to assist us with clarifications of our reports on this subject and for supplying us with his most helpful Recent Developments summary regarding the same.

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Report #15

A complete listing of the proceedings and speakers is available on **the Institute's Web site**

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This Report is our **final** one for 2006. It lists the sessions that were not reported on for a variety of reasons, but take note that some of these sessions were mere extensions of the main sessions that were previously presented. It also contains a collection of all of the comments that we previously made about technology resources for estate planners in the previous 14 Reports that have been published so that those of you who have a particular interest in this subject area will have all this information in one convenient place. In addition, at the end, we have added a listing taken from various discussion lists of the Form 706, 709 and 1041 software programs that are currently available and from whom so you can pursue this information further, as many of us are currently actively searching for new vendors for this sort of software due to the acquisition of the Zane and Shepards-West and ProBATE return preparation software products by Thomson RIA's Fast-Tax software division over the last two years or so.

Don't forget, next year the Heckerling Institute will take place in Orlando, Florida. The dates are January 8-12, 2007. The HQ hotel will be The Orlando World Center Marriott. See you then.

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Sessions That Were Not Reported On
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Tues. a.m. - "Grantors Are From Mars, Grantor Trusts Are From Venus" by Samuel A. Donaldson Wed. a.m. - "Foreign Affairs 101: Planning for U.S. Clients with Foreign Property" by M. Read Moore Wed. p.m., SS I-A - "Uncle Sam: The Silent But ever-Present Party at the Estate and Trust Dispute Settlement Table" by Donald R. Tescher and Laird A. Lile Wed. p.m., SS I-F - "Alternative Investments: Promise or Peril" by Susan M.
Mangiero
Wed. p.m., SS 2-E - "How to Keep From Throwing Uncle Joe (and His Successors to the Dogs" by Kimbrough Street Thur. a.m. - "Business Succession Planning: The Charitable Options" by Daniel L. Daniels and David T. Leibell (see additional coverage in Special Session 4-D, Report No. 11) Thur. p.m., SS 3-A - "Trust Law and Order: A Mock Trial Demonstration Ripped From the Headlines" by Terrance M. Franklin, Bruce S. Ross, Domiinic J. Campisi, Robert N. Sacks and Steven K. Mignogna (see continuation coverage in Special Session 4-A, Report No. 11) Thur. p.m., SS III-F - "Evaluating Insurance Products" by Jon J. Gallo and Lawrence Brody Thur. p.m., SS 4-C - "Ich Glueckspilz...! What To Do When Your Clients Inherit Foreign Property or Become beneficiaries of Foreign Trusts" by M.
Read Moore and Samuel A. Donaldson

Thur. p.m., SS 4-F - "We Interrupt This Program to Bring You a Special Announcement: The CEO is now Reporting to You' by Robert A. Stolar

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Collection of Software Comments From Reports 1 through 14

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From Report No. 1

Wealth Transfer Planning is now being marketed by Interactive Legal Systems [info@ILSDocs.com] is here again, this time with a fully operational HotDocs version of their WTP assembly engine. In fact WTP has developed some special proprietary HotDocs functionality just for their program. They had a choice of going with HotDocs or GhostFill and chose HotDocs. The user can modify the language in the forms and the system now comes with community property forms that were developed by Michael Graham, a co-owner, who practices law in Dallas, Texas, a community property state. Nicole Splitter formerly of US Trust has now joined the WTP sales staff, and Patricia McLelland, who has been with WTP since its inception, is still with the Company and here in Miami.

The hot talk of the day is all about GEMS, the tax return and fiduciary accounting software that was developed by Gillett Publishing, LLC www.gillettpublishing.com. Currently they have three programs, GEM706,
GEM709 and GEMAcct. Mark Gillett, the President of the Company, advises that they have decided not to do a GEM1041 program even though Mark produced one for years for Shepards, then West, so we will have to look elsewhere for such a program. Hopefully we can cover some of the available options in that regard in later Reports. People who have purchased the GEMS system (it is not sold in separate modules) have been very pleased with it and how user friendly it is, which is no surprise given how well Mark developed the comparable programs for Shepards, then West, in the past. This is one set of programs that are well worth a look-see if you do not have one or are using ones you do not like, and the company is offering a discount price of $895 during the Institute and until January 15th, including for our readers.

Trusts & Estates magazine has just announced the premier (1/9/06) issue of the "Trusts & Estates Newsletter" and is making it available on-line exclusively to subscribers to Trusts & Estates magazine and for free. More information about this new publication can be obtained from Prism Business Media at Booth #103 at Heckerling.

Cannon Financial Institute has just announced the lineup for its monthly Estate Planning Teleconference Series for 2006. This series starts off on, Tuesday, January 24th, with the topic "Understanding Beneficiaries' Rights Under Trust Documents and Local Law." The presenters are none other than Roy M. Adams and Charles ("Clary") A. Redd, both of Sonnenschein, Nath & Rosenthal, LLP. Both Roy and Clary are presenters at this year's Institute. Roy is doing the Friday morning session on Circular 230 and Clary is doing the Thursday afternoon Special Session 3-E on Circular 230.

From Report No. 2

From WealthCounsel (www.wealthcounsel.com) comes the news that they are demonstrating the latest version of their document drafting system, WealthDocs 6.2, which is being released this quarter at Heckerling. WealthDocs 6.2 is an upgrade of WealthDocs 6.1 that was first released at

Heckerling in 2005. More details on this new release will be forthcoming later. The main reason for this announcement is to let you all know about the "Thriving in Estate Planning Practice Model" presentation that WealthCounsel is presenting on Wednesday, January 11th, from 6:00 to 7:00 p.m. in the Imperial I room of the Fontainebleau Hotel. To attend, contact the WealthCounsel booth at Heckerling (Nos 18 and 19) or fax your name and phone number to 1-888-292-6126. This presentation is going to be done by Stan Miller of Miller & Schrader, PA in Little Rock, AR. This is described as a simple yet exciting Practice Model for working more effectively as an attorney-advisor team using the power of collaboration between the attorney and financial advisors in together designing solution sets that can include both insurance and financial products as well as legal solutions. Sounds interesting.

Schumaker Publishing, Inc. has some Year 2006 specials currently going on. One, they are selling a value pack of 250 copies of one of their Quick-Read brochure of your choice for only $212.50 plus $20 s/h (a savings of $49). Two, they are selling 250 copies of their Client Newsletter for $212.50 plus $20 s/h (a savings of $49). Third, they are selling 100 of their brochures or newsletters free with every one of their Powerpoint Seminars that is purchased, a $100 value. These offers are good until 1/31/06. For free samples and pricing information, visit www.estateplanning.com/specials.

From Report No. 3

Brentmark Software [www.brentmark.com]:

They are working on an enhanced version of their popular EP Tools program to include a module that will calculate the state inheritance or estate taxes for each of the 50 states, realizing that some of those state were gap tax states never decoupled from the federal credit, such that they no longer have a death tax. When this module is does , it will also be integrated into their Kugler financial planning program.

Intuitive Estate Planner [www.west.thomson.com]

Version 9 was released in December of 2005. The most significant enhancement is the ability to calculate state death taxes for up to three states. The best part of the program is the handling of decoupled states. The program also now has the ability to look at the cash flows of numerous trusts and pension alternatives all at once and then integrate the effect of this into the calculations for taxes and liquidity. The results can be printed to PDF or RTF files for editing or electronic transmission to clients.

CCH ViewPlan Advanced [www.cchgroup.com]

At the present time this product is on hold except for fixing any problems or basic enhancements, as they are waiting for Congress to decide on the future of the death tax. We assume this means than any updates that are shipped out between now and then will be nominal in cost since they will not be a full annual update.

From Report No. 4

Lawgic [www.lawgic.com]

Lawgic now has forms modules for Florida, California, New York, Maryland and Georgia.

Additional state modules are under consideration. The price normally is $1,500 per year, but the show price is $1,350 for the first year. You can also purchase this on the monthly plan at the rate of $150 per month ($137.50 during the show). A sample CD is available at their booth.

Authoritative.net [authoritative.net]

This company is new this year. They produce a file management system for small and medium size firms. It works with your existing file system and they can integrate that system into their program. It allows the user to preview documents just by pointing to them in the system to identify the file without opening the native program. It has a very good search tool and will use one of theirs or allow the user to select a different search tool such as Google, Microsoft and others. They have two versions, standard and professional. The cost is under $200 for the professional version and about $75 for the standard version.

Attorney's Will Registry (AWR) [www.attorneyswillregistry.com]

This company is also new this year. Their Web site is advertised as a worldwide registry of wills, trusts and other legal documents that is centrally located and accessible at any time. They do not store the actual document, only the information that is submitted by the attorney or the client (typically name, date of birth and address), which can be done on-line or by fax or mail. While clients can do this directly, they encourage the use of an attorney to do this. The Registration cost is $15 per document. Searches cost $10 per search and there is no charge for an unsuccessful search. Their Privacy Statement on their Web site is understandably three pages long. Their contact information is c/o Salt Lake City, but as far as we can tell this registry is in no way connected with the Mormon Church family registries that are also located there. The "About Us" link on their Web site is currently not active, so we are not able to find out anything more about this company and its principals by that method. For those of you who are familiar with DocuBank [www.docubank.com] and how it provides access to living wills and health care documents for your clients will find the AWR model to be very similar except AWR will not have the actual documents on file and currently does not charge an annual membership fee.

From Report No. 5

Wealth Transfer Planning ["Interactive Legal Systems" info@ILSDocs.com]

They are working Brentmark to integrate their Estate Planning Tools and NumberCrucher programs with WTP. Phase I will be completed in January and shipped to WTP users as no charge then. Subscribers must be using the 2006 version of the Brentmark programs. They will also have an automatic updating service by February. New features include an extensive no-contest option for wills and revocable trusts and completely updated planning memos. Lastly, they have added a SNT to their forms library.

BNA Estate and Gift Tax [www.bna.com]

Their calculation program now has state calculations for decoupled states included in it. This program is very popular for its's spreadsheet look and feel and how easy it is to do three-column what-if comparisons for a given set of facts for a married couple, including with an instant reverse order of deaths calculation feature. BNA also has a feature that comes with a subscription to its Tax Management EGT Portfolios whereby the user can gain instant on-line access to the portfolios, Code and regulations.

Lexis/Nexis [www.hotdocs.com and www.lexisnexis.com]

No word on any pending upgrades to their current line of HotDocs products, which are HotDocs 2005 and HotDocs 6.1 and 6.2. Maybe the folks over at Wealth Transfer Planning or WealthCounsel know something we don't know. Lexis does have a flat rate Tax Library that allows a user to ahve access to all the primary sources, administrative materials from the IRS, and state administrative codes, as well as dozens of secondary sources. The cost for a single user is 225 per month.

From Report No. 6

GEMS

Talk about timely technical support, take a look at this little GEM that hit the airwaves today:

Date: Thu, 12 Jan 2006 14:22:13 -0600 (CST)
From: "GEMS" <gems@neb.rr.com>
To: <Support@gillettpublishing.com>
Subject: GEMS UPDATE NOTIFICATION - GEMS 709

To all GEMS Users,

Yesterday afternoon we discovered a minor calculation issue in our newly released GEM709 program and have posted an update to our website this morning to correct the issue. The update makes a correction to the tax computations on the 709, page 1, lines 4 and 5 for amounts LESS than $10,000 on lines 2 and 3. We apologize for this inconvenience. Our corporate policy is to immediately update GEMS if an issue is discovered and to inform our users as quickly as possible. We appreciate your understanding and will continue to strive to give you the very best products and support.

Report No. 7 - No Software Report

Report No. 8 - No Software Report

From Report No. 9

TEdec Systems Inc. [www.tedec.com]

TEdec has just announced the release of Version 6.2 of it's Windows based Fiduciary Accounting System. Their Web site provides additional information, sample reports and a slide show showing how easy TEdec is to use. For the first time, TEdec is building bridges to the Lacerte Form 1041 (1/06) and Form 706 (9/06) programs, a very welcome addition to their product line. The software is designed for ease of use by legal assistants. This is accomplished by such things as one-time entry, standard transaction descriptions, pre-coding of all transactions, and point and shoot menus. For training TEdec provides both a hands-on tutorial and on-side and regional training sessions. A single use version costs $545. Network versions are also available ranging from $795 (2 to 5) up to $1,145 (10 or more). The President and CEO of TEdec, Teddar Brooks, has been in this business almost since the inception of software for preparing fiduciary accountings and the fact that he has stayed the course all this time is a testament to the quality and longevity of the product his Company provides.

WealthCounsel LLC - WealthDocs - [https://www.wealthcounsel.com/]

Highlights from their 2005 year include the introduction of the WealthCounsel asset Transfer System (WDATS), the introduction of the joining of forces with the Business Enterprise Institute, and updated and improvements in their WealthDocs document assembly software. The current version of their software is 6.1, which has included since inception documents for revocable living trusts, ILITs, QPRTs, Intervivos QPRTs, Third-Party Special Needs trusts, Charitable Lead Trusts, Charitable Remainder trusts, Private Foundations (both trust and corporate) and FLPs. During 2005 the software was updated with Retirement Trusts and family Limited Liability Companies. The release of Version 6.2 is anticipated in February of 2006. When that is released, the system will also include business succession planning documents, including Buy-Sell Agreements, Employ Purchase/Bonus Agreements, Section 83(b) elections, deferred compensation agreements, Top Hat IRS Letters and a Stay Bonus Agreement. In addition, it will include modifications to the standalone Retirement Trust to include provisions granting a trust protector the authority to switch a conduit trust to an accumulation trust. Finally two new features will be included that will simplify the assembly of documents, Express Interview and Library File Folders.

From Report No. 10

Looking for CUSIP numbers? Here from a recent discussion on the PTL List are the latest suggestions for where to go.

http://www.cusip.com - not free
http://activequote.fidelity.com/mmnet/SymLookup.phtml
http://www.quantumonline.com/Index.cfm
http://www.nasdbondinfo.com/asp/bond_search.asp

DataTech Software - Heritance System [www.heritancesystem.com]

The Heritance System is a tax, probate and fiduciary accounting software system that has been developed by DataTech Software. The fiduciary accounting module seamlessly shares integrated information with the other modules in the system, including the federal and state forms, and fills out these forms from within the accounting program. The system is flexible and the individual modules can be used separately or together. Since Heckerling 2005, the new or enhanced features include the handling of community property, the ability to group asset and liability accounts together, handling for selling multiple lots, including on the FIFO method, and the addition of additional reports, all of which can be personalized and exported in a variety of formats. Additional additions and enhancements include such things as multiple year trusts and estates, the ability to specify a date range on the First and final Accounting, the option to manually calculate the number of stock shares, prices and totals, the ability to convert from principal to income and vice versa, and the ability to transfer selected accounts to a trust to create multiple trusts from one estate. In 2006 one of the additions will be of several new state modules, including appropriate state formats for the accounting reports. Heritance also provides periodic on-line Webinars of their system for anyone who might be interested in obtaining an overview of their system. These last 20 minutes plus Q&A. The link for signing up for these is www.heritancesystem.com/webinar [the next presentation will be 1/18/06]. The special show price for this software was $899 just to give you a rough idea of its retail price.

From Report No. 11

Lawgic [www.lawgic.com]

Building on our earlier coverage of this document assembly product, the company representatives wanted us to know that their big addition in 2005 was the release in May of 2005 of the New York Wills & Trusts edition of the popular Lawgic software. This was made possible with the able assistance and co-authorship of New York attorney Carlyn McCaffrey. In fact, at Carlyn's urging the "federal' portions of all of the estate planning forms in the Lawgic system were revised and fine-tuned with the cooperation and supervision of Rick Stockton of Holland & Knight who oversees the Lawgic line of wills and trusts software programs.

Hot Off The Presses - Apple Goes Intel

In case you missed it earlier this week, Apple made a hugh surprise announcement on the 10th that they are releasing an Intel-based iMac and a similarly based laptop called the MacBook Pro. This is a real shift in Apple's development plans, and this announcement caught all the analysts off guard. To check this out further, go to Macworld at C/NET Digital Dispatch [www.cnet.com]. To go along with this news, for all of your iPod owners, there will not be a new iPod right now. Instead, for a mere $50, you can get a little device that adds an FM tuner to the Apple music player (how nice).

From Report No. 12

ABA Real Property, Probate and Trust Law Section
[http://www.americanbar.org/groups/real_property_trust_estate.html]

The ABA RPPT Section was an exhibitor again this year, offering discounts on their numerous publications. Unfortunately you had to be three to partake of those discounts. One of those publications is the Section's flagship magazine. The latest issue for January/February 2006 contains an interesting article in its Technology - Property column by Gary Whittington about the eight blunders of trying to develop word processing document assembly documents. This is such good article that we thought we would list the eight blunders here as a way of peaking your interest. For in more depth treatment of these, we refer you to the article.

Blunder 1 - In The Swamp of Perfectionism Blunder 2 - Drafting by Programers Blunder 3 - The Grand Plan Blunder 4 - Taking Too Much Drafting Responsibility Away From Users Blunder 5 - Encouraging a Slave Mentality Blunder 6 - Forgetting the 80/20 Rule Blunder 7 - To Far Ahead of the Technology Curve With Web-Based Assembly of Complex Templates Blunder 8 - Too Few Documents

From Report No. 13

Vince Lackner reports that the hottest thing with their products this year is the handling of every decoupled state estate tax return in the country
(15 of them, including NJ), plus 3 quai decoupled returns (CT, NE and WA), plus 4 inheritance/estate tax returns (IN, NJ, OH, PAF). That is 21 jurisdictions in total. They are in the process of adding IA, KY, OK and TN, which will give them coverage for all 25 jurisdictions that still impose a state death tax.

Their system also handles the calculation of the tax on property located in the non-domicilary states and the circular state death tax calculation that is required in IL, VA and WI.

Vince provided us with a three page list of features and benefits of his programs, which include the preparation of the forms 706, 709 and 1041 and a Fiduciary Accounting. There is not enough room to list all of them here, but listed below are a few highlights tha caught our attention.

1. Comes with both a basic and an advanced mode of data entry.
2. The screen displays are fully WYSIWYG.
3. It comes with a spell checker - what a plus - wish that more programs like this one had this feature
4. Draft watermarks with date and time stamps.
5. Detailed allocations of assets to beneficiaries 6. Built in library of over 91,000 securities with their CUSIP numbers.
7. Common phrase micro library.
8. Tax return forms for multiple years included.

EstateWorks [www.estateworks.com]

EstateWorks is billed as the case management workflow solution to the estate planning and administration practice of law. The system gives professionals a simple system to track all cases, clients, deadlines, team assignments and workload, store documents, generate reports and deliver single data entry integrity. EstateWorks delivers world class workflow-based practice management solutions designed specifically for Trust and Estate professionals. It also provides bankers, lawyers, accountants and estate planning and settlement professionals with a system to track and streamline complex processes, information flow, and estate holdings. There is a free demo of their system on their Web site, and you are encouraged to go there for a lot more information than we have the time or space to provide here. The cost of this system is $900 per year per seat. The data in the system can be ported to a number of Form 706 software programs and to the state Inventory form, which eliminates the duplicate entry of data and the attendant errors that can produce. Although the data is stored on their IBM computers, users are encouraged to archive that data to their own PCs on a regular basis just to be safe. One has to question whether a system such as this makes sense economically for a solo practitioner or a small firm, but larger firms with a big T&E department can definitely benefit from a system like this.

West - Drafting Wills & Trust Agreements [www.west.thomson.com]

This document assembly software, which originally was designed to run in CAPS, was converted to GhostFill in 2004 and has been quite well received since then. To our knowledge, it currently is in Version 2.1.3 - June 2005. This update to version 2.1 of DWTA modified language related to state allocation methods offered in Plan One for the creation of shares/trusts, affecting the long-form will and revocable trust document types. In addition, certain interview dialogs were not retaining the answers provided during the interview, affecting the following dialogs: Trust B Details, Long Term GST Trust, and Add EGTRRA Item. The cost of this product starts at $895 and can be paid for monthly if that is desired.

On-Line Securities Valuation Services:

EVP - Estate Valuations & Pricing Systems, Inc., Financial Data Service, Inc. [www.financialdata.com] Wallace Historic Data CD [www.financialdata.com] Appraise - Evaluation

Services, Inc. [www.appraisenj.com]

From Report No. 14

Now that the Institute is over, we have reviewed out notes to see what vendors we were not able to cover or who did not submit any information to us on which we could report. We wanted to list those vendors here and their Web site URLs in case any of you might have an interest in one of their particular products:

HotDocs [www.hotdocs.com] - popular document assembly engine - used by WTP and WealthDocs

GhostFill [www.ghostfill.com] - another popular document assembly engine - used by DWTA and Amicus

Connect2A [www.connect2A.com] - EP client collaboration via the Internet

Capital Trust Company of Delaware [www.ctcdelaware.com] - planning summaries and presentations

Mercer Capital [www.mercercapital.com] - business valuations and investments banking

Foundation Source [www.foundationsource.com] - back-office support services for private foundations

Leimberg Information Services, Inc. {LISI] [www.leimbergservices.com] - provider of e-Newsletters for Estate Planning, Employee Benefits and Retirement Planning, Business Entities, Asset Protection Planning, Financial Planning and Charitable Planning, as well as the LawThreads(r) news service, Actual Text, State Laws, and US Code Searchers, and Supersearcher tools. All this for only $24.95 per month (that's $300 per year rounded).

Practitioner's Publishing Company (PPC) [www.ppc.thomson.com] - tax and accounting solutions and services

ProDoc [www.prodoc.com] - estate administration document assembly system for Texas and Florida

Thomson RIA [www.ria.thomson.com] - tax research and software resources for tax and accounting professionals, including Fast-Tax Forms 706, 709 and 1041software

Thomson West [www.west.thomson.com] - tax research and software resources for tax and accounting professionals, including Westlaw research and IEP estate planning software

U.S. Trust - [www.ustrust.com] - Practical Drafting by Richard Covey, a quarterly publication available in print and on CD, plus EP Forms and Estate Planner's Toolbox

The Weinberg Group
[www.theweinberggroup.com] - Wealth Transfer Plan Design and Funding; Life Insurance Consultant and Expert Witness; and Business, Commercial, and Trust & Estate Mediation"

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Report No. 15 - Software For Forms 706, 709 and 1041
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Recently there have been discussions on several lists of what it the best software to use form the Forms 706, 709 and 1041 now that Shepards-West and ProBATE Software have been acquired by Thomson Fast-Tax, which is a Zane-based set of products that are in need of a serious overhaul to incorporate the best of the Shepards and ProBATE software programs as was promised by Fast-Tax back when those acquisitions took place rather than continuing to maintain their current Zane-based platform. We went surfing through the various list archives to see what we could find. Below in no particular order are some of the suggestions for alternative programs that have been made in the last year or so. If we missed a good one, let us know.

ATX MAX, Kleinrock, Saber - Forms 706, 709 and 1041 Drake Software [www.drakesoftware.com] - Forms 706. 709 and 1041 TaxWise by Universal Tax Systems [www.taxwise.com] - Forms 706, 709 and 1041 TaxWorks.com out of Utah [www.taxworks.com] - Forms 706, 709 and 1041 GEMS [www.gillettpublishing.com] - Only Forms 706 and 709 - no Form 1041 Intuit ProSeries [www.proseries.com] - Forms 706, 709 and 1041 Intuit Lacerte [www.lacertesoftware.com] - Forms 706, 709 and 1041 CCH Prosystem FX - Forms 706, 709 and 1041
DataTech Quick&Easy [www.quickandeasy.com] - Forms 706, 709 and 1041 BNA [www.bna.com] - Only Forms 706 and 709 - no Form 1041 FASTER by FASTER Systems, LLC [www.fastersystems.com] - Form 706 only - no Forms 709 or 1041 [ASP based] The Lackner Group, Inc. [www.lacknergroup.com] - Forms 706, 709 and 1041 Thomson Fast-Tax [www.fasttax.com] - Forms 706, 709 and 1041 [formerly Zane, West and ProBATE] TEdec Fiduciary Accounting System [www.tedec.com] - Forms 706 and 1041 only
- by bridge to Lacerte (in 2006)
WorldWideWeb Tax Professional [www.wwwebtax.net] - Forms 706, 709 and 1041

Our on-site local reporters who are present in Miami this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Bruce Stone of Goldman, Felcoski & Stone, PA in Coral Gables, Florida (a member of the Institute's Advisory Committee), Herb Braverman of Walter & Haverfield, LLP in Cleveland, Ohio, Jeff Weiler of Benesch, Friedlander, Coplan & Aronoff, LLP in Cleveland, Ohio, Merry Balson of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Barbara Dalvano of Isaacson & Rosenbaum, PC in Denver, Colorado, Paul Hood of Dickenson, Peatman & Fogarty in Napa, CA, and Joanne Hindel of Fifth Third Bank in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado who is the Chief Moderator of the ABA-PTL List.

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