

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 settle 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 quasi 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-domiciliary 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]

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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