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

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.

===

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

===
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.

===
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.

==

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.

===
News From The Exhibit Hall
===

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

GENERAL INFORMATION ABOUT INSTITUTE
Inquiries/Registration
Philip E. Heckerling Institute on Estate Planning University of Miami School of Law Center for Continuing Legal Education P.O. Box 248087 Coral Gables, FL 33124-8087
Telephone305-284-4762 / FAX305-284-6752
Web site www.law.miami.edu/heckerling
E-mail heckerling@law.miami.edu
==

Brought to you by the ABA-PTL Discussion List Moderators