Heckerling Institute 2007 Reports from the event, as posted to the ABA-PTL List Serve

Report #1 (Monday & Tuesday)

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 ten 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 41th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 8-12, 2007 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute this year. A complete listing of the proceedings and speakers will be published here later and is also available on the Institute's Web site at http://www.law.miami.edu/heckerling.

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This Report contains coverage of most of the Tuesday morning and afternoon Sessions. Since the Report on the Monday afternoon Recent Developments session has not been turned in yet, we are going ahead with the publication of these Tuesday Reports now.

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Financial Engineering Meets Estate Planning - Derivatives and Structured Products Tuesday Morning, January 9, 2007
Presenter: S. Stacy Eastland

Reporter: Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio

Mr. Eastland, who followed Jonathan Blattmachr, started off by saying that he remembered Ed McMahon from the Johnny Carson show saying that one should never follow an animal or children’s act.

He then said that he would describe financial planning products that work well with GRATs and IDGTs and hoped that we would find them easier to understand than the Iraq policy and Texan.

Mr. Eastland started off by describing the vocabulary used by financial engineers including the definitions for a call option; a call spread option; a put option and a put spread option. He pointed out that buyers of call or call spread options assume that a stock will go up whereas buyers of put or put spread options assume that a stock will go down in value.

He then discussed key tax law considerations that affect the integration of financial engineering with estate planning by reviewing the tax treatment with respect to call options held by an investor and the tax treatment with respect to the owner of the put. Mr. Eastland also discussed how the writer of a put or call is taxed.

The focus of Mr. Eastland's presentation centered around situations that allow for the integration of financial engineering with estate planning and post mortem planning.

Situation 1: Using financial engineering to hedge or monetize a dominant single stock position in an integrated estate plan

Mr. Eastland briefly described the effect of diversification of a single stock position and the possible strategies an investor might consider to accomplish diversification. He pointed out that for the individual investor who wishes to benefit his family there are two primary taxes on capital: capital gains taxes and transfer taxes.

He then posed the following examples for this situation:

1. Contributing highly appreciated marketable stock to a partnership and then selling the limited partnership for a note to a grantor trust for the benefit of the grantor's family.

The following questions were addressed in connection with this example:

Is the grantor entitled to a valuation discount for the sale of the limited partnership interest to the grantor trust? Will the grantor owe any tax on the sale of the partnership interests to the trust? Will the grantor owe any gift tax because of the effective payment of income tax on the trust income that is accruing for the benefit of the trust beneficiaries?

Mr. Eastland then discussed the answers; the grantor will be entitled to a valuation discount for the sale of the partnership interest but will not owe any tax on the sale or any gift tax. He concluded this example with a brief discussion of the advantages of this technique (immediate liquidity and simplicity and economically superior if there is a declining market value associated with a single stock position) and also pointed out the considerations (immediate tax burden and no opportunity to take advantage of the investor's charitable intent).

2. Transferring highly appreciated stock to a family limited partnership that then creates a 20 year CRUT in which the partnership has a 90% actuarial interest and the charity has a 10% actuarial interest. The trustee of the CRUT sells the stock and the grantor then transfers her limited partnership units to a GRAT and receives annuity payments for the transfer.

Here too, Mr. Eastland discussed the advantages:additional contributions, possibility for trust distributions to keep pace with inflation and a current income tax deduction for the grantor. He also pointed out that, depending upon investment performance, under the tiered income rules when the trust terminates approximately 40% to 60% of the inherent “old” capital gains and the assets contributed to the CRUT will not be subject to capital gains tax. Also, the remaining inherent capital gains will be subject to capital gains, but it is tax deferred. Depending upon the term of the unitrust it is tax deferred for as long as 20 years.

He also listed the considerations inherent with this example (unfavorable tax treatment of distributions of a CRUT and inability for a CRUT to own any unrelated business income investments). He also indicated that the need to value the CRUT assets annually may present additional administrative burden to the trustee and may be costly and there are certain prohibited party transactions. Capital gains tax rates may also increase in the future so it is possible that some of the capital gains deferral could be taxed at a higher rate.

3. Four individuals contribute assets to an Exchange Fund Partnership which is designed to last 20 years. All the individuals contribute their interests in the partnership to a family limited partnership and then sell the FLP to a grantor trust. When the partners withdraw their pro-rata shares from the partnership they incur no capital gains at the time of their withdrawal and have achieved a diversified portfolio.

Mr. Eastland discussed the advantages of this example (effective non-charitable technique if markets are rising and many investment firms market the exchange fund partnership to multiple clients and collect many public securities upon formation) and the considerations (lack of liquidity and financial management fees and exchange fund partnerships also have a limit on the number of shares of any particular stock they will accept. So, for a client with substantial holdings the manager of the exchange fund partnership may not be in a position to accept all of that client’s holdings or even a majority of that client’s holdings). He also pointed out that if a client wants a relatively small portion of his assets in index type funds, this is not an appropriate technique for that client.

4. The dominant owner of a partnership is considering either a cashless collar or a prepaid variable forward contract. The partnership is considering borrowing against its hedged position and reinvesting the proceeds of that loan. Once the transactions are complete, the owner will transfer her limited partnership positions to a grantor trust.

Mr. Eastland discussed the advantages and considerations for both the cashless collar and the prepaid variable forward contract and then concluded with the following observations:

If the client wishes to allocate a portion of her asset allocation to domestic index funds, then the exchange fund solution might be the best choice. If she has some deferred charitable intent, then the partnership CRUT technique might be the best. If she has a bullish feeling about her stock, then she might wish to consider the prepaid variable forward contract and if she does not have a bullish feeling about the stock, she should consider simply selling her stock to meet liquidity needs.

Mr. Eastland reviewed a chart that examined the examples posed assuming that the client lived in New York and died in the 20th year. He concluded by pointing out that the reason why the various techniques produce a better result for the client's family has little to do with the total income taxes saved but rather the reason why the techniques are efficient and produce a superior result is because of the investment opportunity cost associated with those income taxes.

Situation 2: Integrating Financial Engineering with GRATs

After discussing a number of aspects of GRATs including their valuation advantages, synergy with other techniques, comparatively low hurdle rate, high leverage, non-recourse risk to remaindermen and financial reasons why a GRAT may not succeed, Mr. Eastland reviews examples of financial engineering with GRATs.

1. Grantor wishes to compare the possible results from entering into a variety of private derivative transactions with his spouse. He also wants to compare transactions in which his spouse takes her position and contributes it to a second GRAT.

Mr. Eastland reviewed charts contained in his outline to analyze this example and concluded that significant results will be attained even if only one GRAT is utilized in either the private call spread transaction or the private put spread transaction. He also analyzed the tax outcome and possible legal outcome by a court of having the spouse then take her part of the family's hedged position in the stock and contribute that to another GRAT.

2. Grantor uses cash to enter into a call spread transaction and then transfers his call spread position to a GRAT. The GRAT is very successful over the annuity period and it then terminates in favor of a grantor trust held for the benefit of the grantor's children. The grantor then transfers a part of his closely held business to the grantor trust in exchange for the cash in that trust.

Mr. Eastland pointed out that this technique is very useful because of the power to substitute with a grantor trust without income tax consequences.

3. Grantor and his spouse use their positions with respect to a cashless collar with GRATs.

Mr. Eastland commented that in order to avoid the reciprocal trust doctrine being applied, it may be necessary to have different beneficiaries for the two GRATs that the Grantor and his spouse create.

4. Same facts as in #2 but the Grantor and his spouse also enter into a call spread transaction using different GRATs for stock .

5. Daughter owns a significant position in a stock and mother, who also owns a significant position, tells daughter that she would be happy to purchase a contemplated call option from daughter. Are there income tax or gift tax consequences to this transaction? What if mother decides to contribute her call option to a GRAT in which the remainderman is a trust in which the daughter is a discretionary beneficiary?

Mr. Eastland discusses aspects of these additional two examples as well.
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Investor Initiated Life Insurance: Really a "Free Lunch" or Prelude to Acid Indigestion? Tuesday Morning, January 9, 2007 Presenter: Stephan R. Leimberg

Reporter: Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co., LPA in Cleveland, Ohio.

Mr. Leimberg discussed Investor-Initiated Life Insurance, the last portion of the outline, although the early part of the outline that was not discussed is a very comprehensive overview of the "insurable interest" rules in life insurance.

Investor Owned Life Insurance--referred to as Stranger Owned Life Insurance also "SPIN" Life Insurance.

The concept is not new. The early "free insurance" case is Warnock v. Davis, U. S. Sup Ct (1881). A substantial amount of insurance was purchased on the life of Henry Crosser through a group of investors who agreed to pay all premiums and costs with respect to the policy with no outlay made by Mr. Crosser. The investors were to receive 90% of the proceeds and Mr. Crosser's wife, 10%. Citing insurable interest requirements the Supreme Court ruled the arrangement was void. For there to be an insurable interest there must be a "reasonable expectation of advantage or benefit from the continuance of the (insured's) life." The Court held there was no fraud or deception but there was no rights the investors had no to the policy proceeds. The Court held there was nothing wrong with financing premiums or assignment of the policy, but the assignment was valid as to the investors only for the sums advanced.

The issues relate to the following: Market finance principles, insurance, tax and property laws.

Mr. Leimberg described this form of insurance as a beneficiary looking for an insured rather than an insured seeking a beneficiary.

Questions for the advisor include is the concept legitimate and should the client do it.

Mr. Leimberg raised as concerns compared to the general principles for acquiring insurance based on insured's need, here the acquisition and amount of insurance is driven by the investors with the ultimate goal to sell the policy to a settlement company.

SOLI is based on two concepts: life insurance premium financing and life settlements

Investor Initiated Free Insurance is not a static concept. There is no single program; promoters are constantly changing the names and features so that each arrangement must be examined on its own.

The process includes the following:

1. Insured provides the authorization for release of medical information to determine if one "qualifies" for the program and in return, the insured receives two years free life insurance, up front cash payment (11/2 to 3% of the death benefit) and a profit from the expected sale of the policy.

2. Insured is examined by life settlement company's experts to determine if prospective insured is a candidate (ie a sound investment).

3. Special purpose lender makes a loan to a non-grantor irrevocable trust.

4. Trust collaterally assigns the policy to the lender.

5. After 24 months (period coincides with the investors' needs to meet both the policy's incontestability period and avoid the state's "wet ink" insurance laws regulating the premature sales of policies to settlement companies, the insured selects the following:

a. Repays the loan and all costs; b. Sells the policy to a life settlement company; or c. Transfers the policy the lender in full satisfaction of the loan.

The parties to the transaction include the following: The insured, the insurer, the investors, special purpose lenders, the settlement company, the insured's advisors and the broker. By the way the broker obtains two commissions on the initial sale of the policy and then the subsequent sale to the settlement company if that is the exit mechanism selected.

The Risks.

Uses insured's amount of available life insurance--insured loses the ability to acquire insurance if needed later.

The rebate/sweetner given to insured to enter into the program may be illegal or if not, certainly income.

May trigger both income and gift tax. Some authorities believe this is split dollar.

If trustee returns the policy to the lender there is possible forgiveness of debt.

A sale of the policy leads to additional questions as to how much gain, what is the trust's basis (is the basis reduced by the cost of insurance), if so, policy's basis may be close to zero. Since trust has no other assets who pays the tax? Will IRS pierce trust and tax the insured?

Insurer possibly may rescind the policy if it believes the policy was applied for under false pretenses.

Possible lawsuit by investors against the insured if the insurer denies payment and the investors do not receive expected benefit.

The settlement company does not purchase the policy or offers a significant reduction from what was originally anticipated.

If there is a real need for insurance why let a stranger receive the benefit?

Finally as Mr. Leimberg states, the "Ickyness" factor. The insured hopes to live a long time. The investor has no control over who owns the policy and more importantly the investors' return varies inversely with the number of years he lives. The tension is as stated by Michael Nelson, that the third party owner benefits from the death of the insured. On the other hand sound underwriting is that the owner of the policy and the insured are better off if the insured continues to live.

SOLI has been described by Barry Flag as "mortality futures" transaction. The insurer is calculating life expectancy one way and the investors in another way. The shorter the insured lives the greater the return for the investors. The investors return is dependent up the present value of the death benefit outweighing the present value of the acquisition costs.

Recent developments.

New York General Counsel Opinion issued July 9, 2006. The Office of General Counsel of New York State Department of Insurance opined that "free insurance" was not insurance as there was no valid "insurable interest." The opinion examined the true substance of the transaction and not its form. "..procurement of insurance solely as a speculative investment for the ultimate benefit of a disinterested third party."

New York Life and Annuity Corporation filed suit on July 5, 2006 to rescind a sale of a policy.

Similar to the position in New York, the states of Utah in Utah Insurance Department Bulletin 2006-03 and Louisiana in Louisiana Insurance Department Bulletin 06-05 ruled that stranger investor policies violated the state's insurable interest rules.

Mr. Leimberg concluded by saying because of the many unanswerable questions with investor-initiated "free insurance" it should give all advisors pause in this area. ==
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What have they done to our benefits? An update on recent developments in Estate and Distribution Planning for Retirement Benefits Tuesday morning, January 9, 2007 Presenter: Presenter: Natalie B. Choate, Esq.

Reporter: Merry Balson Esq.of Wade, Ash, Woods, Hill & Farley in Denver, Colorado

Ms. Choate started the session by reviewing a few recent pronouncements by the IRS. In 2006, the IRS finally gave practitioners some guidance regarding questions that had been pending for many years. First, in Chief Counsel Memorandum 2006-44020 the IRS addressed the problem of funding a pecuniary bequest by transferring an interest in an IRA to a beneficiary. Here, a trust made $100,000 pecuniary bequests to charities. The trustee, who had been named as beneficiary of an IRA, requested that the IRA provider transfer $100,000 IRA to the charities, hoping that a charitable deduction would be available to protect the IRA from income tax. In this CCM, the IRS said this would not work, and instead, held that the transfer of an IRA to a pecuniary fixed dollar legatee in satisfaction of a pecuniary bequest triggered the immediate realization of income under 691(a)(2). Ms. Choate notes that while the CCM went too far, its holding may be correct. Because the trustee had a choice of assets to use to satisfy the bequest, the direction to transfer the IRA could be considered an assignment of income under 691(a)(2). Section 691(a)(2) provides that after death of the IRA owner, the underlying income of the IRA is immediately realized when the IRA is transferred unless the transferee is entitled to the IRA under the will or trust. Note that the IRS supported the CCM by citing a 60 year old case that doesn't even mention 691(a)(2). Estate planners need to deal with this issue in their drafting. If the document requires the charitable bequest be satisfied by transferring a portion of the IRA, Ms. Choate believes the transfer should not trigger recognition of income because the document requires the transfer and the transferee is entitled to the IRA. The lesson here is that if there will be substantial pecuniary bequests (e.g., marital deduction formulas) and IRA benefits will be payable to a trust, practitioners must consider the income issues and work around them if possible.

Second, the IRS issued an unpublished Technical Advice Memorandum addressing the “life insurance subtrust”. These subtrusts occur where an IRA owner holds a life insurance policy inside the retirement plan, using the plan assets to pay the premiums. Ms. Choate noted that this is not usually recommended if there are other options. A subtrust is created by the retirement plan to keep the policy out of the owner’s estate under the theory that this might avoid incidents of ownership by the insured. Plans engaged in this activity for years, with no guidance from the IRS, until now. In September 2006, in this unpublished TAM provided to a single taxpayer, the IRS took the position that the subtrust disqualified the plan, based on a very old revenue ruling dealing with the incidental benefit rule. That rule says that if a plan benefit cannot be used to provide retirement benefits, the plan is disqualified. While there may be a way to draft around this, Ms. Choate believes use of subtrusts for insurance is too risky, and she suggests people stay away from these. The TAM noted that a person may irrevocable designate a beneficiary without disqualifying the plan. The TAM is discussed in more detail in Steve Leimberg’s Employee Benefits and Retirement Planning Email Newsletter - Archive Message #385 (September 19, 2006) and in a Tax Notes article in December 2006.

Third, in Revenue Ruling 2006-26 the IRS rejected the Uniform Principal and Income Act (UPIA) provisions regarding income for marital deduction purposes. The UPIA provides that 10% of a minimum required distribution is income and that the balance is principal. The IRS held that the UPIA 10% rule cannot be used to determine income of a marital deduction trust. If this rule is used, the trust will not qualify for the marital deduction. This ruling does not require rewriting of all trusts. However all marital trusts that will receive retirement benefits should requires the distribution of all trust income, and all income from the IRA to qualify for the marital deduction. Income from the IRA is either internal trust accounting income (e.g., the interest and dividends are identified within the IRA and distributed as income) or a unitrust percentage between 3 and 5%.

Congress has passed 3 pieces of legislation recently affecting retirement benefits:

1. Pension Protection Act (PPA) of 2006. This Act contains two provisions that affect retirement benefits. First, up to $100,000 can be transferred from an IRA of a person over age 70 1/2 to a §501(c)(3) public charity in a direct trustee to trustee transfer. This provision is sometimes referred to as the charitable rollover. This provision only applies for 2006 and 2007, and applies only to IRAs, not to other types of retirement plans. Private nonoperating foundations, donor advised funds, split interest gifts and supporting organizations do not qualify for the charitable rollover provisions. Ms. Choate suggests that if a client is going to make a charitable gift using IRA money, the charitable rollover is the preferable method. The advantages of the charitable rollover over a withdrawal by the participant followed by a contribution to the charity are numerous. First, for very low income taxpayers, a withdrawal of IRA assets will increase taxable income which can increase taxability of social security payments, while a direct transfer avoids this increase. Second, alternative minimum tax is impacted when IRA assets are withdrawn because that amount is added to gross income and can affect the phase out range and reduce the taxpayer’s available exemption. Third, the charitable rollover is a deduction in addition to the regular percentage limitations for charitable deductions, and can be beneficial for those clients who want to make additional gifts. Fourth, a withdrawal followed by direct contribution to the charity will increase the taxpayer’s income, which can have the effect of reducing the taxpayer’s available itemized deductions by up to 2%.

The charitable rollover is best for two main groups of people: (1) older clients who do not need the money or the hassle of IRAs, and want to give money to charity now rather than waiting until death; and (2) the average Joe/Jill who is retired, over 70 1/2, and makes charitable gifts, can use this as a way to fully or partially satisfy their minimum required distributions while satisfying the charitable gift at the same time.

One problem with the PPA is that no one asked the IRA providers what they thought of the charitable rollover, and they may be setting some minimum rollover amounts to avoid multiple small gifts from IRAs. Additionally, there has been some confusion about the $100,000 limitation on the charitable rollover and a person's required minimum distribution. While the charitable contribution can satisfy the required minimum distribution, the limitation on the charitable rollover does not change a person's required minimum distribution.

Effective January 1, 2007, the PPA gives a nonspouse beneficiary the ability to rollover inherited retirement benefits after the participant's death to an inherited IRA. The process is as follows: nonspouse beneficiary inherits a 401(k) plan; beneficiary opens an inherited IRA titled in the same manner as the inherited 401(k); and, the then beneficiary directs the 401(k) plan to send the funds by direct plan to plan transfer to the new inherited IRA. This provision is long overdue, because although the tax law has permitted payout of an inherited 401(k) over the beneficiary's life expectancy, plans were not required to offer this payout option, and most did not offer this extended payout and instead offered only a lump sum distribution. Note that this provision will not enable you to fix the beneficiary designation after client dies, but Ms. Choate will address post mortem fixes in the special session on Thursday.

2. Tax Relief and Health Care Act of 2006. This law was passed in late December 2006 and is not in the outline. The Act created a new tax free transfer from IRAs called the qualified health savings account contribution. The provision allows a one time tax free transfer from an IRA to a health savings account (HSA). An HSA is a tax free account that can be used to pay medical expenses if you have a high deductible health plan. A high deductible health plan is generally one that has a deductible of not less than roughly $1,100 and a deductible or out of pocket limit of not more than $5,000. Roughly $3,000 can be contributed to an HSA and that account can later be used to pay medical expenses. The contributions to an HSA are tax deductible on the front end, and distributions from the HSA for medical expenses are tax free. The Act made HSAs easier to get. However, if you are over age 65 you will not qualify because Medicare is not a high deductible health plan. Steve Leimberg's newsletter (cited above) today includes an article by Natalie Choate providing additional details on HSAs. At this time, Ms. Choate sees no benefit to the ability to make a distribution from an IRA to an HSA. The only group to benefit under this rule are persons under 59 1/2, who want an HSA, but have no other assets to fund the HSA. Email Ms. Choate at author@ataxplan.com if you have other ideas about how this new provision could be used.

3. Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA). This Act encouraged conversions from to Roth IRAs. Under Roth IRA rules, income tax is paid on contribution into the plan, but all future distributions are tax free and there are no minimum required distributions during life. Currently, the attractiveness of Roth IRAs is limited in two primary ways: (1) the price of the conversion is high because the tax must be prepaid on the contribution to the plan, thus, low income taxpayers cannot afford to convert; and (2) no conversions are allowed unless the taxpayer's income is under approximately $100,000 (the "income test"), thus, high income taxpayers (who can afford the tax) are prohibited from participating in conversions. Under TIPRA, starting in 2010, there will be no income test for IRA conversions.

Additionally, as of 2006, anyone who has a 401(k) or 403(b) plan can now elect to have their cash or deferred contributions allocated to a Roth 401(k) (also referred to as a "designated Roth account") rather than a regular plan. There is no income test for this, therefore if clients have a small business, they may want to adopt a 401(k) plan and a Roth 401(k) to take advantage of these provisions. There are many considerations to take into account when determining whether to convert to use a Roth 401(k) and Ms. Choate ended the session with the following comments she has heard

from clients, attorneys and other planners highlighting those considerations: 1. client is concerned the investments may depreciate after conversion to a Roth 401(k) and he/she will lose money; 2. client distrusts government, and believes they may change the law and make Roth plans taxable; 3. client wants the current tax deduction of a traditional 401(k); 4. client already has significant traditional retirement plans and wants to diversify into a Roth; 5. client wants to pack the retirement plan by putting the full deferral amount into the Roth plan and pay the taxes with other non-retirement assets which increases total value of the plan; 6. client believes it is easier to pay the taxes now when he/she is still working, and that tax payments during retirement may be more difficult; 7. clients spend assets that are not in a retirement plan so they will be advised to fund these plans; 8. client believes that the tax rates are low now, but as the baby boomers start to retire the tax rates will increase to pay for necessary services for them; and, 9. client will not pay tax now to convert because they believe the baby boomers by virtue of their sheer numbers have such influence over Congress that they will be able to affect change to the retirement plan rules and convince Congress to make all pensions tax free.
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Avoiding Malpractice Claims Against Estate Planning Counsel Tuesday afternoon, January 9, 2007 Presenter: Kevin Rosen

Reporter: Alan Rothschild Esq. of Hatcher, Stubbs, Land, Hollis and Rothschild, LLP in Columbus, Georgia

Opening thoughts: Juries predisposed against attorney In conflicts of interest area, if there is any uncertainty, situation will be construed against the attorney. Client identification is key. No such thing as the family lawyer. The engagement letter is the key protection against malpractice in the estate planning area – who you do and don't represent.

He noted that estate planning malpractice claims present unique problems because claims may not arise until years, or even decades, after the alleged malpractice occurred.

Privity – General rule is that attorney owes a duty of care only to the client with whom attorney stands in privity of contract. Starting in 1950/60's, courts began to relax the privity requirement to malpractice claims by estate beneficiaries.

Lucas case (California Supreme Ct. 1961) allowed narrow exception to privity rule – six point, balancing of factors test: extent to which the transaction was intended to benefit the plaintiff; forseeability of harm to plaintiff; degree of certainty of harm; closeness of connection between defendant's conduct and the injury; policy of preventing future harm; and whether imposing liability placed undue burden on legal profession.

Florida-Iowa Rule – a narrower cause of action approach than the balancing of factors test. Also adopted in Colorado, Michigan and Wisconsin. Here, a beneficiary may maintain cause of action only if the client's intent, as expressed in estate planning documents, was frustrated.

Strict Privity – In some states, lack of privity still acts as bar to legal malpractice claim against estate planning attorney by beneficiary – unless attorney acts with intent to harm.

When does duty to client end? Not as estate planning case, but cited Georgia case where court found attorney liable for not renewing UCC filing. Like conflicts, if unclear, will likely be construed against attorney. ABA suggests writing understanding when duty ends.

Cause of Action – where beneficiary has standing, must prove four elements:

1. existence of duty
2. breach of that duty
3. proximate cause – the breach must have caused the harm
4. actual injury

Examples of duty – to inquire as to heirs at law; prepare will in accordance with client's wishes; to advise correctly about legal implications; to know and research law.

Ten common risk situations in estate planning field:

Attorney naming himself/herself as fiduciary Requiring drafting attorney be engaged to represent estate Bond letter that attorney will advise estate Understanding duties and obligations as attorney for fiduciary Spousal and family representation Very old/ill testator & caregiver Estate administration – multiple clients Unauthorized practice of law – this area capturing attention of bar groups, plaintiff attorneys and criminal enforcement agencies, recent NC case where GA lawyer prosecuted for work for NC client. Actions post-mortem contrary to decedent's intent/actions Competency of client

Protections – Document, document, document – in writing, including extent of representation; testator's intent; issues discussed with client; research done. Contemporaneous documentation of research and advice may lead to "judgmental immunity" which is a key defense, allows for summary judgment and case doesn't go to jury.

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Charting A Course for Convenience or Incapacity - New Aids to Navigation in the Uniform Power of Attorney Act Tuesday afternoon, January 9, 2007 Presenter: Prof. Linda S. Whitton

Reporter: Alan Rothschild Esq. of Hatcher, Stubbs, Land, Hollis and Rothschild, LLP in Columbus, Georgia

The presenter of this session, Prof. Linda Whitton, Professor at Valparaiso Law School, is Reporter for the Uniform Power of Attorney Act. Large portion of the written outline was the November 27, 2006 version of the Uniform Power of Attorney Act with prefatory note and comments which is available at the NCCUSL website – http://www.nccusl.org/.

Reasons for uniform power of attorney effort raise competing interests - POA must be acceptable to those relying upon it, protect the principal from abuse, yet must also protect agent who takes actions on behalf of principal.

Greatest challenge – making acceptable to person/institution relying upon – they demand to be protected for doing so. Act contains protections for good faith acceptance of acknowledged POA (Section 119). Also contains protection for legitimate refusal to accept POA. No liability for refusing unacknowledged POA. Two alternative provisions in uniform act -- Alternate A (120(b)) contains six safe harbors for refusal. Alternate B provides only protection for refusal of non-statutory form POA.

Liability for unreasonable refusal (120) – time limits for decision to accept (7 business days); may not require additional or different form; liability for refusal to accept – court mandated acceptance/attorneys fees & costs.

Presently, unclear under most states' laws what fiduciary duty means in the context of a POA. The uniform act contains a list of default rules/duties (Sections 111-118) which can be altered through contrary language in the POA. Certain mandatory rules also in uniform act.

Any important concept is the protection of the principal's previously expressed choices (114). Standard for agent conduct is principal's expectations – best interest standard applicable only if expectations not known. Agent must cooperate with health care agent. Has to preserve estate plan to extent known and in principal's best interest.

Agent's authority continues after later court appointment of a fiduciary unless court limits or terminates agent's authority.

Protecting the principal – valid POA can be refused by person who suspects principal is victim of abuse. Generally, no duty to account, but a governmental agency with authority to protect welfare may request an accounting from agent. Unless POA states otherwise, spouse will cease to be agent upon filing of action to dissolve or annul marriage.

Hot powers – express language required in POA to create, amend, or revoke inter vivos trust, to make a gift (statutory limits in 217 unless POA specifies otherwise), change rights of survivorship, create or change beneficiary designation;

delegate authority granted to agent under the POA; waiver of principal's right to be a beneficiary of a joint and survivor annuity, exercise of fiduciary powers that the principal has authority to delegate, disclaimer of property, including a power of appointment.

Questions: Is there HIPAA language for access of medical info? – yes, in109 & 213. Brokers require medallion guarantee, would this address? Yes, if state enacts, only acknowledgement required. Can agent do will for principal under uniform act? No.

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News From The Exhibit Hall - none tonight - this is already long enough

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Our on-site local reporters who are present in Orlando this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Herb Braverman Esq. of Walter & Haverfield, LLP in Cleveland, Ohio, Merry Balson Esq.of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Paul Hood Esq. of L. Paul Hood Jr. (APLC) in Mandeville, Louisiana, Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio. Jason Havens Esq. of Havens & Miller PLLC in Destin, Florida. Alan Rothschild Esq. of Hatcher, Stubbs, Land, Hollis and Rothschild, LLP in Columbus, Georgia, and Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co., LPA in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado, who also is the Chief Moderator of the ABA-PTL List.

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