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

Report #10

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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Eratta #2 Thursday afternoon Special Session 4-C on Tax-Advantaged Trusts by Bergner and Gans.

Because PLRs can only be relied upon by the taxpayer to whom the ruling is issued to, both ACTEC and the ABA Tax Section have requested the IRS to issue a revenue ruling endorsing the estate and gift tax positions taken in the PLRs regarding the general power of appointment trust. The specific ruling requested deals with the following issues: "(1) that property belonging to the surviving spouse but over which the first spouse to die holds a general power of appointment exercisable at death will be included in the gross estate of the first spouse to die under Section 2041 and against which any unused exclusion amount of that spouse may be applied, and (2) that the gift made by the surviving spouse to the first spouse to die by granting that spouse the general power of appointment qualifies for the marital deduction under Section 2523. Both organizations requested that rulings be issued with respect to both a revocable trust funded solely by the surviving spouse and a "joint revocable trust" created and funded with property from both spouses. Neither organization requested the IRS to address the income tax basis of the property over which the first spouse to die has been granted the general power of appoint

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This Report contains coverage of the Friday morning regular sessions on Financing the Cost of Long-Term care, Keeping the Vacation Home in the Family and What We Have Learned (at Heckerling) and What to Do with it as well as the Thursday Afternoon Special Session on Coordinating Business and Succession Plans

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The Inheritance Threat That Dares Not Speak Its Name: Financing the Cost of Long-Term Care
Friday morning, January 12, 2007 Presenter: Prof. Richard Kaplan

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

Professor Kaplan discussed the various methods of financing one’s long-term care from public and private sources. At the outset he stated the topic is very broad based and hours could be spent covering just one of the aspects of long-term care and thus this topic/session was a broad brush overview. For those wanting more detailed analysis Professor Kaplan referred to his book, Elder Law in a Nutshell, by Thompson/West (4th ed. 2007). In that text there are separate chapters dedicated to the issues of Medicare, Medicaid, Long-Term Care Insurance and Nursing Homes.

Professor Kaplan started with an overview of the area. The statistics he cited were that about 43% of persons age 65 and over will spend some time in a nursing facility; the average stay is 408 days, with 31% being less than one month and 11% extending beyond three years; and average costs of a nursing home being $71,000, and in many areas even greater.

He stated this will become a bigger issue as the population ages. In traditional estate planning this has been an area that has not been addressed or often overlooked. The majority of the people do not plan for it and then when it strikes it is too late.

Sources of financing long-term care.

- Medicare
- Supplemental “Medigap” Insurance
- Accelerated Life Insurance Benefits
- Medicaid
- Long-Term Care Insurance

Medicare. Charges in a “skilled nursing facility” are covered but if only the following conditions are satisfied:

- Hospital stay must precede the SNF admission by no greater than 30 days
- Hospital stay must have been at least 3 days (excluding the discharge day)
- SNF must be Medicare-approved
- Recipient is receiving “skilled nursing care”---services ordered by a physician requiring professional administration (i.e. insulin, shots)on a DAILY basis.

Even if one satisfies these tests (which are becoming harder because of advances in medicine as well as cost containment issues which results in persons being discharged sooner from facilities) complete coverage is limited to the first 20 days, with costs for the next 80 days covered except for a daily deductible of $119 (in 2006). After 100 days nothing covered.

Services of a home health agency are covered pursuant to a plan reviewed by a physician. The recipient must be under a physician’s care and medical necessity must be re-certified every two months. If one qualifies it is limited to 28 hours per week.

Supplemental “Medigap” Insurance. Fills in the gaps where Medicare does not cover. There are 14 various types of policies. All of these policies provide “core benefits”Part A hospitalization co-insurance amounts, Part B co-insurance, hospital coverage for 365 days beyond Medicare’s coverage. Optional benefits include Part A deductible, Part B deductible, SNF co-insurance, excess “balance billing” expenses for “non-participating providers, foreign travel emergency. In certain of the policies, C –L will cover the deductible for SNF not covered by Medicare for days 21-100, provided all of the other requirements to qualify for Medicare coverage in the first instance are met.

Accelerated Benefits on Life Insurance. A rider to an insurance policy that will pay a designated portion of a policy's face amount prior to the insured's death as "accelerated" or "living" benefits. Eligibility varies with policies but generally restricted to person who are likely to die within one year. The proceeds may be used for any purpose. The proceeds received are tax-free if the insured is "terminally ill" or "chronically ill." The benefits are limited to $250 per day in 2006 or the actual costs of long-term care, if higher, for chronically ill persons but this limitation does not apply to terminally ill persons.

Medicaid. Combination of a federal and state program. One does not automatically qualify for this program but must apply. Programs are administered by the state and many of the definitions and rules are governed by the state and can even vary within each state. A nursing home to qualify for Medicaid patients must accept the state maximum which is generally less than the costs to the facility to provide these services. Nursing homes thus monitor very closely their private pay versus Medicaid census.

Medicaid has asset qualifications. A Medicaid recipient may retain generally $2,000. Also a recipient can retain personal effects and household goods, without limit, as long as they do no have investment value and equity in a residence of up to $500,000 as long as the person "intends to return" to live there. The state will lien the personal property and residence to secure any payments made on behalf of recipient.

Other non-countable assets include, a motor vehicle (as long as used to transport applicant or member of applicant's household); life insurance as long as face value does not exceed $1,500; burial spaces(without limit); and certain testamentary trusts.

No penalty applies to transfers of assets made by the applicant more than 60 months prior to applying for Medicaid. Exchanges made for full consideration. All other transfers cause the period of ineligibility during which benefits will not be paid. The penalty is calculated by divided the value of the transfer by the monthly cost of care. The penalty period begins with the month in which the transferor would otherwise be eligible for Medicaid.

Income Eligibility. A recipient's countable income for Medicaid includes all investment income, profits from dispositions of stocks, bonds, gifts/bequests, social security receipts. Small amounts such as $30-$50 can be retained. "Medically Needy" states provide that if monthly income does not cover the nursing home costs, Medicaid will pay the difference. Other states "Income Cap" states provide that if monthly income exceeds a specified limit ($1809 in 2006) the person is ineligible for Medicaid even if that income is less than the person's nursing home expenses. In Income Cap states a person with excess income can transfer all of their income to "qualified income trusts" and after the patient's death, any remaining assets go to the state to the extent of Medicaid outlays made on the patient's behalf.

Long-Term Care Insurance. It is private insurance that one must apply and qualify for. Does not help the person who is in crisis mode. It is very selective and applicant must go through medical underwriting.

Premiums are deductible as medical expenses up to specified limits that depend upon the insured's age. Because of the adjusted gross income limitations for deducting medical expenses these premiums will probably not be deductible.

Evaluating policies one should consider the following:

- Inflation protection.
- Financial strength of insurer.
- No prior hospitalization required. Should not be a condition for receiving benefits.
- Custodial care covered. Note, Medicare does not cover.
- Waiting period of less than 90 days.
- Exclusions due to pre-existing conditions.
- Length of benefit payout period.
- Cost.
- Covers home care assistance.

Professor Kaplan concluded with an example of self funding the costs of a policy. The goal was to replicate the John Hancock policy of four years at $100 per day, with a 5% compounded inflation protector. Annual premiums are $1,740. The prospective insurer is single and 65 years old. Insurance is not needed until person reaches age 80. Premiums are unable to be deducted. Person's effective federal/state income tax rate is 26%. The insurer does not raise the premium rates after policy's issuance.

The cost of this goal. A $100 per day after 15 years of 5% annually compounded increases to a daily benefit of $208, or $6,240 per 30-day month.

The amount needed at 6% to generate four years of benefits of $6,240 per month is $265,699. To obtain this amount, annual $265,699. To obtain this amount, annual investments of $1,740 for 15 years must earn 28.9% compounded annually AFTER-tax or pretax of 39.1%.

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From NASCAR Condominiums to Private Mausoleums: Keeping the Vacation Home in the Family
Friday morning, January 12, 2007 Presenter: Wendy Goffe

Reporter: Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado

This presentation focused on the family vacation home and planning to keep the home in the family for generations to come.

Throughout the materials and the presentation, the property is referred to as the cabin, regardless of value or size or how ornate the property.

Cabins have different meanings and goals in different families. Some uses of the cabin:

To relax

An ongoing, never finished project to improve or maintain the property

To enjoy a common interest; an example is the condominiums being built that overlook NASCAR racetracks. The owners can sit in their hot tubs and watch the race.

An opportunity to teach descendants to appreciate the benefits of nature

Many times the cabin represents a large portion of the family wealth because the vacation property has increased in value much faster than the other assets.

It is helpful if the family creates a master plan. The best plans are negotiated between family members, sometimes with the help of a mediator or facilitator. As part of the planning, the family sometimes creates a mission statement. The mission statement often addresses questions such as

what is most important to the family about the cabin?;

what does the family value most about how it uses the cabin?; and

how would the family like to see the ownership affect the ways the various members interact?

If the family will not accept the use of a facilitator, a survey can be sent by the attorney. Sometimes, the senior generation finds that the younger generations have no interest in retaining the cabin. The results may also reveal worries of the family members that need to be addressed in the master plan.

She discussed conservation easements and the benefits that they may have in preserving the property in its current condition. Also, many parts of the country have local land trusts or land banks that preserve or protect the property.

There are issues when conveying an interest in the property to one of these organizations. It is important that there is an agreement to define who pays what and allows the donor some control. She indicated that the result is not a reduction in the cost of owning the property.

Some qualified organizations for a conservation easement are a private operating foundation and a supporting organization. A private foundation is not an eligible donee.

A QPRT is another possibility but donors must pay rent after the term. She likes this alternative as it gets rent out of the donor’s estate. However, many donors do not like this part at all. Some problems arise with the use of a QPRT. It may be necessary to carve out the residence from the rest of the property.

An outright gift of the cabin is the best alternative to get the property out of the donor’s estate. If the gift of an undivided interest in the cabin is given, a discount in the value may also be obtained for the gift. The downside to intervivos gifts in the lack of a step-up in basis.

Irrevocable trusts can also be used. However, the lack of ability to adapt to changes in the future may make these poor choices. It may be hard to add members in the future and to maintain an adequate reserve to cover future costs.

An LLC can be a good alternative The members will have limited liability, the management is flexible and can be changed in the future, it can exist perpetually and it is easy to amend if the requisite number of members or membership interests agree.

She used to like sales to family members using a private annuity, but the issuance of the new regulations can cause a problem with the use of this method.

The senior generation may also want to use a revocable trust for an initial period. She referred to this method as “a trust with training wheels.” If things do not work out among the family members, the senior generation can revoke the trust.

The ongoing management of the cabin should be set out in a written management agreement. The agreement needs to put into place the mechanisms to manage the property, resolve conflicts and provide for the maintenance of the property. There are also numerous issues that should be considered in the management agreement. Her materials include a large laundry list of these issues. A number that she mentioned were pets, smoking, perfume, assessments and the manager.

She feels the best arrangement is for one member to be elected manager and authorized to maintain the property in its current condition. Any improvements must be voted on. The hardest problem - spouses of the family members. Among other problems, you may want to provide a buyout provision if a spouse receives an interest in the cabin in a divorce.

Another tough issue is how to handle a buyout in the event that a member withdraws. One issue in this case is whether the buyout is at a discounted rate to avoid a hardship on the remaining owners.

If the property is large enough that there are or can be several homes, the family should consider a homeowners' association. This type of arrangement is good when there are common facilities such as a swimming pool or a dock.

She also suggested that a cabin is a great opportunity for an irrevocable life insurance trust to fund the property when the senior generation is no longer available to provide additional funds as needed. This would require the senior generation to be insurable.

She concluded that it is important to recognize the cabin often is a symbol of the history, emotions and value of the family. It can embody a whole range of emotions for the family. Understanding these attributes and building on these is critical in developing a master plan to continue to happily own the cabin.

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There's got to be a Morning After: What We Have Learned and What to Do With it. Friday morning, January 12, 2007 Presenter: Mark Edwards

Reporter: Herb Braverman Esq. of Walter & Haverfield, LLP in Cleveland, Ohio

In prior years, the presenter assigned to close the Institute with a case study synthesis that brings together all the information presented by others during the prior week has had a daunting task that sometimes proved to be quite difficult. This year, Mr. Edwards simply took a different approach. He had his own message ready to be delivered to the attendees and, during the course of the week, he attempted to work into his message some of the ideas presented by others who had presented at the Institute.

Referring to himself as a storyteller and opening with a reference to the 1972 movie, The Poseidon

Adventure, and its best known lyric, "There's Got to be a Morning After", he suggested that we were experiencing the perfect storm in our professional lives and have been reading in this direction ever in 2001 when Congress created an environment of pervasive uncertainty in our professional area. Congress was going to phase in the estate tax repeal that, with the recent elections, will now never happen. We are looking forward to a substantial credit shelter amount with spousal portability, perhaps lower rate(s), reunification within the transfer tax and other unknown changes in the tax law.

Mr. Edwards expressed concern about the financial markets and their future--no more high flying '90's and how will we ever replace the 6 lost years of compounding he has calculated in his materials. Along with the financial uncertainty, he cites the affects of aging in a society dominated by "the Boomers", those born between 1945 and 1965. By 2020, someone will be turning 65 years old every 5 seconds every day; 44% of us will be 65+ and only 13% will be under 19. He presented other similar "facts" and pointed out that our clients will have a different profile.

They will be anxious, increasingly so, as they age. They will be risk adverse and have a much longer life expectancy. They will need "life planning" not estate planning. Their focus will be on the longer conservation period of their lives and not on transferring money and wealth to children or grandchildren. Their real estate and 401(K)'s will not be appreciating like they did in the 90's. They will do targeted giving to benefit their natural bounty, but probably for educational and medical purposes, but only after they feel secure.

Mr. Edwards turned to issues of capacity and noted that we will be dealing with these issues increasingly. He spoke of the "fog" of incapacity that comes on slowly and does not result from trauma or other acute events. We must be cautious and sensitive to these changes in our clients. He provided in his materials some basic capacity testing materials and urged us to obtain the available ABA materials and handbook on the subject.

Mr. Edwards spoke of better prepared powers of attorney--not rote or statutory forms, but carefully tailored documents. He included an example in his materials, but cautioned against it except as a guide. Nevertheless, he emphasized the importance of certain provisions--those dealing with gifting, retirement accounts, insurance transactions, acceptance by 3rd parties.

He spent some time on qualified retirement accounts and related items, indicating they are and would be increasingly important assets. He suggested that attorneys should not hide behind their limited licenses, but should be prepared to give advice regarding the mechanic of the financial world around us (and our clients).

Mr. Edwards suggested that we and our clients "embrace the risk of longevity". We should increase our involvement in the management of our clients financial lives.

Mr. Edwards gave a provocative presentation--one that few were expecting (although his outline did suggest something different). I hope that all who attended the conference will take a moment to reflect upon his ideas. I think he is asking us to be aware of the changes that are constantly occurring around us and affecting our clients (as well as ourselves) and he is encouraging us to be "current" in a more fundamental way.

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Special Session 3-D Coordinating Business and Succession Plans Thursday afternoon, January 11, 2007 Presenters: Jonathan C. Lurie and Read Moore

Reporter:Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado,

This report summarizes that breakout session following up on Jonathan Lurie's presentation on Tuesday. Read Moore assisted with this presentation.

The materials contained five hypotheticals. The discussion covered four of these. This session was Socratic and involved the audience to a large degree. The audience made suggestions, recommendations and asked numerous questions.

The first hypothetical involved an LLC. The operating agreement allowed transfers by the member to a permitted transferee, and upon such transfer, the transferee becomes a member. The agreement also contained a call right in the LLC. The issue discussed was whether the operating agreement should include a provision to allow the LLC to buyout the permitted transferees of the deceased member upon the triggering event (death).

Point 1: When drafting your estate planning documents always ascertain ownership in entities and whether buy-sell provisions exist.

Point 2: You need to ascertain the intent of the client when of these situations exist. The drafter of the documents needs to make sure the documents prepared properly account for various situations, even though not contemplated by the parties.

Point 3: To try to determine problems, the attorney(ies) need to run through a variety of different scenarios with the client(s) and make sure the results under the agreement are those that are expected.

In most of the scenarios, the materials contained suggested language for addition to the various documents. However, often there is no correct answer - the clients need to determine how they want the documents drafted.

Scenario 2 involved a corporation. The bylaws provide that, upon the vacancy of a director, that the vacancy may or may not be filled until the next election. There was also a buy-sell agreement containing a call right for the corporation to purchase a deceased stockholder's stock based upon a formula. Due to some mistrust between the three stockholders, they required that the call right be exercised by a unanimous vote of the directors. Each of them are appointed as directors. Election of the directors occurs at the annual meeting. One stockholder dies about a month before the annual meeting.

Problem: Upon the death, the remaining two stockholder/directors reviewed the formula clause and determined that the price was favorable to them. They then exercised the call right by the unanimous exercise (by the two of them, because the third director would not be elected until the annual meeting) of the call right. The deceased stockholder's family is bound by the agreement.

There was substantial discussion of this issue. There were proposed solutions but no one really agreed on the most appropriate one. All agreed that the problem existed because the documents did not really reflect what the stockholders understood would happen - that all three families would be voting on exercise of the buy-sell provisions.

Other things all agreed on: the corporation bylaws and the buy-sell agreement did not work together, the decedent's estate planning documents need to appropriately handle these other agreements, and the formula pricing needs to be up-to-date.

The exercise issue could have been solved had the agreements contained provisions that the two surviving directors could not act before the spouse of the deceased stockholder was appointed as a director.

Other issues discussed:

1. Should the formula contain a discount for a minority interest. Jeff Weiler pointed out that this was negotiable.

2. Both one comment by the audience and Lurie agreed that insurance could have solved both problems - the discount and the price.

3. The materials also pointed out that the estate planning documents must complement the corporate documents - the two surviving directors should not be the trustees or executors of the deceased stockholders estate, and therefore, voting on whether to exercise the call right.

The problem that often exists is the lack of coordination between the estate planning documents and the corporation documents. The drafter(s) of the documents must have all of the relevant information. This is an example of a situation where working through the different scenarios could have eliminated the problem.

Scenario #3

The problem: coordinating the trust agreement and the stockholders' agreement.

Trust law requires that the assets in the trust must be diversified. In most cases, this needs to be overriden in the trust document for special assets.

The drafter must be careful when drafting language to override the duty to diversify. The language must be clear and effective. There are cases both ways on this issue. See report #6 containing the discussion of the twin UPIAs on diversification.

The attorney must document the files. The transmittal letter needs to explain these provisions. It must be clear that the provision overriding the duty to diversify was intended in the trust document and that it is not just boilerplate. Several courts have indicated that when the language is boilerplate, the duty to diversify a specific asset was not overridden.

Scenario #5: Where the property is community property, must the spouse be involved in the stockholder agreement? Further, must the spouse sign the document. This seemed to depend on the state and the practice of the various attorneys. John said that having the spouse sign in California is common. Read felt that the stockholder agreement need not be signed by the spouse. All agree that this is a thorny issue. Also, this issue is state specific. If there is a question between the states, local counsel needs to advise.

Other issues:

1. Some community property states allow a spouse to deal it his or her sole and separate property.

2. If the spouse entering the agreement is the manager and the other spouse is not involved in the business, the answer may be different.

3. Lurie said that if the agreement is negotiated in an arms-length transaction, that the agreement is binding on the spouse.

4. It may not do any good to have the spouse sign. The material included a Washington case that said that, where the spouse was not active in the negotiation, it was not binding on that spouse - should they have separate counsel?

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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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