

Compilation of Heckerling Reports – 2012
Minor Edits Only-Arranged by Institute Schedule
(Discussion Threads, Announcements and
Vendor Highlights at end of Session Reports begin on page 87)

As we have done in January for the last fifteen years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we posted daily Reports to this list containing highlights of the proceedings of the 46th Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 9-13, 2012 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute starting in 2007. A complete listing of the proceedings and speakers is available at www.law.miami.edu/heckerling.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Web site, as we have since the 2000 Institute. Those Reports can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html. In addition, each Report can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that is now at URL <http://mail.americanbar.org/archives/aba-ptl.html> by registered subscribers to that List or by anyone at the List's public archive at <http://home.ease.lsoft.com/scripts/wa.exe?A0=ABA-PTL-PUB>.

Our on-site local reporters who are present in Orlando in 2012 are Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq., Attorney At Law, in Stuart, Florida; Mike Stiff Esq. of Stiff, Zisman & Ingraham, P.C. in Denver, Colorado; Herb Braverman Esq., Attorney At Law, in Orange Village, Ohio; John Warnick Esq. of Family Wealth Transitions & Solutions in Denver, Colorado; D. Scott Robinson Esq. of Long, Reimer & Winegar in Boulder, Colorado and Cheyenne, Wyoming; Jason E. Havens Esq. of Havens & Miller in Destin, Florida and Carol A. Sobczak of Favaro, Lavezzo, Gill, Caretti & Heppell, PC in St. Helena, California.

The compiler of periodic discussion threads from certain public and private e-mail discussion lists such as ABA-PTL, ABA-TAX, ACTEC-PRAC and WealthCounsel's WCLS is Stanbery (Stan) Foster Jr. Esq. of Williams, Kastner & Gibbs PLLC in Seattle, Washington.

The editor again in 2012 is Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado, who is also the Chief Moderator of the ABA-PTL List.

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SCOPE OF HECKERLING - THE LEADING ESTATE PLANNING PROGRAM

The Heckerling Institute on Estate Planning is the nation's leading conference for estate planners, including attorneys, trust officers, accountants, insurance advisors, and wealth management professionals. The general session lectures and breakout sessions offer comprehensive coverage of the latest estate planning techniques and strategies, while special program tracks allow attendees to customize their educational experience and focus on those areas most relevant to their practice. In addition to traditional estate planning topics, this year's Institute offers programs on related areas that can enhance your practice such as elder law, asset protection, and income tax planning. Attendees also enjoy unparalleled networking and professional development opportunities that make attending the Heckerling Institute a valuable investment for every estate planning professional.

Recent Developments: The recent developments panel on Monday afternoon, featuring three of the nation's foremost estate planning experts, will guide you through the most significant legislative, regulatory and case law developments of 2011.

Focus Series: Today's estate planners and their clients are faced with uncertainty in both the legal and economic environments. The focus series will explore how to plan successfully in these uncertain times by building flexibility into the estate plan. The series will examine the use of powers of appointment, flexibility in the formation and operation of trusts, using the \$5 million exclusion amount, portability, and effective planning techniques for estates of varying sizes.

Planning with Financial Assets: Our financial assets series will cover the benefits and drawbacks of using annuities in estate planning, planning with Roth IRAs, and best practices for monitoring life insurance policies in ILITs.

Litigation and Tax Controversies: This series will include sessions on the effective use of expert witnesses, how to properly maintain and administer FLPs, and how to avoid or litigate a financial elder abuse case.

Fundamentals: The Fundamentals programs are of interest to both new and experienced planners who would benefit from a comprehensive review of three important planning areas. The programs will cover powers of appointment, tax-exempt organizations and charitable gift planning, and the use of grantor trusts.

Networking and Practice Development: As the largest gathering of estate planning professionals in the country, the Institute offers a unique opportunity to exchange ideas, network, and review the latest in technology, products and services displayed by nearly 150 vendors in an exhibit hall dedicated entirely to the estate planning industry.

Valuable Resource Materials and Sample Forms: Valuable materials for your practice include outlines, case studies and sample forms prepared by the nation's leading experts.

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Institute Advisory Committee and Emeritus Members, and 2012 Heckerling Substantive Program Speakers, Schedule and Program Highlights

Due to some technical problems we have been having in capturing the text of the Institute's Brochure that is in PDF format on its Web site and converting it to Word and/or WordPerfect file formats so we can list the members of the Advisory Committee plus all of the faculty members and a summary of their topics in this message, we are instead giving you the URL for that Brochure below so you can go there and view and print out the Brochure itself, or the parts of it you want in print, if you want to.

http://www.law.miami.edu/heckerling/pdf/2012/46th_heckerling_brochure_071411.pdf

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

Telephone: 305-284-4762 / FAX: 305-284-6752 Web site: www.law.miami.edu/heckerling

E-mail: heckerling@law.miami.edu

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NOTICE: Although audio tapes of all of the substantive session at the Miami Institute currently are only made available to Institute registrants for purchase, the entire proceeding of the Institute are published annually by Lexis/Nexis. For further information, go to their Web site at <http://www.lexisnexis.com/productsandservices>. The text of these proceedings is also available on CD ROM from Authority On-Demand by LexisNexis Matthew Bender. For further information, contact your sales representative, or call (800) 833-9844, or fax (518) 487-3584, or go to <http://www.bender.com>, or write to Matthew Bender & Co., Inc., Attn: Order Fulfillment Dept., 1275 Broadway, Albany, NY 12204.

Monday, January 9, 2012

9:00 AM- 12:15 PM - Fundamentals Program No. 1

What Your Mother Never Told You About Powers of Appointment:

A Most Flexible Estate and Financial Planning Tool

Presenter: Jonathan Blattmachr

Reporter: Carol Sobczak

This 3-hour presentation covered some fundamentals and fine points of powers of appointment. Emphasis was on how such powers can produce enhanced estate, gift, generation-skipping transfer tax and income tax benefits and how they can cause adverse effects. Specific planning suggestions and sample language were also presented. The following report covers some of the more significant highlights of this particular presentation.

This session was divided into three major sections: (i) powers of appointment in general; (ii) decanting; and (iii) tax consequences.

A power of appointment (POA) is a power given to a donee by a donor that allows the donee to designate the recipients of certain property or interests in property. While the Second Restatement of Property posited that a POA could be held in a fiduciary capacity and could be exercised in further trust, the draft Third Restatement defines a POA as a power that enables a person, *acting in a non-fiduciary capacity*, to designate recipients of beneficial interests. Today, however, POAs include a fiduciary power to appoint in further trust, which is called “decanting.”

This reporter, who lives in the Napa Valley, was convinced she would have a difficult time not daydreaming of “decanting” her favorite wine all during the presentation. However, Mr. Blattmachr delivered an impassioned and interesting talk, kept her attention throughout, and mixed some very good basics with interesting new issues. The only problem, in this reporter’s humble opinion, was that Mr. Blattmachr spent much too much time explaining the New York decanting statute and not enough time on the tax consequences of POAs.

1. POAs in General.

While local (state) property law governs POAs, they are not transferable and thus are not considered property interests under the Internal Revenue Code (the “Code”). Yet, the granting, release, presence, lapse, and exercise of POAs may have income, estate, and GST consequences.

POAs can be imperative, or non-imperative, exclusive or non-exclusive, but generally most POAs today are non-imperative (that is, they are not required to be exercised) and exclusive (they allow the donee to exclude any eligible individuals). That is, if you have a power to appoint to descendants of the trustor, you need not appoint to all of them.

We tend to classify POAs as either general or non-general. If a donee has a general POA, assets subject to the POA will be included in the donee’s estate for federal estate tax purposes. A non-general (or special or limited) POA may not be exercised in favor of the donee, the donee’s estate, the donee’s creditors, or the creditors of the donee’s estate. This does not bring the assets subject to the POA into the donee’s estate.

In drafting, be careful not to include the donee of the POA in the class of permissible beneficiaries, such as giving the power to appoint to the testator’s descendants, where the donee of the power is a descendant.

The relation-back doctrine treats the exercise of a POA as a transfer by the *donor* of the power.

Generally, a POA may not be revoked or amended. When it's done, it's done!

One must have the capacity to dispose of property under state law if one is to make a valid appointment

A legal representative of a donee may exercise a POA. It may be wise to specifically give an agent the power to exercise a POA on behalf of a principal under a power of attorney. Again, check state law.

Also note that, if the power requires it to be exercised by a valid Will admitted to probate, you may have to admit a Will to probate that you would not otherwise have to admit.

Property subject to a non-general POA is not subject to claims of creditors of the donee, while property subject to a general power is.

Note that a power to appoint to oneself, but only for one's health, education, maintenance, and support, *is* a general power but may not be subject to attachment by creditors, depending on state law.

2. Fiduciary Powers of Appointment (*i.e., decanting*)

A fiduciary power to distribute trust property on a discretionary basis is considered a power of appointment, and the trustee may distribute assets in further trust per *Phipps v. Palm Beach Trust Co*, 142 Fla.782, 196 So. 299 (1940). Thus, common law gives trustees with discretionary powers a decanting power, which is a POA for property law purposes.

At this point, Mr. Blattmachr gave a very detailed description of the New York decanting statute. Other states are getting into the act, although the *Phipps* case seems to indicate that decanting is allowed under the common law.

There was some discussion of the *Bosch* case, which stands for the fact that the IRS does not have to accept the ruling of any state court other than the highest court of the state. But compare Rev. Rul. 73-142, which posits that if you modify an instrument prior to the taxing event, the IRS may be more likely than not to accept the ruling. Decanting may have tax consequences, such as gain recognition, change of income tax status of the new trust as opposed to the old trust, gift tax issues re a beneficiary who acquiesces to a decanting. Also, does a beneficiary with the power to decant have gift tax issues?

3. Tax Consequences of Exercise of POAs

POAs are very flexible estate planning tools, and have sometimes been referred to as powers of "disappointment." In drafting, be sure to indicate what manner of exercising the power will be accepted, such as in a valid Will admitted to probate, in a Will or other writing, etc. Be careful not to violate the rule against perpetuities in drafting and exercising POAs.

The tax issues governing POAs are found in IRC sections 2514 and 2041.

As noted above, property over which a donee holds a general POA is included in his or her gross estate for federal estate tax purposes. Be aware of the Delaware Tax Trap, which can turn a limited power into a general power. There may be instances where you wish to do this, to include property in a donee's gross estate.

While the exercise or release of a general POA is a gift by the donee, it may be incomplete under Treas. Reg. § 25.2511-2. A lapse of a general POA is treated as a release, but only to the extent of \$5,000 or 5% of the property over which the POA may be exercised.

A POA may be disclaimed. A release may have gift and estate tax consequences, but a disclaimer should not.

Finally, some parting words from Mr. Blattmachr:

These Revenue Rulings will save your life: Rev. Rul 85-13, 73-142, 84-1205.

Always keep property in trust as long as possible. This reporter does not agree, as her clients' financial status may be quite different from the financial status of Mr. Blattmachr's clients.

Powers of appointment may allow a donee to "jump generations" and thus have only one GST tax imposed. One may foil the reciprocal trust doctrine with POAs.

Thus, POAs are extremely flexible planning tools, but be certain to use them properly.

See Discussion Thread 1 at end of reports under Miscellaneous Stuff

Monday, January 9, 2012

2:10 - 5:15 PM - **Recent Developments 2011**

Presenters: Dennis Belcher, Carol Harrington and Prof. Jeffrey Pennell

Reporter: Herb Braverman

The title of this traditional topic speaks for itself. Summarized here are many of the more significant highlights from the presenters' presentation and their 215 page outline that was edited by Ron Aucutt. The Recent Developments presentation is one of the most important of the Institute and this edition also proved to be important.

The panel, relying in part upon an excellent outline prepared by them and by a well known cadre of other ACTEC Fellows, discussed something in the area of forty issues that concern or should concern estate planners everywhere. Since it is impossible for me to cover all of those issues, it is my suggestion that you obtain the outline and the audio version of the presentation, along with the audio version of the Question & Answer session that the same panel will conduct on Wednesday, January 11, for some of the same topics will be discussed further for sure. This will certainly be worthwhile.

However, I will mention some of the many topics that were discussed. In general, each of the panelists took the lead on some topics and the other panel members chimed in with other points and opinions on each topic, as they saw fit. The chemistry among them was enjoyable and often humorous, making the three hour session quite manageable.

Ms. Harrington and the others on the panel spoke about Form 8939, on which the estates of 2010 decedents may make a Code Section 1022 election out of the estate tax, opting for the carryover basis regime; however, Form 8939 MUST BE FILED BY JANUARY 17, 2012, and there are no extension provisions per se. Under the remedial Code Sections 9100-2 and -3, there arguably could be a six-month extension to file Form 8939, on a properly filed return but this is very doubtful and should not be relied on in Carol's view. She discussed other issues relating to Form 8939, including identifying the "recipient" of assets in some estate plans, the use of appraisals, the filing of Schedule R with Form 8939 and other issues making this topic one that deserves much attention to detail. Mr. Belcher suggested that formula allocations and conditional filings of Form 8939 would not be available.

Correction - Recent Developments in Report #2

Carol Harrington, one of the three co-presenters has requested that we post the following correction and clarification of one of our statements that is in our Report of the Recent Developments 2011 general session

that was held on Monday morning, January 9, 2012 as it was reported in Report #2:

I would appreciate it if you would correct the following statement in the summary for Mon Jan 9:

"Ms. Harrington and the others on the panel spoke about Form 8939, on which the estates of 2010 decedents may make a Code Section 1022 election out of the estate tax, opting for the carryover basis regime; however, Form 8939 MUST BE FILED BY JANUARY 17, 2012, and there are no extension provisions per se. Under the remedial Code Sections 9100-2 and -3, there arguably could be a six-month extension to file Form 8939, on a properly filed return but this is very doubtful and should not be relied on in Carol's view."

In fact, we never said that 9100-2 would allow a late election, but that if you timely file and made the 1022 election, you could under 9100-2 change the allocations of basis. We also said that there was the possibility of a late election of 1022 under 301.9100-3 but that the guidance indicated that given the time that has already elapsed, that route was not likely to be successful in anything other than unusual circumstances. It is a small change but important I think.

Thanks for the clarification Carol. Very helpful.

Professor Pennell discussed the "clawback" issue that might occur if an individual takes advantage of the \$5,120,000 exclusion amount currently available to our clients, only to die after that exclusion has been replaced by a substantially lower exclusion in a sunset scenario, such as may occur if Congress does nothing to stabilize this area of the tax law. On the other hand, he explained that there really is no clawback problem and he used the calculations on the Form 706 for 2011 decedents to prove his point. In fact, he suggested that the real problem would be that a taxpayer who paid a gift tax before the sunset occurred might lose some or all of the credit therefor and would be disadvantaged accordingly. This relates to the reverse-clawback issue. The amount of credit lost would be only that amount of gift tax paid on a gift made under a lower exclusion amount that would not have been payable if the exclusion at death had been in effect in the year of the gift. This problem can be avoided if the donor continues to give amounts equal to the increased exclusion amount. There was also a related discussion of how the basis of assets gifted would also effect the results for the taxpayer.

Mr. Belcher reviewed the lengthy period of inaction by Congress that has made planning so interesting of late. Will Congress do nothing in 2012 and/or 2013; will the estate tax be repealed altogether; will the US adopt the Canadian capital gains on death approach, continue the current regime or come up with something else entirely. In any event, the instability and unknown future of the tax laws have gotten the attention of clients and he referred to this condition as "the golden age of estate planning". In part, he was suggesting that our clients should well consider making gifts to the extent of the current exemption, particularly in a period of low interest rates and low asset valuations.

Mr. Belcher discussed "portability", which was apparently intended to simplify the Code, but has not proven to do so. He did suggest that a Form 706 be filed for every decedent, regardless of estate size, to protect the "portability" election for the surviving spouse. There are other issues surrounding this issue that have not been resolved in this area and these were noted briefly, including a comparison of the use of "portability" as opposed to a by-pass trust plan in the materials.

Professor Pennell discussed the items in the Service's Green Book, including portability (he predicted its permanence), modifications to Code Section 2704 (b) by regs. currently "on the shelf", changes to Code Section 2702 (end of zeroed out GRAT), limits for dynasty trusts to 90 years, etc.

The panel also discussed Code Section 67(e) and its 2% of AGI floor for certain itemized deductions and the "unbundling" of fiduciary fees accordingly. Although the newly proposed regs. in this area are not final yet and, if applicable in 2013, would not show up on returns until 2014, the panel suggested that fiduciaries begin thinking

about the "any reasonable method" they will use to do this unbundling to advance the interests of taxpayers.

Ms. Harrington mentioned the new SEC rules that may require registration by the end of March of this year by many who are not aware of how these rules will effect family offices, large and small, while Private Trust Cos. are not subject to these rules.

Professor Pennell reviewed the methodology for making a protective claim for refund in an estate tax setting under Code Section 2053. He noted that the requirements are essentially set forth in Rev. Proc. 2011-48, Notice 2009-84 and CCA 2008-48045, dealing collectively with issues of timing and claim perfection. The rules apply to claims over \$500,000.

Mr. Belcher noted IRS Notice 2011-101 to advise that the issues relating to decanting would not be the subject of rulings or comments until dealt with by the IRS in the future. He suggested the issues that the IRS are considering suggest a strict regime from the Service in this area.

The panel covered a wide variety of mostly recent cases decided in the areas of valuations, Code Section 2036 inclusion issues relating to discount valuation entity cases ("train wrecks" for taxpayers), pass-through entities, defined value formula clauses, step transaction and timing issues, Graegin loan issues and cats.

Many other issues and items were discussed. Get the outline, get the audio version and get the Q & A audio session also; you will then be aware of the recent developments for 2011.

Tuesday January 10, 2012 - General Sessions

9:00 – 9:50 a.m.

IRA Distributions and Rollovers - Integrating Estate Planning and Income Tax Planning

Presenter: Christopher R. Hoyt

Reporter: Jason Havens

Following a review of the ground rules for required lifetime and testamentary distributions from retirement plans, this session illustrated the impact that those rules have on different beneficiaries: elderly, younger, and youngest. In the case of an elderly surviving spouse, does portability provide the best of both worlds: estate tax benefits plus the income tax benefits of an IRA rollover to a surviving spouse? Is portability better than using an IRA to fund a credit shelter or QTIP trust? What about second marriages?

Chris Hoyt discussed the basic and some of the more advanced rules governing both the income and the estate taxation of retirement accounts. He focused mostly on the income and estate tax planning options available for a surviving spouse dealing with an individual retirement account (IRA). His materials include several useful charts, a glossary of the terms involved in this area, and several case studies that are practical and helpful to practitioners, including those who do not specialize in this niche area.

Chris began by covering the fundamental rules that apply to an IRA when the owner/participant dies. He emphasized that the surviving spouse is the only beneficiary who may roll over a deceased spouse's IRA to the surviving spouse's own IRA. However, even with a rollover approach, the governing rules require exhaustion of that IRA within a relatively short time period, especially where the surviving spouse is older.

Chris offered a charitable remainder trust (CRT) as potentially a viable solution to this and related problems. If a CRT is the designated beneficiary of the IRA, the CRT may be structured, for example, to provide a 5% constant

payout (rather than the escalating/increasing exhaustion rates required by the minimum required distribution (MRD) rules) to the surviving spouse and then continue with a 5% payout to each of the children. Chris cautioned that this technique will not work if the CRT minimum remainder interest (MRI) rule is violated, which basically requires that there be a statistical likelihood that at least 10% of the CRT will indeed pass to the charitable remainder beneficiary. Therefore, in order to use a CRT effectively as the designated beneficiary of an IRA, the surviving spouse and the children generally need to be a bit older (e.g., a 75-year-old surviving spouse and all children over age 40).

Chris illustrated that rollovers typically produce the best income tax results due to the deferral of income taxation of the IRA based on the surviving spouse's longer life expectancy. He then discussed the other payout options depending on whether (a) the participant died before or after the required beginning date (RBD); (b) the IRA had a designated beneficiary; and (c) the determination date, which is September 30 of the calendar year that follows the calendar year of the IRA owner's death. To eliminate some of the beneficiaries and cure any issues where one or more of the beneficiaries do not qualify as designated beneficiaries, three options exist before the determination date: (1) disclaimers, (2) cashing-out a beneficiary, and (3) creation of separate accounts for different beneficiaries.

Chris also covered the differences between an accumulation and a conduit trust. A trust generally does not qualify as a designated beneficiary of an IRA unless it meets certain tests as a "see-through" or "look-through" trust. Then if the trust may retain the MRDs in trust for the trust beneficiaries, the oldest trust beneficiary's life expectancy is generally the one used in calculating MRDs. If, on the other hand, the trust simply passing the MRDs through the trust to the surviving spouse, then his or her life expectancy may generally be used to calculate MRDs.

Chris discussed in more detail the options available to a surviving spouse. The following is an excerpt from Exhibit C of his materials, which summarizes well this portion of his presentation. The time period denoted by asterisks represents the "Number of Years in Income Tax-Sheltered Environment."

Rollover = *Actual life of surviving spouse, plus life expectancy of beneficiary*

Accumulation CST = *Remaining life expectancy of surviving spouse*

Conduit CST = *Actual life of surviving spouse, plus a few more years*

CRT = *Actual life of surviving spouse, plus actual lives of all other beneficiaries*

Chris included several case studies that include a comparison on a year-by-year basis of the payout rate of each of these techniques.

He also touched on portability under the 2010 tax act, which generally allows a surviving spouse in a separate property state to use the remaining exemption of his or her deceased spouse. Chris cited Steve Akers' American Bar Association eReport article that listed various reasons why a credit shelter (bypass) trust would still be more effective than relying on the new portability option. However, Chris noted that retirement assets do not fit into the category of being helpful assets to fund a credit shelter trust. As a result, the CRT approach offers more advantages as a tax-exempt structure for income tax purposes and as an excluded trust for the surviving spouse's estate tax purposes.

Chris concluded by reiterating the advantages of a spousal rollover for income tax purposes and the historical tension between the income and estate tax planning regarding retirement assets. That tension is mitigated by portability because the disadvantage of "loading" a surviving spouse's estate with a rollover IRA can now be resolved in many cases by applying the unused exemption of the first spouse to die. Portability might sunset at the end of 2012, though, and is often not the best option for combined estates in excess of \$10 million or second

marriage situations. In those situations, some of the other options above need to be considered.

9:50 – 10:40 a.m.

Straightjacket Trusts: Requested, Needed or Imposed by Default? (Focus Series)

Presenter: John F. Bergner

Reporter: John Warnick

Straightjackets are designed to restrain a person who may otherwise cause harm to themselves or others. Sometimes a straightjacket trust is appropriate - however, many clients prefer flexible trusts. But, flexibility for whom? The settlor, beneficiary or trustee? This session discussed designing, drafting and implementing trusts that are adaptable to changing times and circumstances.

Mr. Bergner started out his presentation by noting that trusts can either be very constraining or very flexible. It requires skill, experience and judgment to know how to appropriately balance the tension between constraints and the desire for flexibility. This is what Mr. Bergner refers to as "The Art of Estate Planning." He noted that even when there aren't tax considerations, being able to listen effectively to a client and discern what the client's intent suggests will be the appropriate balance between constraints and flexibility is one area where the estate planner can demonstrate tremendous value.

The constraints which surround trusts come from five different sources:

1. The Settlor's wishes
2. Common law and statutory rules
3. Tax Laws
4. Marital Property Laws
5. Creditor Rights' Laws

This presentation highlighted what Mr. Bergner terms the Beneficiary Flexible Trust. The assumptions which underlie the suggestions offered around the Beneficiary Flexible Trust were: (1) flexibility has its limitations and in some situations may not be either possible or desirable; (2) constraints may be imposed on the settlor, trustee and beneficiary and when wisely chosen are key to obtaining the objectives for the trust; and (3) the principal objective is to create a trust which gives the beneficiary maximum flexibility consistent with the other goals such as tax minimization, asset protection, etc.

John Bergner highlighted three relatively common planning situations where the Beneficiary Flexible Trust might be utilized. The first is when your client approaches you and advises you that they are going to make a large gift, outright and free of trust, to their children or other beneficiaries. The second planning situation where this concept might offer great value is when the client has completed their own planning but there is the prospect of a large future inheritance which will likely change the planning landscape when it materializes. And the final place where a Beneficiary Flexible Trust is a great fit is when the client is on the cusp of a major business or investment decision which has great potential and the client doesn't want to lose access to the hoped for future appreciation in value and cash flow which will be generated by this project.

In one example Mr. Bergner offered he demonstrated how the client could be a beneficiary of a Beneficiary

Flexible Trust which is created by a third party and funded with no more than \$5,000 over which the client/beneficiary would have a right of withdrawal which would lapse. The trust would be designed to be a grantor trust with the client/beneficiary treated as the grantor for income tax purposes but it would also be structured so that it would be GST exempt and outside the estate of the client/beneficiary. The client/beneficiary could loan the necessary investment capital to the Beneficiary Flexible Trust and that loan transaction would be ignored for income tax purposes if the trust has been designed and implemented to qualify as a grantor trust with the beneficiary as the grantor. Mr. Bergner noted that care needs to be taken to insure that the settlor will not be treated as a grantor under the grantor trust rules.

The inclusion of broad non-general powers of appointment in a Beneficiary Flexible Trust is something Mr. Bergner strongly encouraged. He noted the power of appointment is also the "power of disappointment." If I understood him correctly, Mr. Bergner feels that having a lifetime and testamentary non-general power of appointment which is exercisable first by the client/beneficiary and after his/her death by his/her surviving spouse may be a more effective tool than an in terrorem clause. That non-general power of appointment shifts what Mr. Bergner described as the "balance of power."

Mr. Bergner provided both a sample Beneficiary Flexible Trust as well as same withdrawal right language and a sample withdrawal notification letter for the trustee to use to notify the client/beneficiary of the existence of the withdrawal right. This sample letter is quite interesting because it goes on in great detail to describe the difference between a release and a lapse and to detail both the transfer tax and income tax consequences of either a release or lapse. The form Mr. Bergner provides has the client/beneficiary acknowledging their intention to allow the withdrawal right to lapse and their acknowledgment that this will result in their being treated as an "owner" of the trust for income tax purposes. I believe the sample forms Mr. Bergner has provided are such that those who are interested in the Beneficiary Flexible Trust, or its cousins the Beneficiary Designed/Defective Irrevocable Trusts, and aren't attending the Heckerling Institute will want to purchase the written materials as soon as they become available.

Mr. Bergner closed with this powerful summary of both the challenges and opportunities we face in balancing the tension between constraints and flexibility: "The tension between flexibility and control manifests itself in virtually every provision of a trust instrument, from beneficiary designations to distributions to trustee selection to administrative powers. Some of both is necessary in every instrument; too much of either can be disastrous. The competent practitioner will know how to balance flexibility and control in order to achieve his client's goals. That is the art of estate planning."

10:55 – 11:45 a.m.

Pressing The "Do Over" Button: Strategies for Modifying Wills and Trusts After Formation (Focus Series)

Presenter: Joshua S. Rubenstein

Reporter: Craig Dreyer

This session first considered the federal and state tax considerations underlying the decision whether or not, and if so, how to modify wills and trusts after formation. It then considered those options for modification that have retroactive effect to the date of creation, as well as those options whose effect is purely prospective. The session conclude by considering the availability of litigation settlements to make otherwise much needed modifications to wills and trusts.

Mr. Rubenstein opened his presentation discussing a few current events that weren't expected such as the

European debt crisis, the Asian spring, and the Yankees failing to reach the World Series. He noted that you cannot anticipate all changes and issues that may arise in the future. Clients often make bad decisions regarding their estate plans, and lawyers sometimes make mistakes. In addition, people are living longer than ever before which raises the question, so how long does a person have to wait to inherit? There is an increase in litigation, and trust beneficiaries often few trusts negatively. Mr. Rubenstein divided the presentation into four different sections in discussing how to address some of these issues: I) Tax Considerations Underlying Modifications: Income and Transfer Taxes, II) Retroactive Modifications, III) Prospective Modifications, and IV) Special Considerations with Respect to Litigation Settlements.

I) Tax Considerations

In describing the tax consideration's underlying modifications, he noted the current low income tax rates, which he only expects to increase. Historically income tax rates are as high as 90% for the top rates as opposed to the current 35-40% income tax rates and 15-28% capital gains rates. He also discussed the various forms of taxation for different entities and how gifts, legacies and distributions from estate/and or trusts are generally tax exempt, except for income in respect of a decedent, distributable net income, and gifts to employees. The most common deductions are charitable, businesses, and administration expenses which are all subject to substantial limitations. He also noted many states and municipalities impose income tax rates, while eight states levy no income tax.

Furthermore, transfer taxes have been at 55% for the last several decades, and historically have been as high as 90%, although today we are at 35%. The deductions on the transfer tax side include the marital deduction, charitable deduction, debts/claims, administration expenses, and exclusions. These deductions can often be claimed on the estate tax return, income tax return, or a decedent's final income tax return. He noted that the true cost of estate tax repeal did not take into account the shifting of deductions. This increased the cost of estate tax repeal significantly. All states impose an estate tax or inheritance tax, but due to the current federal credit many states effectively do not impose an estate tax. Gift taxes are levied by two states, Connecticut and Tennessee. Most GST taxes mirror the federal credit. As all these taxes increase, the importance of their effect on trust and will modifications increase as well.

II) Retroactive Modification

Reformation proceedings are statutorily allowed in certain circumstances. Today a charitable gift can be modified if it would otherwise be disqualified as a charitable split interest trust. In addition, a trust can be modified to correct errors that would otherwise disqualify the trust from being GST exempt. Finally, a qualified domestic trust (QDOT) can be modified to allow it to qualify for the marital deduction (oddly the same is not available for a QTIP trust). There is also 9100 relief for botched elections, but this has had mixed results with QTIP elections. In discussing the effectiveness of retroactive modification, he noted the IRS will generally not respect them due to *Commissioner v. Estate of Bosch*, 387 US 456 (1967), which provided in the absence of a determination by the state's highest court, only "proper regard," not finality, should be given to interpretations by state courts, provided it was entered by a court in a bona fide adversary proceeding.

He noted that if there is a genuine ambiguity, IRS is more likely to respect a construction proceeding than a reformation proceeding. He noted that tax allocation provisions often have problems and can result in significant rewriting of a will, since tax provisions can often dramatically shift who receives assets or may disinherit someone entirely. Disclaimers are also beneficial to resolve problems of disqualifying dispositions and people can also disclaim powers. In addition, a person may be able to disclaim a tax apportionment clause resulting in a significant shifting of property. He also noted that people should keep in mind the non-qualified disclaimer as it may be available to solve problems, although it may be subject gift tax.

Litigation settlements also provide opportunities to rewrite documents. Probate contests can substantially rewrite wills from bequests in trust to outright distributions. Elective share contests can also rewrite wills, but will often

result in an increase or decrease in taxes; and contests involving conflicting agreements, the agreement often trumps the Will. Examples of agreements that may trump a Will include: separation agreements, prenuptial agreements, shareholder and partnership agreements, pledges and contracts to make wills.

III) Prospective Modifications

Decanting is often used to change trust terms. He noted three main basis for decanting are: (i) the trust instrument, (ii) common law, and (iii) state statute. As for the statutes, he noted many new changes to statutes allow decanting in most all situations in a state such as New York. He discussed various reasons for decanting such as: to correct drafting errors, modify trust provisions, improve administration or managements, address changed circumstance, remove unworkable restrictions, change provisions relating to trust powers and succession, achieve tax savings, change trust situs, combine or divide trusts, and GST planning. He also noted notice 2011-101 which the IRS has issued to look into the various impacts of decanting. Often modification of trust documents can be done pursuant to the trust's terms. Resignation of disqualified fiduciaries can resolve the reciprocal trust doctrine. Trust splitting can also resolve GST or S corporation taxes, and partial QTIP elections. In addition, he noted some states allow parties to amend irrevocable trusts if the grantor is alive and all parties are adult and competent.

IV) Litigation Settlements

A fiduciary being sued should always look to ways to benefit the beneficiaries in the litigation by taking the opportunity to improve the document provisions. He noted that special consideration must be given to marital and charitable deductions in litigation settlements. For a marital deduction to be valid, under state law, an interest must pass from the decedent, property must be included in the gross estate, property must pass to the surviving spouse, and it cannot be a terminable interest, unless statutorily exempted. Similarly a charitable interest to be allowable under state law, must pass from decedent, must be included in the gross estate, must pass to charity, and the contest must be bona fide.

The tax treatment of settlements can often dramatically change results. If the marital deduction is lost, this can increase taxes and perhaps penalties and interest. The charitable deduction can also do the same. Also the values on interests cannot change considerably otherwise you can have gift tax consequences. It should also be noted that section IRC 102(a) exempts gifts and inheritances except for income from gifts and inheritances, gain on conversion or deemed conversion, and compensation for damages or services. Legal fees are also deductible by a fiduciary on the estate or trust return and a beneficiaries fees are generally not deductible by an estate or trust, except for probate contests and construction proceeding. These may or may not be deductible by the beneficiary. If the estate pays the beneficiary's legal fees there may be a possible deduction that helps resolve the litigation.

Mr. Rubenstein reminded us to think outside of the box and be creative. Consider the following strategies that can be employed to achieve substantial tax savings when modifying governing instruments as part of litigation: (i) Careful consideration of all claims should be reviewed to ensure proper consideration is given to each claim; (ii) enhance tax advantaged trusts such as credit shelter trusts or trusts not in the gross estate, estate tax deferred trust such as marital, and GST exempt trusts; (iii) consider possible benefits of exercising a right of contribution, transfer of debt to lower generations, discounting long term notes, consider deducting payments to charity, buy back assets from charity, characterizing transfers as gifts versus loans, and consider unitrust conversion options.

11:45 a.m. – 12:35 p.m.

They Say You Can't Take It With You - But How Do You Give It Away? Using the New \$5 Million Exclusion Amount (Focus Series)

Presenter: Ann B. Burns

Reporter: Joanne Hindel

Estate planners have an unprecedented opportunity at least until the end of 2012 to advise clients about the transfer of wealth to younger generations without federal gift tax. This session discussed options for wealth transfer to younger generations using the \$5,000,000 gift tax exclusion amount from the simple to the complex. The program included discussion of outright gifts, loan forgiveness, dynasty trusts, qualified personal residence trusts, gift splitting, grantor trusts, future taxation of current gifts, and more. If you can't take it with you, find the best strategy to give it away.

Ann Burns started her presentation with the point that the planner should start every discussion with the client at the very beginning: by reviewing with the client the motivations for making gifts and a realization that making gifts is not easy. She also pointed out that the motivation to make a gift or not is very personal with each client.

Ms. Burns also emphasized the need to conduct the analysis with a team of planning professionals including the client's financial consultants, investment professionals, tax preparers and other advisors.

In addition to the tax savings, the estate planner should consider the lifestyle needs and wants of the client when discussing the gifting considerations. One rule of thumb might be that if the client did not use the \$1 Million gift tax exemption prior to 2011, the client might not be a good candidate to use the \$5 Million exclusion amount in 2012.

The planner should explore with the client questions of financial security, chemical dependency, mental health, marital strife and special needs of the children and grandchildren before advising the client about the appropriate amount and structure of the gifts. The planner should encourage clients to bring children into the dialogue.

In addition to considerations of "how much", the planner should discuss the "how" with clients to determine if gifts should be made outright or in trust. Further, the planner should explore the selection of assets in discussing the intended gifts. Ideally, the best asset for gifting is an asset that has the potential to appreciate in value. The gifting strategy should be matched to the appreciation expectation.

Some of the advantages of gifting include the ability to remove appreciation and income from the donor's estate, the avoidance of the tax-inclusive nature of the estate tax on the gift, avoidance of state estate tax on the lifetime gift and the ability to shift income to donees in lower tax brackets.

Some of the disadvantages of gifting are the loss of step-up in basis on the gifted property, loss of income from the gifted asset and loss of control of the asset itself.

Generally, gifts should first be considered for their "clean-up" value: out of family or fairness considerations; to reduce audit or valuation risks and to unwind prior planning techniques that are no longer effective or desired. For example, gifts can be used to forgive loans; pay off children's mortgages; equalize family lines; or to transfer remaining partnership interests held by the older generation in family limited partnerships or family LLCs.

The estate planner should use a graduated approach to gifting by analyzing with the client the first step of making the gift and then moving through the embellishments of adding grantor trust features, gifts of discounted assets, allocation of GST exemption and installment sales to a grantor trust.

The creation of the family trust for the benefit of the donor's spouse and children acts as a prefunding of the credit shelter trust. The planner should discuss additional powers within the trust agreement such as the five and five power and powers of appointment to family members. When working with couples the planner should discuss complimentary trusts and avoid the problems of reciprocal trusts.

Ms. Burns also discussed gifts to a grantor trust and how they can provide substantial estate tax savings because the income of the trust is taxable to the grantor but this additional benefit to the trust is not considered an additional transfer for gift tax purposes. She reviewed the grantor trust rules and some of the IRS rulings pertaining to powers retained by the grantor.

As the highest level of planning in conjunction with gifts, Ms. Burns discussed the planning technique of installment sales to grantor trusts. She reviewed how the technique involves the sale by the donor of property at its fair market value to a grantor trust in return for an installment note. She pointed out how an installment sale is often referred to as a “freeze technique” because it freezes the value of the asset in the hands of the donor.

At the culmination of her presentation, Ms. Burns reviewed two scenarios: one involving a \$20 million dollar estate and one involving a \$200 million dollar estate and determined through illustrative charts that with the smaller estate the leverage provided by valuation discounts and the benefits of a grantor trust provide additional advantages to the family but the most significant aspect was making the gift itself.

In the larger estate, the biggest bang for the buck was the leverage provided by the installment sale to the grantor trust.

In summary, the estate planner should review a series of questions with the client to make full sense of the gift tax exclusion amounts available in 2012 which include: is the client ready to make a substantial gift; what assets should be gifted; what strategies are most appropriate and what benefits is the client trying to achieve.

2:00 – 2:50 p.m.

The Last Picture Show -- What You Should Do with Your Art

Presenter: Ralph E. Lerner

This presentation examined the current tax and estate planning alternatives for all sorts of collectibles, including charitable remainder trusts - both inter-vivos and testamentary; private operating foundations; fractional interest gifts; sale and lease-back transactions; valuation issues and new Internal Revenue Service valuation requirements and penalty provisions. Here are the highlights.

Ralph Lerner started his presentation by setting forth the four criteria a donor must meet before making a lifetime donation of a work of art to a charitable organization. The donor must determine: 1) the status of the charitable organization; 2) the type of property being contributed; 3) whether the collection satisfies the related use rule, and; 4) whether there is a qualified appraisal prepared by a qualified appraiser.

It is important to verify the status of the charitable organization as either a public or private charity because there is a very different result when a taxpayer makes a contribution to one or the other. Generally, a taxpayer will only receive a deduction of the cost for a contribution of an appreciated work of art made to a private charity as opposed to the full fair market value for a contribution made to a public charity.

The characterization of donated property as capital gain property or ordinary income property is important regarding charitable contributions. If the property is considered capital gain property, the taxpayer will receive a deduction for the full fair market value but will be limited to cost for ordinary income property.

Property is treated as ordinary income property if: it was created by the donor; it was received by the donor as a gift from the creator; it is held in inventory by a dealer or it would produce short-term capital gain or a capital loss if sold.

Mr. Lerner described a very funny hypothetical situation in which a client is given a work of art by an artist and then cannot obtain treatment of the art as capital gain property.

The related use rule requires that the use of the tangible personal property by the donee organization be related to the purpose or the function constituting the basis for the donee's exemption under section 501.

No income tax charitable deduction is allowed for any contribution of property for which an appraisal is required under the Tax Reform Act of 1984 unless the substantiation requirements of the regulations are met. These requirements are that the taxpayer obtain a qualified appraisal for the property; attach a fully completed appraisal summary to the tax return claiming the deduction; and maintain records regarding the contribution.

In light of the new rules under the Pension Protection Act of 2006, a donor should make the contribution of appreciated tangible personal property to a public charity; be sure that the contribution satisfies the related use rule; make the contribution only with long-term capital gain property; and be sure that there is a qualified appraisal by a qualified appraiser of the contributed property.

Mr. Lerner discussed partial inter vivos charitable transfers in some detail.

Since the IRS was concerned that there was abuse of the fractional gift technique (situations where the taxpayer claimed a deduction for a fractional interests in a work of art yet retained physical possession of the donated property for the full year), a new section under the PPA makes fractional gifts no longer desirable. There are valuation limitations, timing limitations, use limitations and the possibility of recapture of the deduction or denial of the deduction.

Mr. Lerner indicated that for purposes of determining the deductible amount of each additional contribution in the same work of art, the fair market value of the donated item is now limited to the lesser of: 1) the value used for purposes of determining the charitable deduction for the initial fractional contribution; or 2) the fair market value of the item at the time of the subsequent contribution.

He discussed a number of cases including the case of Estate of Robert Scull v. Commissioner in which the value of the decedent's 65% undivided interest in an art collection was reduced by 5% to reflect the uncertainties involved in any acquisition of the interest, which was the result of a divorce proceeding still being appealed. He pointed out that there really is no market for fractional interests.

Mr. Lerner described a situation with a client who wanted to establish his own public charity and Mr. Lerner arrived at the best solution which was a private operating foundation. He described the private operating foundation as falling somewhere between a private foundation and a public charity and indicated that the major advantage is that the donor can treat it the same as if the contribution had been made to a public charity. Contributions of art to a private operating foundation can be deducted to the extent of their full market value so long as the specific donation requirements are satisfied.

In closing, Mr. Lerner pointed out that one of the critical skills a lawyer has, particularly with wealthy clients who are collectors, is to learn to say no to their choices for handling their collections and convince them to give the collections to public charities and satisfy the four criteria set forth above.

2:50 – 3:40 p.m.

Portability: The New Estate Planning Wonder Drug? (Focus Series)

Presenter: Thomas W. Abendroth

Reporter: Herb Braverman

For years clients have complained about the extra planning necessary to ensure that both spouses' applicable exclusion amounts are used. Now we have a law that allows one spouse to pass unused exclusion to the survivor. This session discussed how to use portability, and whether it should be used before clinical trials are completed.

Mr. Abendroth opened his presentation with an advertisement for "portability", referring to it as a drug under clinical trial. He got a full round of applause for the opening; the fellow next to me thought the advertisement reminded him of a Cialis commercial, but I never heard of that!!

Tom reviewed the estate tax exclusion environment over the past 30 years or so and noted our heavy reliance upon the AB estate plan with an optimum marital deduction. He noted the some clients are reluctant to retitle assets to accommodate this style of planning. After citing some of the commonly used techniques in our planning, he noted that "portability" had been proposed to "simplify" estate planning for many married couples. But, as he concludes, it certainly remains to be seen whether "portability" will do that for US citizens.

Tom reviewed the basics of "portability", including certain definitions. See Code Section 2010 and regs. He points out that "portability" may work for some couples doing estate planning, but wonders if it will be with us eleven months from now and points out that it will not be helpful with GST planning at all.

The key is DSUEA (d-soo-ay, if you will)--deceased spouse unused exclusion amount. Although not adjusted for inflation, for decedents dying after December 31, 2010, there may be unused exclusion amount that a surviving spouse may use to exclude assets from estate or gift taxes. Although there are questions that Tom (or any of us) cannot answer yet about this new technique, the gist of it is that if one's last deceased spouse does not use his/her full exclusion amount (\$5,120,000, in 2012) to offset taxes when he/she dies, the surviving spouse now has an exclusion equal to the base amount plus the unused portion of the deceased spouse's exclusion amount. The regs. provide certain examples which should be studied, of course, but it is clear that there are no sure answers to certain questions, for example, the order of use of the enhanced exclusion amount, remarriage, serial marriage, recapture if lifetime gifts are subjected to the lower DSUEA of a "new" last deceased spouse or a reduction in the applicable exclusion at some point in the future, etc.

Citing IRS Notice 2011-82, Tom notes the details of implementing "portability". The election is made by the executor of an estate filing a Form 706, presumably on a timely basis. The election is irrevocable, but the executor can choose not to make the election by so indicating to the Service on the 706 or on an attached statement. Will there be a more efficient and less costly way of doing this in the future--not sure, but for now it is likely that a lot of 706's that would not otherwise be filed will be filed from now on, until the law is changed again.

Tom points out that "portability" planning should not be the answer for married couples, though it might help them under certain circumstances, in part because the provision in the law may well expire at the end of the year. Like other presenters at the Institute, Tom compared "portability" planning to credit shelter trust planning and, as one might expect, credit shelter planning is the favorite. After all, the more traditional planning will shelter appreciation and income, include the protective benefits of trusts, allow for GST planning, possibly avoid audit issues, and not be as impacted by remarriage.

Tom made some predictions. "Portability" is probably here to stay in some form or another. We will build more flexibility into credit shelter trusts, as planners. Those who can should carefully use DSUEA for lifetime gift giving as long as it is available. Prenuptial agreements will have language in them to cover the use and impact of this device.

As for me, I am expecting some pretty unusual marriages in the future, undertaken with "portability" in mind. See the new social matching website, Dying Medicaid Qualified Widows and Widowers with high potential DSUEA.com

3:55 – 4:45

There's No Place Like Home - Unless You Give It Away

Presenter: David A. Handler

Reporter: Mike Stiff

This session discussed the potential benefits of giving away a family home (primary or vacation), the practical issues associated with the ongoing use and maintenance of the house after transfer, methods of transferring homes, and the pitfalls associated with continued use after the transfer.

Since the \$5 Million gift tax exemption became part of the estate planner's arsenal David Handler has had at least monthly conversations with clients who asking themselves "Can or Should I Give Away My Home?"

Mr. Handler gave a number of reasons why clients may opt to give away all or a partial interest in their home: (1) they want to take advantage of the \$5 million gift tax exemption but don't want to give away other assets such as cash or marketable securities; (2) they can't give away other assets such as a retirement plan account, annuities, etc. or there will be adverse income tax consequences as a result of such transfers; or (3) they might be an executive of a public company and can't transfer stock in such company because of the impact that reporting such transfer might have in the marketplace or due to transfer restrictions on options, etc.

Then he proceeded to share the reasons why clients most often decide they don't want to make a lifetime transfer of their personal residence: (1) the children don't want it; (2) a gift might become divisive because of fairness or other relational issues; or (3) the gift is impractical due to the age, economic circumstances or location of the children.

Once the client decides to consider making a gift of a personal residence, there are four key questions Mr. Handler suggests be addressed with the client: (1) do the children want the home, cabin or vacation compound; (2) will the donor want to use the home after the gift; (3) who is going to bear the costs of maintaining the residence; and (4) what will be the rules for use of the residential property going forward?

How should we answer this question: "Can I use the home after I give it away?" Mr. Handler's answer is "Yes, but with a number of caveats." The principal concern will be avoiding the reach of Section 2036. His outline does an excellent job of covering the 2036 issues and charting a safe course for our clients to follow.

The first suggestion is to have the client retain an undivided interest in the family home. In creating the undivided interest it is critical that it be a tenancy in common rather than a joint tenancy with rights of survivorship. Otherwise, Section 2040 will defeat the tax objectives of the gift and result in full inclusion of the value of the home in the transferor's taxable estate. Mr. Handler cited a 2010 Second Circuit decision, *Estate of Stewart*, in which the court noted that there are two factors which have been determinative in reaching the conclusion there was an implied agreement as to retention of use of the property. Those two factors are "continued exclusive possession" by the transferor and "withholding of possession from the donee." Mr. Handler suggests that *Stewart* demonstrates that any continued occupancy by the donor is indicative of an implied agreement. When we are dealing with those facts he feels a use agreement or lease is imperative if the donee won't be concurrently using the residence with the donor.

Another possibility to consider is a gift by the client to a trust for the benefit of his/her spouse and children. This would permit the transferor to continue to reside in the home with their spouse but in the event of divorce or death the donor could no longer use the residence for free.

The third alternative that permits the donor to continue to occupy the residence is a lease arrangement with a rental that is "adequate consideration." Mr. Handler also pointed out the potential advantages if the residence is transferred to a grantor trust. That not only protects the property from the reach of the children's creditors but it also simplifies the rental transaction from an income tax standpoint. The beneficiaries of the trust won't

have to recognize income tax on the rental income and the rent payments are an additional tax free gift made to the trust.

In terms of who is going to bear the cost of maintenance, Mr. Handler gives a helpful overview of practical considerations that should be considered before the gift of the residence is completed. He points out that if the gift is being made into a multi-generational trust we should realize it is likely the home will need major renovations and may even need to be razed and rebuilt over a 50 or 100 year time horizon.

I thought there was great wisdom in Mr. Handler's suggestion that the rules for using and enjoying the family home/cabin. He notes that "(w)e teach our children to share their toys, but a house is completely different" and that family mayhem can erupt if we don't establish the rules for shared enjoyment of this gift. He then set out in great detail what the terms of a use agreement should cover and what some of the complications around shared decision-making regarding the home might be. At a minimum he suggests the use agreement cover: vs LLC hold property and integrate use agreement into the operating agreement.

1. How often and for how long can the property be used?
2. What will be our system to reserve dates for use?
3. How will utility, property taxes and maintenance fees be shared?
4. What voting system will we adopt for decision to renovate or sell the property?

He also noted that if the gift is being made to a trust that there may be reasons to consider transferring the home into a LLC first and including in the operating agreements the elements of the use agreement for the residential property. When the trust terminates or if the trust makes a distribution of an interest in the property to a beneficiary this ensures that the beneficiary will be subject to the terms of the use agreement.

Mr. Handler closed his presentation with a thorough discussion of the "Hows" to make the gift of a family residential property. The principal alternatives are (1) an outright gift of the home; (2) the transfer of a partial interest; (3) transfer of the property to a family LLC or partnership; (4) a sale; (5) a QPRT or multiple QPRTs; or (6) a RPM ("Remainder Purchase Marital") Trust.

The presentation materials contain an excellent discussion of the discount opportunities that arise in the transfer of an undivided interest as well as the most comprehensive comparison of the RPM Trust as an alternative of a QPRT that I have ever seen.

4:45 – 5:35 p.m.

Ethics - The ACTEC Commentaries in the 21st Century: Where Have We Been and Where Are We Going?

Presenter: Bruce S. Ross

Reporter: Mike Stiff

This presentation addressed the past, present and future ethical issues facing the estate and trust practitioner and attempted to address the practical application of the ACTEC Commentaries on the Model Rules of Professional Conduct in answering those ethical challenges since the Commentaries' first publication in 1999. Information about obtaining copies of the current 2006 4th Edition of the Commentaries can be obtained on the ACTEC

public Web site at <http://www.actec.org/public/CommentariesPublic.asp>. The materials consisted of a 29 page outline.

Bruce Ross began his presentation with a brief history of the ACTEC *Commentaries* from their original adoption in 1993 through the Fourth Edition published in March of 2006. He discussed that the purpose of the ACTEC *Commentaries* was not to change the Model Rules. As stated in his outline, "the *Commentaries* are designed to give "particularized guidance" to ACTEC Fellows, estates and trusts lawyers generally, and others regarding the professional responsibilities of lawyers engaged in a trusts and estates practice. The *Commentaries* reflect a concerted and thoughtful effort on the part of experienced probate practitioners to harmonize the "black letter" restrictions of the Model Rules of Professional Conduct with the ethical dictates of a generally non-adversarial and family oriented trusts and estates practice." They provide a lot of practical answers to the estates and trusts practitioner. Sample engagement letters designed to be used in conjunction with the ACTEC *Commentaries* were published simultaneously with the Third Edition. The ACTEC *Commentaries* and *Engagement Letters A Guide to Practitioners* are available to all attorneys and the public on the ACTEC public website (see above).

Mr. Ross discussed the general bias in the Model Rules against the representation of multiple clients. However, he noted that there is nothing inherently wrong with the representation of multiple clients if the clients and the attorney have entered into an ethical charter as to the terms of the representation. Mr. Ross reviewed the basic themes of the ACTEC *Commentaries* as stated in the Reporter's Note to the First Edition which was reproduced in his outline

Basic Themes of *Commentaries*. The main themes of the *Commentaries* are(1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally non-adversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of the law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the MRPC's.

The basic themes of the *Commentaries* have remained unchanged with the recognition that we must adopt the *Commentaries* to the local laws and the current situation.

Due to the time constraints, Mr. Ross focused the remainder of his presentation on the ACTEC *Commentaries* to Model Rules 1.1, 1.2 and 1.6.

ACTEC *Commentaries* on MRPC 1.1 Competence

Mr. Ross discussed the distinction between a lawyer's general competency and incompetency as it relates to a specific incident for legal malpractice. He also discussed the relationship between a lawyer's discipline for failure to act competently and a lawyer's liability in a negligence case. Mr. Ross noted that it severely complicates a negligence case if there is an alleged violation of a professional duty to a client. Mr. Ross also reviewed the privity rule and that at least 34 States have ruled that the lack of contractual privity between the drafting attorney and the intended beneficiary is not a bar to a legal malpractice claim by the beneficiary against the drafting attorney. At least 6 states still hold that lack of privity is a defense to a malpractice action, but cracks are developing and may see further erosion of this rule within these states.

ACTEC *Commentaries* on MRPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

Mr. Ross reviewed that the client and lawyer are generally free to define the scope and objectives of the representation. Mr. Ross noted that in addition to defining what you will be doing, it is often just as important to

define what you will not be doing. A good engagement letter may limit scope of representation and limit the duties owed to the client beyond the scope of representation. Many cases arise from confusion between the client's advisors as to who is responsible for certain actions. This confusion usually leads to both advisors being sued. It is best to put in writing and have the client sign. Clients mis-remember or lie (memories change / signatures don't).

Representing fiduciaries is more complex and dependant upon the facts and communications between the parties. Generally, if the lawyer represents the fiduciary in an administration of an estate or trust, the lawyer represents only the fiduciary. If clearly communicated, the lawyer would not owe duties to the beneficiaries. However, this is not accepted in all jurisdictions and is fact dependant. If the fiduciary breached a duty to the beneficiaries based upon the lawyer's advice then the lawyer may have liability. If the lawyer misleads the beneficiaries into believing the lawyer is representing or protecting their interest then the lawyer will have liability. If Lawyer gives the impression to the beneficiaries that the lawyer is representing their interests, the lawyer may have problems. Clear communications to the fiduciary and beneficiaries of the lawyer's scope of representation is critical to the lawyer avoiding such claims and potential liability. Mr. Ross also reviewed cases addressing whether a lawyer is required to follow self-destructive directions from a client with diminished capacity.

ACTEC Commentaries on MRPC 1.6 Confidentiality of Information

Mr. Ross reviewed MRPC 1.6 and how this affects the joint representation of a husband and wife. Generally, all communications between a husband and wife are confidential as to the outside world but there is no confidentiality between the husband and the wife. This creates a real dilemma for the lawyer if there is a unilateral communication by one spouse to the lawyer with the admonition not to share the information with the other spouse. May or must the lawyer share the information with the other spouse? Must the lawyer withdraw from the representation? Mr. Ross reviewed the split in relevant cases and the duties of the lawyer under the *ACTEC Commentaries*.

The outline was clear, informative and well done. The presentation addressed common ethical dilemmas for estates and trusts practitioners and provided practical advice and useful guidance.

Wednesday

9:00 – 9:50 a.m.

Use of Irrevocable Income - Only Trusts in Elder Law Planning: Yes, You Can Have Your Cake and Eat It Too

Presenter: Bernard A. Krooks

Reporter: D. Scott Robinson

One of the most valuable tools in the arsenal of the elder law attorney is the income-only trust. This session discussed the types of clients for whom this trust is most appropriate and broke down and analyzed the pertinent provisions of a properly drafted income-only trust, including so-called "boiler-plate" provisions which may come back to haunt you. Relevant tax considerations were also addressed.

The Wednesday morning sessions kicked off with a stellar presentation of the use of irrevocable income only trusts ("ILOT") in elder law planning. Mr. Krooks began his presentation by observing that with increasing transfer tax exemptions there are fewer clients seeking tax-driven estate planning and that as a result other areas of estate planning are becoming more important to both clients and estate planning practitioners. One of the areas of

increasing importance is the use of trusts, specifically irrevocable income only trusts, in long-term care planning for the elderly.

Why is planning with IOTs important? The ever increasing need for and costs associated with long-term care. Most Americans are under the misconception that long-term care costs, which stem from chronic illnesses, such as Parkinson's disease or Alzheimer's disease, will be paid for by health insurance and Medicare. That notion is incorrect as there is not a health insurance system, other than Medicaid, in the United States to provide for chronic illness (long-term care) costs.

Medicaid, which is a jointly (state and federal) funded government-based health insurance system and was originally established for the poverty stricken and destitute, has become the safety net for the middle class. A safety net in that those individuals that fail to plan for long-term care often exhaust their personal assets providing for such costs and then become dependent on Medicaid to pick up the long-term care cost tab. Mr. Krooks reported that the average cost of nursing home care in the United States was currently \$90,000 per year (much higher in areas like metropolitan New York and Alaska) and that two-thirds of Americans will require long-term care during their lifetimes.

It is critical that the practitioner undertaking Medicaid planning, due to the variations in the laws among the states, be familiar with the laws of the state in which the practitioner is practicing. Additionally, it is important that the practitioner keep in mind that, like tax law, Medicaid laws do not make sense and are constantly changing. Mr. Krooks noted that the typical clients seeking Medicaid planning will have a six or low seven figure net worth and are fearful of exhausting their life savings to pay for long-term care costs.

What about long-term care insurance? Mr. Krooks reported that long-term care insurance only paid for seven percent of long-term care costs last year in the United States, which means the remaining costs were paid for out of pocket or by the government. Mr. Krooks stated that very few individuals carry long-term care insurance, which is expensive and becoming more expensive. Despite the cost, Mr. Krooks believes that long-care insurance should be discussed and considered during the estate planning process.

In general, Medicaid planning involves structuring a client's assets into one of two pots: 1) countable assets and 2) non-countable or exempt assets. Non-countable assets can include an IOT. Mr. Krooks pointed out, however, that due to the five-year look back period a settlor cannot simply place assets into an IOT today and then be qualified for Medicaid benefits tomorrow. IOT planning is not appropriate for crisis planning. This type of planning should only be utilized when the client wants to plan ahead for long-term care costs. Mr. Krooks also noted that having exempt assets does not mean that such are protected from Medicaid estate recovery. Exempt assets are simply not counted for Medicaid qualification purposes.

With Medicaid trust planning it is important to understand the distinction between revocable trusts and irrevocable trusts. Revocable trusts will not work for protecting assets from nursing home costs (i.e. for Medicaid planning purposes). The only kind of trust that will work is an irrevocable trust, where the trustee has no discretion to distribute (invade) principal for the settlor and where the income must be distributed to the settlor.

Mr. Krooks mentioned that the current Medicaid Qualifying Trusts ("MQT") rules have been in place since 1993 and that having a MQT will disqualify a settlor from Medicaid eligibility (one of those things about Medicaid that does not make sense). The MQT rules basically apply to basically to inter vivos self-settled trusts. In other words, the rules do not apply to testamentary trusts. The rules also do not apply exempt trusts, which are essentially special needs trusts. Mr. Krooks noted that the MQT rules ignore all restrictions on trustee discretion and presume that such discretion is exercised in favor of the settlor.

An IOT has several benefits over an outright gift. An IOT allows the settlor to maintain control over the disposition of the assets. This control is in the form of limited powers of appointment or a "rainy day" provisions.

With regard to limited powers of appointment, Mr. Krooks mentioned that care needed to be taken with respect to whether to include testamentary or lifetime powers. Some courts have taken the position that lifetime powers allow too much control.

“Rainy day” provisions are sprinkling powers that enable the trustee to distribute principal to children or other friendly beneficiaries. These beneficiaries can then utilize the distributed funds to purchase items, such as airline tickets, for the settlor. In order to strengthen the sprinkling provision, which indirectly allows the settlor receive benefit from the principal other than income, Mr. Krooks suggests giving the settlor the power to remove and replace the trustee. In this manner, if the trustee will not make the sprinkling distribution, a “more friendly” trustee can be put in place to accommodate the distribution. Mr. Krooks noted that a sprinkling distribution does not start a new look back period (i.e. is not treated as a new gift).

Other benefits of the IIOT over outright gifts include tax benefits and creditor protection. The tax benefits stem from the IIOT being a grantor trust for income tax purposes and the fact that the settlor is often in a lower tax bracket than the individuals who would otherwise receive the assets placed in the IIOT through an outright gift. In order to fully take advantage of the income tax benefits without having to limit the investment of the trust’s assets, Mr. Krooks advised that the trust should be drafted so as to be a grantor trust with respect to income and principal. Mr. Krooks mentioned that he prefers to do this with the power to substitute assets of equivalent value. However, the practitioner should exercise care when using the power to substitute assets as the authorities in some jurisdictions have taken the position that such power allows the settlor access to the principal of the trust. Being a grantor trust with respect to principal provides for capital gains to be taxed to the settlor and maintains the Section 121 personal residence exclusion in the event the settlor’s residence is part of the corpus of the trust and is later sold. Another tax benefit relates to the assets in the trust receiving a stepped basis at the death of the settlor because the assets are includible in the settlor’s estate. This basis increase does not occur with an outright gift.

From a creditor protection standpoint, the assets in the IIOT are not subject to the claims of non-settlor beneficiaries (i.e. the children) and can be maintained in trust after the death of the settlor. Mr. Krooks suggested that the creditor protection aspects of the IIOT could be strengthened for the settlor by establishing the IIOT in a state with domestic asset protection trust statutes. These states include Delaware, Nevada, South Dakota and Wyoming.

The amount of assets in which to fund the IIOT depends on several factors, such as age, health and net worth. The settlor must maintain sufficient assets outside the trust to live on for at least five years (the look-back period). When funding the IIOT high basis may be want to be left out for gifting strategies because of the carryover basis associated with gifts. Also, income producing assets may want to be sold after the settlor goes into a nursing home as the income of the IIOT gets paid to the nursing home. Mr. Krooks cautioned against adding assets to the IIOT after initial funding as such added assets are subject to the five-year look-back period and suggested that it is generally better to establish a new IIOT for additional assets to be transferred.

Mr. Krooks concluded his presentation with a discussion of drafting tips and references to resources in the materials, which are excellent. These tips included overriding a state law power to adjust between principal and income, whether to treat invasions of principal for the children as advancements and exercising care with regard to termination of the trust. Other tips included drafting considerations when real property, specifically the settlor’s residence, comprises a portion of the principal of the trust.

Gift Tax Audits: A Tale of Two Initiatives

Presenter: Beth Shapiro Kaufman

Reporter: Mike Stiff

The IRS is obtaining records from third parties and looking for unreported gifts. Current audit initiatives involve intra-family transfers of real property and transfers to 501 (c)(4) organizations. Learn who is at risk, what the potential penalties are, and what strategies can be used in these cases. The materials consisted of a 17 page outline.

Beth Shapiro Kaufman began her presentation by noting that the gift tax audit rate has been relatively consistent in the past several years (less than 1% of filed gift tax returns with a low of .4% and high of .7%). However, several factors are working to increase the gift tax audit rate in the coming years. The higher exemptions mean fewer audit resources are necessary for estate taxes. Ms. Kaufman expects these resources may be shifted to handle the numerous large gifts being made in 2011 and 2012.

Two recently revealed IRS gift tax compliance initiatives lend support to this conclusion. The first initiative involved transfers to Section 501(c)(4) organizations. While there had been no activity on this issue for decades, the IRS acknowledged in May 2011 that it had opened audits of 5 taxpayers involving transfers to 501(c)(4) organizations. The IRS asserted that gift tax was due on transfers to 501(c)(4) organizations. While there are specific exclusions for gifts to 501(c)(3) organizations and 527 political organizations, there is no explicit exception for gifts to 501(c)(4) organizations. This generated a strong reaction on Capital Hill and questions of whether this was politically motivated. The Commissioner responded that "this activity was conducted as part of ongoing work that focuses broadly on gift tax non-compliance and is not part of any broader effort to look at donations to 501(c)(4) organizations." On July 7, 2011, the Deputy Commissioner announced that until further notice, examination resources should not be expended on this issue and all current examinations should be closed.

The second initiative was revealed by papers filed by the IRS in California seeking the release of state real estate records showing the transfer of real estate to related parties for less than full consideration. The IRS stated that 60-90% of the taxpayers who transfer real property for little or no consideration fail to report the transfer on a gift tax return. The IRS stated that the initiative had already been underway for two years. The IRS also stated that as of December 10, 2010, the IRS had examined transfer records in 15 states, completed examinations of 323 taxpayers, had 217 examinations underway and was researching an additional 250 cases. In October of 2011 it was reported that there were 364 cases under review and 20 cases resulting in recovered gift taxes. The California court originally denied the IRS request but it was later granted on December 15, 2011. It is presumed that California is in the process of providing the requested information to the IRS and that other states have provided such information voluntarily.

Generally, there is no duty to correct a gift tax return. However, gift tax on any unreported gift can be assessed at any time. It also causes problems for future gift tax returns which must disclose all past gifts. Attorneys must comply with their duties under Circular 230 and advise clients of their options to correct the return and the consequences of non-compliance. The rules that apply to CPAs require that the CPA must withdraw from the representation if the client fails to correct the error.

Ms. Kaufman described two types of disclosures to correct an error on a gift tax return. The first is a "quiet" disclosure in which the taxpayer simply corrects the error by preparing and filing the relevant corrected returns. If the error was simply an oversight and the resulting gift tax is covered by the taxpayer's credit, this may be the best strategy. The second type of disclosure is often referred to as a "noisy" disclosure and the taxpayer initiates contact with the IRS to determine if the case is acceptable under the voluntary disclosure program. Under the voluntary disclosure program, the IRS will generally forego criminal prosecution, if the taxpayer comes forward before the IRS has started an examination. The voluntary disclosure program does not offer any protection from civil penalties. If there is any possibility of criminal penalties, serious consideration should be given to a noisy disclosure. One advantage of a noisy disclosure is that a closing agreement will be issued providing finality. Ms. Kaufman also noted that it generally is not advisable to self assess penalties and ok to wait for the IRS to send a bill for the penalties. Occasionally a bill for penalties never arrives.

Ms. Kaufman reviewed the civil penalties.

Section 6651(a)(1) Failure to File 5% of the gift tax due per month with a maximum of 25% (if fraudulent 15% per month with a maximum of 75%)

Section 6651(a)(2) and (3) Failure to Pay Half a percent per month with a maximum of 25% after 50 months

* If both Failure to File and Failure to Pay penalties apply, then maximum of 5% per month with maximum of 25%

* The IRS may waive the penalties if "due to reasonable cause and not willful neglect." Reliance on qualified tax advisor or ignorance of the obligation can constitute reasonable cause.

Section 6662 Accuracy related Penalties

Negligence Penalty Underpayment of tax that is attributable to "negligence or disregard of rules and regulations"
- 20% of the underpayment of tax

Substantial Underpayment Value of any property listed on the return is 65% or less of the amount determined to be the correct amount - 20% of the underpayment of tax or 40% if 40% or less of correct amount.

* If both Negligence and Substantial Underpayment penalties apply, the maximum is 20% unless 40% penalty applies.

* The IRS may waive the accuracy related penalties if the taxpayer can show had reasonable cause for the position and acted in good faith.

Section 6663 Fraud Penalty 75% of the underpayment of tax due to fraud.

* The IRS can impose either the Negligence or Fraud penalty, but not cannot collect both.

* The IRS can institute a **Criminal Investigation** when there has been a willful failure to file a gift tax return or the filing of a false gift tax return.

Ms. Kaufman discussed that the omission on a gift tax return not only affects future gift and estate tax returns, it can also affect the tax liability of the transferees and executor of the donor's estate. Ms. Kaufman reviewed the transferee liability of the donee and that the IRS has an extra year after the expiration of the period of limitation for assessment against the donor to assess the tax against the donee. If the assessed tax is not paid, the tax is an estate and gift tax lien (10 years from date of gift) against all gifts made during the year, including marital deduction gifts. The executor of the donor's estate may also have liability for delinquent gift tax if he or she pays other claims even if the tax is unassessed and undetermined at the time of payment. It is not necessary for the government to make a claim in probate to hold the executor personally liable after the estate is closed. The courts have generally only imposed personal liability on the executor when the executor had actual knowledge or should have known.

The program provided a good review of the civil and criminal penalties that apply to gift tax returns and a framework for addressing unreported gifts or correcting errors on gift tax returns.

10:55 – 12:35 **Question and Answer Panel**

Presenters: Dennis I. Belcher, Carol A. Harrington and Prof. Jeffrey N. Pennell

Reporter: John Warnick

This presentation was based on questions that were previously submitted by those in attendance.

The panel started the Q&A Session by tackling questions regarding Form 8939. Perhaps the most significant point was made by Carol Harrington when she stressed the importance of filing the Form 8939 by next Tuesday, January 17th. She gave an example of a \$4.9 MM estate. There is no protective election nor is there a contingent election. However, if you file on time you get a “do-over” in the sense that you can take advantage of the six month period to correct the initial Form 8939. This doesn’t require a fee nor does it require a PLR. It is an automatic do-over made possible under 9100-2. However, it cannot be used to get out of Section 1022.

Professor Pennell made a very interesting point in response to a question regarding how you value the undivided interests that multiple beneficiaries receive when an asset is divided into separate but equal shares. In this fact situation assume that 100% of the property owned at the time of the decedent’s death is valued at \$600,000 but had a cost basis of \$300,000. What value has to be used in determining what basis step-up will be allocated to the undivided one-third interest in that property which each of three residuary beneficiaries will receive upon settlement of the estate? Will the value of what the beneficiary ends up with will be deemed to be 1/3 of the \$600,000 or do you have to look at what the value of an actual undivided 1/3 interest in that asset would be. If you have to discount the value of what each of those beneficiaries receive because it is an undivided interest then you won’t be able to allocate as much basis step-up because you can’t allocate basis step-up to an asset in excess of its fair market value. Professor Pennell feels that you allocate that step-up in basis according to the value of the property the decedent owned and not according to what the actual value might be of the undivided interests each of the residuary beneficiaries end up with.

Carol Harrington reminded us that appraisals must be attached to Form 8939.

Another question was raised as to whether you can aggregate all of the positions in a brokerage account and allocate basis to the account or whether you have to list each individual security within the account. You must show each asset that a beneficiary will end up with and what its value is. Otherwise, there would be a potential for abuse and it wouldn’t be clear to a beneficiary what their basis is.

Carol Harrington suggested that when you are going to exhaust the \$1.3 MM basis step-up the PR carefully consider what assets are most likely to be sold first and to allocate that basis step-up to the assets which you expect will first be sold.

Dennis Belcher addressed a question on whether a formula allocation clause on the Form 8939 will be effective. He worries that doesn’t work. Carol Harrington suggested that you might want to consider making all of the specific allocations to individual assets to soak-up all of the basis increase you can make and then to make a protective formula election that would allocate any remaining basis increase to any after-discovered assets.

There were a number of questions which considered QTIP issues that arise with reporting on Form 8939. The first relates to property that is includible in the decedent’s taxable estate because they were the beneficiary of a QTIP trust. This type of QTIP property is not reportable under Form 8939 because it isn’t property acquired from the decedent.

The second question arises with Reverse QTIPs. Confusion arises because Reverse QTIP property also isn’t property “acquired from decedent” so it wouldn’t ordinarily be reported on Form 8939. But Carol Harrington cautioned that there is a Schedule R that must be completed for the Reverse QTIP property even though that property won’t qualify for a basis step-up using Form 8939.

The \$3MM basis step-up that is available for property passing to a spouse has to be reduced by administration expenses. That isn't true for the \$1.3MM basis increase for assets passing to beneficiaries other than a spouse.

Professor Pennell kicked off an extensive discussion on questions relating to Portability. One question was what is the likelihood that the IRS will issue a Form 706EZ to make portability a less expensive proposition from a reporting and compliance standpoint? He mentioned that he had met with the IRS in August and had discussed that possibility with them. The estate tax attorneys for the IRS gave him several reasons why a Form 706EZ isn't feasible or likely. First, they will have to look at these estates and make sure that the marital deduction works. Second, they will have to look at values from the standpoint of basis and making sure that values aren't being inflated.

Professor Pennell noted that the cost of filing a 706 in order to preserve portability isn't insignificant. He conducted an informal poll of CPA in Georgia. The least expensive cost estimate he received for filing a Form 706 to make the portability election was \$3,000 and that was from a CPA in a less populated corner of Georgia. He estimated that in Atlanta the cost would probably range between \$6,000 and \$10,000. While foregoing portability and using a credit shelter trust for smaller estates would avoid that cost, he cautioned that you have to take into consideration what is the compliance cost of filing a Form 1041 each year for the remainder of the surviving spouse's lifetime.

Dennis Belcher feels that portability is going to be very important. He pointed out that to not rely on portability and go down the credit shelter trust path two important conditions have to be satisfied. First, you have to have a proper estate plan that creates that credit shelter trust. And, second, there must be a proper titling of assets that allow you to take advantage of that estate planning. If clients don't balk at the cost of an estate plan, they often resist the hassle and cost of retitling. Dennis feels that failing to satisfy both of these conditions will happen much more often than we might otherwise expect.

Professor Pennell pointed out a serious conflict that will be faced in estates where the decedent is survived by both children and their step-parent. If the children are named as executors and they don't like the surviving spouse (step-parent) then a conflict arises over the portability election. If the surviving spouse isn't the personal representative of the decedent's estate it doesn't appear there is any way that she/he can make the portability election other than to secure the cooperation of the estate in making that election. This creates what Dennis Belcher refers to as the "blackmail opportunity" where the executor might bargain with the surviving spouse asking for financial consideration in addition to the estate's actual costs of filing the Form 706 for cooperating with the survivor to secure the benefits of portability.

Does the personal representative owe any fiduciary duty to the surviving spouse? What if she isn't even a beneficiary of the estate?

Neither Professor Pennell nor Dennis Belcher feel it is inappropriate for the personal representative to ask the surviving spouse for reimbursement of the actual costs of filing Form 706. And Jeff Pennell suggested this is yet another reason to pay close attention to the question of who should be the personal representative when we are dealing with blended estates.

Dennis Belcher responded to a question of whether a decanting statute can be used to extend the term of a Section 2503(c) trust beyond the beneficiary's attaining age 21. He noted that many of the decanting statutes have a savings clause which doesn't allow decanting to jeopardize the marital deduction or other tax savings. However, if the decanting statute doesn't deal have such a savings clause you must pay careful attention to what the gift tax consequences will be of decanting a 2503(c) trust.

Professor Pennell took a question regarding Beneficiary Flexible Trusts where the sole beneficiary is also the sole

trustee. The panel's consensus was that if you comply with the HEMS ascertainable standard you aren't creating a greater likelihood of a 2041 inclusion issue. But Carol Harrington cautioned "don't get cute". And Professor Pennell suggested that a Beneficiary Flexible Trust should include an "Upjohn" clause that prohibits any distribution that would discharge a legal obligation of the trustee.

2:00 – 5:20 Fundamentals Program #2 - What Every Estate Planner Needs to Know About Tax-Exempt Organizations and Charitable Gift Planning

Presenters: Alan F. Rothschild and Jr., Richard L. Fox

Reporter: Craig Dreyer

This program provided the tools to effectively counsel clients on planning for both lifetime and testamentary charitable gifts, and the use and operation of charitable trusts, family foundations and donor-advised funds to further a client's philanthropy. Topics covered included various categories of tax-exempt organizations, income and transfer tax issues, UPMIFA, allowable restrictions and conditions on charitable gifts, drafting gift and trust agreements, and professional ethics in gift planning.

The speakers prepared an outline of over 800 pages and the session often moved rapidly to cover as much material as possible. This report will highlight some of the issues discussed during the presentation.

Mr. Rothschild opened by noting that many planners have little knowledge about charitable gifts and exempt organizations. In addition, few development officers have significant knowledge about estate and income tax laws. He stated it is important to keep up on these matters to ensure proper counsel to clients since there is little knowledge in this area.

Mr. Fox noted that even in a bad economy over \$300 billion is given each year to charities with over 70% given by individuals. Over \$500 billion goes to foreign charities, which is an interesting area for planning to ensure you get the income tax deductions. Gates and Buffet each pledged to give away 50% of wealth prior to death, so there is a lot of demand for giving advice. People are generally very passionate about philanthropy and it often leads to new work. Philanthropy is also constantly evolving. They noted that the Gates Foundation will close 50 years after the death of the last named trustee. Many people are trying to push money out of these foundations to allow more benefits immediately to the community. Due to the advent of donor advised funds, many smaller charities are also converting into donor advised funds.

An interesting fact is that the Fidelity Gift Fund which handles donor advised funds is now the third largest charity in the country behind the United Way and Salvation Army. They also noted that while private foundations have a 5% minimum distribution, donor advised funds still have no required distributions.

Currently, there is a lot of opportunity with the low 7520 rates to use charitable lead annuity trusts. The large exemptions available also create more opportunities for split interest trusts since in the past these methods often resulted in taxable gifts. Mr. Fox warned also that there are many traps in giving as well, and many more donors are pushing the envelope in the charitable planning arena.

All 29 subsections of 501(c) are entities exempt from taxation, but only the 501(c)(3) gets the income tax charitable deduction for donors. There are about 1.5 million charitable organizations. Private foundations are 501(c)(3)s, but are not public charities. Advantages of 501(c)(3)s is that they are exempt from income tax in general, except for certain unrelated income. Contributions are also tax deductible. They may also be exempt from sales, real estate, and other taxes depending on their location. The price for being a 501(c)(3) is stringent oversight by the IRS and the applicable state attorney general. Solicitation activities are also often regulated for

charities by the state law. A Form 990 must be filed by every 501(c)(3) organizations, or 990 PF for every foundation, and these filings are subject to public inspection. These are the ultimate public disclosure statements as donors and the media often review them.

501(c)(3)s are creatures of state law, whether they are non-profit corporations or charitable trusts. In order to form a 501(c)(3), you must follow the state and federal rules. You apply to the IRS for tax exempt status with a form 1023. In this form the IRS wants to know, among other things, about the charities conflict of interest, whistleblower, and document destruction policies are going to be implemented. Some states are more active than others in charitable governance. The speakers noted that the IRS often takes time to approve a form 1023. While an application is pending, a contribution should be deductible if a determination letter is later issued. However, individual taxpayer has the burden to prove a contribution is deductible.

Mr. Fox also discussed the difference between a private foundation and a public charity. Private foundations have less oversight, so there are more restrictions. On the other hand, public charities have a lot of oversight, so there are fewer restrictions. He considers private foundations the least favored charity. Private foundations are generally single source contributions, grant making, and controlled by a single family. Section 509(a) determines whether it is a public charity. Certain organizations are public charities due to their actions such as a church, school, hospital, and governmental unit. A gift of stock to private foundation results in you only getting your basis in the stock in certain circumstances. If you have no basis in stock, you could make foundation look like a school to get public charity status. Often where there is a will there is a way. If there is enough public support available, 33 and 1/3 of support given by the public, then you can become a public charity although no more than 2% from any individual will count towards a 33 and 1/3 percentage.

Mr. Rothschild moved on to discuss private foundations, donor advised funds, and supporting organizations. If you are looking for broad support you want to use a public charity, but family philanthropy is often better suited to other organizations such as a foundation, because they want to be grant making institutions. In a private non-operating foundation the donor or donor's designee can retain control over assets even though they must be used for charitable purposes. We can control governance, staff, investments, and terms of a foundation. The second type of private foundation is private operating foundation, these are single funded but may operate as a museum and are very rare. Private non-operating foundations are grant making entities and very common. The offset to foundation status is their complex tax regime. Most modern foundations are set up as non-profit corporations.

Mr. Rothschild addressed the issue of duration for private foundations. The Carnegie and Rockefeller foundations were set up to be perpetual. However, family members often want foundations to end to prevent mission drift. Mr. Rothschild noted that the Gates and Buffet foundations brought this issue to the forefront by limiting their terms. He noted that third, fourth, and fifth generation foundation members often do little to help giving to the charity while taking credit for all its actions. It is important for advisors to address this issue with their clients.

Private foundations provide a charitable deduction at the front end and have no income tax on earnings, except for some types. Also private foundations formed as corporation must have special provisions in their operating agreement. Charitable foundations require minimum distribution of 5% per year of the value of assets each year. Before this requirement, many foundations did nothing with their money. Grants can include a portion of operating expenses and program related expenses count toward this. Program related loans also count towards the 5%. The self-dealing rules of section 4941 are significant and these actions must be avoided. For example, the sale, lease, or renting of property to a private foundation from a disqualified person is completely prohibited, this is true even if it is a good deal to the foundation. No benefit can go to a disqualified person. Public charities can dedicate limited resources to legislation, but there is no provision for private foundations to influence legislation. Expenditures are also prohibited for travel or study. Often people get in trouble for gifts to another private foundation where expenditure responsibility is not exercised. The Pension Protection Act of 2006 doubled all excise taxes for every year, so it can be a huge amount of money if self-dealing occurs.

There is an investment excise tax for private foundations. They are subject to minor excise tax on investment income that a public charity would not have to pay. The Gates foundation paid significant tax, but you can also make gift of stock instead of selling stock and the private foundation doesn't recognize gain. Self-dealing issues can create problems with a closely held company. It is a self-dealing transaction to pay compensation from private foundation to a disqualified person, but personal services can be paid for to carry out the services of the foundation. Rothschild notes there is no definition of what services are, but legal and accounting services are personal services, which are generally professional or managerial in nature. Decorating, catering and real estate services may or may not qualify, but you should not risk excise taxes of 10% per year. Mr. Fox noted that government officials cannot be paid either since they are considered disqualified, but public officials can be reimbursed for travel in the 48 contiguous United States.

Mr. Rothschild discussed how donor advised funds allow an immediate deduction, but they are considered to be part of a public charity. They give donors the power of recommendation to designate grants and advisors, but ultimate control is with the community foundation. Not all sponsoring organizations are the same, so people should shop around. Some foundations also have limits on who may receive money or reversion clauses to give money back to community foundation if it is not distributed over a certain period of time. Speakers think 4 or 5 million is really what is necessary to fund a private foundation, otherwise you should look at a donor advised fund.

Mr. Fox said a foundation can pay some compensation to disqualified person for certain services, but a donor advised fund cannot. In addition private foundations can occasionally buy tickets, but a donor advised fund cannot and there is a 125% tax.

Mr. Fox discussed supporting organizations under 501(c)(3) set up to exclusively support another public charity. You put money into trust held by trustees, allows some control over funds without giving all to charity. These are not private foundations, but have the benefit of a public charity. Supporting organizations must give to or for the benefit of a public charity and must have a close nit relationship to the public charity. The family and founder cannot control the supporting organization. Supporting Organizations are a target of Senator Grassley. Mr. Fox recommends converting to another type of charity if possible in many of these scenarios.

Mr. Fox also discussed a trap he has seen many people fall into. If a charity is the sole beneficiary under trust or a will it will be under 4947(a)(1) and is considered a private foundation since under 647(A)(1) a wholly charitable trust is subject to private foundation rules even without filing for a tax exemption. You can also become supporting organization without filing a form 1023.

Mr. Rothschild further discussed charitable income tax deductions. Entitlement to income tax deduction is dependent on the entity receiving the gift. The kind of property given away may not be deductible and gift substantiation may be required. The amount of deduction is limited by AGI depending on property and time for holding property, and type of exempt organization. Normally, contributions of appreciated capital assets held over one year are deductible at fmv. However, there are many traps to this general rule. The material provides outline for gifting and timing of gifts to charitable organizations. Substantiation documents are also important. Private foundation must substantiate a gift, even if given by same person who runs the private foundation. A donor must have letter substantiating gift before filing the income tax return to get a deduction as the IRS has gotten very strict about this.

Mr. Fox discussed issues when contributing appreciated property. He also noted you can give modern art to the modern art museum and get full deduction, but not to the Salvation Army since, in general, tangible personal property must be given to a charity for a related purpose. A form 8283 must be filed for a contribution over \$5,000. He noted that when donating property it is important to get as much documentation as possible to justify related purposes, such as board resolution. He also provided that a remainder interest in personal residence or farm you can often get significant income tax deduction. However, a fractional interest in artwork is limited under

the Pension Protection Act of 2006 since the remaining amount must be given within the following 10 years. Furthermore, a creator of artwork can only deduct their basis in it. If a donation is more than \$20,000, you must attach copy of appraisal to your 1040. He also noted that stock options have many traps as well, so be aware of these issues before gifting.

Mr. Fox noted that Individuals giving money to people on the street cannot deduct it, but can give it to a 501(c)(3) organization for support of individuals who are poor. He noted you cannot do 501(c)(3) for an individuals since the class is not broad enough. You cannot deduct funds earmarked to individuals. Also charities cannot be used as conduits. Contributions to private foundations can be given to indigent people, but not relatives. However, grants for travel to non-relatives cannot be given without prior IRS approval.

In addition contributions to foreign charities must be planned. A US person can only take an income tax deduction for a gift to a domestic charity. However, you can give to organization under us laws; even a US company where everything happens overseas is still allowed as a deduction. This is very literal reading of the statute. Friends' organizations often support foreign charities and enable current income tax deductions. International donor advised funds are also a popular way to give funds to foreign charities. You donate money to domestic organization, and they write check to foreign organizations. Private foundations can make grants to foreign organizations, but it is more difficult since either an opinion of counsel or an affidavit is necessary for them to qualify.

Mr. Fox also reminded us that lifetime gifts have two benefits, the immediate income tax deduction and the property is out of the taxable estate. If you are limited to a 30% deduction, in many cases you can often get a 50% deduction of your basis if you have high basis property and make the appropriate election. This can increase your deduction.

The speakers also noted that it is often better to give an intention to pledge rather than a binding pledge for clients. Also giving appreciated capital is not taxable, so you can do bargain sales. The difference between fmv and sales price is the charitable deduction. They also noted that charitable gift annuities are often better than a charitable remainder trust since they are simpler. It is also possible to terminate charitable remainder trusts and accelerate payments to beneficiaries and the charity. They also highlighted the failure of congress to extend the IRA rollover for 2012, but said it might still occur. This avoids increasing AGI, which often eliminates deductions.

Mr. Rothschild continued with current trends today, most large donors do not want to give to general funds but want specific restrictions on donated funds. It is permissible for a donor to earmark a donation to name a building after them, as long as it is for charitable purpose. We must be sure not to encourage our clients on not implementing too many restrictions, since problems may arise in the future. He noted to be careful when drafting conditions to charitable gifts, since a condition to return money if a school is not built may eliminate a current income tax deduction for the donor. You may be able to include an alternative gift to a donor advised fund if it is not built, to ensure a current charitable deduction. Charitable gift agreements should be treated as all business agreements and ensure all possibilities are taken into account. Emphasize what is important if making gifts to a school. Is it the school or the activity such as Georgia School of music, put it in the agreement whether music or the school is the primary intent. Put standard contract terms in such an agreement including governing law provisions. As a final note, keep in mind that UPMIFA can change how charities use assets and may increase the amount of income given to charities.

SPECIAL SESSIONS I 2:00 – 3:30 p.m.

Session I-A Planning for Clients with \$5 Million or Less (Focus Series)

Presenters: Gideon Rothschild, Bernard A. Krooks, Barry A. Nelson

Reporter: Carol Sobczak

This workshop explored strategies to consider for the more modestly wealthy clients who comprise the majority of Americans. It discussed non-tax considerations of the estate planning process including elder law, asset protection, retirement plan beneficiary issues, portability (or not) and a potpourri of other relevant issues.

This special session considered non-tax considerations of the estate planning process for clients with estates under \$5 million (\$10 million if married), including elder law issues, asset protection, and retirement plan issues.

Many clients in this category are concerned about whether they will have enough money to live on in their old age. Thus, it may be difficult to convince them to do any planning.

But there are many reasons for such clients to plan and many things we can do to help them. Here are a few ideas:

Unless the clients are already in ill health, consider an irrevocable income-only trust (see morning session). There is a 5-year waiting period to be eligible for Medicaid. If too late, have healthy spouse leave assets in trust for ill spouse rather than outright. Move assets into name of healthy spouse. Make sure clients have current advance directives and durable powers of attorney.

Always ask clients about long-term health insurance.

Relying on portability or disclaimer trusts does not work because the assets will be available for Medicaid recovery.

Consider using a lifetime or testamentary QTIP trust for the benefit of the ill spouse.

Check on clients' "old" trusts, such as expired QPRTs. Could be a problem if house has low basis and/or clients cannot afford to pay rent. Can children forgive rent?

Consider decanting to provide that commutation is not prohibited. But query whether this would include value of house in client's gross estate for federal estate tax purposes (to get step-up in basis).

State law is important to consider. For example, in Florida, tenancy-in-entireties property is protected from creditors, but you do not want to transfer a residence because of the homestead exemption. But in other states, like New York, you may wish to transfer home to an ILOT to start the 5-year period of Medicaid ineligibility to run. For clients where both spouses are healthy, consider self-settled trusts in the jurisdictions that allow them for creditor protection. Make certain that trusts are not reciprocal by making dispositive provisions different.

Consider lifetime QTIP or credit shelter trusts. Consider revising revocable trusts if they terminate at specific ages for children so that children are protected from creditors and divorce issues.

If any family members are disabled, consider special, or supplemental, needs trusts.

Professional clients, such as doctors and lawyers, need asset protection, so title assets in tenancy-by-the-entireties in states where this provides creditor protection. Otherwise, consider the use of lifetime QTIP or credit shelter trusts that revert back to settlor spouse upon death of beneficiary spouse. Per Treas. Reg. §25.2523(f), settlor spouse is not deemed to be the grantor.

I-B – Family Limited Partnerships: Not Just a Passing Phase?

Presenters: John W. Porter and David Pratt

Reporter: Mike Stiff

The panelists reviewed current issues and developments involving family limited partnerships, and discussed how and why these entities are useful in an environment of higher exclusion amounts.

1. The materials consisted of a 57 page outline, a sample IRS audit letter and a 65 slide Power Point presentation.

The program was divided into two parts. The first part reviewed IRS challenges to closely held entities and recent developments. The second part reviewed planning without discounts and the impact on current planning techniques.

A. Gift on Formation / Indirect Gift:

IRS Argument: Where funding occurs simultaneously or close to the transfer of limited partnership interests, gift is measured by value of assets transferred to partnership (no discount) Taxpayer has burden to prove funding occurred before the transfer of the limited partnership interests. (Senda)

John Porter stated that the government is going to continue to make taxpayers prove the funding occurred prior to the transfer but noted that it should be easy to avoid entire issue with careful documentation. Mr. Porter also mentioned that he prefers to have documents and transfer paperwork notarized even when not legally required to provide further support of when events actually occurred. He dislikes seeing "effective as of" language and prefers "this ___ day of _____, 2012". This leads to the next question of how long to wait between funding and transfers. No bright line (Holman - 8 days ok, Gross - 11 days ok with marketable securities, Linton/Heckerman - simultaneous funding/transfer not enough). Mr. Porter noted that the Holman/Gross courts said longer time may be needed for less volatile assets. Mr. Porter said depends on underlying assets but generally 30 days good, 90 days better and 120 days great (the longer, the better).

B. Step Transaction - Pierre v. Comm'r:

IRS Argument: When gift and sale occur on the same day or close in time, the interests transferred should be aggregated for valuation purposes.

The aggregation of the gift and sale interests can trigger majority rights or otherwise affect valuation. This also may make it harder to satisfy the adequate and full consideration exception to a Section 2036 challenge if the seed gift and sale transfer are aggregated. John Porter prefers for the seed gift to be in cash or non-partnership assets to avoid potential aggregation. Mr. Porter likes to see differences in amounts and timing. No bright line for how long to wait between seed gift and sale transfer.

C. Using Partnership Interests for Annual Exclusion Gifts - Price v. Comm'r:

IRS Argument: Limited partnership interest does not represent a present interest that qualifies for the annual exclusion.

The Price case has had a chilling affect on using limited partnership interests for annual exclusion gifts. Mr. Porter noted that many of the partnership provisions at issue in the Price case were very standard provisions and significant distributions (\$500,000) had been made to the limited partners. Can you draft around the problem? Many of the provisions are desirable and if eliminate then create other problems or negatively affect the valuation discounts. Some have suggested put rights but may not be worth the trouble. David Pratt suggested making cash

gifts to satisfy the annual exclusion amounts with the donees then subsequently purchasing the limited partnership interests. He noted this approach doesn't eliminate the need for an appraisal. The panelist agreed that it is best to satisfy annual exclusion gifts with other assets if possible.

D. Section 2036:

IRS Argument: Decedent retained right to possession or income, or right to designate who enjoys, and all assets of entity should be includible in decedent's estate.

This has been the most effective argument for the IRS in challenging FLPs. It also has the most serious ramification. If the IRS is successful, all assets of the entity might be brought back into the taxable estate. The panelist reviewed the 2036(a)(1) retention of the possession or enjoyment of, or the right to the income from, the property, and the 2036(a)(2) retention of the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, challenges by the IRS. All taxpayers who have been successful against such IRS challenges have satisfied the "Bona Fide Sale for Adequate and Full Consideration Exception" to Section 2036. This is a two part test. Adequate Consideration requires interests proportionate and value of contributed property credited to capital accounts. Bona Fide Sale requires "significant and legitimate non-tax reason" for creating the entity.

The panelist reviewed the significant and legitimate non-tax reasons that had been successful in recent cases: (1) centralized asset management; (2) involving next generation in management; (3) protect from creditors/failed marriage; (4) preservation of investment philosophy; (5) avoiding fractionalization of assets; and (6) avoiding imprudent expenditures by future generations. Actions need to match recited reasons and looking for concrete examples of benefits achieved when defending from IRS challenge.

The panelists reviewed the best practices to avoid a Section 2036(a)(1) challenge by the IRS: (1) document non-tax reasons; (2) respect the partnership agreement; (3) maintain accurate books and records; (4) no personal use assets in partnership; (5) pro-rata distributions; (6) avoid distributing all income; (7) avoid "as needed" distributions; and WWPD? (What Would Partners Do?). If identify a problem, best to fix immediately.

The panelists reviewed how to avoid a Section 2036(a)(2) challenge by the IRS: (1) use business standards for distributions or other decisions in partnership agreement, avoid "sole and absolute" or "unfettered" discretion; and (2) have senior family members gift away all interests 3 years before death. John Porter predicted more 2036(a)(2) cases will be litigated in the future.

Mr. Pratt asked Mr. Porter if he prefers to have the non-tax purposes listed in partnership agreement. Mr. Porter indicated that he has no strong preference as to whether non-tax reasons listed in partnership agreement but must be tailored to actual facts and can't be boilerplate. He wants to see as much documentation of the non-tax reasons as possible. Remember your potential audience in all correspondence to the client and the client's advisors. Emails could be subpoenaed and informal tone leads to a lot of bad evidence. Ok to discuss tax attributes, but also talk about non-tax reasons too. The attorney's correspondence may be subject to discovery and should be drafted so that it is an asset, not a liability, to your case. Mr. Porter noted that he has called the drafting attorney as a witness in all of the 2036 cases which effectively waived the privilege.

IRS Argument: Against public policy and should be ignored.

The taxpayers have been very successful in the recent formula clause cases. These cases have involved two types of formula clauses, defined value clause (McCord/Hendrix), and defined value clause based upon values "as finally determined for estate/gift tax purposes" (Christiansen/Petter). These formula clauses allow the transferor to define value of hard-to-value assets passing to taxable transferees, with excess passing to non-taxable transferee (e.g. charity). Mr. Porter also noted price adjustment clauses (King), but older precedent and inconsistent

treatment from IRS. The panelist agreed that you want to avoid the reversion clauses (back to settlor) that have not been unsuccessful (Proctor).

John Porter addressed whether you could use a defined value clause, as in Petter, with the excess passing to a GRAT or marital deduction trust as opposed to a charity. John Porter stated that it shouldn't matter but no precedent to provide comfort. The cases have focused on the duty of the charities to ensure the fairness of the deal. Mr. Porter would prefer to see different fiduciaries with different fiduciary duties to different beneficiaries.

David Pratt reviewed the existing restrictions on discounts under Section 2704(b). He also noted that Section 2704(b)(4) authorizes the IRS to issue statutory regulations providing for the disregard of other restrictions "if such restriction has the effect of reducing the value of the transferred interest for purposes of this subtitle but does not ultimately reduce the value of such interest to the transferee." It has been reported that draft proposed regulations are apparently substantially complete. Mr. Pratt questioned why have they not been issued?

Mr. Pratt reviewed the recent bill (H.R. 436), the administration's "Greenbook", and other proposals such as family attribution that would attack valuation discounts in FLPs. Mr. Pratt noted our current situation is not much different than where we were 3 years ago. We just don't know what will be implemented or when change will occur.

Mr. Pratt reviewed the impact of no discounts on our current planning techniques. The discounts magnify the effectiveness of our current techniques but most remain viable and effective without discounts. Some current techniques are more affected than others. For example the loss of discounts generally impacts long term sales more than short term GRATs. However, other techniques such as intra-family loans and fractional interest discounts may be unaffected.

The materials were excellent, including a detailed outline with a Power Point summary of the key points. The panelists covered a large amount of information quickly with insightful comments and practical recommendations.

Special Session I-C - Planning and Administering the Artist's Estate and the Artist's Foundation

Presenters: Ralph E. Lerner, John Sare and Christine J. Vincent

Reporter: Joanne Hindel

This workshop built on Mr. Lerner's Tuesday morning General Session about what you should do with your art and examined in detail planning techniques for the visual artist, valuation issues, tax planning issues and the administration of the artist-created foundation that is funded with works of art and an endowment fund.

NOTE: The Presenters requested review of this Report before it was published. We have been unable to obtain Mr. Sare's comments and/or corrections in time due to his "time consuming business commitments in England" so, if and when Mr. Sare sends us any comments or corrections, we will post those at that time.

Fact Pattern:

Jeff and Marci Danza married for 40 years – he, now deceased, was an unsuccessful writer, she is a successful artist. They have 3 children:

Tommy, 40 with 2 children lives in Iowa and knows nothing about art. Timmy, age 42, also 2 children and an attorney. Amy, 36, unmarried and no children interested in graphic design.

The Danzas assets consist of cash of \$3 Million; real estate (2 parcels) valued at \$8 million, stock valued at \$5 million and paintings by Marci valued at \$100 million. Marci has additional drawings and photographs she says are worth nothing and co-owns a C Corporation with another artist valued at \$10 million. She also owns other artists' paintings valued at another \$20 million.

Marci says that she wants to protect her artistic legacy, does not want to pay any taxes and wants to provide for her children and grandchildren. Her accountant has recommended establishing a foundation for her art and she is involved with two nonprofit organizations that she also wants to provide for.

Ralph Lerner poses as Marci Danza and puts questions to John Sare as the attorney and Christine Vincent as the advisor.

John points out that artists are used to getting their own way by force of personality and it takes some finesse to deal with them on financial and estate planning matters. He tells Ralph that prior gifts to children could be includable in the artist's estate and points out that record keeping is often a problem with artists as it is with many clients. He also tells Ralph that he cannot take a charitable deduction for donations of his own art and if his children sell the paintings he has given them they will be taxed on the sale proceeds as ordinary income because art gifted by the artist cannot be treated as capital gain property.

The discussion then turns to the establishment of an artist-endowed foundation by Ralph.

Christine points out that 60% of the artists that establish foundations do not have children and that the number of artists establishing foundations during their lives is growing.

John points out that an artist-endowed foundation can save the artist estate taxes but it must meet specific qualifications on formation, particularly being dedicated exclusively to a charitable purpose that provides a public benefit. He urges clients to consider doing this during their lives rather than at death but cautions that the artist should consider and be properly advised about the legal and practical implications of setting up such foundations.

John also indicates to Ralph that the foundation must establish a public benefit in how it makes use of his art and he reviews the art and copyright concerns and the need to clarify the ability to segregate the art from the copyright.

Christine clarifies that, although there is no prohibition, the artist is best advised not to put his/her own art into the foundation during the artist's life, given the inherent risk of self-dealing should the foundation's activities with the art serve to promote the artist's commercial interests, and says that the research shows that hardly any artists put their own art into the foundation during life.

The panelists spend a considerable amount of time discussing the appropriate people to serve as leaders and board members of the artist-endowed foundation and express concern that many artists name family members and other friends and advisors who have no experience in foundation management.

They emphasize that these individuals hold fiduciary responsibility for the management of the foundation and are responsible for seeking professional development to educate themselves in their foundation roles.

The panelists also discuss the potential for conflicts of interest and self-dealing. Christine points out that many new foundations have missions to educate about and promote an artist's works but are being formed with boards whose members in some cases include persons that own and sell the artist's works, potentially benefiting economically from the foundation's activities and heightening possible conflict of interest risks, particularly in the absence of experienced foundation management. John emphasizes the importance of foundations having a clear conflict of interest policy.

John and Christine discuss the implications of having the artist's children serve on the foundation board and the possible problems for both the foundation and for the children in those circumstances. They also discuss the propriety of having the artist's dealer serve on the board and the problem with continued sale of art work by that

dealer which can create a self-dealing risk. They recommend that the dealer can serve as an advisor to the board without being a board member.

John also points out that the artist's dealer should not serve as the artist's executor because of the same self-dealing problems.

He indicates that one unique aspect of handling an artist's estate is the interest of the executor in representing the artist on earth going forward and he suggests that while children might be the natural choices of the artist, a corporate fiduciary is usually a better choice because of the independence.

John then discusses how art is valued at the death of the artist and how a blockage discount might apply when the artist's art becomes available to the market all at once at the death of the artist. He also cautions that the artist may not realize that the executor's fee is often based upon a percentage of the value of the estate and if the art is highly valued the fee can be quite large without adequate liquid funds to pay the fee.

He suggests that this should be discussed by the estate planning attorney when the artist is considering the choice of executor.

Christine points out that it is important for the artist-endowed foundation to own the artist's copyrights in order to engage in the charitable purposes of the foundation, for example by licensing books, prints and films as a means to increase the public's access to the artist's works. She also emphasizes that artists should indicate their intentions as to the foundation's use of the intellectual property and in particular for artists such as sculptors, printmakers and photographers who produce works in "editions," whether additional art will be allowed to be produced posthumously.

The audience asked a few questions including the following:

1) Whether trading among artists of their respective art could result in assets that each artist could donate and get a charitable deduction for. The answer was no – another artist's work could not be donated and then obtain a charitable deduction if the deceased artist had acquired the art through a trade. However, the art would be includable in the deceased artist's estate although it would not be included for blockage discount purposes.

2) Whether the art of an artist could adequately support the financial needs of the foundation? The answer was that the rule of thumb was if the art could not support the artist while alive, it would not likely support the foundation after the artist's death.

For those readers who are interested, Christine Vincent is the Study Director of The Aspen Institute's National Study of Artist-Endowed Foundations. Information about that Study, called The Artist as Philanthropist: Strengthening the Next Generation of Artist-Endowed Foundations can be obtained at <http://www.aspeninstitute.org/psi/a-ef-report> > www.aspeninstitute.org/psi/a-ef-report.

Special Session I-D - Twenty Tax Traps and Other Trustee Selection Considerations

Presenter: Mark R. Parthemer

Reporter: John Warnick

This session identified and explored twenty tax and non-tax factors on trustee selection, including tax traps surfaced by some of the planning under TRA 2010.

Mr. Parthemer serves as Fiduciary Counsel and Managing Director for Bessemer Trust in Palm Beach, Florida. Mr. Parthemer acknowledged at the outset of his session his appreciation to his colleague at Bessemer Trust, Stephen

R. Akers, Esq. for his gracious permission to use his 2008 outline entitled “Structuring Trustee Powers to Avoid a Tax Catastrophe (or Twenty Things You Need to Know About Selecting a Trustee and Structuring Trustee Powers)”.

Mr. Parthener pointed out that despite all of the changes on the tax landscape over the years, this particular subject matter is one that has remained relatively constant over a very long period of time. He introduced the topic by briefly reviewing the three key statutory provisions that the 20 tax traps and trustee selection considerations spring from: Sections 2036, 2038 and 2041. The 20 tax traps and selection considerations can be grouped into four major categories: donor issues (9); beneficiary issues (4); state law and income tax matters (2); and non-tax factors (5). Here is a sampling of the 20 tax traps and trustee selection considerations Mr. Parthener presented.

Section 2503(c) Trust for Minor:

There is what Mr. Parthener refers to as imbedded trustee tax trap if the grantor or the grantor’s spouse serves as the trustee of a 2503(c) Trust. One of the advantages of the 2503(c) Trust is that it qualifies for both the gift tax and GST tax exclusions. But neither the grantor nor the grantor’s spouse should be trustee.

If the grantor dies while serving as trustee of a 2503(c) Trust the trust assets will be includible in his/her estate plus there is a 3 year look back under 2035(a). Unfortunately, the “imbedded trustee tax trap” isn’t avoided by having the grantor’s spouse serve as trustee. If the grantor’s spouse dies while trustee, the trust’s assets will be includible in the spouse’s taxable estate so long as she/he had a legal obligation to support the beneficiary. If the grantor’s spouse is alive when the minor attains age 21, there may be a lapse of a general power of appointment and thus a taxable gift.

Grantor Trust Status and Tax Reimbursement:

Mr. Parthener discussed the implications of Rev. Rul. 2004-64 which held that a grantor’s payment of income taxes attributable to the grantor trust is not treated as a gift to the beneficiaries. It also held that a mandatory tax reimbursement clause would result in inclusion of the full value of the trust’s assets upon the grantor’s death because of the retention to have the trust assets be used to discharge the grantor’s legal obligation. Mr. Parthener noted that a court might limit the amount includible in the grantor’s estate to only that amount which would be used for the grantor’s benefit at the time of his/her death.

Mr. Parthener cautioned that giving the trustee discretion to reimburse the grantor for income taxes which are attributable to the grantor trust may still risk estate inclusion in two circumstances: (1) when there is an understanding or pre-existing arrangement between the trustee and grantor regarding reimbursement; (2) if the grantor can remove the trustee and appoint him/herself as successor trustee; or (3) if the discretion to reimburse would permit the grantor’s creditors to reach the trust’s assets under applicable state law. On this last point Mr. Parthener pointed out that some states are amending their laws to provide that a discretionary power to reimburse the grantor for income taxes attributable to a grantor trust would not give the grantor’s creditors access to the trust.

Distributions by a Trustee/Beneficiary to Other Beneficiaries:

Under Treas. Reg. § 25.2511-1(g)(2) a trustee/beneficiary doesn’t make a gift if he distributes trust property to another beneficiary under a fiduciary power which is limited by a “reasonably fixed or ascertainable standard.” The implication, however, is that if a trustee/beneficiary makes distributions to others pursuant to standard which isn’t “reasonably fixed or an ascertainable standard.

Mr. Parthener cautioned that language which declares that a trustee’s decision is final and not subject to challenge, such as “the determination of the trustee shall be conclusive with respect to the exercise or

nonexercise of a power”, would result in what would otherwise be an ascertainable standard being treated under the regulation cited above as not being “limited by a reasonably definite standard.”

If a trustee/beneficiary chooses not to make a distribution to him/herself has such trustee made a gift to the other beneficiaries? There are no cases where this issue has been raised. Mr. Parthener noted, however, that this possibility has been raised by Professor Pennell.

Savings Clauses:

Mr. Parthener described savings clauses as “game changers” potentially in avoiding unintended, negative tax consequences. Some states wishing to play what Mr. Parthener described as “the role of the calvary” have adopted statutory savings clauses. However, if the situs of a trust shifts from one state to another you might end up with a less favorable savings clause or without one altogether. So including savings clauses in the trust instrument itself should be your first line of defense.

But Mr. Parthener called attention to a sobering analysis of a Tax Court decision by Marc Merric which was published last summer. Mr. Merric suggests that the *Estate of Arthur J. O’Conner*, 54 T.C. 969 (1970) should serve as a warning that courts may interpret a support obligation savings clause as illusory. In O’Connor the decedent had created a trust for the benefit of his minor child and died while the child was still a minor. The trust did not contain an ascertainable standard and there was no state law to that effect. The trust did contain a support obligation savings clause but the decedent’s estate argued that this term was really illusory and the trust was really an accumulation trust until the beneficiary reached the age of majority. The Tax Court rejected this argument. At a minimum O’Connor is a prime example of carefully drafting distribution clauses and making sure you have considered each of the tax traps and trustee selection considerations.

There was one more warning Mr. Parthemer shared about the dangers of relying on a savings clause. He feels it is quite possible that a court would deem a distribution clause specific and a savings clause general and thus not allow the general language (the savings clause) to trump the more specific language (the distribution clause). As Mr. Parthemer states: “The take-away is this – either insert the appropriately limited distribution standard or better yet make the right appointment of trustee to avoid any potential inclusion.”

Session I-E - Expert Witnesses in Trust and Estate Litigation (Litigation Series)

Presenters: Matthew P. Matiasovich, David E. Lieberman, Julia B. Meister, Robert H. Sitkoff
Reporter: Herb Braverman

Make sure that you can navigate the treacherous waters inhabited by the expert witness, where your own expert can be as much of a danger to you as those on the opposing side. From the perspective of both the litigator and the expert, learn the techniques for preparing and working with your own expert as well as for cross-examining the opponent's, and learn to avoid the mistakes that bedevil even the most experienced litigators when they deal with expert witnesses.

This afternoon special session from the litigation series was structured so that three trial attorney would advise on the role of expert witnesses in trust and estate litigation, while Professor Sitkoff discussed the subject largely from the point of view of the expert witness. Regrettably, those attending did not participate in the discussions in any way.

The panel suggested that an attorney with a trust and estate litigation matter should determine whether or not there is a need for one or more expert witnesses in the matter, what the scope of the expert witnesses roles should be, when in the process the expert would be needed. It was agreed that experts might be consulting on a case or

testifying in the matter and that, in either case, the experts should be brought into the matter before discovery closes, since counsel may have to obtain more information for the experts in order for them to be most effective.

There was a good deal of discussion about the new federal and some state rules for the discovery of expert witnesses communications and other materials and it was suggested that these areas must be carefully planned to protect the confidentiality of the expert witnesses and all communications with them. Protocols for these communications may be different for substantive and procedural communications. This was clearly a matter of considerable concern among the litigators.

Whether the expert witness is being used for consulting purposes or trial purposes or both, the litigators emphasized the character traits they felt were important, depending on the matter and the issues involved, including "likability", integrity, ability to teach, absence of arrogance, knowledge, thoroughly vetted record, publications, associations, etc. Professor Sitkoff emphasized an expert must be frank, truthful, respectful of his/her role as source of information, less so as an advocate, with an awareness of his/her own boundaries. At times, it was not clear that the trial attorneys agreed completely with the Professor's view of the role of the expert witness.

All agreed that the relationship must be carefully described and agreed to in a written retention letter that would certainly discuss billing matters, scheduling, scope of retention, conflicts and a variety of other relevant matters. The Professor insisted that such a contract include certain conflict rules, that the hiring of the witness was being done by the law firm (not the client in the matter) and that the witness was not being hired as counsel for anyone, only as a witness.

There was discussion regarding the rendering of an opinion by the expert witness and the requirement of a written report. My impression was that the litigators were not as likely to require a written opinion on the issues involved as the Professor was. Of course, this could also be a requirement of the Court involved. These opinions, whether in written form or not, might be used at trial, in negotiations, to learn more about the case in preparation stages, etc.

There was a good deal of discussion, even debate, about how to prepare an expert witness for deposition or cross-examination at trial. Helping the witness to understand the context of his/her opinions, the structure of the case and related items would result in better, more solid opinions for the case and optimum organization by the expert--and better results. In any event, preparation must be exhaustive and vetting must be continuous as a case winds on over many months. The use of motions in limine were discussed to contest or restrict the subjects of expert testimony, the quality of expert testimony or to advance other aspects of the case. It was agreed that the potential expert witness must have sufficient information to reach an opinion in a matter, but that too much in too many bankers boxes would probably not increase the efficiency of the witness preparation and would increase costs.

The materials were succinct, about 18 pages, and would be worthwhile for someone interested in this area. The session made me recall discussions we had in Cambridge with A. James Casner....but that was so long ago!

Session I-F - Using Annuities in Estate Planning: Opportunities and Pitfalls (Financial Assets Series)

Presenters: Mary Ann Mancini, John L. Olsen and Melvin A. Warshaw

Reporter: Kimon Karas

Using commercial annuities in an estate plan has never been a very popular technique, but with the uncertainties in the economy and the new products out there, planners may be ignoring what could be a valuable tool to achieve important goals for the family. The panelists discussed how annuities work financially, what the tax ramifications are when dealing with these assets and the benefits (and drawbacks) they can provide to the estate plan. This report covers the more significant highlights of this presentation.

The topic addressed the concept of commercial nonqualified annuities in estate planning. In certain cases an annuity may be appropriate in lieu of a trust because of expense, trustee selection, and/or flexibility. Common situations where an annuity may be appropriate instead of a trust, where one desires a disposition to an employee, household help where the annuity will provide the person a stream of income. Alternatively one desires to make a gift to a person and for the gift to be confidential an annuity may be appropriate.

An annuity in a trust poses many problems. Do trust powers authorize the purchase of an annuity. If the trust must qualify for the marital deduction paying the spouse all the annuity income will not satisfy the all income

requirement. In an all income trust, marital or nonmarital, distributing the annuity would probably be considered an impermissible distribution of principal.

The panel reviewed the income tax consequences of an annuity. All amounts distributed from an annuity, during life or death, are either (i) "amounts received as an annuity, or (ii) "amounts not received as an annuity."

Amounts received as an annuity are treated part as a return of investment and part as ordinary income. For annuities with an annuity starting date after 12/31/86, this treatment, exclusion ratio, applies only until all of the investment in the contract is received and thereafter all receipts are taxable income.

Amounts not received as an annuity are taxed depending on issuance date. Contracts issued prior to 8/14/82, return principal first and contracts issued after that date return income first.

Amounts received as an annuity include among others, withdrawals, loans, and pledges.

The tax deferred treatment of gain in an annuity is not granted by specific Code reference, but by implication. A deferred annuity does not enjoy tax-deferred treatment:

1. When held by a "non-natural person" Section 72(u);
2. Applies to extent of contributions after 2/28/86.

Exceptions to that treatment for:

- a. Qualified contracts;
- b. Qualified funding asset;
- c. Immediate annuities;
- d. Contracts acquired by estate by reason of death;
- e. Where the holder is acting as "agent of a natural person"
 - (i) Corporation as holder;
 - (ii) Family limited partnership as holder;
 - (iii) Trust-most revocable trusts and many irrevocable trusts except where a trust beneficiary included a "non-natural person."

Distributions from an annuity can incur penalty tax 10% of amount includable in income. Section 72(q). Exceptions are;

1. After person reaches age 59 1/2;
2. By reason of death of holder;
3. Taxpayer's disability;
4. Substantially equal periodic payments.

Taxation at death. If contract in payout status at least as rapidly as distributions were being made to decedent owner. However, if distributions are made to a beneficiary under a "refund feature" they are not taxable until all investment in the contract has been received.

If the contract was not in payout status, the entire value must be distributed within 5 years unless:

1. Contract is payable to or for the benefit of a designated beneficiary in which case contract may be distributed over no longer than beneficiary's life expectancy; (Section 72(s)(2))
2. If beneficiary is surviving spouse, the spouse may treat the contract as spouse's own contract-"spousal continuation." Section 72(s)(3).

Death benefits should be paid to the owner/beneficiary who should be the same person. Complications arise if the contract is annuitant driven (death benefit paid upon death of annuitant), but since 1/18/85, all contracts are

owner driven (death benefit paid upon death of owner). If the owner and beneficiary are the same the death of the owner will trigger distribution of the entire contract at owner's death.

However, if the contract is annuitant driven and the non-annuitant owner dies, depends on contract terms, which can vary. For example an annuitant driven contract when the annuitant dies first. If the owner beneficiary is the spouse the spouse cannot do a spousal continuation; and if a third party is beneficiary, the death benefit is payable to a third party with spouse having no rights to the contract; the beneficiary will be liable for all gain in the contract, beneficiary may be liable for 10% penalty as the exception for distribution by reason of death of holder is not applicable, and owner spouse will be deemed to have made a gift of entire value of annuity to beneficiary.

Avoid at all costs a jointly owned annuity.

Annuities and trust. Where the trust owns and is the beneficiary of the annuity. Annuity must be distributed within 5 years of grantor's death and trust must pay tax on annuity gain. Annuity owned by an irrevocable non-grantor trust will cause distributions during lifetime of annuitant to be subject to 10% penalty and if trust does not qualify as "agent of natural person" annuity gain will be taxable as earned. If the annuity is owned by an irrevocable grantor trust depends on the company some say the death of the grantor will trigger the distribution, others say the death of the annuitant.

If the trust is the beneficiary, a very common situation, where the annuity is payable to annuitant's revocable trust. If contract is owned by a married individual and spouse is the beneficiary, the spouse has the following options;

1. Lump sum;
2. Distributions over 5 years;
3. Distributions over spouse's life expectancy;
4. Spouse treats annuity as her own.

If the trust is the beneficiary, spouse forgoes options 3 and 4 above even if she is sole trustee and sole beneficiary of trust.

Summary

1. Read the contract;
2. Annuity is a tool not a magic bullet;
3. Annuitant and owner should be same person;
4. Don't make annuity payable to trust without good reason;
5. Don't name joint owners without good reason;
6. Be alert to tax triggers, taxation on gain by giving contract, pledging as collateral.

The panel then presented a number of power point examples [available from Mary Mancini upon request] and concluded with two scenarios. One example based on TAM 9825001 dealt with funding a NIMCRUT with a deferred annuity. The TAM held purchase of annuity was not self-dealing; it did not affect trust's qualification as a CRT, and the trust's right to receive either the cash value or the surrender value in the contract did not create trust accounting income under Code Section 643(b). However, all distributions to the beneficiary will be taxable ordinary income.

The last example was the use of a deferred annuity to fund a retirement benefit. The example used as a grandparent funding a trust for a grandchild with a deferred annuity with a payout not to arise until the grandchild attains age 65, unless the grandchild becomes disable. The panel recommended if one contemplates such a strategy make certain the trust has built in flexibility if for any reason the annuity does not perform as anticipated or any other unanticipated changed circumstances.

II-A – Planning for the “New Medium Sized” Estate of \$5 to \$15 Million

Presenters: Thomas W. Abendroth, Christopher R. Hoyt and Joshua S. Rubenstein

Reporter: Carol Sobczak

An examination of planning options for a class of wealthy taxpayers who suddenly find themselves in the sandwich generation – with enough wealth to be taxed but not enough to give away. There was an analysis of lifetime and testamentary wealth transfer strategies, as well as a focus on what happens to retirement assets that could be hit with a double-whammy of estate and income taxes.

This special session focused on fundamental planning principles for clients who have large enough estates to be concerned about planning, but are not at the top tier of wealth. Here are the more significant highlights of this session.

We may think that clients worth \$15 million should just give away \$5 million, but our clients would probably disagree. As with the \$1 million to \$5 million estates, they also are concerned with having enough to live on.

1. Lifetime Planning. The lifetime planning issues for these clients include making certain they have valid advance directives and durable powers of attorney in place. Find out if they have separation agreements or pre-nuptials.

Dynasty trusts may not be appropriate for these clients due to the value of the trusts. Be very careful with tax apportionment clauses. For example, leaving a specific gift of a \$5 million painting to one child and the residue of \$5 million to the other with taxes coming out of the residue will treat those children quite differently.

Avoid probate contests by not disinheriting one child completely, as that child would have no incentive not to contest.

Check the character of property of clients moving to or from community property states and draft marital property agreement to keep character of community property to keep the step-up in basis at the first death.

Check life insurance policies for conversion options. If proceeds would be includable in gross estate, it may be wise to pull out some cash value for the clients' use.

Make annual exclusion gifts and pay tuition and medical expenses which are excluded from gift tax.

It may be a very good time for private annuities as assets are devalued and the federal rate are low.

If clients have a small business that is less than 35% of their gross estate, they may want to transfer assets to the business to get it over 35% to qualify for small business treatment.

2. Testamentary planning. Testamentary planning can include making death-bed transfers in states that have a separate death tax with a lower threshold than the federal tax.

Check marital formula clauses. The optimum marital deduction may not be appropriate for these clients, especially in second marriages.

Also check GST formula clauses. In a \$10 million estate, the maximum amount of GST exemption, which has increased from \$2 million to \$5 million, may not be the appropriate amount to pass to children in trust. Consider using percentages of the estate, or a formula that gives a specific amount “but not more than” a certain percentage of the estate.

3. Retirement Planning. Retirement planning issues can be complicated because of the interplay of income and estate taxes, and many clients in this bracket have a large percentage of their estates in retirement plans. Another issue is that you can't give these assets away during your lifetime.

If a client is ill, it is better to take the minimum distribution early in the year so the beneficiary doesn't get hit with both income and estate taxes. Another device is to convert to a Roth IRA to save estate taxes. See Rev. Rul. 94-27 and PLR 200336020. Remember that you can also reverse the Roth IRA conversion anytime before the client's income tax return is due in the following year.

Finally, consider a charitable bequest of a portion of retirement accounts since charities pay no taxes. Or name the charity as a contingent beneficiary and have the primary beneficiary disclaim all or a portion. Make certain the charity is a donor-advised fund so that the primary beneficiary can have the assets used for a purpose the beneficiary considers important.

Special Session II-B - Recent Developments for Fiduciaries

Presenters: Turney P. Berry and Dana G. Fitzsimons, Jr.

Reporter: Joanne Hindel

With a focus on how fiduciaries and their advisors may best understand and manage fiduciary risk and related ethical challenges in an increasingly litigious and confrontational environment, the panel reviewed recent cases and statutory enactments from across the country and discussed trends and developments in several areas including: investments, concentrations, and special assets; distributions; surcharge exposure; disclosure to beneficiaries and evidentiary and ethical privileges; the fiduciary as a client and conflicts of interest; modification of trusts; settlement, defenses, and limitations on actions against fiduciaries; jurisdiction; trust advisors; incapacity; and third party liability.

Turney and Dana discussed selected cases detailed in their materials in order to focus on particular areas pertaining to fiduciary administration and the representation of fiduciaries. This Report covers many of the highlights from their session.

They started with the section entitled "**Disclosure**" and focused on the fiduciary exception to the attorney-client privilege. After reviewing the Jicarilla case, Dana pointed out that most states do not have clear law regarding the fiduciary exception to the attorney-client privilege but this is now changing and more states are enacting legislation to address this issue.

Turney then discussed two cases dealing with the disclosure of information: the Wilson case addressing the duty of the fiduciary to provide information to beneficiaries even when the settlor had limited their access to information in the trust document and a Florida ethics opinion that provided that a lawyer who represented the decedent in estate planning matters could disclose information from the file to the personal representative unless the decedent specifically required that the information not be disclosed.

The panelists then turned to "**Surcharge Litigation**" and focused on three cases addressing circumstances in which beneficiaries behaved badly. In the Hunter case, a beneficiary sought to set aside her waiver of objections to a trustee's accounts and the court held that the trustee's records were not well maintained and it could therefore not uphold the waiver.

In the W.A. K. case, the court found for the trustee and ruled that a beneficiary had to pay the trustee for legal fees incurred in seeking enforcement of an indemnification agreement.

In Gore, the court dismissed a beneficiary's argument that the doctrine of unclean hands could only be used defensively and applied it in this case..

The panelists then turned to the issue of trustee **delegation** and discussed the case of Knox in which a trustee was held liable for taking the direction of an individual who was neither a co-fiduciary nor someone to whom any fiduciary duty had been properly delegated by the trustee.

They then turned to the section entitled "**Arbitration**" and discussed four cases to highlight the point that even when a trustee agrees to arbitration, that agreement does not serve to bind trust beneficiaries to arbitration also.

Dana next turned to the section entitled "**Settlements**" and discussed the case of Saunders. He reviewed the facts and pointed out that the court was able to approve a settlement agreement even when not all the trust beneficiaries had agreed to it and emphasized the analysis that the court went through it determining that the settlement was fair, adequate, reasonable, and free from collusion or fraud.

Turney then reviewed the section on "**No-contest clauses**" and reviewed the way in which courts have interpreted whether certain actions brought by beneficiaries violated no-contest clauses or were actually a construction of whether the no-contest clause applied or not. The cases reviewed included Dorsey, Arnall and Nusser.

Dana then discussed the duty of the trustee to provide beneficiaries with **inquiry notice** in conjunction with the distribution of information in order to start the statute of limitations period and referred to the Schiff case to highlight the point.

The panelists then turned to the section entitled: "**Funding, Construction and Creation of Trusts**" and focused on four cases: Kucker dealing with the funding of a trust and the reliance upon a catch all provision to accomplish the funding; Skaff dealing with trust construction on appropriate distributions from a trust for the support of an incarcerated beneficiary; Flood and Friedman in which the courts upheld spendthrift provisions and Nixon which dealt with application of the full faith and credit clause between two states.

In the section entitled "**Amendments and Modification**" the panelists discussed the case of Rivas in which the court held that an investment in a single asset would violate the settlor's intent for the trust despite the fact that the trust terms gave an Advisory Committee the ability to direct the trustee with respect to investments.

The panelists concluded their review by discussing the section entitled "**Powers of Attorney and Guardianship**" and cautioned the audience to advise their corporate clients about acceptance of POAs and the risks associated with forged documents. They discussed the Uniform Power of Attorney Act and how it addresses the acceptance of statutory POAs by financial institutions.

Special Session II-C - What's New for U.S. Clients with Non-U.S. Assets?

Presenters: M. Read Moore, Mark Barmes and Bruce Zagaris

Reporter: Mike Stiff

This panel discussed 2011 developments in the U.S. taxation of U.S. residents' offshore income, including government initiatives to improve taxpayer compliance, as well as important developments outside the United States that affect U.S. clients who have offshore

assets and trusts, including tax and trust law developments in Switzerland, the European Union, and offshore financial centers. The materials consisted of a 38 page outline.

The panelist noted that there is a substantial amount of new legislation, regulation and law enforcement activity and developments affecting U.S clients with non-U.S. assets. The panelist began with a review of some important non-U.S. trust law cases.

BQ v. DQ was a Bermuda case involving a Bermuda resident who used a U.S. attorney to create some self-settled trusts which would be very similar to the typical revocable trust used in the United States. The Bermuda resident was the sole trustee and sole beneficiary of the trusts. However, the Bermuda court found the documents to look more like a will than a trust. This was important because the Bermuda resident had remarried and remarriage under Bermuda law revoked prior wills. The Court found the trusts to be ineffective and revoked by the subsequent marriage. The Bq v. DQ case demonstrates that the planning techniques that we use in the U.S. may not work or be respected else where. We need to understand our limitations and seek help when needed for our clients.

The panelist reviewed recent cases addressing the **Rule of Hastings-Bass**. This Rule allows courts to undo bad decisions if the trustee wouldn't have made the decision if he knew the negative tax consequences. This Rule is used routinely to modify trusts to solve beneficiaries tax problems. Some refer to this Rule as the "get out of jail free rule". While some jurisdictions, such as the Royal Court of Jersey, continue to support this Rule, there appears to be some erosion of this Rule in other jurisdictions.

The panelist noted that there is a different attitude toward beneficiaries outside the U.S. and rarely receive the same level of financial disclosure for beneficiaries as we are accustomed to in the U.S. They reviewed the ***Krok case*** from the Supreme Court of Victoria which held the beneficiaries were only entitled to receive an accounting. The beneficiaries generally must go to court to receive any information beyond the accounting.

The panelist reviewed the increased compliance issues for foreign financial institutions. This has led many foreign financial institutions to avoid new U.S. clients and in some cases to shed existing U.S. client relationships. They noted that the U.S. expatriat rates tripled in 2011.

The panelist reviewed the increased use of **John Doe summons** by the IRS to find unreported foreign accounts of U.S. citizens. The John Doe summons identify a model of conduct, as opposed to identifying specific individuals. This has led to the almost weekly indictment of U.S. taxpayers with unreported foreign accounts, as well as foreign bankers and asset managers. The panelist reviewed the status of the UBS settlement and settlement negotiations between the U.S. and Swiss government over the U.S. investigations against Swiss financial institutions.

The panelist reviewed the new Form 8938 which requires U.S. citizens and residents to disclose foreign financial assets. The information to be reported depends upon filing status and residency. The temporary regulations, form and instructions were finalized in December 2011.

The panelist reviewed the **Stop Tax Haven's Abuse Act** (S. 1346) which was introduced by Senator Carl Levin on July 12, 2011. The stated purpose of the bill is to collect \$100 billion in lost revenue each year from offshore tax dodges.

The panelist reviewed the **Financial Action Task Force** (FATF) and **Financial Stability Board** (FSB) developments and recent peer reviews. They also reviewed the increased anti money laundering regulation and whistle blowing, and increased enforcement of the Foreign Corrupt Practices Act.

The Panelist noted that Swiss courts will begin to recognize foreign trusts. Generally, trusts were not previously recognized in Switzerland. They will continue to ignore the trusts of Swiss settlors. Primarily used for pre-immigration planning and for investments outside of Switzerland. Conversely, trusts are under attack in other jurisdictions. The panelist noted that the French have stated that trusts are tax evasion tools that need to be taxed out of existence. New French laws are being promulgated in this regard with tax rates of 45-60% and new responsibilities and penalties apply to French trustees.

II-D – New Technologies to Deliver Better Client Services

Joseph G. Hodges, Jr. and Catherine Sanders Reach
Special Sessions 2-D and 4-D (A Repeat)
Reporter (2nd Session Only): Craig Dreyer

This session exposed participants to the latest and greatest in available technologies to provide more efficient and effective client communications. These technologies can help empower your estate and financial planning clients in relatively simple and affordable ways. The speakers also discuss popular and affordable practice management tools and techniques that can be used to your financial and life-style advantage.

The first part of the presentation focused on technologies for marketing and interacting with clients. The second part of the presentation focused on utility programs for use in our practices. Mr. Hodges noted that Don Kelley's publication *The Electronic Practice* is a great information source for trusts and estates technology and is available through the *Trusts & Estates* magazine and their accompanying website. The *Trusts & Estates Technology* newsletter is also an exceptional resource which is also produced by Mr. Kelley. The materials for the session included a software matrix of available vendors for the trusts and estates fields and web links to a multitude of resources.

Ms. Reach first spoke about marketing technologies to get clients in the door such as LinkedIn, Facebook, Twitter and Google. LinkedIn allows you to create a company page. It can show services and a profile so it is a nice landing site for the firm. She recommends setting one up. Facebook also has a services page that can be kept separate from your personal page. She notes the best way to use these services is through a combined service where you can filter information and pass it along to clients. Twitter is also beneficial to push out content to clients. Twitter can also be pushed in to LinkedIn or Facebook pages. Ping.fm is a good site to use to update all your social media at one time. You can have one post go to multiple sites for marketing. Google + is also fairly new and not as developed, but you can post to Google + and push it out to other sites as well. Google + pushes posts out to LinkedIn, Twitter, and Facebook. An additional benefit of Google + is that it is starting to show up in Google search results.

Ms. Reach next moved to web presence. She noted that if you use WordPress you can create an entire site surrounded around a blog. In addition you can set up these sites personally, which is often more efficient since it eliminates the need for a middle person to update content. She also noted that adding a map to a web page is simple and beneficial, and provided that a custom Google map can show clients where the courthouse, banks, social security offices, and other locations of interest are located. This also enables your clients to get information for themselves on your website on areas they may need to go to. Ms. Reach recommended filling out your free profiles for research portals on the web, such as Bing, CitySearch, Yelp, Yahoo, and Google. This gives better search result for local search which is especially important with the advent of smart phones and location based searches.

Communication with clients can also be enhanced through technology, so that they can help themselves. One option is online appointment scheduling. It shows availability to clients for available times to schedule appointments. An example is Genbook which costs \$20 per month and anyone can use it. It costs \$40 for groups. Other alternatives are also available. You can also send your schedule view via outlook and insert your calendar with dates of availability to help coordinate appointments with clients. MeetingWizard.com is also beneficial when trying to schedule multiple people for a single time. Here you can pick dates and times you are available, and send invitations to everyone else to see when others are available.

Google alerts are a good tool for current awareness. If you set up a Google alert for your name you can see where it appears on the internet. This can allow you to keep up with current events and information and provides an opportunity for proactive communication with clients if you set alerts as key words relating to them. This is a very personalized way to communicate with clients.

Clio Client is a cloud based practice management system that offers Clio Extranet where clients have a place on the web where they can go pick up documents. When working with data providers make sure you can get data backed up locally as well. Mr. Hodges noted that dellcloudapplicaiton.com also has some helpful issues to consider for cloud computing. PBWorks client extranet is also a helpful tool if you want a prefabricated client extranet. Project management software is often beneficial for helping clients get access to information and improve their satisfaction.

Skype is a beneficial service for video conferencing. Google hangout is also another beneficial streaming service. In addition Join.me allows other people to see your computer screen. You can get up to 96 people together for free. All of these services are generally free, and can help improve the efficiency of your practice. Google Forms can also increase efficiency as it is beneficial to have clients fill out forms where you need data. You can use this service to customize forms. This comes with Google apps suite and is a good alternative to Adobe acrobat, which often presents challenges for its users.

At this half-way point, Mr. Hodges moved onto practice management software. He noted that the practice management software is not trusts and estates specific. The TABS3 billing system has Practice Master for a generic practice management system which is available for \$200 a year, which, in addition to TABS3 billing, is a total bill of only about \$400 and currently purchasers of billing get practice master for free. This software is helpful to keep track of critical dates. A lot of the fiduciary accounting software programs also have probate specific tickler systems that are easy and handy to use.

Collaborative type software tools for data intake and management are also helpful. Clients can go on your homepage and fill out informational forms. Foretrustsoftware can create estate planning documents with the clients doing the initial data input that go back to the client and the attorney for review to make any changes before signing. This is a way to compete with sites such as legal zoom. Estate Works also has a web based interface where client enters information online which goes into the office's database. Also collaborative tools for lawyers have recently opened including Probate.com which allows lawyers to be registered with them and they act as an online resource and directory and STEP which is focuses primarily on international law practitioners. Mr. Hodges noted that the world has changed and is now more interactive and we need the tools and presence to compete in this area.

Mr. Hodges then discussed the online asset valuation tools discussed in the materials. Asset valuation, EVP, has become the default standard for valuing stock and bonds and they have recently also added the ability to value foreign securities. Another is Appraise. IRS auditors also use the EVP service to value valuations. Brentmark software also has a program to value savings bonds. In addition treasurydirect.gov can be used to value savings bonds. These simple tools can help in the planning process and administration process. BNA estate planning software, ViewPlan, Intuitive Estate Planner and Z Calc are also beneficial tools in this area. Intuitive Estate Planner gives you all the calculation results you would generally need plus built in graphs and charts and even a customizable slide show. Joe also demonstrated the IEP product.

Mr. Hodges also noted that the Keebler Company has developed a number of client charts that can be taken from their website for free. See <http://www.keeblerandassociates.com>. These charts are a good reference tools. The materials also contain a comparative chart off all the estate tax calculation programs. Charitable calculations are also available through Brentmark on the Charitable Financial Planner, which has most calculations you would use with most clients. He noted you can also attach these reports to tax returns as well. Brentmark has a software program for retirement calculations in their plan analyzer as well. These are good tools that will work in most cases without significant expenditures. Mr. Hodges also recommended looking at Crescendo Lite that is only \$150 and an additional \$150 for Crescendo Presents. This is an inexpensive option to have in your office. In addition, he noted many freebies available in this area and has them listed in the materials.

Mr. Hodges then moved on to the document assembly systems. He noted that one benefit of Lawgic is that they are truly state specific and at a lower cost than many other programs. Some of the higher end drafting programs are Interactive's Wealth Transfer Planning, DWTA and WealthCounsel's WealthDox7. He recommends having at least one of these programs in your office for complex planning issues and use something simple like Pathagoras for more routine and simple documents. He also recommends trying them all out before you purchase any of them.

He also mentioned some online resources for sample documents such as Drafting Libraries. Northern Trust also provides forms which are a very high quality through the Northern Trust Website. <<http://www.Ali-aba.org>>www.Ali-aba.org is also advertising forms for between \$19-\$39 dollars. You can also purchase forms for a specific practice area.

Mr. Hodges noted that many programs exist that do the Forms 706, 709 and 1041 and fiduciary accountings. These include GEMS, Lackner 6-in-1, TEdec, FPS (formerly Zane), Faster and Heritage. They all have tickler systems and work fairly well. ACTEC also has new quicken templates available on their website, for those who prefer to use Quicken, that are compatible with Quicken Versions 8 -12. Once you pay a small fee, you can download quicken accounting templates for Quicken 2008-12.

Ms. Reach concluded by discussing the word processing programs. She noted that Hot Docs is common, but often abandoned by people due to its complexity. Pathagoras Documents Assembly is a simpler version and is an add-on to Microsoft Word. ActiveWords is another version of a macro generator to automate some processes through macros across everything on your system. In addition, she noted that Microsoft office users have quick parts built in, which is a built in document assembly service in Word and is also available in Outlook.

Special Session II-E - Taking a Look Under the Hood - A 10 Point Diagnostic Test for Your Family Limited Partnership (Litigation Series)

Presenters: Stephanie Loomis-Price and N. Todd Angkatavanich

Reporter: John Warnick

Partnerships are viable business and estate planning tools, providing significant benefits from both tax and non-tax standpoints; however, just like maintaining a sports car, these vehicles require regular care and maintenance. This session discussed practical tips that practitioners should consider in conducting a periodic diagnostic test of a client's partnership, and how such a practice could protect not only the client, but also the practitioner.

Stephanie Loomis-Price, a tax controversy litigator with Winstead P.C. in Houston, Texas, and N. Todd Angkatavanich, Esq., a planner with Withers Bergman LLP in Greenwich, Connecticut, presented an outstanding program based on 10 suggestions of what we can and should be doing to make sure that the family entities we are creating will be respected by the IRS. What made this session so powerful was the synergy that bringing the experiences and perspectives of a tax litigator who has been involved in more than 300 tax controversies, some of which are notable cases which have helped shape the evolution of family limited partnerships over the last 10 – 15 years, with the planning acumen of a trusts and estates/tax attorney who has spent a great deal of time in the business succession and planning worlds.

The presenters started the session with this simple truism: a partnership is only as strong as its weakest link. Ms. Loomis-Price remarked that too often families develop a false sense of security as a result of the positive results we describe as possible during the planning and formation stages. The FLP requires care and legal nurturing but our clients too often think that it can just be signed and filed away.

The tendency for clients to drop out of touch with their tax counsel and/or ignore the prescriptions for compliance we give at the signing of the documents led to the suggestion which became the title of this special session: we should be conducting mock lifetime audits which will stress test the planning and measure how ready for an audit we are. Such mock audits allow us to discover both the strengths and weaknesses of our client's entity and affords the opportunity to suggest corrections before it becomes too late.

One of the reasons Ms. Loomis-Price feels so strongly about post-formation audits of FLPs is the fact that when a tax controversy with the IRS materializes the creator is not going to be around and it will often be the draftsman who will have to explain why the FLP was set up and how it was operated. Mr. Angkatavanich prefers to schedule partnership meetings and to draft minutes for such meetings. We have an opportunity through proactive steps like these partnership meetings and lifetime audits to begin to build a powerful file and good facts to defend the entity against IRS attack.

Ms. Loomis-Price went through patterns she has seen emerging through the FLP cases. Both she and Mr. Angkatavanich agreed on the importance of being able to establish non-tax reasons for the establishment of the entity and operating the FLP consistent with and in furtherance of its stated objectives? The presenters suggested that you perform an audit of how the FLP was formed and is being operated in **four key areas**: maintenance, control issues, transfer of partnership interests and transfer tax reporting.

With regard to **maintenance** the presenters suggested ten steps we should follow to make sure our FLPs are as ready for a challenge from the IRS as possible. Here are the ten suggestions:

1. Make all required filings including both tax returns and any annual or biannual state filings required for the FLP.
2. Comply with all terms of the FLP's governing documents. If annual meetings are required, hold them. If distributions are required to be made annually, make them.
3. If loans are in place, make sure all payments are made. But better yet, discourage any types of loans from the FLP to family members. If a loan is in default, take legal steps to collect.
4. Make sure if distributions are required that they are made and make sure all distributions are made pro-rata. If you discover a non-pro-rata distribution, get it corrected.
5. Don't allow personal use of FLP assets unless fair rental value is paid that use. Discourage payment of personal expenses or satisfaction of estate's needs with FLP assets.
6. Counsel partners to refrain from paying the obligations of the FLP.
7. Encourage partners to maintain current and accurate books and records.
8. Avoid the following transactions between the FLP and its partners: loans, redemptions, non-regular distributions and non-pro-rata distributions.
9. Review the non-tax reasons for formation of the FLP and be sure and follow them.
10. Establish a protocol for administering the Partnership in accordance with the requirements of the partnership agreement.

Special Session II-F - Tax, Business, and Drafting Considerations of Buy-Sell Agreements

Presenters: Nancy Schmidt Roush and Farhad Aghdami

Reporter: Jason Havens

This session addressed important business considerations, tax aspects, and drafting issues for buy-sell agreements for closely-held companies. The speakers covered issues applicable to both corporations (including S corporations) and limited liability companies.

This well-attended special session was a "stand-alone" presentation in that there was no general session on this

topic. Ms. Roush and Mr. Aghdami used the ACTEC “SHAREHOLDERS AGREEMENTS FOR CLOSELY-HELD CORPORATIONS OUTLINE” as the materials for their presentation. It is a superb outline (over 100 pages in length and also including an extensive bibliography) covering numerous aspects of buy-sell situations.

Ms. Roush began by discussing general concepts and issues in a buy-sell situation. She noted several **purposes of a buy-sell agreement**:

- * Transfer restrictions to control ownership
- * Optional or mandatory purchases on designated triggers
- * Protect S election
- * Set price and terms for purchases

The presenters next discussed the **differences among various business entities** that inform the buy-sell process. For example, in a state law corporation setting, the transferee of the shares becomes a direct owner of the corporation. In contrast, in a limited liability company (LLC) setting, the transferee is typically only an assignee, which can have significant creditor rights implications (especially if located in a jurisdiction with a charging order as the sole and exclusive remedy of a creditor). In addition, the operational rules in a corporation are generally “set” by the governing state statute, whereas the LLC operating agreement may and often does vary the governing statute.

Consequently, the transfer restrictions on the underlying ownership interest also differ between corporations and LLCs. The restrictions in the articles of incorporation (a) bind everyone involved; (b) cannot create positive duties on the shareholders (only the company); (c) are public due to the nature of this filing with the department/secretary of state; and (d) cannot be enforced through a lawsuit (void). Again, in contrast, the restrictions in the LLC operating agreement (a) bind only the parties to the agreement; (b) can indeed create duties and rights for all parties; (c) are private because the operating agreement is not filed anywhere; and (d) breaching the restriction requirements can be enforced through a lawsuit, including legal remedies of specific performance and/or an injunction.

The presenters both explained that **reasonable restrictions** are valid, such as preserving the subchapter S tax election (originally obtained via IRS Form 2553, which incidentally an LLC may also utilize for federal tax purposes) of the entity. Each of them explained **some humorous transfer restrictions** that had been requested in their practices, including the requirement that a child divorce his or her spouse prior to the completion of the transfer. However, you cannot absolutely prohibit transfers of ownership interests. You also cannot prohibit involuntary transfers, such as upon death or divorce. A transfer restriction subject to a right to buy/purchase is generally valid.

The presentation then turned to the **triggers** involved in a right to buy on a transfer. In defining whether the purchase is voluntary/optional or mandatory, you may provide advantages to the buyer or the seller. For example, the ability to call for the required purchase at any time for any reason is best for the buyer, with the option to purchase based on a triggering event also being more advantageous to the buyer. On the other hand, the ability to put the ownership interest at any time for any reason is best for the seller, with the mandatory purchase based on a triggering event also being more advantageous to the seller.

The **two primary forms of a buy-sell agreement** are the **redemption** agreement, which directly involves the business entity, and the **cross-purchase** agreement, which is only between the buyer and seller (usually individuals, which is how this report refers to them). Major differences exist between these two approaches, such as the source of the price/funds, i.e., the corporation in a redemption versus the individual’s assets in a cross-purchase; how to structure life insurance to fund each type; and various tax issues. As a result, both presenters often use **hybrid agreements** comprising elements of each type of agreement. For example, the company might have the first option to purchase, followed by the other owners with the second option -- or the converse, if

desired.

In bankruptcy, the critical issue is whether the buy-sell agreement is an “executory” contract, which the Countryman case defined as “a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.” If the agreement is an executory contract, the bankruptcy court may assume or reject it. If not, the court is bound by the agreement’s terms.

The presenters discussed **numerous factors involved** in these agreements, such as the use of classes to define the order of the option to purchase (e.g., Child A and descendants) to keep the classes proportional, whether to sell the stock or the assets, and the use of “drag-along” and “tag-along” rights which respectively provide advantages to the majority or the minority owners. The presenters then worked through several short case studies to illustrate how a particular transfer’s design can be beneficial or detrimental for tax purposes. They also spend considerable time on subchapter S issues, with the loss of that election often being a major issue to consider in these buy-sell situations. They next discussed subchapter K (partnership) issues, including whether and how to utilize a Section 754 election to adjust the deceased partner’s inside basis upon his or her death.

Lastly, the presenters highlighted some of the **estate tax issues** involved in buy-sell arrangements. Mr. Aghdami explained the rules under the so-called anti-freeze provisions of Section 2703 (part of Chapter 14 of Title 26 of the U.S. Code), which allows a buy-sell agreement to define the purchase price during a seller’s lifetime and at death if this section’s requirements are met. The presenters also discussed estate tax apportionment issues if the price is not honored by the IRS and marital deduction issues. They concluded with a discussion of valuation issues in the estate context.

Thursday
7:45 – 8:45

Florida Insurance: Issues Relating to Unauthorized Entities (Not covered by reporters)

9:00 - 9:50

A Hop, Jump and Generation-Skip Away with GST Tax

Presenter: Julie K. Kwon

Reporter: D. Scott Robertson

The generation-skipping transfer (“GST”) tax has undergone significant changes during recent years, and numerous relief provisions are scheduled to sunset in 2012. This program reviewed planning considerations and opportunities in the current environment, potential effects of the upcoming sunset and ways to mitigate the GST tax consequences, plus other recent developments affecting GST tax planning and compliance.

This presentation, given by Julie Kwon, provided an overview of the recent developments and drafting considerations involving the generation-skipping transfer (“GST”) tax. This Report covers some of the more significant highlights from this presentation.

Ms. Kwon began her presentation with a discussion of two recent IRS notices (2011-66 and 2011-76 (the “Notices”)) providing guidance with respect to the GST tax provisions of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “2010 Tax Act”). **Notice 2011-66** provides guidance regarding the application of the election for carryover basis rules to GST. **Notice 2011-76** extended the filing deadlines for executors of estates of decedents who died in 2010. With regard to Notice 2011-66, the essence of this notice is that the election to have carryover basis rules apply will not have any effect for GST tax purposes. In other words, for GST tax purposes the carryover basis of election means nothing. Notice 2011-66 also provides the timely filing

of Form 8939 will be considered timely allocation of GST exemption.

Prior to the issuance of the Notices it was unclear whether a decedent's estate electing carryover basis would be entitled to the increased GST exemption. The Notices clarified that in such cases the increased exemption amount still applied. Additionally, Ms. Kwon noted that the Notices clarified that just because the GST tax had a zero percent rate in 2010 is not the same as a GST exempt trust. In other words, if direct skip trust was created in 2010 and GST was not allocated to that trust, such skip trust would not have an inclusion ratio of zero, which could cause GST tax liability for distributions and terminations involving direct skips for such trust.

With respect to **Form 8939**, Ms. Kwon is not focused on that return but does care about the Schedule R as that is only portion of the return that has current operative effect. Choices need to be made on Schedule R or the default rules are going to apply. Direct skips to individuals from 2010 decedents are reported on Schedule R. For such skips, the practitioner will want to elect out of the automatic allocation rules (remember zero tax rate).

With respect to 2011 gift tax returns and GST allocation, Ms. Kwon pointed out that due the volatile nature of assets value it may be advantageous to make an intentionally late allocation of GST exemption. This advantage stems from the fact that a timely allocation is based on values on the date of transfer, whereas with a late allocation the values utilized are the allocation date values. Therefore, for transfers made in 2011, in which the values have meaningfully decreased, it may be worth taking a look at making a late allocation of GST. In order to make the late allocation, the practitioner would need to elect out of automatic GST allocation on a timely filed return. The caveat to this election out is to ensure this is not done with direct skips as that would cause such transfers to be immediately subject to the imposition of GST tax.

Next, Ms. Kwon discussed the **provisions of EGTRRA that will sunset as of December 31, 2012**, and planning ideas to potentially deal with the sunset. Provisions that will sunset include the increase of the GST exemption, the automatic allocation of GST exemption to lifetime indirect skips and related elections, the ability to allocate GST exemption to prior transfers to avoid taxable terminations where certain non-skip trust beneficiaries have predeceased the transferor and what will be recognized as a qualified severance for GST tax purposes.

Ms. Kwon pointed out that Regulations that have been developed to address **qualified severances** under EGTRRA that should survive any sunset. Before EGTRRA there were few instances where the IRS would recognize a severance for GST purposes. Qualified severances are important to address inclusion ratio and related GST issues. The general rule from the Regulations was that trusts are not treated as separate unless the trusts have always been separate from the creation of the trusts. However, the Regulations now make an exception for mandatory severances in the Regulations under § 2654.

What about nonqualified severances? Ms. Kwon noted that the Regulations under §2642 provide for discretionary severances. Such Regulations provide that separate trusts resulting from a nonqualified severance, which are treated as separate under applicable state law, will be respected for GST purposes as of the date of the severance. However, Ms. Kwon pointed out, while the separate trusts will be respected for GST purposes, the resulting trusts will have the same inclusion ratio as the trust prior to the creation of the separate trusts.

When funding qualified severances a special valuation rule applies. As Ms. Kwon noted, it is possible to fund qualified severances in a non-pro rata fashion. However, the Regulations provide that discounts or premiums that might otherwise apply under usual property law value rules will not apply when funding a qualified severance. Ms. Kwon stated that a fiduciary must take such discounts or premiums into account from a fiduciary duty standpoint and that the fiduciary will have difficulty reconciling the GST valuation rules with the usual property law rules. This probably leads to the practicable result that qualified severances will almost always be funded on a pro rata basis.

The Regulations provide an income tax safe harbor for all severances. Ms. Kwon discussed that if the severance is

authorized under the governing instrument or applicable state statute and is funded on a non-pro rata basis that the severance will not constitute an exchange for income tax purposes. Ms. Kwon emphasized that the Regulations require a state statute where the trust instrument does not provide express authority and that a judicial order (absent statutory authority) or non-judicial modification in jurisdictions that allow such modifications will not fall within the safe harbor. In the latter instances, an analysis under the *Cottage Saving* will be necessary to determine whether there is an income tax consequence. Ms. Kwon noted that when undertaking severances that other tax consequences (e.g. income, gift and estate) need to be considered.

Then Ms. Kwon mentioned that when dealing with taxable terminations resulting from death to keep the deductions under §2622 in mind. This section allows deductions to be taken that are similar to those allowed under §2053. New Regulations have recently been issued under §2053 and Ms. Kwon suggested taking a close look at the changes when determining §2622 deductions.

The final segment of Ms. Kwon's presentation dealt with **drafting issues**. Ms. Kwon suggested reviewing the fiduciary severance powers of trust documents to build in flexibility. Ms. Kwon note that it is not necessary for each severed trust to contain identical terms as the originally severed trust. However, Ms. Kwon stated that nearly all of the severance provisions she sees in trusts provide that the severed trusts must have identical terms, which may limit the ability to deal with changed circumstances and other planning opportunities. Ms. Kwon also suggested that when drafting formula provisions to discern the client's true intent. For example, does funding with the maximum amount of GST exemption mean the same thing to the client when the exemption is \$1 million and \$5 million?

Ms. Kwon believes that drafting is going to become simpler going forward. Due to a variety of changing circumstances, including increasing exemption amounts, Ms. Kwon, stated that the terms of her exempt and nonexempt trusts are largely identical. She is providing for very broad discretion in her trusts. In one instance, Ms. Kwon recounted drafting for the provisions of one trust and then simply allowing the flexibility for the trustee to sever that trust in the future to deal circumstances at the appropriate time.

Ms. Kwon then discussed that drafting for the applicable transfer tax is something that needs to be considered. Increased exemptions and decoupling of state transfer tax regimes bare drafting consideration. It is no longer as simple as assuming that estate tax rates are always going to be less than GST tax rates. One option, which is commonly utilized, for dealing with future tax considerations is allowing the appointment of an independent trustee to grant a general power of appointment in circumstances where estate tax looks like it would be better than GST tax. Another option would be to deliberately trigger the "Delaware tax trap." The "Delaware tax trap" is discussed in a still applicable article from 1989 by Jonathan Blattmachr and Jeff Pennell. Be careful though it is called the "Delaware tax trap" for a reason.

Is there something better? One of the problem with the two options above is that there is reliance on someone to be aware and to take action. Drafting using a default general power of appointment that is driven by a formula would be ideal. Ms. Kwon stated, however, that she has not come up with the perfect drafting solution to address all of the considerations for creating the formula power of appointment.

Ms. Kwon concluded by mentioning the *Timken* case, which is one of the last line of cases dealing with general powers of appointment over grandfathered trusts. In *Timken*, the Sixth Circuit Court of Appeals affirmed the district court's decision upholding the IRS Regulations dealing with the issue. Ms. Kwon then suggested that the practitioner may want to consider reducing the general power to special power now in grandfathered trust so that the power fits within the Regulations that exempt the special powers from application of GST tax.

9:50 – 10:40 In-Plan Roth Rollovers: A Good Idea? Or Just Another Revenue Raiser?

Presenter: Marcia Chadwick Holt

Reporter: Jason Havens

A discussion of the pros, cons and caveats of rollovers to Roth accounts.

Ms. Holt, who is an emeritus member of the Advisory Committee of the Heckerling Institute on Estate Planning, has written and spoken extensively on retirement planning. She opened her presentation by noting that in-plan Roth rollovers were only recently made available. Her materials include preliminary questions and factors to consider in assessing whether to pursue an in-plan Roth rollover.

She walked through the process of an in-plan Roth rollover, which is available to the vast majority of employer-sponsored retirement plans including 401(k), 403(b), and 457 plans. The rollover, known as an “In-Plan Roth Direct Rollover” (IPRR), involves transferring the assets/funds from one account in the plan to a Roth account in the same plan. Who can roll, Ms. Holt’s materials ask? A plan participant, his or her spouse, or an alternate payee (namely a former spouse of the plan participant) can accomplish the rollover.

Qualified plans are not required to offer IPRRs, but may be amended to allow these rollovers. Ms. Holt’s materials state that “[t]he recipient must include the fair market value of the IPRR reduced by any basis in gross income.” The outcome is the same for tax purposes as if a traditional individual retirement account (IRA) were rolled over or converted to a Roth IRA. Special elections are available to pay the income taxes due on these IPRRs over two tax years.

For better or worse, Ms. Holt pointed out that you cannot change your mind regarding this rollover. Thus, if the value of the Roth account assets declines after the IPRR, you must still pay the income tax on the entire amount (less basis). Her materials state that this reality “... could mean paying income taxes on losses. An IPRR indeed can be a revenue raiser.”

Her presentation and materials also provided details on the amount eligible for an IPRR. That amount must be an eligible rollover distribution both under the Internal Revenue Code (s. 402(c)(4)) and the plan itself. On a pre-tax account, the participant must have severed employment, reached age 59.5, died, become disabled, or received a “qualified reservist distribution.” In contrast, after-tax contributions and rollover contributions typically are not limited in these ways.

The “eligible rollover distribution” excludes required minimum distributions (RMDs), equal periodic payments, hardship distributions, and other distributions listed in Ms. Holt’s materials. The “bad news” is that the RMD rules apply to these IPRR-to-Roth accounts in the same way that they apply to pre-tax salary deferral contributions. In other words, taxpayers must begin taking RMDs from their Roth accounts no later than their required beginning date (RBD). In contrast, the lifetime RMD rules do not apply to a Roth IRA.

Ms. Holt posed the question of why a participant would want to use an IPRR to a Roth account. First, there is no age requirement. You may contribute at any age provided you are eligible to participate in the employer-sponsored plan itself (in contrast to a traditional IRA, which denies contributions of anyone age 70.5 or older). You must also have compensation in the year of the contribution to the Roth account. Lastly, the major advantage is that there are no income requirements (unlike Roth IRAs, which do impose income limitations).

The maximum contribution amount also differs between a Roth IRA and an IPRR-to-Roth account. The maximum contribution to a Roth IRA is \$5K plus an additional \$1K for anyone age 50 or older. However, the maximum contribution to a Roth account is the same as the limit applicable to pre-tax accounts. In 2011, the maximum was \$16,500 plus \$5,500 for anyone age 50 or older. Cost of living adjustments also apply to these Roth account limits

Ms. Holt then outlined the withdrawal rules. To qualify for tax-free withdrawals, you must leave the funds in the

Roth account for 5 taxable years. The “right reasons” to qualify for tax-free withdrawals (“qualified distributions”) include (a) reaching age 59.5, (b) death of the participant/taxpayer, or (c) disability of the participant/taxpayer. Any withdrawal from a Roth account that is not a qualified distribution is taxed on a pro rata basis. This issue might become a record keeping problem, which is why employers should evaluate those requirements before allowing IPRRs. Ms. Holt’s materials contain a good example (based on IRS Notice 2010-84, Q&A 13, 2010-15 IRB 872 (Nov. 29, 2010)).

Ms. Holt concluded with situations where IPRRs might be useful. These IPRRs appeal to participants, their surviving spouses, and alternate payees (generally former spouses) because they are easy compared to opening a new Roth IRA since they only need to file a form with the plan administrator to implement. The IPRR is also attractive to the participant who will be in an equal or slightly lower tax bracket when distributions from the Roth account occur. For participants with charitable deduction carry-forward or other tax credits, the IPRR might also make sense. However, the participant needs to consider that outside funds need to be available to pay the taxes on the IPRR (dangerous to use plan money and create a circular tax calculation). If the participant only wants to take qualified distributions, the IPRR would also be viable. Finally, for death-bed situations, where the taxpayer has a short life expectancy and wants to fund a credit shelter (bypass) trust, the IPRR would make sense because distributions from the Roth account would not be income in respect of a decedent (IRD) as long as they were qualified distributions. Plus the income tax payable as a result of the IPRR would be deductible for estate tax purposes (or perhaps on the estate’s income tax return if no estate tax payable).

10:55 – 11:45

Let My Trustees Go! Planning to Minimize or Avoid State Income Taxes on Trusts

Presenter: Richard W. Nenno

Reporter: John Warnick

Managing state income tax liability is a critical aspect of planning and administering a trust. If done properly, the planner may provide substantial benefits to the beneficiaries. If done poorly, the trust may be subjected to significant cost. This session covered how states tax trust income with emphasis on key jurisdictions, how tax often may be avoided, how substantial the potential tax savings are, why a trustee might be surcharged for failing to take steps to avoid tax, and why this subject is relevant to planners in states that don't have an income tax.

Dick Nenno started off his presentation with a little drama, thanks to the cooperation of Laura Toomey – Simpson Thatcher partner in New York City. He came up with 10 true or false questions on the state income taxation of trusts which would become increasingly difficult. I thought this was an excellent way to summarize many of the key points from Dick’s materials. Here is the repartee between Dick and Laura, as near as I could get it:

Dick: Question #1. I work in Florida. I work in Texas. This topic is meaningless to me because my state does not have an income tax. I might as well hop on my broom and jet over to Harry Potter world for a tour of Hogwarts. True or False?

Laura: FALSE. I think they need to stay tuned because you are going to show us how their trusts may become subject to state income tax too

Dick: Correct. Question #2. The state income taxation of trusts isn’t important to my client because they always create grantor trusts. True or False?

Laura: FALSE. Nothing is more certain than death and taxes. I don't think that trust will always be a grantor trust.

Dick: Correct. Question #3. If my trust is a grantor trust for federal purposes, then it will automatically be a grantor trust for state tax purposes. True or False?

Laura: FALSE. I think this may come as a surprise to people but not all states recognize grantor trusts.

Dick: Correct. Question #4. Planning to avoid or minimize state income tax on non-grantor trusts isn't a big deal because the tax always is insignificant AND because it is deductible for federal purposes. True or False?

Laura: FALSE. Jane Peebles is going to share some numbers in our special session today that may surprise people.

Dick: Correct. Question #5. It is not worth trying to avoid state income taxation on trusts because it always involves a costly, constitutional challenge that is likely to fail. True or False?

Laura: FALSE. And I have a feeling, Dick, that you are going to show us a way to work our own magic on this one.

Dick: Correct. Question #6. Illinois and Minnesota statutes say that all income of a trust created by the will or inter vivos instrument of a resident is taxable. This means that no matter what I do all accumulated ordinary income and capital gains of my client's trust are forever taxable. True or False?

Laura: That is particularly tough since I'm from New York but I'm going to take a guess and say FALSE.

Dick: Correct once more. Question #7. My trust says that New York law governs its validity, construction, and administration, as well as the ability of creditors to reach its assets. This means that no matter what I do my trust will have to pay New York income tax. True or False?

Laura: Thanks for throwing me a bone. Being from New York I can say with certainty that one is FALSE.

Dick: Correct. Question #8. If I am the trustee of my friend's trust and if I move to California I won't have to pay California tax on the trust income because my friend isn't a California resident and because the trust has no California beneficiaries. True or False?

Laura: Oh goodness, don't forget to send your change of address card. That one is definitely FALSE.

Dick: Correct. Question #9. This is a tough one Laura. You might want to use a lifeline. 17 states tax a testamentary trust solely because the testator died there. True or False?

Laura: That sounds a bit high. I'm going to say FALSE.

Dick: Correct, the answer is 16. Question #10. In 2011 Pennsylvania taxed trustees at 3.06%. True or False?

Laura: Not sure on that one. But I don't think that is quite right. I'm going to say FALSE.

Dick: Correct. Absolutely 100% correct. The answer is 3.07% Well done Laura Toomey.

In 2011 the rates of state income taxation on trusts ranged from the 3.07% low of Pennsylvania to 10.30% in California to 12.846% in New York City. Typically, the tax savings opportunities involve planning for the non-source income of non-grantor trusts, and particularly their capital gains. The potential tax savings from planning to minimize or avoid state income taxes on trusts are substantial. For example, in one example Dick Nanno cited

a trust with a \$1,000,000 long-term capital gain in 2010 that could have saved over \$93,000 in California state income taxes if the trust had a Washington trustee rather than a California resident trustee.

Dick Nenno's materials are the most comprehensive discussion, laced with state by state examples and rules, of the savings opportunities we can seize and the tax traps we face when considering the state income taxation of trusts. Because trusts are becoming increasingly mobile, in terms of moving from one situs to another, and because of the increasing geographic diversity of trust beneficiaries, these materials will be a wonderful resource for estate planners and trustees.

11:45 – 12:35

You're What? With Whom? But Have You Thought About ... ? Marriage, Domestic Partnerships, Civil Union - The Developing Legal Landscape

Presenter: Wendy S. Goffe

Reporter: Herb Braverman

Unmarried partners, and partners in a same-sex marriage, civil union or domestic partnership, face numerous obstacles not encountered by traditional married couples. There are also many opportunities to do good planning for same-sex and unmarried clients, to help them form and maintain a family, raise children and gain some predictability with respect to their estate plans. This presentation provided some tools and tips to use to take advantage of the opportunities available, to bring some legal parity with married couples, and to reduce the risk of challenge and an added tax burden. This report covers the more significant highlights.

Ms. Goffe introduced the area of estate planning for same sex couples with a good deal of personal observations and some sociological term definitions. She described common law marriage, civil unions, domestic partnerships, same sex marriage and variations thereof in those states that have dealt with same sex couples in a legal manner, including California, Connecticut, Hawaii, Massachusetts, Washington and New York. The laws passed in these states all have their own idiosyncrasies and will be in a state of fluidity for some time in the future. She spoke about the Defense of Marriage Act (DOMA), a federal law that effects this planning environment also.

With this as a background, Ms. Goffe discussed cohabitation agreements, documents in which same sex couples define the terms and conditions of their relationship, since the laws around them often do not or do not do so adequately. Issues must include parenting, asset ownership, taxation, duration, medical care, assisted reproductive technology, adoption, estate planning and many other potential issues that are relevant to a given relationship.

Ms. Goffe discussed the tax issues that impact same sex couples or unmarried couples, who must deal with income tax issues, gift tax issues, estate tax issues, social security and other benefits provided to some by law. These issues are knotty enough, but may be made more so by difficult family relationships, transgender issues and the "geography of love." Her materials are substantial and would provide a good reference source for a planner interested in this area. This is the status of non-traditional relationships in a very traditional country, making planning quite challenging. The use of charitable techniques in this area is the subject of a break out session in the afternoon.

Ms. Goffe pointed out the importance of estate planning documents in place for lifetime situations, as well as death time and suggested that such documents must always be on hand and accessible for same sex couples. A "bomb proof" estate plan is even more important for someone in a same sex relationship or an unmarried relationship.

There may be some advantages to the circumstances of same sex couples; for example, GRITS are still available to unrelated parties under the tax code. Also, some aspects of QPRT planning will be more easily managed by unrelated persons. Life insurance planning may ease some problems for these couples. It is a matter of close analysis and creative planning.

Comments from attendees reflect the challenges that same sex couples and unmarried householders have and will continue to have in a country that has such strong and conflicted laws, emotions, morals and attitudes. Planners will have to stay alert and advise clients continuously in an ever-changing environment.

2:00 – 5:20 **Fundamentals Program III - Grantor Trusts: Take Nothing for Granted**

Presenters: Amy E. Heller and Alan S. Halperin

Reporter: Kimon Karas

Most estate planners understand that the grantor trust rules are critically important. Fewer planners fully acknowledge the complexity of the rules. This session explored the grantor trust rules, with a focus on the powers and interests that will cause a trust to be a grantor trust without causing estate inclusion and addressed estate planning techniques involving grantor trusts, such as GRATs and installment sales to grantor trusts. This Report covers only the significant highlights from this 3-hour session.

This fundamentals program was a survey of the grantor trust rules of Sections 671-679 comprising subpart E of Part I of Subchapter J of chapter 1 of the Code. The grantor trust rules came into the Code as an attempt by Congress to prevent income shifting by taxpayers in high tax brackets to lower tax bracket persons. When the rules were enacted in 1954 there were 24 individual income tax brackets ranging from rates of 20%-91%. Consequently it is “easy” to fall within the rules. Today with more compressed income tax rates, the rules are used as a wealth shifting device. The trusts are created to be grantor trusts for income tax purposes but designed to be excluded from one’s estate for estate tax purposes. The payment of income taxes by the grantor for the trust’s assets removes assets from the grantor’s estate and allows the trust assets to grow without the burden of income taxes.

Section 671 describes the consequences of being a grantor trust; 672 the definitions and 673-679 the “grantor” strings. In wading through these rules the statutory language is paramount. The statute is a patchwork of provisions coming into the Code at different time periods. Certain definitions are specific to the rules as compared to other Code provisions; i.e. “Income” for the grantor trust rules generally means taxable income although in other circumstances it is not clear if the reference may be to fiduciary accounting income defined in 643(b). Note that for purposes of the rules, Section 672(e), a grantor is treated as holding any power or interest held by grantor’s spouse. For transfer tax purposes, powers and interests held by one’s spouse generally are not attributed to the grantor. Thus, by granting a spouse certain powers/interests, it is possible to create a trust to be a grantor trust for income tax purposes without causing the trust to be includable in grantor’s gross estate, commonly referred to as “intentionally defective grantor trust.”

The first power discussed was Section 674(a). A grantor of a trust shall be treated as the owner of any portion of a trust in respect of which beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party. A nonadverse party is one who is not adverse. An adverse party is any person who has a substantial beneficial interest in the trust that would be adversely affected by the exercise or nonexercise of the power which such person possesses respecting the trust. An exception is provided in Section 674(c) if the power to distribute or accumulate income or principal is solely exercisable (without the approval of any other person, including a trust protector), by independent trustees. Independent trustees are trustees who are not the grantor or grantor’s spouse, and no more than half of the trustees are “related or subordinate parties” who are “subservient” to the wishes of the grantor. Related or subordinate party generally includes ones family, a corporation or any employee of a corporation in which the grantor’s holdings are significant from voting control standpoint, or subordinate employee of a corporation of which grantor is an executive. A party is presumed to be

subservient to the grantor if the party is related or subordinate, unless such party can show by the preponderance of the evidence that the party is not subservient. An exception to the Section 674(c) exceptions arises if any person who is nonadverse has the power to add beneficiaries (other than after-born or after-adopted children).

Certain administrative powers treat the grantor as the owner of the trust. Section 675(4)(C), a power to reacquire trust corpus by substituting property of equivalent value will result in grantor trust status, if such power is exercisable in a nonfiduciary capacity, without the approval or consent of any person in a fiduciary capacity. Rev. Rul. 2008-22, provides that a grantor's retained power, exercisable in a nonfiduciary capacity, to reacquire trust property by substituting property of equivalent value will not, by itself cause the trust fund to be includable in the grantor's gross estate under Sections 2036/38. That concept was extended to life insurance in recent Rev. Rul. 2011-28. Panelists cautioned to carve out Section 2036(b), stock of controlled corporation, from the swap power. Key is that trustee has a fiduciary obligation to ensure that properties exchanged are in fact of equal value and that benefits of trust beneficiaries is not shifted.

Section 675(2) treats a grantor generally as an owner of a trust, or portion of trust, over which the grantor or nonadverse party has power to borrow trust principal or income, directly or indirectly, without both adequate interest and adequate security. There is some concern that power to borrow without adequate interest could be viewed as a retained power causing estate inclusion. Therefore, if grantor is given the power to borrow, adequate interest should be required and so long as adequate security is not also required, grantor trust status should be triggered. Most powers cause grantor trust status by mere existence of the power. If a power is not available grantor trust status may be attained by the grantor actually borrowing trust funds. In Rev. Rul. 86-82, Service ruled that a grantor-trustee who borrowed the entire trust fund and repaid the loan with interest in the same taxable year would be treated as the owner for the trust for the entire year. In effect the borrowing causes a trust to be a grantor trust to a retroactive date prior to the borrowing.

Section 677(a) provides that a grantor is treated as the owner of any portion of a trust as to which the grantor or a nonadverse party (or both) has the ability to use the trust income for the benefit of the grantor or grantor's spouse in certain identified ways without the consent or approval of an adverse party:

1. Income may be distributed or accumulated for grantor or spouse. Use of income to discharge legal obligation. Where grantor has a reversionary interest i.e. GRAT. However, the ability of a trustee other than the grantor to make distributions to grantor's spouse will not cause estate inclusion but because of the spousal attribution rule, the trust will be a grantor trust for income tax purposes.
2. Income may be used to pay or apply to the payment of premiums for life insurance policies on the life of grantor or spouse. Statutory language indicates mere ability to pay premiums should be sufficient. Old case law prior to the enactment of Section 677 suggests otherwise. However in FAA 20062701F, Service stated a trustee power to purchase life insurance on life of grantor or spouse from trust income was sufficient to create grantor trust status, irrespective of whether a policy was in fact acquired by the trust.

Section 678 treats a person other than the grantor as a substantial owner. Section 678(a) treats a person other than the grantor as the owner of any of the powers identified the most discussed power being if the person has previously partially released or otherwise modified such power and after the release or modification retains such control as would, within the principles of Sections 671-677 subject a grantor of a trust to treatment as the owner. Although partially released or otherwise modified is not defined, one PLR the Service indicated that a lapse for purposes of Section 2514(e) is a release and a beneficiary holding a 5% annual withdrawal right that fails to exercise should be treated as partially releasing a power to withdraw under Section 678(a)(2). Section 678(b), however provides that Section 678(a) does not apply to a power over income if the grantor is treated as owner under another Code provision. The concern is whether a beneficiary with a Crummey power may cause an inadvertent grantor trust as to the power holder. Many commentators feel that the reference to "over income" in Section 678(b) was a drafting error meaning that a beneficiary with a withdrawal power would not be taxable

where the grantor holds another power over the trust. Service has issued private rulings where it in fact read the words “over income” out of the Code. See, PLR 8326074.

Section 679 provides that if a U.S. person makes a gratuitous transfer (including indirect transfer) to a foreign trust that has one or more U.S. beneficiaries, Section 679 treats the trust as a grantor trust owned by the U.S. person to the extent of the transfer. Purpose of Section 679 is to prevent U.S. persons/grantors from establishing foreign trusts in low tax jurisdictions, which would accumulate income for ultimate distribution to U.S. beneficiaries.

The panel discussed the income tax consequences of grantor trusts. A person who is the deemed owner of a portion of the trust must take into account in computing his own taxable income the items of income, deduction and credit attributable to the portion of the trust. The trust does not. There is a distinction between property ownership and tax law. For example, if a grantor trust makes charitable contributions, the contribution for property law purposes is made by the trust, but for tax law purposes the gift is treated as being made by the grantor. In Rev. Rul. 85-13, the Service ruled that a grantor who acquires trust corpus (that prior to the transaction was not a grantor trust) in exchange for grantor’s unsecured promissory note will be considered to have indirectly borrowed the trust corpus. Grantor is thus treated as owner of the trust under Section 675(3) (direct or indirect borrowing of the trust fund). The transfer of the trust assets to grantor is not treated as a sale for federal income tax purposes. The consequences of disregarding the sale:

1. No realization of gain (or loss) because there is no sale for income tax purposes;
2. Basis is carried over because there is no sale;
3. Interest payments made on the note are disregarded, i.e. no interest income to the recipient and no interest deduction to the payor.

Caution however must be used, as a grantor may not be deemed the owner for all income tax purposes. For example, at risk rules look at the amount the grantor has at risk not the trust; passive activity loss rules look at the participation in the activity of the grantor and not the fiduciary. Also, watch partnerships profits interests transfers within 2 years of issuance. Is a transfer to a grantor trust a prohibited transfer under the revenue procedures?

Drafting Considerations:

1. **Tax reimbursement clauses.** Rev. Rul. 2004-64 clarified circumstances under which the inclusion of a tax reimbursement clause would cause the trust to be includable in grantor’s gross estate. If trust terms require reimbursement the trust fund will be includable in grantor’s estate; if trust terms or state law are merely permissive granting trustee discretion to reimburse the grantor, the existence of the reimbursement clause will not of itself cause inclusion. It was suggested that since the release of the ruling some planners have included standard language in documents granting trustee discretion to reimburse grantor for income taxes. Panel cautioned about using this power consistently as a potential inclusion based upon an implied understanding and even if there is no understanding there may be inclusion in a state where the existence of such a clause causes the trust to be subject to the claims of creditors.
2. **Toggle power.** Notice 2007-73 describes situations of interest that must be disclosed. Since the release of this Notice some planners are concerned with the use of repeated on and off toggling of grantor trust status. The Notice stated that terminating grantor trust status once did not require disclosure. The Notice also dealt with the generation of non-economic losses or the avoidance of gain recognition. Many believe the Notice is limited to its specific facts. When considering toggle power, be cognizant of trust termination of grantor trust status if the trust has assets with debt in excess of basis, Crane gain. Possible solution is to add assets with basis in excess of liabilities it is possible no gain may be recognized; however, if gain is determined to be recognized on asset by

asset basis, the transfer of high basis assets will not preclude gain recognition. If the trust is inflexible and the toggle power is not available, consider if decanting is a possibility under the trust terms or if state law grants that power. Consideration must be given to Notice 2011-101, where the Service has requested comments regarding the income and transfer tax consequences/considerations in the use of the decanting power.

Trust Reporting: see Reg. Section 1.671-4, for the general rule and alternative compliance methods.

The program concluded with the panel reviewing some discussion hypotheticals illustrating the rules discussed. The panel discussed funding a trust with a defined value clause and possible recipients of the excess other than charities, as in the reported cases to date. Panel raised a concern with the excess passing to one's private foundation as to raising a possible self-dealing concern. Discussed may want to consider allocating the excess to a GRAT, marital deduction trust (but not QTIP), or a trust that would be classified as an incomplete transfer as to the grantor.

Panel also discussed a community property situation where husband funds trust with cash from a personal account (cash was compensation he received from his employment) retaining a power to reacquire trust assets. Husband desires to sell appreciated asset in family business that is his separate property for a promissory note. Unless a transmutation agreement is entered into presale, ½ of the interest payments on the note will be taxable to the wife.

SPECIAL SESSIONS III 2:00 – 3:30

Special Session III-A - Planning for the Large Estate of Over \$15 Million (Focus Series)

Presenters: Ann B. Burns, John F. Bergner and David A. Handler

Reporter: D. Scott Robinson

The array of estate planning strategies available today can be mind boggling, making planning for estates in excess of \$15 million especially challenging. This panel sorted out the gift, estate, and income tax consequences of various planning tools and discussed the selection of appropriate tools to accomplish the clients' goals.

This program was the culmination of three Special Sessions about planning for various size estates, the first two being estates under \$5 MIL (SS 1-A) and the second being estates between \$5 MIL and \$15 MIL (SS - 2-A) This session presented a wonderful potpourri of planning ideas for the really large estate. The presentation centered around two hypothetical scenarios.

The first scenario involved a couple with \$30 million in assets (so called "middle class of the wealthy") and the second scenario involved a couple with assets over \$100 million. This Report cover only the significant highlights of this presentation.

With regard to the first scenario, the \$30 million couple are in their 70s with children in their 30s and 40s and two grandchildren under 10 years old. The estate is comprised of an IRA (\$6 million), a jointly-owned residence (\$4 million), closely-held business (\$5 million), a securities portfolio (\$5 million) and life insurance policy on the husband (\$10 million face value, \$200,000 fair market value and \$50,000 annual premium).

Mr. Bergner started the substantive portion of the presentation off by discussing a three-step planning process. The first step is to fully understand the clients' personal and financial situation. It is important to understand who the clients are, their family situation and needs and have a good understanding of the family business and individuals involved in the business. It is vital to the understanding of the clients' personal financial situation to involve the financial planning professional. Once there is a firm understanding of the clients' personal and financial situation, the second step involves turning back to the clients and letting them tell you what their goals and objectives are. Then a discussion of the tax consequences is discussed after learning the clients' goals and objectives. In large estates, there will be a greater focus on tax considerations. The changing environment of the transfer tax system makes advising clients difficult.

Motivating clients to take action is often challenging. Mr. Bergner stated that providing a solution that is not implemented is not a solution. The key to getting clients to move forward is being able to communicate effectively with clients by identifying solutions, explaining the administrative costs and potential inconvenience. Something that may help with motivation is to explain future appreciation to clients and how the IRS is a silent partner in that appreciation. Mr. Bergner noted that when discussing transferring wealth it is important to find out what the client feels comfortable in giving away, generally, after a needs analysis. A sensitivity analysis should be part of this analysis process.

Mr. Bergner then discussed that the first place to start with transfers is with the simple use of exemption. Typically, the clients will want such transfers (possibly any transfer) to be put in trust. This is for multiple reasons including control, creditor protection, use of GST planning, etc. Increased exemptions have opened the door for planning to transfer amounts into trust for the benefit of the spouse and children. By including the spouse in the trust with the children, the transferring spouse benefits indirectly from the trust. This indirect benefit can be maintained as long as the beneficiary spouse is alive and the couple are married. Another option for protecting the ability of continued benefit is for the husband (transferring spouse) to purchase life insurance on spouse so if she predeceases him the assets in the trust for his wife are replenished with the life insurance proceed.

Mr. Bergner stated that making sure the client is comfortable with having no access to the assets is important. In addition to indirect access, another method for dealing with this is for each spouse to transfer assets into a trust for the benefit of each other. In these instances, however, be wary of the reciprocal trust doctrine and plan accordingly. Something else to consider as another way of dealing with access to assets after death is providing the non-transferring spouse with a special power of appointment.

Giving away the life insurance with a \$200,000 value will not affect lifestyle. Use the tried and true approach of the irrevocable life insurance trust to facilitate the gift. One approach for motivating clients to transfer life insurance to an irrevocable trust is to explain to them the economics of the proceeds payable at death. For example, if the policy is left outside an irrevocable trust and the estate is taxable, the IRS will get 35% (at current rates) of those proceeds. One of the panelist suggested explaining to the client that the policy amount could be reduced upon transfer to an irrevocable trust and still yield the same net benefit without the IRS receiving any of the proceeds.

Be aware that when transferring an existing policy of avoiding three-year estate inclusion rule. One method of avoiding the rule is to sell the policy to fund the trust. However, make sure the trust is a grantor trust to steer clear of the transfer for value rules. Ms. Burns mentioned that another option for dealing with the three-year rule is transferring the policy to a marital deduction trust if death occurs within three years of the transfer. Ms. Burns also noted that if the clients were in 80s and rather than 70s, the three-year rule might be more of a consideration.

What about transferring the residence (\$4 million)? Mr. Handler stated that the residence is not at the top of the list for transfers. However, if clients are unwilling to undertake transfers of liquid assets for financial security reasons, the residence may be a good to transfer. Mr. Handler pointed out that there are always issues with transferring the residence, which include the cost of maintenance and upkeep and property taxes. A sometimes attractive option is to gift the residence to a grantor trust and having the settlor pay fair market rent. The rent is not taxable income and helps to address the ongoing costs associated with home ownership.

The business is a significant asset and it is important have a good understanding of the business. What is anticipated for the business? Will one or more the children operate the business? Is there liquidity event on the horizon? Closely held business interests offer the advantage of being able to use valuation leverage through lack of marketability and minority discounts. Such interests can be transferred through an outright gift, gift to trust and potentially a sale to a defective grantor trust.

With regard to the \$30 million estate, the panelist pointed out that the clients are unlikely to use the full \$10 million exemption. Mr. Bergner brought up the point that most clients fitting the profile of this scenario are not going to feel comfortable giving \$5 million of liquid assets away.

However, they are likely to feel comfortable giving away a large portion, perhaps up to 45%, of the business to a trust for the spouse and children.

Closely-held businesses also generally provide cash flow, which may be a means of paying life insurance premiums in the irrevocable life insurance trust. The panelists brought to light that any planning with the business needs to take into consideration planning for income flow if husband predeceases wife (assumption being that the business is the husband's asset and income source), and one thought for that was employee salary continuation agreement.

It is likely that the clients fitting the profile of this scenario will be thinking about funding the payment education for their grandchildren. In this regard, the panelists discussed §529 plan versus annual exclusion gifts in trust to the grandchildren. The panelists favored the approach of making annual exclusions in trust and then paying directly for education as needed for the grandchildren. This approach gives the grandchildren the flexibility of cash after graduation and provides for greater reduction in the clients' estate. The panelist cautioned that GST annual exclusion is different from the gift tax annual exclusion and that care must be taken if the client what gifts to grandchildren in trust in which the client wants to qualify for the GST annual exclusion under §2642. Ms. Burns commented that the most common mistake she sees in this area is giving the grandchild a limited power of appointment rather than a general power of appointment, which is what is required to qualify under §2642.

The panelists then discussed loans and gifts to the children to purchase a residence. It is not usual for clients fitting this profile to have made loans to their children to purchase a residence. With the increased exemption amounts this is a good time to use exemption to pay off existing loan. Additionally, the low AFRs also make loans very attractive.

After loans and gifts the panelists discussed planning for the IRA. The suggestion was that the IRA could be the assets that are spent down and used for annual gifting without impacting the clients lifestyle. If the clients have charitable goals, planning for the use of the IRA to fund charitable should be discussed.

The panelist concluded the discussion of the planning for the \$30 million estate by summarizing their approach and reminding the audience to not forget the basics.

The presentation then shifted gears to the planning for the \$100 million estate. The overall point of using \$100 million is that amount takes out of the equation whether or not the clients can afford to do some types of planning. The \$100 million estate scenario is comprised of closely-held business (\$50 million), separate business real estate (\$10 million), three homes (one of which is jointly owned with one of the couple's children), no life insurance, a modest IRA (\$2 million), an investment portfolio (\$25 million) and an automobile collection (\$3 million). The couple has used \$2 million their exemption of which \$1 million was used with the purchase of the jointly-owned residence with the child. No GST exemption had been used.

The panelist began the discussion of planning for this larger estate by discussing planning for the business (keep in mind all of the considerations mentioned above). At this level of wealth, a gift to grantor trust combined with an installment sale of some or all of business interest is very likely an appropriate strategy. When undertaking an installment sale strategy it is important analyze the cash flow from the business and to involve other professionals in that process. This importance helps in determining in the ability of the trust to make the payments on the installment obligation. Other practice tips the panelist discussed with regard to sale strategies were to make sure to compare the appropriateness of a sale versus a GRAT, use defined value clauses, and consider whether now is the time to capture discounts before the law changes, which seems to be the writing on the wall.

The business real estate can provide additional planning opportunities. The real estate is probably generating cash flow through rental payments from the operating business. It may be more beneficial to sell the business real estate to the grantor trust first for cash flow purposes and then later do a sales transaction involving interest in the operating business. However, the clients may want to maintain the real estate or portion of it for the rental cash flow. Therefore, it is important to understand what the client plans are for the business real estate. If the business real estate is transferred from the clients make sure that there is a commercially reasonable written lease in place with fair market rent being charged and collected.

For the investment portfolio, the panelist mentioned that GRATs should be part of the planning tools utilized. The transaction costs with marketable securities are relatively low. The primary benefit of GRAT is the shifting the appreciation out of the estate. When structuring the GRATs, consider using a floor when the clients' goal is to transfer only a certain amount to the children. For example, perhaps the first \$10 million of the remainder goes back to the grantor and the children get the rest. The panelists noted that providing a floor does not change the value and calculation of the GRAT.

The panelists also discussed the use of increasing GRATs, especially in cases where the initial assets do not generate a lot of cash flow but may generate more in the future (e.g. liquidity event involving the business). The use of decreasing GRAT is another strategy that the panelists discussed. With a decreasing GRAT the first annuity payment may be something like 90% and the second perhaps 15%. This type of strategy creates a GRAT that is economically equivalent to establishing a one-year GRAT.

An interesting idea the panelists discussed next was the use of qualified disclaimers with GRAT planning. The idea works like this: one spouse transfers several stocks to a general power of appointment marital trust that provides for the ability of the beneficiary spouse to disclaim any of the stocks. If the spouse disclaims any stock it goes into a GRAT for that stock. Because of the disclaimer rules, however, it is as though the stock went into the GRAT on the date it was transferred to the marital trust.

Using this strategy allows a nine-month window to determine whether the stock would be appropriate to transfer into a GRAT.

Planning for the car collection is a bit more difficult. The panelists agreed that the car collection should not be placed into a family limited partnership or LLC. The panelists also acknowledged that most clients would not want to transfer the car collection during their lifetime. The panelists noted that the car collection would be considered a collectible for tax purposes and subject to a 28% (currently) capital gains tax. In that regard, it is likely more tax efficient to hold onto the car collection to have a stepped-up basis at death rather than to make a lifetime gift that will have a carryover basis in the hands of the children.

Next, the panelist discussed the interesting idea of using a remainder purchase marital trust (the "RPM trust"). This strategy involves the husband establishing a marital trust that provides for an annuity or income interest for the wife for life. The remainder interest is then sold to the children. Under the gift tax rules the trust qualifies for the marital deduction if the trust is a QTIP or if a third-party pays full and adequate consideration for the remainder. This strategy eliminates the mortality risk for the husband as he walks away from the transaction after funding the marital trust. Another advantage to the RPM trust is the ability for the remainder to be purchased by a GST exempt trust. The panelists noted that a potential disadvantage to the strategy is the risk of divorce, which would mean the husband could not benefit indirectly from the marital trust.

The panelist then moved on to the discussion of life insurance. Recall that this larger scenario does not involve life insurance. The need for life insurance for estate of this size will depend upon the liquidity needs for the estate and the amount that the client wishes to leave to the children.

Life insurance may also be needed as a tool to hedge against a premature death because many of the strategies employed to transfer wealth are going to take time to move assets out of the estate.

The panelists concluded the presentation by discussing the use of defined value clauses and the present payment of gift tax. The panelists suggested that when using defined value clauses the excess value, if any, should be transferred to a charity or nontaxable trust. The charity should not be the family foundation. The panelist stated that their favorite charity is the use of a donor advised fund through a community foundation. Often community foundations will accept interests in a closely held business and this will facilitate an exit strategy (often a buyback by the family or redemption by the business). Selecting a public charity, like a community foundation, avoids the self-dealing rules that would occur if a foundation were involved in the transaction.

With regard to the current payment of the gift tax, the current tax rate of 35%, especially when combined with discounted values, may make the payment of gift tax now appealing to some clients in the large estate category. This is at least something that should be discussed and considered as part of the overall strategy for the larger estate.

III-B – Family Limited Partnerships: Not Just a Passing Phase?

(Repeat of Session I-B)

John W. Porter

David Pratt

Special Session III-C - GST Tax: Pitfalls, Pratfalls and Practical Pointers

Presenters: Julie K. Kwon and Beth Shapiro Kaufman

This interactive workshop, which built on the Thursday morning General Session on GST by Julie Kwon, reviewed common factual scenarios to highlight recurring GST tax problems in drafting, post-death administration and allocations, and options to mitigate the adverse consequences or take advantage of planning opportunities.

NOTE: This Report replaces the earlier Report on this Special Session that was published as part of Report #16.

The presenters went through nine scenarios. Due to the extremely detailed and technical nature of the discussion, the factual scenarios and some key points from the discussion are only briefly summarized here. Please refer to the main outline from the plenary GST tax session or the full audio recording of this program for additional information.

I. Transferor (“T”) created a \$3 million trust fbo her grandchildren and more remote issue in 2010. No other gift or GST exemptions have been used. T timely files a gift tax return and affirmatively elects out of automatic allocation of GST. Then makes additional gift of \$2 million to the trust in 2011. The trustee makes distributions to T’s grandchildren and great-grandchildren in Feb 2012 and June 2012.

- T is the current transferor. When distributions are made, she is still the transferor, but is reassigned to child’s generation.
- The creation of the trust is a direct skip subject to GST tax, but the rate in 2010 is 0%. The inclusion ratio with respect to the 2010 contribution is 1 because no exemption was allocated.
- Whether or not T should have allocated exemption to the trust upon creation depends on whether T intended for this trust to benefit grandchildren primarily (no allocation of GST exemption necessary) or to be held as a long-term trust benefiting generations more remote than grandchildren (because distributions to great grandchildren and beyond will be taxable distributions subject to GST tax if the inclusion ratio remains 0).

- In 2011, it would be cleaner to create a new trust if no GST exemption was allocated to the 2010 trust ; otherwise, the trust with both the 2010 and 2011 contributions would have an inclusion ratio of between 0 and 1 (due to the automatic allocation of GST exemption to the 2011 contribution absent an election out of that allocation).

II. In 2000, T created irrevocable Trust A with \$2 million. T had not used any gift or GST exemption. Trustee has discretion to distribute to T's child and child's issue. Trust terminates at C's death. In April 2012, Trust A is worth \$5 million.

- There was no GST exemption automatically allocated since the lifetime automatic allocation rules were not in effect in 2000.
- T can allocate GST exemption to Trust A now because T can file late allocation at any time until the filing deadline for T's federal estate tax return. However, T would have to allocate \$5 of exemption since late allocations have to use the current value.
- If T makes a distribution in 2008 to T's grandchild, it is a taxable distribution and subject to GST tax if no allocation made before the distribution is made.
- A late allocation made after the distribution has occurred would not save the distribution from being taxable.

In 2011, T creates another trust, Trust B, with \$3 million. Trust B creates a separate share for each grandchild. Trustee may distribute income and principal to grandchild during lifetime of grandchild. Upon termination, assets to T's issue per stirpes.

- If T does not allocate GST exemption to Trust B, it will be automatically allocated because the transfer is a direct skip subject to automatic allocation. This timely allocation uses \$3 million of T's GST exemption. T should not elect out of the timely allocation because a late allocation is not helpful with direct skips – the GST tax would be imposed immediately as of the due date of a timely filed return. If Trust B assets lose value, some GST exemption will be wasted. Be careful with assets used to fund GST trusts.

III. T has 3 children and in 2011, creates irrevocable trust fbo all issue. No exemptions used to date. Trust is held as a single trust until youngest child is 25, when it will divide into 3 separate trusts, one for the benefit of each child and such child's issue. One child dies before the trust is divided into 3 trusts.

- In 2011, GST likely would be automatically allocated to the trust since it appears to be a "GST trust" as defined in IRC Section 2632 that is subject to automatic allocations. BUT don't rely on the statute that defines GST qualifying trusts. The speakers strongly recommended electing into treatment as a GST trust from inception to ensure automatic allocations would occur if the planner intends that the trust should be GST exempt. Affirmative allocations will be necessary if the automatic allocation rules for indirect skips sunset in 2012.
- If distributions are made to grandchildren prior to division, will be subject to GST tax, but no tax due if exemption was allocated. If elected out of automatic allocation, there would be tax due.
- When the trust divides, the deceased child's trust will be held for only skip persons; thus, the division results in a taxable termination as to the share held for the deceased child's family. If GST exemption was allocated to the trust, then this taxable termination will not be subject to GST tax. The "predeceased ancestor" exception does not apply to eliminate the taxable termination because the child was alive at the creation of the original trust.
- The creation of the separate trusts for the surviving children's families does not incur GST tax.
- Taxable distributions made to grandchildren generally will be taxable distributions that incur GST tax; except that distributions to the deceased child's children will not incur GST tax because of the "move down" rule that applied upon the taxable termination.

IV. T created a trust in 2005 with \$1.5 million. Trustee has discretion to distribute income and principal to T's children until death of last surviving child, at which time trust property will be distributed equally to T's grandchildren. T does not file a gift tax return reporting the gift.

In 2007, T creates an irrevocable dynasty trust with \$2 million. On the due date of the gift return (4/15/2008) the value has fallen to \$900,000. The assets in the 2005 trust have appreciated to \$4 million.

In 2010, T creates a trust for grandchildren and more remote issue with \$5 million.

- Automatic allocation applied to the 2005 trust so that \$1.5 million of exemption allocated. T could have elected out of the automatic allocation on 709, but she failed to do so.
- T's GST exemption was automatically allocated to the 2007 contribution, but she only had \$500,000 of exemption left due to the prior automatic allocation to the 2005 trust.
- T's GST exemption was automatically allocated to the 2010 trust because it is a direct skip, even though there was a 0% rate of GST tax in 2010.
- If T primarily intended to benefit grandchildren with the 2010 trust, then T likely should have elected out of automatic allocation for the 2010 trust because of the 0% GST tax rate and the lack of GST tax imposed on distributions to the grandchildren thereafter. T could try for 9100 relief as a last resort if she failed to elect out.
- The inclusion ratio for the 2005 trust is 0 because of the automatic allocation. For the 2007 trust, T only has \$500,000 of exemption left, so inclusion ratio is 0.75. For the 2010 trust, \$3 million would be allocated automatically, producing an inclusion ratio of 0, unless T elects out of the automatic allocation which would result in an inclusion ratio of 1.

V. T created Crummey trust in 1988 which provided that each of T's 3 children and 3 grandchildren had non-cumulative Crummey powers. All income accumulated; no distributions other than the Crummey right of withdrawal. Upon T's death, trust divides into 3 separate trusts, one for each grandchild for life. T made annual gifts of \$60,000 each year until death in 2007. No GST exemption was allocated by T to the trust.

- The gifts to the grandchildren qualify for the gift tax annual exclusion but not the GST annual exclusion.
- There is no automatic allocation to the transfers before 2001, when the lifetime automatic allocation rules for indirect skips became effective.
- If Crummey power lapses in excess of the 5x5 power, child becomes the transferor as to the excess. Because the transferor changes when any portion is subject to federal gift or estate tax and the GST tax rules treat trusts attributable to different transfers as separate trusts, it is conceivable that 12 separate trusts would actually be created.
- GST exemption should be allocated to this trust if T intends for the trust to remain GST exempt.
- **NOTE:** There is a difference between electing into treatment as a GST trust (which would result in all future contributions to the trust receiving automatic allocations) and allocating exemption to a particular contribution). The speakers agreed that electing into treatment as a GST trust is the safer method to ensure that the trust will remain GST exempt as long as the rules automatically allocating to indirect skip transfers remain in effect, rather than relying on single affirmative allocations that must be made for each transfer

VI. T created irrevocable trust in 2002 fbo Child 1 and Child 1's issue. Child 1 is entitled to all income for life. Principal may be distributed to Child 1 and her issue in the trustee's discretion. On Child's death, trust will be distributed per stirpes to T's issue.

In 2006, to resolve disputes, trustee determines that actuarial value of child's interest is 45% and remainder is 55%. T allocates GST exemption to trust to produce inclusion ratio of 0.45. Then T severs the trust and allocates 45% of assets to child's trust and 55% to the trust for child's issue.

- This is not a qualified severance because the IRS does not treat this type of severance as maintaining the same succession of beneficial interests, as required for a qualified severance. Both trusts have an inclusion ratio of 0.45.
- There could be other tax consequences of this split (e.g., gift tax, income tax).
- The split caused a taxable termination as to the share held exclusively for grandchild. T would need to allocate GST exemption to the entire trust before the split to eliminate the GST tax due on the severance. This may waste exemption, but it is the only way to prevent GST tax on the grandchildren's trust as a result of the severance, given that this is not recognized as a qualified severance.

VII. T created a 5-year GRAT in Feb 2006 with \$1 million. T has two children, C1 and C2 (of course). The GRAT remainder will be distributed to T's issue per stirpes upon termination.

T did not allocate GST exemption to the trust. T elected out of automatic allocation.

C1 died in 2010 survived by two children. The GRAT terminated in Feb 2011 and balance was distributed per the terms of the trust.

- T should not have allocated GST exemption to the trust because (i) children usually survive their parents and (ii) the allocation would not be effective immediately because of the estate tax inclusion period ("ETIP"). If T had allocated, it would not have been effective until the ETIP ended.
- Also, T should have elected out of automatic allocation because you would have to wait until the end of the ETIP. When one elects out, one can always allocate later.
- There is no GST tax imposed at C1's death because T (another non-skip person) still has an interest in the trust. The predeceased ancestor exception does not apply because C1 was alive when the initial transfer was made.
- If T did nothing until after the termination, T could allocate GST exemption, but would have to allocate based on the full value of trust even though only a portion of the trust is subject to the taxable termination, which wastes exemption.
- T could have severed the trust during the ETIP to enable allocation at the end of the ETIP to the trust for C1's children only.

VIII. T died in 1989 with \$1 million GST exemption available. Per T's Will, a QTIP Trust was created fbo T's spouse, with \$4 million. No Schedule R was filed with the estate tax return so no GST exemption affirmatively allocated and no reverse QTIP election made.

- GST exemption was not automatically allocated to the QTIP trust because the spouse later becomes the transferor upon spouse's death.
- A reverse QTIP election could have been made for the QTIP, but it would have to be made over the entire trust because no "partial" reverse QTIP election is allowed. Instead, if the trust terms or state law gave the trustee the power to divide the QTIP, the trustee could have created 2 trusts, one with \$1 million with the reverse QTIP election, and the other with \$3 million and no reverse QTIP election. The speakers addressed in detail why it is optimal for tax planning purposes to match the amount of GST exemption with the trust that is subject to the reverse QTIP election.
- 9100 relief may be available to make a late retroactive reverse QTIP election, in which case the automatic allocation would spring into existence for the reverse QTIP trust.

IX. The last scenario was long and complicated, but the general gist is that if you make a late allocation of GST exemption after a taxable distribution was made, the late allocation does not change the tax due upon the distribution.

But, once the late allocation is made, future distributions are exempt.

If T receives a private letter ruling granting an extension of time under IRC §2642(g)(1) to allocate GST exemption to a trust, then it relates back to the date of the initial transfer and so cures those distributions made after the initial transfer but before the ruling.

Special Session III-D - Anyone Can Whistle - What You Should Know About the Newly Revised IRS Whistleblower Program

Presenters: Martin E. Basson, Dawn M. Applebaum and Michael A. Sullivan

Reporter: Michael Stiff

Effective December 2006, the IRS totally revamped its informant claims program. Rewards are now mandatory, unlimited in amount, and contingent fees are permissible. This panel of current and former IRS Whistleblower Office representatives and a private whistleblower attorney discussed the current issues in this developing area of tax practice, and the practical realities of developing and pursuing tax whistleblower claims. The materials consisted of an 8 page outline.

The panel began with a brief history of the whistleblower statute which dates back to 1867. The Whistleblower Office was formed under the Tax Relief and Health Care Act of 2006 which amended Section 7623. Prior to 2006, the payments to whistleblowers were discretionary, with a maximum award percentage of 15% of the collected taxes and penalties and a maximum award of \$10 million. There also was no judicial remedy if an informant did not agree with the outcome of the claim. The old law has been re-designated as 7623(a).

The new law created 7623(b) and applies to cases in which the amount in dispute exceeds \$2 million dollars. If the taxpayer is an individual, gross income must be greater than \$200,000 for at least one of the tax years at issue. The awards are no longer discretionary and shall be 15-30% of the amounts of tax, interest and penalties collected with no maximum amount or cap.

To be eligible for an award under the new law, the whistleblower must submit a claim (Form 211) signed under penalty of perjury. The claim form should be mailed to the Whistleblower's Office in Washington, D.C. To receive an award after submitting a claim, the IRS must take action on the claim and must collect greater than \$2 million. If the amount collected is less than \$2 million, the award would be 1-15% under the old rules of 7623(a).

Once the claim is received, the Whistleblower Office will review the information submitted and perfect the Form 211. The Whistleblower Office consists of approximately 25 attorneys and 25 subject matter experts. Within 60 days of receiving the claim, the claim must be assigned for investigation or rejected. In making the determination, the Whistleblower Office also evaluates if the information provided is tainted by privilege or 4th Amendment rights against illegal searches and seizures.

Once a claim is submitted, the informant may be told only the status of the claim and may not be told the action taken in the taxpayer's case. This admittedly creates frustration for whistleblowers and their counsel. However, the taxpayer's information is protected from disclosure by Section 6103. The IRS has taken a restrictive interpretation and generally wishes to avoid having a person with a financial incentive involved in the examination. There also is a \$5,000 penalty for each unauthorized disclosure which makes the representatives of the Whistleblower Office very cautious.

The Service will try to protect the identity of the whistleblower. However, it is not always possible to pursue the investigation or examination without revealing the identity of whistleblower. Mr. Sullivan noted that there are a

number of risks for whistleblower including criminal prosecution, civil suits, retaliation from employers, being blacklisted from the industry and threats to their life or safety. The largest whistleblower in history (UBS case) went to jail.

The representatives from the Whistleblower Office indicated that they are not looking for attorneys or accountants to inform on their clients. The most typical whistleblowers are ex-spouses, family members, professionals and fired employees.

Estate and gift tax cases represent a significant number of the cases in the Whistleblower Office. Mr. Basson related a recent case that involved the failure to report \$200 million from the exercise of pre-1942 general powers of appointment on an estate tax return. The whistleblower was a former trust officer. The panel noted that if there is a whistleblower, this fact is normally not disclosed to the taxpayer during the examination or investigation. This fact may not even be disclosed if the whistleblower is a witness against the taxpayer, unless the taxpayer or taxpayer's attorney inquires.

The awards are not paid out until two years after the total amounts are collected. If the claim involves an estate that has made the 6166 election, this may mean the award is not received for 17 years. If there are other claims found during the examination process, the whistleblower only receives an award based on the amounts collected relating to the original claim. If the IRS finds other items and the items related to the whistleblower's claim are dropped as part of the ultimate settlement with the taxpayer, the whistleblower would not receive any award. The IRS has a lot of discretion in choosing which claims to pursue and the whistleblower can't force the IRS to pursue claims against a taxpayer.

The Whistleblower Office paid \$19 million in awards in 2010. The average time period between the submission of the claim and final award is approximately 7 years.

This was a very interesting program and the members of the panel did a wonderful job in reviewing the law and its mechanics from the perspective of the whistleblower, the whistleblower's counsel, the Whistleblower Office and the taxpayer.

Session III-E Elder Financial Abuse: Protecting the Aging Client from the Den of Thieves (litigation Series)

Presenters: Bruce S. Ross, Dana G. Fitzsimons, Jr. and Vivian L. Thoreen

Reporter: Joanne Hindel

This session discussed the legal and ethical issues involved in deterring, minimizing, and even avoiding elder abuse through: state laws; estate and elder law planning; use of powers of attorney, medical directives, and trusts; pre-death will contests; and other techniques. It also discussed strategies for litigating the elder financial abuse case, including: discovering abuse; adult guardianship litigation; the powers and limitations of the civil courts; multi-jurisdictional issues and judgment enforcement; and coordination with local, state, and federal authorities. Highlights from this session are reported here.

Bruce started out by saying that Elder abuse can be physical, emotional/psychological, sexual and financial. The largest number of cases reported involves family and friends and caregivers, loss to the elderly through commercial, financial abuse is the highest.

While definitions of the term elder financial abuse varies from state to state the central concept is the misuse of the elder's money or property.

He mentioned that he and Vivian represented Mickey Rooney who had personal experience with elder abuse at the hands of relatives.

Dana then discussed the initial ethical challenges lawyers face when representing the elderly.

When deciding whether to represent an elderly person who may have suffered financial abuse, the lawyer must first determine whether the client has the requisite capacity to enter into an attorney-client relationship. With an existing client, the lawyer's actions are somewhat different. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

If the lawyer believes that the client is at risk of substantial physical or financial harm the lawyer may take reasonably necessary protective action including the possible appointment of a guardian ad litem, conservator or guardian.

The lawyer will often have valuable information about the capacity of the client and must carefully consider the ethical duty of confidentiality when approached by family members for information or when contemplating the right course of action to protect a client with diminished capacity. One possibility is to have the client sign a release allowing the attorney to reveal confidences if necessary.

Dana emphasized, however, that the lawyer should not represent an elderly client in estate planning matters and in matters pertaining to a guardianship and should never bring an action against a client for a determination of competency.

Vivian then discussed forms of deterrence for elder abuse.

Litigation is a form of deterrence against financial elder abuse. Some states have enacted statutes that strip the inheritance rights of persons who commit financial elder abuse. She reviewed a few of the states that have partial disinheritance statutes and indicated that these could be improved upon for better protection of the elderly.

Vivian then covered another method of preserving an elderly person's assets through the use of pre-death probate. Another method is through the use of traditional will contests post death.

The advantage of the pre-death probate approach is greater certainty for the testator as well as the ability of the testator to testify as to intent and defend against challenges. The disadvantage to the process is the fact that the testator may still revoke a will so the action can be ultimately just a waste of judicial resources. The process may also damage family relations.

Another method to deter attempts at financial abuse is through the use of no contest clauses in wills which are available and enforced in most states.

The panelists then turned to the topic of punishing a thief and reviewed both civil and criminal statutes. Vivian said that actions against those who engage in financial elder abuse can be civil and/or criminal actions. Generally, the burden of proof in civil actions is usually a preponderance of the evidence. In criminal actions, the burden is beyond a reasonable doubt. Damages in civil actions usually entail restitution while criminal actions may result in restitution as well as prison sentences.

She pointed out that in the case of Brook Aster whose son was convicted of engaging in financial elder abuse against his mother, he only got 1-3 years in prison despite having taken millions from his mother.

Vivian then discussed the pros and cons of jury versus bench trials in the actions against the thieves.

Dana concluded the discussion with a review of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) that was promulgated by NCCUSL in 2007 and deals with jurisdictional issues with respect to conservatorships and guardianships.

Session III-F Traditional and Roth IRAs: Conversions, Creditors, Caveats and Community Property (Financial Assets Series)

Presenters: Marcia Chadwick Holt and Alvin J. Golden

Reporter: Jason Havens

A discussion of: how to do and undo Roth conversions; creditor's rights in inherited IRAs; caveats on prohibited transactions; and a comparison of the results under common law and community property law upon the death of the IRA owner or spouse beneficiary.

Ms. Holt continued her general session, but with a focus on the conversion of traditional individual retirement accounts (IRAs) to Roth IRAs. Like the in-plan Roth rollover discussed in her general session, this type of conversion is not limited by the account owner's age. The income limit that formerly existed (\$100K adjusted gross income) was eliminated. Beneficiaries may also make a qualified rollover contribution to a Roth IRA. There is also no timing restriction (like the one that applies to successive rollovers between traditional IRAs). This conversion from a traditional to Roth IRA may be accomplished by (a) a withdrawal followed by a rollover (within 60 days), (b) a direct (trustee-to-trustee transfer), or (c) a redesignation of the account (only if the IRA and the Roth IRA have the same trustee).

There is a price for this type of conversion: The taxpayer is subject to income taxation as if he or she had withdrawn the account (essentially ignoring the rollover to the Roth IRA). An exception for 2010 allows the payment of those income taxes to be spread between 2011 and 2012.

Unlike the in-plan Roth rollover, these conversions may indeed be recharacterized. For example, the taxpayer may reverse the transaction if the market decreases post-conversion in order to lower his or her income tax burden. A personal representative (or other responsible agent of the decedent/owner) may also make this election to recharacterize.

Ms. Holt's materials describe the methods of recharacterizing as well as the information required on the election notice. In terms of timing, the best approach is to recharacterize "...by the due date (plus extensions) of the taxpayer's return for the taxable year for which the recharacterized contribution was made to the first IRA and reflected on the return for that year." However, it is possible to accomplish within 6 months of "...the unextended due date of the return for the year in which the contribution or conversion occurred after the return for the year has been filed."

It is even possible to reconvert if you have "third thoughts"! In other words, the taxpayer may convert a traditional to a Roth IRA, recharacterize that conversion, and then decide to reconvert the IRA to the Roth IRA. The timing of this reconversion is limited to the later of (a) the next tax year (i.e., the tax year following original conversion to the Roth IRA) or (b) "...the 30-day period beginning on the day on which the IRA owner transfers the amount from the Roth IRA back to a Traditional IRA."

Many of the same categories of account owners discussed in the general session will also find appealing conversion to a Roth IRA (e.g., taxpayers with separate funds to pay income taxes due based on the conversion, death-bed conversions, etc.). Some taxpayers, on the other hand, will not generally desire this conversion, including the current expense of paying income taxes upon conversion, taxpayers who need withdrawals for reasons other than qualified distributions (such as living expenses or college tuition of dependents), a taxpayer

who will be in a much lower tax bracket when the funds are withdrawn from the IRA than when they were contributed, and a taxpayer who wants to name a charity as his or her beneficiary.

Mr. Golden then covered the rights of creditors against IRAs. The first part of his presentation focused on the 2005 bankruptcy reform act. That act actually expanded the protection of IRAs by seemingly allowed the debtor in bankruptcy to elect state exemptions of his or her IRA and then fall back to the federal exemptions if necessary. However, these exemptions generally apply to tax-qualified, employer-sponsored plans. There is a \$1 million limitation “apparently designed to apply to other than employer plans and rollovers from employer plans to IRAs; i.e., to individually established IRAs and Roth IRAs.” There are still unanswered questions surrounding these rules.

Inherited IRAs are usually in the “unclear” category even where state exemption statutes purport to exempt IRAs from creditors’ claims. Mr. Golden highlighted the distinctions between a typical IRA and the inherited IRA. Some state statutes have specifically attempted to exempt inherited IRAs, but case law would seem to cast some doubt on those statutory provisions. Mr. Golden’s outline includes summaries of numerous cases on this subject.

To resolve this problem, Mr. Golden suggested consideration of paying the benefits to a spendthrift trust. However, that trust cannot be a so-called “conduit” trust (discussed in Chris Hoyt’s general session/report) because creditors could then reach those required distributions from the trust. Consequently, Mr. Golden discussed the use of an accumulation trust (also in Chris Hoyt’s materials/report), which also qualifies as a “see-through” trust for designated beneficiary purposes. He noted that the beneficiary designation itself is the only means to create separate shares for designated beneficiary purposes, which therefore requires that each separate trust be named in that form. He also noted problems with accumulation trusts in this context, including the use of special powers of appointment and contingent beneficiaries -- either of which might frustrate the application of these retirement planning rules for income tax purposes.

Another alternative is to utilize a trustee IRA. These relatively new creatures are not quite as simple as they sound, however, because they often contain “...multiple choices and are more complex than custodial IRA joinder agreements, and MUST BE REVIEWED by an attorney.” In addition, in order to obtain creditor protection, the trustee IRA must qualify as a spendthrift trust for state law purposes.

This session also included a brief discussion comparing IRA results under common law (separate property) and community property law regimes. This part of the outline includes a case study with various permutations and either the husband or wife dying first. There is also a relatively short outline regarding prohibited transactions, which also generally apply to charitable trusts and organizations.

Special Sessions-3:50-5:20

Session IV-A - The Trust Protector - Trust(y) Watchdog or Expensive Exotic Pet? (Focus Series)

Presenters: Gideon Rothschild and Alexander A. Bove, Jr.

Reporter: Michael Stiff

It's no secret that the Trust Protector has become the new kid on the trust block, with powers ranging from removing and replacing trustees, to adding or deleting beneficiaries, to a virtual re-writing of the trust. But is the Trust Protector really a new idea in trust law? Which trusts should have a trust protector and who should it be? What are the pro's and cons of giving the Protector such extensive powers and what drafting issues come into play? The materials for this session consisted of two outlines, sample language for trust protector clauses, a summary of states trust protector statutes, Robert McLean Irrevocable

Trust v. Patrick Davis, P.C. (Missouri trust protector case with relevant motions and orders), and several trust protector articles.

The panelists began by asking what is a trust protector? Mr. Rothschild reviewed various definitions from the Oxford English Dictionary, the Cook Islands International Trust Act and the South Dakota statute which differed greatly. Mr. Rothschild stated a trust protector in its simplest role is a watchdog.

The panelists discussed there is a long legal history as to trust advisors but it was the offshore trust community that coined the name "trust protector". The need for trust protectors arose from settlors' hesitation about appointing unfamiliar trustees in offshore trusts. The trust protector could oversee the trustee, resolve problems and in some cases unwind the arrangement if necessary. In order to ensure that U.S. courts would not have jurisdiction over the trustees, the trust protector could not be an American. For this reason the trust protector was usually familiar to the offshore attorney or the foreign trustee, but usually unfamiliar to the settlor or the settlor's family. This individual generally would only be acting when called upon and it seemed reasonable that not to hold this person liable as a fiduciary. The trust protector proved to be an effective tool in offshore trust administration and became attractive to domestic trust practitioners. With domestic trusts, the settlor could appoint a trustworthy individual who was familiar to the family. This also allowed the settlor to regain some level of control through such trusted individuals. While it made sense to exculpate the offshore trust protector, it needs to be examined in each case whether the same holds true for the domestic trust protector.

The trust powers which are granted to a trust protector may be very narrow or very broad. Mr. Rothschild noted from his outline that the trust protector may be given the power to: vary trust provisions to reflect changes in tax law; remove, replace or add beneficiaries; modify distribution or administrative provisions; remove and replace trustees; consent to or veto exercise of trustee discretionary powers; terminate the trust; grant/consent to exercise powers of appointment to beneficiaries; change trust situs; change governing law; direct trust investments; resolve disputes between beneficiaries and trustees; to approve accountings; and to determine whether an event of duress has occurred. It also was observed that all powers granted to a trust protector are taken from the trustee.

The trust protector could be the settlor, a beneficiary or a third party. Mr. Bove noted that most problems avoided by not having the settlor serve as the trust protector and is generally a bad idea. The choice of trust protector can have significant tax and asset protection consequences. While it is obvious that there may be estate tax consequences from the settlor serving as the trust protector, some of the tax consequences may be more subtle. It was discussed that if the trust protector is a New York resident, this may subject the trust to New York state income taxation. It also was discussed that a foreign trust protector could cause the trust to be a foreign trust for federal income tax purposes.

The panelists then reviewed whether the trust protector is a fiduciary and whether it was possible to exculpate the trust protector from all liability. Mr. Bove stated that it depends on the role of the trust protector and the circumstances. However, Mr. Bove strongly voiced his opinion that a trust protector is a fiduciary and it is not possible to exculpate from all liability. Mr. Bove provided a common situation where the unrelated third party trust protector has the power to add beneficiaries. What if the trust protector adds his own children as permissible beneficiaries? Mr. Bove provided numerous other examples with common fact patterns and then reviewed equally common exculpatory language that would release the trust protector from all liability. Mr. Bove questioned why a settlor would want to exculpate a trust protector from all liability and how this would be in the best interests of the family? Mr. Rothschild offered that the trust protector may not be a fiduciary if acted in good faith. Mr. Rothschild noted that some states expressly provide in their trust protector statutes that the trust protector is not a fiduciary. Mr. Bove replied that the states that provide the trust protector is a fiduciary are redundant, and the states that provide the trust protector is not a fiduciary are embarrassing. Mr. Bove believes in appropriate cases that a judge could still impose liability upon the trust protector despite the state statute.

Mr. Bove reviewed the McLean case in which he was an expert witness. The case involved a special needs trust that was established in Missouri to hold a large personal injury award for the trust beneficiary. The initial trustees were the beneficiary's attorney and a corporate trustee. The attorney who handled the personal injury case was appointed as the trust protector. The trust agreement stated that the trust protector was a fiduciary. When the initial trustees resigned, the trust protector appointed a new trustee who happened to be the attorney who initially referred the personal injury case to the trust protector. In approximately 18 months, the entire trust had been dissipated. The representatives of the beneficiary sued the trustee for breach of fiduciary duties and a settlement was reached. The representatives of the beneficiary then sued the trust protector for his breach of fiduciary duties in not monitoring the trust and removing the trustee. The trial court granted the trust protector's motion for a summary judgment. The court noted there was no Missouri law on point and could not hold the trust protector liable. The case was appealed. The Missouri Court of Appeals agreed there was no Missouri law on point, but found the trust protector was a fiduciary. However, the Missouri Court of Appeals was confused as to who the fiduciary owed a duty and remanded the case back to the trial court to define the duties of the trust protector. The trial court reviewed the trust protector's duties and issued a directed verdict in favor of the trust protector. Mr. Bove noted that the court acted as if the trust protector concept was from another planet. He noted the court wanted to see the duties of the trust protector in the trust agreement and this may be something to consider in our documents. It also was noted that damages posed an interesting question as to when to start damages caused by trust protector's failure to monitor.

The panelists concluded their program with **several drafting considerations**. It was noted that it advisable to set forth if the trust protector will be compensated and how such compensation will be determined. The panelist generally provide for reasonable compensation with language similar to that used for trustees. It was questioned whether the trust protector who is not a fiduciary would be entitled to compensation. Generally not entitled to compensation for personal services. The panelist discussed the importance of defining the powers of the trust protector. Mr. Rothschild noted that he primarily uses trust protectors to remove and replace trustees. The panelist also discussed whether the trust protector should sign the trust agreement. The panelists agreed that if the trust protector is a fiduciary, the trust protector should sign the trust agreement. If the trust protector is not a fiduciary, no need to sign the agreement. The panelist were asked if they had ever agreed to serve as a trust protector. Mr. Rothschild answered no. Mr. Bove remarked that he had never been asked to much laughter.

The materials were well done, practical and extensive. The speakers were excellent and not afraid to share their opinions. This was my favorite program for the week.

Special Session IV-B - The State Income Taxation of Trusts from A (Alabama) to W (Wyoming)

Presenters: Richard W. Nenno, Christine L. Albright, Laurelle M. Gutierrez, Laura H. Peebles and Laura M. Twomey

Reporter: D. Scott Robinson

This session, which built on Mr. Nenno's excellent and entertaining Thursday morning General Session about State Income Taxes, explored in depth the fiduciary income tax approaches of key states (including California, Connecticut, Delaware, Illinois, Massachusetts, New Jersey, New York, Ohio, and Pennsylvania), with emphasis on how to minimize or avoid tax, and illustrative calculations were also offered.

This presentation provided informative, in-depth discussion of the various states' approaches to the taxation of trusts. The presentation opened with Mr. Nenno setting the stage with **two fact patterns**. The **first** fact pattern dealt with creating a new \$10 million dynasty trust and the state income tax considerations if the clients and/or the proposed trustees, advisers or other committee members reside in various jurisdictions. The **second** fact

pattern involved moving an existing non-grantor trust to minimize or avoid state tax if taxes are being paid in various states.

After laying out the fact patterns, Ms. Peebles took the reins to discuss the **various tax calculations** prepared to analyze the fact patterns. Taxable income for the tax calculations was set at \$1 million. The initial calculation involved the comparison of Alabama and Wyoming. Ms. Peebles noted that Wyoming does not impose an income tax and that at the \$1 million tax income level trusts are incurring alternative minimum tax ("AMT"). Additionally, Ms. Peebles noted at this level of taxable income that trusts receive no benefit from the state income tax deduction.

Ms. Peebles next discussed the concept of a resident trust and illustrated the consequences of having a resident trust in the various states beginning with Arizona. It was notable in the calculations that without state income taxation the AMT was \$15 and with state taxation (Alabama) the AMT was \$6,375. Some states determine residency based on the location of the trustees and beneficiaries and others space residency on other factors. Surprisingly, Oregon has the highest trust income tax rate at around 10.6% and California imposes a health care surcharge when taxable income exceeds \$1 million. Interestingly, Delaware, which is generally considered a leading trust situs state, is not an income tax free state. Ms. Peebles pointed out that a Delaware trust with a resident beneficiary will pay over \$68,000 in state income tax. A Delaware trust without a resident beneficiary will not be subject to state income tax in Delaware. If the trust is a resident of the state and city of New York watch out as the combined city and state tax at a rate of approximately 13% are nearly the same as the federal income tax.

The next calculations that Ms. Peebles presented involves the selection of grantor trust status. The calculations illustrated using New York as an example that is not always better for a trust to be treated as a grantor trust from an income tax perspective. However, when estate tax savings (both state and federal) are factored into the analysis paid it may well be better that from an overall tax perspective to have grantor trust status even in high income tax jurisdictions. The take away point shown by the calculations is to always run the numbers.

Following Ms. Peebles, the panelists **focused on minimizing or eliminating state income** beginning with a discussion of New York, New Jersey and Connecticut by Ms. Twomey. All three states tax resident trusts and define resident trusts as trusts established in their respective state. Therefore the strategy to minimize or eliminate state income taxes in each of those states is to **find an exception to the resident trust rule**. The exception in **New York is based on a three prong test**. In order for New York not to impose income tax on a resident trust the trust must have 1) no New York trustee, 2) no assets located in New York and 3) no New York source income.

One of the strategies Ms. Twomey discussed was to name a trustee in the jurisdiction other than New York. Ms. Twomey cautioned that in naming a new trustee to look at the trustee's contacts with New York as New York is very aggressive in finding the trustee is a New York trustee for purposes of taxation. What about trust protectors and trust committees? It was reported that as long as the members of such committees are not directing the activities of the trustee New York will not assert that these positions are quad like trustees and impose income tax liability based on having a New York trustee.

Ms. Twomey then turned to a discussion of **second prong of the test** no New York assets. She stated that intangibles are easy as they are deemed situs in the state where the trustee is domiciled. This means by simply moving the trustee the intangible assets are being moved. Tangible assets on the other hand are more difficult. Tangible personal property, such as an art collection, would need to be moved out of state of New York. When dealing with real estate, it may be advisable to divide the trust and the two pieces. One piece that contains the real estate will continue to be taxed in New York. The other piece that contains other assets will not be subject to taxation in New York. One strategy that may work with respect to real estate is to wrap real estate in an entity and have the trust hold the interests in equity. Ms. Twomey mentioned that there was a notice released by the Taxpayer Guidance Division that supports the use of entities to convert real property into intangible property. Ms. Twomey quickly pointed out, however, that strategy will not likely work in a tax year when the real estate is sold.

Ms. Twomey prefers the more conservative approach of splitting the trust to deal with New York real estate.

Ms. Twomey then moved to the **third prong of the test**: no New York source income. She reported that the rules literally states that one dollar of New York source income will cause the entire trust to be subject to taxation in New York. Ms. Twomey pointed out that some practitioners take issue with the rule and report only income from New York sources. Ms. Twomey does not agree with such an approach. The strategy that Mr. Twomey's suggests for dealing with New York source income is to split the trust into two pieces. One piece will be subject to New York taxation and will hold New York source income assets, including any questionable New York source income assets like private equity interests and interests in pass-thru entities. The other piece will not be subject to New York taxation and will hold the remaining assets.

Ms. Twomey concluded her discussion of New York by discussing the use of a general power of the appointment to change the tax situs of the trust. Ms. Twomey reported that there is a New York advisory opinion that concluded if a non-New York resident exercises a general power of appointment to shift the assets to another trust, the new trust would be treated as created by non-New York resident. This rule does not apply to limited powers of appointment. Ms. Twomey mentioned that Connecticut has a similar ruling regarding the use of limited powers and that the exercises of such powers will not change the resident status of the trust.

Ms. Twomey began her **discussion of New Jersey** by stating that while New Jersey has never codified the same three prong test used in New York the court cases and fiduciary income tax return instructions follow a nearly identical three-pronged test. Therefore, the practitioner would follow essentially the same steps for New Jersey resident trusts as previously discussed with regard to New York resident trusts.

Next, Ms. Twomey **shifted to Connecticut** and stated that Connecticut's definition of a resident trust is very similar to that of New York and New Jersey. However, Connecticut differs slightly that Connecticut's rules are that 100% of the trust is taxable by Connecticut if the trust is a testamentary trust created by a Connecticut resident and a portion of the trust that is inter vivos trust depending on the residency of the beneficiaries. Therefore, one of the planning opportunities in Connecticut is to set up a separate trust for non-Connecticut beneficiaries.

After Ms. Twomey, **Ms. Gutierrez discussed trust income taxation in Arizona, California and Oregon**. Ms. Gutierrez referred to **Arizona** as sublime in its approach to trust taxation. Arizona's tax rates are relatively low, the separate AMT, tax capital gains are taxed at the same rate as income in the Arizona Department of revenue is fairly laid-back in its collection efforts. Arizona taxes Arizona source income and considers a trust to be a resident trust if any fiduciary resides in Arizona. A recent by the Department of Revenue held that a trust protector of an irrevocable trust residing in Arizona will not cause the trust to be considered a resident trust.

Arizona taxation can be avoided by simply not having an Arizona fiduciary or having the trustee move out of Arizona – both options which may not be feasible or desired. An option for tax minimization is to add nonresident fiduciaries as Arizona allocates taxable income between resident and nonresident fiduciaries. The use of an Arizona trust protector to direct nonresident fiduciary is another option identified by Ms. Gutierrez tax avoidance or minimization.

After Arizona, Ms. Gutierrez discussed **Oregon**, one the highest rates and most complicated trust taxation states. Oregon taxes all Oregon source income for the trust and taxes all income of resident trusts. A resident trust in Oregon is one in which the administration is being carried on in Oregon. This is found through an individual trustee being a resident. Ms. Gutierrez noted that Oregon is very aggressive in establishing an individual's domicile in Oregon. If the trustee is a corporate trustee engaged in interstate business, administration of the trust is going to be deemed in Oregon if trustee conducts a major part of the administration in Oregon.

Minimizing or avoiding Oregon taxation involves having the trustee move out of the state of Oregon or resign. Another option is to move the major administration aspects of the trust out of the state. Additional option is to

bifurcate the duties of the trustee where the administrative aspects are carried on in Oregon and the decision-making aspects are handled by a non-resident trustee. The final option that Ms. Gutierrez mentioned was to add additional trustees in order to try to get the major administration aspects of the trust out of the state.

Next, Ms. Gutierrez discussed **California's** approach to the taxation of trusts. Ms. Gutierrez's home state is California, called California's approach "ridiculous." In addition to its normal income tax, California levies a surcharge on income above \$1 million and has its own alternative minimum tax. California taxes all California source income and uses a two-pronged test to determine whether the trust is a resident trust, will subject the trust to taxation beyond source income. This two-pronged test involves the determination of the residency and activities of the fiduciaries and residency of the beneficiaries. Ms. Gutierrez noted that the definition of fiduciary is unclear under California law and that caution should be taken regarding the activities in California of anyone who may be considered a fiduciary. Ms. Gutierrez indicated that California seems to be shifting to more of an activity based test for fiduciaries based on "quantifiable events," like transactions in administering the trust that occur within California and the fact that the California resident trustee owns legal title.

If the trust has more than one fiduciary, then the residency of the fiduciaries becomes important because California allocates non-California source income among the fiduciaries. When non-source income is allocated to a nonresident fiduciary the second prong of the test, which involves an examination of the residency of beneficiaries, is needed. Beneficiaries include non-contingent beneficiaries and it is unclear what is defined as a non-contingent beneficiary. Income allocated to nonresident fiduciaries is then allocated to the beneficiaries. The amounts allocated to California beneficiaries are then subject to California trust taxation. For example, if one-half of the non-California source income is allocated to a nonresident fiduciary and the trust has for beneficiaries one of which is a California resident then one-fourth of the income allocated to the nonresident fiduciary will be taxed to the trust.

Massachusetts resident; 2) during any part of the tax year any grantor resided in Massachusetts; and 3) one of the grantors died a resident of Massachusetts. Ms. Albright mentioned to avoid Massachusetts income tax make sure that the trustee is not a Massachusetts resident. She also mentioned including provisions for removing and replacing trustees in the event a trustee becomes a Massachusetts resident. Another planning approach is to ensure that each grantor of an inter vivos irrevocable trust be a resident of another state prior to the creation of the trust. Again Ms. Albright emphasized it is the *time of creation of the trust* that one must consider. The time of creation is the time when the declaration of trust is executed and property is delivered to the trustee – not necessarily when the trust becomes irrevocable. Ms. Albright suggests that in order to avoid being subject to taxation in Massachusetts, grantors with revocable trusts created in Massachusetts who are moving out of the state of Massachusetts, should terminate such trusts and establish new revocable trusts after becoming a resident of the new jurisdiction. Similar to Illinois, there is an existing inter vivos irrevocable trust in the grantors moving out of state sellers a new irrevocable trust for future gifts.

Ms. Albright then moved on to **Ohio**, which she stated was the most complicated states for trust income taxation. Ohio has nine different tests for determining when a trust is an Ohio resident. Ms. Albright mentioned that the nine tests would not be found laid out in Ohio statutes and were derived from the Ohio Department of Taxation Information Release, Trust 2003-02. Other than testamentary trusts, the other tests contain a common thread tied to the residency of a "qualifying beneficiary" for Ohio tax purposes during a given tax year. The term qualified beneficiary is defined by reference to a potential current beneficiary as set forth in IRC§1361(e)(2). Ms. Albright noted that based on the term "qualified beneficiary" that Ohio resident status could be turned on and off from year to year for a trust. Ms. Albright then stated that many of the planning opportunities that had already been discussed should also apply for minimizing or avoiding Ohio taxation.

Mr. Nenno concluded with a brief discussion of trust taxation in **Pennsylvania and Delaware**. With regard to Pennsylvania, Mr. Nenno stated he had covered that state in presentation earlier in the day. With regard to Delaware, Mr. Nenno noted that it follows all of the federal grantor trust rules (other states that recognize grantor

trust rules do not follow all of the federal rules). Additionally, Delaware recently reduced its trust income tax rate. Delaware defines a resident trust as a trust with one or more individual or corporate trustees that are residents of Delaware or a trust created by one or more Delaware testator or resident.

The overall takeaway points from this presentation were to run the numbers and seek the assistance of professionals familiar with the jurisdiction where the trust is being established, where one or more trustees are located or are moving and where one or more beneficiaries are located or are moving.

IV-C – Charitable Gift Planning for Unmarried Couples

Wendy S. Goffe

Presenters: Wendy S. Goffe and Lauren J. Wolven

Reporter: Herb Braverman

This presentation examined the charitable giving opportunities available to unmarried couples, same-sex married couples and domestic partners.

This afternoon session was a continuation of the General Session program Ms. Goffe presented on Thursday morning (Report #6) regarding planning for unmarried and/or same sex couples; this session focuses on charitable gift planning.

In general, the panel discussed the following techniques for charitable planning: charitable remainder trusts (CRT), charitable lead trusts (CLT), charitable gift annuities (CGA), pooled income funds (PIF), gifts of remainder interests of personal residences or farms, and simple wills and disclaimers. The objective was not to review the details of these techniques or devices, although some of this was done. The real point seemed to be to show how some of these techniques and devices might be used by same sex couples.

Ms. Wolven presented statistics to demonstrate that this is a concern to quite a few people in our society, suggesting that there may be more than 650,000 same sex couples in the country, quite a few of them seniors who would like to cohabit without losing their social security and related benefits. Others are married or in civil unions under the laws of some of our states and/or other countries; they may have children to plan for also.

Planning for these groups of people requires a different focus because there may be code sections, regs and other precedents that are available and that support this planning differently than what many planners are otherwise used to. For example, a CRT may be used in estate planning to compensate for or to replace the unavailable marital deduction. Planning must be done with provisions or separate documents that deal with relationships that end along the way, when the legal steps of divorce or dissolution are not available.

The panel discussed a series of examples to highlight the use of charitable techniques for such planning, but made it clear that each case must be analyzed carefully since the client may have a critical family to deal with and/or a relationship that does not have all of the legal boundaries and rules of the so-called traditional married couple. This area is growing and its variables are changing all the time from state to state and country to country; the challenges are similar to the traditional planning scenario, but are made even more significant by the many issues that are unsettled and unguided at this time.

The materials provided, taken together with the materials from the morning session covering other aspects of planning for this growing population, would certainly be helpful to planners interested in taking up the many challenges in this area. Those who believe that charitable planning for unmarried, often same sex couples is the same as the more traditional approaches will soon learn otherwise.

IV-D – New Technologies to Deliver Better Client Services

(Repeat of Session II-D)—See Above

IV-E – Monitoring Life Insurance Policies in ILITs – Guidelines

for Trustees to Minimize Fiduciary Liability (Financial Assets Series)

Lee Slavutin

Presenter: Lee Slavutin

Reporter:

A review of the process for a trustee of an ILIT to monitor life insurance policies including carrier financial strength, product suitability, policy performance, policy pricing, and health of the insured. The Cochran and Paradee cases were reviewed and a comprehensive checklist to help the trustee was provided.

Dr. Slavutin started his presentation by saying that the most important guiding principle for all trustees is: “It’s all about your files” which means that an ILIT trustee should demonstrate a prudent process for monitoring and managing the life insurance policies in the trust. Life insurance policies can be underwritten by financially impaired carriers, they can lapse before the client’s life expectancy because premiums are inadequate or because policy loans cause the policy to lapse.

He took the audience through three published sources available to ILIT trustees:

- * The Cochran case in which KeyBank, the ILIT trustee, replaced two variable policies in an ILIT with one policy that reduced the death benefit by about \$5.3 million. The bank was then sued by the trust beneficiaries but its decision was upheld by the court on two primary grounds: KeyBank had engaged in an ongoing review of the policies in the trust and could document its rationale for making the change of the policies and it brought in an outside, independent consultant to review and make recommendations regarding the proposed policy changes.

- * The RJR Nabisco case that stands for the proposition that the trustee must look beyond the ratings to evaluate the strength of an insurance company in order to engage in appropriate fiduciary review and monitoring.

- * The Uniform Prudent Investor Act that encourages an ILIT trustee to delegate investment and management functions that it cannot prudently handle on its own. In the case of ILITs, trustees should almost always hire agents to assist them in fulfilling their duties with respect to the monitoring and managing of life insurance policies held in the trust.

Dr. Slavutin discussed the general duty imposed upon a trustee through the Uniform Prudent Investor Rule as it applies to trustees of ILITs. A trustee is charged with investing and managing trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. A trustee is also expected to consider the tax consequences of investment decisions and strategies.

A trustee has an ongoing duty to diversify the investments of a trust.

Diversification in a life insurance portfolio can occur at two levels: by spreading the risk among different highly rated life insurance companies and/or by using different products that have different attributes such as a combination of whole life and guaranteed universal life.

A trustee also has an ongoing duty to only incur costs that are appropriate and reasonable in relation to the assets.

A trustee has a duty to delegate investment functions if unable to perform them but must exercise reasonable care, skill and caution in selecting the agent, establishing the scope and terms of the delegation and periodically reviewing the agent’s actions in order to monitor the agent’s performance.

Dr. Slavutin then discussed the aspects that the trustee must monitor when administering ILITs.

The first of these aspects is the financial strength of the life insurance company. He pointed out that while no death benefit has ever been denied due to the failure of an insurance company, there are important consequences to financial impairment of a company: 1) increasing insurance costs; 2) interest bearing liens placed on cash values and; 3) reduction in policy interest guarantees.

He said that while ratings are not perfect they are useful and there is a clear correlation between the rating and the probability of failure. He indicated that if a company has a AA rating across all 3 ratings companies then the trustee need not look further into the financial strength of the company however, if the rating is anything less than AA, the trustee must dig deeper into the financial stability of the company. He also said that any company with a rating of BBB should not be used for the purchase of any insurance policy.

The second aspect is the suitability of the product. He said that it is important here too to demonstrate a rational process for selection of the insurance policy. He said that the trustee should consider why the client wants or needs the policy; how much is considered for the death benefit, who will own the policy; what kind of policy is most appropriate and finally the design of the insurance policy for the particular client and situation at hand. He cautioned that the trustee should use illustrations in order to understand possible outcomes but not to predict or guarantee outcomes.

Dr. Slavutin then discussed the third aspect of trustee monitoring: the adequacy of the premium. He pointed out that every change in interest rate will have a big effect on the premium being paid and a review of the adequacy of the funding should be reviewed annually.

Finally, he said that the last most important monitoring aspect for the trustee is the health of the insured. He pointed out that if the insured's health improves after the policy is issued, the premiums may be able to be reduced and the trustee has a duty to minimize costs.

In his final comments, Dr. Slavutin pointed out that when the trustee hires an agent to assist in fulfilling these trustee duties, the hiring of the agent should be done in conjunction with the guidelines set forth in the Uniform Prudent Investor Act.

Friday

9:00 – 9:50 a.m.

Asset Protection & Estate Planning - Why Not Have Both?

Presenter: Barry A. Nelson

Reporter: D. Scott Robinson

What should planners consider in selecting a situs to enhance asset protection upon creation of an LLC, partnership, or trust or to obtain tenants-by-the-entireties protection? What lessons should be learned as asset protection techniques have been tested? How can we maximize protection using the \$5 million exclusion amount? How do we ethically protect clients' assets after a liability exists?

Mr. Nelson began the substantive portion of his presentation with a discussion of the *Solow* case, which involved a debtor (Mr. Solow) and his wife undertaking offshore asset protection planning after the SEC had obtained a judgment against the debtor. The court ordered Mr. Solow to bring the assets back onshore. When he did not do so, the court found him in contempt and had him incarcerated. The assets involved in the planning were assets that had been held for many years in held in tenants by the entireties. The SEC had obtained disgorgement order and the court found that such order eliminated any protection afforded the assets held by the entireties. The two

takeaways from *Solow* are that a SEC disgorgement order will trump state law property exemptions and better to do asset protection with estate planning and before the protection is needed.

Next, Mr. Nelson mentioned a case involving Peter Rogan and his attorney Frederick Cuppy who were indicted by a federal grand jury for perjury and conspiracy to obstruct justice. The indictments followed the government's attempts to obtain information regarding Rogan's Bahamian trust. This case stands as a warning for attorneys engaged in asset protection planning.

A discussion of the recent *Mortensen* case was the next topic Mr. Nelson brought to light. The case involved the ten year look back for fraudulent transfers to trusts under §548(e) of the Bankruptcy Code. The transfer in *Mortensen* was completed more than four years prior to the suit. The court found that the debtor was solvent at the time the trust was created. Nevertheless, the court held that the transfer to the trust was a fraudulent conveyance and that the trust could set aside §548(e).

Planning in advance will provide protection. Mr. Nelson discussed the example of one of his client who is a real developer that set aside a portion of his assets a nest egg for retire savings. When the real estate market turned the client essentially lost of all of his unprotected assets not to bankruptcy but to debt settlement. The same client was involved in litigation involving a joint venture. The other sides' counsel has examined the clients' assets and is aware that the bulk of his assets are protected. Mr. Nelson stated that his client will likely reach into his protected assets simply to settle the case and avoid the cost of continuing to defend against the suit. The point of the example is that the client will be left with funds after the settlement and the planning in advance put the client in that position.

Mr. Nelson emphasized the increasing need to follow the formalities of the planning. Claimants are becoming increasing aggressive and will investigate to ensure that documentation, transfers and operation of the planning are appropriate. Think of this as similar to family limited partnership planning. Following formalities is vital to the success of the planning.

Planning ahead may allow for "import the law" opportunities. For example, Mr. Nelson stated that one does not have to be a Florida to take advantage of the Florida law for tenants by the entireties. If a married couple purchases real estate in Florida and takes title as husband and wife, a tenancy by the entirety is created. Mr. Nelson presented an interesting planning opportunity to deal with the loss the entirety protection at death by acquiring life insurance, which would presumably be placed in trust, as a nest for the higher risk spouse.

Next, Mr. Nelson mentioned that the **IRS has ruled favorably to the use of an Alaska self-settled trust as a completed gift**. With that there is a planning opportunity where husband and wife each create an Alaska self-settled trust with \$5 million. The trustee can make discretionary distributions from their respective trusts to the settlor and each trust will be treated as a completed gift. Mr. Nelson believes there are a lot of issues with reliance on the ruling, which applied to an Alaska resident. For example, the ruling's application to nonresidents. Also, the IRS did not rule on any inclusion under §2036 related to the trustee's discretion to distribute principal income. Mr. Nelson also believes there is the possibly that if too much wealth is transferred to such a trust that the IRS could find an implied agreement with a similar §2036 analysis.

Mr. Nelson then discussed a planning idea involving **non-reciprocal inter vivos credit shelter trusts**. One example Mr. Nelson discussed involved the husband and wife creating trusts for each other using some or all of their exemption. Husband's trust for wife uses a HEMS standard and an independent trustee. On wife's death trust assets go back to husband in a bypass trust. Wife creates a similar but non-reciprocal trust. Mr. Nelson wonders if such planning really works from asset protection standpoint as the power to get the property back may well be treated like a self-settled trust. From a tax standpoint, if the trusts work, the values of the assets are frozen for transfer tax purposes.

Another take on the non-reciprocal credit shelter trust idea that Mr. Nelson discussed was very similar. Only this time the trust does not provide for the assets to come back to the husband (or wife). Instead, there is a limited power of appointment that the beneficiary-spouse can exercise to provide assets in a bypass trust for the surviving spouse. Mr. Nelson is more comfortable with this type of planning as it takes independent action on the beneficiary spouse's part. However, Mr. Nelson does not believe the planning is without risk due to the relation back doctrine that may apply to the power of appointment. If there is uncertainty as to whether the trust assets will be needed by the surviving spouse, life insurance payable to a bypass type trust for the benefit of the surviving spouse to replace the value of assets may be a good option.

Mr. Nelson's **preferred planning option** from both a tax and an asset protection standpoint **is the use of non-reciprocal inter vivos QTIP trusts**. The idea here is that each spouse establishes an inter vivos QTIP using amount near the applicable exclusion or more. The assets transferred to the inter vivos QTIP trusts are then protected. Additionally, by funding each trust with the applicable exclusion amount or more, each spouse's estate tax exemption will be utilized at death without a reliance on portability. To strengthen the planning, the QTIPs could be created in one of states, such as Arizona, Delaware, Florida and Wyoming, that have modified their spendthrift trust statutes to protect inter vivos QTIPs. The primary drawback to inter vivos QTIPs planning is inability to shift appreciation and deflect income away from the spouse's taxable estates. Perhaps to minimize this aspect, one spouse could establish the inter vivos QTIP and the other spouse could establish an inter vivos credit shelter trust.

Mr. Nelson then mentioned that CPAs will often recommend that couples divide their assets to fund each spouse's respective revocable trusts. Once this is done, however, none of the assets are protected from creditors' claims.

The **main takeaways** of this presentation are to combine estate and asset protection planning and to plan ahead of the storm.

9:50 – 10:40 a.m.

Charitable Gifts: Annuities and Remainders in Personal Residences and Farms

Presenter: Conrad Teitell

Reporter: Kimon Karas

Charitable remainder trusts are in the spotlight at many conferences, but gift annuities are not bit players. They are the mainstay for many charities and their donors. Plus, remainders in residences and farms enable donors to have their cake and eat it too. Topics covered included: income, gift and estate tax rules; assuring the marital deduction and solving problems and avoiding pitfalls.

As always Conrad gave a very spirited and entertaining presentation. I cannot remember all of the quips, but for those of you on the "rubber chicken" circuit you should be pleased to know that the "new chicken" to look forward to with anticipation coming to your next banquet, is "Chicken ala Maserati."

Conrad commenced the presentation discussing **charitable gift annuities**. As with all estate planning strategies, this is one of a list of charitable alternatives for the charitable client. This is not to be engaged in simply for tax reasons if the client has no charitable intent. On the other hand as part of the estate planning process professionals should explore charitable giving with their clients.

Charitable gifts annuities can be immediate (commence payout within one year of funding); deferred (commence payout more than one year from gift) or flexible (at such time as annuitant selects). A gift annuity is a contract whereby the donor irrevocably transfers money or property to a qualified organization in return for its promise to

pay the donor, another individual or both, fixed and guaranteed payments for life. The payments cannot be variable, nor for a term of years, nor a minimum or maximum. Code Sections 501(m)(5) and 514(c)(5) govern charitable gift annuities. The amount of the payment can be annual, monthly, quarterly or semi-annual. As with a commercial annuity the older the annuitant at the starting date, the greater the annuity payment will be. With two annuitants the payments will be smaller than if there was one annuitant. Transfer is a part gift and part purchase of an annuity. The transferred assets become part of the charity's general assets and the annuity payments are backed by the charity's assets. The annuity rate is established by charity using the rates recommended by The American Council on Gift Annuities. The rates have recently been updated and Conrad referred to the Council's website, www.acga-web.org.

Conrad addressed the tax consequences of an immediate annuity. The donor is entitled to an immediate income, gift or estate tax charitable deduction for the charitable contribution, calculated as the difference between the amount of money (or fair market value of long term securities or real estate transferred) and the present value of the annuity. The present value of the annuity is based upon the life expectancy(ies) of the annuitant(s), the frequency and timing of payments and the 7520 rate for the current month or the prior 2-months. The income tax deduction is subject to the usual limitations on deductibility of charitable gifts. Also be aware of the taxpayer's situation, ie does taxpayer itemize or take a standard deduction.

Since a portion of the consideration paid by the donor exceeds the present value of the annuity payments under the agreement, a portion of each annuity payment is treated as a return of principal (tax free) for the participant's life expectancy under Section 72, exclusion ratio, and the balance is taxable. Effective for annuities with "starting dates" after 1986, an annuitant who outlives life expectancy may not exclude future portion of each payment.

The transfer of appreciated property in exchange for a gift annuity is deemed a bargain sale. Consequently donor may recognize a capital gain upon entering into a gift annuity. The capital gain may be reported ratably over donor's life expectancy if the: (i) the annuity is nonassignable and (ii) donor is sole or one of the annuitants in a two-life annuity. If donor annuitant dies before all gain is reported, remaining gain is lost as is if the donor is the first annuitant in a two-life annuity to die funded with deceased annuitant's separate property. Therefore, with spouse, convert separate property to joint prior to funding.

Charitable gift annuities are regulated by the states. Depending on the jurisdiction the charity may be required to be licensed, file reports, have minimum reserves or govern type of investments.

Asset considerations in funding a gift annuity:

1. Mortgaged property. May be used but with caution. Charity may have taxable debt financed income. The mortgage is added to the actuarial value of the annuity in determining gain implications. The gain attributable to the debt cannot be reported ratably over the donor annuitant's life expectancy.
2. Tangible personal property. Can produce an income tax deduction. Remember the related/unrelated use and most importantly is this a good deal for the charity since if it keeps the property it will need to use other funds to pay the annuity or if it sells the property it may receive less than the valuation used to determine the annuity. Confirm that state law permits the issuance of an annuity for tangible personal property.
3. S corporation stock. Can be used. For the charity Code Section 512(e)(1) treats all S income as UBTI as well as the gain on the sale of the stock.

Conrad briefly described deferred annuities. The donor receives a current income tax deduction for annuity payments to commence in the future. However with respect to capital gain property, the gain will not be reportable until the payments begin and then ratably over the life expectancy.

Flexible annuity is rarely used.

The **final topic** discussed was a gift of a **remainder in personal residence or farm**. Donor may receive an income/estate tax benefit by making a charitable gift of a personal residence (need not be a principal residence) or farm, even though donor retains the right to life enjoyment. Life estate may be retained for one or more lives or an estate for a term of years. The remainder must be in a personal residence or farm and not furnishings or other tangible personal property. In computing the income tax charitable deduction, depreciation (computed on the straight-line method) and depletion must be taken into account in determining the value of the remainder interest. Those values are discounted at the 7520 rate in effect in the month of transfer or the prior two months. The charitable remainder qualifies the unlimited charitable deduction, however watch if the life estate is retained for an individual other than the donor, there may be gift tax consequences.

10:50 – 12:00

That's a Wrap! (Focus Series)

Presenters: Bruce M. Stone, Elaine M. Bucher and Wendy S. Goffe

Reporter: Kimon Karas

Uncertainty, flux, and even chaos abound in the world of estate planning. Throughout the week an all-star cast presented various ideas for building flexibility into estate plans to cope with that uncertainty. This final session will assemble and edit ideas from those presentations to produce a director's cut on the sea changes in the way we practice, and what those changes mean for estate planners now and going forward.

This was the wrap up session. The presentation commenced with Elaine leading a discussion of drafting for flexibility which was a recurrent theme at this year's Institute. Drafting for flexibility is important for a number of reasons including:

1. Tax laws in constant flux;
2. Extended life expectancies;
3. Family circumstances changes, including definition of family; and
4. Dynasty trusts (more people are drafting trusts for extended period of time and must attempt to account for future unanticipated circumstances).

In drafting first and foremost address the client's concerns but also be a counsel and resource to the client. Provide alternatives for a client's consideration. The attorney must be more than mere "order" taker. Make sure the client's goals are attainable; otherwise one may inadvertently be running into problems, whether anticipated or unanticipated. Some of the drafting considerations should include:

1. Discretionary distributions;
2. Powers of appointment. Consideration of class of appointees. Include spouse of a beneficiary; what if spouse divorces, remarries (consider charities);
3. Trustee. Consideration of who past the first generation should be trustee(as most clients only focus on the immediate), how determined, who determines. Include appointment and removal powers;
4. Decanting, add power to decant trust;
5. Change of situs/ choice of law. Consider in light of significance of state taxes whether state taxes, ie income tax should be considered as to who can act as fiduciary. Simply who is a fiduciary and such fiduciary's residence

may cause a trust to be taxable in the trustee's jurisdiction. Also, depending upon asset mix, might have a specific state law reference for certain assets, e.g. for real estate. Must have some situs to the law selected, however;

6. Trust protector and what powers broad or limited should be granted;
7. Rule against perpetuities. Consider how assets from transferred trust are treated in "recipient trust" regarding the rule. Panel agreed transferor state jurisdiction would apply to "transferred trust" assets.

What if one is dealing with an "inflexible trust." How does one address that. Considerations should include:

1. Modification/reformation court action or if state law permits, private agreement;
2. Disclaimers, qualified for tax purposes, and non-tax qualified;
3. Decant; however be aware of IRS Notice 2011-101, and the IRS's request for comments on income and transfer tax issues relative to decanting.

Next the presentation included discussions regarding the changing practice of estate/tax law and the influx of commodity providers, such as LegalZoom. Wendy suggested that professionals need to be aware of competing service providers including the popular do it yourself planning. What practitioners must do is differentiate themselves from the commoditizers. Fill in the blank or the one size fits all does not work for all and most importantly requirements vary from state to state.

Commoditization cannot and will not replace the personal human interaction that takes place in client face to face meetings. Much can be learned from experiences such as the family, what is important to the client, personal and financial goals and desires. Most importantly one can evaluate client competency. Documents prepared on line one can only guess who may have prepared the documents, was it the client or some third party influencing decisions. The attorney/service provider needs to become the trusted advisor to the client which the impersonal cannot compete with.

Wendy then discussed the concept of the "ethical will." This is a client's communication to one's descendants regarding the client's cultural history, ethical and spiritual values. An example was President Obama's letter to his daughters, which is widely available on line. In this letter the President passes on his wisdom, love, spiritual values, blessings, hopes, and dreams for his daughters, life-lessons and wisdom gained from his experience, and he also requests forgiveness for regretted actions and sets forth his rationale for the paths he has taken. Bruce recommends that the client should prepare this and he often incorporates that into the estate planning documents.

Bruce completed the program with some drafting suggestions for adding flexibility to dynasty trusts.

First, he addressed distributions. In addition to including HEMS standards he also suggested adding discretionary distributions "for best interests" or whatever other description one might consider but based on the independent trustee making that discretionary distribution.

Next he discussed language that he has been including in documents for distributions to married beneficiaries in order to forestall a claim by a spouse. He limits the HEMS distribution allowing only for an independent trustee to make distributions for support and health of the beneficiary. He then adds language that allows for broader distributions if the beneficiary's spouse signs a waiver whereby the spouse waives any rights the spouse may have or assert against the trust. The waiver runs to the trustee. This is not a prenuptial or postnuptial agreement. The spouse should have separate representation and the value of the beneficiary's trust should be disclosed to the spouse. What is attempting to be done is to protect the assets in the trust from some potential claim that the spouse may have in the trust in a marital proceeding. Whether it works is not certain but, as Bruce said, having language such as this is better than not.

Finally Bruce concluded his presentation with giving due consideration as to who qualifies and may qualify as a descendant in the future. With the continual advances in medicine children will be born long after the father or

mother may be deceased or a child of a same sex couple similarly after the death of both spouses. With same sex couples depending on the circumstance the parent may not be the biological parent of that child.

The Institute concluded with Tina announcing this year's attendance of 2,625 and urging everyone to calendar the 2013 Institute for January 14-18, 2013 at the Orlando World Center Marriott.

Miscellaneous stuff:

Discussion Thread No. 1

Compiled by Stanbery Foster, Jr.

Subject: POA/Decanting & Decanting

Messages are listed from most current backwards

ACTEC-Practice List on behalf of; Larry Rocamora [lrocamora@MACROCLAW.COM]

Sent: Saturday, 6/11/11 5:15 AM

Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

The power of appointment language would permit the powerholder/ beneficiary to appoint to a new trust in which beneficiary can receive distributions for any reason but only in the discretion of an independent Trustee. The power of appointment would prohibit powerholder from appointing to a new trust in which powerholder or related and subordinate party within 672(c) could be the distribution Trustee for distributions not pursuant to HEMS. Powerholder could be Trustee for distributions to HEMS. Purpose is to broaden the distribution standard to allow for further estate planning by beneficiary. I think we have decided that safer course is to use court modification to accomplish this goal.

From: ACTEC Practice List On Behalf Of William Graf

Sent: Thursday, June 09, 2011 10:20 AM

Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

But, why do you conclude that there is no GPOA to begin with? Your facts say the power is to appoint to a trust for the benefit of the powerholder, and the distribution standard will not be limited to HEMS,

I think that makes the power a GPOA.

6/8/11 9:00 AM

on behalf of; Larry Rocamora [lrocamora@MACROCLAW.COM]

I agree that the exercise of a power of appointment in further trust does not make the power holder who exercises the power the grantor and therefore 2036 and 2038 should not be implicated. It seems that only 2041 is the concern. I came to the same conclusion as Les below. Thanks for your input.

6/8/11 8:53 AM

on behalf of; Larry Rocamora [lrocamora@MACROCLAW.COM]

Regarding 2041(a)(2), the exercise or release refers to the exercise or

release of a general power of appointment, so I don't think that is applicable to this situation if the power to appoint in further trust is not a general power of appointment to begin with. 2041(a)(2) refers to "such" a power of appointment and the such refers back to the preceding part of the sentence which refers to a general power of appointment

From: ACTEC Practice List On Behalf Of LES RAATZ
Sent: Monday, June 06, 2011 5:35 PM
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

Bill, although I am sure that possession of a GPA at death includes the property subject to the GPA, I am not dead sure how 2035 enters into partial release of rights in or power over the property held by the powerholder beneficiary. I took a look at the regs., including 20.2041-3(d)(2). That reg. sec is bothersome, but that deals with complete release of the POWER ITSELF, whether or not partially released before, and not with deemed property rights. It doesn't deal with the interest in the property that the beneficiary had or still possesses that under 2041(a)(2) is governed by the string provisions, including 2035.

I still think I have it right. But I'd rather know the right answer.

From: ACTEC Practice List On Behalf Of William Graf
Sent: Monday, June 06, 2011 12:52 PM
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

Les - 2041 has it's own rule, which is not limited to 3 years. 2035 does not apply to 2041 powers.

From: ACTEC Practice List On Behalf Of LES RAATZ
Sent: Monday, June 06, 2011 2:32 PM
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

That is for the 3 year rule, which includes the property subject to a GPA, which GPA was exercised or released within 3 years prior to death to the extent that the beneficiary GPA powerholder retained a 2036, 2037, 2038 or 2042 string that he later released or exercised in a manner that cut the string. (I think I got that right.)

That may pull in property in addition to continuing to possess a GPA as death that causes inclusion of the trust assets remaining subject to the GPA at death.

From: ACTEC Practice List On Behalf Of William Graf
Sent: Monday, June 06, 2011 11:01 AM
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

What about 2041(a)(2) which refers to "exercise?"

From: ACTEC Practice List On Behalf Of LES RAATZ
Sent: Monday, June 06, 2011 1:08 PM

Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

I agree with Andrew. It is not the exercise of a power that causes inclusion under 2041 (Delaware Tax Trap excluded), it is the existence of the power granted in the initial trust that must be reviewed and tested. If it says that the beneficiary can appoint to anyone but himself, his estate or the creditors of either, then that is not a GPA, but then he could not appoint to a trust in which he is a beneficiary at all. If it says that he can also appoint to a trust that could benefit himself, in addition to the permitted beneficiaries described in the preceding sentence, but that either:

1. The power can only appoint to a person not related or subordinated as described in 672(c) to distribute to him in the trustee's discretion, then I don't think that is a GPA since he did not create the trust to raise the "power in conjunction with another" of 2036 or 2038, or

2. He can still be the trustee but his rights cannot be in excess of HEMS rights (and maybe add a 5&5 power), then such is also not a GPA.

I don't think he can have the power to the appoint to a trust that would permit him to appoint to 1 above and also be the trustee, or appoint to a trustee who is related or subordinate as described in 672(c). If he as trustee can decant to cause the this to occur, then the GPA problem exists.

Of course, the decanting power of a state is what it is, and its affect on powers could limit actions or permit actions and create problems. It sounds like NC's decanting statute is somewhat cautious.

From: ACTEC Practice List On Behalf Of William Graf
Sent: Monday, June 06, 2011 9:14 AM
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

2041 - not 1041

From: ACTEC Practice List On Behalf Of William Graf
Sent: Monday, June 06, 2011 11:58 AM
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

I think the question is whether the beneficiary holds a GPOA under the initial trust that grants the power. If so, the exercise of that power will implicate section 1041.

From: ACTEC Practice List On Behalf Of Katzenstein, Andrew M.
Sent: Monday, June 06, 2011 11:22 AM
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

If limited by a standard not 2041. So the issue would be whether the beneficiary is deemed to make the transfer to the new trust....which if not then no 2036 or 2038...if in the initial trust he could have the power then unless he is deemed creator of new trust don't think there is a problem...am

I thinking about this properly?

From: ACTEC Practice List
Sent: Mon Jun 06 07:42:39 2011
Subject: Re: [ACTEC-PRAC] Power of Appointment and Decanting

If the beneficiary has the power to appoint to himself as beneficiary of a new trust, doesn't he have a power exercisable in favor of himself, for which the exception would not apply?

From: ACTEC Practice List On Behalf Of Larry Rocamora
Sent: Monday, June 06, 2011 8:09 AM
Subject: [ACTEC-PRAC] Power of Appointment and Decanting

Client is beneficiary of trust in which Trustee (client) can make distributions to client/beneficiary pursuant to HEMS standard. In NC, a special Trustee can be appointed to decant to a new trust (the "Decanted Trust") as long as the Decanted Trust does not contain a distribution standard more liberal than old trust, i.e., the Decanted Trust cannot give independent Trustee power to distribute trust property to client/beneficiary for best interests. Under NC law, beneficiary of Decanted Trust can be given power to appoint trust property in further trust.

Can the client/beneficiary of the Decanted Trust be given a power to appoint trust property in further trust for benefit of the client/beneficiary in which distributions are not limited to an ascertainable standard if the power of appointment in the Decanted Trust limits who can be trustee of such new trust to an independent Trustee as to beneficiary under Section 672(c) without running afoul of any 2041 issues?

I think there are no 2041 issues as long as the power of appointment does not permit the beneficiary to appoint the trust property either outright or under any new trust to beneficiary, beneficiary's estate, creditors of beneficiary or creditors of the estate of the beneficiary and if the beneficiary appoints in further trust for the benefit of the beneficiary any distribution not limited to an ascertainable standard must be made by an independent trustee.

A more liberal distribution standard will allow further estate planning reduction in client's estate.

Thanks for any comments.

Date: Fri, 21 Oct 2011 20:54:41 +0000
Subject: [ABA-PTL] Frequent flyer miles
To: ABA-PTL@MAIL.AMERICANBAR.ORG

Does anyone have experience in dealing with frequent flyer miles in preparing an estate tax return?

Should the miles be included as an asset?

If the answer is yes, how should the assets be valued? Is there a market for frequent flyer miles? (Unfortunately, there is no spouse in the current situation.)

Thank you for your help.

Are the frequent flyer miles of the decedent transferable to another?

Or do the "die" with him?

Apparently, the miles are transferable.

I have not dealt with the issue on a 706, but since most frequent flyer programs sell miles to members, you could find out what the applicable program(s) charge, and that would be a presumably valid valuation method. BTW, I include a specific clause in my wills specifically devising such accounts, and have found this to be helpful in transferring the miles, as some programs are much more restrictive than others.

For some musings on this see

http://www.groco.com/readingroom/fin_frequentflyer.aspx

and

<http://tinyurl.com/4x2ljq7>

It turns out not to be easy to determine value, though there appears to be a \$.01 to \$.02 per mile range for most purposes (lower with some poor-choice redemptions for merchandise and well times/planned redemptions for premium travel higher). Using the cost to buy miles from airlines seems to overstate the value since there are other less expensive ways to obtain miles.

And don't forget, you can buy the miles, but you cannot sell them! I would think that has a significant impact on value.

Here's a couple of strategy points and how certain airlines address frequent flyer miles in the estate planning/wealth management vein.

<http://www.forbes.com/sites/janetnovack/2011/07/13/how-to-pass-on-your-frequent-flyer-miles/>

Here is the language I use as part of the will disposing of personal property:

"I give any frequent flyer mileage accounts, hotel points programs or any similar reward program I own to _____."

I wrote earlier to the party inquiring as follows:

There have been a number of recent articles in the NYT and WSJ, stating that under the airlines' programs, the real owner of the miles is the airline itself-- and not the traveler. If this is so, it would not seem appropriate to include them at value on the 706. In addition, my experience with two estates that held the miles is that we had to purchase the miles from the airline, i.e., we had to remit a check to pay for them. If you have to buy them, even if for a nominal sum such as \$25 or \$50, then it would seem as though you would not have to value them on the 706.

Following is the article that was in the Wall Street Journal on October 13, 2011:

"Think You Own Your Frequent-Flier Miles? Think Again.

"You "earn" your frequent-flier miles through travel or spending. They are held in "your" account; you think of them as cash in a bank account. You spend them as you see fit. They are your asset, and airlines record your future award travel as a liability on their books.

"And yet, many airlines write into the "terms and conditions" of their frequent-flier programs that the miles are actually owned by the airline, not the consumer. Surprised? Those aren't really your miles after all. (This issue is explored in this Middle Seat column.)

"You actually shouldn't be surprised. Because airlines claim they own the miles, they get to exert control and that control frustrates consumers all the time. Airlines set expiration dates on miles, for example, and wipe out accounts that haven't been active in as little as 18 months. They set very restrictive terms you can't sell your miles, trade them or donate them to a school auction. In some cases you can't leave them to heirs in your estate or split them in a divorce settlement. If you really owned the asset, why couldn't you do whatever you wanted with it?

"Not every airline has such restrictive rules - you might want to check the terms and conditions of your program. United's MileagePlus rules, for example, state: Accrued mileage and certificates do not constitute property of the member. Neither accrued mileage nor certificates are transferable (i) upon death, (ii) as part of a domestic-relations matter, or (iii) otherwise by operation of law. But Delta doesn't include such language, and a spokeswoman said "miles are owned by the member and can be inherited, willed or used as part of a settlement." Still, Delta doesn't allow selling, transferring or bartering miles.

"American's AAdvantage program has language almost identical to United's but adds, "However, American Airlines, in its sole discretion, may credit accrued mileage to persons specifically identified in court

approved divorce decrees and wills upon receipt of documentation satisfactory to American Airlines and upon payment of any applicable fees." A spokeswoman said the fees are \$50 for dispersing miles from a deceased members account or \$100 in the case of a divorce. (Turns out, divorce really is more expensive than death.)

"I've long argued that the airlines' love of complex rules turns consumers against companies that they really do want to love. Flying can be a joy and a thrill, and yet it has been turned into a major hassle. Complicated fare rules and frequent price changes are maddening and seem so often punitive. Fees and expensive penalties anger customers. Rules are so often one-sided - consumers get penalized for being late, changing flights and making mistakes, but when it's the airline that's late, unreliable or wrong, the consumer gets a snarly sorry, if that.

"Frequent-flier miles are an asset, and consumers who have them ought to be able to use them as they want, not as their airline wants."

Date: Mon, 5 Sep 2011 07:01:40 -0500

Subject: [ABA-PTL] Decanting Question

To: ABA-PTL@MAIL.AMERICANBAR.ORG

NonGrantor Trust was created by Husband (now deceased). Wife has a Grantor Trust. We would like to be able to combine them, AND have the entire trust continue to be a Grantor Trust as to Wife.

Can you decant from a Nongrantor Trust into a Grantor Trust, and the Grantor Trust continue to be a Grantor Trust as to the entire trust?

The decanting NC would be accomplished under North Carolina's statutory regime.

No, the grantor of the "to be recanted trust" will remain the grantor of recipient trust. You can not change the identity of the grantor by transferring the assets to another trust that has different grantor, in which recipient trust will have 2 grantors for purposes of Code Sections 671-678.

This is correct - the grantor of the original trust generally remains the grantor of the second trust. See Treas. Reg. §1.671-2.

Yes, or if Code Section 678 applies, by why then decant if the surviving spouse will own the assets, to be included in her estate?

Section 678 says you need a general power on the way in, but (a)(2) says you can release or modify that power and retain some other 671 to 677 power and still have grantor trust status. This might be a workable scenario in your case, if the grantor trust status of the surviving spouse's trust is based on something other than revocability, though it seems rather convoluted.

The goal is to determine whether it is possible to convert a NonGrantor GST Exempt Trust created by decedent spouse, into a Grantor Trust of Surviving Spouse.

On the surface it looks obvious that there would be no reason to decant if we are granting a GPOA to the surviving spouse.

That being said, one reason to decant and grant a GPOA would be to get a step-up in basis, but that is definitely not the goal here.

The problem here is that we have are two different Grantors (one is deceased). Husband was sole Grantor of Trust 1 and has died. Wife would be the sole Grantor of Trust 2.

I don't think there would be any issue if we had the same Grantor for both trusts.

Perhaps it is possible, but at what cost? Using 678 to try to trigger status could lose asset protection, not to mention other issues. The end goal still seems unclear to me. To simply save a few hundred dollars 1041 filing? Or is it asset specific, such as S corp rules or IRC 121 treatment of residence sales?

To the best of my knowledge, you cannot achieve what you are trying to do, unless you want to cause the assets to be includible in the surviving spouse's estate or you cause the surviving spouse to be deemed to have made a gift to the new trust. You would have to effectively make the surviving spouse the grantor to the trust, I believe.

Have you considered selling the assets of the old trust to the Grantor Trust? If a significant gain would occur with the sale it may not make sense, but if the gain is limited you could end up in a similar place as decanting to the Grantor Trust - the surviving spouse paying tax on any income generated on the assets formerly held by the old trust (if that is your goal). Even with a large gain I wonder if the benefit of the transfer tax-free payment of the income tax on those assets would outweigh the tax cost of a sale.

Announcement:

WealthCounsel® and Trusts & Estates® Announce Findings from the Fifth Annual Industry Trends Survey

Orlando, FL – January 9, 2012 – Today, WealthCounsel, LLC and *Trusts & Estates* magazine released a report of the key findings from the Fifth Annual Industry Trends Survey. The survey is conducted annually and has earned a reputation as the primary resource for insight on the state of the industry and emerging trends. Of the 1,085 respondents, 87 percent were estate planning attorneys, while the remaining professionals were comprised of certified public accountants, certified financial planners, registered representatives and insurance professionals.

“This year’s survey has a broader focus, inviting participation from all professionals involved in estate planning and wealth management,” said Matthew T. McClintock, J.D., Chief Executive Officer of The WealthCounsel Companies. “It is clear from the growing number of participants that the survey has become a valuable business resource for professional advisors engaged in trust and estate planning.”

In addition to questions regarding the impact of the Tax Relief, Unemployment Insurance Reauthorization and the Job Creation Act of 2010, this year's survey solicited feedback on the economy's impact on business-owner clients, partisan gridlock in Washington, the unemployment crisis and the connection between financial illiteracy and the subprime mortgage crisis. Key findings include:

- 57 percent stated that clients are proceeding with planning for non-tax reasons
- 32 percent believe the 2010 Tax Act has all but eliminated "estate tax avoidance" as motivation to plan
- 80 percent believe the nation's economy will continue to suffer due to partisan gridlock in Washington
- 71 percent believe business incentives are needed to return jobs to the U.S. that have been sent overseas
- 73 percent believe that the lack of financial literacy contributed to the purchase of adjustable rate mortgages involved in the subprime mortgage crisis

"Despite the challenges over the past year, it is encouraging to see that 89 percent of those surveyed expect to see their practices grow over the next five years," said Rich Santos, Group Publisher, *Trusts & Estates*.

A report summarizing the findings appears in the January 2012 issue of *Trusts & Estates* magazine. The survey report may be downloaded at www.wealthcounsel.com.

From the Institute: The official attendance count this year is 2,625, 125 below the all time high in 2011 of 2,800 due in large part to the passage of the 2010 tax act.

From ACTEC: The 4th Edition of the ACTEC Commentaries and Engagement Letters are available for free on the ACTEC Public Home Page at www.actec.org.

From ACTEC: The newly updated ACTEC Fiduciary Accounting Templates for Quicken Versions 8, 9, 10, 11 and 12 are available to Non-Fellows to purchase for \$150 at <http://www.actec.org/public/Templates.asp>.

From ALI-ABA: The on-line forms library for editable estate planning forms was recently updated with new additions in January of 2012. See <http://www.ali-aba.org/index.cfm?fuseaction=online.forms&categoryid=228>.

From Dell Computers: The free 11 Chapter Cloud eBook can be located at http://go.dellcloudapplications.com/forms/ebook-cloud?utm_source=google&utm_campaign=na+us+search+cloud&utm_content=Cloud-Computing&utm_term=cloud%20computing&campaign_id=701C000000ckLh&gclid=CKrPv_dw60CFRb7AodJHxYBw

From TechnoLawyer: TechnoLawyer is a popular legal technology and practice management resource that consists of a network of free, critically-acclaimed e-mail newsletters, and a searchable Web-based repository of all TechnoLawyer content. To join, search, or learn more about TechnoLawyer, visit the following Web site: <http://www.technolawyer.com>. The 1/12/12 Issue of their Smalllaw Newsletter contains an article by Erik Mazzone in which he tackles cloud storage services with five options depending on your preferences and priorities. Those 5 are (1) 1. DROPBOX AUTOMATOR FOR THE DROPBOX JUNKIE, (2) INSYNC FOR THE GOOGLER, (3) SPIDER OAK FOR THE ABUNDANTLY CAUTIOUS, (4) JUNGLEDISK FOR HAROLD CAMPING FOLLOWERS, and (5) JUNGLEDISK FOR HAROLD CAMPING FOLLOWERS.

From ABA Law Practice Management: The 2012 Edition of the [Solo and Small Firm Legal Technology Guide](#), the only one of its kind, has just been release. It contains Impartial best-of-breed recommendations for hardware and software including the following:

- A guide to social media usage by lawyers--its riches and risks
- How to access your data from anywhere--and be secure!
- An analysis of the evolving smartphone market
- The latest in case management, time and billing and document assembly programs
- Taking your practice paperLESS and improving your bottom line
- How to protect your firm from security threats, including viruses, spyware, and spam
- A look at what's coming in legal tech during the next year

From TECHNORELEASE - January 13, 2012

NOTE: This is the alternative document assembly program that was mentioned in 2012 Heckerling Special Sessions 2-D and 4-D.

TIME IS MONEY: PATHAGORAS WILL HELP YOU TO MAKE MORE OF BOTH IN YOUR LAW PRACTICE

Increasing client demands are the order of the day for solos and small law firms. Rapid and accurate production of documents has become even more imperative. The need for a document assembly program that is both easy to set up and easy for you and your staff to administer is absolutely essential to your bottom line. However, many of the document assembly tools now on the market seem to require a degree in computer programming.

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Unfortunately, most solos and small law firms still resort to the comfortable, but highly inefficient, cut-and-paste, search-and-replace method of document production. ("Just take John Robertson's will and change the names to make it work for Mary Harris.")

Enter Pathagoras, a truly full-featured, yet remarkably easy to use document assembly program. Proudly 'low tech', Pathagoras is easy to set up and easy to use. With Pathagoras, you can create document variables (holding spots for personal text that will be inserted later) simply by enclosing descriptive words such as "Client Name" and "Spouse Name" within plain text square brackets. So, following that pattern, "[Client Name]" and "[Spouse Name]" are automated variables in Pathagoras.

It is just as easy to create 'optional text' (text you will leave in some documents and delete in others). Enclose optional text within {curly braces}. When the document is processed, Pathagoras will highlight the optional text block and ask you if you want to keep it. Simple as that.

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One final point. Pathagoras is all Word, all the time. You don't have another program to load and to learn from the ground up. You start in Word, you end up in Word, and all intermediate steps are in Word. You and your staff are always in your comfortable and familiar word processing environment. (Sorry, WordPerfect users. Pathagoras is

available only in Microsoft(R) Word.)

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From Trusts & Estates Magazine's Technology Center - Software Reviews: Donald H. Kelley has just released his 1/11/12 review of

Cheshire Wealth Manager

Version 2011-D, which is designed for registered investment advisors, trust companies and other investment professionals to assist them in financial and retirement management. It addresses goal or cash based financial planning, including basic estate planning (the effect of credit shelter trusts; gifting; irrevocable live insurance trusts; grantor retained annuity trusts, grantor retained unitrust and qualified personal residence trust planning and charitable trusts) as well as providing Monte Carlo analysis (using correlated rates of return for all asset classes) as part of its "What-If" analyses. It enables the creation of retirement, estate and life income plans. It addresses Roth conversion analysis for a full or partial conversion. It has the capability to import data from client accounts and holdings using Advent Axys, Advisor Exchange, Albridge Solutions, Morningstar Advisor Workstation, Morningstar Principia, Schwab Portfolio Center or a .csv file. You can also automatically derive asset allocation based on ticker symbols using Morningstar technology. Click Here for the Full Article http://trustsandestates.com/tech_center/cheshire_wealth_manager.

From Trusts & Estates Magazine's Technology Center - Website Reviews: Donald H. Kelley released his review of the www.Mystatewill.com Website on December 14, 2011. This site is provided by Kurt R. Nilson, a Pennsylvania probate attorney. It provides information relating to intestate distribution of a decedent's estate according to the decedent's personal and financial circumstances. It presents free intestacy calculators for all 50 states and the District of Columbia, links to selected portions of the applicable state intestacy laws, an interactive summary of state intestacy laws, a degree of kinship chart and other resources. It features per stripes and per capita calculations that compute the amount of the net estate passing to each heir based on such estate divisions. It also has facts and charts on degrees of kinship, intestacy law, family member shares and blended family issues. Best of all, IT'S FREE. Don's review can be found at http://enews.penton.com/enews/trustsandestates/tech/2011_12_14_12142011/view.html.

Estate Planning Charts and Graphs: It was announced during the two Technology Special Sessions on Wednesday (SS 2-D) and Thursday (SS 4-D) that the accounting firm of Keebler & Associates, LLP in Green Bay, Wisconsin currently provides FOR FREE some 15 different estate planning diagrams and charts, in addition to the full text of some of their CCH articles. The charts include several for IRAs and ROTH IRAs and distribution planning from those plus Notices 2011-66 and 2011-82. These free resources are located at <http://www.keeblerandassociates.com/education>

Domestic Asset Protection Trust State Rankings Chart by Steven J. Oshins, Esq. of Oshins & Associates, LLC in Las Vegas, NV
(From the ABA-PTL List Archives)

11/15/11 ABA-PTL List

Given South Dakota's and Hawaii's important changes to their Domestic Asset Protection Trust statutes, both

effective 7/1/2011, it has bothered me that my DAPT State Rankings Chart (see http://www.oshins.com/images/DAPT_Rankings.pdf) isn't scheduled for the next annual updates until April of 2012. This chart gets hundreds of web hits each month, so I felt that it needed an update.

So I decided to make some "mid-year" tweaks.

*I updated South Dakota's pre-existing tort exception creditor fix and gave South Dakota more positive "Comments."

*I moved Hawaii from #12 to #8 given its significant positive changes.

*I changed the "Comments" for Delaware to reflect that Delaware has gone from the bottom of Tier 1 to the top of Tier 2. There is just too much of a gap after the big three (Nevada/Alaska/South Dakota) to continue to include Delaware in that group despite the amount of business it gets. It's too similar to the other Tier 2 states. I know this won't be popular with a lot of people, but the chart doesn't lie.

Vendor Report, Monday - Friday, January 9-13, 2012

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The vendor hall enjoyed regular traffic throughout the 46th Heckerling Institute. A few vendors mentioned that attendance seemed a bit less than last year (which it was). Perhaps attendance will increase next year, particularly if we have some form of federal transfer tax legislation (or else a return to the 1997 tax act).

These Reports follow in more or less Alpha order as the various Vendors were listed in the Program. Jason Havens covered A through G and Craig Dreyer covered H through Z.

*** The Advisors Forum:**

WealthCounsel created The Advisors Forum (<http://www.advisorsforum.com>) more than five years ago to assist attorneys "... to generate consistent new business from other wealth planning professionals." The Advisors Forum provides personalized monthly newsletters (the "Wealth Counselor"), teleconferences, packaged continuing education for presenters, blogging content, and other tools to help attorneys in strengthening their referral networks. The Advisors Forum also provides personalized client newsletters (the "Wealth Advisor") for its members. Through The Advisors Forum, members may offer private label, secure (256-bit encryption) on-line client document vaults known as ClientDocx. ClientDocx may be integrated with a firm's current website or used as a standalone application. The Advisors Forum offers website content as well.

*** American Bar Association Section of Real Property, Trust and Estate Law:**

This ABA-PTL list is provided by the RPTE Law Section of the ABA (http://www.americanbar.org/groups/real_property_trust_estate.html), which usually exhibits at the Heckerling Institute. This year they have several new books relevant to trust and estate practitioners. Besides its scaled membership rates based on years in private law practice, the ABA recently began offering a discounted solo practitioner membership rate in addition to its other special rates for judges, public service lawyers, and government lawyers.

*** Bloomberg BNA:**

Bloomberg acquired BNA (<http://www.bnasoftware.com/Products/Index.asp>) last year (2011), but BNA's offerings continue seemingly without any changes. For example, they still offer their Estate & Gift Tax 706 Preparer and 709 Preparer. They also still offer their Estate & Gift Tax Planner, which generates a variety of reports, PowerPoint presentations, flowcharts, and more.

*** Brentmark Software:**

Jane Schuck shared that Brentmark (<http://www.brentmark.com>) continues to offer and support its popular Estate Planning Tools and Retirement Plan Analyzer as well as its robust Kugler Estate Analyzer (comparable to the BNA Estate & Gift Tax Planner, above, and CCH's ViewPlan Advanced, below) and more titles/applications. Jane also mentioned that Brentmark has a substantial custom set of offerings used by some of the leading brokerage firms and financial planning firms. She also shared some horror stories primarily involving on-line calculators that either produced fundamentally incorrect results or simply were not updated properly. Well-known author and Forbes senior editor Deborah Jacobs was also exhibiting her new book *Estate Planning Smarts* at the Brentmark booth (it was reviewed by Steve Leimberg in LISI Message #1832 in July of 2011).

*** CCH**

CCH was there exhibiting their usual publications as well as their Practice Guide for Estate Planning, their Forms 706, 709 and 1041 preparation software, their ROTH IRA Conversion Expert software program, and their Financial and Estate Planning Review (The Journal) publication which now contains periodic Technology Update columns written by the Editor of these Reports. CCH is also the vendor for the ViewPlan estate planning software.

*** CharitablePlanning.com:**

Emmanuel Kallina's robust and recently redesigned website, CharitablePlanning.com (<http://www.charitableplanning.com>), is "...an on-line tool for planning professionals seeking to manage their research, save time and make educated decisions." The site includes a deep electronic library featuring the Internal Revenue Code and Treasury Regulations, full-text cases, rulings, and daily and other commentary from their team of experts. Emil has also added numerous calculators for their subscribers to use. An in-depth handbook on charitable planning is also available. They use a tiered pricing structure depending on how much of their content you want.

*** CrummeyService.com, LLC:**

As one of the newest exhibitors, CrummeyService (<http://www.crummeyservice.com>) offers automated Crummey/withdrawal notification letters to beneficiaries, funding notices/reminders to grantor(s), and premium payment notifications/reminders to the trustee(s). These records are retained for substantiation purposes. In the ever-increasing realm of trust and estate litigation, services like this are worth considering, especially for family trustees.

*** ElderCounsel:**

ElderCounsel (<http://www.eldercounsel.com>) was formed in October 2007 by a team of four leading elder law attorneys (two of whom are certified by the National Academy of Elder Law Attorneys) and WealthCounsel "... to provide elder law and estate planning attorneys with critical resources to competently serve the needs of the nation's aging population and those with special needs." Members receive a comprehensive drafting system known as ElderDocx, which includes the Irrevocable Medicaid Asset Protection Trust (the same type of trust discussed in Bernard A. Krooks' general session this year on "Use of Irrevocable Income-Only Trusts in Elder Law Planning: Yes, You Can Have Your Cake and Eat It Too"). Members also gain access to marketing materials (such as client-friendly handouts, sample client newsletters, and sample presentations), bi-monthly newsletters for referral sources, monthly teleconferences and webinars, and an extensive legal research library. ElderCounsel is offering a separate "Medicaid Immersion and Practice-Building Camp," later this month in Orlando but since it is sold out they will be offering it again from May 2-4, 2012 (location to be determined).

*** Gillett Publishing LLC:**

Gillett Publishing (<http://www.gillettpublishing.com>) continues to offer its estate tax (GEM706) and gift tax (GEM709) return software, along with a fiduciary accounting application (GEMAcct) that prepares estate and trust accountings that comply with the National Fiduciary Accounting Standards. Gillett seems to be one of the first software providers to respond to the release of draft and/or new forms. Their website includes training guides (PDF format) for their software titles.

***Lackner Group 6 in 1 Estate and Trust Administration**

With one entry of data, 6-in-1 allows a user to produce a US Estate Tax Return, Inventory, U.S. Fiduciary Income Tax Return, State Fiduciary Income Tax Return, State Inheritance/Estate Tax, Account (Trustee's and Executors) and Inventory. The system also includes a Form 709 preparer. It also supports probate forms for Pennsylvania and North Carolina.

The program has also added Delaware and Hawaii as states included in its DecoupleCruncher in order to perform estate tax calculations in multiple states. The program has recently added e-filing for the Form 1041 and will be adding state e-filing for New York, Massachusetts, and Pennsylvania this season. They also reminded us that if you file more than ten 1040's and 1041's you will need to apply for an electronic EFIN with the IRS.

They offer Account, Inventory, State Death Tax, Federal 706 Death Tax, Federal 1041 Fiduciary Income Tax and State Fiduciary for \$2,000 or \$1,700 during the Heckerling Institute. They also offer varying portions of the 6-1 system individually. For more information, go to The Lackner group web site at www.lacknergroupp.com or call 800-709-1041.

***Lawgic**

Lawgic is an estate planning drafting program which has specific drafting software for California, Florida, Georgia, Maryland, and New York as well as a template version for South Carolina and a state neutral version as well. They are also in the process of adding Tennessee, New Jersey, Colorado, Texas, Ohio, Indiana, Illinois and Arkansas.

The program has updated the Florida Durable Power of attorney, and added a new interface and functionality. In addition to their non-state specific version they have added a joint trust. Probate Plus is still offered as a module for the Florida planner. Their California model added a simple will as well. All state specific documents have been updated over the past year.

Lawgic offers free training and support. The cost is \$1,800 for state specific versions, and \$1,200 for non-state specific versions. In addition you can buy a separate module for the Florida durable power of attorney and advance directives for \$500. Heckerling attendees also receive a 20% discount if the package is purchased during the conference. For more information go to the Lawgic website at www.lawgic.com or call 877-252-9442.

***Interactive Legal Suite**

Interactive Legal Suite has three separate packages. Wealth Transfer Planning, Elder Law Planning and Essential estate planning. The wealth transfer planning module is implementing a contemporary or plain language version of their documents. They also have their irrevocable trust system to draft trusts for husband and wife and ensure they are not reciprocal to use the 5 million dollar gifting amount this year. The full Wealth Transfer Planning package includes FLP, LLC, and Grantor Trusts. In addition to the full Wealth Transfer Planning option they have a simpler version called Essential Planning. In addition, they have their Elder Law Planning drafting system as well.

Purchasing one license gives you access to multiple state versions in the Wealth Transfer Planning module. They

have the updated Florida power of attorney and have updated their documents for various states throughout the year.

Heckerling attendees can receive 14 months for the price of 12. For more information go to the Interactive legal suite website at www.interactivelegal.com or call 321-252-0100.

***My Personal DataSafe**

This system allows you to store your family's personal information and upload copies of birth certificates, deeds, medications, stock, life insurance and much more. You can update family, medical, financial, legal and insurance information on line. Then you can authorize complete or partial access to your advisers, physicians or family members. You can also choose when to share the information.

This system also provides a place to store electronic passwords for easy access to those who you wish to have access. In addition, if you pass away, your family can have access to any passwords or information you believe they may need under a share after death feature. In addition, they offer a medical access card that first responders can access and pull up all your shared emergency medical information, including medications and emergency medical history.

Pricing is a \$100 for the first year, and \$60 each year thereafter. In addition, they offer for lawyers a \$300 fee per year, where they can give out unlimited memberships to their clients for a free year subscription. For more information please go to the My Personal DataSafe website at www.mypersondatasafe.com or call 855-565-5225.

***CareBinders**

The CareBinders software is similar in function to My Personal DataSafe that is mentioned above. There report capabilities once all the necessary data is entered includes Personal reports for residential service providers, pets and resumes, Medical reports, including intake forms and emergency cards, Financial reports, including data locators, and Tracker reports. This program was developed by Carol Kaufman after her experiences with her father's estate and affairs after he died in 2008. See the write up in The New York Times 11/5/10 "Discussing Family Money Without The Family Drams." For more information, go to www.carebinders.com.

***Probate.com**

Probate.com is a brand new website that is only two months old. It is a combination probate and estate planning attorney directory and local resource guide. The site has been redesigned to make it easy for people to search for law firms, accountants, appraisers, financial advisors, funeral directors, handymen, investment managers, maintenance contractors, movers and trust companies.

In addition, the web site is an on line market for relevant probate and estate planning keyword search terms that can increase exposure and provide another avenue for clients to find you. They do web search optimization to maximize advertising, and also have content for individuals to learn more about estate planning and probate.

Probate.com offers various packages for listings on their site. For more information please go to www.probate.com or call 855-411-probate.

***Drafting Wills and Trust Agreements (Thomson Reuters)**

Thomson Reuters has updated and significantly revised their drafting Wills and Trust Agreements software. They have implemented a new checklist for drafting documents. They also provide new updated flow charts to enable clients to better understand their estate plan. They added a new irrevocable income trust and new joint trust

agreement extending through the lifetimes of both spouses. The drafting program also includes four binders with sample documents. They also include some state specific language provisions for their documents.

Thomson Reuters also provides Intuitive Estate Planner which many of us have become familiar with over the years to give clients a picture of their estate plans with various tax calculations. It is one of the most sophisticated and comprehensive calculation illustration programs available in the estate planning area that allows you to compare among various planning techniques.

They offer packages with various levels of capability, and they offered a Heckerling discount. For more information please go to Thomson West website at www.west.thomson.com or call 407-252-4152.

***TEdec**

TEdec is a full featured Trust and Estate Accounting Software. One time data entry is available for court inventories and accountings, management reports, estate tax and income tax returns are available through a bridge to Lacerte Tax Software for Forms 706 and 1041. They also allow you to outsource to them all your fiduciary accounting needs, where they can provide Data Entry, Court Inventories, Accountings, and Releases for you. They are compliant with official forms for NY, PA, NC, FL, CA, and the National Fiduciary Accounting Standards.

TEdec provides a single license fee for \$395 per year, and a processing fee for each entity of \$65.00. They encourage you to try their outsourcing services to prepare complex estate, trust or guardianship accountings. They also offer webinar training.

For more information please go to their website at www.tdec.com or call 800-345-2154.

***Trusts & Estates Magazine**

Trusts & Estates Magazine provides two very useful technology tools. The first is Don Kelley's book, *The Electronic Practice*, which was first published in 2008 and is periodically updated on line (last update was 2010). The second is Don Kelley's *Trusts & Estates Technology Newsletter* that is published monthly. More information about these two products is available at http://trustsandestates.com/tech_center.

***WealthDocx**

WealthDocx is a comprehensive estate planning document assembly system put out by WealthCounsel. Every year they release two significant enhancements to WealthDocx. The first release this January will update the LLC Operating Agreements to add voting and non-voting stock and to allow for preferred distributions in LLCs taxed as C Corporations as well as several updates to their LLC Operating Agreements. In addition, WealthDocx will be undertaking a comprehensive style review of their entire drafting system to provide clarity and consistency in each of the document assembly systems within WealthDocx.

They are also working on the release of a new niche-practice planning system called GunDocx for firearm legacy planning. They described it as "Not just a Gun Trust, but a comprehensive solution to help build a successful niche practice."

For more information about WealthDocx please visit their website at www.WealthCounsel.com or call 888-659-4069.

***Appraise**

Appraise is produced by Evaluation Service Inc., and is a web based e-commerce model program, in full compliance with IRS Regulations to value securities from anywhere Internet access is available. All you need to do is provide an email and create a password to use the system. Once in you can input data and value assets using either ticker or CUSIP numbers. They provide reports for Date of Death, Alternate Valuation Date, Gift Tax, Market Value, and closing prices.

There is no software to install and no necessity to call your IT department. Reports can be emailed to yourself, clients and others. Payment can be made via credit (so you can get those rewards) and your asset information will be stored on their servers for 10 months if you want to go back to a valuation.

For more information please go to their website at www.appraisenj.com/webappraise or call 201-284-8500 ext. 104.

***EVP**

EVP stands for Estate Valuations & Pricing Systems, Inc. This software, which is also free and a competitor to Appraise, also does securities valuations on line on a nominal per security basis using either CUSIP or tickler symbols. They have just recently added foreign securities too. Their EVP Office suite comes with Estate Val, CostBasis and CapWatch. They are the exclusive provider of historical evaluations to the IRS and have been since 1996. Several of the fiduciary accounting software programs have a built in link to EVP for valuation purposes. For more information, go to www.evpsys.com.

***Northern Trust**

Northern Trust provides information to professionals through their wealth advisor portal. Here you can sign up for newsletter and they even provide sample estate planning forms at no cost through this website and periodically host call-in Webinars of interest to estate and financial planners. For more information go to the Northern Trust Website at <http://wealthadvisor.northerntrust.com>

***STEP**

STEP stands for the Society of Trust and Estate Practitioners and is a worldwide professional association comprised of attorneys, accountants, trust officers, tax specialists, bankers and financial advisors. Their website is an on line directory for its members. The organization provides education, training, representation and networking for its members. Membership costs \$370 per year plus an initiation fee of \$110, which, if you sign up before mid-February, will be waived. For more information go to their website at www.STEP.org or call 212-737-3690.

***LEXIS-NEXIS Matthew Bender**

Lexis-Nexis is the official publisher for the Heckerling Institute and provides a multitude of resources for the estates and trusts practitioner. They still provide an electronic document drafting systems using Hot Docs. In addition, they offer state specific modules for some states. These documents are updated regularly. These drafting systems and many invaluable resource books can be viewed and purchased on line. For more information visit their website at www.lexisnexis.com/Estatecatalog or call 800-223-1940.