Aggregated Summary of Reports
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2015 Heckerling Estate Planning INSTITUTE
Edited, Aggregation of On-Site Reporter Summaries

Monday, January 12

9:00 - 12:15
Fundamentals Program #1
Basis – Banal? Basic? Benign? Bewildering? (Focus Series) Howard M. Zaritsky, Lester B. Law

Basis used to be a simple tax concept of only modest importance to estate planners, but recent tax law changes have made income tax planning more important than estate tax planning for some clients, and the use of such techniques as intentional grantor trusts, contingent powers of appointment, private annuities, Alaska community property trusts, joint exempt step-up trusts (JESTs), and trust commutation have made basis sometimes very difficult to determine and even harder to integrate into an estate plan. This session will explore the rules of basis and their increasing importance in estate planning.

Reporter: Beth Anderson Esq.

Mr. Zaritsky's and Mr. Law's materials consisted of 245 pages of which they covered nearly every topic in their three hour lecture. They started the lecture with a reminder that the rules of estate planning have changed and practitioners must focus on the balance of estate and income taxes and that balance will vary among the states, and touched on the history of tax basis and general terminology.

Next they briefly covered what types of issues can lead to an adjustment (increase or decrease) in basis. While normally we think of carrying charges (mortgage interest paid) as deductions, if a taxpayer does not have income to apply the deduction, then the taxpayer may elect under §266 to capitalize the carrying charge and increase the property's basis.

They reminded us that under §1015 gifts of appreciated property have basis depending on whether the property is later sold for a gain or a loss and it's important to track the basis on gift tax returns so you can later accurately determine the gain or loss. To avoid loss of the loss, it's better for the donor to sell the depreciated asset (to take advantage of the difference between the donor's basis and FMV) and gift the cash to the donee rather than gift the asset to the donee who would have to use the FMV at date of gift as basis to determine loss at the subsequent sale. §1015(d)(6) provides for an adjustment to basis on the gift taxes paid attributable to the net appreciate in the value of the gift. See §1.1015-5(c)(5) for an example.

Turning next to §1014, normally we think of this as new basis for assets included in the decedent's estate, but it's broader than estate inclusion and may apply to assets that are not included in the estate, but that are still acquired by the decedent. As pointed out later in the lecture, income, gift and estate taxes are not quid pro quo and you can get an income tax basis adjustment on assets that do not trigger gift or estate taxes. For example, Rev Rul. 84-139 provides that property owned by a non-resident alien is not subject to US estate taxes but still receives a date of death FMV basis adjustment.

The discussion then flowed into transfers of appreciated property in contemplation of death. The general rule under §1014(e) is such that the donor cannot gift property to the donee in contemplation of donee's death and receive a step-up in basis when donee's estate transfers the property back to the donor unless the done lives more than one year from the date of the transfer. The discussion turned on whether the donee's estate could transfer the property to a trust in which the donor had an interest or could later be added to the trust. The theoretical answer is that the adjusted basis should be denied for the value of the donor's interest in the trust. The

practical answer –what's the value of an interest in a discretionary trust. Instead, you can create a bifurcated creditor shelter trust and provide that any assets received from the donor within one year of death are placed in a trust for the benefit of the children and any additional assets needed to max out the estate tax exclusion amount that were not received from the donor within one year of death are placed in a trust for the benefit of the donor and children, and any assets in excess of the exclusion amount are in the martial trust.

The presenters briefly touched on the importance of holding periods for determining long term (one year and a day) and short term capital gains, and reminded us that the gifts or non-recognition events usually allow for tacking of the donor's/contributor's holding period for the recipient, but sales do not, so you may have two different holding periods for a part sale/part gift transaction. Holding period for recipient of property from the decedent is long term so long as the recipient is the one who sells the property.

Uniform Basis Rule was the next topic, and provides that an asset acquired from the donor or decedent has a single basis even if multiple people with different interests own an asset. Therefore, each individual's portion of the basis will vary based on different facts including life expectancy, interest rate, terms of the trust or type of interest owed.

The next big topic was basis planning with portability and the ability to get two basis adjustments, one on the death of each spouse. Both presenters advised that portability should be the default or go to estate plan which is then adjusted for non-tax reasons such as second marriages, creditor issues, spendthrift, asset protection, collateral tax issues – GST planning.

They next transitioned into ways to "fix" the old credit shelter trusts for better basis:

- Distribute assets to Spouse;
- Trust protector can grant a general power of appointment to Spouse;
- Modify the trust (start drafting trusts) with contingent general power of appointment similar to GST general power over assets that exceed the DSUEA; or
- Delaware Tax Trap if it's available in your state and under your document

Of these 4 methods, Mr. Zaritsky prefers a combination of the contingent general power of appointment and the ability of the trust protector to grant a general power to the spouse. The first provides a back stop in the event the trust protector fails to act. It is extremely difficult to draft a formula general power of appointment over the specific assets and not exceed the amount which would incur estate tax, and it's also difficult to find a trustee or trust protector willing to either distribute assets to the spouse or grant a general power to the spouse for fear that after the spouse's death the assets won't be in the hand of the trust beneficiaries.

Just before the mid-way break, the presenters pulled out the big guns and started discussing partnership tax. They stared slowly, with terminology and general conceptualization of the relationship between the partners and the partnership whether this relationship is an aggregate theory or entity theory. Generally, for basis purposes, the partner and partnership are under the aggregate theory – think of them as combined units instead of separate entities. Recall when a partner makes a contribution of assets in exchange for interest in the partnership, the assets have an Inside Basis equal to the basis of the contributor (transferred basis) and the new partner has an Outside Basis in the partnership interest equal the basis of the assets contributed. For example, partner contributes blackacre with basis of 100 and value of 500 in exchange for a 50% interest in the partnership, the inside basis of the blackacre is 100 and the outside basis of the partnership interest is also 100.

Recognition of gain usually occurs in the estate planning area because of "boot" and investment partnerships (§351). Boot is the receipt of cash or other property, by the partner, other than a partnership interest. Boot triggers a recognition of gain to the extent it exceeds the partners outside basis.

Outside basis is increased by the amount of partnership debt assumed by the partner, and it's decreased by any partner's debt that is relieved, but what is the basis on the note contributed to a partnership. Unlike a c-corp, which

provides that a note has basis equal to fair market value, a note contributed to a partnership in exchange for a partnership interest has zero basis until payments are actually made, and subsequently the outside basis of the partnership interest is also zero.

Next, they discussed two types of distributions from a partnership, liquidating and non-liquidating and how they affect inside and outside basis. A liquidating distribution is a return of capital and termination of the partnership interest, and a non-liquidating distribution is a distribution that isn't liquidating. Gain may be recognized on either type of distribution, but loss can only be recognized on a liquidating distribution.

Basis is reduced in a non-liquidating distribution by the amount of cash received and the basis of any property transferred. For example, Janet has an outside basis in J,LP of 100. J,LP makes a distribution to Janet of 5 in cash and land with a FMV of 15 and basis of 5. Janet's outside basis in the partnership is reduced by the value of the cash received (5) plus the basis of the land (5) from 100 to 90, and Janet takes a carryover basis in the land (5). When the land is later sold she will have to recognize the built in gain.

In a liquidating distribution the entire outside basis is allocated to the cash and property received. For example, Z is a partner with an outside basis of 20 and as part of the liquidation of his partnership interest, Z receives 8 in cash and land with an inside basis of 10 and value of 21. Z's outside basis is reduced from 20 to 12 because of the 8 in cash and the remaining 12 is allocated to the land thereby adjusting its basis from 10 to 12.

754 election to adjust a partner's inside basis on the partnership assets and timing of recognition of income. When a partner dies the outside basis receives a date of death fair market value adjustment but the inside basis of the partnership assets do not, unless a 754 election is made. The election applies to a transfer of an interest in an partnership by sale or exchange or upon the death of a partner (§743 is triggered). The partnership makes the election for the partner and it only affects the transferee (new) partner. It requires tracking all of the partnership assets and keeping a separate 754 inside basis for that partner. The process can be complicated and time consuming when there are multiple elections (more than one partner dies) and depreciable assets (real property).

Interesting note, is whether a 754 election should apply at the end of estate administration and the funding of the trust. §761(e) provides that with respect to §743, any distribution of an interest in a partnership (not otherwise treated as an exchange) shall be treated as an exchange. So the distribution of the partnership interest from the estate to the trust could trigger an additional 754 election.

Grantor Trusts vs. Non-Grantor Trusts and Notes is the next cluster of topics discussed. The section started with a recap of the Rothstein case and Rev Rul 85-13 and the concept that sales to grantor trusts are non-recognition events because the grantor is deemed to own the trust assets for income tax purposes. Because grantor is deemed the owner of the trust assets, when the trustee purchases grantor's assets for a note, the basis of the note is zero (similar to partnership note) because the basis in the assets cannot be allocated to the assets and the note. If the grantor later sells the note to a third party, then there should be recognition of gain for the value of the note (or at least the purchase price).

While grantor is living and the grantor trust status is "on" basis is not going to change, but there may be a basis adjustment if the grantor trust status terminates during grantor's life. Increase basis for the appreciation from the net gift tax paid.

Termination of grantor trust status at death and basis adjustment without a recognition event. Recall, at the beginning of this outline, income and estate taxes are not quid pro quo, and basis may be adjusted when property is acquired from the decedent. At the death of the grantor, the grantor trust status terminates and the assets that were deemed owned by the grantor are not acquired from the decedent by the trust arguably creating a date of death basis adjustment under Rev Rul 85-13 and §1014, but good luck finding an accountant to sign a return using this theory.

Basis with private annuities and self-cancelling installment notes (SCINs). Private annuities and SCINs are usual tools for clients that are not likely to outlive their actuarial life expectancies.

Annuitant (seller's) basis is divided into three parts: return of capital, gain (difference between the present value and adjust life expectancy), and annuity (interest like and makes up the rest of the annuity payment). The buyer's (obligor) basis varies on the situation, for a gain, basis is the present value. Loss cannot be recognized until payments are made and if at a loss the basis is the value of the payments.

SCINs carry a premium because of the risk that the full value will not be paid before the note is cancelled at death. That premium may increase the basis because it increases the value of the note. The premium may be a higher interest rate, larger payment or some combo of the two. As payments on the note are made, the basis of the note increases, but there should not be an adjustment at death for cancellation of debt. The obligation only applies while the transferor is living, at death there is no longer an obligation and therefore nothing to cancel. Judge Halpern's dissent in Frane. The argument is compelling unless you are in the 8th circuit in which case the majority opinion in Frane controls and income is recognized by the estate as IRD. IRD does not get a basis adjustment.

The final topic of discussion was double basis step-up planning with the JEST and Community Property Trusts of Alaska and Tennessee.

JEST stands for joint estate step-up trust and is a variation of the tax-basis revocable trust from TAM 9308002. In a JEST each spouse has a separate share of the trust and the power to terminate the trust during their lives and retain their separate shares. The first spouse to die has a testamentary power of appointment over the entire trust. On the death of the first spouse to die, the assets of such spouse's share first fund a credit shelter for surviving spouse and descendants and if necessary a marital trust for surviving spouse. If the deceased spouse's share is less than the applicable exclusion, then the credit shelter trust is bifurcated and the assets subject to the general power are held in trust for the descendants and not the surviving spouse. The full value of the trust should be included in the estate of the first spouse to die because of 2041 general power and 2038 retained interest.Alaska and Tennessee have statutory trusts that allow spouses to opt in to community property status for assets and get the benefit of the double basis adjustment like community property states. The statutes require the trust situs to be in AK or TN, respectively, the property may be located anywhere, but real property will need to be converted to tangible property (put in a LLC) in order for its situs to be in another state. At least one of the trustees must be located in AK or TN, and must perform some type of trustee like function – management, possession of assets, records, tax returns, and a mandatory all caps disclosure of the consequences of this trust. Although there are conflict of law concerns, if done properly these trusts should work for spouses in "good marriages" without creditor concerns.

2:00 - 2:10
Introductory Remarks
Tina Portuondo, Director, Heckerling Institute Patricia D. White, Dean, University of Miami School of Law

2:10 - 5:15
Recent Developments 2014
Dennis I. Belcher, Samuel A. Donaldson, Carlyn S. McCaffrey

Reporter: Bruce A. Tannahill Esq.

The Faculty for this session consisted of Dennis Belcher of McGuire Woods, Richmond, VA; Professor Samuel Donaldson of Georgia State University College of Law, Atlanta; and Carlyn McCaffrey of McDermott Will & Emery in New York

This session alone was worth the cost of attendance, not only for the information provided by the panelists but for the humor the panelists, especially Prof. Donaldson, used in their discussion. A heavy rainstorm was heard during much of the presentation, offering additional opportunities for levity during the program.

Mr. Belcher began the program by thanking the authors who contributed the materials and Ron Aucutt who edited them. He said that this has been an interesting year and the panel's objective is to put the developments into perspective.

He noted that estate planning practice has changed significantly over the last 14 years. 2001 brought the gradual increase of the gift and estate tax exemption to $3.5 million in 2009, followed by the 2010 choice of a one-year repeal or a $5 million exemption. In 2011-12, we had the concern that the exemption could go back to $1million and the 2012 end-of-year planning rush.

The 2012 American Tax Relief Act brought us estate tax stability for the first time in many years but it changed the estate planning practice. Ten years ago, clients would call Mr. Belcher and say they were concerned about estate tax law changes. Congressional action and tax laws would drive people to attorneys for estate planning.

In the future, he said that tax changes may not drive clients to us. We will need to be more proactive because clients will need our services but not as likely to seek us out. Estate tax concerns still affect the top 0.2% have estate tax needs. Wealth is being created at the top so these clients still need help minimizing estate taxes. For them and the remaining 99.8%, assistance is needed to pass assets as they want.

For clients who need estate tax planning, it is no longer sufficient just to make gifts to irrevocable trusts. We also need to deal with income tax rules. A zero basis asset given away must appreciate 250% to offset the loss of stepped-up basis. Assets will almost certainly be sold.

If a client says their children won't sell assets, get it acknowledged by client in writing because the children may have different plans.

Mr. Belcher concluded his introductory remarks by saying that he hopes the program helps you better advise clients and proactively help them.

Federal Tax Developments

Prof. Donaldson began by noting that ATRA is like any other tax legislation –it included extenders that expired at end of 2013. He used the example of the above the line deduction for teachers' classroom expenses as a provision that is a feel-good provision that has minimal revenue impact. There is no policy reason for not making it permanent. Legislators don't want to make it permanent because then they cannot take credit for extending.

On December 19th, the Tax Increase Prevention Act (TIP) Act was signed by the President. The provisions are only effective until the end of 2014, which means we are back in the same position as we were a year ago. Prof. Donaldson said that a carton of milk bought that day was good longer than the TIP Act.

One provision included in the TIP Act is the qualified charitable distribution. This allows clients over 70 ½ to have up to $100,000 of their IRA paid directly to a charity. It is not included in income and no charitable deduction is followed for it. It is an important tool in our quiver because the charitable deduction may not offset RMDs included in income due to the limitations on charitable deductions and Pease phase-out of itemized deductions.

The TIP Act also included the ABLE Act of 2014. It enacted section 529A, which is like a section 529 plan for individuals with disabilities. Under a qualified ABLE program, accounts can be established for individual receiving Supplemental Security Income and Medicaid or eligible to receive it, based on a disability that began before age 26. There is a maximum $14,000 annual contribution, which grows tax-deferred. To the extent

distributions are used for qualified expenses, they are not included in anyone's income. There is a broad definition of qualified disability expenses. Amounts in ABLE account don't count as resources up to $100,000. The excess is considered a resource for SSI purposes but not for Medicaid purposes. Prof. Donaldson thinks it will be a nice additional benefit we can bring to the table for our clients who have family members with special needs.

Legislative Developments to Watch For

Prof. Donaldson noted that Congress is firmly under control of Republicans. He doesn't think we'll see dramatic tax reform since Republicans can't override a presidential veto. On the other hand, the President's proposals have as good a chance of passing as the professor's would.

Mr. Belcher agreed on the prospects of estate tax legislation but noted there is a better chance than last year due to Republican control, moving from nominal to better than nominal.

There are at least two potential vehicles that could be used to attempt to force estate tax reform. First up is the February deadline of February to the Department of Homeland Security. The debt ceiling will need to be increased in late spring or early summer.

The panel then reviewed some of the estate and gift tax proposals included in his 2015 budget proposals, released in 2014. These include:

- Modification of the GST treatment for Health and Education Exclusion Trusts.

  Ms. McCaffrey says that the change is not needed because current law already provides the proposed treatment or the IRS already has adequate tools to combat any abuse.

- Simplify gift tax exclusion for annual gifts administration.

  The Administration doesn't like the current gift tax exclusion because gifts are made to people who never get anything from the trust. Gifts are also difficult to monitor. What the proposal means isn't clear. The best guess is it would limit the annual exclusion to outright gifts or single beneficiary trusts, except for $50,000. It has little chance of being passed.

State death taxes

Maryland and Rhode Island increased their exemptions while Minnesota retroactively repealed its gift tax.

Ms. McCaffrey noted that New York is expensive place to die. Until last year, the exemption was $1,000,000. A new law gradually increases it to federal level in 2019 but with a phase-out that eliminates the entire exemption between 100% and 105% of the exemption. Estates above 105% of the exemption receive, no benefit from exemption. At certain levels, individuals pay 200% of the amount in excess of exemption. In addition, gifts within three years of death are added back to the estate, even by non-resident decedents who made gifts of New York situs property while a resident of
New York.

IRS and Treasury Matters

The Treasury priority guidance plan for Gifts and Estates and Trusts has one new item: Guidance on Rev. Proc. 2001-38, which provides relief for unnecessary QTIP elections. Prof. Donaldson emphasized that this Rev. Proc. is a relief provision. With portability, people now use QTIP trusts to get a stepped-up basis. The concern raised by some is that the IRS could say a QTIP election wasn't necessary since there is no taxable estate. He said that Treasury on board with modest estates doing QTIP elections and that they will not be ignored. Because temporary regulations cannot last more than three years, the temporary regulations on portability need to be made final or new temporary regulations issued. He doesn't expect significant changes. Other items have been on the list for a while

and will be there next year.

Mr. Belcher noted that the IRS budget cut in current budget. The number of lawyers has dropped. Eric Corwin of Treasury has said that he wouldn't be surprised if regulation projects PLRs, and other guidance take longer.

Valuation Matters

The panel reviewed several valuation matters.

- Estate of Richmond v. Commissioner: The appraisal was never finalized by the accountant. There was a significant built-in capital gain. The Tax Court allowed 15% discount for it, based, on the Court's own time value of money analysis, assuming the gain would be realized over time
- Estate of Gustino v. Commissioner: A Ninth Circuit decision filed December 5, 2014 reversed the Tax Court. The Tax Court said that even though decedent owned 41% interest and couldn't liquidate, there was a 25% chance a hypothetical buyer could find another partner to agree . The Ninth Circuit said it was clear error to assign a 25% probability of everything happening that needed to happen to liquidate.
- Estate of Elkins v. Commissioner: The client owned fractional interests in art. IRS said no discount allowed based on an appraiser who said that there was no market for fractional interest. The Fifth Circuit said the estate's valuation discount would control because the IRS presented no evidence as to the valuation discount and the estate had three expert appraisers supporting the discounts. The result was an aggregate discount of about 67%. Ms. McCaffrey said that the opinion isn't precedent for 70-80% discount for fractional interest in art. You need good evidence for discount. If the heirs want to sell art, a valuation discount may be counterproductive due to the loss of stepped-up basis. As the rain picked up, Prof. Donaldson noted that it rained harder when discussing cases where the IRS loses.

- PLRs 201431017, 201441001: Alternate valuation requires an election on the estate tax return. It must be made within one year of the due date including extensions. In the first ruling, the failure to make the election was corrected within one year after original the due date and the IRS ruled that section 9100 relief available. In the second ruling, it was not corrected within one year and the IRS rule that no section 9100 relief was available.

Constitutionality of State Rules Against Perpetuities

Professor Robert Sitkoff and Stephen Horowitz wrote an article for Vanderbilt Law School, arguing that the statutory modifications to the common law rule against perpetuities in Arizona, Nevada, North Carolina, Texas and Wyoming violate those states' constitutional prohibitions against perpetuities. They further argue that states that do not allow perpetual trusts may not recognize perpetual trusts established by their residents in other states. The article was picked up by New York Times on December 5.

Leimberg Information Services published a rebuttal by Steve Oshins on December 22. Jonathan Blattmachr also weighed in. The original law review article and the responses are available on the Heckerling web site at <http://www.law.miami.edu/heckerling/supplemental_materials.phphttp://www.law.miami.edu/heckerling/supplemental_materials.php.

Mr. Belcher doesn't agree with the Sitkoff/Horowitz article's conclusion that it recognizing the perpetual trust would violate public policy. He does worry about a bankruptcy trustee going after a trust where the beneficiary is the bankrupt. Ms. McCaffrey stated that whether the grantor's state would recognize the trust may not be relevant because that state's court couldn't reach the trust assets. Prof. Donaldson said it becomes more of a trade-off and risk analysis.

Other Developments

Estate of Sanders v. Commissioner involved what is adequate disclosure to start the running of the statute of limitations for gift tax returns. The donor had filed gift tax returns 1999-2008 and the IRS assessed gift taxes in 2012. The taxpayer moved for summary judgment due to the statute of limitations having run. The IRS said there was not adequate disclosure and the Tax Court denied summary judgment because there was a genuine dispute as to whether there was adequate disclosure. It was noted that there are two types of adequate disclosure: one for gift taxes, one for chapter 14. A disclosure checklist developed by Stephanie Loomis-Price is available at <http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/heckerling/2014/adequate_disclosure_checklist.authcheckdam.pdfhttp://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/heckerling/2014/adequate_disclosure_checklist.authcheckdam.pdf.

Estate of Aragona v. Commissioner involved when a trust materially participates in a business. This was originally a concern under the section 469 passive activity loss rules. It has become important for estate planners because the passive loss rules are used to determine if certain activities are investment income/loss for purposes of the 3.8% net investment income tax. The IRS has taken the position in litigation that only a trustee's actions as trustee count in determining the trust's material participation. The passive activity loss regulations have reserved the section dealing with material participation by a trust. The Tax Court held that without guidance, it will take the position that a trustee's activities as employees count. Prof. Donaldson disagrees with the IRS position that trustee's actions as employee don't count. He said you can't remove the fiduciary hat in anything you do. Since trustees materially participated as employees, the trust should be considered to materially participate.. Until we get regulations that codify the IRS litigation position, we can rely on Aragona. Mr. Belcher said that the IRS is concerned about the use of trusts as tax shelter but he expects it will be several years before we see any guidance. PAL is probably bigger issue than NIIT.

SEC v. Wyly is an SEC disgorgement case where the defendants were ordered to disgorge almost $620 million due to securities violations arising from tax planning using offshore trusts. The panel said we care about the case because it the judge who decided it is a federal district judge who might decide tax issues. He concluded that trusts were grantor trusts. The degree of control grantors exercised over the trust created de facto control and implicated section 674 making the trust a grantor trust. The panel thought that a similar conclusion would be reached under sections 2036 and 2038. Mr. Belcher said that this case shows egregious facts make bad law. Legal fees for handling SEC complaint and lawsuit was $100m.

Tuesday, January 13

9:00 - 9:50
Trust Design: The Most Important Part of the Estate Plan David A. Handler

Trusts into which assets are transferred during life or at death will govern the administration, investment and disposition of the assets for one or possibly several generations. It is critical to build a smart, flexible trust agreement that can adjust over time, as the people, assets and society will all change in unforeseeable ways during the life of the trust. This session will discuss ways to make a trust flexible, and oft-overlooked provisions that should be in every trust agreement.
Reporter: Michael Sneeringer Esq.

Mr. Handler combined humor and real world experience to explain to the audience why trust design is just as important as taxes in estate planning.

Mr. Handler's remarks followed his session outline in order. However, he expounded upon the outline beyond what was in the materials; ordering the session in audio format, if interested in the topic, would be recommended. He began by explaining why trust design is important: once the trust becomes irrevocable, the trust provisions control

everything for X number of years (where X is the number of years of the rule against perpetuities prescribed under the trust's governing state law).

The first main topic was building flexibility into trusts. Mr. Handler began by recommending how estate planning practitioners should draft their clients' trustee provisions. He covered who should be trustee and how to change the list of successor trustees (appointment and removal power). Mr. Handler touched on a few specific topics with regards to trustee selection such as having different roles for different trustees, age restrictions for the trustees, requirements for certain trustees experienced in one field versus another, and having spouses as trustees. Mr. Handler mentioned that estate planning practitioners should consult Revenue Ruling 95-53 for trustee removal and appointment powers by grantors. He also provided guidance on trustee provisions when beneficiaries are trustees of their own trusts.

Mr. Handler then discussed Trust Protectors. He highlighted that clients do not understand that a trust protector can re-write a trust if given both broad administrative (add beneficiaries; amend the various trust provisions) and technical (tax) powers. His comparison was that the trustee is often picked first and is the most "trusted" person, leaving the follow-up client discussion to who would be the client's choice as the "smartest" person… the smartest person is then picked as the trust protector. He stressed that once clients are aware that a trust protector can amend the trust provisions, the client will want to modify the terms of the previously created irrevocable trust as often as if he or she were changing the terms of a revocable trust (opening the door a crack). He added that changing certain administrative provisions (changing scrivener errors, changing the name of the trust) may be better than giving the trust protector broad authority.

Mr. Handler discussed powers of appointment and described them using the reference to the "stick"; parents' say "I brought you into this world, I can take you out of the trust." He stressed that estate planning practitioners should be mindful in crafting who assets may be appointed to and what the provisions say.

Mr. Handler's best comments were in the middle of his presentation in describing why trust assets should be divided into subtrust amongst each beneficiary (as opposed to being held in one pot trust for all of the children): David's Proverb, share toys, not money! He stressed that estate planning practitioners need to approach this subject with some common sense. He also related a recent client story in explaining withdrawal rights to the audience: why Crummey… unfortunately (or fortunately for clients) that is the name of a family.

The next main topic was incentive provisions versus trustee guidance. Mr. Handler briefly touched on defining support and maintenance, advancements, and the importance of including a grantor statement in the trust to advise the trustee in making distributions. His main point in this portion of his presentation was that the grantor should help guide the trustee by providing in the trust certain principles for the trustee to consult (requests but not requirements) when making discretionary distributions to beneficiaries.

The final topic was important but overlooked clauses to include in trusts. Mr. Handler quickly spoke three or four sentences on each of the twenty-six subtopics. He noted that hard and fast rules in drafting divorce clauses in trusts lead to unexpected consequences. He stressed though that clauses should be included to address income tax consequences that occur upon divorce and trustee provisions that change following divorce.

Mr. Handler noted that children should be thoroughly defined, and that adoption needs to be covered in the trust as estate planning practitioners should not rely on state law.

He pointed out that provisions should be included to address portability, the disposition of individual retirement account assets, and how changing the trust's governing law effects the rule against perpetuities governing the trust.

Mr. Handler expanded upon the discussion of the trustee's power to acquire closely-held business entities where the trustee has an interest by explaining to the audience that provisions need to point out that the trustee should be a family member, the beneficiaries should have an interest in the closely-held business too, and that the beneficiaries consent to the investment by the trustee.

Mr. Handler thought that the most useful clause in the trust is the single signatory clause: all the trustees consent to the action and just one trustee needs to sign the specific form to take the action!

Mr. Handler finished his presentation by briefly touching on the right to information and survivorship requirement provisions that should be included in a client's trust.

9:50 - 10:40
Portability or No: Death of the Credit Shelter Trust? (Focus Series) Diana S.C. Zeydel

This program will review the opportunities and pitfalls of estate planning under the new portability regime. More complicated than advertised, relying exclusively on portability may rarely be the right answer. Planning to maintain flexibility is critical, but may be difficult to achieve.
Understanding the rules and how the math works is key to giving clients the best advice. This program will apply simulation based analysis to quantify the financial consequences of a variety of estate planning strategies in light of portability. The results are eye opening and a "must-know" for every estate planner.

Reporter: Tiffany Walker Esq.

Ms. Zeydel began her presentation by assuring the audience that despite the foreseeable permanence of portability, estate planners need not automatically disregard traditional planning techniques (such as "Credit Shelter Trusts"). While the American Taxpayer Relief Act of 2012 ("ATRA") made portability permanent, Ms. Zeydel mentioned that purely relying on portability might not be ideal under all circumstances. The printed materials for the presentation provide that the addition of the portability election, in application, requires analysis to determine the advantages of its use on a case-by-case basis. Although the 64 pages of materials provide a conceptual overview of the use of portability, Special Session I-A, entitled "Projecting the Financial Consequences of Planning or Not Planning with Portability," will provide more detail regarding specific financial consequences of various estate planning strategies in light of portability.

Ms. Zeydel noted that the addition of portability has complicated rather than simplified planning. Portability is beneficial in that it may be used to provide the surviving spouse with an estate and gift tax shelter, as well as a double basis step-up for assets. However, concerns regarding the use of portability include the potential that portability may not really be permanent and not all tax benefits are covered by portability. More specifically, portability does not extend to state taxes or generation skipping transfer taxes.

The discussion skimmed the beginning of the materials, describing how to elect portability, and the use and computation of the deceased spousal unused exclusion (DSUE). Much to the dismay of many estate planners, the Internal Revenue Service has declined to provide a Form 706EZ for those who are not required to file an estate tax return but wish to elect portability. The reason for the Internal Revenue Service's failure to provide a simplified form is likely due to their need for more detail in determining the amount ported to surviving spouse. Ms. Zeydel added that she was "sort of" sympathetic to the continued requirement for a completed estate tax return because without such a return it would be difficult for the Internal Revenue Service to contend with the computation of the amount ported.

As an overview, portability is elected in a timely filed estate tax return (within nine month of the decedent's date of death plus any extensions granted). Ms. Zeydel further noted that in completing such a return, there is no box to

check for a portability election and the election is automatic with a timely filed return. However, to elect out of portability, an affirmative statement "electing out" must be attached to the estate tax return, if any, when filed.

The discussion picked up at planning with portability. In application, if the surviving spouse does not have sufficient assets to fully use their applicable exclusion amount, then portability would be used to "port" the excess to the surviving spouse. The DSUE amount is computed using the surviving spouse's last deceased spouse. Therefore, in the event of remarriage, Ms. Zeydel suggested placing a clause in the surviving spouse's premarital agreement with a new spouse to guarantee compensation for DSUE amount lost or assurances that the new spouse will preserve at least as much DSUE as surrendered.

Ms. Zeydel mentioned that in situations where the majority or all of the client's assets consist of a large homestead coupled with retirement assets, it might be beneficial to rely on portability. However, Ms. Zeydel went on to warn the audience that if portability is used on the wrong clients the outcome can be worse than with traditional pre-portability planning techniques. More specifically, on average for clients with a balanced portfolio the use of portability may not be ideal.

For a wealthier couple, if the surviving spouse is willing to immediately use the DSUE amount to fund a grantor trust for the benefit of descendants upon the first spouse's death or follow a disclaimer plan, then Ms. Zeydel commented that the use of portability is not as concerning. However, Ms. Zeydel remarked that she has yet to have the task of convincing a surviving spouse to follow this sort of planning, and the surviving spouse could be hesitant at the idea of transferring assets to a grantor trust that is not for the surviving spouse's benefit. In addition, the surviving spouse's payment of the income tax on the trust may deplete their own assets too quickly, especially if the amount used to fund the trust is close to $5.43 million (the maximum applicable exclusion amount in 2015).

In summary, the disadvantages of portability discussed in comparison to the use of a "credit shelter trust" include the loss of the predeceasing spouse's unused GST exemption and creditor protection, as well as the loss of trustee protection against improvident investments and family members taking advantage of the surviving spouse. Additional disadvantages discussed further were the loss of tax credits and potential loss of DSUE amount due to remarriage. As mentioned above, provisions should be included in a pre-marital agreement to provide some protection against the loss of DSUE due to remarriage. Another potential solution to protect against the loss of DSUE is to have the spouses agree to trigger Section 2519 upon remarriage or deciding to make a taxable gift.

Ms. Zeydel commented that the potential loss of DSUE amount is intellectually blocking estate planners. The discussion included several facts and figures highlighting the relatively low probability of the surviving spouse remarrying. In the alternative, an advantage to the surviving spouse remarrying is the potential to "stack" DSUEs through lifetime gifting. Ms. Zeydel commented that we should be advocating for a change in the law to omit the potential loss of the DSUE amount.

In traditional planning, a "credit shelter trust" is funded using some, or all, of the DSUE amount, also benefiting from the allocation of the deceased spouse's unused GST exemption. Alternatively, if the client prefers to use disclaimer planning and preserve the ability to elect portability, the estate of the first decedent may pass into a "QTIP trust," also benefiting from the allocation of the deceased spouse's unused GST exemption. Ms. Zeydel noted as a practitioner tip that you always start with the trust with greater benefits and disclaim into the trust with lesser benefits, often requiring the surviving spouse to give up a power of appointment of the trust. As an advocate for using independent fiduciaries, Ms. Zeydel also noted that an independent fiduciary should be appointed to shift benefits from one beneficiary to another. Similar to a disclaimer plan, partial QTIP elections and Clayton provisions can defer the decision to use the first decedent's exemption.

The discussion then turned to the idea of a "Supercharged Credit Shelter Trust," providing for the creation of a lifetime QTIP trust by one spouse for the benefit of another spouse, or an inter-vivos QTIP. As stated in the

materials, “[b]y the terms of the lifetime QTIP trust or pursuant to the exercise of a special power of appointment by the beneficiary spouse, the lifetime QTIP trust will become a Credit Shelter Trust using the unified credit (estate tax exemption) of the first spouse who was the beneficiary of the lifetime QTIP trust and in whose gross estate the QTIP trust is included.” The regulations provide the key elements that make this type of planning work, and although others have expressed concern regarding navigation of the reciprocal trust doctrine, Ms. Zeydel does not believe the application of this doctrine is a concern due to the fact that the trust is includable in the grantor's spouse's gross estate. The discussion also included an analysis of the interpretation of Treasury Regulation 1.671-2(e)(5), providing that the first spouse may not be granted, or exercise, a general power of appointment in the lifetime QTIP. The materials also mention that “[i]ssues regarding self-settled trusts are determined under state law, and although there is no issue under Florida law, there may be issues in other states.”

Unless both spouses are creating a lifetime QTIP trust, the spouse expected to survive should create the trust. If each spouse is creating such a trust, practitioners should avoid creating these trusts at the same time, with the same assets, and under the same provisions. In addition, Ms. Zeydel mentioned that the potential for leaking income is not as large a concern as it was in the past, especially for clients with a balanced portfolio. Ms. Zeydel further expressed that out of all the planning with portability, the “Supercharged Credit Shelter Trust” is the easiest.

The discussion closed with the review of several projections using JP Morgan's proprietary MAPS projection system. For more information regarding the numerical analysis on the use of portability, please refer to the review of the materials and discussion related to the Special Session mentioned above, which is scheduled for Wednesday.

10:55 -11:45

Planning for the 0.2% as if They Were Part of the 99.8%: Some of the Best Planning Strategies We See that Reduce Both Income Taxes and Estate Taxes (Financial Assets Series, Focus Series) S. Stacy Eastland

The presentation will focus on planning strategies that lower the taxpayer's potential transfer taxes and reduce the net tax effect a sale of any assets subject to estate planning may have, including: various borrowing, location, disregarded entity, grantor trust, QSST, DSUE, mixing bowl and charitable planning strategies. The presentation will also explore various strategies that reduce a complex trust's income taxes, indirectly benefit grantor GST trusts with a Roth IRA conversion, and enhance the basis of a surviving spouse's assets.

Reporter: Beth Anderson Esq.

Mr. Eastland opened his presentation with a useful observance in that the only difference between the extremely wealthy and us is that their assets have really appreciated a lot. This lecture is a teaser for the special session II-A on Wednesday afternoon in which Mr. Eastland joins Steven B. Gorin and Ellen K. Harrison in a more in depth discussion on planning strategies that reduce income and estate taxes. Mr. Eastland's outline is 155 pages of written text and another 183 pages of example financial schedules and projections, and as a result Mr. Eastland ran through his outline rather quickly but effectively highlighted strategies to reduce the income taxes for clients with highly appreciated assets.

The first topic of discussion was the use of estate/gift to mitigate income issues. Rev Rul 85-13 sales to grantor trust and the trust is not capable of being a separate tax payer if it violates the grantor trust rules. Therefore a sale with a low basis Promissory Note doesn't cause any income tax issues. What about buying assets back from the trust with a Note with FMV interest rate (higher than the AFR) to give your Note more basis. Mr. Eastland did point out that there is no authority as to what is the trust's basis in the note, and there is a risk that as the Note is paid down the trust could have capital gains.

Mr. Eastland discussed the importance of asset classes and the ability to have passive investments – equities vs hedge funds, private bonds. Consider taxes effect asset allocations because Congress has subsidized investing in equities by lower long term cap gains and timing of when a taxpayer wants to incur those gains. The taxpayer can chose to not be taxed by holding onto until death or gift to charity. This is not true with high yield bond (turn over). Practitioners are in the investment business because allocation and location of assets affect the client's estate plan. For example, compare a 200% turnover hedge fund to a 5% Portfolio Index Fund and determine the rate of return necessary in order to double the asset value over 10 without using a grantor trust. The 5% index fund needs a rate of 12.21% to double while the hedge fund needs to earn 21.03%. If both funds are subject to estate taxes, to match the index fund, the hedge fund must improve by 72.34% annually pre-tax. If you put the hedge fund in a grantor trust using estate/gift tax to subsidize, the gap improves significantly and the hedge fund needs to improve by only 12.49%.

The next topic of discussion was low basis assets and whether to hold them or let them go. He did point out that it is a rare asset that the client wants to hold onto but the beneficiaries want to get rid of immediately upon death. However, if there is an asset that no one wants to sell then even if it's low basis it's ok to gift it. The planning has focused to not using exemption until death, but getting appreciated assets out by sales or other types of transactions such as rolling GRATs; cascading sales to Grantor Trusts; Leveraged Sales as used in the Hendricks and McCord cases with the excess contributions to a GRAT or charity or QTIP. Worried about deemed contribution or selling to the wrong thing then have a disregarded entity as signal member LLC (which can have two members the client and his grantor trust) and contribute the non-voting units to the GRAT.

§385 of the corporate tax code provides guidance on leveraged transactions and debt v. equity in enterprises. Using the same concepts we can have leveraged LLC, and transfer the non-voting units (after they are old/cold) to a GRAT. Hard to value assets – double discounted – but if the assets are inside the GRAT when the value is challenged by the Service the only thing that can happen is the annuity amount is increased, but no gift tax surprise. Further appreciation is not needed to make the plan work because there is a discounted asset going into the GRAT with modest yield and undiscounted cash coming out. No need for re-valuations because not distributing hard to value property, and shouldn't be a deemed contribution or commutation. Better than rolling GRATS because the annuity amount is relativity small, and even if die in two year period the amount included in the estate is the annuity divided by the then 7520 rate. Some growth still escapes.

Wealthy are almost always self-made. They started from modest circumstances and usually want to take care of their parents. Why not create a grantor trust for elder parent with a gift of cash (high basis) and a subsequent sale of low basis assets to trust. The trust also provides that the parent has a general power of appointment over the trust assets. The difference between note and the assets will be included in the parent's estate, and if structured properly all the trust assets included. Wealthy child gets a step-up in basis for helping out the parent. Good planning for fully depreciated assets and the trust is a grantor trust so pay off note with high basis assets and gets to restart depreciation. §1014(e) doesn't apply because when made the gift it was cash – not highly appreciated asset – and if after the parent dies the assets go to a trust of which the client/donor isn't a beneficiary then there are even less concerns.

What if client doesn't use a note, but goes to the bank and borrows money, then uses the cash to buy asset back. Now client has basis and trust has cash, however, normal folks don't like borrowing to third parties, so refinance the bank note by using the cash in the trust. Note to trust for cash and pays off the bank. Note for cash is better than note for low basis assets. Want to add another level of planning made the trust a complex trust instead of grantor trust.

Mr. Eastland turned next to post mortem strategies to avoid estate taxes. Testamentary charitable lead annuity trust – clients don't like them because of "Prince Charles Syndrome" – waiting for the crown, but the solution is a leveraged buyout. There is probate exception to the self-dealing rules if certain restrictions are met (see Treas. Reg.

§53.4941(d)-2), but the Note must be equal to or greater than fair market value of the asset in the CLAT (ie the partnership interest/LLC units); and the Note must be more liquid than the asset. Perhaps a 20 year note balloon, interest only higher than AFR to zero out the CLAT, this is the "world's best note" because there is never out of pocket principal and subsidized interest because of the estate tax charity deduction and income deduction for interest payments.

Mr. Eastland briefly talked about DSUE planning and simulated credit shelter trusts, noting that this plan requires a couple who is happily married, with low basis assets. For example 50 million in low basis assets at the death of the first spouse, assets get a step-up, are contributed to a single member LLC. The surviving spouse gifts part of non-voting units to quasi credit shelter (the spouse is not a beneficiary of the trust) and sells the rest of the non-voting units for a Note. The Note coming back from the Trust gives the spouse greater rights (debt priority) than being a trust beneficiary and simulates a 46 million dollar credit shelter trust, way better than the usual $5, 430,000.

Discounts, Estate freezes and Grantor Trusts are the 3 pillars of Estate planning, but Grantor Trusts far exceed the benefits of the other two, and it's very powerful when you can use all three.

Planning with GST and surviving spouse with creditor problems, enter subchapter S planning and the self-settled grantor trust. Suppose the client has an ancient trust with boiler plate (or you modify a not so ancient trust) to allow investments in sub Scorps and qualify the trust for Sub-S status. If the beneficiary makes the QSST election then the trust becomes a grantor trust, and the beneficiary can sell asset to the trust and escape cap gains. The surviving spouse could also make a leveraged sale of Scorp stock to the credit shelter trust. The trustee of the credit shelter invests in sub Scorp and the surviving spouse sells the non-voting stock to a trust of which the client is the beneficiary, the client gets natural step up in basis when first spouse dies. Under the Uniform Principal and Income Act a note that is secured by stock and its distributions is paid as creditor over beneficiaries this plan is similar to the DSUE plan mentioned above, but unlike DSUE this trust can be GST exempt and protected from creditors.

Next, Mr. Eastland touched on pre-death charitable techniques and having an entity create a CRT which cannot last for a lifetime but can last as long as 20 years with very dramatic benefits with the health care tax. No income tax deduction for cash to charity but if you give preferred partnership interest and sell the common interest to family, §2701 shouldn't apply and you get an income tax deduction for the gift of preferred as present value of fixed income component. It's not taxed under 704(b), and if you put in highly appreciated asset and later the charity sells the asset without gain recognition. Granted the Service could challenge "entity theory" of the partnership, but the fix is to create a CLAT which is not taxed on the distribution for income or health care tax. The charity gets a coupon" and the client's family gets the rest.

Trust planning to reduce the health care tax burden. Mr. Eastland discussed interesting ways to reduce the income in the trust and allocate it to a lower income tax bracket beneficiary in order reduce the 3.8% health care tax burden. For example, what if the trust beneficiary had a limited right to withdraw, that does not violate §2041, over the income of the trust, and the trustee made a discretionary distribution to cover the income taxes. Suppose further that the trust is purely discretionary, could the trustee exercise such discretion to grant the appropriate beneficiary the same limited withdrawal right.

In closing, Mr. Eastland briefly mentioned income tax planning with IRAs. You could convert to a Roth avoid income taxes, but must pay the taxes up front, so the issue becomes, who should pay this tax ? Create a dynasty grantor trust and either borrow the amount of taxes due or sell a call option to simulate derivatives. Trust can call in 12 years or so depending on grow of the IRA and terms of the call and the results are income and estate tax benefits of making the conversion.

11;45 - 12-35
The 30,000 Foot View from the Trenches: A Potpourri of Issues on the IRS's Radar Screen (Litigation Series)

This presentation will address a number of current audit and litigation issues from the perspective of a seasoned litigator who deals with the IRS on a daily basis. The discussion will include hard to value assets, formula clauses, 6166 issues, GRATs, tax return preparation issues, and avoidance of penalties.

Reporter: Carol A. Sobczak Esq.

This presentation addressed a number of current audit and litigation issues from John Porter's perspective, who is a seasoned litigator who deals with the IRS on a daily basis.

The issues on the IRS's radar are:

Installment sales

§ 2036

Valuation

Formula clauses

Promissory Notes

GRATs

Transferee liability

Mr. Porter first paraphrased President Nixon and said that it's not paranoia; the IRS is really out to get you in these areas! He noted that the IRS is bringing up more arguments in their 30-day and 90-day audit letters, that examiners are requesting more pre-appeals conferences, and Appeals is not considering any new issues. These need to be brought up at the examination level.

INSTALLMENT SALES

The area of installment sales to intentionally defective grantor trusts is still a hot area on the IRS's radar screen. In the gift tax area, the issues include the fair market value of the interest sold and the consideration received. See the Woelbing cases (Tax Court Docket Nos. 30261-13 and 30260 13). Also be aware that the IRS is looking at the step transaction doctrine also. See Pierre v Comm'r, 133 T.C. 24 (2009).

The estate tax issues include estate tax inclusion under § 2036 and § 2038 regarding the interest sold, whether the sale was a bona fide sale for full and adequate consideration. Watch the timing of payments and put some time between the seed gift and the sale to the trust.

SECTION 2036

Section 2036 is still the most litigated issue. The "bona fide sale" is "where the rubber meets the road." If the bona fide sale requirement is satisfied, the taxpayer generally wins. Make sure you have adequate consideration, the interests are proportionate, and value is credited to capital accounts. Make sure there are significant and legitimate non-tax reasons for the transaction, which can include centralized asset management (see Stone and Kimball), protecting assets from creditors and possible divorces, preservation of family assets such as ranches and other large real estate holdings, and avoiding imprudent expenditures by the next generation.

Most § 2036 cases involved the retained right to control of §2036(a)(1). You should avoid using trust income to pay personal expenditures, using trust assets for the benefit of the grantor, and paying transfer taxes and expenses when the assets are transferred close to the death of the grantor. Keep accurate books and make sure there are sufficient assets outside of the entity for the grantor to live on comfortably. Some of the cases in this area include Harper, Strangi, and Miller.

To avoid inclusion under § 2036(a)(2), don't allow the senior family member to have sole discretion to make distribution decisions, but put limits on that discretion. Mr. Porter includes in his agreements a definition of a "business judgment ascertainable standard" for distributions and defines what cash should be available for distribution. Also, bring on younger generation family members to be involved in the entity. Remember that if you satisfy the bona fide sale requirement of § 2036(a)(1), you won't ever get to an (a)(2) issue.

The best advice is to prepare at the planning stage. The IRS will require all documents relating to the creation of the entity including e-mails. Drafters and CPAs may be required to testify, especially in estate tax cases where the decedent can't. You should help your client's case by corresponding about non-tax reasons for the transaction, but you don't need to ignore the tax reasons.

VALUATION

Discounts are still a hot area. The discounts allowed by the IRS since 2000 range from 7.5% (Koons, T.C. Memo 2013-94 (April 8, 2013)) to 63% (Church 2002). The speaker's best advice is to obtain a qualified appraisal from a qualified appraiser, and make sure it is finalized and signed.

FORMULA CLAUSES

Types of approved formula clauses include defined value clauses based on values "as finally determined for federal estate and gift tax purposes," defined value as in the McCord case (120 T.C. 358 (2003)), and price adjustment clauses as in the King case. Whatever you do, do not ever use a reversion clause as in the Procter case (142 F.2d 824 (4th Cir. 1944)), where any excess value went back to the transferor. The speaker's "favorite" entities to which any excess should revert are public charities and donor advised funds, private foundations, and lifetime QTIPS and GRATs (with different trustees and beneficiaries) (in that order).

The speaker also recommended filing a gift tax return to start the statute of limitation running and make sure to report consistent with the formula, reflect the formula in the gift tax return, and attach all formula transfer documents and appraisals to satisfy the adequate disclosure rules.

PROMISSORY NOTES

The IRS is looking at § 7872 issues and, especially where family members are involved, whether the note is a bona fide loan or a gift. Factors the IRS looks at include the interest, repayment schedule, collateral, demand for payment, records, and a reasonable expectation of repayment.

GRATS

Make sure to comply with § 2702 and operate the trust pursuant to its terms. The IRS looks at the valuation on transfer and whether the transfer is actually a disguised gift. Consider using a Wandry formula (based on values as finally determined for federal estate and gift tax issues). See Wandry, T.C. Memo 2012-88 (March 26, 2012).

TRANSFEREE LIABILITY

See US v. Marshall. There is a split in the circuits whether the liability of a transferee is limited to the value of the gift received or is unlimited to include interest. Consider filing a gift tax return to start the statute running.

2:00 - 2:50
SCINs and Private Annuities: Disappearing Value or Disappearing Strategies?
(Financial Assets Series, Focus Series)
Steve R. Akers

For clients with "shortened" life expectancies, planners often consider sales for self-canceling installment notes (SCINs) or private annuities. Both of these strategies have come under IRS attack in recent cases. The underlying viability of these strategies, the tax effects (income, gift and estate tax) of these strategies, and practical planning considerations are addressed.

Reporter: Kimon Karas

We are reporting here only the more significant highlights of this session. A more detailed analysis will be contained in the coverage of Special Session 1-B Planning with SCINS and Private Annuities on Tuesday afternoon.

Steve gave a very enlightened presentation on the topic together with an extensive outline of the subject matter. He provided an overview of some of the nuances of each topic that will be further explored and discussed in the special session. Steve discussed the each topic as a way to move appreciation to younger family members for persons with a life expectancy less than what the tables would otherwise proscribe for such person.

Steve commenced his presentation discussing SCINs. Due to recent developments Steve cautioned against using SCINS until further guidance is issued or case law developments arise.

A drawback of an intrafamily installment sales or sale to a grantor trust is the potential inclusion in the seller's gross estate for the unpaid obligation at death. One alternative is to use a self-cancelling installment note (SCIN), a debt instrument providing that the obligation is cancelled upon grantor's death. The leading case is Estate of Moss where Tax Court held remaining payments due at seller's death was not includable in estate because the 'cancellation provision was a bargained for consideration provided by the decedent for the stock's purchase.' However if SCIN is cancelled by reason of seller's death during note term, the deferred gain likely will be recognized as income the question being whether on decedent's final return or estate's income tax return. See Frane, income recognized on estate's initial income return as IRD.

A recent development is CCA 201320033, where the IRS concluded that Section 7520 tables do not apply to SCINs. Assets were transferred to grantor trusts in return for SCINs, some with substantial principal premium and some with substantial interest premium. Following the CCA is the recently docketed Tax Court case, Estate of Davidson. In Davidson decedent entered into large sale transactions for SCINs. The sales were for notes providing for annual interest payments and balloon payments after 5-years. Decedent died within six months of transaction without receiving any note payments. At time of transactions the Section 7520 tables reflected a life expectancy in excess of 5 years. Evidence presented by four medical experts (two from the estate and two from IRS) who all opined that decedent had a greater than 50% probability of living at least one year at time of transactions. IRS raises two arguments that: 1)SCIN transactions are not bona fide and the notes provide no consideration and 2) in the alternative if SCINs are bona fide, they should not be valued under Section 7520 but rather under willing/buyer/seller analysis. IRS argues that Section 7520 applies only to valuing annuities and life estates. Steve suggests case most likely will be settled and if so, we still may be left with no guidance except the IRS's announced position that Section 7520 is not applicable to SCINs.

Steve then turned to a discussion of private annuities which he favors in light of recent developments relating to SCINs. It is clear in a private annuity the Section 7520 actuarial tables apply. In a private annuity transaction individual transfers property to a younger family member or trust in return for a promise to pay a fixed amount periodically for remainder of individual's lifetime. Annuity can be structured as a deferred annuity, a graduated annuity, or for a fixed number of years or until the individual's death, whichever first occurs (stated term annuity).

Private annuities can be useful in following situations:
1. An individual in poor health, not terminally ill under regulations, but whose life expectancy is less than tables otherwise provide.
2. Individual can self-select asset(s) subject to the sale.
3. Provides cash flow.
4. Hedge to other planning techniques that require longer time periods to capture the intended transfer tax benefits.

Advantages include the following:
1. Shifts future appreciation.
2. No gift tax.
3. Wealth shift if transaction can be structured with a GST-exempt trust.

Disadvantages include the following:
1. Individual outlives life expectancy.
2. If proposed regulations issued in 2006 become final (for private annuities entered into after 10/18/06 with a 4/18/07 effective date), seller is immediately taxed on difference between value of annuity and seller's basis for asset sold. Proposed regulation creates strong incentive for future private annuity transactions be with grantor trusts. Under prior law (pre proposed regulations) gain recognition is deferred and recognized pro rata as annuity payments are made with portion of payment being capital gain and balance ordinary income. Prior to proposed regulations an annuity has three possible components: i)recovery of capital; ii)capital gain; and iii) the balance which is ordinary income; i.e. recovery of basis over seller's life expectancy; gain based on present value of annuity (capital gain until total gain is realized-when annuitant outlives life expectancy-thereafter payments are ordinary income; and balance is ordinary income. If annuitant outlives life expectancy all annuity payments are ordinary income.
3. Payor receives no interest deduction and no immediate full basis in the property. After transferor's death buyer's basis equals the total annuity payments actually made.
4. Potential 2036/2038 inclusion if the payor does not have ability to make the annuity payments.
5. Potentially impractical for older persons.

The distinction between a private annuity and installment sale based on GCM 39503 that provides an annuity is determined to exist if the stated maximum amount would not be received by the individual until after the individual's life expectancy.

The three significant issues to address with the private annuity are the Sections 2036/2038 issues, the valuation using tables under Section 7520, and the exhaustion test.

Section 2036 concern arises if there is a question regarding the ability to make the annuity payments. A particular concern if the sale is made to a trust without significant assets or other ability to make the payments. If Section 2036 applies there should be a Section 2043 offset based on the value of the annuity at the time of transfer. Consider same strategies to avoid Section 2036 as one uses in order to avoid Section 2036 argument regarding sales to grantor trusts, including among others transfer assets to a trust with substantial corpus, seed trust in advance of private annuity transaction, sale should be negotiated between parties, and annuity amount should not be tied to or equal to the income generated by the trust.

Use of Section 7520 table issues are avoided so long as individual does not have an incurable illness or other deteriorating physical condition and greater than 50% probability of living for greater than one year. See Estate of Kite, where decedent sold asset to her children for a deferred, and she died prior to receipt of any annuity payments. Wife had a 12 and ½ year life expectancy at time of sale. Court held using IRS actuarial tables was appropriate even though annuity payments would not commence for 10-years, as wife was not terminally ill at time of sale and had a greater than 50% chance of living more than 1-year. Side note, Steve recommends using commercial software to determine actuarial factors.

The rationale for the exhaustion test is the annuity valuation tables are based on lives of individuals considering the actuarial likelihood of surviving up to age 110. Even if annuity is structured with grantor trust exhaustion test still applies. Failure to satisfy exhaustion test results in a gift. Ways to defend against the exhaustion test include challenging the regulation relating to exhaustion, enter into transaction with existing funded trust, or enter into personal guarantees, which did not work in Trombetta. A possible alternative to satisfy the exhaustion test without having a preexisting funded trust is to use a term annuity, for a stated term or annuitant's life expectancy, whichever is shorter.

Steve concluded the presentation by discussing considering the use of a deferred annuity where the effect is to increase the likelihood that the annuitant receives no or few payments prior to death. Also consider sale of assets from a QTIP for a private annuity, reference to Estate of Kite.

2:50 - 3:40
Oh, What a Relief It Is: Curing Estate Plans that No Longer Make Sense in Light of the American Taxpayer Relief Act of 2012 (Focus Series) John F. Bergner

As a result of ATRA, the federal wealth transfer tax system is no longer relevant to most taxpayers and less relevant to the rest. For most taxpayers it will be more important to plan for reducing income tax than for reducing transfer tax. Typical estate planning transactions that may have once been appropriate for a client may be less so in the post-ATRA world. This presentation explores how clients can escape from the no-longer-useful (or perhaps harmful) estate planning transaction or more efficiently administer those they cannot escape from.

Reporter: Michael Sneeringer Esq.

Mr. Bergner methodically described nine strategies that estate planning practitioners should review and recommend as needed to their clients post-ATRA. Mr. Bergner's remarks are thoroughly described in the written materials so those wanting an in-depth discussion, with endnotes, should consult those materials.

Mr. Bergner began his presentation with an overview of pre ATRA planning and how estate tax savings were more important to clients than today whereby income taxes are more of an immediate concern. He described the frenzy of 2012 planning and the aftermath that is ATRA.

Mr. Bergner outlined the nine strategies that clients should pursue post-ATRA, including: (i) avoiding valuation discounts for client-owned assets; (ii) causing inclusion of trust assets in the settlor's estate; (iii) causing inclusion of trust assets in a beneficiary's estate; (iv) causing inclusion of trust assets in a third party's estate; (v) causing inclusion of gifted assets (not in trust) in the donor's estate; (vi) changing ownership of spousal assets to achieve a new income tax basis for appreciated assets and to preserve the income tax basis of "loss assets"; (vii) avoiding imposition of the 3.8% net investment income tax ("NIIT"); (viii) addressing life insurance policies and life insurance trusts that are no longer needed; and (ix) turning off grantor trust status to avoid unnecessary wealth shifts and to facilitate income tax planning.

Mr. Bergner noted that there are common issues in implementing these strategies, including, but not limited to: planning for the future; ethical issues; state and local tax issues; state law regarding fiduciary duties; and governing

documents.

Mr. Bergner first discussed avoiding valuation discounts for client-owned assets. He pointed out the example on page 6-7 of the materials in noting that after ATRA, although valuation discounts will still produce an income tax cost, because of reduced rates and increased exclusions and exemptions, valuation discounts may not yield as many estate tax benefits.

Next, Mr. Bergner discussed the strategy of causing inclusion of trust assets in the settlor's estate. Within this strategy, he described the use of the "swap power" and noted the *Estate of Halpern* case as references.

Mr. Bergner then discussed causing inclusion of trust assets in a beneficiary's estate. Some of the subtopics highlighted were the intentional triggering of the Delaware tax trap and avoiding funding the bypass trust upon a death of a spouse with an outdated estate plan. Mr. Bergner described the concept of using a family settlement agreement and the problems that can transpire there.

Next, Mr. Bergner discussed causing inclusion of trust assets in a third party's estate. He noted that estate planning practitioners need to help their clients avoid Code Section 2014(e) and the one year transfer prior to death rule. Mr. Bergner followed up that discussion with the strategy of causing inclusion of gifted assets (not in trust) in the donor's estate.

In discussing changing ownership of spousal assets to achieve a new income tax basis for appreciated assets (and to preserve the income tax basis of "loss assets"), Mr. Bergner highlighted the discussion on page 6-56 in the materials. He highlighted in this strategy's discussion how couples can live in a common-law state but still cause appreciated assets to be considered community property using an Alaska Community Property Trust or a Tennessee Community Property Trust.

Mr. Bergner only briefly described avoiding imposition of the 3.8% NIIT and addressing life insurance policies and trusts that are no longer needed. However, he noted that the ABA booth at this year's Heckerling Institute had a wonderful PowerPoint presentation that it was giving out on NIIT.

Mr. Bergner finished up with the strategy of turning off grantor trust status to avoid unnecessary wealth shifts and to facilitate income tax planning. He noted that this strategy was of particular importance in the new income tax world whereby paying income tax when the client could get a step-up in basis is a bad move. He referred the audience to the seven alternatives on pages 6-77 through 6-89 of his materials.

In conclusion, as Mr. Bergner stated at the outset, even if the Estate Tax was repealed, everything in his outline would still be relevant!

3:55 - 4:45
Cain v. Abel: How to Prevent Sibling and Cousin Rivalry When a Family Owns a Business

Louis A. Mezzullo

The discussion will describe strategies to deal with disputes among siblings and/or cousins over business and family issues that are detrimental to the success of the business and a congenial family, taking into account trust, corporate, tax, and estate planning issues. In addition, it will cover ways of dealing with such conflicts once they occur.

Reporter: Joanne Hindel Esq.

Lou Mezzullo used Cain versus Abel as his theme story; he read a children's version of the biblical story.

While most businesses in the U.S. are family owned it is estimated that only 30% survive to the second generation and only 12% to the third generation.

The most prevalent cause for the failure of family businesses is conflicts among brothers and sisters and/or cousins.

Some of the factors that cause sibling and cousin rivalries are:
1. Not all the siblings are active in the business and the inactive members would rather sell the business.
2. The siblings are in unequal financial conditions and those with less financial resources outside the business want more dividends or distributions.
3. Those family members who are not in the business may feel left out and not in control of the board of directors.
4. The family members without descendants will be likely to agree to the sale of the business.
5. If only one or some of the family members are named as trustees of the family trusts, the others will resent their control.
6. Similarly, if one of the family members is elected as president or CEO by the parent with control, the other siblings may resent that child.

For the lawyer representing the family business and the family there are ethical issues involving conflicts of interest in representing multiple clients with different interests and agenda. May also be difficult to represent active versus non-active family members or family members and non-family employees.

In the attempt to achieve a workable business succession plan the following factors may pose obstacles:
1. In-laws
2. Non-active family members
3. Owner's unwillingness to give up control
4. Liquidity needs of the family and or/business
5. Divorce among the family members
6. Non-family key employees
7. Substance abuse

Case studies

In the majority of the cases Lou acted as an expert witness in the litigation. In some cases, he was able to make recommendations to avoid the problem, in others he could not.

He described the **first case** where the son was left as president of the family businesses and trustee of the family trusts – valued at about $4 Billion. Sisters became unhappy with his management and challenged their brother on a number of issues including his compensation and the return on the trust investments. A possible solution might have been to provide more specific terms in the trust authorizing the son/trustee to handle matters as he did.

In the **second case** one sibling was left as the president of the family business and trusts of the family trust and of a voting trust holding stock in the family business. The other siblings sued the brother because they wanted to sell the business but because the son/trustee had control of the voting trust they could not force the sale. The litigation revolved around the duties of the trustee of the voting trust.

In the **third case** non-active siblings were owners of interests in a pass-through entity. Since there was no provision in the partnership agreement to force distribution of cash, the owners could not access dividends to cover the taxes associated with the income allocated to them by the partnership return. A solution to the problem is to have a provision in the shareholders agreement that allows them to require the distribution of sufficient cash to cover the income tax liability.

In the **fourth case**, siblings asserted that one child exercised undue influence on the mother to leave the most valuable asset to that child in contradiction to the long- standing estate plan of the mother and father. One of the issues was the fact that the attorney who had represented the parents for years continued to represent the child who had allegedly committed undue influence.

Lou then described the **George Halas Family dispute** involving the Halas family and their ownership of the Chicago Bears. It revolved around the actions of the trustee of trusts that held interests in the company that owned the Chicago Bears. The lawsuit dealt with the trustee's duty of notice to interested parties and the actions taken by the trustee and whether they were a violation of his fiduciary duty. The court addressed the language in the trust agreement and held that it authorized the trustee to engage in the conduct that he undertook.

Planning to avoid disputes

With the founding owner a good approach is to encourage the owner to set policies while he is alive and set an example by being transparent about the business and the estate plan. The spouse of the owner plays a crucial role in ensuring that the next generation will function as a team.

When the second generation takes over the dynamics may change depending upon whether only one child or multiple children take control. If only one, this will be a lot like the original owner's structure. If more than one child assumes control the possibility for conflict may increase.

By the third generation, the chances of having more remote family members in the business increases. Management of the business may be more structured. The possibility of sale to a third party increases or the business could also go bankrupt.

A business should establish a mission statement and a strategic plan for the next five or ten years. These should be reviewed periodically and amended as the family changes.

The business should also adopt objectives and specific policies addressing compensation, standards for family employment, distributions of profits to the equity owners, retirement of family members, redemption of equity interests and other matters that create potential conflict.

The business should create communication guidelines that include regularly scheduled meetings of the family, perhaps the creation of an advisory board to add non-family members to the board of directors and eventually adding nonfamily members to the board.

A plan should be developed to address ownership of voting stock, the ability of active members to buy out inactive members and the use of premarital agreements to avoid dilution of ownership as a result of divorce.

4:45 - 5:35
Coping with Death and Incapacity: How the Uniform Fiduciary Access to Digital Assets Act will help
Suzanne B. Walsh

Our clients lead increasingly virtual lives. Unfortunately, both technology provider policies and federal and state laws lag far behind technology's advances. The Uniform Fiduciary Access to Digital Assets Act ("UFADAA"), will give estate planners and fiduciaries the ability to plan for and manage digital assets, both before and after death.

Reporter: Tiffany L. Walker Esq.

The discussion opened with an introduction of Ms. Walsh, highlighting the active role she played in the Uniform Fiduciary Access to Digital Assets Act (UFADAA) as chair of the Uniform Law Commission's Committee on

Fiduciary Powers and Access to Digital Assets. A copy of the final act is included in the materials accompanying the presentation, and is also available on www.unifromlaws.org. Ms. Walsh commented that although the UFADAA proved difficult to draft, there is no doubt about the necessity for such an act. Digital assets are growing exponentially; however, as of the date of the presentation, only nine states have enacted legislation dealing with fiduciary access to digital assets. Ms. Walsh went on to comment that although nine states have enacted this legislation, only Delaware's legislation is similar to UFADAA. In comparison, Connecticut, Idaho, Indiana, Louisiana, Oklahoma, Rhode Island, Nevada, and Virginia enacted limited legislation. Ms. Walsh also noted that most state probate codes do not mention digital assets, which are difficult to define.

Ms. Walsh went on to provide some background information on the Uniform Law Commission, including that the drafting process involved commissioners, observers, and advisors. Notably, Ms. Walsh provided that observers for the enactment of the UFADAA involved input from third parties in the business of digital assets, including representatives from Google.

Following the format of the printed materials, Ms. Walsh discussed the challenges involved in providing fiduciary access to digital assets. Several challenges were outlined in the discussion, including encryption, which may be more difficult for fiduciaries to circumvent than passwords, and terms of service agreements. However, Ms. Walsh commented that federal laws are the biggest impediment to providing fiduciaries with access to digital assets.

More specifically, the fourth amendment provides a strong expectation of privacy in a person's home, and although networks accessed are not located in the home, there is still the same expectation of privacy. In response, Congress enacted the Stored Communications Act, which includes an exception allowing public communications providers to voluntarily disclose communications with the lawful consent of the sender, recipient, or intended recipient. Ms. Walsh stated that this exception does not expressly include fiduciaries, although there is evidence that senate may have intended for fiduciaries to be included. A state law or court order for a fiduciary's request for such information should expressly provide that the fiduciary has lawful consent. Although, legislation enacted in Virginia provides parents of minors post-mortem access to electronic accounts. Ms. Walsh further discussed that the disclosure of non-content information, such as sender information or a subject line, is not prohibited by the SCA.

The presentation then turned to the topic of the need for estate planning documents to address digital assets. Ms. Walsh mentioned the potential for prosecutors to impose criminal liability against fiduciaries accessing digital accounts. In addition to criminal prosecution, civil damages may result. Ms. Walsh provided an example of a disagreement between two business partners that resulted in the aggrieved partner being awarded $450,000 as a result of the other business partner accessing an email account with a previously shared password.

Although terms of service agreements control the account holder and the custodian, Ms. Walsh pointed out that most people do not read these agreements carefully. As an example, Ms. Walsh provided the results of a recent study where several people consented to giving their first-born child in exchange for free Internet under the terms of a service agreement. Although terms of service agreements may prohibit the transfer of content, Section 8 of UFADAA renders boilerplate provisions in terms of service agreements void against public policy. As such, an affirmative election to prohibit a fiduciary from the same authority as the account holder is required. Ms. Walsh also commented that a similar affirmative election must be made for choice of law clauses into a jurisdiction prohibiting access under state law.

As mentioned above, Ms. Walsh expressed that there was some difficulty in defining digital assets. Although the committee began with a laundry list of items for the definition, the definition as drafted is short and all-inclusive. However, the definition does not include ownership of the underlying asset.

The discussion continued on with an overview of the provisions of UFADAA. Ms. Walsh began with Section 4,

which grants a personal representative access to digital assets unless otherwise prohibited under the terms of service agreement, in a will, or by a court. Section 5 grants a conservator or guardian access after the opportunity for a hearing, and Section 6 provides for agents acting under a Power of Attorney to access digital assets and catalogue of electronic communications. However, Ms. Walsh pointed out that UFADAA requires express consent for an agent to access electronic communications content. Section 6 is noted as a point of contention for many attorneys due to the fact that, similar to gifting, authority to grant access to electronic communications content must be expressly included in the power of attorney, which will require clients to sign an updated power of attorney document.

Following the discussion of the Sections 4 through 6 of UFADAA, Ms. Walsh pointed out that UFADAA confirms the authority of a trustee accessing accounts opened by trustee. Although Ms. Walsh stated that the transfer of title should provide lawful consent, UFADAA distinguishes between electronic communications content and catalogues. In addition, Section 8 of UFADAA specifies the nature, extent and limitation of the fiduciary's authority over digital assets, omitting any provisions on the mechanics of transferring digital assets to trusts. Ms. Walsh described that this Section further authorizes fiduciaries to access digital assets on devices.

In addition to providing for access to digital assets, Ms. Walsh pointed out that UFADAA also requires that custodians comply with a request for access within a specified time period. Further, if a custodian complies, then the custodian is immune from liability. Despite the grant of custodian immunity, Ms. Walsh noted that custodians are arguing for indemnity as well.

Ms. Walsh closed the discussion mentioning the enactment of UFADAA in Delaware, and the expected eventual widespread enactment. Further, Ms. Walsh provided that anyone interested in enactment in their state may contact Ben Orzeske at NCCUSL who will assist in enactment, provide a kit and lend support.

Wednesday, January 14

9:00 -9:50

The Devil Is in the Details: Important Tax Administration and Procedural Rules for Estate Planners (Focus Series) M. Read Moore

Who would want to lose a tax matter for a client based on a technicality? This presentation will address important technical rules, from the obvious to the obscure, that frequently come up with estate planning clients with respect to tax returns and tax controversies. Among the topics addressed will be what is a tax return, where, when, and how to file tax returns, amended returns, the gift tax adequate disclosure rules, refund claims, statutes of limitation, and when reliance on the advice of an attorney or accountant is reasonable cause to avoid penalties.

Reporter Michael Sneeringer Esq.

Mr. Moore touched on all of the subjects that have a lot of little details that come up when estate planning practitioners are filing returns with the IRS for their clients.

Mr. Moore described tax procedure as a daily thing: there are many procedural issues that are constantly changing.

Mr. Moore's outline of 118 pages discusses topics covered in the presentation and many other topics in great detail.

Mr. Moore began with the topic of what the return is and why it is important. He expounded upon the three requirements that explain when a document filed with the IRS is a return… it is a return if it is: (i) filed on the proper form; (ii) provides sufficient information for the IRS to compute the tax owed; and (iii) is signed under penalties of

perjury.

Mr. Moore spent a generous amount of time during the beginning of his presentation on the adequate disclosure rules and the gift tax statutes of limitation. He highlighted page 9-32 for the beginning on the discussion of the adequate disclosure rules. His important takeaway point was that the adequate disclosure rules are a "safe harbor." He highlighted the *Brown* case in his remarks. The question posed was: was there adequate disclosure and substantively, was there a gift?

Mr. Moore then spent time describing who could sign the return. He went through who could sign income tax returns versus estate tax returns versus gift tax returns. A fact that he noted as quirky is that a client's agent can file the gift tax return on behalf of the taxpayer, subject to certain conditions enumerated in more detail in his materials.

Mr. Moore highlighted the fact that the estate tax and gift tax are cumulative; estate planning practitioners may have no duty to amend prior returns, but at least need to include the correct amount of exemption remaining.

Mr. Moore then discussed the effects of amending returns. He mentioned how the mechanics work if an amended return is filed timely, as well as if an amended return is filed following the due date. These due dates were in the materials on page 9-9. He also described the mechanics of extensions which are also cited in his materials. Some of the due dates discussed were the date for filing individual income tax returns, trust returns, FBAR and claims for refund. Mr. Moore spent extra time on claims for refund which are highlighted in his materials on page 9-45.

One of the takeaways from Mr. Moore's presentation was his emphasis on foreign assets and income; estate planning practitioners whose clients have foreign income or foreign assets must be sure to report as there is a six year statute of limitations. He noted that the statute of limitations can be extended if an agreement with the government is made with the taxpayer.

Mr. Moore moved on to discussing filing the return. He went over when the return is deemed filed, including the mailbox rule, use of registered and certified mail, and which private delivery services were approved to deliver returns to the IRS. Mr. Moore noted the *Grossman* case and postal service processing.

Mr. Moore finished up his presentations by going through the various penalties that taxpayers could be subject to. He noted page 9-55 of his materials for reference and more information on penalties.

9:50 - 10:40
Lloyd Leva Plaine Distinguished Lecture Series Crafting a 21st Century Estate and Gift Tax David Cay Johnston, Ronald D. Aucutt

The estate and gift tax are porous, ineffective and lack intellectual coherence. A rewrite of the code would give the system integrity, encourage strivers, discourage dynasties and strengthen the 2,500-year-old principle of progressive taxation that is fundamental to democracy. The presentation is part of a broader project to devise a tax code for the 21st Century economy drawing on ancient principles of tax that the author teaches at Syracuse University College of Law.

Reporter:Bruce A. Tannahill Esq.

The Lloyd Leva Plaine Distinguished Lecture Series honors and remembers Lloyd Leva Plaine, a well-respected estate planning attorney and frequent presenter at Heckerling. In his introduction, Mr. Aucutt paid homage to Ms. Plaine. He observed that it is very fitting that these lectures focus on the tax policy issues she loved so much.

Mr. Johnston won a Pulitzer Prize for his coverage of taxes in *The New York Times* in 2001 and was a finalist three

other times. He is in his seventh year at Syracuse University College of Law, teaching the tax, property, and regulatory law of the ancient world.

This session featured a presentation by Mr. Johnston, followed by his responses to questions posed by Mr. Aucutt. Mr. Aucutt noted that some of his questions may be contrarian to stimulate the discussion that Ms. Plaine would have loved.

Overview

Mr. Johnston acknowledged his proposal is a work in progress and requested that the audience send him comments on it. During the discussion with Mr. Aucutt, he stated that the plan needs further thought and development. He sprinkled his presentation with quotations from Plutarch, Edmund Burke, and Teddy Roosevelt, among others.

Mr. Johnston began by observing that "the American transfer tax system is economically, intellectually, and legally incoherent. It double taxes, under taxes, and far too often fails to levy economic gains. It has become so porous that a gift worth $100 million can be passed through a $1.2 million tax-free hole."

He stated that our current tax system was well designed for the 20th century. Our current economy has progressed beyond the 20th century economy while our tax system has not. Our tax system needs to be updated to reflect our 21st century economy.

Mr. Johnston referred back to ancient principles of government and taxation. Those principles are that tax is the foundation of civilization. It is not our master or enemy, it is our servant. Without that foundation, there can be no liberty, no private wealth creation or government that sets rules, defines property rights and protects them. If tax is the foundation of everything we hold dear, he said we should oppose chipping away at its granite base until it turns to sand, making everything built on it unstable.

He traced the theory of progressive taxation back to Athens. It has been supported by people as diverse as Plato, Adam Smith, Karl Marx, John Maynard Keynes, Milton Friedman, and George W. Bush. He said we shouldn't ignore such classic, conservative virtues.

Founders of country wrote at length about what they feared would destroy America. Their focus was on inequality. Plutarch said imbalance between rich and poor would cause the downfall of a democracy. Several founders feared that if most were wage workers or sharecroppers, wealth owners will convince the wage workers/sharecroppers of voting against their interests.

He stated we actually live in the second American republic. The first, governed by the Articles of Confederation, didn't have power to tax or power to regulate trade. Our Constitution lists six purposes of our country, including promoting the general welfare. He believes that the dead have no need of welfare nor do billionaires but we are taking from the many to give to the very rich few and it will destroy the country if we don't stop it.

Mr. Johnston believes we need to focus on underlying principles. Our tax system should motivate, encourage, and reward productive investment and discourage unproductive investment.

Discounts came in for a great deal of criticism. They can allow people to escape tax on hard to value or fractionalized assets while earnings and readily marketable securities are subject to full tax. He thinks estate planners are aiders and abettors in fraud and cheating through promoting discounts.

In the Constitution, we have given Congress essentially an unlimited power to tax. We didn't want oppression by those in power of those out of power so it requires taxes to be imposed uniformly. An export tax was banned to get

the southern states to ratify the Constitution.

The Modern Optimal Savings Tax (MOST)

Mr. Johnston proposes a new system that will reflect today's economy. Mr. Johnston stated that his proposal is a work in process and welcomes comments on it. He calls it the" honest tax." Many of his ideas run contrary to current conservative thoughts on taxation.

His proposal uses an account he calls a Lifetime Investment Account (LIA). The purpose of the plan is to encourage investment in productive assets, not unproductive assets. Only productive assets can be held in a LIA. In return, you get total freedom to move economic assets from one to another without tax.

The features of LIAs would include:

- Trusteed investment accounts;
- Rigorous set of fiduciary obligations on the trustee;
- An absolute prohibition on loans from LIAs;
- Unlimited deposits and withdrawals, with withdrawals subject to tax to the extent of gains;
- Full protection from creditors; and
- Deposits and withdrawals must be made in cash.

The fiduciary would be responsible for ensuring that transactions in any investment other than publicly traded securities is done at arms-length prices. Personal use property, including personal homes, could not be owned in a LIA, nor could collectibles. The fiduciary would be trained, licensed, and bonded. A condition of fiduciary service would be agreeing that they will be subject to severe civil and criminal penalties for misconduct.

At an individual's death, his/her LIA would be liquidated and any gain subject to tax, unless there was a surviving spouse. A surviving spouse would become the temporary owner of the deceased spouse's LIA. At the surviving spouse's death, both LIAs would be liquidated and taxes paid on the gains, even if the surviving spouse had remarried.

Mr. Johnston admitted it looks like a big tax break for the rich. In return for giving up their lifetime exemption, except for withdrawals, no longer have to worry about tax impact of economic decisions. One of the big benefits is that it eliminates the lock-in effect.

He concluded by saying that he doesn't want any of his descendants to pick up history textbook that begins "the U.S. was . . ." and goes on to describe the downfall of the U.S.

Comments for Mr. Johnston about the MOST plan may be sent to him at dcjohn01@syr.edu.

10:55 - 12:35
Question and Answer Panel
Dennis I. Belcher, Samuel A. Donaldson, Carlyn S. McCaffrey

Reporter: Kimon Karas Esq.

This session included the panelists addressing a number of questions presented by Institute attendees including some follow up on the topics addressed by the same panel in the Recent Developments Session on Monday afternoon. Here are the significant highlights.

The presenters commenced their presentation responding to a question from young practitioners asking what sources or materials should one refer to in order to keep current with updates and developments. Sources cited included among other, Tax Notes, Leimberg List Serv, Checkpoint, BNA Daily Tax Report, Trusts and Estates and Estate Planning periodicals, ABA RPTE Section, state bar associations, Tax Prof and Trust Prof Blogs, as well as participating in or forming study groups within local community of attorneys, accountants, financial planners, and trust officers.

The panelists addressed a question regarding a QTIP trust with marketable securities creating a FLP to be funded with marketable securities. The considerations to be considered include:

1. Does the governing document/state law grant fiduciary authority to do so,
2. Reason-business purpose.
3. Fiduciary duties owed to beneficiaries restricting beneficiaries' ultimate access to funds by reason of agreement's restrictions.
4. Section 2519 should not be a concern citing FSA 199920016.

Next the panelists discussed a QTIP with an FLP that as a result of tax law changes wants to position the trust for a basis step up. Consider amending governing document to remove restrictions that depress value.

A question related on the obligation/duty to file a portability election in a second spouse situation where child (not child of surviving spouse) is fiduciary and estate otherwise has no filing obligation, where estate value is under filing threshold. Panelists concurred there is no duty to file an estate tax return to elect portability; however if spouse offers to pay costs, expenses may want to consider. Does filing return expose estate to issues that it would not otherwise be subject to if there is otherwise no obligation to file by filing, i.e. prior gifts? Executor must weigh duties and who the beneficiaries are.

A question was posed does not addressing asset protection planning in an estate planning matter expose professional to professional liability. Probably not but it depends upon the custom in the community; may have an obligation at least to address asset protection with a client who may be a high risk occupation, endeavor, and if the practitioner does not engage in asset protection planning to at least refer or co-counsel with one who does. Best practice is to address in engagement letter.

A question was posed regarding allocation of trustee's fees in a QSST, where general rule is trustee's fees allocated ½ to income and ½ to principal when all distribution to QSST is income. Consider power to adjust.

In response to a question on gift tax adequate disclosure, disclosing a transaction on Form 1040, i.e. sale to grantor trust is not adequate disclosure for gift tax purposes. Adequate disclosure must be made on Form 709.

Next the panelists discussed a recent New York Times article regarding families creating private art museums for art collection in facilities on family compound. Questions arise what is charitable purpose-what extent is it open and available to the public-a fact question and must be aware of self-dealing issues.

Next a question was posed where child has right to acquire father's 50% interest in partnership for $50K with a value of $4M. Section 2703 would not respect the $50K value for estate tax purposes although son has a state contract right to purchase for $50K. Further question is what is value for spouse's elective share right. Not clear although elective share statutes do not reference federal estate tax values.

Next panelists discussed Section 67(e) unbundling. Corporate fiduciaries are studying issue based on an informal survey conducted by the panelists of corporate fiduciaries attending the Institute. One suggested in a trust situation 40% of fees would not be subject to limitation and in an estate situation 80% of fee would not be subject to the limitation.

In addressing a question regarding a late filed 706 to elect portability 706 at second spouse's death when 706 not filed in first spouse's estate, panelists agreed based on Section 2056 regulations as long as this return was first filed return it should be acceptable.

A question was raised regarding a QTIP trust that has exploded in value between time of spouse's first death where surviving spouse and remainder beneficiaries want funds to pass to charity and trust does not grant surviving spouse a power of appointment. Consider state law modification, children can give remainder interest to charity, or decant into a trust where surviving spouse is granted a power of appointment.

The panelists addressed two situations regarding late elections. One related to portability if person failed to satisfy 12/31/14 relief provision under the Rev. Proc. Consider Section 9100 relief if facts fit within requirements. An additional fact situation was posited where husband and wife file 709 and elect split gift. Based on an oversight there was a failure to allocated GST on a GST transfer made by transferor spouse. Now husband unknowingly has used part of GST exemption because of the automatic allocation rules. A proper situation to request 9100 relief.

2:00 - 5:20
FUNDAMENTALS PROGRAM #2
Robert S. Keebler, Jeremiah W. Doyle, IV

This easy to understand session will discuss the core concepts of the income taxation of estates and trusts including planning ideas and the "dirty dozen" things estate planners need to know. A lifetime of knowledge taught in 3 hours!

Reporter: Carol A. Sobczak

This reporter requested this Fundamental Session for her own edification, but entered the session with trepidation, having glanced at the nearly 200 pages of materials. Her fears soon subsided, however, as the session was presented in an organized, logical manner, covering the fundamentals in an interesting and comprehensive way.

The materials included three well-written outlines: (i) Income Taxation of Trusts and Estates; (ii) The ABCs of IRD; and (iii) Grantor Trusts. The presentation, while it could not cover all of the materials, focused on the basics.

Mr. Keebler began by stating that the world of fiduciary taxation is becoming more important to estate planning professionals as fewer taxpayers need to be worried about the estate tax, while fiduciary income tax rates can be as high as 39.6% (at only $12,300 of income) plus the 3.8% tax on net investment income. When you add state income taxes, you could have a 50% rate. The basic concern is not to have a trust or estate pay income tax, but rather to have it flow through to the beneficiaries, whose rates and tax thresholds are lower.

Both presenters shared the stage for the remainder of the presentation, and this reporter will not differentiate between them in this summary.

General Rules. The income taxation of trusts and estates is governed by Subchapter J of the Code (§ 641 *et seq*.). An estate or trust is a separate taxable entity. Generally, the taxable income is computed in the same manner as for individuals (§ 641(b)) with some exceptions. ,

A fiduciary may elect a fiscal year for an estate. A trust may use a fiscal year if it elects §645 treatment. The income of a trust or estate is taxed either to the entity or to the beneficiary. The exemptions are different ($600/$300/$100); there are different rules for charitable deductions; and depreciation deductions are allocated between the entity and the beneficiary.

Administrative expenses may be deducted on either the estate tax return (706) or fiduciary income tax return

(1041). An executor fee may be split between the 706 and the 1041.

Administration expenses include attorney and accountant fees, executor commissions, filing fees, surety bonds premiums, appraisals, etc. The fiduciary may elect to take the expenses on the 706 or the 1041, and the expenses are generally not subject to the 2% floor. The general rule is to claim expenses on the return with the highest tax rate, which more often these days is the income tax return.

Any deductions attributable to tax exempt income are non-deductible. If a trust or estate has tax exempt income, a portion of the trustee or executor fee will be non-deductible.

Types of Trusts. There are three types of trusts for income tax purposes: (i) simple trusts; (ii) complex trusts; and (iii) grantor trusts, and the rules are different for each.

A *simple* trust is required to distribute its accounting income annually, cannot make any principal distributions or distributions to charity.

A *grantor* trust is one where the grantor or beneficiary has one or more "powers" described in §§ 673-678, resulting in all income, expenses, and credits "flowing through" and taxed to the grantor or beneficiary regardless of whether any distributions are made. The rules of Subchapter J do not apply to grantor trusts, and they were not discussed in this presentation.

A *complex* trust is any trust other than a simple or grantor trust.

Definitions of Income. There are several very important concepts when dealing with the income taxation of trusts and estates that differ from income taxation of individuals. The first is "trust accounting income" (TAI), defined by the governing instrument or, if silent, state law (such as the Uniform Principal and Income Act or unitrust provisions). TAI governs the amount of distributions to beneficiaries and the allocation of receipts and disbursement between accounting income and principal. TAI does not include capital gains, subject to several exceptions.

"Taxable income" (TI) of an estate or trust is computed the same as for an individual, except the exemptions are different ($600 for an estate, $300 for a simple trust, and $100 for all others); there are different rules for charitable deductions; depreciation deductions are allocated between the entity and the beneficiary; and administration expenses are generally not subject to the 2% floor.

If income is accumulated in the trust or estate and not "deemed" distributed, it is taxed to the trust or estate rather than the beneficiary. If income is distributed, the trust or estate gets a deduction for the amount of the distribution, but it is limited to "distributable net income" (DNI) (discussed below). The beneficiary accounts for income actually distributed (or deemed distributed) to the beneficiary, limited to DNI.

"Distributable net income (DNI) is the heart of the income taxation of trusts and estates. It governs the amount of an estate's or trust's distribution deduction and the amount a beneficiary accounts for on his own return, and the character of that income.

To calculate DNI, start with TI and then

- Add back the distribution deduction and the personal exemption;
- Subtract out capital gains (but add back capital losses allocable to principal [except in the year of termination]);
- Subtract out extraordinary dividends and taxable stock dividends allocated to corpus for simple trusts; and
- Add back net tax-exempt income.

Capital gains are generally taxed to the trust or estate, thus are TI but not TAI. There are exceptions, such as in the year of termination of the trust or estate, and some others (under Reg. 1.643(a)-3.

The rules of DNI and the distribution deduction apply differently to simple trusts versus complex trusts and estates.

Simple Trusts: In a simple trust, the income distributable is a deduction for the trust or estate, and is income to the beneficiary, whether or not actually received by the beneficiary. The character of income remains the same for the beneficiary as in the estate or trust. If there are multiple beneficiaries, DNI is apportioned among them in proportion to the TAI received by each.

Complex Trust: In a complex trust or an estate, the beneficiary is taxed on distributions, but only up to the amount of DNI. Gains are taxed to the trust or estate, and its distribution deduction is limited to DNI. Trust income retains its character in the beneficiary's hands. DNI is allocated among multiple beneficiaries proportionately, based on distributions to each beneficiary.

There are several important concepts when dealing with complex trusts and estates: (i) the tier system; (ii) the separate share rule; (iii) the 65-day rule; (iv) specific bequests; and (v) distributions in kind.

Tiers. The first tier is beneficiaries to whom income is required to be distributed, and the second tier is all others. DNI is taxed first to the first tier beneficiary and any balance is taxed to the second tier.

Separate Share. This rule allocates DNI among beneficiaries based on distributions of their "share" of DNI. This applies when substantially separate and independent shares of different beneficiaries of a trust are treated as separate trusts. An example from the materials follows:

Trust has $20,000 of DNI. Trustee distributes $30,000 to A and $10,000 to B. Under pro rata rules, A would include $15,000 of DNI ($30,000 distribution/$40,000 total distribution x $20,000 DNI), and B would include $5,000 of DNI ($10,000 distribution/$40,000 total distribution x $20,000 DNI). If the separate share rule applies, A's separate share earns $10,000 of DNI and B's separate share earns $10,000 of DNI. Note that this rule is solely for computing DNI, and its effect is to treat multiple beneficiaries of a single trust or estate as if each were the sole beneficiary of a single trust.

The 65-Day Rule. This rule allows a fiduciary to treat a distribution to a beneficiary made within 65 days of a new year as being made on Dec 31 of the preceding year. The election must be made by the due date of the tax return and is irrevocable. This is a year-by-year election.

Specific Bequests. Bequests of specific sums of money or specific property do not carry out DNI. For this rule to take effect, the bequest must be paid all at once or in not more than three installments, and the amount of the bequest must be ascertainable at the date of death. It is not deductible by the trust or estate or taxable to the beneficiary.

Distributions in Kind (§643(e) election). For residuary bequests, an estate or trust may elect, but is not required, to recognize gains or losses. A distribution carries out DNI, but the amount of DNI depends on whether the § 643(e) election was made. If not made, then the DNI carried out is the lesser of basis or FMV of the distributed property. If the election is made, then the DNI carried out is the FMV of the distributed property. The basis of property to the beneficiary is the basis of property to the estate or trust plus or minus any gain or loss the estate or trust elects to recognize on the distribution.

Charitable Deductions. For a charitable deduction to be valid, a charitable bequest must be paid from gross income and pursuant to the governing document. If valid, it is unlimited in amount. There is no distribution deduction if the charitable deduction is not valid. Generally, the bequest must be actually paid in current year or preceding

year. Estates and pre-1969 trusts can get a charitable deduction if the amount is "permanently set aside" for charitable purposes.

Depreciation. For trusts, depreciation is apportioned between the income beneficiary and the trust by the terms of the trust document or, if none, then on the basis of trust income allocable between the beneficiary and the trust. For estates, depreciation is allocable on the basis of income allocable to the beneficiary and the estate.

The § 645 Election. When made, this election treats a "qualified revocable trust" as part of the decedent's estate for federal fiduciary income tax purposes. The election is made on Form 8855 and must be filed by the due date of the fiduciary income tax return for the first taxable year of the estate, including extensions.

The benefits of making the election include filing one return instead of two; using a fiscal year-end; eligibility for holding sub-S stock for the duration of the election; and not being obligated to make estimated tax payments for any taxable year ending within two years of the decedent's death.

Termination of Trust or Estate. Upon the termination of a trust or estate, any excess deductions and unused loss carryovers can be passed on to the beneficiaries.

AND NOW, WHAT YOU'VE ALL BEEN WAITING FOR. . .

Taking all of the above into consideration, here are the ***"Dirty (Baker's) Dozen"*** -- Drafting and Planning Ideas:

1. Select a fiscal year-end for estates to take advantage of income tax savings.
2. Administration expenses should be elected where they will save the most taxes.
3. Draft documents with flexibility to include gains in DNI.
4. Include boilerplate language to allow non-pro-rata distributions.
5. Use specific bequests to avoid DNI carryout.
6. Avoid the separate share rule, if desired, by drafting as a spray trust or having a trust divide into separate subtrusts.
7. Take advantage of the §643(e) election to control taxation of capital gains and DNI carryout.
8. Consider §645 election to take advantage of estate's more favorable rules.
9. Draft carefully to qualify for §642(c) fiduciary income tax charitable deduction.
10. Avoid excess deductions in year prior to termination.
11. Remember the 3.8% surtax when drafting trusts.
12. Consider "Kenan" gain when drafting formula clauses – pecuniary versus fractional (pecuniary bequests carry out income).
13. "Extra Credit"

- Separate share rule has special rule that applies to IRD.
- IRD is allocated to any share that could "potentially" be funded with IRD, whether or not actually funded with IRD.
- If intent is for IRD to go to a particular share (e.g. marital trust), draftsperson must so state in the trust instrument.
- If IRD is not specifically allocated, surprises could result.

For an example of a 2014 fiduciary income tax return for a complex trust and a resource list for this topic, see the materials on the Heckerling web site at www.law.miami.edu/heckerling and go to "Supplemental Materials."

2:00 - 3:30 SPECIAL SESSIONS I

Session I-A

Projecting the Financial Consequences of Planning or Not Planning with Portability (Focus Series) Diana S.C. Zeydel, Erik S. Hendrickson

Assisting clients with appropriate estate planning in light of portability is a daunting task. Using simulation based modeling, this program will examine the financial consequences of implementing different lifetime and post-mortem planning strategies for modest, mid-range and ultra-wealthy married couples under a variety of scenarios taking income and transfer taxes into account. Can we really do nothing and rely on portability? This program will reveal what the numbers show.

Reporter: Tiffany L. Walker Esq.

Assisting clients with appropriate estate planning in light of portability is a daunting task. Using simulation based modeling, this program examined the financial consequences of implementing different lifetime and post-mortem planning strategies for modest, mid-range and ultra-wealthy married couples under a variety of scenarios taking income and transfer taxes into account. Can we really do nothing and rely on portability? This program revealed what the numbers show. This special session builds on the general session on the same subject.

The presentation by Ms. Zeydel and Mr. Hendrickson on Wednesday afternoon was accompanied by 56 slides (included in the printed materials), providing financial analysis on the use or non-use of portability in respect to various planning techniques. The presenters noted that the Morgan Asset Projection System (MAPS) generated the projections discussed; however, the presenters also mentioned several other options for analysis, such as the use of the Number Cruncher software.

Ms. Zeydel began by reiterating the takeaway of her presentation on Tuesday, stating that grantor trusts are the best planning option. However, throughout the discussion the presenters reminded practitioners to remain mindful of the balance between access to assets and minimization of transfer taxes in conforming the plan to the client's wishes, as well as underlying goals such as lifetime gifting. In addition, the presenters then provided an overview of several uncertainties in the current planning environment, including Administration proposals on minimum GRAT terms and limits on valuation discounts.

The presenters continued the discussion by mentioning the importance of beginning an analysis with the determination of a client's spending level, taking into consideration that clients have a difficult time adjusting their lifestyles to reduce spending. The presenters included the projected surplus capital in their financial analysis, stating that this information is pertinent to a client who might wish to increase either lifetime gifting or spending. As noted by the presenters, the projections take into account income taxes, inflation, and portfolio return based on a balanced portfolio, in addition to spending based on a fixed dollar amount.

As with the general session presentation on this topic, the focus turned to increasing the percentage of GST exempt assets. Ms. Zeydel commented that the federal government sort of gave away the store by setting the estate tax exemption at $5 million indexed for inflation. As a result, estate tax savings do not vary as significantly from scenario to scenario as the percentage of GST exempt assets.

The first fact pattern involved a couple with $10 million in assets in a jurisdiction without state income tax. The presenters noted that although the couple is not likely to owe an estate tax, the creation of a QTIP trust increases the proportion of GST exempt wealth after the second death in comparison to no planning. In addition, the presenters also noted that the scenario does not take into account the other benefits of planning, including asset protection and control of ultimate disposition.

The presenters then introduced a second fact pattern, outlining a couple with $30 million in assets and the goal of a $5 million dollar spending cushion. Noted by the presenters was the projection's use of an indexed DSUE amount until the first spouse's death in year five of the fact pattern. The second fact pattern projected a loss of $13 million

due to transfer taxes, using a QTIP trust established upon the first spouse's death. The presenters stated that based on the projections, even in the most difficult markets, planning was necessary. Also noted, was the importance of informing the client of the worst-case scenario, in comparison to the best case and median case scenarios, each projected in the printed materials. It is important for the client to see in the projections that their comfort will not be disturbed, even under the worst-case scenario. In addition, the presenters commented that basis is not as much of a concern for a couple with a balanced portfolio. In the event of a closely-held family business, the presenters mentioned the use of a concentrated, single stock as a proxy for the financial analysis.

Within the calculations, the presenters provided an example based on the same 5-year time horizon as the previous fact pattern, concluding that a 19.81% return would be required for a lifetime gift to be more beneficial than a testamentary transfer. However, the presenters pointed out that the longer the time horizon, the less return needed to break even. In addition, the presenters stated that even a 100% basis asset would not have a 100% probability of breaking even due to the potential for the asset to decline in value. Another notable difference involves the introduction of income taxation into the analysis, the presenters highlighted that a Florida resident (not subject to state income tax) would need less of a return to break even than a California resident (subject to state income tax).

Continuing with the analysis of the second fact pattern, the presenters added in the use of a Credit Shelter Trust. In comparison, the presenters noted that the use of a Credit Shelter Trust increased the GST exempt assets to over 50% on average. However, Ms. Zeydel noted that the result is even better with a Super Charged Credit Shelter Trust, increasing this amount to over 75%. Based on the same analysis, the presenters also pointed out that the probability of more wealth being transferred increased to 99%.

Ms. Zeydel also discussed the psychological aspects of lifetime gifting, stating that many clients link their balance sheet to their identities. As a result, another possible fact pattern presented relied on portability with creation of two irrevocable grantor trusts by the survivor (one using the survivor's exclusion and another using the exclusion ported). Although, in the aggregate the presenters noted that using the entire exclusion today is still the most favorable outcome for GST planning purposes based on the numerical analysis. Further on in the presentation, the presenters noted that an even better outcome results from "topping up" your trust each year with the annual inflation-adjustment to the exclusion amount.

The conversation shifted focus to the expected time between the deaths of two spouses. Although many strategies require an over life, Ms. Zeydel pointed out that this type of planning remains important because even a 70 year old client still has 9.01 average over life. She further provided that an overlife as high as 15 years might be used in financial projections for some high net worth clients due to their propensity to live longer as a result of their access to better healthcare. Also noting that the closer the dates of death, the less efficient the strategies.

The final scenario presented involved a couple with $100 million in assets. The presenters reminded the audience that very wealthy clients might have large fixed costs, requiring quite a bit of income to maintain their lifestyle. In this fact pattern, the presenters introduced a potential sale of assets to the trusts. Further noting that, in the alternative, allocating GST exemption to a GRAT may be more complicated when weighed against any concerns regarding the use of an installment sale.

In conclusion, the presenters opened the floor to questions, and addressed the balanced portfolio assumption as well as concerns regarding the purchase of assets by the grantor using a note.

Session I-B
Planning with SCINs and Private Annuities – Seizing Opportunities While Navigating Complications (Financial Assets Series, Focus Series) Steve R. Akers, N. Todd Angkatavanich, Melissa J. Willms

SCINs and private annuities offer tremendous potential opportunities, in light of taxpayers' ability to "self-select" when to use these strategies and various planning flexibilities. But these strategies also involve a host of complicated tax rules and requirements through which the planner must navigate. The panel will focus on practical planning issues and strategies.

SCINs and private annuities offer tremendous potential opportunities, in light of taxpayers' ability to "self-select" when to use these strategies and various planning flexibilities. But these strategies also involve a host of complicated tax rules and requirements through which the planner must navigate. The panel focused on practical planning issues and strategies. This special session builds on the general session on the same subject that was presented by Steve Akers.

The panel began by reviewing why wealth transfer "freeze" planning, such as self-canceling installment notes (SCINs), grantor retained annuity trusts (GRATs), private annuities, or installment sales to grantor trusts, is attractive to clients. Properly done, these techniques contain the value of assets in the grantor's taxable estate, transfer future appreciation to the beneficiaries, and provide cash flow to the grantor (and possibly the grantor's spouse).

SCINs and private annuities have the potential for superior wealth transfer results if the seller's health is not good, causing a reduced chance of surviving to life expectancy. Because the seller may survive past life expectancy, SCINs and private annuities create the risk that the payments made will ***increase*** the value of the seller's estate, a "reverse freeze."

Mr. Akers noted that many people may not have done a SCIN or private annuity. These strategies have a lot of complexity and moving parts. In their basics, they are very similar to a GRAT or an installment sale. The only difference between a SCIN and an installment sale is the terms of the note.

With SCINs and private annuities, there is a valuation risk involved on both sides of the transaction – the value of the asset being sold and the value of the note. We don't have any guidance on how to determine the risk premium that the seller may not receive full value for the asset sold. The examples in their presentation used the section 7520 rate but they are not saying it's the proper rate to use.

Ms. Willms reviewed the guidance and cases involving SCINs and private annuities, noting that the IRS position continues to evolve. Many pre-date the enactment of section 7520, raising the question of how much weight to give them.

Mr. Angkatavanich discussed the valuation rules. Section 7520 requires that the value of any annuity, interest for life, term of years, remainder interest, and/or reversionary interest be determined using IRS tables and an interest rate equal to 120% of the midterm AFR. An exception exists if the seller is terminally ill, as defined in the regulations.

Practitioners thought the section 7520 regulations could be used for SCINs and private annuities. Commercial software such as NumberCruncher/Estate Planning Tools and Tiger Tables use the section 7520 regulations in their computations.

CCA 201330033 and the IRS position in the *Davidson* case call this into question. The CCA states the IRS litigating position in *Davidson*. The IRS said that the actuarial tables under section 7520 and "terminally ill" test did not apply to SCINs. Instead, SCINs must be valued under a willing buyer/willing seller standard and that the parties in an arms-length transaction would use actual life expectancy, rather than the section 7520 tables. The seller's actual life expectancy would be based on their medical history.

The *Davidson* case may be settled. If it is, it leaves the IRS in best of all worlds: they have the chilling effect of the

CCA and no court decision providing guidance.

The panel offered the following planning considerations for SCINs:

- Expect IRS scrutiny if the seller dies early. The IRS views SCINs with a jaundiced eye, particularly if the seller has health issues and/or dies soon.
- "Backloading" SCIN payments are a "red flag."
- The ability of the buyer to repay the SCIN is critical in evaluating whether it is valid debt.

- A large principal risk premium creates heightened concern. The note may exceed the value of the asset sold. Securing the SCIN by additional assets will increase the expectation of repayment.

The important thing when evaluating any of these transactions is to "run the numbers." The panel reviewed a hypothetical situation.

The bottom line is that there are more issues with SCINs than we thought.

The panel then turned to a discussion of private annuities. They may be more attractive than SCINs due to certainty in determining the value of private annuities for gift tax purposes. Private annuities have significant 2036 issues, however.

Private annuities can be a good opportunity for someone who isn't in the best of health but is not terminally ill. For someone terminally ill, there are valuation risks on the buyer's side as well because you can't use the section 7520 tables.

The *Kite* case involved private annuities with the first payment deferred for 10 years but within the seller's life expectancy. A letter from her doctor stated that she wasn't "terminally ill". The IRS attempted to depart from the section 7520 tables, claiming it was foreseeable that she wouldn't live for five years. The court held that the deferred annuity was adequate consideration for the transfer of family partnership interests. It said the fact she had home health care didn't show she was terminally ill. She was wealthy and spent her money to provide the type of care she wanted.

This was a good victory for the taxpayer but doubling down with 10-year deferral can get the IRS's attention.

Proposed regulations on the taxation of annuity payments would make significant changes to the income taxation of private annuities. Historically, a private annuity results in the seller reporting gain ratably over the annuity term. If finalized, the regulations would be retroactive to October 18, 2006. They require the seller to recognize gain at the time the assets are transferred. Mr. Akers said he won't do private annuities to individuals or non-grantor trusts, just with grantor trusts.

Ms. Willms discussed a second part of the 2006 regulations that affects private annuity sales to grantor trusts: the "exhaustion test." It applies if a life annuity is paid from a trust or other limited fund. In that situation, there is an additional gift if the fund is insufficient to pay the annuity to the annuitant's age 110.

She recommended that unless you are an actuary or a glutton for punishment, use commercial software to make the calculation. Even if you do it yourself, she recommended checking your result against commercial software.

Strategies to consider to avoid the additional gift if the trust would fail the exhaustion test include using a substantial pre-existing trust, personal guarantees, or a combination. In *Trombetta,* Judge Cohen refused to give effect to personal guarantees.

A Private Annuity for the Shorter of Annuitant's Life or Stated Term ("PAST") can help with the exhaustion test. If

the annuity can't last to age 110, the exhaustion should be inapplicable. The stated term should be longer than the seller's life expectancy. Under GCM 39503, if the stated term exceeds the annuitant's life expectancy, the annuity is taxed under the annuity rules of section 72 rather than as an installment sale.

If the sale is to a grantor trust, you can have section 2036 issues, especially if the annuity stream looks to be close to income from asset. The materials include cases where the taxpayer won on section 2036 issues. The panel standard the best practice is not to have annuity payments equal or close to the income from the asset.

The materials include other suggestions on how to use private annuities for maximum benefit for clients. The panel agreed that the uncertainties associated with SCINs make private annuities to grantor trusts a safer alternative.

Session I-C
Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases (Litigation Series) Dana G. Fitzsimons, Jr., Gerard G. Brew

Recent cases will be reviewed to assist fiduciaries and their advisors in identifying and managing contemporary fiduciary challenges, including: investments, business interests in trusts, disclosure and privileges, surcharge and defenses, trust modification, and more. Gerard Drew could not participate so Dana Fitzsimons covered all topics.

Reporter: Joanne Hindel Esq.

He explained that he looks at cases each day to determine what is going on in litigation.

He started with cases involving Investments:

Kastner v. Inrust Bank
Claims against trustee were dismissed where beneficiary is not a qualified beneficiary and for failure of proof of any economic harm. Knowledge of trust law and knowledge of how to put on a case are very different skills.

Greenberg v. JP Morgan Chase Bank
Two trustees – there was a contractual delegation of investment management to the corporate co-trustee. Individual co-trustee then sued corporate co-trustee for downturn in market value of assets and for continued investment in proprietary funds. Court refused to dismiss claims for investment losses during economic downturn where bank rejected individual co-trustee's request to reallocate portfolio despite existence of contractual delegation.

Matter of Littleton
This case involved a concentration of Corning Glass stock. Trust had an exculpatory clause but court refused to dismiss suit based upon the exculpatory clause. Allegations were that trustee had never met with the beneficiaries or talked with them. Dana pointed out that some exculpatory clauses will be upheld but better practice is to act in a prudent and fiduciary manner to increase chance that a court will uphold the exculpatory clause.

Cavagnaro v. Sapone
Court held that trustee did not breach duties by selling residential property to save expenses and better support widow, regardless of the fact that the remainder beneficiary resided there.

Matter of Gill, 2014 NY App. Lexis 7828
Suit against a bank as trustee for breach of duties by investment in mutual funds. Dismissed as a matter of law by appellate division – statutes authorize corporate trustees to invest in their own mutual funds and allegation that investments decreased in value is not sufficient. Test is prudence not performance.

Newcomer v. NCB 2014 Ohio case
Pre-UTC claims that expired prior to enactment of longer period under UTC will not be revived. Standard of proof for breach of fiduciary duty is clear and convincing evidence. Court addressed reckless indifference versus willful neglect. Plaintiffs tried to assert that multiple actions of the trustee could rise to the level of a breach of the fiduciary duty when aggregated – court rejected this.

Damages & Remedies

Miller v. Bank of America
Trustee breached duties by investing in nonproductive commercial real estate and borrowing from an affiliate to generate phantom income to distribute to the beneficiaries and measure of damages should include both inflation adjustments and prejudgment interest without reduction for the phantom interest distributed to the beneficiaries.

Attorney's fees and costs

Regions Bank v. Lowrey
If you sue a trustee and lose, the trustee has a lien against the trust for the attorney's fees. Alabama Supreme Court reversed lower court ruling for improperly reducing the trustee's reasonable reimbursement of attorney's fees and costs of successful defense against surcharge claims. Court also held that trustee can get the fees it incurs in seeking its fees.

Larkin v. Wells Fargo Bank
Lone beneficiary that continues litigation following completed settlement, arbitration and judicial resolution of claims is responsible for attorneys' fees incurred by trustee and other beneficiaries incurred in responding to his actions.

Abusive Litigation

Ringgold-Lockhart v. County of Los Angeles
9th Circuit vacates district court's order that declared plaintiffs "vexatious litigants" and imposed a pre-filing condition on the plaintiffs as a result of their various filings relating to their challenge of the LA County Probate Court's removal of one of the plaintiffs as trustee.

Schmeller 2015 US District Lexis 1825
11 redundant pro se lawsuits against executor of an estate. Plaintiff's lawyer was Sergeant Pepper – lawsuit involved damage to house plants.

Directed Trusts, Protectors & Special Fiduciaries

SEC v. Wyly
In securities law case, court rejects "independent trustee" exception and finds trusts are grantor trusts despite professional offshore trustees.

Schwartz v. Wellin
Trustee appointed by trust protector substituted as plaintiff because beneficiaries' removal of trust protector without appointing a successor protector for 3 months violated the trust terms and did not bar protector from appointing trustee.

2014 US District Lexis 172610-
Court reached same result with slightly different reasoning.

Manasseon 4D13-2241- Florida case
Children sued wife/trustee for overspending – issue was whether the children were current or remainder beneficiaries. Court said trust terms were ambiguous – trust protector determined that spouse was only current beneficiary and children were only beneficiaries upon her death. Actions by trust protector might have resulted in his being included in the lawsuit on basis that he favored spouse not children and breached his fiduciary duty.

Spendthrift and Asset Protection Trusts

Mennen v. Wilmington Trust Company
Fiduciary exception to the attorney-client privilege does not apply to trustee's legal advice in connection with trustee's petition arising out of failed investments directed by co-trustee.

Safanda v. Castellano
Spendthrift provision in South Carolina trust does not protect assets from bankruptcy trustee where debtor instructed family member trustee to apply provision and convert outright gift to a trust, thereby causing the trust to be a device similar to a self-settled trust and subject to creditors. Dana suggested that you should start with a spendthrift trust and then build flexibility into it.

Scott v. Dendero and IMO Daniel Kloiber Dynasty Trust
In both cases beneficiary of trust enters into divorce proceedings outside of jurisdiction of trust and spouse takes position that trust assets can be reached as a part of the divorce proceeding. Probate court determines that divorce proceedings must be finalized first to determine if trusts can be accessed.

2014 Kentucky App – Kloiber divorce case addressing fraudulent transfer that occurred 10 years before the divorce thrown out by appellate court.

Fiduciary Succession

Testamentary Trust of Conti
Court refuses to approve UTC nonjudicial settlement agreement that provided terms for the change of corporate trustees in conflict with the UTC judicial change of trustee provisions. Court held that change of circumstances requirement under statute must be determined by facts.

Taylor Intervivos Trust
Beneficiaries cannot use the UTC codification of the Clafflin trust modification doctrine to grant beneficiaries power to remove and replace trustee without cause and contrary to the UTC judicial removal of trustee provision.

Vincent Fumo Irrevocable Children's Trust fbo Allison Fumo
Court, over one dissenting opinion, voids the settlor's appointment of a trustee under a power reserved in the trust where the trustee was found to be the "alter ego" of the settlor and would facilitate settlor's plan to reclaim the benefit of the assets in the trust following his federal incarceration for mail fraud and tax evasion.

Business Interests

Jimenez v. Corr
Use of pour over will violates shareholder's agreement and forces sale of stock to company, despite the fact that the revocable trust provided for distribution or sale of shares to qualifying shareholders.

Bleckman 2015 Florida App. Lexis 193
Corporate agreement prohibits transfer of ownership in assets to a "paramour"- brother tries to do so and court upholds agreement terms.

Trustee disclosure

Smith v. SunTrust Bank
Line item on account statement reporting sale to straw man does not start statute of limitations on sale by trustee but trustee's detailed letter received by beneficiaries starts limitations period on income distributions.

Beck v. Mueller
Wisconsin Court of Appeals rules that trust beneficiaries' claims against trustee were time-barred by the statute of limitations as the beneficiaries had notice of the trustee's actions and their claims thus accrued before the trustee filed his formal accounting.

Fiduciary Privileges & Exceptions

Dana pointed out that we do not have a consistent body of law on fiduciary exception to privilege

Heisenger v. Cleary
Connecticut rejects the fiduciary exception to the attorney-client privilege.

Hammerman v. Northern Trust Company
Arizona holds that the UTC and state law support adoption of the fiduciary exception to the attorney-client privilege. Reverses trial court for ordering disclosure of all communications to both beneficiary and successor trustee.

Cy Pres

Old National Bancorp v. Hanover College
Trustee that failed to seek stay of court order and transferred assets to charity lacks standing to appeal termination of charitable trust.

Lechowicz v. Costco
Terms of deed granting standing to local citizens not effective to grant citizens rather than attorney general standing to enforce terms of a charitable gift where citizen cannot show unique interest in gift or harm.

Arbitration

Brown v. Brown-Thill
Under co-trustees arbitration agreement arbitrator could order co-trustee to consent to distribution plan from trust owned entity, but could not exercise judicial power to remove trustee under UTC.

Archer v. Archer
Trust term requesting arbitration of disputes is precatory and cannot establish an enforceable agreement to arbitrate under trust agreement.

Gupta v. Merrill Lynch
Court enforces broad arbitration provision in separate unrelated custody agreement as barring claims against trustee for breach of trust, but refuses to apply direct benefits estoppel to bind trust beneficiaries with no contractual connection to arbitration provisions in trust agreement.

Warren v. Geller
Beneficiaries bound by arbitration in client agreement creating a trust by court's finding they were third party

beneficiaries of the contract and through equitable estoppel by accepting distributions.

Amendment, Revocation, Reformation and Termination of Non-charitable trusts

O'Connell v. Houser
Reformation of trust affirmed by state supreme court under Commissioner v. Bosch principles on adequate proof that reformation was proper to avoid loss of grandfathered GST-exempt status.

Purcella v. Olive Kathryn Purcella Trust
Alaska Supreme Court rules that grantor of self-settled irrevocable trust did not produce evidence sufficient to establish that trust was the product of undue influence or sufficient to reform, modify or terminate the trust due to a purported mistake of fact or law or due to unanticipated circumstances.

Construction and Conditions

Estate of George McFadden
Ambiguous perpetuities termination provision construed to allow trust to exist for longest possible period allowed under the rule against perpetuities.

Matter of Kirschner v. Fischer
No trust assets pass under a trust provision for the distribution of property in the amount of assets includable in the grantor's estate for FET purposes where the decedent died in the year 2010 and elected to pay no FET.

Life Insurance

Torti v. Hoag
Court refuses to dismiss claims against trustee and trustee's insurance broker business for loan to settlor from cash value in life insurance subject to split-dollar arrangement.

Wills and Probate

Estate of Truong Tran
Decedent's DNA sample "plucked hair" is an estate asset.

Session I-D
Asset Protection Trusts Under Attack - Views from the Bench and Bar Gideon Rothschild, Judge Margaret A. Mahoney, Duncan E. Osborne

Seventeen years after enactment of the first DAPT laws the courts have yet to rule in favor of them. This panel, including a Chief Judge of the U.S.
Bankruptcy Court and two experienced practitioners, will examine and explore the efficacy of these structures.

Reporter:Craig Dreyer Esq.

Seventeen years after enactment of the first DAPT laws the courts have yet to rule in favor of them. This panel, including a Chief Judge of the U.S. Bankruptcy Court and two experienced practitioners, examined and explored the efficacy of these structures. Here are the Reporter's significant highlights from this presentation.

The speakers provided an extensive outline. The outline was split into the following six sections: 1) Self Settled Trusts: An Open Question, 2) Asset Protection Trusts: Case Studies, 3) Domestic Venue Asset Protection Legislation Vulnerabilities, 4) Fraudulent Transfers, 5) Defining Future Creditors in the Context of Actual Fraud, and 6) a

Discussion of Hypotheticals.

The panel opened with the question: Domestic Asset Protection Trusts ("DAPT"), do they work? The panel was created after a speaker last year made the comment that DAPT do not work. The panel believed that DAPT do work in certain circumstances. The panel also discussed the primary way to attack DAPT is by applying the fraudulent transfer statutes. They noted how the term fraudulent transfer is misleading as no fraud needs to occur for the statute to apply. They noted the Uniform Fraudulent Transfer Act has changed the name of the transfers from a "fraudulent transfer" to a "voidable transfer" to eliminate the misconception that a fraud is necessary. The updated Uniform Fraudulent Transfer Act was released in October and is expected to be adopted by many states soon.

The panel noted that there are very few cases on DAPT, but there are many on trusts in foreign jurisdictions. Mr. Rothschild stated that most of the cases involving fraudulent transfers are decided on public policy grounds with very bad facts. Interestingly, in attacking DAPT courts have been citing to Section 270 of the Restatement (Second) of Conflict of Laws which has a public policy exception; however, it seems Section 273 is more applicable, but it does not have a public policy exception.

Mr. Osborne spoke on a number of recent cases. He analyzed *Evrseroff* (where the court did the solvency analysis) and noted the importance of doing this analysis before and after asset protection planning is done to assert as a defense to a fraudulent transfer claim. He also noted the *Weitz* case (where the Court held tortious conduct occurred in NY as a result of a wire transfer to the Cook Islands) and the panel agreed the ruling was a real stretch of the long arm statute to get personal jurisdiction over the trustee. In addition, the panel discussed how the *Mortensen* case was the first case to address a DAPT. Although the ruling failed to support the DAPT it was a result of bad facts. The debtor drafted his own trust without counsel and in Judge Mahoney's view the case a slam dunk as the debtor failed to even pay the creditors who existed when the trust was created.

The panel also discussed *Huber* and *Townley* cases to emphasis that potential future creditors may be included in the fraudulent transfer test. Mr. Osborne views California, Washington and Illinois as very creditor friendly states. The panel went on to discuss the *Rush* case as a set of bad facts (one of the trustees and the real property held by the trust were located in Illinois). The panel noted that the best plan does not have a trustee or property in a non-DAPT jurisdiction.

Judge Mahoney noted that under section 548(e) of the Bankruptcy Code, it provides a 10 year look back for fraudulent transfers to self-settled trusts. The *Porco* case noted 548(e) only applies to express trusts and not resulting trusts, but also left many unanswered questions. The panel discussed *Hamilton Greens, LLC*, to emphasize that impossibility is a complete defense to a contempt charge. In *Hamilton Greens, LLC*, unlike the widely discussed *Lawrence* case, the court determined the settlor had no ability to bring the assets back.

Judge Mahoney lead the discussion on the Uniform Fraudulent Transfer Act ("UFTA") and the Uniform Fraudulent Conveyance Act ("UFCA"), noting these statutes are the vehicles for voiding transfers into asset protection trusts by bankruptcy trustees or creditors under state law. The UFCA is the older statute, but is only discussed because it is still the law in New York. The UFTA statute has examples of badges of fraud to help determine if there is a fraudulent transfer. These state statutes for fraudulent transfers vary from 2- 10 or more years depending on the state. The fraudulent transfer look back period under the bankruptcy code is limited to two years, absent other provisions. However, a bankruptcy trustee can use the bankruptcy code, or step into the shoes of a state court creditor to go after fraudulent transfers. Therefore, they can use the state statutes as well in many cases. The panel then discussed the issue about foreseeable or potential creditors and noted there are no clear answers.

Judge Mahoney noted Section 727 of the Bankruptcy Code where a debtor can have a discharge denied if the debtor engages in transferring assets within one year of filing or the debtor conceals assets. This is a bad result for the debtor as all their assets are seized, but they are still liable for any outstanding debts after the

seizure. Furthermore, if bankruptcy court finds concealment of property, it may result in a criminal conviction. Judge Mahoney believes asset protection plans help create settlements. She also noted that domestic trusts look better to judges since they are harder to dismiss on public policy grounds.

Mr. Osborne addressed some constitutional issues with asset protection trusts. He notes the full faith and credit issues often arise in that a judgment of one state must be recognized in another state.

Mr. Osborne then discussed the ways to attack a DAPT. In general you need to prove a 1) fraudulent transfer, 2) sham transaction – settlor is controlling the trust rather than trustee ,or 3) against public policy of the state to allow self-settled asset protection trusts in other states. Once you obtain a favorable ruling you must get a judgment, and then you have to deal with jurisdictional and conflict of law issues to enforce the judgment. As a result, DAPT assets have become extremely unattractive to creditors as this process may take years. Judge Mahoney noted that most cases settle.

Mr. Rothschild noted that asset protection trusts are not bulletproof, but provide a substantial amount of leverage to a client when faced with a creditor. He noted it is also important to consider other methods of asset protection for clients such as spousal lifetime access trusts, GRATS, QPRTS, and SCINS which does not take on the same smell as DAPT.

The panel also went through some hypothetical planning scenarios. During the hypotheticals they emphasized that you must consider fraudulent transfer law in panning. They also emphasized that transferring assets may result in a denial of discharge in bankruptcy, and Judge Mahoney noted that it is not always the debtor who chooses bankruptcy. Overall, the panel feels asset protection trusts work to a degree, but may not be a strategy for all individuals. They also noted that off shore provides greater obstacles to enforcing judgments, but they also entail greater risks for the client.

Session I-E
What You Never Knew You Never Knew: More Tax Administration and Procedural Rules for Estate Planners (Focus Series) M. Read Moore, Nancy G. Henderson

This workshop will consider in depth a number of additional rules that apply to tax returns and tax audits, including transferee liability, fiduciary personal liability, estate and gift tax liens, tax payments and deposits, extraterritorial application of U.S. tax laws, equitable recoupment and setoff, and similar topics. The last time this topic was addressed in depth at the Institute was in 1999, so don't miss out on this once in a blue moon but nevertheless important topic.

Reporter:Michelle R. Mieras

This session expanded upon Mr. Moore's morning presentation by applying the technical rules to three case studies designed to present issue that would likely arise in real life practice. In particular, Mr. Moore and Ms. Henderson wanted to take a closer look at the adequate disclosure rules, statutes of limitations, the mailbox rule, fiduciary liability, transferee liability, equitable doctrines, and tax liens and collections. The first two case studies are discussed below.

CASE STUDY 1: Decedent with Many Open Tax Issues at Death

Case Study 1 Facts:

In December 2012, MB gifted a 35% interest in a single member LLC (which owned commercial real estate) to an IDGT she had formed for the benefit of her children. A gift tax return for this gift was filed in August, 2013, using figures from a) a qualified appraiser's valuation of the underlying real estate, and b) MB's CPA firm's appraisal of

the LLC interest, which included a 41% discount for lack of control and marketability. The appraisals, but not the trust, were attached to the return.

In March 2013, MB sold another 35% LLC interest to the IDGT for a note, using the same value she had used for the December gift. MB learned she was ill in early 2014, and to settle the note, transferred an LLC interest back to herself with a value equal to the balance due on the note. Not wanting to pay for more appraisals, MB used the grossed up property values to reflect the percentage increase in revenues and applied a 41% discount as the CPA had done.

MB appears to have made several transfers during her lifetime that were not reported and may have exceeded the gift tax annual exclusion. MB's cousin in the UK died in 2006, leaving an account overseas to MB, which MB never reported.

MB died August 1, 2014. Shortly before her death, her 2010, 2011, and 2012 income tax returns were audited, with a focus on the deduction of personal expenses as expenses related to her rentals. Her 2013 income tax returns was not filed before her death.

Case Study 1 Discussion:

If you are an executor faced with tax fraud, unfiled tax returns, and gifts without statute of limitations running, what do you do? Option one is resign and ask to be relieved of further liability. Option two is to continue to serve, get the statute of limitations running on the matters in question. But be aware of the executor's potential personal liability.

Ms. Henderson pointed out the fiduciary's obligation to file all of the decedent's tax returns that have not been filed, although there may be exceptions for gift tax returns if there would be no tax due and the gifts are disclosed on the estate tax return. If you are unsure what may have been filed, copies of the past three years' returns can generally be obtained from the IRS, and a transcript can be obtained and will list returns filed over at least the past ten years. The executor has a responsibility to try to get the information.

Ms. Henderson cautioned against inadvertently opening the statute of limitations on an issue that would otherwise be closed. The adequate disclosure rules were not in effect before 1997. Therefore, at that time, a gift tax return could have been filed and cause the statute of limitations to run on undisclosed gifts. Rather than reopening that return, disclose on the estate tax return (or later gift tax returns that have to be filed) that the gift was made but the statute of limitations has run.

The point was made that even after the estate tax return statute of limitations has passed, the IRS can still assess tax on unreported gifts. This makes it very important to get the statute of limitations running (and closed) on gifts made. For this reason, it may be more favorable to file past gift tax returns (if the statute of limitations has not already run on the gifts) and file a Form 4810 (which can only be filed after the return is filed and the tax is paid) to shorten the statute of limitations, rather than relying on disclosure of gifts on a 709.

Remember, for gift tax returns filed starting in 1997, the statute of limitations does not generally run on gifts not adequately disclosed. In MB's case, there were two deficiencies in the 2012 return. First, the copy of the trust agreement was not attached. Mr. Moore believes there is still a return filed even if the trust was not attached (and therefore the requirements have not been fulfilled), as long as there is enough information on the return to give the government the ability to dig in. Second, the appraisal provided by the CPA was probably not a qualified appraisal.

What about the gifts made by MB in 2013? The executor will probably want to get a gift tax return filed to get the statute of limitations running. A full new appraisal probably does not need to be obtained, but the executor will

need to justify relying on the prior report. Mr. Moore pointed out that the 2013 and 2014 returns have to have the correct adjusted prior gift numbers. So even if the executor is not filing the prior 2012 return, he has to make sure the figures are correct.

The executor is probably not responsible for going back and fixing fraudulent returns, but he does need to handle any audits going on. The executor could amend returns to eliminate any fraud.

Since MB did not file her 2013 income tax return before she died, the executor will need to file it. If he can show that MB filed to file for an extension because she was sick, the executor could ask the IRS for a good cause exception for the failure to file.

With regard to the foreign account MB inherited from her cousin, the executor has a duty to make sure the FBAR and 8939, if necessary, is filed. After 2010, the failure to complete foreign reporting on an income tax return prevents the statute of limitations from running on the return entirely (even with regard to the properly reported domestic income). Note the steep penalties for not completing FBAR filing.

When an executor has or should have knowledge of a liability and takes action to reduce the value of available assets (other than by paying appropriate administration expenses), then the executor can be liable for the liabilities. The executor can generally seek a discharge from liability, but that doesn't mean the tax is not collectible. Instead, the tax is collectible from the successors in interest.

CASE STUDY 2: Transferee Liability

Case Study 2 Facts:

Mom and Dad owned a closely held business. Beginning in 2005, they made annual gifts of company stock to a Crummey trust established for their children, in an attempt to take advantage of the annual gift tax exclusion. For this purpose, the business was valued using the CFO's estimate based on the financials and a cap rate, less a 35% discount for lack of control and marketability. None of the gifts were reported for gift tax purposes.

In 2012, Mom and Dad gifted $250,000 cash to each of their 5 children. They also used the balance of their lifetime gift tax exclusions to gift the remaining stock in the business to the trust. They timely filed gift tax returns for the 2012 gifts, including copies of an appraisal from a qualified appraiser and the trust agreement.

Dad became ill in 2013. Son tried to run the business. Mom had faith and continued to pump money into the business. Dad's illness consumed Mom and Dad's other resources. Dad died in January 2015, by which time their home was mortgaged, all personal and business lines of credit were maxed, there accounts were drained, and the business is being liquidated by a receiver. The only remaining asset is an ILIT established by Dad for Mom's benefit, which held $4 million insurance proceeds. Mom is entitled to all trust income, and the trustee (Mom) may distribute principal for Mom's health and support.

The 2012 gift tax returns were selected for audit. The agent inquired into prior transfers of company stock, and argues that the annual gift tax exclusion did not apply due to restrictions on transferability and lack of dividend distributions. The IRS assets that Mom and Dad each owe about $700,000 in gift tax, interest and penalties from the 2012 transfers.

Case Study 2 Discussion:

Mr. Moore gave a general overview of the tax deficiency process was given, and the basic three year statute of limitations, or six year statute in the case of a 25% or more omission, were discussed.

Does the IRS have to file a claim in the state probate court? The IRS can file a claim, but it is not subject to state nonclaims statutes. The IRS may not want to file a claim, because it is putting itself within the probate procedures, and may have to deal with the executor disallowing the claim. The IRS does not want to create a situation where state court could be determining a federal liability issue. If it finds itself in that position, it would probably try to remove the matter to federal court. Note that the government cannot use its levy functions as part of a collection action inside of a probate action. Therefore, as long as probate is occurring, the government cannot enforce its liens in the normal ways. This does not, however, apply to nonprobate property, regardless of whether a probate is in progress.

In the case of the destitute surviving spouse, who is to pay the liability? Be on the lookout for gift splitting by spouses, which creates joint and several liability. If Mom and Dad gift split on the 2012 gift tax return, the IRS could go after Mom for all of Dad's gift tax liability. Think about this when considering filing a gift tax return with gift splitting. It makes the spouse liable for all gift tax liability, even for gifts not actually reported on the return (and that the other spouse made). Unlike the income tax arena, there is no innocent spouse relief for the joint and several liability arising from gift tax returns with gift splitting.

Can the IRS pursue the donees for the tax liability? Under Section 6324(b), there is a lien on property transferred by gift for unpaid gift taxes for 10 years following gift. The IRS can collect on this lien without going to court. In this case, there is a lien on the $250,000 cash gifts to the kids. The lien follows the asset, so if a child purchased a home with that money, the lien would apply to the real estate. Note that the IRS does not need the lien for the transferee to be liable. The government can sue the transferees who will be liable to the extent of the gift received. This means one donee could be liable for the entire unpaid gift tax, if the gift he received is sufficient.

Does the liability of a transferee include interest on the deficiency? A November 2014 5th Circuit case held that a beneficiary liable under Section 6324(b) is liable for interest on the tax (the 3rd Circuit has reached a different conclusion). This case may be reargued, but it potentially means the transferee could end up owing more than what they received from the donor. They may then have a right of contribution under state law to get repaid from the other transferees.

The IRS has yet another avenue to collect against the children under Section 6901, and under this method the government can get taxes, interest and penalties from the donee. Significantly, 6901 applies to any taxes owed at the time the transfer was made (not just gift taxes).

What about the life insurance trust for Mom? Can liability be assessed against the life insurance or the trust? Ms. Henderson commented that the ILIT could have some transferee liability due to transfers to the trust in 2012. Additionally, a lien could be placed on Mom's account to which mandatory distributions are made.

Does the IRS have to go against Mom and Dad's estate before it goes after the transferees? Not if the IRS is using a special gift tax lien. But, if the IRS is using Section 6901 for fraudulent transfers or other equitable doctrine under state law, then the IRS must pursue all possible actions against Mom and Dad's Estate unless doing so would be futile.

Ms. Henderson points out that we have been assuming that Mom is the kids' biological parent. What if she is their stepmother and doesn't care about the kids? If Mom is the executor of the estate, and Mom has no assets, she wouldn't particularly care what the tax bill is since the kids, not her, will end up paying it. Do the kids have any right to be involved in the proceeding that determines the liability for which they will end up being responsible? No. (Note that Mom may have a fiduciary duty to the children, but only if they are interested parties in the estate administration.)

Session I-F

The Philanthropic Imperative (Charitable Giving Series) Edward J. Beckwith, David E. Ratcliffe, David Pratt

Thoughtful planning often projects well beyond our clients and their families. Increasingly, clients care about and seek to address the needs of others and issues both local and global. This session will explore why our clients want us to engage and help guide their charitable ambitions as part of their planning. Our panel will examine why this is a core competency and what each planner needs to know to be relevant and impactful for clients.
Basic tools and techniques will be discussed in the broader context of various life cycle events.

Reporter: Beth Anderson Esq.

The first break out session for charitable planning discussed how to start the philanthropic conversation with your clients. The speakers discussed two surveys from US Trust (The 2014 U.S. Trust Study of High Net Worth Philanthropy, November 2014 and The U.S. Trust Study of the Philanthropic Conversation, October 2013) in which high net worth clients and their advisors were surveyed about giving, amounts and frequency of gifts and whether the communication about the gift strategies was relevant and helpful. The results of the surveys reveal that clients are giving more, more frequently and through the use of more giving vehicles. The motivation to makes the gifts is a desire to make an impact and a difference in the community as well as the fulfillment and satisfaction of making the gift. These sophisticated givers are also looking to increase the frequency and amount of the giving over the next 3 to 5 years which makes the conversations and strategies around giving even more important. The philanthropic conversation study showed clients are not getting a balance communication from their advisors while advisors believe they are providing an equal approach of altruism and technical. Clients want to know more about the non-tax aspects of their gifts, and the altruistic factors are more important to them than the tax benefits, yet advisors continue to delve into the technical details before discussing the purpose and motivation about the gift. Also clients want to have the charitable conversation earlier in the planning stage, and advisors tend to push it until later.

Next the presenters discussed how to deliver or start the philanthropic conversation. The goal is to have a “kitchen table” conversation about what really matters to the client about their community, family, allocation of wealth. To have a meaningful conversation with the client you have to develop a relationship with the client. This may be accomplished by finding commonalities with the client – same religion/event/sickness/school that client and advisor can relate, or by using examples about how the advisor has given back to the community. This animates the conversation and helps the client think about what he or she wants to do. Donors may be looking for way to mentor their children and grandchildren about the value of money and how to make an impact in their community and teach the responsibility of wealth.

Behavior differences between the types of clients are important when discussing planning techniques. Turn of the century donors gave later in life as part of their legacy, while “Dotcom” donors and the newly rich are giving earlier and becoming actively engaged in the organizations they support.

Generation Y may not have significant cash yet but they should still start their giving plan with small gifts, serial gifts, and donations of time instead of money. If they invest their time in an organization early they can make money contributions later. Their parents or grandparents may want to consider adding them as advisors to a donor advised fund or setting up a fund in their name as a teaching or mentoring opportunity for the next generation, and to develop early financial intelligence.

The Baby Boomers and Gen X are in their compensation prime right now and growing their wealth, but may not be ready for significant gifts, but are looking for income deductions, and gifts of appreciated assets could be good planning strategies for them to help offset some of their income.

The Pre-Boomers and older are likely retired and may be looking for a steady income stream. Charitable remainder trusts or charitable gift annuities may fit their gifting scheme.

Advisors should start with client's values, and set a goal to achieve; asking them their objectives and history of engagement; what issues are serious to them (in society at large); and keep them in the center of discussion. Seek out organizations that are a line with their goals and determine what engagement they have or can have with them. Scope and duration of the gift will be an important decision. Is the donor looking to make a single large gift or serial gifts, and can the donor economically make this gift now or sometime in the future. If the donor is struggling to find motivation or purpose to support, ask the donor about was a defining moment in his or her life and what he or she associates that moment, and why was that an important event, and how can the donor pay that moment forward.

Charitable gifting is not a product but part of the comprehensive process, and advisors must be patient with the client, and make sure all of the advisors are on board with the plan– financial advisors, attorneys, accountants and on the same page as a team for the client.

How you approach and phrase questions about charitable planning pushes the donor's thought process. For example, instead of asking "What charities do you support?" ask "If you could change one thing in the world what would it be?" In a discussion regarding contingent beneficiaries, talk about legacy and impact on the world. Remind them that "Uncle Sam" is a charity, but one that doesn't give the donor control over the purpose and spending of their money, and if you take a small amount away from kids you can take out the payment to the government and make an impact on the community.

When is a good time to give? Life events can be opportunities for charitable giving – marriage, remarriage, weddings/parties, birth of child. Instead of giving the event-holder a gift, donate to their or your favorite charity. Also participate in fundraising events and volunteer to raise awareness on a specific topic that matters to the donor.

The panel briefly discussed some of the technical aspects of charitable giving such as §509 requirement for being a public charity or support charity instead of a private foundation. They also mentioned the three types of gifts – restricted, partially restricted or unrestricted. Donor advised funds are not a fourth type of gift, but a modification of one of the three types with the addition of donor input.

The panel finished their discussion by providing the following websites as additional resources for information:

<http://www.irs.gov/charities>www.irs.gov/charities

www.pgdc.com

<http://www.guidestar.org>www.guidestar.org

www.cof.org

<http://www.foundationcenter.org/>www.foundationcenter.org/

http://nyct.giftlaw.com/?pageID=52

3:50 - 5:20 SPECIAL SESSIONS II

Session II-A
Planning Strategies That Reduce Both Income Taxes and Estate Taxes (Financial Assets Series, Focus Series) S. Stacy Eastland, Steven B. Gorin, Ellen K. Harrison

If a basis enhancing strategy is not used, the panel will explore the break-even growth rate that is required before it is more advantageous to give away a low basis asset. The panel will also focus on the advantages and considerations of different basis enhancing strategies that could be used with estate planning including: various borrowing, disregarded entity, grantor trust, QSST, DSUE, mixing bowl and charitable planning strategies.
The panel will also explore strategies that reduce a complex trust's income taxes and enhance the basis of a surviving spouse's assets.

Reporter: Tiffany L Walker Esq.

The presentation by Mr. Eastland, Mr. Gorin, and Ms. Harrison followed Mr. Eastland's presentation earlier in the week on the same topic, and provided a more in depth discussion on planning strategies to reduce income and estate taxes. Supplemental information can be found in Mr. Eastland's prior outline, as well as slides and an additional 194 pages of written material accompanying the follow-up presentation. Although most, or possibly all, of the ideas included in the outline were covered in the discussion, the printed materials provide a much greater amount of detail regarding the topics discussed.

Mr. Eastland opened the presentation by discussing basis. More specifically, he provided that if the assumed growth rate is higher than the breakeven rate, it is better to use lifetime gift planning. The discussion also addressed other factors, aside from the above formula, that should be included in the analysis. These factors include asset protection, cash flow planning for retirement, and plans to retain the asset for the client's lifetime or the family's desire to sell the asset immediately after the client's death. The panelists spent the remainder of the presentation discussing various strategies to reduce income and estate taxes.

Ms. Harrison discussed the advantages of grantor trusts, as well as possible repositioning of assets to ensure low basis assets are owned by the individual upon such individual's date of death. She also addressed a potential concern with the purchase of low basis assets using a promissory note. It is possible that the promissory note may have the same basis as the asset for which it is exchanged. However, Ms. Harrison also highlighted a potential solution to this issue, involving the grantor borrowing from a bank instead of the trust for the asset purchase. If the grantor prefers for the loan to be between the grantor and the grantor trust, Ms. Harrison proposed that the trust might instead purchase the receivable from the bank.

Another planning technique, discussed by Mr. Gorin, involves extracting equity from depreciated assets. Mr. Gorin outlined the three following steps: (1) borrow against the property and distribute cash to the owner; (2) invest the proceeds in taxable income-producing property; and (3) make annual exclusion gifts or otherwise engage in leveraged estate planning techniques.

Following Mr. Gorin, Ms. Harrison discussed sales to spousal trusts. Ms. Harrison touched on the potential for providing the spouse with a testamentary power of appointment and incomplete gifts, mentioning the risk involved in transfers for less than full and adequate consideration. She provided further that the potential risk mentioned above might not be mitigated by the running of the statute of limitations.

Mr. Gorin then mentioned another technique, consisting of the conversion of a Credit Shelter Trust to a Qualified Subchapter S Trust (QSST), the investment by the Credit Shelter QSST in a Subchapter S Corporation and the sale of the Subchapter S stock owned by the surviving spouse to the Credit Shelter QSST. The presenters then pointed out the various income tax benefits of such a transaction. In addition, there is the ability to switch the QSST to an ESBT. Also noting Section 502(b) of the Uniform Principal and Income Act. In addition, if there is a gift element in the sale, then the presenters provided that the sale instrument should include a disclosure and the trust should agree to hold this amount as a separate share with the addition of a power of appointment.

The panel also briefly mentioned Beneficiary grantor trusts. The panelists noted the potential usefulness of this technique over a QSST when both are available. Mr. Eastland then discussed the sale of an interest in a partnership

or S Corporation to such a trust, expanding on the use of lapsing withdrawal rights or the trustee's power to grant such rights on a year-by-year basis.

Following this topic, the panel touched on exiting from or dividing a partnership, as well as distributions and the anti-abuse rules. In addition, the panel discussed the use of preferred partnerships for a low basis asset with appreciation potential. However, similar to other strategies, the panel pointed out that cash flow might be an issue.

Ms. Harrison reminded the audience that the general planning idea with basis is to preserve exemption for low basis assets. She noted Mr. Eastland's proposed cascading sale of partnership interests, as well as rolling GRATs. Noting the goal as locking in gain by substituting cash or short-term fixed-income obligations, and repurchasing low basis assets that depreciated in value to place into a new GRAT. If the grantor becomes ill or there is concern about death during the term of the GRAT, Ms. Harrison suggested purchase of a remainder interest to remove it from the grantor's estate.

As a final way to remove future appreciation from an estate, Mr. Eastland introduced a technique involving an extremely leveraged single member limited liability company, which is also a disregarded entity, and a grantor trust partner. He also noted that the grantor trust might include a revaluation clause for hard to value assets. Mr. Eastland then mentioned the topic of CLATs and potential deductions resulting from their use, and then further into the discussion he included CRUTs.

On the topic of the DSUE amount, Ms. Harrison mentioned the potential sale to a grantor trust of assets by the surviving spouse in exchange for a note. She provided that this method avoids disadvantageous income tax results while optimizing GST exemption. Ms. Harrison also noted that this might not be a preferred technique if the spouse was married to someone other than the decedent at some point in time, in addition another drawback is the potential exposure of assets to creditors.

Ms. Harrison closed with explaining what she called the three legs: freezing; discount planning; and intentionally defective grantor trusts. These are each methods for shifting the income tax burden and repositioning assets. She noted that relying on DSUE has some significant disadvantages, and instead she recommended the use of QTIP trusts. Also mentioned was the transfer of grantor trust assets in exchange for partnership preferred interests with a high rate of return, as well as the use of GRAT for scenarios in which the surviving spouses has little to no remaining exemption.

Session II-B
A Panel Discussion: The Most Important Elements, Clauses and Ideas for Trust Design David A. Handler, David J. Herzig, Benetta Park Jenson

A panel discussion by experts from the banking, legal and academic worlds regarding design and structure of trusts, key provisions for every trust agreement, and building flexibility into trusts to adjust and evolve over time.

Reporter:Joanne Hindel Esq.

Trusts are not generic and will control for many years – so the trust must be given considerable thought.

The trust terms should be flexible enough to address issues that arise over time.

The panel first discussed dividing trustee duties among multiple trustees or fiduciaries.

Directed trusts are on the rise – the ability to bifurcate duties allows for the right experts to handle aspects of trust administration: investment management versus distributions between corporate entities and individual family members.

Be careful in the drafting of multiple trustee roles to not have them overlap and clarify who will cover what function and who will be relieved of responsibility for someone else's duties.

Specify terms and conditions as to who can serve as trustee. Specify the trustee's role and powers. Directed trust statutes may address this is certain states although the trust terms will always control.

State statutes that authorized directed trustees provide protection and clarity regarding the roles of multiple trustees - especially if the statutes that been tested and approved by courts.

The panel then discussed the role of trust protectors.

Trust protectors may have even more authority than the trustee if the trust protector can change dispositive provisions.

Trust protectors can amend the trust but can also make changes for tax purposes or possibly to change beneficial interests. Be careful about allowing the trust protector to amend beneficial interests because the settlor will want to do so through the protector's exercise regularly.

A better approach is to allow the protector to amend administrative provisions.

Be careful when considering foreigners to serve as trust protectors because their involvement may cause the trust to be considered a foreign trust.

You need to know the tax status for each individual with fiduciary authority over the trust and review that status on an annual basis.

The panel then moved to the concept of dynasty or perpetual trusts.

They questioned whether dynasty trusts are really useful or necessary for most families.

Then they discussed powers of appointment.

Powers of appointment are basically the power to amend either during or after the settlor's life. It is generally better to give power to family members such as children of settlor. Can be given to a third party but specify provisions as to exercise and scope.

One approach is to give a child a general POA, but give the trustee, upon request of the child, the ability to remove the POA authority of the child.

The Panel then polled the audience to determine the extent to which clients are asking for the grant of powers of appointment in their trusts to spouses and/or children. They also asked to what extent clients are allowing their family members the ability to appoint to in-laws. A decent number in the audience indicated that they are drafting powers to allow for appointment to in-laws.

One option is to limit the amount that can go to an in-law in the trust terms.

The trust terms should define whether the exercise of the power of appointment can occur inter vivos or only testamentary and whether it must be in writing.

One drafting technique is to allow a person to exercise a power of appointment to another trust and continue to retain that power in the second trust. This give the power holder continued control and also removes any possibility that the exercise itself will be considered a gift.

The panel then moved to dividing trusts.

Share toys but not money. The panel recommended including the ability to divide a trust into shares for each of the children.

Give a third party trustee the ability to exercise discretionary distributions in sole and absolute discretion, equally or unequally, considering or ignoring the beneficiary's financial resources, to or for the benefit of the beneficiary.

Give the trustee the ability to count distributions as advancements if necessary.

Incentive provisions often require the identification of all the exceptions to them to the point where the exceptions will swallow the incentive. Alternatively, give the trustee guidance regarding the discretionary distributions as to whether to consider the beneficiary's other income and resources. Also, set forth desired behavior.

If you establish perpetual trusts, incentive provisions may be difficult because of changing circumstances over time.

If the settlor wants to identify intent for the trust, it might be best to put guidelines in the trust agreement itself as opposed to a separate letter.

Letter of wishes or intent is not binding and may actually conflict with the trust terms.

The panel also discussed important clauses to put in trusts: divorce clause that removes settlor's spouse and spouse's family members; and the spouse of children. Watch also the application of IRC Section 677 that could cause the settlor to be considered the owner (grantor trust) even after a divorce.

Address adoption in the event beneficiaries move and state laws vary. Children born out of wedlock should also be addressed because laws vary depending on whether a child is identified as the mother's or father's child.

Definitions should also include identification of "spouse.

Whoever is initially listed as trustee will change. It is important to determine who is empowered to appoint trustees. Empower client, spouse, beneficiaries and others to appoint and remove trustees and to change who can appoint/remove trustees

Give the trustee the ability to change the situs and governing law except as to the rule against perpetuities (can't extend the length of the trust).

Define health, support, education.

Give trustee the ability to authorize use of real property held in trust and allow trustee to determine whether rent should be charged.

Considering including a provision that allows the trustee to depart from the prudent person rule and to consider similar trusts as part of the same portfolio.

Define incapacity and address such matters as absence, incarceration, minority, and health.

Specify how trustees will vote – necessity for majority or unanimity. Consider using the single signatory provision.

Provide a conflicts waiver clause for corporate trustees but also for individual trustees who may provide other services. (brother-in-law who is an accountant).

Address what happens when a beneficiary disclaims – don't rely upon state laws that may change or vary from state to state.

Provide survivorship clauses and identify who is entitled to information about the trust.

Session II-C
Keeping It in the Family
Louis A. Mezzullo, Christine Quigley

The session will explore business succession planning for the closely-held and family owned business, including various exit strategies and techniques to deal with liquidity issues. A hypothetical fact pattern will be used.
The session explored business succession planning for the closely-held and family owned business, including various exit strategies and techniques to deal with liquidity issues. A hypothetical fact pattern was also used. Here are the significant highlights from this session.

The presentation primarily was based on a fact pattern. The fact pattern involved a successful family business, an S corporation, owned by 2 brothers. One of the brothers was happily married with 3 children, a daughter whose husband is in the business (although the marriage is rocky-however a successful and growing part of the business is related solely to his efforts), a son who is very involved in the business, and a son who is successful in his own right with no interest in the business. He is extremely conservative and very frugal in his personal financial affairs. The other brother is recently remarried with a child from a prior marriage who undoubtedly has no future in the business and commitments to his second wife through a premarital agreement. He lives a lavish lifestyle and depends upon the business cash flow to maintain his lifestyle.

In this instance the main operating company as a given was an S corporation. In starting with an engagement such as this one of the preliminary matters is to review business structure. Is it appropriate or should conversion be considered (tax issues) or if a C corporation should S status be considered.

In planning with a family enterprise at the outset need to distinguish ownership and management. They need not be the same and often times for the success of the enterprise they should not be. Ownership should not automatically grant one management rights. Give due consideration to management issues; are there key employees who are not family members. Rather than giving such an employee equity examine phantom stock or other way to incentivize and retain those key employees.

In considering succession planning it is a process. Best if it is considered at the startup phase especially if there are multiple owners or sides of family. Process should be implemented hopefully well in advance of the expected targeted transition date, whether that be retirement or some other event. Hopefully a plan is in place in the event of an unexpected death or order of death.

Succession planning done correctly requires the consultation and involvement of multiple professionals and disciplines, accountant, financial adviser, business attorney, family attorney, business appraiser, banker, insurance professional, possibly depending on the dynamics a business psychologist/consultant.

Initial consideration: is there an existing plan. In any event what are family goals and individual's family member goals. Often times those are not in sync. Children do not necessarily agree to what the senior generation believes is appropriate. There should be a mission statement which will help define family's goals, businesses goals. Regular meetings should be considered as well as an outside person(s) to serve on an advisory board. Consider whether nonfamily members should be on the board of directors.

Goals will dictate approach: Is sale a consideration-in the near term or not a consideration; if business is to continue who is to have ownership and who is to have control. Is ESOP a consideration.

When looking at ownership and transitioning consider buy/sell or transfer restriction agreements. In that regard be cognizant of Sections 2703/2704 in drafting such agreements. If one fails those sections decedent ends up with an estate tax value that exceeds the buy/sell price that is paid by purchaser. Consider adding a clause in buy/sell that if the agreement and price determined in the agreement causes an estate tax, the purchaser is obligated to reimburse the estate for the 'tax cost.'

Agreement should contemplate a possible break up and also conflict resolution whether it be mediation/arbitration so family disputes are not in the public domain and help control expenses.

Are there multiple business lines that can be spun off tax free under Section 355 that aligns business with ownership and management.?

How do senior family members desire to treat family especially if there are multiple children with differing interests and some are not in the business. Is equalization a goal or getting assets to those who should have them, i.e. ownership to those who are active in the business with an attempt as best as can be done to provide for nonactive family members. Consider placing passive interests, i.e. building in an entity that nonactive family members own. Consider recapitalization with voting and nonvoting interests giving the nonvoting interests to nonactive family members. If senior family is attempting to equalize values and nonactive members are allocated business interests grant the active members a right/option to acquire the business interest that was allocated to the nonactive family member. It is extremely important that whatever strategy or approach is implemented be conveyed to the family members. Surprise at death or some other event is not a preferred planning result.

If contemplating a GRAT strategy give consideration to how the annuity will be paid. Should confirm there is sufficient cash flow to satisfy the annuity so that business interests do not need to be used to satisfy the annuity obligation causing valuation issues to be addressed and need for appraisals.

Consider whether life insurance is appropriate both in the business context as well as in family member's personal planning.

Consider if appropriate whether in case of death Sections 6166 or 303 are appropriate or whether planning should consider qualifying for those sections if necessary.

The presentation concluded with a general overview of ethical considerations and conflicts in general when planning. Engagement letter must be provided outlining the considerations and be signed off by all affected persons.

Session II-D
Life Insurance as an Asset Class (Financial Assets Series) Lawrence Brody, Mary Ann Mancini, Charles L. Ratner

This panel will discuss planning with life insurance in a post-ATRA world, including life insurance as an investment, reassessing the need for estate liquidity, techniques for paying large premiums on trust-owned policies, managing

existing policies and programs, and addressing issues with existing policies in ILITs. This panel discussed planning with life insurance in a post-ATRA world, including life insurance as an investment, reassessing the need for estate liquidity, techniques for paying large premiums on trust-owned policies, managing existing policies and programs, and addressing issues with existing policies in ILITs. This Report covers the significant highlights.

Mr. Brody, Ms. Mancini and Mr. Ratner presented different considerations with regard to life insurance. Mr. Brody began the session with a discussion of the tax consequences of various transactions with life insurance and modified endowment contracts. Next, Mr. Ratner walked through the tax advantages of investing in insurance. Ms. Mancini concluded the session by offering solutions for broken insurance trusts.

Mr. Brody's presentation began with the definition of life insurance for tax purposes under Section 7702. The policy must be valid under applicable law and meet either the cash value accumulation test or the guideline premium test, both when the policy is issued and throughout the policy's existence. The guideline premium test requires the ratio of death benefits to cash value to be at least as great as the 7702(d)(1) cash value corridor. Variable policies must also be adequately diversified under Section 817(h). Private placement variable policies must further meet an investor control test.

Mr. Brody assured the audience that we do not each have to go through Section 7702 and perform the actuarial tests. Instead, the advisor can rely on the policy illustration.

Next, we turned to Modified Endowment Contracts (MECs) under Section 7702A, which applies to policies issued on or after June 21, 1988. If a client pays too many premiums too fast (usually within the first seven years of the policy), a MEC will be created. This is an actuarial calculation that can only be made by the carrier. The carrier should also be expected to monitor premium payments and reject any premium payment that would create a MEC. For income tax purposes, a MEC is still life insurance if it satisfied Section 7702, and it will qualify for the 101(a)(1) income tax free exclusion (but is subject to different tax rules when cash comes out of the MEC in various manners). Once a MEC, always a MEC. The contract cannot just be changed to get rid of MEC status.

The standard rule for insurance is that increases in the cash value of the policy are not taxable income unless and until it is accessed in a tax inefficient way (surrender, withdrawal in excess of basis, etc.). This rule also applies to MECs, assuming the policy still meets 7702(a) requirements.

Mr. Brody then turned to the tax consequences of policy dividends, loans, withdrawals, surrenders and lapses.

Policy dividends are generally nontaxable, until the basis in the contract is fully exhausted.

Loans against an insurance policy are generally not taxable income, even if the loan exceeds the owner's basis in the policy. But, if the policy is transferred (even by gift) when the amount borrowed exceeds the basis, then it is treated as a part sale with taxable gain on the sale, and will be transfer for value (unless the transfer or transferee is exempt from the transfer for value rules).

Loans and withdrawals are not the same thing. Withdrawals can be made from universal life policies from the policy accumulation accounts. A policy withdrawal is generally not taxable; instead, if simply decreases the available accumulation account. One exception is the forced-out gain ("FOG", which Mr. Brody noted was the perfect acronym) provision, which provides that if a withdrawal is made in the first 15 policy years and it does not reduce the death benefit, it is taxable income. See Section 7702(f)(7).

What about loans or withdrawals from MECs? Mr. Brody noted that these will generate taxable income to the extent the cash surrender value of the policy just before the loan or withdrawal exceeds the investment in the policy. Remember, in a MEC, basis comes out last, income comes out first. In order to protect against end runs around this, there is also a rule that if a MEC is pledged as collateral for a third party loan, that loan is treated as

though it was a withdrawal from the policy, creating the same income tax consequences. Mr. Brody pointed out that the MEC consequences don't end there. Under Section 72(v), there is a 10% penalty tax for any distribution, including a loan, from a MEC unless an exception applies, the most common of which is the taxpayer has reached age 59½. Note it says taxpayer, not policy owner. What if the policy is owned by a trust? It is not spelled out, but industry practice is to look to the grantor (if the trust is a grantor trust) and use the grantor's age to determine if the penalty will apply.

When a policy is surrendered or lapses, amounts received are taxable to the extent the surrender proceeds exceed the investment in the contract. So surrendering the policy will always generate income to extent there are gains in the policy. Everyone assumes that surrender proceeds are taxed as ordinary income, not capital gains, because the sale/exchange component is not there (the policy was not sold, it just went away). Mr. Brody pointed to a potential argument for capital gain treatment: Section 1234A. This treats the expiration of financial instruments (like options) as capital transactions without a sale or exchange component. Could this apply to surrender of policy? Although there are no reported cases to this effect, Mr. Brody successfully settled a Tax Court case on this basis.

Be cautious when surrendering a policy with a loan against it; the amount of the loan will be included in surrender proceeds. This total in excess of the investment in the policy is the taxable portion, and your client might be surprised by a tax bill resulting from loan proceeds previously taken out (and not taxed at that time).

What about the sale of a policy? This will generally create capital gain (although gain in excess of basis, up to the surrender value, will likely be treated as ordinary income). Note that Rev. Rul. 2009-13 was specific to the life settlement market, and there are arguments both on both sides as to whether it would apply, for example, if the policy was sold to a relative or to a grantor trust.

Having had the tax consequences of insurance transactions explained by Mr. Brody, Mr. Ratner took to the podium to focus on the tax advantages of insurance as an investment.

Mr. Ratner noted that there are tax advantages with life insurance that cannot be obtained with any other investment.

Mr. Ratner began with three caveats. First, remember that a client's happiness with a policy over the years does not usually hinge on the tax ramifications. Instead, the client is concerned with how the policy is structured, the bells and whistles on the policy, the amount of the premiums, etc. In other words, be cautious about focusing the client discussion entirely, or even mostly, on the tax implications and benefits of insurance. Second, calling life insurance something other than life insurance is a rouse. Third, do not talk about the availability of Section 1035 to exchange a policy as though it is as easy as getting your oil changed. There is no guarantee that the insured will be just as healthy in future years. There are costs involved. There could be loans against the policy. Treat the policy as though it could be the last policy the client is ever able to buy.

Mr. Ratner then reviewed various insurance products at a high level. He expressed that he has no preference as to type, it is just critical that the client gets all of the information. He believes there is a product for everyone. If someone walks away without a policy, it is probably because a) they do not want to take a physical, b) it is too complicated of a mousetrap, or c) they have unrealistic expectations.

He has observed the acute differences between the ways a liquidity buyer and an investor look at a policy's cash value, premium, and death benefit. A liquidity buyer does not care about cash value, asks why the premium can't be lower, and wants the death benefit. (Mr. Ratner explains a different version of the Theory of Relativity: if the check someone is writing is not going to benefit them, but instead will mostly benefit his relatives, the slower the check will be written.) On the other hand, an investor asks why it takes so long to get money into the policy, what if

I change my mind, let me see the costs, why do I have to wait so long to take money out, why do I need such a large death benefit. The investor is also far more interested than the liquidity buyer in the post-sale services offered.

Mr. Ratner then turned to the types of life insurance products, and briefly described whole life term blend policies, current assumption/performance based universal life (CAUL), equity indexed universal life (EIUL), variable universal life (VUL), and private placement variable universal life (PPVUL). With regard to PPVUL, he emphasized the caveats from the beginning of his presentation. He cautioned that the tax discussion on this product must be short if the client is going to have the attention span and time to understand the product. Also, with regard to 1035 exchanges, who knows what the market for this product will look like in ten years.

No matter what you do:

1. Get the client to become invested in this process. Make sure they understand that a lot of work is going into this on the front end.
2. Make sure there is an early indication of underwriting classification. Without this, illustrations are meaningless.
3. Do not assume that the bid that comes back with the lowest premiums is the best deal. Ask why that carrier won. Look at the numbers behind the policy, and be sure to look at the strength and history of the carrier.

Ms. Mancini then transitioned to discussion to what to do when you a have strong insurance policy, but it is stuck in a trust that just is not working. Perhaps there has been a divorce or other change of circumstances that make the trust no longer desirable, or maybe the trust doesn't have the "right" tax provisions. Ms. Mancini discussed four alternative methods to get a policy out of the trust and into the right hands, and pointed out that there are drawbacks to each method.

First, the trustee could sell the policy. The biggest advantage here is that the trustee can sell the policy to anyone, rather than being bound by the distributive provisions of the trust. The sale of a policy can bring up some issues. What if the purchaser wants to buy the policy with a note? This could backfire in a few ways. The insured could die shortly after the sale, leaving the beneficiaries wondering why the trustee would have sold the note when the purchaser now has the death benefit in cash while the trust still holds a note. Or, the purchaser could fail to pay on the note, knowing that the trust no longer has any liquidity with which to pursue any action against the buyer. The trustee needs to make sure they take appropriate steps to have adequate security for the note and perhaps even some liquidity remaining inside the trust in order to protect itself from claims against the beneficiaries.

The sales price of the insurance policy can be another significant issue for a trustee. Ms. Mancini pointed out that a trustee must be able to show that the trust received fair market value for the policy. If the policy is sold for too little money, there is an argument that the trustee has made an impermissible distribution from the trust (assuming the purchaser is not a beneficiary entitled to distributions). If the policy is sold for too much money, has the purchaser made a gift to the trust? Ms. Mancini reminded the audience to take the transfer for value rules (and the exceptions) into consideration.

Second, the trustee could distribute the policy. This is clearly limited by the distribution provisions of the document. The distribution technique could be hindered by inappropriate eligible beneficiaries (i.e., minors or multiple owners who would want to split the policy), limited distribution standards (could the trustee consider the distribution of a policy as a distribution for the beneficiary's "support"?). Ms. Mancini pointed out that if the distribution provisions are the problem with the trust to begin with, this is likely not a good solution.

Third, the trustee could decant the policy. This could occur pursuant to a decanting statute, terms of the trust agreement if the agreement provides for distributions to another trust for the benefit of the beneficiary, or by common law, i.e., the law of the state provides that a distribution to or for the benefit of a beneficiary includes the option to distribute to a trust for the beneficiary. But decanting is not a magic bullet. There are issues with notification requirements. For example, if a beneficiary who would not be a beneficiary under the receiving trust

does not object, is there a potential gift? Also, remember that many insurance trusts have Crummey powers. Watch out for hanging Crummey powers, and be sure to leave enough in the original trust to satisfy any outstanding withdrawal rights

Finally, a provision to substitute assets could be utilized, if applicable. Ms. Mancini discussed the fairly recent Revenue Rulings that found that the right to substitute assets retained by a grantor is neither an incident of ownership over the insurance policy nor a retained interest that may cause estate inclusion of the policy. She pointed out that both Revenue Rulings discuss the right to substitute assets of "equivalent value" without defining it, but if you look back to the original case underlying these Rulings, the case referred to "equal value" which it expressly defined.

Session II-E

Covering Your Assets (Digitally and Ethically Speaking) and Managing Cyber
Risks: Are You, Your Firm, and Your Clients Cyber-Secure? (Ethics Session) John T. Rogers, Jr., Scott Brown, Suzanne B. Walsh

Cyber-attacks used to be science fiction; now they are very real. They range from annoyances such as spam e-mail to sophisticated schemes to destroy or steal data, steal money, disrupt business, and damage reputations. As professionals, we face not only risks of our own losses, but also risks of liability if we do not take reasonable steps to protect client information and confidentiality (including posthumously). This panel will discuss the latest threats, what the future holds, and what you and your clients should (and should not) be doing to address cyber risk and post-mortem issues from the legal, ethical, and practical standpoints.

Reporter: Michael Sneeringer Esq.

Mr. Rogers, Mr. Brown and Ms. Walsh took turns informing the audience on the topics of what digital assets are, what threats there are, and what estate planning practitioners should be doing to keep their firms and clients safe from threats. Ms. Walsh also presented the general session on this subject on Tuesday afternoon.

The presenters' materials were illustrated using a PowerPoint presentation. Each presenter had a specific subtopic within the presentation and spoke for about 30-45 minutes.

Mr. Brown spoke first and focused his presentation on cyber security.

He began by giving the audience the evolution of cyber-attacks beginning with spam and viruses, all the way to the present with today's hactivism and state sponsored hacking.

Mr. Brown posed to the audience the question of how could estate planning practitioners, as employees within their respective firms, be smart about cyber security? He noted that some of the security measures that he takes are not using public Wi-Fi and using his own 3G card, among others. He noted that the cloud is where the new crop of victims lay and described the catalyst as to how some of today's celebrities were hacked. He also described the Internet of things and how some of our home technologies, such as thermostats and garage door openers, are vulnerable to cyber-attack. He challenged the audience to use whole disk encryption, and described the trouble with anti-virus products. He noted that clients should focus on "achievable security."

Mr. Brown next explained the difference between internal (inside of the organization) and external threats hackers; some opportunistic and others focused). He noted that our own federal government and the N.S.A. are another type of threat.

Mr. Brown then explained how we can help our clients. He explained that we need to implore our clients to be prepared. One technique to prepare our clients Mr. Brown noted was to have them go through a simulated hack. Who is on the client's reaction team and how would he or she handle it (IT hygiene)?

After explaining that estate planning practitioners need to educate their employees, use duel factor authentication and perform all software updates, Mr. Brown rushed through the remainder of his slides including, but not limited to: performing a security risk assessment; not using USBs; having a plan in the event of a cyber-attack; implementing office social media guidelines; and implementing communication policies.

Mr. Rogers spoke next. He touched on some of the Model Rules and cybersecurity. He emphasized Model Rule 1.1. comment 8, Model Rule 1.6. comment 18 and discussed Arizona Ethics Opinion 05-04. Mr. Rogers made the comment that the client can require the lawyer to take certain steps for his or her security. He put up a PowerPoint slide with the top ten worst passwords of 2013. Mr. Rogers' key point was that as estate planning practitioners, we need to meet the expectations of our clients.

Mr. Brown then spoke briefly on what to do if you or a client is a victim of a cyber-attack. He noted that the first thing to do would be to call someone that knows what he or she is doing; if the hacker/attacker is a "known" actor, the victim should consider legal action.

Ms. Walsh then spoke on covering your assets. She began by defining digital assets. She then explained why fiduciaries need access to digital assets and how estate planning practitioners can locate and help fiduciaries gain access to such accounts.

Ms. Walsh spent much of her time explaining digital asset planning, including some websites with valuable information on this topic. She noted that websites such as VAIL and Google's digital asset planning option help martial assets of clients post-death.

Ms. Walsh noted the type of estate planning that should be undertaken, including nominating a fiduciary to handle digital assets, while at the same time not naming specific accounts or including passwords in client documents (think, one day that Last Will may become public record).

Ms. Walsh noted recent developments in the law, such as Nevada recognizing electronic wills and the cases of Ajemian v. Yahoo, In re Castro and Estate of Karter Yu. She concluded with the point that it is necessary for clients to plan and even if they do plan, pick a digital asset fiduciary, and the court approves of the fiduciary. Websites have subtly noted that they employ algorithms to detect changes to a user's pattern in order to terminate a nominated fiduciary's access.

The presenters' concluded their presentation by taking questions from the audience. Of the answers posed, Mr. Brown answered one question concluding that to save emails going back years (2008 was his example) was unreasonable. The presenters' also noted that estate planning practitioners and their clients need to plan for the worst and have a plan for if, and when, there is a breach.

Session II-F
Restricted Charitable Gifts: Drafting Agreements that Stand the Test of Time (Charitable Giving Series) Alan F. Rothschild, Jr., Susan N. Gary, Michele A.W. McKinnon

Donors want to help charities and charities need and want that help, but over time problems can develop over the interpretation of restricted gifts. To minimize later conflict, a gift agreement should describe the charitable use as clearly as possible and should plan for future changes in circumstances, while keeping in mind a complex set of laws. This program will suggest ways to draft an effective charitable gift agreement which achieves the donor's goals, and provides lasting benefits to the charity.

Reporter: Beth Anderson Esq.

This is the second of two charitable special sessions from Wednesday. In this session the presenters discussed eleven hypothetical fact patterns in light of what could or should have been done to prevent the issues and avoid litigation.

Hypo 1

Longtime donor of the university who in the past has made substantial gifts to the athletics department for basketball is approached to make a gift to the music department for violin chair. This is not a normal gift for the donor, but the donor will make the gift if it's the greatest need for the university. What happens five years later when the music department terminates its violin program?

Discussion:

The Gift Agreement is perfect place to capture donor's intent with a clear statement of purposes and restrictions, anticipate changes in circumstances and address what would happen upon changes to circumstances. At the time of the gift the donor's intent was to do provide for the "greatest need" but it's unclear from the agreement the next "greatest need" beyond the initial purpose of the gift. How do you determine, donor's intent when the agreement is unclear; look to statements at the time of the gift, past giving history (basketball). The best circumstances you can talk to donor if donor is still alive to determine what's next for this gift. If donor's dead, you want flexibility under the terms of the agreement to do what is consistent with donor's intent.

What if the agreement doesn't include a change in circumstance provision? The Uniform Prudent Management of Institutional Funds Act ("UPMIFA") provides for modifications to restrictions. UPMIFA is default law, and applies only if the gift agreement doesn't provide otherwise. UPMIFA only applies to Non-profit corps and provides guidance on three areas:

1. Investment of assets, Endowment funds;
2. Construction to unclear language in donor agreements; and
3. Modify donor restrictions – using cy pres and deviation doctrines.

Even with the ability to modify, you still need to know donor's intent, but under cy pres and deviation you can go to court to determine intent. This requires notifying the Attorney General (AG) and is expensive. Often charities don't want to incur that cost or alert the AG. If the gift is older than 20 years and "small" less than $25,000 (could be increased by states up to $100,000), UPMIFA provides for a small old fund modification which is great tool to clean up old endowments. It still requires notifying the AG, but the charity does not have to go to court.

Hypo 2

Harry and Sally a couple of successive real property developers and your clients of 20 years want to support the arts. The community has a local arts council, but its financial stability is "iffy". They are concerned the board won't be able to handle a large gift, and want the children involved in the gift. What should they do?

Discussion

A donor advise fund (DAF) at the local community foundation (CF). The donors can include children in the advisory process, either as primary or successors, and the charity is not in control of the money. The board of the community foundation is providing over sight and investment strategies.

What about a private foundation? Depending on size of the gift a private foundation may be a god option. If the donor wants to lock in the purpose of the private foundation then use the trust form for the private foundation. DAF may provide more control because the CF will have the ultimate oversight whereas, PF can have mission statements changed overtime. PF is good if you want "real control" over everything and want to include family on the investment side.

Hypo 6 – Who should be the parties to the agreement?

Donor wants to establish a scholarship to study Latin. A new development officer drafts up the agreement and the foundation signs. After the gift is made the foreign language department is notified of the gift, and tells the foundation that the major is being terminated. Should the university have been a party to this gift during the planning period?

Discussion

Yes, university should have been a party with respect to purpose restriction to make sure it would work. Foundation cannot commit university to governance/policies, and advance approval is usually required for naming chairs or other big decisions.

Hypo 7

Donor created 3 scholarships, with gift agreements but didn't read the terms. Donor is now getting reports and notices charges for administration fees, and fees vary among the scholarships.

Discussion

Pressure is on organizations to raise operating funds, but charging fees for administration of gifts is not directly addressed by UPMIFA. Many agreements do mention charging fees and if donor agrees then its fine, but if it's not covered in the gift agreement then murkier especially when restricted assets are used for other purposes. The non-profit should show that the amount of the fee is tied to the costs of administrating the funds, but if it's used for other operations (fund raising) may not have the authority to do this. Additional expenses can mess up the spend rate for the endowment fund (example. rate is 4-5% plus 1% admin fee may risk longevity of the fund).

Hypo 9 - Endowments

Historic home receives a large bequest and the board of the non-profit declares this gift an endowment. Later a big storm does significant damage to the home's gardens. May the board use the endowment to repair the high grove?

Discussion

Board designated endowment not a real endowment, so board can use if for any purpose. Designated as an endowment hoping to get more contributions, and if coupled with solicitations for contributions to the endowment then any money received from that solicitation may be earmarked as donor restricted endowment.

Hypo 10 - Naming Rights

Donor Cougar donated 10 million to have the school theater named after her. Five years after gift, donor is convicted of statutory rape. Can theater change the name?

Discussion

Lack of terms in gift agreement may make it difficult to remove the name especially if the agreement does not contain a policies/procedures addressing when the name could be changed. Court may determine the name was in consideration of the gift and may have to return the gift. Most organizations have a policy explaining generally what happens to named buildings, outlining time limits, future changes, what happens if the building is changed, destroyed, no longer used, incorporate policy into the gift agreement and provide a copy of the policy (cold body of policies – not this donor specific).

Hypo 12

Donor transferred private business stock to charitable remainder trust (CRT) and then sold the business. Donor wants to satisfy pledges from assets of the CRT, but the pledges are legally binding obligations.

Discussion

The mere promise to make the gift is not legally binding – it's only a promise. May have detrimental reliance that can later make it legally binding – must be some kind of consideration before the pledge is binding. Ground breaking/loans on new construction for example. If legally binding, the CRT is treated as a private foundation, and self-dealing rules would treat payment of the donor's (a disqualified person) binding obligations as self-dealing and subject to excise taxes.

Hypo 15

Rules of Prof Conduct – based on state ethics opinions

Be aware of conflicts of interest especially when serving on a board of the organization and drafting related documents. You may have a conflict between your duty of loyalty to charity and duty of independence to donor.

Hypo 16

Donors made gift to university for the purpose of performing a Shakespeare play each year. No one (other than the donors) like Shakespeare plays and university changed the play schedule. Do the donors have standing to force university to put on play?

Discussion

No, probably not unless it's addressed in the gift agreement. General rule is that donors don't have standing to enforce a gift only the AG has standing. AG offices have differing views on how to enforce gifts. Charity officials view role as protecting the public interest not so much about donor's intent carried out. Although AG has the authority to enforce gifts, they may not have the manpower/resources to look into every complaint. Gift made to a charitable trust by a donor, donor does have standing if the state has adopted the UTC.

THURSDAY, January 15

9'00 - 9:50
Powers of Appointment in the Current Planning Environment Turney P. Berry

Powers of appointment are seemingly ubiquitous and have a myriad of family, administrative and tax uses. We will examine the state law of powers of appointment focusing on the new Uniform Powers of Appointment Act adopted by the Uniform Law Commission as well as the federal income, gift and estate tax consequences of holding and exercising powers.

Reporter: Tiffany L. Walker

Mr. Berry opened his presentation with a reminder to practitioners that general powers of appointment often have real world consequences, which followed as a theme throughout the remainder of his presentation. He then noted that the first several pages of the printed materials provide an overview of basic concepts, beginning the discussion with a focus on state law and the Uniform Powers of Appointment Act on page 14. A copy of the Uniform Act is also included in the printed materials.

As an overview, Mr. Berry provided that the Uniform Powers of Appointment Act was promulgated in July of 2013, and has been enacted in Colorado, as well as introduced or studied for introduction in several other states. He further noted the need for the Uniform Act due to the lack of state law on the matter.

Mr. Berry then noted several items of interest in the Uniform Act, including differences in commonly used terminology. He pointed out that throughout the Uniform Act the traditionally used term donee is known as the powerholder, and special powers of appointment are known as non-general powers of appointment.

The discussion turned to the grant of general powers of appointment in practice. Mr. Berry posed several questions regarding providing another individual with the power to grant a general power of appointment. He continued by stating that practitioners have nudged state lawmakers to provide that the power to create a general power of appointment is not the power itself.

The focus moved to choice of law, which Mr. Berry pointed out is an important deviation from common law in the Uniform Act and deserved mention. Under common law, powers of appointment are governed by the law where such power is created. However, Mr. Berry noted that the Uniform Act modifies this aspect of the law, and provides that powers of appointment are governed by the law of the powerholder's domicile. He then introduced an example of when the choice of law may be pertinent in governing powers of appointment, stating that the definitions of spouse or descendants often vary across jurisdictions. More specifically, the definition of spouse may not always include same-sex spouses.

Mr. Berry then mentioned a common issue with instruments providing a power of appointment among descendants, which may include the powerholder in the class. He noted that state law has provided for reformations in many jurisdictions under the premise that such a power was not intended to create a general power of appointment. Addressing this issue, Mr. Berry pointed out that the Uniform Act avoids creation of a general power of appointment by disregarding the powerholder as included under the class.

The discussion turned to another potential issue often arising and recognized under the Uniform Act. Under the terms of many documents, powers of appointment are only exercisable under a will. However, as Mr. Berry discussed, there are some practitioners who do not like using wills or would prefer to exercise powers of appointment under the terms of a trust. To remedy this potential problem, he discussed the Uniform Act's inclusion of a doctrine of substantial compliance. Although, he warned against a document generally exercising all powers of appointment, stating that the exercise of a power must at least include the name of the person or entity creating the power. In the alternative, as a practice pointer, he also noted that it might be necessary to include a clause in the powerholder's document regarding the non-exercise of any available powers.

The discussion touched on permissible appointees and fraud in the exercise of powers of appointment. Mr. Berry provided that this topic would be discussed in more detail in the afternoon during the Special Session. However, he did provide an example and noted that a potential solution to protecting against fraud is to provide that the exercise of the power is conditional upon the approval of a third party. However, later in the presentation, there was mention that the approval of a third party for the exercise of a general power of appointment may not provide protection against creditors.

Next Mr. Berry discussed the narrowed form of a general power of appointment, powers exercisable in favor of only the powerholder's creditors. He provided that such a power might pose an issue as a result of ambiguities in determining who is a creditor and whether the creditor is entitled to only an amount equal the debt or the entire trust. Further, he also mentioned that the use of powers of appointment has become more widespread, and therefore causes more of a concern than in prior years.

The presentation expanded on the discussion of creditors, and turned to a creditor's ability to reach trust property as a result of a general power of appointment. Mr. Berry discussed the general rules, noting that statutory laws and cases across jurisdictions vary, especially in states with asset protection trust legislation. He commented on the aggressiveness of some states in disallowing creditors to access trust assets subject to a general power of appointment, and provided that the biggest change in the Uniform Act was that creditors may access trust assets subject to a general power of appointment.

In concluding the presentation, Mr. Berry noted that jurisdictions might desire to revise some aspects of the Uniform Act prior to enactment. More specifically, he noted the Uniform Act's treatment of Crummey Powers. He also added that the use of powers of appointment by entities would be discussed in detail during the afternoon Special Session. As a final thought, he provided that the scholarly debate regarding perpetual trusts is not so concerning due to the use of powers of appointment, and as such, he noted the importance practitioner response to such debates.

9:50 - 10:40
Something Alien? Split Interest Trusts Created by Entities: Sometimes a Good Notion (Charitable Giving Series)
Jonathan G. Blattmachr

It may seem impossible, ridiculous or downright silly, but there are times when having a partnership, corporation or trust create a charitable remainder trust or a charitable lead trust will produce a superior result than having an individual do so. This presentation will provide a map, a GPS and coordinates to traverse this previously uncharted territory.

Reporter: Craig Dreyer Esq.

Mr. Blattmachr provided an extensive outline. It covers everything from basic charitable deduction rules to entity created split interest trusts with grantor and non-grantor status. The presentation focused on the advantages of creating split interest trusts through entities. Mr. Blattmachr noted that entities will be used more in the future for creating these trusts. He discussed the history of corporations using trusts when they wanted to terminate corporate status, but did not want to distribute the property to shareholders. Today corporations usually use partnerships or LLCs, but there is a long history of entities creating trusts. The idea came to him while looking at the benefits of using private placement life insurance to fund a charitable trust.

He briefly discussed the income tax deductions for individuals under 170(a) for certain items given to a charitable organization. He also noted the trust income tax deduction under 642(c). This provides a trust deduction for gross income set aside or paid for a charitable purpose pursuant to the trust terms. C –corps also gets deduction under 170(a), and S-Corporations and partnerships generally distribute the charitable deduction to their owners.

Rev. Rul. 2004-5 provides that if a partnership makes charitable contribution and a trust is a partner, the trust gets the charitable deduction as if it is made from gross income. The trust is further allowed the deduction under 642(c). The IRS reluctantly agreed to this result after multiple loses in court. However, if the gross income to the partnership would be Unrelated Business Income ("UBIT"), Section 681, Unrelated Business income, applies and prevents the deduction under 642(c). Mr. Blattmachr questions whether this should be true, but advises it is still safer to make distribution from non-UBIT income.

He also discussed the charitable income tax limitation on Individuals of 50% of the contribution amount for gifts of cash to a public supported charity, or 30% if it is a private foundation or long term capital gain property. Individuals can get a deduction when made to or for the use of charity. If the charitable gift is for the use of a charity you are limited to 30% of the contribution amount. Any contribution to a CLT will be limited to 30% of the contribution amount. If a partnership makes contribution and partner is a trust there is no 30% or 50% limitation. It is only limited if paid with UBIT.

While corporation or partnership can create a trust, it will not be treated as created by the entity unless it is for a genuine business purpose. A CLT can do this by creating a non-charitable entity for philanthropic purposes. One example of this is Google.org, which is Google's philanthropic organization. It is not a non-profit, but the purposes are philanthropic. This means that when creating a partnership to form a charitable lead trust, one of the business purposes of the partnership should include philanthropic purposes.

In a CLT, you can create it with a series of unitrust or annuity payments usually followed by a payment to children. The code also allows it be grantor or non-grantor. Mr. Blattmachr noted that it will likely be a non-grantor trust. With a non-grantor trust there is no income deduction for property going to charity, but you will get a 642(c) deduction each year, unless you have unrelated business income. If you do a CLT with grantor status and it terminates early (such as death), the code recaptures the deduction and puts it in gross income, to the extent of the present value of all income. This is a bad result. However, subsequent regulations provided recapture only if and to the extent of the PV of payments made to charity are less than the deduction taken. However, In Rev. Proc. 2000-45, the service gave sample charitable lead trusts, but appears to have reinstituted the draconian recapture rules under the code. It is unknown whether this was intentional. You will always have recapture in a grantor CLT when the grantor dies, but if a partnership, trust, or other entity creates the CLT you can prevent this termination of grantor status.

Mr. Blattmachr then went through a series of options for implementing CLT. How do we get an upfront deduction and not get income on back end with a grantor trust? You could fund the trust with municipal bonds. However, the return on municipal bonds is lower than section 7520 rate. You need growth or income in excess of the 7520 rate for success in a CLT. Other people have discussed using a Roth IRA to fund the CLT. This seems to work under Rev. Rul. 85-13, and regulations that anything owned by grantor trust is treated as owned by the grantor. It appears funding a grantor CLT with a Roth IRA makes some sense. However, Natalie Choate disagrees and so may someone at the IRS. The concern is that the IRS will say transferring an IRA to a grantor trust may terminate the IRA status. The effect of this is so bad that it is not worth the risk of the IRS taking this position.

Mr. Blattmachr then noted the one time he has done a grantor CLT, he used a longtime held insurance policy of a client to fund the CLT with a large cash value. It was owned long enough to avoid the Modified Endowment contract rules, and they borrowed against the policy to make the annuity payments. He noted that most clients will not want to transfer such an asset into a CLT, but that it worked well for his client who was looking to cancel the policy.

Mr. Blattmachr then discussed many ideas on ways to fund grantor CLTs and the problems with trying to get a grantor CLT to work. He noted the *Atkinson* case where the Tax Court and 11th Circuit held that trust was not a qualified charitable remainder trust because the annuity payments were not made on time. The same premise has been applied to GRATs in audit. Mr. Blattmachr has added language to try to address scenarios where clients fail to make payments. He discussed the shark fin CLAT idea and funding with cash and later swapping for an insurance policy but noted the self-dealing issues that arise with CLTs. He also discussed the issues you run into with funding with cash and a non-paid up insurance policy under the Split-dollar life insurance, annuity and endowment rules of 170(f)(10).

Alternatively, he discussed how one could contribute cash in a CLT and after many years then the CLT could buy an insurance policy. The IRS could argue step-transaction and apply 170(f)(10). Also you can't substitute property into

the grantor trust CLT by the grantor, because you will run into self-dealing rules that may result in an excise tax of up to 200%.

How do we get to the impossible dream of a grantor CLT? Mr. Blattmachr points to 7702(g). If you can have multiple life policies you may be able to structure a steady income stream, and then you may be able to structure a charitable lead trust like a GRAT with increasing payments. Then you have no annual income, and no borrowing that triggers income. Mr. Blattmachr said he would discuss this further in his afternoon special session.

10:55 - 11:45
In Protectors We Trust: The Nature and Effective Use of Trust Protectors Kathleen R. Sherby

This presentation will explore the state of the law in the U.S. governing trust protectors, what is meant when referring to a trust protector, the differing roles a trust protector can fulfill to maximize flexibility of a trust and carry out the settlor's intent, the extent of the trust protector's duties, if any, and to whom these duties might be owed, the terms essential to include in a trust when providing for a trust protector, and what a person should confirm prior to agreeing to serve as a trust protector.

Reporter: Joanne Hindel Esq.

The emergence of third party decision makers in trust administration is one of the most significant recent developments in American trust law.

Kathleen began using trust protectors 20 years ago when her London partners described them at her law firm. When she learned that a litigator was looking forward to challenging a trust "protector" she changed her documents to say trust "adviser". Eventually, she found however that the change in name added to the confusion and she researched how each state's laws handles the terms and the distinctions.

There is confusion and controversy over the role and nature of a third party decision maker, there is also a lack of consensus as to what such a person should be called. Trust protector, trust adviser, investment adviser, trust director, distribution adviser etc. are some of the names used.

Best approach is to use trust adviser for a person who holds one or more powers that may direct the trustee in carrying out traditional trustee duties and the term trust protector should be used to identify a person who has powers that relate to one or more specific trust matters without involving or infringing on the trustee's performance of traditional trustee duties.

Kathleen pointed out that the early states that adopted these laws made these distinctions.

The use of the term trust protector does not have an independently understood legal role. Most state statutes either do not address the powers of a trust protector at all or almost uniformly provide that the trust protector only has those powers that are expressly provided in the trust terms.

When deciding whether to designate a trust protector the best question to ask is "is there any role or function that would be important in this trust to give to a third party decision maker that would require the appointment of a trust adviser or trust protector?"

Trust protectors are not for every trust – use them carefully and only when needed.

Trust protectors are third parties to whom powers are given by the settlor to work with the trustee.

The term and concept has been used for a long time in England and in other foreign jurisdictions.

Settlors have used trust advisers in the US for some time to bifurcate the powers of the trustee, giving some powers to persons other than the trustee to determine investments, direct discretionary distributions of principal or to consent to the sale of trust assets and the reinvestment of sale proceeds in other investments or to discretionary distributions.

In the early 1980s settlors began to expand the powers given to persons other than trustees creating new roles for trust protectors in self-settled spendthrift offshore asset protection trusts that were then gaining in popularity.

Eventually, states started to develop statutes addressing the appointment and duties of third parties with respect to trusts.

In the late 1990s the ULC was working on the Uniform Trust Code that included Section 808 entitled "Powers to Direct". This section provides that a person , other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.

This UTC section deals primarily with trust advisers. The comments to the UTC indicate that this section is intended to ratify the use of trust protectors, however.

The UTC has been adopted in 29 states and 15 of these still provide Section 808 as the only provision in their laws touching on trust advisors and trust protectors.

Of the states that have not adopted the UTC, a few have general statutes that are virtually indistinguishable from UTC Section 808.

There are, however, 11 states that have no state statute addressing either trust advisors or trust protectors.

In fact, more than half the states have either no statutory provision or a very limited and ambiguous statutory provision as to trust protectors and trust advisors.

The state statutes vary as to whether they provide a list of powers available to a trust protector – most indicate that the trust protector only has the powers set forth in the trust document.

The state statutes vary as to whether or not they treat a trust protector as a fiduciary.

A lot of states indicate that the trust protector is a fiduciary but this can be changed in the trust agreement.

Most states use the term trust protector and trust adviser interchangeably which adds to the confusion.

Only Virginia makes the distinction between the two and its trust protector statute makes the trust protector a fiduciary that cannot be changed by the trust terms.

There are three cases dealing with trust protectors:

In the McLean case the question was whether the trust protector could be held liable in not exercising the right to remove and replace the trustee of a Special Needs trust. The court held that the trust protector had no duty to monitor the actions of the trustee and determined that the trust protector was not obligated to remove and replace the trustee.

In the Schwartz case, the court held that the trust protector's amendment of the trust added an entirely new provision to the trust that purported to expand his own powers over the trust and that exceeded the trust protector's powers given under the trust terms.

The third case is the Manasean case from Florida where the authority of the trust protector was upheld even though Florida does not have any statute specific to trust protectors but just the UTC Section 808.

Three types of powers can be given to a third party:

Powers that would otherwise be subsumed by a trustee – these powers should go to a trust adviser and include investment or distribution decisions.

Be sure to identify who still retains fiduciary responsibility for actions – whether it is the advisor or the trustee.

The second type of power is a power that the settlor, beneficiary or trustee would not otherwise have but might be reserved by or given to them in the trust instrument without adverse tax or other consequences. Examples include the power to control trustee compensation and the ability to change governing law.

The third group of powers would be the powers that are otherwise lodged with a court and for tax or other reasons cannot be given to a beneficiary or trustee or reserved by a settlor. Examples might include modifying the trust instrument or interpreting trust terms.

Top drafting considerations:

1. Trust protectors are not necessary or desirable for all trusts
2. Do not rely on state law, and try to avoid jurisdictions that provide mandatory statutory provisions for trust protectors (Virginia).
3. If the trust protector will hold powers beyond those inherently given to a trustee, will the trust protector act in a non-fiduciary capacity? Make that option available in the trust terms.
4. Be very specific in trust terms as to what authority the trust protector has and whether or not the trust protector will act as a fiduciary. Make it clear whether the trust protector will monitor the actions of the trustee and be entitled to information about the trust.
5. Make sure to use the terms trust protector and trust advisor appropriately and consistently.
6. Give the trust protector discretionary, not mandatory, powers and provide guidance as to the exercise of those powers.
7. Clearly articulate the duty of care with which the trust protector is to act.
8. Remember that the trust protector needs protection as well.
9. Grant the trust protector access to the trust information. But be careful not to increase the trust protector's liability by giving access to information.
10. Provide detail with respect to the manner in which the trust protector is to be compensated.
11. Provide a mechanism to remove, replace and appoint trust protectors.
12. Remember that the trust protector does not "protect" the trust.

If a lawyer is acting as a trust protector, he or she may want to have an indemnification agreement executed when acting in that role to ensure that he or she is not later sued for actions taken as a trust protector.

11-45 - 12:35
Ethical Considerations in Acting as an Executor or Trustee: Do You Really Want to Do This? (Ethics Session) Charles D. "Skip" Fox, IV

This session will review the ethical considerations that lawyers and other professionals must take into account when deciding whether to be named as an executor or trustee and when acting as an executor or trustee. Among the subjects to be covered are avoiding conflicts of interest, communications with beneficiaries and third parties, hiring the lawyer's firm to represent the trust or estate, how to and not to charge fees, and confidentiality of information including possible responsibilities to the IRS.

Reporter: Michael Sneeringer Esq.

Mr. Fox educated the audience on ethics, including considerations that estate planning practitioners should take into account when deciding whether to be named as an executor or trustee, and when acting as an executor or trustee.

Mr. Fox's overarching theme was how should estate planning practitioners handle the representation? What role do lawyers have? He noted at the outset that serving as a fiduciary for a client can make for one of the estate planning practitioner's most fulfilling relationships. Another theme of his was that the presentation was not just for lawyers; the topics covered applied to other professions including accountants and insurance professionals among others.

Although he briefly touched on some case law and state ethics opinions, Mr. Fox relied primarily on the ACTEC Commentaries on the Model Rules of Professional Responsibility and the American Bar Association's Model Rules of Professional Conduct.

Mr. Fox began with a summary of the five challenges facing estate planning practitioners advising fiduciaries or serving as fiduciaries: competence; conflicts of interest; communication, privilege, and confidentiality; compensation; and gifts. Mr. Fox then gave the audience some statistics on active complaints against lawyers acting as fiduciaries. He highlighted the number of complaints against lawyers acting as fiduciaries. He noted that when estate planning practitioners have longstanding relationships with clients, many of the issues discussed in his presentation come up as problems routinely occur. Mr. Fox explained that this was because the estate planning practitioner has a comfort with the family due to the relationship, and may then fail to adhere to the rules. The five challenges were then discussed in greater detail for the duration of the presentation, with a great focus placed on conflicts of interest.

Mr. Fox then spoke about competence. He noted that Model Rule 1.1 was most important. He then went through the Model Rule and ACTEC Commentary on 1.1 with the audience. Mr. Fox referred to the cases in his materials on page 14-6 including *Lewis v. State Bar of California* and *Layton v. State Bar of California*.

Mr. Fox next discussed conflicts. He explained that the parameters of the relationship between the estate planning practitioner, the other parties, the estate and the trust need to be set forth at the beginning of the representation. He noted the reasons that estate planning practitioners may be tempted to leave the relationship as ambiguous on page 14-8 of the materials. He then described the consequences for failing to define the client relationship as described on pages 14-8 and 14-9 of the materials.

Mr. Fox continued talking about conflicts by highlighting Model Rule 1.7(a) and (b) on page 14-12 of the materials. He noted that estate planning practitioners need to think about whether there is a concurrent conflict. He then discussed joint representation of co-fiduciaries, answering the question of whether a lawyer can represent co-trustees or co-executors. He noted that co-trustees and also co-executors must stay informed and participate in their respective trust administration or estate administration.

Mr. Fox then discussed whether the estate planning practitioner owes a duty to the beneficiaries. He noted that state law, in many instances, should be consulted as in some states, there is no duty to beneficiaries while in other states, there is a duty. He pointed out that the ACTEC Commentaries describe that a fiduciary owes few, if any,

duties to estate beneficiaries.

Mr. Fox described the waiveable conflict of the estate planning practitioner representing both the fiduciary and beneficiary; waiveable because what if the surviving spouse is both a fiduciary and beneficiary? He noted the *Baker* case beginning on page 14-28 of the materials.

Mr. Fox then discussed whether the lawyer can name his or herself in the estate planning documents to be the trustee or the executor. He noted that there are disadvantages to doing this, and insisted that if it is done, the lawyer should get the client's consent in writing and in some states, the lawyer must get the client's consent. He noted that the drafting lawyer has no right to probate his or her client's estate.

Mr. Fox then discussed communication with a focus on communicating with unrepresented third parties. He was particularly adamant that lawyers must not give legal advice to persons not represented.

Mr. Fox went on to discuss confidentiality of information. He noted that if you have joint clients and tell one client something, the other client must also be informed.

Mr. Fox then discussed compensation and fees. He noted Model Rule 1.5 on page 14-54 of his materials. The test on reasonableness of fees is based upon numerous factors. He noted that estate planning practitioners must ask themselves what type of fee arrangement makes the most sense. He noted the *Estate of Hughes* case in his materials on page 14-59.

Mr. Fox concluded with a brief discussion on gifts to lawyers. He noted some of the distinctions. His final thought was (paraphrasing): If you do ethics wrong, you will get screwed!

2:00 - 5:20
Fundamentals Program #3

Our clients are bombarded with schemes to reduce the taxes on their retirement plans. Some are tried and true techniques that should not be overlooked. Others are off the wall and should be avoided. Some definitely don't work, some definitely do work, and some are yet to be tested...and they're all here!

Reporter: Bruce A. Tannahill Esq.

Ms. Choate, wearing a button reading "I gave to the IRS", said that she had collected every idea that she has heard of, read about, or thought about into the written materials for her presentation. She then classified them in the material as "best" and "worst." The materials are as thorough and easy to read as anyone who has heard her speak or read any of her articles or books would expect.

Her book, Life and Death Planning for Retirement Benefits, now in its 7th Edition, is an essential resource for anyone who has a retirement plan or who has clients with retirement benefits. She mentioned that it is now available to order online at
<http://www.retirementbenefitsplanning.com>www.retirementbenefitsplanning.com.

For this presentation, Ms. Choate took a "Lifecycle approach" to retirement benefits– from birth to death and beyond with a lot of detours. She said she has no mastermind idea to eliminate taxes. Instead, her goal is to help clients get more benefit from their retirement benefits and keep them out of trouble or get them out of the trouble they are already in.

She reminds us that the rules are full of technical glitches and loopholes. IRS will use them against your clients so use them in favor of your clients.

YOUNG PEOPLE (UNDER 59 ½)

During this phase, you should save money for retirement and keep it accessible, even though there's a 10% tax on early distributions.

She believes that the best retirement plan for young people (other than an employer plan with a match) is a Roth IRA. Unique in the retirement plan universe, it provides the ability to take contributions out at any time without tax or penalty. The earnings on Roth are tied up until 59 1/2. The second best is a 401(k) plan that may permit you to borrow against the plan, which isn't allowed for IRAs. The worst plan is the traditional IRA because it holds contributions hostage until 59 ½.

She strongly discourages taking money out of an IRA before age 59 ½ due to the 10% penalty tax. The 13 exceptions to the penalty do not offer much opportunity for planning other than the series of substantially equal periodic payments, which is good for people who retire early and need money to live on.

ULTRA-WEALTHY WITH MEGA IRA S (More than $1 million)

These have been in the spotlight lately, because of a Government Accountability Office study. Ms. Choate believes clients with mega IRAs need annual IRA checkups, with a formal agenda. Anyone with an interest in the financial health of the account should attend, including the client, tax preparer or accountant, IRA custodian, estate planning lawyer, and wealth manager. The Agenda should include:

· Review tax forms filed for the IRA every year

o Form 1099-R if a distribution occurred

o Form 5498. For 2015, the IRS will require more information on hard-to-value assets owned by IRAs, including non-publicly traded securities and real estate. Ms. Choate suspects the IRS will use this information to audit IRAs with hard-to-value assets. The information is optional for 2014 forms.

o Review IRA compliance: Were RMDs taken? If not, when will they be taken? How will they be taken? Clients may want to distribute hard to value assets as part of their RMD to avoid checking the box next year. Assets may be distributed in kind.

o Look at recent developments in the law and prospective developments.

o Look at family changes.

o How are expenses being paid? IRA account expenses can be paid from the IRA (not considered a distribution) or paid with outside assets (not considered a contribution).

o Income tax returns: Form 1040 and 1041 (if a trusteed IRA)

o Want to file return for trust even if its only asset is Roth IRA.

o Include Form 5329 to start the statute running on IRA penalties. IRS has gone after people for IRA penalties 10-15 years later and won because statute never runs if the Form 5329 is not filed.

o File Form 8606 to document after-tax contributions to IRA that produces its basis.

ESTATE PLANNING FOR RETIREMENT BENEFITS

Ms. Choate identified two aspects to estate planning for retirement benefits.

· Choosing the beneficiary. Ms. Choate quoted Jonathan Blattmachr and Howard Zaritsky as believing that what the client wants may be the last thing to consider. The value of an inherited IRA depends on beneficiary.
She identified three good choices and three not-so-good choices.

o Good choices

§ A young individual beneficiary because can take money in installments over their life expectancy, producing long tax-deferral if implemented properly.

§ Surviving spouse outright who can roll it into his/her own IRA, producing a spousal trifecta of no RMDs until 70 ½; RMDs calculated using the Uniform Lifetime Table instead of the shorter and faster Single Life Table; and the spouse's beneficiary takes distributions over his/her life expectancy. With portability, there is no reason to name a credit shelter trust for spouse as beneficiary because you lose spousal benefits.
§ Charity, because they are income tax exempt. For Roth IRAs, a charity is not a good choice because qualifying Roth distributions are not subject to tax anyway.

o Bad choices

§ Old person because they don't have a long life expectancy.§ Trust for spouse because it doesn't get the spousal rollover and the spousal trifecta. Leaving it to a trust doesn't preserve it for children but ensures it will be gone sooner, possibly before the spouse dies. Ms. Choate suggested finding another way to preserve the money, such as splitting the IRA among the spouse and children or buy life insurance and name the children as the beneficiaries. If the retirement account is the only asset available to fund a trust to avoid state death taxes, compare the income tax cost to the state death taxes saved.
§ Estate, which is limited to a five-year distribution.

Implementing the plan

o The estate planning lawyer drafts the beneficiary form. Ms. Choate advised not to leave it up to the client because It won't get done or won't get done right. To deal with the concern that clients won't want to pay for this, include a certain number of beneficiary designations in the standard estate planning fee, with each additional form at a specified amount.
o IRA providers have gotten more sophisticated about IRA beneficiary forms and many now cover the necessary things in their forms.
o Ms. Choate did not take a position on whether you should have a separate trust for the retirement benefits. She said both ways work but sometimes one is better than the other.

PEOPLE APPROACHING 70 ½

· IRAs produce RMDs regardless of whether you are working. Company plans do not require RMDs until actual retirement except for a 5% owner. To avoid RMDs, you can roll the IRA into the company plan before the year you turn 70 1/2. You must make sure the plan accepts rollovers from IRAs.
· Consider putting some of the retirement plan into a qualified lifetime annuity contract (QLAC), which can be excluded from the RMD calculation.
· Before rolling over a company plan to an IRA, determine if the plan includes any company stock. If there is, consider whether using the net unrealized appreciation (NUA) rules makes sense. Under new IRS guidelines, you can rollover the taxable part and take the balance outright.
o Tax-free Roth IRA conversion for everyone, which Ms. Choate said is "as close to pornography as we get at Heckerling". To take advantage of it, you must be a member of a qualified retirement plan that accepts rollovers from IRAs and have some after-tax money in an IRA or qualified plan.
o Ms. Choate said that after-tax money in IRA is a real pain because each distribution carries out some pre-tax and some after-tax money. In 2014, new IRS rules made the path for getting money to Roth IRA clear.
§ Step 1. Have IRA provider send all or almost all of pre-tax money to 401(k) plan. You must certify to the qualified plan administrator that it is all pre-tax money because plans can't take rollovers of after-tax money.
§ Step 2. Convert remaining money to Roth IRA.
o For people in a qualified plan, the process is similar. Two checks are used.
§ Step 1. The pre-tax portion becomes a direct rollover to IRA, avoiding income tax.
§ Step 2. The second check is a direct rollover to the Roth IRA.
· Review the state tax situation. Some states have tax benefits for retirement plan benefits.
· Look at the client's creditor situation. Protection under qualified plans is likely to be better.

· Look at death benefit options. IRAs generally have better death benefit options.
· Evaluate if a company plan may have deals and options you can't get elsewhere.

TAKING RMDS and ROLLOVERS

· For clients required to take RMDs and to pay estimated taxes, consider having them use their RMD to pay their estimated taxes. Have the IRA provider send the RMD directly to IRS as withheld income taxes, using Form W-4P.The withheld income taxes are credited to your account as paid throughout the year.
· Don't ever do 60-day rollover. Always do a direct transfer because there is no limit to the number you can do. A 60-day rollover is much riskier, especially after the Bobrow case and subsequent IRS announcement limiting you to one 60-day rollover every 12 months.
· A client caught doing a second rollover within 1 year, can roll it to a qualified plan, which is not subject to the limit. Alternatively, convert it to a Roth IRA and then recharacterize it to a traditional IRA.
· Use qualified charitable distribution if over 70 1/2. Since it expired at end of 2014, if a client would give the RMD to charity anyway, send it directly to charity whenever the client wants. If it is not renewed for 2015, the client has income and an itemized deduction. If the choice is donating the RMD or other asset (such as appreciated asset), the client needs to wait for the extension. If done before extension, would need to make sure reported properly on the 1099-R.

OTHER COMMENTS

Ms. Choate commented on Jonathan Blattmachr's discussion of transferring an IRA during your life to a grantor trust. She advises not to do it without a PLR. The IRS has never allowed an IRA owner to transfer an IRA to grantor trust, even though it seems contradictory to the normal IRS position on grantor trusts. If the beneficiaries are spouse, children, etc. and you don't get any benefits from it, the IRS could say it's a grantor trust, you're treated as the owner and it violates prohibition on transfer, disqualifying IRA. She advised obtaining a PLR even if you are the only beneficiary of a grantor trust,

Clark v. Rameker, holding that inherited IRAs do not qualify for the retirement fund bankruptcy exemption, is irrelevant. If a client is worried about a beneficiary's creditors, leave the IRA to a trust.

A Roth IRA is not a good asset to leave to a dynasty trust. The Roth IRA is still subject to the RMD rules so the maximum payout period for the Roth IRA is the beneficiary's life expectancy. In addition, if a dynasty trust doesn't vest in anyone, she doesn't see how it would qualify as a see-through trust. IRS tests trusts by going through chain of beneficiaries to first person who gets assets outright at death of the prior beneficiary. If a perpetual trust keeps going with no outright distribution, won't qualify for stretch payout.

2:00 - 3:30 SPECIAL SESSIONS III

Session III-A
Curing Obsolete Estate Plans in Light of ATRA 2012 (Focus Series) John F. Bergner, Carol A. Cantrell, Barbara A. Sloan

This session will explore how clients can escape from prior planning techniques that are either no longer useful or perhaps harmful in light of ATRA 2012.

Reporter: Carol A. Sobczak, Esq.

The speakers provided thorough materials with examples and footnotes of the items in the discussion. The materials were divided into four main sections: 1) Taxation of Partnership Distributions, 2) Taxation of Trust Distributions, 3) Inter vivos Toggling of Grantor Trusts, and 4) Tax Consequences of Family Settlement Agreements. The panel opened by discussing the changes that were created by the 2012 act with the increased exemption

amounts, reduced estate tax rates, and increased income tax rates. They said that for 99.6% or 99.8% US taxpayers there are no longer any estate tax concerns.

The panel noted that first we must identify plans that don't makes sense and analyze how to modify them. The panel then discussed some goals for the non-estate taxable client. A few of the ideas mentioned included: 1) avoiding valuation discounts, 2) avoiding the bypass trust planning (try to bring assets back into another parties estate for the basis step up), 3) considering changing the ownership of spousal assets to prevent built in losses from vanishing, 4) avoiding the net investment tax, 5) looking at ways to terminate unnecessary life insurance trusts, and 6) considering ways to toggle on and off grantor status.

Ms. Cantrell noted that Form 706 filings statistics for 2011 deaths released by the IRS last year were up (most likely due to portability). She noted Form 706 preparation has increased. Today the clients with between 5-10 million are the hardest to plan. Planners must take into account income, transfer taxes, fiduciary duties, ethical duties, administrative matters, and how does changing these plans affect creditor and spousal claims.

The panel noted that parties should address how state law affects their planning but must also be considerate of the fact that it changes. Questions often arise as to whether to have a trust continue or should it be terminated? Often with state estate and income taxes, you may want to keep the bypass trust in effect for even modest estates. This is a fact intensive issue depending on the basis of the assets, the tax rates of the beneficiaries, and the tax rates of the decedent. Ms. Sloan noted that the most important question is often where do the children live and what are their tax rates, but not necessarily what the decedent's estate tax rate is. When clients have children living throughout the country it gets complicated. Ms. Cantrell mentioned that if a bypass trust terminates and it is not all paid out to surviving spouse you should be wary of the complex basis issues regarding the disposition of lifetime interests.

Next the panel moved on to avoiding unwanted discounts which may reduce basis. Mr. Bergner noted that the IRS may start arguing for discounts instead of against them. Ms. Sloan mentioned that the number of valuation cases decreased last year, and the IRS may no longer be as interested in valuation discounts. They noted that discounts are not always beneficial. Planners may want to consider changing distribution standards, reworking the cash out provisions, and changing voting requirements to reduce discounts on death. The panel discussed opportunities with liquidating distributions that may trigger tax in non-liquidating distributions. The panel also warned against triggering the seven year rule on liquidation if there was a contribution of appreciated property within seven years. The Seven year rule prevents tax free exchanges through partnerships. Also, the panel discussed the various basis issues that may occur if there are not pro-rata distributions of assets.

Mr. Bergner provided that the IRS may soon start asserting fractional interest discounts at death on property. If there are co-owners, it may be best to give both people the right to sell the property without the others consent to ensure that no discounts are added. He noted most of us report ½ the value of joint property on an estate tax return, but there should probably be a discount.

The panel then discussed how to cause property to be included in a settlor's estate to receive a step-up in basis. If you have a swap power, you could swap cash for the low basis assets. If there is no swap power, you could do purchase and sale transaction in a grantor trust without recognizing income. Mr. Bergner also noted that if you need grantor trust status, you can intentionally trigger grantor trust status by borrowing money from the trust. Mr. Bergner then discusses gift reporting regulations and discussed how if reporting a swap there may be no need for an appraisal for adequate disclosure, although it would be preferred.

Ms. Cantrell noted she liked purchasing the remainder interest in a CRT, GRAT or QPRT to get the asset back in a settlor's estate. The panel then discussed the various issues involved with using these techniques. Ms. Sloan noted that when terminating these remainder interests, you should get the consent of all parties to prevent fiduciary liability. Other ideas discussed included staying in a residence after the QPRT term, or simply disregarding

partnership formalities and using them as a piggy bank. We may be able to use prior IRS victories to our advantage to have a basis step up.

Mr. Bergner noted that a beneficiary who is not an executor can argue for a new basis contrary to what was reported on a Form 706. This can even be done after the Form 706 statute of limitations has passed, to avoid an estate tax audit. Courts have allowed this argument if there is reasonable evidence. It may even be possible for a child to argue that an asset should have been includable on a Form 706, to obtain a step up in basis.

The panel then moved to getting trust assets into a beneficiary's estate. The easiest answer is to distribute trust assets to a beneficiary. The panel noted it is important to review the entire trust document as there may be hidden tools to accomplishing goals. It is also important to document any trust terminations in a family settlement agreement, but remember that the IRS is not bound by the agreement. The panel then discussed triggering the Delaware tax trap, they also discussed the situation where a credit shelter trust gave the spouse all income and the assets significantly appreciated. It may be possible to make a late QTIP election for a full basis step up on these assets.

Finally, the panel discussed how to avoid the 3.8% tax on Net Investment Income? The recent case of Frank Aragona Trust, v. Comm'r, 142 TC No.9 (2014) where a trustee met the material participation test was discussed. The panel noted that it may be possible to distribute all passive activity investment gains to a beneficiary who is active in the business. They discussed the possibility of toggling grantor trust status on or off depending on whether the beneficiary or the trustee is active. Another option is to make distributions to the beneficiaries up to the threshold of the Net Investment Income tax.

Session III-B
A Closer Look at Powers of Appointment in the Current Planning Environment Turney P. Berry, Sarah S. Butters, Thomas P. Gallanis

The panel will look at key issues in drafting and exercising powers of appointment such as choice of law, design of powers, and comparing powers of appointment to fiduciary distribution and administrative powers. The Uniform Powers of Appointment Act will be reviewed as well as general common law principles. Common and clever uses of powers will also be featured.

Reporter:Carol A. Sobczak Esq.

Unfortunately, Prof Thomas P. Gallanis had the flu and could not be present. Fortunately, Mr. Berry and Ms. Butters presented a very insightful special session. Ms. Butters, primarily a litigator, provided a useful prospective.

First, readers are directed to view the Uniform Powers of Appointment Act and any other uniform acts at <http://www.uniformlaws.org>www.uniformlaws.org. The free site also includes comments, which are of great value.

The speakers began by explaining that powers of appointment are not fiduciary powers, like trust modifications or decanting powers. The new "divided trusteeship" duties, such as with trust protectors, are the subject of a new uniform act which is being worked on currently. Powers of appointment (POAs) are different in that they are non-fiduciary powers.

The most common reason to include POAs is for a "second look" - so that a trust may be changed due to changed circumstances or tax laws changes. Two questions to ask are (i) do you want someone to be able to make such changes, and (ii) who should do so and by what standards?

Also, old trusts may have bad investment standards, obsolete provision, etc. POAs can be exercised to send trust assets to a new trust with better provisions. There are other ways to do this, such as by using trust protectors or decanting, but powers of appointment may be simpler.

POAs may be considered "powers to Disappoint." Think of a trust fbo mom and kids, mom wants a new car; kids don't want her to have a Ferrari, only a Ford, but mom has a POA and could "disappoint" the kids who disagree with her by disinheriting them.

We need to be careful when we add POAs and consider how well we have done our job. If our client can disinherit half of his family, is that what the client would have wanted? What about when the client is old and infirm and subject to undue influence of others? That could result in a misuse of the power.

The new trends Ms. Butter is seeing as a litigator include (beside the old trend to bring flexibility to estate plans) getting a new basis in trust assets, avoiding GST issues, and avoiding income tax by appointing to a trust in a jurisdiction that does not have state income tax.

POAs are useful to add flexibility to estate plans, to potentially keep family members in line (by threatening to use it), but also to keep charities in line where they may have changed their focus, not being in line with the grantor's original intent.

POAs can help when family dynamics change due to the beneficiaries' ages, marital issues, creditor issues, divorce issues, etc.

However, unanticipated circumstances may arise with the exercise of POAs. Might the assets now be subject to the claims of creditors? Do we know all the consequences of exercising a power?

Mr. Berry gave the example of Mom, who has a trust from her mother that will not be included in her estate for federal estate tax purposes. But her son, the only beneficiary after Mom, wants to get a step-up in basis. So son, with consent of Mom and other beneficiaries, modifies the trust to give Mom a general power of appointment so that it is included in her gross estate and son will get a new basis in trust assets. But what if Mom runs a school bus off the road? Will the trust be subject to the claims of the injured? What if the POA is subject to approval by other beneficiaries? What if mom created the power herself, would there be different treatment? There is no easy answer. Merely having a testamentary general POA does not create rights in creditors - this is the general rule.

The questions from the audience included whether a POA can be drafted so that power can't be exercised without consent of another person; whether you can exercise a POA to another person to avoid creditors or whether that would be a fraudulent transfer. These, and other questions, are not easily answered.

The new Uniform Act allows a POA to be exercised in either a will or a trust. The creation, revocation, or amendment of a POA is governed by the law of the donor's domicile. The exercise, release, or disclaimer of the power, or the revocation of the power, is governed by the law of the powerholder's domicile at the time of the exercise, release, disclaimer or revocation.

What are the ramifications when you have same-sex marriage partners and one state may, one may not, approve of the marriage and the POA allows the exercise in favor of spouses? Or with artificially reproduced children - who is a descendant? What about adult adoptions

The substantial compliance provisions of the Uniform Act permit the validity of POAs even if all formal requirements are not complied with, but if the POA complies with what the donor AND the powerholder intended, it should be OK. Best practice is to specifically refer to and comply with donor's requirements as set forth in the power.

Be careful of old documents in effect before certain laws passed, such as those relating to adopteds, artificial insemination, etc. because the default may be what the law was at the time and place the document was drafted.

What may be a fraud on a power? An impermissible appointment? What if dad appoints to kids provided they will take care of mom? What if dad appoints to 2 sons but not the 3rd to take care of mom? If there is a “contract” based on a conspiracy, a litigator may take the case.

There are a lot of outstanding issues about the details and specific transactions regarding POAs, but the bottom line is that there are more questions now, and the uniform act does not address them all, especially now that we are using POAs for other than just flexibility. Always look to your specific state law for guidance.

Session III-C
Trust Protectors for Trusts for Individuals with Special Needs: Not an Option Anymore - But Not Just Boilerplate
Lawrence A. Frolik, Bernard A. Krooks, Kathleen R. Sherby

Planners setting up trusts for beneficiaries with special needs know that because such beneficiaries are unlikely to be able to protect their interests, a trust protector is needed. But the planner should carefully consider just what is being “protected” and what trust provisions are needed to ensure that the protector, in name, is a protector, in fact. And should the protector be a fiduciary? All this and more will be discussed as we move the use of trust protector from the world of theory to the land of the practical.

Reporter: Joanne Hindel Esq.

This special session builds on Ms. Sherby's related general session from Thursday morning.

Generally, beneficiaries will monitor the actions of trustees, but with special needs beneficiaries this is not possible.

If a beneficiary is not able to watch out for his or her own interests, then a trust protector might be able to do so on behalf of that beneficiary.

Special needs trusts fall within two basic groups: self-settled trusts (d4A trusts) where the funds come from the settlor/beneficiary and pooled trusts (d4C trusts).

The examples used by the panel were of situations where a third party establishes a trust for a special needs beneficiary.

The examples contain trusts with wholly discretionary authority in the trustee and with provisions that require the trustee to ensure that governmental benefits will not be adversely affected by trust distributions.

The panel reviewed a few situations where the trustee of a special needs trust was challenged by a court for not attending to the unique needs of the beneficiary of these trusts. This is one of the reasons why a trust protector might be helpful to fulfill that duty.

The panel presented a group of problems to discuss the role of the trust protector in each scenario. In the problems, the trust protector had the following powers:

1. The power to remove or replace the trustee and if necessary to name a successor trustee.
2. The power to move the trust to another state or country.
3. The power to make corrections to the trust document
4. The power to amend the trust in light of federal or state tax law changes.

5. The right to be compensated from a trust under the same standard as a corporate trustee.

Further, the following powers might be added when appropriate:

1. The power to approve or disapprove proposed distributions
2. The power to add beneficiaries.

Discussion Problem #1 -- Who should be named as trust protector?

First Scenario

Parents with a Downs Syndrome daughter are considering either their son or a cousin as trust protector of a Special Needs trust they have established for their daughter. A corporate trustee has been nominated in the trust terms.

The possible problem with naming the brother as trust protector is the fact that the remainder beneficiaries of the trust after the daughter's death will be the brother's children. Will the brother have a conflict of interest in serving as trust protector and will he try to challenge distributions made on behalf of his sister?

The lawyer counseling the parents should determine the relationship between the brother and sister and also consider the fact that the brother lives abroad.

The cousin is local but is older. Still, since he does not have any inherent conflict of interest, he is likely the better choice as trust protector.

If, however, the trust terms prohibit the trustee from jeopardizing the beneficiary's governmental benefits then distributions may be limited to small amounts and the conflict of interest that the brother might have is diminished.

Second Scenario

Parents with three children have one adult child with mental illness in the form of bipolar disorder. They plan to leave one-third of their estate to this son in trust and name the two daughters as co-trustees of the brother's trust.

Whom should they name as a trust protector? An uncle who is close to the son or the parents' attorney?

The likelihood of the lawyer serving as trust protector is remote but the uncle may also not be a good choice because he currently employs the son and is quite a bit older than the son.

It might be best to convince the parents to name a corporate trustee or possibly the attorney and then use one or both of the daughters as trust protector.

The lawyer should discuss with clients the fact that involving siblings as trust protectors will mean putting siblings in the life of the disabled person on a permanent basis. Siblings may not always want that.

The panel pointed out that when a family member is mentally ill, the other family members are often not willing to assume such an active role in that person's life.

An alternative to the trust protector role might be to have a guardian or conservator appointed to monitor the well-being of the mentally ill person.

Discussion Problem #2 -- Is a trust protector always needed? If so, who?

Grandfather wants to set aside funds at his death for his disabled grandchild. He plans to name his son and daughter-in-law as trustees of the trust for his grandchild. Does he need a trust protector?

Because of the length of time that the trust may be in existence (given the young age of the grandchild) it might be necessary to amend the trust at some point. Therefore a trust protector is valuable to the trust.

An alternative would be to ensure that the parents of the disabled child only serve as trustees as long as they remain married (particularly the daughter-in-law) and then the trustees could have the ability to amend the trust to continue to qualify it as a special needs trust.

Discussion Problem #3 -- Should the trust protector be obligated to act or just react?

Co-trustees and brothers of a trust are also current beneficiaries, along with a disabled beneficiary who is another brother. A cousin is serving as trust protector.

The co-trustees are investing the assets to maximize the income of the trust that may not benefit the remainder beneficiary, a local charity. Does the trust protector have a duty to review and question the investment strategy of the trustees?

The panel determined that the trust protector would not be obligated to review the investment strategy unless the trust terms require this. Further, if the trust protector does review the investments it would be for the purpose of determining whether the investment strategy is appropriate for the disabled beneficiary not the remainder beneficiary.

Discussion Problem #4 -- If the parents leave assets to a pooled trust, should they name a protector?

Parents with a disabled child plan to leave a portion of their assets to a pooled trust in order to benefit their disabled child and get the benefit of administration by a professional trustee. The terms of the trust provide that a portion of the funds will be paid to the state at the death of the beneficiary.

Should the parents name a trust protector for the trust?

The panel suggested that instead of naming a trust protector for the pooled trust set aside other funds to be used for the special needs beneficiary which allows the trustee of that trust to monitor the actions of the pooled trust trustee.

Session III-D
International Developments Everyone Should Know About Henry Christensen III, Ziva Robertson, Jean-Marc Tirard

This session will examine 2014 developments worldwide in the taxation of foreign accounts and trusts and in reporting requirements that apply to just about everyone, as well as important offshore trust judicial decisions everyone should know about.

Reporter: Michelle R. Mieras

Appropriately, the panel for this session on International Developments was composed of counsel from New York (Mr. Christensen), London (Ms. Robertson), and Paris (Mr. Tirard).

Ms. Robertson began the session with a fundamental question: Why should you be interested in trust cases in other jurisdictions? The bottom line is that the world is shrinking. When a decision is made in corner of the world,

it is often not long before it reverberates throughout the rest of the world. Therefore, keep your eye on trends and developments.

Ms. Robertson discussed international developments in the following areas: 1) mistakes by trustees, 2) sham trusts and transactions, and 3) choice of law.

Mistakes by Trustees:

Across the world, practitioners have been watching the aftermath of the 2013 UK Court of Appeal opinion in *Futter v. Futter*, which reversed a string of authority under the *Hastings-Bass* rule from the mid-1970's. The *Hastings-Bass* rule essentially allowed a court to reverse a trustee's action taken without consideration of relevant facts (e.g., a trustee inadvertently takes action that creates immediate tax action) or that had unintended consequences. The *Futter* court sharply curtailed the rule. The *Futter* decision encompassed to cases. In one, a trustee took legal advice from competent solicitors, but the solicitors were mistaken. (Ms. Robertson noted, yes, there will be mistakes made from time to time, which all attorneys should remember.) The court said the concept of reversing a trustee's actions had gone too far. A trustee who makes a mistake can only hope to have it set aside if negligent, and then the beneficiaries – not the trustee – would have grounds to set it aside. In this case, taking advice from a solicitor is not negligent, so it will not be set aside. The trustee, instead of having that ability to have its actions reversed by the court under the *Hastings-Bass* rule, would instead need to pursue an action against the solicitor to be made whole for any liability found by the trustee. Ms. Robertson described this as a "sea change" in English law.

Because *Futter* so departed from the long-standing *Hastings-Bass* rule, several offshore jurisdictions, including Jersey, Guernsey and Bermuda, introduced legislation to formally implement the ability of courts to reverse a trustee's act taken due to mistake. The Chief Justice of the Cayman Islands also indicated that it will not follow *Futter*. In the future, trustees may wish to take advantage of another jurisdiction with more favorable law.

***Sham Trusts and Transactions*:**

Ms. Robertson then discussed sham cases. She explained that the family courts in England have legislative power to amend and vary trusts, both English and foreign, if they were created in anticipation of a marriage or during marriage, or even if the trust is drafted in terms that describe someone in his or her spousal capacity. Calling London the divorce capital of the world, she warned against references to "spouse" in trust under English law, as the spouse can run to matrimonial court and seek to vary the trust.

For example, she pointed to *A v A*, in which a wife argued that a trust set up for her husband by his parents and brother were a sham, as husband was, at the time, divorcing his first wife. The wife claimed the assets were simply placed in trust to try to hide the assets. The judge referred to the wife's claim as lacking in a number of respects. A sham is really an attempt to mislead third parties into thinking there is one structure in place when there is, in fact, a different structure.

A sham requires there to be an intention to mislead that is shared between the trustee and settlor, and that intent must be manifest at the commencement of the trust. English and offshore law provide that if it is not a sham at the beginning, it cannot become a sham. On the other hand, if a sham trust exists and then a new trustee is appointed, if the new trustee does not share the sham intent, then the sham ceases.

***Choice of Law*:**

How effective is a clause that purports to confer exclusive jurisdiction to certain courts? In the recent Jersey case *Crociani*, the trust included a provision conferring exclusive jurisdiction in the country of administration. The trust was transported into Jersey, then later away from Jersey. Did that clause confer on the Jersey court sole jurisdiction? The court said no.   Ms. Robertson stated that even if you think the jurisdictional provision is sufficient

tight to require all litigation be held in one jurisdiction, there will be cases where it gets heard in another court. So practitioners are fine-tuning their language.

Ms. Robertson then turned the session over to Mr. Tirard, who discussed the EU approach to exchange of information, as well as the upcoming European Succession laws. He wanted to make three overall points: 1) tax transparency is the new world, 2) trusts are under attack and offshore trusts are less and less effective, and 3) tax planning is becoming a risk-planning exercise.

Automatic exchange of information is the phrase of the day. FATCA, which originated in the US, has spread its roots across the globe. While US financial institutions may groan at FATCA compliance, foreign governments agreed it might be a good idea, and a proposed global automatic exchange of information between taxing authorities (GATCA) was developed. Note that the US thinks FATCA is sufficient and has no intent of participating in GATCA (as does the UK, added Ms. Robertson).

The basic idea is that the government must get detailed financial information from institutions and exchange the information annually with other jurisdictions. Mr. Tirard gave examples of the information collected and exchanged.

He then stated that trusts are under attack. Trusts are seen as a way for the rich to hide money offshore. As a result, there can be punitive tax treatment – not only for the trust, but for the settlor and beneficiaries as well. For example, in 2011 France introduced tax provisions that tax beneficiaries regardless of distributions. The result could be that a beneficiary must pay taxes on assets never received.

Mr. Tirard explained that even though France does not recognize trusts, it does have a trust registry. It is still unclear whether it would be open to the public. An audience member commented about the risk of having to disclose minors on the registry, and questioned whether there were concerns that this could promote kidnappings.

In a world of tax transparency, Mr. Tirard suggests you advise your clients to become compliant, and take advantage of voluntary disclosure programs while they are in place. France has already collected two billion Euros, and expects to collect another three billion Euros in 2015, though its voluntary disclosure program.

Mr. Tirard concluded with what he called his "only piece of good news": the EU succession regulation coming later in 2015. This seeks to resolve the application of different succession laws by implementing a uniform system of recognition of succession law. It is broadly based on aperture residence of the decedent, and does not distinguish between movable and unmovable assets. Only three committee countries have opted out (Denmark, Ireland, and the UK). A person in a non-participating state can still elect to have the law apply. For example, a Mexico citizen owning property in the EU who wants to avoid forced heirship can sign a will stating the laws of Mexico apply.

Mr. Christensen believes the moral of Mr. Tirard's story is as bad as you may think FACTA is, stay out of the EU because it is worse over there.

Mr. Christensen reminded the audience that FATCA is in effect and that reporting from foreign financial institutions begins in March. Recall that back when FATCA was passed as part of the HIRE Act in 2010, everyone screamed about how expensive it would be to comply. The response was that the US would receive a lot of foreign money from those that want to take advantage of the kind of protection FATCA provides. But now, foreign jurisdictions are implementing their own versions.

The idea all along was to get intergovernmental agreements (IGAs) between the US and its trading partners to implement FATCA compliance, and get information about foreign accounts held by US investors. Why not just make foreign banks issue 1099s? Because the US doesn't have the authority to make them do that. So instead we have FATCA, which causes massive over reporting.

Mr. Christensen discussed the basic operation of FATCA. He characterized FATCA as a set of withholding rules under Sections 1471-1474 of the Code. The definitions are a significant part of FATCA, and he pointed out the definitions of "US account," "financial institution" and "foreign financial institution" (FFI). A participating FFI is one that has agreed to comply with FATCA. The FFI then registers with the IRS, and must keep certain records and make disclosures to the Treasury. A deemed compliant FFI is a non-participating FFI which still is deemed compliant with FATCA.

He then discussed the withholding requirements. Section 1471 requires 30% withholding on passive investment income to FFIs. Starting in two years there will be withholding on the sale of an asset that would generate income that would require 30% withholding. Note, however, that there will ultimately be only one type of withholding. Section 1441 withholding takes a backseat to Section 1471 withholding.

With regard to trusts, Mr. Christensen said ACTEC took the position that trusts could not be FFIs, because a) trusts are not entities (Treasury rejected that argument), and b) if you look at the way Section 7701(a)(3)-(4) works, trusts are not permitted to do business, and they could therefore not be in the business of administering assets of others (Treasury also rejected this argument).

Treasury's approach can be found in Reg. 1.1473-1(b)(3). An FFI that is a trust has to report anyone entitled to mandatory distributions, and any discretionary beneficiary who received a distribution in the prior year. This solved some over reporting issues that would have resulted if the Type 3 FFI rules applied. GATCA has not adopted these limitations.

Mr. Christensen does not think that trying to avoid participating FFI status is worthwhile, as then you will have to disclose information on all account holders. FFIs do not want to disclose their foreign beneficiaries. There was not time to discuss the differences between the different IGAs out there, but if you have an IGA, that is what you are bound by. Model 1 IGAs report to their own institution. Model 2 IGAs report directly to Treasury, and there are only a handful of these (notably, Switzerland, Bermuda and Japan). Ms. Robertson then described the "UK FATCA", which is basically a series of IGAs.

There was then a brief discussion of the Lichtenstein rules, modified in 2009 after a scathing report of Lichtenstein's handling of money of potential tax evaders.

With the last 20 minutes of the session, the panelists addressed some common themes:

Are trusts dead? Mr. Christensen thinks not. Is there an alternative people should be considering? Ms. Robertson says stay with trusts. A lot of her clients are using them to try to avoid forced heirship; there is no alternative. Mr. Tirard thinks trusts are not dead, but he thinks it will be difficult to use trusts as an international tax planning vehicle.

Assuming we stay with trust structures, where should the trust be located? People discuss the future of offshore jurisdictions pessimistically. Mr. Christensen hears people talking about moving trusts from offshore to onshore/nearshore (Delaware, London). Ms. Robertson believes that if you look at trusts as a succession vehicle rather than tax advantageous structure, the legislation in offshore jurisdictions surpass legislation in England and Wales. Most offshore jurisdictions bring certainty of applicable law regarding construction and the ability to overcome forced heirship. Additionally, the family courts have the power to vary offshore, foreign law trusts. But there is always a question of enforcement. Finally, there is a question of confidentiality, and the concern that clients' names will find their way into the media.

Mr. Tirard agrees with Ms. Robertson, and thinks the ability to overcome forced heirship is a good use for offshore laws. He observed that might apply specifically to France, where perception is a significant factor. The French are

convinced that any Lichtenstein trust must be a scheme to avoid taxation. If you want to give authorities a different impression, move the trust offshore, and to them this could mean Delaware (which is not perceived as a tax haven). The reality is that situs can affect how the trust is treated.

Ms. Robertson notes that when determining where to set jurisdiction, consider the litigation potential. Consider the speed of the litigation process, which varies greatly by jurisdiction. But also factor in the expertise of the judiciary, the quality of decisions that emerge from the jurisdiction, the cost, confidentiality, and importantly disclosure requirements.

Session III-E
Will to Litigate (Litigation Series)
Steven K. Mignogna, Robert W. Goldman, Charles A. "Clary" Redd
Clients often request, if not require, provisions in wills and trusts aimed at preventing disputes. Estate planners likewise recommend techniques for the same goal. Ironically, those same measures often increase the likelihood of lawsuits. This program will survey the common steps and provisions that lead to contention and how to deal with them in the drafting and litigation stages. The presentation is vital for those who counsel clients on estate planning, administration, or litigation – and don't want to be the target of lawsuits themselves.

Reporter: Michael Sneeringer Esq

Mr. Mignogna, Mr. Goldman and Mr. Redd partook in a spirited discussion on several different provisions in wills and trusts aimed at preventing disputes, and why some of those same measures often increase the likelihood of lawsuits. The presenters' outline contains much of the discussed material and would make for a great supplement to their presentation should readers be further interested.

Mr. Mignogna began by describing the presentation as not a "bulletproofing the estate plan" talk; he analogized the over careful estate planning practitioner drafting a "bulletproof" estate plan to avoid litigation, to the idea of going to Times Square for New Year's Eve… it sounds like a great idea but in practice, it is not a great idea. Mr. Goldman added that clients want to get their money quickly and efficiently; they do not want a prolonged administration or litigation.

Mr. Redd spoke first on in terrorem clauses (no contest or forfeiture clauses that seek to prevent contest of a will or trust instrument by removing the beneficiary who challenges the provisions of the applicable instrument). He gave the audience the background and history. He noted that in Florida and Indiana, they are not enforceable (and that Vermont has no developed law on the issue). Mr. Goldman and Mr. Mignogna chimed in with vignettes throughout, while Mr. Redd followed his outline, discussing caselaw and educating the audience on what was considered a "contest" for purposes of in terrorem clauses. He also discussed whether good faith played a role, and the effect of the settlor/testator's move from one state to another (conflict of laws issues). The panelists discussed whether a declaratory action triggers the clause, too.

Mr. Redd also opined on what the clause should say, whether there should be attorneys' fees provisions included, what happens if the contest is lost, and whether a conditional gift requiring arbitration is an in terrorem clause (among other issues).

Mr. Goldman spoke second on mandatory arbitration. His theme was that these clauses are taking court out of judges' hands and placing decisions in attorneys'; is a litigant's day in court over for good? Mr. Goldman noted some of the spirited debate amongst litigators in other states, mentioning that California attorneys were at first taken aback, while Florida attorneys were more receptive since the judges being appointed to the bench were coming from different legal backgrounds.

Mr. Goldman explained the various sub-issues, such as whether these clauses are creating more litigation than not,

whether just saying “I request arbitration” is enough, what the terms of an arbitration clause in a Last Will or trust could say to be more effective, and whether there are time bars to such arbitration. His last few points were on attorney’s fees and mandatory arbitration, as well as whether mandatory arbitration clauses should be more like a contract whereby the potential beneficiaries sign off on such provisions (however, Mr. Redd and Mr. Goldman discussed on this particular topic whether the “contract” idea would cause these provisions to look more like a post or pre-nuptial agreement; would more financial disclosure be required?).

Mr. Mignogna finished the presentation by discussing videotaping of the Last Will/trust execution ceremony and exculpatory clauses. On the topic of videotaping the execution ceremony, Mr. Mignogna noted the many issues, including the authentication of the tape at a possible trial, the type of videographer needed, and the appearance of videotaped execution ceremonies in general. This spirited discussion included a horror story by Mr. Goldman that included a psychiatrist (after doing a pre-interview with the client before a signing ceremony) telling a videographer that his services were no longer needed, the videographer taking notes on the day’s events and Mr. Goldman using the videographer’s notes in the eventual litigation.

Mr. Mignogna explained that exculpatory clauses were to be strictly construed and usually enforced. He noted the horror stories of Enron and Kodak stock provisions in documents (keep and invest these stocks no matter what). He mentioned the need for independent advice, and gave drafting tips that focused on the issue of when a corporate fiduciary wants certain exculpatory language added to a will or trust… why not ask the corporate fiduciary to lower its fee?

Mr. Mignogna and Mr. Goldman finished the presentation by discussing cases in the exculpatory clause realm. While Mr. Mignogna’s cases were taken from the outline on pages 35-41, Mr. Goldman added citations to two further cases: In re: Trusteeship of Williams, 591 N.W.2d 743 (Minn. Ct. App. 1999) and In Re Green Charitable Trust, 431 N.W.2d 492 (Mich. Ct. App. 1988).

Session III-F
Family Governance: Mumbo Jumbo or Credo?
Joshua S. Rubenstein, Thomas C. Rogerson

The topic of family governance has become such an overly promoted flavor du jour that some practitioners tend to dismiss family governance issues as being pablum (as opposed to being a topic for sober consideration), while others assume it is only relevant to the ultra-wealthy. Our speakers will consider the nuts and bolts of family governance issues for ALL clients, not just the ultra-wealthy, including preparing one’s family for wealth and considerations behind selecting a trustee to implement the family plan.

Reporter: Tiffany Walker

The presenters, Mr. Rubenstein and Mr. Thomas, opened the discussion on family governance by providing the helpful reminder that family governance is not just for the wealthy, as issues with family governance can arise in every family. Accompanying the presentation were slides illustrating the topics discussed by Mr. Rogerson and two short bulleted outlines for the topics discussed by Mr. Rubenstein, although some of the slides used during the discussion were not included in the printed materials.

Mr. Rogerson began his portion of the discussion by stating that family governance has grown as a topic on the radar of practitioners everywhere within the last several years. Further on in the presentation, he discussed a study asking families to provide the source of their failures with the following results: 60% lack of communication and trust within the family around group decision making; 25% unprepared heirs; and 3% due to failure in planning (taxes and investments). Mr. Rogerson noted that his prior routine of providing clients with a list of best practices has now evolved as a result of clients desiring assistance in relaying information on the topic of family governance to their families through a team learning experience. He also added that practitioners are often working for

multiple generations, and as a result, earlier involvement in the family makes sense.

The presenters expressed the idea that families are losing wealth more often due to a lack of family governance, and not as a result of inefficient estate planning. Mr. Rogerson shared the story of his own family, which was highlighted in an article published in WSJ Money on lost inheritance. He stated that within four generations a very large amount of wealth was depleted as a result of family governance issues, mainly resulting from each branch of the family managing their shares independently and making the same mistakes that could have been avoided had they worked together as a unit.

Mr. Rogerson noted the tactical approach some clients take to estate planning as a hindrance to family governance. He mentioned that these clients restrict the practitioner's time to a particular tactic rather than allowing practitioner to create a strategic plan.

Mr. Rogerson also introduced the idea of a family meeting. He mentioned that these meetings are a method to reach a client's goal of avoiding a sense of entitlement in their children by preparing them to receive the money. As an example, Mr. Rogerson provided that Warren Buffett famously stated that he wanted to leave enough to his family so that they can do anything, but not so much that they do nothing. Also noted was the fact that although many of these same clients are very successful at building a team mentality at work, they may not be as successful in doing so at home without assistance. Included as discussion points for these family meetings, he provided the following: what is success; what is failure; and what is the guiding principle.

The discussion then turned to the topic of how much do you tell the children, and Mr. Rogerson stated that numbers may change so it may not be the best practice to provide the children with exact numbers. He then introduced the idea of big trains versus little trains, starting children on their own tracks by performing a function or role in family management. Mr. Rogerson provided an example for introducing philanthropy to children by having them each chose a charity to give a specified amount to each year, and in addition, the children will also chose a charity as a unit to give the same specified amount. He also mentioned an example of this practice in his own family, stating that his own children are in charge of an investment account used to fund family vacations, also agreed upon and planned by his children. Although, Mr. Rogerson did note that the topic of losing control may be a sensitive subject for clients, and should not be a conversation starter. However, he stated that linking what you're doing as a family creates the structure for a legacy.

Mr. Rogerson concluded his portion of the presentation with the five steps to family governance. As provided by Mr. Rogerson, the five steps to family governance are family education, family communication, family values and meaningful experiences, family philanthropy, and healthy family governance. In addition, Mr. Rogerson provided the reminder that family fights are almost never about what they are really about, and in general success requires a combination of family meetings, communication, team and value exercises, family philanthropy, and family wealth literacy education.

For the second part of the presentation, Mr. Rubenstein began with his key takeaways which are as follows: (1) yes there are an infinite number of wrong ways, but there is no one right way; and (2) usually when things go wrong there is not a problem with the drafting, but a problem with implementation. Mr. Rubenstein noted that the problem with implementation is often due to the family being scared away from assistance with implementation due to attorney fees.

Mr. Rubenstein next posed the following question, how do you make an estate plan when the world is constantly changing? In the current environment, he stated that clients must plan for divorce, as well as same-sex marriage, adult adoption, and assisted reproductive technology. He noted that adult adoptions are becoming increasingly more common for same-sex partners, although initially created to ratify pre-existing relationships between stepparents and stepchildren. As a result, he provided that many power of appointments benefiting classes such as spouses or issue might be a point of contention for families. Mr. Rubenstein discussed the benefits of using

corporate fiduciary in response to such situations. He also mentioned the benefit of using corporate fiduciaries in situations where children learn only after their parent's death that money was left in trust instead of outright, especially if the trust is a dynasty trust.

The discussion then moved to factors considered in selecting a fiduciary. Mr. Rubenstein stated that it might benefit the client for the attorney to discourage use of individual fiduciaries. He noted that although individual fiduciaries are often inexperienced in making investment decisions and unqualified for the position for other reasons as well, clients prefer individual fiduciaries over corporate fiduciaries due to a lack of trust and perceived cost. However, Mr. Rubenstein stated that corporate trustees generally provide the entire scope of services needed for trust administration, and as such, are often not as costly as perceived by clients after considering the cost of each service individually. He also provided that a directed trustee might be a solution for these clients.

Mr. Rubenstein also pointed to the potentials conflicts of interest that might arise with corporate fiduciaries, as well as individual fiduciaries. He reminded the audience of the Enron case in which the bank did have a potential conflict of interest, and the potential for the bank to sue itself on behalf of beneficiaries. Also addressed was the use of private trust companies, which Mr. Rubenstein stated are very costly, with high overhead expenses, and probably not beneficial for most clients with small wealth. He also mentioned a case in which a court pierced a private trust company for the creditors of a beneficiary who was also involved in the management of the private trust company. As a final thought, he noted that practitioners must look to the family, their nature (more pretentious, less pretentious), assets, and the duration of trust, making an independent determination each time.

3:50 - 5:20 SPECIAL SESSIONS IV

Session IV-A
Split-Interest Trusts Created by Entities: When and Why It Will Make Sense...and More! (Charitable Giving Series)
Jonathan G. Blattmachr

This presentation will provide additional detail on when it will be preferable to have a trust, corporation or partnership create a charitable remainder trust or charitable lead trust. In addition, it will explore the impossible dream: how to create a charitable lead trust that is a grantor trust (so the grantor gets an immediate income tax deduction) without having to report any appreciable taxable income during the lead trust term.

Reporter: Beth Anderson Esq.

This presentation builds on the General Session presentation that was given by Mr. Blattmachr on Thursday morning. The significant highlights are reported here.

In this special session, Mr. Blattmachr expands on the planning techniques he introduced in the morning session. When establishing a grantor trust by an entity, if you get it wrong and the owners of the entity are deemed the grantors of the trust then the transaction is treated as though the entity made a distribution/dividend to the owners, subject to tax, then the owners made a contribution to the trust. The benefits of a corporation creating a charitable remainder trust is tax free deferral until distributions are made and if one contributes an appreciated asset and sells it there is no recognition of gain.

§170 limits individuals to max of 50% AGI for charitable deduction, and no deduction for ordinary income (except at death), but a trust can have 100% deduction.

Wants a charitable deduction on income from trust, but trust terms don't include the ability to make distributions to charity. If the trustee has broad investment authority, then create a partnership and put trust assets into the partnership. The trust income is income from partnership. If partnership makes a contribution to charity instead of trust, the deduction is passed out to the trust and the trust gets the §642(c) deductions even though terms don't

provide for charitable distributions, and it's a 100% deduction so long as contribution was not from unrelated business income. §681 applies to distribution by partnership to charity, and the distribution must be paid from gross income and not UBI.

PLR 9821029 non-grantor trust created charitable remainder trust. Step-one, decant from current trust to give a currently exercisable non-general power of appointment to any person or entity. Step two, exercise the power to transfer assets to new charitable remainder trust with the current trust as the unitrust recipient.

Shark Fin CLAT – small payments then when insured dies big payment, Rev. Proc 2007-45 says you can make any annuity payments so long as you can actuarially compute charitable deduction. Some risk that if the payments are too small then the payments may not work. PLR 201216045 IRS expressly approved 10 year CLT with annuity increasing by 20% each year.

§1.170A-8(a)(2) gift of income interest is a "for the use" of charity, and contribution of a remainder is "to" charity. §170(f)(10) denies income tax deduction and confiscates assets for a transfer "to or for the use" of charity and a non-charity is the direct or indirect beneficiary. Creation of CLT is a contribution "for the use" of charity, and payments of insurance premium from CLT is risky and looks like an indirect payment to a non-charity benefit. Exception for certain CRTs but unsure if this exception applies to CLT. 170(f)(10)(C) and (E).

Fund the CLAT with cash and substitute the policy later – is this ok? Make distribution of cash, pay the policy, then when policy is paid swap assets – cash for policy. Can't be "planned" step transaction doctrine may apply, collapse the transaction and §170(f)(10), but also run into self-dealing because transactions between trust and disqualified person. Query if a power to swap is self-dealing which could disqualify the trust as a CLT no income tax deduction and potential 200% §4941 excise tax.

Ideal solution – use a non-MEC – use an old/cold life insurance policy, but if you want to do the CLT now but don't have an old non-MEC policy then use a policy that isn't defined under §7702(a). Frozen net cash value policy (FNCV) – 10M premium and continues to grow over the years, even though flunk §7702(a) test don't pick up any income under §7702(g) because the net cash is frozen at the premium paid. Normally a single premium policy is a MEC, but the MEC rules only apply to policies that meet 7702(a). Now you can borrow against the FNCV to pay the annuity and not worry about §170(f).

Session IV-B
Case Studies in the Ethical Considerations in Acting as an Executor or Trustee (Ethics Session) Charles D. "Skip" Fox, IV, Amy K. Kanyuk, Mary F. Radford

Using case studies, the panel will examine different ethical issues that arise when a lawyer or other professional acts as an executor or trustee.

Reporter: Carol A. Sobczak Esq.

This session builds on the General Session on the same subject that Mr. Fox presented on Thursday morning. As with that Report, this one too is about the significant highlights. This session used the Model Rules of Professional Conduct and the ACTEC commentaries, and could not be state-specific as to the issues presented. Practitioners are warned to review their own state laws and ethics opinions

The issues we all need to consider are: competence, conflicts, communications, compensation, and gifts.

There were 20 case studies, and we cannot discuss them all in this summary, so this reporter will attempt to summarize some of the traps we as attorneys should avoid.

If you represent several generations of the same family, and are asked to do something that may be to the detriment of one generation, first ascertain who is the client, and then make sure you disclose who your client is and perhaps suggest separate representations.

An attorney may represent conflicting interests if (i) he satisfies himself that he can provide competent representation, and (ii) everyone waives the conflict.

If you are asked to represent a beneficiary and an administrator of a holographic will, you may want to be sure that state law will validate such a will. Then any conflict may be waived. The best practice is to acknowledge any conflict in writing and to suggest separate counsel. Think of possible conflicts down the road. It's easier to decline the representation rather to have problems later.

Conflicts are prevalent in our area of practice, especially with respect to joint representation. We need to identify conflicts and manage them. The advantages of joint representation are that it saves clients money; clients think of us as "family" lawyers; it may be impractical for each party to have a separate lawyer; you can lose clients by suggesting more lawyers; you have history with clients and may be able to better find solutions. Written consent to joint representation is not enough - you need to have discussions with the clients. On the other hand, if all parties consent but you have no writing, it might not be OK.

When you represent a fiduciary, who is client? Majority view is that the fiduciary is the only client. There is disagreement among the states. There is a "privilege exception" that, in trust administration, the beneficiaries are the "real" clients of the lawyer. Beneficiaries may be entitled to all communications if the lawyer who now represents a trustee in litigation was previously representing the trustee in administration.

Does a lawyer owe a duty to his trustee/client to tell him about rumors of an investment he is about to make which would make the investment worthless? Rule 1.4 says a client needs to be kept reasonably informed. Is the lawyer obliged to reveal to a beneficiary what she learned in course of representation? No, but the Restatement says a lawyer who represents a fiduciary where there are beneficiaries who can't protect their own rights can reveal information to a non-client to the extent the lawyer can prevent a breach of duty where the breach would be a crime or fraud. Check state ethic opinions and model rules since there is variance.

Can you represent two of a decedent's three children as co-executors of a will and one child as a beneficiary? What if they received unequal shares of the decedent's estate? Under Rule 1.7 there is a conflict, but the lawyer can represent all parties if she can do so adequately and get informed consent in writing. How to get informed consent? Later on the clients may say they didn't give informed consent because they didn't know all the facts. Do you really want to take this representation where there is potential for dispute? The beneficiaries may not be happy in the future. Even if you get consents, if someone gets unhappy, they'll say they didn't know what they were signing.

ACTEC commentaries say a lawyer is precluded to act where interests conflict to a "substantial" degree. With multiple parties, especially where their interests differ, or with co-fiduciaries, you must monitor the relationships during representation.

If a lawyer tries to probate an estate which consists of all joint tenancy property, the lawyer is either incompetent (a violation of the rules) or is violating his ethical duty to the client.

A policy of appointing yourself as fiduciary in a majority of your clients' wills and trusts is not OK. But you are allowed to tell clients you are available to serve. But always include a trustee removal and replacement clause so it doesn't seem like it's lifetime employment for you.

A lawyer should not give advice to unrepresented persons. Rule 4.3 says a lawyer who represents a fiduciary should tell the beneficiaries that he doesn't represent them and they should seek separate counsel. You should have a meeting with the beneficiaries at the outset of administration and let them know that you don't represent them.

A lawyer should not solicit any gift or prepare a document on behalf of client that gives the lawyer a gift.

If some children are disinherited, can the lawyer tell them why? Attorney-client privilege survives death of client. Exception - testamentary exception in restatement - applies even if fiduciary does not consent. If decedent would have wanted full disclosure. See variations in the states.

The bottom line is usually the smell test - if it doesn't smell right, check the Model Rules, check state law, check your state ethics opinions, and, as my Aunt Blanche used to say, "If in doubt, sit it out." I think that is the best advice ever.

Session IV-C
Advising the Fiduciaries of Trusts and Estates Holding Business Interests--Balancing Tax Objectives with State Law Duties Edward F. Koren, Richard L. Dees, Karen Sandler Steinert, Robert J. Turnipseed

A fiduciary owning a closely-held business faces unique legal, tax, ethical and practical issues. This panel will explore those issues, including the proper tax elections for trusts holding S stock; the application of the evolving material participation requirements on a fiduciary; fiduciary liability for tax issues involving the business prior to its acquisition; the impact of the Prudent Investor Rule; the emergence of divided decision-making among fiduciaries, including directed trusts; and the conflicts that can arise between the duties of the trustee as a director or shareholder and the fiduciary duties to the beneficiaries.
Presenter: Michelle R. Mieras

Mr. Koren greeted the audience with grim statistics regarding the longevity of closely held businesses passed from generation to generation. He said only about 12% of closely held businesses survive to the third generation. Notwithstanding this unfortunate statistic, he noted that by 2040, over $10,000,000,000,000 of closely held businesses will be transferred, making this a significant topic.

Mr. Turnipseed began the presentation with the facts of a hypothetical that served as the underlying theme for the four panelists' consecutive presentations. It involved a long-term client who has been appointed executor of his brother's estate. His brother left a wife, two adult children, a mistress, and significant assets including an 80% interest in a closely held timber company valued at $30 million. He stated that this type of cash poor, high value estate is not uncommon when discussing closely held businesses. The decedent's will gave placed the timber company into trust for the benefit of his spouse and children, and instructed the trustee (also the long-term client) to preserve the business interest, which was structured on a slow-growth timber process that would ensure slow but steady income for decades to come. Of course, the business itself had a few issues, including delinquent payroll taxes and independent contractors that were historically paid in cash.

The panelists took turns discussing four general areas implicated by the terms of the hypothetical:

1. Tax Issues,
2. Duty to Diversify and the Prudent Investor Rule,
3. Conflicts of Interest, and
4. Section 1411 issues.

Mr. Turnipseed began with tax issues. He noted that fiduciaries cannot just ignore the past. The federal priority statute provides that the claims of the US government shall be paid first. Distributions that render an estate insolvent after notice of a tax debt subject the personal representative to personal liability for the unpaid US

government debts. The battleground is notice. The statutes have broad inquiry notices, meaning notice existed if the fiduciary had notice or there were facts that would lead a reasonable person to inquire into whether there was a tax debt outstanding. Generally, the fiduciary must use due diligence to determine whether there are unpaid tax liabilities.

There are a few defenses to the imposition of personal liability. First, an executor could prove that there was not sufficient notice. This is a question of fact. Mr. Turnipseed pointed out O'Sullivan v. CIR, T.C. Memo 1994-17 (U.S. Tax Ct. 1994), in which the fiduciary had in her possession a copy of a signed tax return. Even though the return had never been filed, the fiduciary did not have an obligation to inquire further because she had the signed tax return. Second, a fiduciary could assert reliance on counsel. This is not absolute however, as Mr. Turnipseed explained that in a recent case, where the executor had notice of the debt, the court found that the client had received bad advice from the attorney but that wasn't enough for relief.

What if there is a probate order permitting a distribution? Mr. Turnipseed noted that this does not generally help your client. For the IRS's purposes, the probate court basically does not exist. Look to the federal priority statute. There is some exception for administrative expenses, and the IRS will defer to state law as to what administration expenses are appropriate to pay out before the tax liability. But a probate court order will not mean the fiduciary is not liable for the tax debts.

Mr. Turnipseed explained that the fiduciary (and really anyone who has possession of assets) has a duty to object to levy or attachment actions. If the fiduciary stands back and does not try to protect the assets, there is potential for the fiduciary to personally liable if there are then insufficient assets to pay the tax debt.

After quickly discussing the business tax issues of the hypothetical and ways to avoid discharge liability, Mr. Turnipseed dismissed the usefulness of the Request for Assessment under Section 6501 due to the number of exceptions.

Ms. Sandler Steinert then discussed the next issue raised by the hypothetical: how the duty to diversify and the Prudent Investor Rule intersect with the decedent's testamentary trust provision directing the trustee to retain the interests in the closely held business.

From a planning perspective, there are arguments for and against including such a provision. Consider how a mandatory provision to hold an asset would interfere with the trustee's ability to dispose of the asset if, for example, of one of the beneficiaries has an emergency need. If Ms. Sandler Steinert cautions that if you are going to include a provision to hold an asset, don't just allow the trustee to hold the asset without diversifying. Also be sure there is a waiver of the trustee to adhere to the Prudent Investor Rule, and an indemnification of the trustee for holding and any loss in value while the asset is held (but be cautious of whether applicable state law will uphold this indemnification).

The hypothetical presents good facts to permit the trustee to keep the asset: it is a specific asset, there is good rationale as to why they would want to keep the asset (proven production of income, family business, etc.). But the business is not handling the timber land in the most profitable manner, which creates tension with the trustee's duty to support the surviving spouse per the terms of the document.

Even with the language discussed above, the best option may be to have all beneficiaries give consent to hold the asset. The more they know about the asset, the more weight given their consent. Another option is to seek court approval to hold the asset, but jurisdictions differ as to whether the court would hear this action. Yet another option would be for the trustee to move the trust administration to a more favorable jurisdiction. Mr. Koren warned that depending on the jurisdiction, the UTC has a provision regarding the developing are of "benefit of the beneficiary rule." That subsumes all of this and makes the Prudent Investor Rule mandatory, so make sure you are looking at your particular governing law.

Mr. Koren then turned to conflicts of interest. In the hypothetical, there are multiple possible conflicts. There could be conflicts between the trustee and the beneficiaries because of their interests in the family business. There are also conflicts inherent to carrying on the business in the same conservative manner as the decedent did, because the surviving spouse needs funds to live on and there are estate taxes that need to be paid. There is a conflict between retaining the stock, and diversifying into income producing assets to support the spouse.

When a business is involved, the trustee doesn't just have to worry about the beneficiaries; the trustee may also have duties to the other business owners. Decisions will need to be made at the entity level which may conflict with decisions that the trustee would make solely in his capacity as trustee. Where the trustee is also an owner of the business in his individual capacity, the business decisions he would make may be skewed by his own personal interests.

The doctrine of minority shareholder oppression is an evolving subject. Mr. Koren points out that if the trust's business interest is a minority interest, the trustee needs to be on the lookout for being disadvantaged or oppressed by majority interests. Similarly, if the trust is a majority owner, it must be cautious about being the oppressor. These could include such things as ignoring business formalities, individuals taking away business opportunities, excess compensation issue, perks for controlling shareholders, lack of business information and participation, or sales of personal property to the business. Note that the oppressors don't have to be solely in control, they just have to be part of "those in control".

Mr. Dees then discussed the Section 1411 issues for trustees. He joked that he usually does not get through his materials, but today he was likely breaking a record as he would not get past the table of contents of his very detailed 64-page outline.

Who reaps the benefit when a trustee materially participates in a business? If the trustee is running the business and meets the 500 hour test, it will count for the trustee for his own individual taxes (assuming the trustee is also an owner as in the hypothetical), but what about the income going into the decedent's estate? Look at Section 469. Basically, as long as the fiduciary is acting in a fiduciary capacity (i.e., subject to fiduciary duties) while carrying out the business activity that meets a material participation test, the trust or estate will not have passive income and can avoid the NIIT.

Mr. Dees briefly covered how income mineral interest would be affected (inherently passive), and the implications of the Aragona case. He then posed unresolved questions about what would happen if the surviving spouse was co-trustee and did not participate at all. Or what if the surviving spouse had veto power over the business administration of the trustee?

Remember that under the Section 1411 regulations, the character of income at the trust or estate level carries out to the beneficiaries who receive the income. If you can change who the trustee is, you have a lot of power over how this could be implemented.

Ms. Sandler Steinert commented that there could be situations where the estate holds on to S corp stock for as long as possible, and in light of NIIT, QSSTs are gaining speed.

Mr. Koren asked how the application of the 1411 rules would be affected if a corporate trustee was appointed. Mr. Dees responded that in most cases, the corporate fiduciary would not be running the business, and material participation becomes unlikely. What if employees of the business went to work for the corporate trustee? They would thereby become the agents of the corporate trustee and their work with the business could fulfill a material participation test for the corporate trustee. Mr. Dees noted that it doesn't seem like this it should work (but it probably does) because it turns on who employs the people doing the active work with the business.

Session IV-D
What's Hot in Florida? Recent Developments in Florida Law Elaine M. Bucher, William T. Hennessey, Shane Kelley

This presentation will review recent developments and hot topics in Florida law that all professionals practicing in the trusts and estates arena should be aware of.

Reporter: Craig Dreyer Esq.

The speakers provided over 80 pages of materials for the session. Mr. Kelley began with homestead law and discussed the basics of Article X, Section 4 of the Florida Constitution and the various statutes and case law that fills in the gaps. He noted that in the past year, three cases have come out regarding waiver of homestead rights. He spoke about the three areas that need to be addressed with homestead: 1) exemption from forced sale, 2) inurement of the exemption upon the death of the owner, and 3) Restriction of the transfer of the property. In Florida there are many scenarios where you cannot freely transfer your homestead. During life you may devise your homestead only if you are joined by your spouse. See Lyons. Fla. Stat. §732.401 provides how homestead property descends at death. In 2012, Florida created an election for a surviving spouse to take an undivided one half interest in homestead property as a tenant in common instead of a life estate. This allows the surviving spouse to partition the property. The tenant in common election is made by filing a notice within 6 months of the date of death and recording it in the county where the property is located.

Mr. Kelley then discussed Fla. Stat. §732.702 which provides how the right to homestead and other various rights of a surviving spouse that may be waived before or after marriage. Also a waiver of all rights is a waiver of homestead even if the homestead rights are not included. They also discussed the requirement for two witnesses on any waiver, and the addition requirement of fair disclosure if the waiver is executed after marriage. The panel then discussed a litany of cases interpreting the statue. It was also noted that there is a case where the majority found improperly devising homestead is not malpractice in Florida. See Lorraine v. Grover, 467 So. 2d 315 (Fla. 3d DCA 1985). The panel noted the strong dissent in the case. The Tescher case provided that a waiver is the equivalent of having the spouse predecease. Mr. Hennessey noted a post death disclaimer will not always have the intended effect with homestead property and a minor's interest in Florida Homestead cannot be waived. Mr. Kelley then discussed a number of cases including Friska, Lyons, Stone, and Habeeb (which was subsequently withdrawn) to demonstrate the complex issues surrounding Florida homestead law. An animated discussion concluded the homestead discussion, between the panel and an audience member which helped exemplify the current debates regarding Florida homestead law.

Ms. Bucher then moved on to Directed Trust matters. She noted that Florida's statute on directed trusts has been in place since 2007. Fla. Stat. §736.0808 is modeled after the Uniform Trust Code. She also discussed the subsequent amendment of Fla. Stat. §736.0703 to satisfy corporate trustee concerns. Ms. Bucher then noted a major development in the trust arena has been regarding trust protectors. In December, Minassian v. Rachins, (4th DCA 2014), it was decided that a surviving spouse was found to have violated her fiduciary duties to her husband's children by continuing her high spending and gambling lifestyle as trustee of the family trust. After the court determined she breached her duties, she exercised the trust protector provision to revise the trust so she would not be in breach. The Trust Protector did this in sole and absolute discretion. The children sued, but the 4th DCA confirmed it was a valid change by the trust protector. This ruling essentially allows a settlor to privatize dispute resolution.

Ms. Bucher then discussed how Florida trusts have two methods to defeat creditors: spendthrift clauses and discretionary trusts. The seminal case is Bacardi, 463 So. 2d 218 (Fla. 1985), were an ex-spouse got continuing writ of garnishment against a spendthrift trust. In 2007, Florida codified Bacardi in Fla. Stat. §736.0502, which provides spendthrift trusts are protected, but §736.0503 addresses exemption creditors which include a child, spouse, or former spouse with a court order for support or maintenance may reach a spendthrift trust as a last resort. Fla. Stat. §736.0504 addresses discretionary trusts and says whether or not if a trust has a spendthrift clause a creditor

may not compel a distribution. She then discussed Berlinger v. Casselberry where the Florida Second District Court of Appeal allowed a former spouse to obtain a writ of garnishment over the trust distribution for her ex-husband because of Florida's strong public policy favoring enforcement of alimony and support orders.

Mr. Hennessey then discussed the rules regarding bequests to an attorney in a client's estate planning documents. He noted that the Florida bar rules made these gifts voidable. However, Florida added Fla. Stat. §732.806, so that after October 1, 2013, it makes any gift to a lawyer, or certain people related to, or affiliated with, the lawyer, void if the lawyer prepares the instrument making the gift, or solicits the gift, unless the lawyer or recipient of the gift is related to the client. This law changed gifts to the drafting or supervising lawyer from voidable to void. He also noted that you cannot prepare a document and have another lawyer supervise the execution. However, a lawyer naming themselves as fiduciary is not considered a gift under this provision.

Mr. Hennessey then discussed pending legislation for 2105. The new changes require a lawyer to make basic disclosures to a client before a will or trust is signed with the lawyer serving as a fiduciary. A client must acknowledge in writing who can serve as personal representative, and that the lawyer is entitled to a fiduciary fee in addition to an attorney fee. The new statute which is expected to pass this year would void any fiduciary fee if there was no disclosure and consent, but it would not void any attorney fees. The statute will not apply to documents executed prior to the enactment of the statue.

Next Mr. Hennessey moved on to lawyer-fiduciary privilege. He discussed the case of Jacobs v. Barton which applied the Riggs analysis (a Delaware case) to fiduciary privilege. The court looks to real clients to see who benefited from the advice. In Florida we passed Fla. Stat. §90.5021 in 2011, to recognize fiduciary-lawyer client privilege, but in December 2013, the Florida Supreme Court declined to adopt this new section of the Florida Evidence Code, rendering ineffective the procedural aspects, if any. Therefore it is arguable whether or not the statue applies. Ms. Bucher then discussed the same sex marriage issue which in Florida is disallowed by the Florida Constitution and statute. However, the US District Court for the Northern District of Florida found these provisions to be unconstitutional. The case is currently on appeal to 11th Circuit Ct. of appeals and it is rumored that the Supreme Court may take jurisdiction soon. The panel noted that the only probate case in Florida dealing with the same sex marriage issue involved a ruling that a non-resident same sex married partner who was appointed executor in their home state was not qualified to serve as personal representative of the Florida ancillary probate. A judge in Palm Beach County determined that this portion of the probate law was unconstitutional as it was applied and allowed him to serve.

Session IV-E
Grandma, Here's Your Deposition Subpoena: Contested Guardianship Issues (Litigation Series) Robert N. Sacks, Peter J. Forman, Crystal M. Patterson

This program will cover a host of issues in contested guardianships/conservatorships, ranging from "normal" battles to multi-jurisdictional disputes, as well as contested substituted judgment proceedings.

Reporter: Joanne Hindel Esq.

A normal guardianship or conservatorship proceeding could be one in which a client comes to you and wants to obtain guardianship over her aunt's affairs. Facts provide that the client cannot easily access her aunt because the aunt is living with another family member who appears to have taken over the aunt's affairs but is not handling her affairs to the aunt's benefit.

First advice that lawyer should give is the impact a guardianship might have on the family relationship. Will the aunt resent the attempt to establish a guardianship?

Nomenclature regarding matters affecting incapacitated individuals can vary from state to state (control over assets versus over the person). Some states use the term guardianships, others conservatorships and others use both. You need to be familiar with your state's laws and terminology.

The lawyer must also determine the domicile or residence of the potential ward – where is it best to file for the guardianship?

The petition should address three issues:

1. Is a substitute decision-maker needed?
2. If one is needed, what is the scope of the powers that should be granted?
3. Who is the best person to serve in that role?

Standard to determine whether a substitute decision-maker is needed

Disoriented as to place and time, impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions and who has demonstrated deficits in behavior which evidence an inability to meet personal needs.

Watch for the distinction between legal incapacity and medical incapacity and be careful when physicians testify that the distinction is understood.

Generally, a psychologist is better able to address capacity for purposes of a guardianship proceeding.

When analyzing the ability of a potential ward, there may be different standards regarding the person's ability to handle various activities. For instance, the ability to make a will may require a lower level of capacity than the ability to enter into contracts.

Scope of powers to be granted

Most courts will tend to be as restrictive as possible with respect to the scope of powers. Often, jurisdictions may provide a "check the box" list of powers that should be listed in the petition for guardianship.

The powers may include the ability to determine where the ward will live, medical and psychological treatment, and ability to provide for the ward's care, comfort and maintenance needs.

In addition, is it necessary to control people whom the ward will be able to see? This can be identified as the power and duty to exercise "supervisory authority over the ward".

Conservatorship powers might include the ability to pay reasonable charges for the support maintenance and education of the protected person. Ability to pay the person's debts, possess and manage the person's assets, manage and/or sell real estate, enter into contracts and apply for governmental assistance and benefits.

A review of prior transactions – going back for a period of years may also be authorized since it is not clear at what point in time the protected person lost capacity.

Who should be appointed as substitute decision-maker?

Many states have priority statutes that lay out the order of priority given to various individuals. Generally, priority is given to an individual who has been appointed as guardian in another jurisdiction, an agent nominated under a health care directive, an agent nominated under a power of attorney document; the spouse of the person, an adult child or a parent.

Courts may not choose priority individuals if there has been a history of family disputes. Then, the court may choose a third party who is disinterested.

The lawyer should review with the client issues such as:

1. Time and cost involved in serving as a guardian
2. Do they really want to be involved in the family drama?
3. Are they physically close to the ward?
4. What is the history and depth of their relationship with the ward?
5. What is their ability to pass a background check?

The procedural requirements include the following:

1. Service of the petition to the ward and other interested persons
2. The court will send a representative to visit with the ward
3. The court will consider appointment of counsel for the ward if the ward has not chosen counsel
4. Determination of any fee to be paid to the attorney representing the ward (consider that it might be risky to accept payments from someone who eventually is determined to be incapacitated)

After the petition is filed, objections may be filed by any individual who is the subject of the proceeding or any interested person (typically those who were entitled to notice). The objections may be with respect to the establishment of the guardianship at all or with respect to the proposed guardian.

If the guardianship is contested, then full discovery is available. One discovery tactic may be a request for inspection at a designated physical location that has relevance to the proceeding and a request for physical/medical inspection of the ward.

You can also depose the ward as well as all critical witnesses and send third-party subpoenas which are written requests to a non-party to produce records or appear and give deposition testimony.

It is possible that before trial, the parties will go to mediation. In some jurisdictions, courts will not allow the parties to determine whether a person is incapacitated but will insist that the matter be tried by the court.

The panel discussed the Uniform Adult Guardianship and Adult Protective Proceedings Jurisdiction Act which is focused on questions of jurisdiction and related issues in adult proceedings. The purpose of the Act is to provide an effective mechanism for resolving multi-jurisdictional disputes.

It creates a three-tier system of priority for determining the proper jurisdiction in guardianship proceedings:

1. the home state (where was the ward physically present for at least six months prior to the filing of the petition)
2. the significant-connection state (a state other than the home state with which the ward has a significant connection other than mere physical presence)
3. Other jurisdictions

Granting jurisdiction or venue to the state where the ward is found has created a phenomenon known as “granny snatching.”

Once the home court is determined, it has the main jurisdiction over the ward but should keep the other jurisdictions informed.

The panel then turned to the topic of substituted judgment proceedings. While a person is alive but has been placed under a guardianship, there is a way to create or change that person's estate plan to increase, reduce, or eliminate gifts in that plan. Generally this is done through a substituted judgment proceeding filed in the guardianship action.

Sometimes, these actions are contested. The court will look at past donative practices of the ward and what are the assets at issue? What are possible tax ramifications of the changes? The court considers what a reasonably prudent person would do under the circumstances.

The panel discussed the Murphy case in which a court held that collateral estoppel applied in an action brought after a contested substituted judgment proceeding had been finalized. The reasoning in that decision suggests that the collateral estoppel effect of a substituted judgment proceeding could be binding in both directions. If the substituted judgment is granted, future challenges to the new estate plan can be barred and if the substituted judgment is denied, future attempts to enforce the rejected estate plan can be barred.

FRIDAY, JANUARY 16

9:00 - 9:50
The New Normal: Planning for the "Modern Family"
Lauren J. Wolven

As popular media reflects, families today come in all shapes and sizes. Contemplating the modern family to reduce conflicts through thoughtful drafting has become a significant aspect of estate planning. This session will focus on crafting estate plans to deal with second (or subsequent) marriages, long-term non-marriage relationships, same-sex couples and twilight relationships. Consideration also will be given to defining terms such as "spouse" and "descendant".

Reporter: Carol A. Sobczak Esq.

The speaker started the presentation by noting that fewer clients these days have federal estate tax issues. The issues today concern this brave new world we are living in.

The general theme of this presentation was defining terms. The first term to define is "spouse." Do you define "spouse" in your documents? If not, courts may determine that a legally separated spouse is still a spouse entitled to benefits, or that a former spouse who reconciled with the decedent and lived with him as a married couple was not a surviving spouse. We are not even speaking about same-sex couples or civil unions yet.

Our documents need to be reviewed and updated. Most clients do not even understand the substantive provisions of their documents, much less the boilerplate, which includes the definitions, which can result in unintended consequences.

"SPOUSE." Your client needs to define a "spouse" more specifically. Does "spouse" include someone who has filed for divorce but the divorce is not yet final? A spouse who is legally separated? A spouse who is not legally married to the other spouse but who hold themselves out as legally married? These are all questions to consider in drafting the definition of a "spouse."

Is s domestic partner a spouse? The parties to a civil union? Do only legal marriages count? What about whether someone is married in any state regardless of the state of administration?

When do you want someone to cease being a spouse? Until divorce? Separation? Filing for divorce? These questions need to be addressed.

The Windsor case was not discussed, although the speaker noted that it does not extend to civil unions or domestic partnerships, and many questions still remain unanswered.

"DESCENDANT." Similar to the question of who is a spouse, who is a "descendant?" Can an adopted person inherit from the parents of an adopted parent? Older documents refer to "lawful" or "blood" descendants, but those definitions are obsolete today.

"Equitable adoption" is an issue, even if many of us have not heard of it. Consider whether a child may inherit from her stepfather's mother, since they had a very close relationship. One California case has said "no," even though it acknowledged the relationship was akin to parent/child. This stressed the need for clients to convey their wishes in their documents, particularly where the family is not the standard Ozzie and Harriet variety.

Likewise, do brothers and sisters include the children of a former son-in-law of the decedent's parents and his new wife? One court said no, but it did take a court to clarify. Better to clarify in your documents.

What about a child born during marriage, presumed to be the issue of the marriage under state law, but was actually another man's child? One case from the 1950's looked to the law at the time of the Will and confirmed the strong presumption that a child born during wedlock is the issue of the marriage.

The moral of the story is that even the traditional ideas of children, siblings, descendants, and issue etc can be difficult to determine if not clearly defined in the document.

"THE NEW TECHNOLOGY." What is the status of children born after a father has been deceased (using frozen sperm)? Are such children descendants of the father? What happens if children born after decedent's state has been administered and is terminated? Most states still do not address this issue.

What about the use of genetic material? It might sound crazy (and the speaker assured us she isn't), but there are issues surrounding harvesting genetic material. For example:
See Block, Dorian, *Dead Man Johnny Quntana's Sperm Can't Impregnate Girlfriend*, New York Daily News, April 30, 2009.
See also, Block, Dorian, *Judge Allows Wife to Harvest Dead Husband's Sperm*, New York Daily News, April 18, 2009.
See Martinez, Jose, *After Husband Kills Himself, Wife Goes to Court Saying She Wants His Sperm*, New York Daily News, October 15, 2010.
Blalock, Katie, *Crowdfunding helps Tucson Woman Raise Money To Have Dead Fiance's Child*, Nov. 7, 2014, available at http://www.abc15.com/news/local-news/watercooler/

Who owns a deceased person's genetic material? Can it be harvested? By whom?

RESTRICTIONS ON MARRIAGE. These clauses are generally not upheld. Query what happens if not upheld? Should always provide a default provision.

NOT THE FIRST RODEO. Traditional A/B plans don't always work for second, third, and subsequent marriages. Your third wife may be younger than your children! Consider a floor on distributions or using unitrust provisions. What if you leave the residence to the spouse, but the tangible personal property to your children? Would you like them to clean out the house around the surviving spouse?

Some things to consider with a house and "not a first" marriage:
Real estate taxes on any residence owned in a trust;
Routine maintenance and repairs on the residence;
Major capital expenditures (such as a new roof) for the residence;

Medical expenses and health insurance;
Utilities;
Insurance on a residence, artwork or other valuables;
Income taxes on the distributions from the trust;
Vacation travel;
Caregivers; and
Automobiles and auto insurance
An independent fiduciary may be better than the spouse or children.

NO RODEO AT ALL. More unmarried couples choose not to marry. Per the last census, there are more than 7.5 million unmarried opposite-sex households and many have children, both natural and adopted.

Domestic relationship agreements can be enforced as a contract. They need consideration, such as household work, financial support, but not sex. But maintenance payments may not be deductible upon termination of the relationship, unlike with a divorce.

TWILIGHT RELATIONSHIPS. These start later in life. Many couples marry over age 50, and there are issues peculiar to these couples, such as caregiving issues, residence, nursing home, etc.

SAME-SEX MARRIAGES. The issues are generally the same as all of those noted above, and then there is the issue of validity of the marriage from state-to-state. Watch powers of appointment that allow appointment to a "spouse" and, as noted above, define spouse to include who and what you intend.

The **bottom line** is to think about the world we're living in and how that effects our estate planning and be sure to draft for those issues.

9:50 - 10:40
Planning for Life After Death: Laws of Succession vs. The New Biology Joshua S. Rubenstein

Most of us are accustomed to having a relatively broad ability to control the disposition of our property following our deaths. It comes as a surprise to know how little ability we have to control the disposition of ourselves, and the uses to which we can be put, following our deaths. This talk will examine the ability to control burial and the disposition of body parts, the posthumous use of our genetic material, inheritance by posthumously procreated individuals, and exhumation for the purpose of genetic testing. It will also offer practical suggestions concerning what can be done to address the fact that medical science now permits the class of one's children not to be closed by one's death.

Reporter: Kimon Karas Esq.

Josh divided the topic into five parts: Control over disposition of remains, control over disposition of body parts, control over posthumous reproduction, control over inheritance by posthumously reproduced individuals, and control over posthumously paternity testing with respect to alleged lifetime conceptions.

Josh commenced his presentation with **the statement** that there is a huge gap between law and science. Law is significantly lagging behind scientific advances in this area.

Josh started his presentation discussing control over the disposition of one's remains. Historically there has been no recognized property interest in the body. Under English common law, there was no property interest in corpses, which were deemed to belong to the public. American common law established quasi-property right vested in the next-of-for the limited purpose of burial or other disposal. The only redress for wrongful handling of corpse is an action in tort, i.e. intentional infliction of emotional distress. A funeral home may not assert a lien for the

nonpayment against a corpse. The litigation in this area involved funeral homes for improper handling of a corpse. Similarly there is no right to dispose of body parts, i.e. no property interest. Josh referenced one's sale of blood (individual repeatedly sold rare type of blood) resulted in income and not capital gains. Also one has no intellectual property rights to one's body parts (physicians used genetically unique spleen of a man who suffered from hairy cell leukemia to develop and patent a commercial T-cell line value at more than $3 billion). (Damages in tort only for plaintiff's surgically removed eyeball being negligently washed down the drain.)(No property rights in excrement containing marijuana-filled balloons).

A decedent cannot control his own burial. Essentially such direction guided usually by i) decedent's wishes. ii) family members, or iii) state statutes defining priority. State statutes address disposition of one's body through burial, cremation or cryogenics ("ultimate estate freeze"). Although there is no absolute right some states are starting to recognize the right to dispose of one's body. Absent such a statute, the right rests with family members. If a state does have a statute generally those are located in the state's health laws and not the probate statutes.

Next Josh discussed one's rights to body parts. There is no right to dispose of body parts while living although state statutes allow for disposition at death. Recent developments permit 'untransplantable' body parts to be transplanted. The Uniform Anatomical Gift Act deals with anatomical gifts by decedents. Statute standardizes the process of organ donation but prohibits sale. Unclear whether 'a stillborn infant or fetus' is covered within the definition of decedent. The National Organ Transplant Act is the only federal law that prohibits the transfer of a body part for 'valuable consideration'. Exceptions include blood, sperm and ova. Possible justification is these are items that are replenishable and less painful and dangerous to donate. Death for this purpose is generally defined by the Uniform Determination of Death Act (adopting the whole brain definition of death). In summary while organ donation law is fairly settled, it has not promoted significant organ donation. Josh suggests affirmative legislation is needed to balance the conflict between sanctity of corpses versus the severe shortage of body parts needed to reduce death and suffering. There are 2 models proposed: the mandatory donation model with exemption for religious beliefs and the presumed consent model which is prevalent and the law in at least 28 countries.

Next Josh discussed the control over posthumous reproduction. This includes gametes (eggs and sperm) which can be cryogenically stored and later thawed (the oldest frozen sperm sample used for a live birth had been frozen 21 years); zygotes, single cell, fertilized eggs; pre-embryo.

Posthumous gamete harvesting. Sperm harvesting is not illegal but the issue being who controls this. In context of females it has been reported frozen eggs being sold by donors ranging from $2500 to $100,000. Reference to www.eggdonor.com.

In the absence of a written agreement among the parties there is scant state legislation addressing custody of pre-embryos, where a couple divorces or simply cannot agree on a course of action. Florida's statute was the first and is a roadmap for others to follow. In general the Florida statute requires that the commissioning couple and their physician enter into a written contract providing for the disposition of the couple's gametes and pre-embryos in the event of death, divorce, or another unforeseen circumstance. Embryos are neither persons nor property possibly something in between. Consensus seems to be that disposition of frozen genetic material is governed by contract. In the absence of a contract it would appear that gametes belong to the surviving spouse and may even be devisable 'quasi-property.'

Next Josh addressed the control over inheritance by posthumously reproduced individuals. Most states developed a statutory and/or maintain a common law scheme to address children born posthumously to their parent's death although conceived prior to death. Not until recently however have a few jurisdictions addressed such births when conception occurred after biological father's death. Common law requires conception and proof of paternity before a father's death for inheritance. The first statute addressing this was the Uniform Parentage Act. (Act establishes the ability of the husband of the sperm receiver to be deemed the resulting child's

father). California's version of the Act was the first state to recognize posthumously conceived children to be eligible for inheritance where child is conceived within 2 years of and consistent with wishes of deceased parent. The Uniform Status of Children of Assisted Conception Act provides that anyone who dies before implantation of an embryo or conception with gamete is not the resulting child's parent unless specific provisions are made for posthumous children by will. The Uniform Probate Court considers a posthumously conceived child to be 'in gestation' at the deceased parent's death if that child is born in utero within 36 months after the parent's death, or is born no later than 45 months after the parent's death.

The issue of posthumously conceived children raises issues that have not been addressed as to how the rule against perpetuities applies, i.e. if this person is not considered on the testing date to be a life in being; legitimacy issues; forced heirship; and rights of afterborn children. The majority of case law in this area has been social security cases whether such child or parent was entitled to benefits. In summary there is little agreement among jurisdictions on the inheritance rights of children conceived after the death of a parent.

The final topic Josh addressed was the control over posthumous paternity testing with respect to alleged lifetime conceptions. The genesis of this has dealt with the law regarding exhumation that requires a showing of necessity. The cases dealing with exhumation historically have dealt with reburial, corrected burial and allegedly suspicious causes of death. Advances in technology have diminished exhumation, through HLA blood typing, which only rules out paternity and genetic marker testing that is 1 in 7.5 trillion accuracy rate of paternity. In summary there seems to be no serious discussion of the decedent's interest in avoiding post-mortem testing.

Josh **concluded** that today part of the estate planning fact gathering must include questions of clients of whether they have engaged in artificial reproductive technology. If so is there a contract with a lab that outlines rights and responsibilities. If not complete amend so issues are addressed. In document drafting review definition of issue/descendants to confirm client's wishes are carried out.

10:50 - 12:00
Our Return to What Really Matters in Estate Planning ". . . and the end of our exploring will be to arrive where we started and know the place for the first time." Christopher P. Cline

Our journey through the legislative underbrush of the last ten years has taught us lessons about what really matters most to clients. The wide variety of topics covered at this Institute are joined through the perennial questions they raise: how can I keep (or maybe give) control of my wealth; how do I use my wealth for my and my heirs' happiness (or at least productivity); how best can I leave a financial legacy; and how can I (as an advisor) provide the insights my clients demand in the face of all this complexity? This wrap-up program examines those perennial questions and tries to link the outstanding presentations made this week through the answers they provide.

Reporter: Kimon Karas Esq.

The **presentation was divided into two parts** by summarizing the week's topics and then discussing some of the issues identified by the presenter. I will address the comments in two areas starting with a summation of the week's topics and then the presenter's materials.

Chris suggested that we are at a turning point in the industry. **He summarized the theme of the week's presentations as follows.**

1. Estate planning at all levels is more difficult. Starting with basis, passive loss rules. There is a great intersection between transfer taxes and income taxes where income taxes are front and center. As I am editing this report preliminary reports are being made public regarding the President's upcoming State of the Union speech where he intends to announce increasing the rate to 28% on dividends and capital gains as well as severely limiting basis step-up. We now have portability and how does one plan with that starting with second marriages. Current

plans/trusts that are in place. Have current laws fundamentally altered the basis/reasoning for the plans in place; can they be modified, terminated, to account for current laws.

2. How do we as estate planners define ourselves; what is the market and who are the clients, especially in a world of $10.8M in exemption between married spouses.

3. Communication is ever important.

4. Dealing with ever changing landscape, i.e. digital assets, the new biology, same sex couples.

5. Importance of trust drafting. Big question whether incentive trusts work. Many people feel they do not. Chris suggested that planners need to seriously consider income only trusts with HEMS standards. Other than a tax concept, what distinguishes maintenance from support. Does that really provide trustee with guidance. As to income only trust, Chris suggests consider identifying a specific dollar amount adjusted for inflation, or income, whichever is greater. He suggests the use of HEMS standards is tied to Section 2041 issues rather than what is best for the beneficiaries. Possibly adding language that identifies priorities with standards. Is health or education more important-identify a hierarchy. Define the terms. Use precatory language. Is the trust to benefit income or remainder beneficiaries. Is one class to be preferred over another class of beneficiaries. Suggests adding purpose language to assist trustee in administering the trust. If a trust is to provide greater control its purpose must be clearly spelled out. What is the purpose of the trust: i) protecting the beneficiary from himself (minor or disabled person); ii) protecting the beneficiary from others (creditors); iii) protecting the beneficiaries from each other (family of second marriage with 2nd spouse and children from 1st marriage) iv) protecting the beneficiary from the IRS (protecting inherited wealth from future transfer taxation upon distribution to or death of beneficiary). Avoid pot trusts. Is a trust protector, trust advisor, needed.

6. Philanthropy is still relevant.

7. Being a fiduciary is a difficult job. A trustee cannot simply ignore trust administration simply by relying on an exoneration clause.

8. Sophisticated tax techniques continue to be relevant in the correct client situation.

9. Powers of appointment continue to have relevancy. Be cautious of indiscriminate use of general powers of appointment focusing on income tax basis to the exclusion of considering creditor issues. Does one solve one problem and open up another unintended issue.

10. IRS compliance issues continue to be relevant.

11. Post 2012 tax changes all estate plans need to be revisited and most likely redrafted. Plan fixing business.

Chris in discussing the themes of the Institute also interrelated some of his thoughts on what matters in estate planning.

In discussing what is estate planning today Chris initial comments related to motivation to engage in planning. What motivates people to do estate planning. Clients say they want their beneficiaries to be 'happy,' what is happiness. Money does not in itself make people happy. One author identified factors of happiness ranging from family relationships, work, community and friends, health, none of which in the hierarchy related to money. On the other hand age does not appear a significant factor. There is good evidence that if a person has not become the person one strives to be by age 40, one never will. Not to say one cannot evolve; rather by age 40 most of one's personality traits are in place and most likely will not change.

In estate planning control is a central theme. A person does not become successful/wealthy by allowing others to take charge. Control may be contradictory. When talking about estate or financial planning clients may be more successful by giving control away. Secrecy is not effective. Many clients as well as advisors believe that withholding information assists their heirs. The idea being that knowledge by itself will spoil the heirs. This is misguided for reasons such as: i) children are smart and can figure out the family has means; ii) even those children who are kept in the 'dark' are still spoiled; iii) knowledge if used property can assist the heirs to develop by directing them to ask the 'correct' questions and giving them the proper tools to assimilate and handle the information. Communication is paramount. That cuts across all lines with basic estate planning to the more complex involving businesses and other unique assets. Although clients in general strive for family fairness, depending upon one's asset mix it may not be possible to treat all heirs fairly. If that is not possible then communication can head off future problems, issues, litigation if that is addressed in advance and the heirs know what to expect.

The Institute concluded with Tina officially closing the 49 Institute by announcing a record attendance of 3010 attendees.

THE END

TECH TIDBITS

Lackner software held s luncheon program today (Tuesday, January 13th) called "2015 Game Changer." Due to an e-mailing snafu notice of this program was delayed going out until yesterday afternoon. If you were unable to attend, Vince Lackner tells us that they recorded the presentation. Order information is available from dana@lacknergroup.com.

Charitableplanning.com provides several online services for planners, including an extensive library, daily digests with industry developments, industry-specific calculators, and an easy to understand charitable planning handbook. A la carte and comprehensive yearly subscriptions are available. Learn more at <http://www.charitableplanning.comwww.charitableplanning.com or visit them at booth 325 to learn about their 7-day free trial and to receive a code for a 20% discount available only during Heckerling.

ElderCounsel specializes in helping practitioners solve the Elder Law piece of the estate planning puzzle. It provides state-specific long-term care, Medicaid, VA benefit, and special needs planning resources, monthly update meetings, and online educational opportunities. Heckerling attendees can receive a discount, but only through the end of the conference. Stop by booths 128-130 for more information or contact John Shickich at john.shickich@eldercounsel.com.

Don Kelley's latest monthly technology article for Wealth Management was released on January 13, 2015. It is entitled "Recent Developments in Tech Resources for the Trusts & Estates Practice, Part 1" and concentrates on developments in software and Internet resources for estate planners in 2014. it can be downloaded and printed out for free from Wealth Management at http://wealthmanagement.com/technology.

Thomson Reuters on January 13, 2015 announced its new Checkpoint IRS Response Library. It is described as the comprehensive tool you need to efficiently respond to your clients' IRS notices, project billing hours, and increase client satisfaction and retention. They say you can quickly find your client' notices in the comprehensive IRS Notice database that is searchable by Notice or form number, issue or key word, research the issue with links to relevant IRS Publications, Notices and primary law, follow a step-by-step Workplan to resolve the issues, respond to your client and the IRS with sample scripts and documents created by former IRS employees, and project billable hours by reviewing the complexity rating for each issue and the estimated hours is will take to resolve. The single user price is normally $329 per year put for a limited time it is only $247. For more information, go to http://store.tax.thomsonreuters.com/accounting/c/Checkpoint-IRS-Response-Library/p/100267003?cm_mmc=Eloqua-_-Email-_-LM_IRLQ115-_-

0000&utm_campaign=IRLQ115&utm_medium=email&utm_source=Eloqua&elq=8d87c32825ea4b9fa14592fe15f42350&elqCampaignId=4704

ESI-Appraise at Heckerling Booth #414 issues a monthly newsletter. The newsletter for the Heckerling week describes their new ESI-Direct service as a modern solution to an old problem of how do you get date of death, alternate date, & market values into your estate tax or fiduciary accountings? They say that the original solutions, which most practitioners still use and were designed in the 1980s, are terribly out of date and that now there is a better choice - ESI-Direct, which is a collaboration of Thomson Reuters ONESOURCE Trust & Estate administration and ESI-APPRAISE (Evaluation Services Inc. Together they say they have created a solution which is fast, economical, scalable and easy to use and they call it ESI-DIRECT. For more information see http://www.evaluationservice.net or https://tax.thomsonreuters.com/products/brands/onesource.

Estate Valuations & Pricing Systems, Inc. (EVP Systems), is the provider of the suite of products including the popular EstateVal. They launched a new product, GiftVal, in Q4 2014. GiftVal is included in EVP Office version 8. GiftVal provides gift valuations for use with the Form 709, including mean pricing with accrued interest. As always, the software suite is free to download at www.evpsys.com, and users only pay for the valuations as the programs are used. Meet Christina Ramirez, VP Business Development & Client Relations at booth #328 to discuss EstateVal, GiftVal, Cost Basis and CapWatch.

PG Calc, one of the providers of charitable calculation software, has just announced its 2014 monthly webinar series so you can keep on top of planned giving trends and developments. Topics include Gifts of Retirement Assets, Adventures in Accepting Restricted Gifts and Planned Giving for Younger Donors. The cost is $95 per session or $855 for the whole series. For more information contact webinars@pgcalc.com or go to www.pgcalc.com.

*Gillett Publishing LLC/GEMS – Gillett Estate Management Suite. GEMS provides 706 and 709 return preparation and trust accounting software. Over the past year, GEM709 has been updated to include full support for all of the GST elections, including the ability to change the language for each of the elections. It also tracks hanging Crummey powers from year to year, calculating the amount lapsing each year and the amount remaining. GEMAcct now includes the ability to maintain lots for stocks and bonds. Shares to be sold can be automatically selected by designating LIFO, FIFO, high basis or low basis. GEM706 now offers support for Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania and Washington. During Heckerling, Gillett Publishing is offering a 25% discount on new licenses. Contact them at booth #322 or sales@gillettpublishing.com.

Trusts and Estates magazine has just issued their January 2015 issue. Included with that issue are two removable inserts, one called "Tax Year in Review 2014" and one called "Special Section: Valuations. Those two inserts are alone well worth a subscription to this monthly magazine, which now comes in print and digital.

The American Bar Association, Section of Real Property, Trust and Estate Law at Booth #316 was offering substantive handouts, including the “Trustee Net Investment Income Tax ‘Crib Sheets’” mentioned in John Bergner’s Tuesday afternoon presentation. Additionally, they featured a number of publications, including the new “Handbook of Practical Planning for Art Collectors and Their Advisors,” by Ramsay H. Slugg. A code for a 20% discount on this book, as well as information regarding a free trial membership to the ABA, was available at their booth. More information can be obtained at "ABA Section of Real Property, Trust and Estate Law" <rpte@americanbar.org>.

Ashar Group, life settlement specialists, has a new plug-in app for mobile devices. They claim to be the first in the industry to offer this kind of app to allow advisors to do low level valuations in the field. For more information, go to http://www.ashargroup.com.

ABA Law Practice Today e-mail edition out 1/15/15 features articles on "Lawyers Who Connect Win the Talent Game," "Trust Accounts," and "iPad for Litigators." For more information go to http://www.americanbar.org/groups/law_practice.html.

Trust & Estates magazine publishes a digital e-mail newsletter that contained many useful articles. The one issued on January 7th has an article in it entitled *"Planning Trust Administration to Avoid Conflict"* in which the authors offer insights and best practices for individual trustees. There is another article on *"Optimizing IRAs and Retirement Plan Distributions"* and still another one on *"The Evolving Landscape of State Income Taxation of Trusts."*` Contact Wealth Mangement at www.WealthManagement.com for more information.

The 2015 Consumer Electronics Show (CES) was held in Las Vegas, Nevada the week prior to the start of Heckerling 2015. On January 6th Law Technology News in its Afternoon Update reported among its top stories taking new directions in 3D printing, Sony ZX2 Walkman, what 5G wireless tech will look like, Reversible USB - it's here and it's great, the smartphones of CES 2015, the OLED next generation best TV ever, and the ArcSoft Simplicam with its improved facial-recognition software update. For more information go to http://www.cnet.com.

In December of 2014 **ZDNet.com** published a report by Ed Bott entitled "Did the browser wars finally end in 2014?" Ed reports that his review of what's new for Chrome, Internet Explorer, Firefox, Safari and Opera says yes. This one is well worth the read. Go to http://www.zdnet.com.

Prof. Gerry W. Beyer of the Texas Tech University School of Law maintains a trusts and estates blog on the Feedblitz network out of Massachusetts that is called "Wills, Trusts & Estates Prof Blog." This blog sends out one message per day highlighting some 6 to 10 items of interest that arelinked directly to the source information for each blog item. This blog is an excellent way to keep up with what is going on in the T&E field and it is free. For more information, go to http://www.feedblitz.com/f/f.fbz?Sub=8995

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Our on-site local reporters who are present in Orlando in 2015 are Joanne Hindel Esq., a Vice President with Fifth Third Bank in Cleveland, Ohio; Kimon Karas Esq., an attorney with McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; Craig Dreyer Esq., an attorney with Clark Skatoff, PA in Palm Beach Gardens, Florida; Michael Sneeringer Esq., an attorney with Nelson & Nelson, PA in North Miami Beach, Florida, Michelle R. Mieras, a Fiduciary Review Officer and Vice President with Bank of the West in Denver, Colorado, Carol A. Sobczak Esq., an attorney with Marshall & Melhorn in Toledo, Ohio, Beth Anderson Esq., an attorney with Wyatt, Tarrant & Dombs, LLP in Louisville, Kentucky, Tiffany Walker Esq., an attorney with S. D. Merritt & Associates, PC in Boulder, Colorado, and Bruce A. Tannahill Esq., a Director of Estate and Business Planning with MassMutual Financil Group in Phoenix, Arizona.

The editor again in 2015 will be Joseph G. Hodges Jr. Esq., a solo practitioner in Denver, Colorado. He is also the Chief Moderator of the ABA-PTL discussion list.

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