THOMPSON COBURN LLP

Heckerling 2017 - Report No. 12 (Thursday 1/12/17)

Included in this Report are Lawyers Serving As Expert Witnesses, Planning for Digital Property, Business Succession, and State Taxation of trust Income.

Due to an editorial mistake, the report on Lawyers Serving As Expert Witnesses was substantially omitted; never fear - it appears in the next report.

The report on planning for digital assets is thorough and a "must read" – so much so that I will not comment on it, lest I fail to do justice to it. I was impressed by a vendor that appears to be on the forefront of understanding and complying with law, as well as organizing one's assets: Directive Communication Systems, Inc., (720) 939-7662 (Ben), bdampier@directivecommunications.com, www.directivecommunications.com. If you have any experience that supports or refutes this impression, please contact me.

The report on business succession was a good summary of several nontax considerations. A comment on *Graegin* loans (discussed at the end): proposed regulations are likely to be issued this year taking away the time value of money benefit of that strategy. The strategy is also difficult to settle with the IRS from a practical income tax perspective, because the recognition of income without perhaps not getting all of the interest deduction is painful. My preference is to borrow from a bank, which requires interest rate swaps so that the interest rate can be fixed instead of floating, and then the negative income tax consequences are not so much a concern.

The state income tax report focused on New York, California, and Illinois and was a very good discussion. I had not focused on New York's throwback tax. California's throwback tax is how it enforces its unconstitutionally far-reaching tax: if the trust doesn't pay California tax on its income, California will nail any California beneficiary with a punitive tax when the beneficiary receives a distribution. To clarify one aspect: Illinois' "replacement tax" is an entity level income tax that is imposed on partnerships, and Illinois' budget has been a mess for years with no hope of resolution in the near future.:

Steve

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From: Joseph G. Hodges Jr.
Sent: Sunday, January 15, 2017 7:54 PM
Subject: Heckerling 2017 - Report No. 12 (Thursday 1/12/17)

As we have done in January for the last twenty years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 51st Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 9-13, 2017 at the Orlando World Center Marriott Resort and Convention Center in Florida. A complete listing of the proceedings and the Institute's 2017 brochure are available at www.law.miami.edu/heckerling and the listing of the proceedings was also published as part of **Introduction Part 2** that was distributed on 1/4/17.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Heckerling Reports Website, as we have since the 2000 Institute. Those Reports from 2000 to 2016 can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html . In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html .

Editor's Comments : This Report #12 ends our coverage of the 3rd series of the Special Sessions that were held on Thursday afternoon. included in this Report are SS 3-E on Lawyers Serving As Expert Witnesses and SS 3-F on Planning for Digital Property. Also included are the first two Reports from the 4th and last series of Special Sessions that were held on the afternoon of the same day, those being SS 4-A on Special Succession and SS 4-B on the State Taxation of trust Income.

The next Report #13 will finish our coverage of the 4th and final series of Special Sessions that were held on Thursday afternoon.

Now for the news of the day : If you or our clients or charities are considering entering into what is now being called a megatrend, Blended Gifts, which are a combination gift that consists of a current gift and the establishment of a planned gift, e.g. an IRA Rollover and a Testamentary Unitrust. We have just received word from Crescendo Interactive that the Crescendo Pro Software now includes donor proposals and illustrations for the 12 most common blended gifts and they are hosting a whole bunch of Blended Gift training seminars in several major cities throughout 2017. For those of you who, like me, often use their very affordable Lite software version of their programs, this is a welcome development. For more information, see www.crescendointeractive.com or call 800-858-9154.

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Thursday, January 12th, SPECIAL SESSIONS III - 2:00 to 3:30 pm
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Special Session 3-E
Arriving by Plane with a Briefcase — Lawyers Serving as Expert Witnesses [LIT]
Presenters: Louis A. Mezzullo, Robert W. Goldman, Margaret G. Lodise and Howard M. Zaritsky
Reporter: Patrick Duffey

The panel discussed an attorney serving as an expert witness in family disputes, attorney malpractice cases, trustee issues, and tax controversies.

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Special Session 3-F
Planning for Digital Property: "The Future Ain't What it Used to Be" (A Yogi Berra Quote)
Presenters: Karin C. Prangley, Anne W. Coventry, Robert K. Kirkland and James D. Lamm
Reporter: Joanne Hindel

There have been several recent developments in the law that underscore the importance of addressing digital property in the estate plan. This session provided practical guidance on how to manage a client's digital property, information and identity in a manner that both protects the fiduciary and is consistent with the client's wishes. Unlike any other asset class, digital property carries with it unique federal and state law implications, valuation issues for fiduciaries, and an incredibly wide variety of ongoing product developments.

Technology has changed the way we interact with people and transact business. Every 60 seconds over 150 million emails are sent. This Report is one of those. Now read on to find out what all the fuss about Digital Assets is all about.

Digital property can be the key to unlocking other assets with financial value.

Digital property itself can also have significant financial and non-financial value, such as:

- Preserving the decedent's story
- Preventing disclosure of secrets/reputation preservation
- Helping a grieving family
- Protecting against identity theft

It is your ethical duty to apprise your clients of the importance of planning ahead. The ABA Model rules provide that "ignorance of technology is no excuse."

Obstacles to fiduciary access to digital property include:

- passwords
- encryption
- data privacy laws and
- computer crime laws

As a fiduciary you need to be able to access the decedent's on-line accounts which may be very difficult to do. Treat your password like your toothbrush- don't let anyone else use it and change it every six months.

Strong password and strong encryption will make it almost impossible to access data.

<u>Data Privacy Laws</u>

The Stored Communications Act prohibits certain providers of communications services from disclosing users' communications to a government or nongovernment entity, except under limited circumstances.

A provider's disclosure depends on whether:

- a government entity is requesting disclosure
- the provider's services are publicly available
- the request is for the contents of an electronic communication or for a non-content customer record
- access to the contents is restricted in some fashion or is completely public
- the company provides an electronic communication service or a remote computing service.

If the user provides lawful consent, then the provider may (but does not have to) provide the information.

Computer Crime Laws

Federal and state laws criminalize certain types of unauthorized access or damage to computers or data.

Terms of service of digital asset providers prohibit fiduciary access. See Facebook's terms of service.

Is it a crime to violate a website's terms of service contract?

In the Nosal case the court held that violating the use restrictions for a computer isn't a crime of "exceeding authorized access" under the federal Computer Crime Laws.

In the Facebook case the court held that accessing a website after being notified that you are not authorized to access it can be a crime of accessing a protected computer.

Germany has dealt with this issue and gave a family access to a deceased family member's accounts.

Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)

This version has been endorsed by Facebook, Google and others. RUFADAA creates a clear procedure to enable access to or disclosure of online user accounts and digital assets to a person's fiduciaries. Fiduciaries include an agent under a POA, a court-appointed guardian, a trustee or personal representative of a deceased person's estate.

Even with the enactment of RUFADAA in your state, its important for people to plan ahead for access to or disclosure of the contents of electronic communications during incapacity or after death.

The substance of RUFADAA:

- The user must "opt in" for fiduciary access. The default rule means terms of the service provider control.
- The user can "opt in" through an online tool or the estate plan.

- Even without “opting in” the fiduciary can get a catalog of the deceased or disabled user’s electronic communications.
- The provider can require a court order if the provider believes it is necessary.

If the custodian provides an on-line tool the user can control access on a granular level – certain accounts but not others can be accessed by a fiduciary.

Planning ahead for digital property

Encourage clients to conduct a digital fire drill - what would happen if computer were stolen, you were in an accident or died today?

Ask the clients whether they want to preserve digital assets following death or disability. Many people do not want all or some of their electronic communications to be available to the fiduciary.

Tell the client to do the following:

- Back up important data.
- Use guess-proof passwords and strong encryption
- Add provisions to estate planning documents granting fiduciary access.
- Consent can be provided in the estate planning documents or in a stand alone document
- Some clients may consider a separate digital fiduciary.

Make a list of digital assets for the fiduciary: create a list of digital assets stored on a password protected USB drive protected with strong encryption and a guess-proof password.

Practical guidance for the fiduciary:

Search the name of the deceased/disabled person and if applicable any business name.

If involved in litigation, do a comprehensive civil/criminal background check. This prevents possibility that fiduciary could be liable for destruction of evidence.

Evaluate who owns the relevant data hardware and who has authorized access.

Make a back-up of the person’s hard drive.

Ask close family and friends about the person’s online activities.

Access the person’s home computer, tablet or smartphone.

Carefully review browser history.

Search for accounts that have username/password auto-loaded.

When you gain access to a person’s on-line accounts set up new accounts with a fiduciary designation.

In a RUFADAA state the custodian will want to see a copy of the death certificate or other document showing fiduciary authority.
Custodian may want proof that account actually belongs to the person (account names don’t often match up to the name of the person who owns the account).

Custodian has options to provide full access or limited access.

Note that RUFADAA is retroactive in many states that have enacted it.

RUFADAA is helpful to corporate fiduciaries.

<u>Privacy in the Digital World</u>
There is a difference between secrecy and the role of the fiduciary – clients should understand that a fiduciary has a duty to keep information confidential.

<u>Identity theft</u>
As clients get older they are more vulnerable to identity theft. Red flags on mailbox are a source of theft to access check information. Fake e-mails from apparent legitimate sources. Identity thieves will look through trash.

In order to protect your online reputation you can set up one or two free Google alerts.

A fiduciary should also monitor and protect a person's copyrighted works. To stop infringement, consider a DMCA (Digital Millennium Copyright Act) takedown notice.

Bitcoin is virtual currency and may not be accepted by a provider. Usually stored in a bitcoin wallet – the currency is anonymous so if lost it is gone forever.

The IRS considers bitcoin to be property.

Valuation of digital property is based upon the willing buyer and seller rule.

Raise the client's awareness of on-line tools regarding access to digital property. The on-line tools take priority over planning done in legal documents.

Much of digital property has sentimental value to clients rather than financial value.

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Thursday, January 12th, SPECIAL SESSIONS IV - 3:50 to 5:20 pm
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Special Session 4-A
Nothing Succeeds Like Successful Succession [FS]
Presenters: Turney P. Berry, Christopher J.C. Jones and Charles A. "Clary" Redd
Reporter: Kimon Karas

Transitioning a private business, usually family-owned, from one generation to the next is one of the trickiest estate planning conundrums. This panel reviewed successful strategies to minimize taxes and pay for those that remain, encourage orderly leadership changes, compensate owners and non-owners, and take steps to position a business for future success. Among the non-tax topics discussed were incentivizing outside managers, limiting conflicts over business perks and dividend payments, and the role of outside advisors and board members in a family enterprise.

The presentation consisted of a general discussion regarding business succession planning. The panelists focused on a number of issues generally not concentrating on transfer tax issues or charitable dispositions of business interests. I would commend anyone interested in the topic to access the written materials. According to the SBA, roughly 90% of American businesses are family-owned, yet only 30% are successfully transitioned to the 2nd generation, and roughly 12% survive into the 3rd.

The panelists addressed two concepts of why family businesses fail when the founder or principal owner dies. The concepts being the money problem-does the business produce sufficient cash flow to support all of those who need or want to derive an income and the leadership problem-is there high quality leadership present that will permit the business to survive and thrive. The money problem may be exacerbated, but is rarely caused by wealth transfer taxes.

The panelists commenced the discussion with a sale of business equity during the owner's life. If keeping the business in the family, the issues of importance to the owner is who will succeed to ownership and who will assume management responsibilities. It may be selling the business is the only realistic means for the owner by which the owner's retirement security and financial well-being can be assured. Also, it may be that the owner can realize full value only through a sale which he is alive and active in the business to assist in the
transition to the purchaser. If the decision is made to sell, prospective buyers include the following:

- Children. A gift may not be possible as owner needs the sales proceeds to live a secure retirement.
- Business Partners.
- Key employees.
- Outside 3rd parties, as it may not be feasible for various reasons, including wherewithal for a family member, partners, or key employees to purchase.

ESOP. Panelists stated quite rare for an ESOP to be a purchaser for multitude of reasons, including all qualified plan requirements of ERISA are applicable, loans, determination of price and the expense of annual valuations of the stock held by the ESOP if equity is not publically traded.

One of the issues an owner faces in developing a succession plan is the need for income once control/ownership has been passed to the next generation. There are several
techniques to help a client secure retirement income. The technique will depend on the case-specific facts, such as cash flow needs, degree of control and ownership client desires to maintain, and other income and transfer tax considerations client may have. Considerations include:
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1. Dividend/distribution policy. Written mandatory distribution/dividend policy; however such a policy must not violate state law or the company's governing documents, including bank loan restrictions.

2. Retain voting interests and gift non-voting interests.

3. Consulting or noncompetition agreements.

4. Installment sales. Allows flexibility in structuring the note. Panelists stated if a sale within family the sale unless there is an overriding exception should always be to a grantor trust.

5. Private annuity.

6. GRAT.

7. Long-term lease. Provides an income stream to a business owner who desires to divest of some or all of the business at some point.

Considerations if the owner desires to maintain the business within the family. Even though the business owner desires to maintain the business within the family there are the questions of whether there are family member(s) capable of handling ownership responsibilities. The owner may want to consider some of the following:

- Board of directors. Helpful if the board consists of outsiders.
- Family council.
- Active versus non-active family members. Conflicts invariably arise between those active in the business, insiders, with those outside of the business, outsiders. There are often conflicts even within the insider group if there is more than one as oftentimes they cannot agree as to who the boss should be and how the business will be operated.

Next the panel discussed how to deal with disposition of the business among active and non-active family members. The scenarios include some of the following:

1. Transfer business to all children. Not the preferred method. Possible solution is to recapitalize the company between voting and non-voting interests. Voting control granted to the insiders and non-voting equity to the outsiders. However, downside to the outsiders is owning an asset that is valuable but with no realistic way to realize or enjoy the value or even voice their issues concerns with the business operations.

2. Transfer business equity to active children and make equalizing transfers of other assets to inactive children. Open question what is 'equal value' and at what point in time is equal value determined. Also there may be insignificant non-business family assets to attain equality. Consider if there are other assets such as real estate transferring the real estate to non-active members. Must be cognizant of issues that can arise in that context as well in structuring lease terms so that outsiders do not hold business hostage with unreasonable rent or other demands. Create additional assets by way of life insurance and if a married couple obtain second-to-die coverage on the owner and spouse.

3. Transfer business equity to active children and make compensating transfers of certain assets or pecuniary amounts to inactive children. This approach may not satisfy an owner who seeks absolute equality among all children.

Under either scenario 2 or 3 there can be wide changes in values and how that impact the decision made.

One alternative is to grant the surviving spouse powers of appointment where there is an opportunity for the survivor to have a 'second look' at the plan of disposition.

Transfer business equity to all children with a redemption agreement. Business owner's plan can provide that all equity passes equally to the children coupled with a built-in exit strategy that may be triggered either by the insiders or outsiders depending on circumstances. The outsiders may be granted a put right that can be exercised within a certain time-frame; alternatively grant the insiders a call right.

The panelists then discussed documents that may constitute the business succession plan. Such documents could include:

- Management agreement. Not used if ever.
- Voting trust.
- Voting agreement, a contractual undertaking that some states permit. Unlike a voting trust, where legal title to the shares passes to the trustee, a voting agreement enables ownership of the equity to remain as is; only voting control is impacted.
- Trust arrangements. Allocating business equity among trusts. In allocating business equity among or between trusts consider the following:
    - Who are the beneficiaries in the trusts and are the active in the business;
    - Who is the trustee and is the trustee active in the business;
    - What are purposes and trust dispositive provisions;
    - What are prospects for growth in value, production of dividends or distributions on equity;
    - Administrative powers provisions. Consideration must be given as to what powers are granted the trustee under the trust, such as retention of the business irrespective of non-productivity, lack of diversification; invest and reinvest in the business despite non-productivity, lack of diversification; exercise voting rights, and operation and dissolution of the business.
- Buy-sell agreement. A buy-sell among related parties to fix the value for estate tax purposes must satisfy not only Section 2703 but also regulation section 20/2031-2(h).

The panel concluded with a summary of a few additional considerations as time was running short. If there is estate tax repeal and replaced with a capital gains tax and basis allocation, how is that basis allocation to be determined. In that scenario it raises significant issues and concerns that will need to be addressed within the family business context. Should basis be allocated to business holdings when in fact the business is to remain in the family indefinitely? This is all unchartered territory.

If a business is expanded by acquiring a new division or operation consider placing that in a separate grantor trust with the younger generation being the owners.

The panel finally concluded with a brief overview of Graegin loans as an alternative to Section 6166 if as anticipated interest rate are expected to rise. Graegin involved the deductibility of a balloon payment of interest due upon the maturity of a loan incurred to pay estate taxes. The note was for 15 years with all interest and principal due in a single balloon payment at the end of the term. The loan agreement contained a prohibition against early repayment. The estate deducted the amount of the single-interest payment due upon maturity of the loan on the federal estate tax return as an administration expense. The Tax Court held that the entire amount of interest due on the note was deductible as an administration expense under Section 2053(a)(2).

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Special Session 4-B
The State Taxation of Trust Income — A Closer Look
Presenters: Richard W. Nenno, Christine L. Albright, Richard S. Kinyon and Timothy P. Noonan
Reporter: Joanne Hindel

This panel focused on how New York, California, Illinois, and other crucial states tax trust income and offered up certain strategies that often may save large amounts of tax.

Tim started the presentation by describing New York's laws.

New York Style Trust Income Tax Laws

New York generates most of the case law and rulings that are pertinent to 26 other states that tax trusts similarly to New York.

New York defines a resident trust as a trust established by a New York resident testator or settlor.

Residency is a key factor and is a function of the domicile status of the settlor.

A resident trust is a trust created under a will or by a decedent who was domiciled in New York at the time of death or for a revocable trust the trust becomes irrevocable while the individual is domiciled in New York.

New York and other states have a concept of an exempt resident trust: it must meet a three pronged test based upon the Mercantile-Safe Deposit case:

1. Trustee is not domiciled in New York
2. All of the trust assets are sitused outside of New York
3. The trust does not have any New York source income

In 2010 New York tried to repeal exempt resident trusts but the state was not successful. However the state did impose a reporting requirement for exempt resident trusts which also requires the trustee to certify the exempt status.

The state has also imposed a new accumulation distribution regime that provides that untaxed prior year trust income can be carried out to a New York resident beneficiary and subject to tax in a subsequent year.

New York is also trying to determine how much NY source income exists in nonresident trusts. The state treats the following categories as NY source income:

Real or tangible property located in NY state

- A business or profession or occupation carried on or in NY state.
- A taxpayer's distributive share of NY partnership income or gain.
- A taxpayer's share of NY state estate or trust income or gain.

Illinois Trust Income Tax Laws

Chris then addressed Illinois' income tax laws. Illinois is in a major financial hole and is looking for revenue through an increase in taxes.

Illinois is not a state that people are flocking to as a tax haven. Trust income tax rates: general income tax of 3.75% and 1.5% personal property replacement tax. The aggregate rate is 5.25%.

It is likely that the Illinois legislature will increase this rate. Just recently a bipartisan bill was introduced to address tax rates in Illinois – it includes an increase in the personal income tax rate which could mean the trust income tax rate could go up to 6.45%.

Illinois defines resident trust as a trust created by will of an Illinois domiciled decedent or for an irrevocable trust, the grantor was domiciled in the state when the trust became irrevocable. However, a trust shall be considered irrevocable to the extent that the grantor is not treated as the

owner under the Grantor trust rules.

The key component is the domicile of the testator or grantor.

Practitioners should consider the income tax implications of clients who set up trusts in another state but then moved into Illinois.

Can Illinois tax trusts in this fashion and not violate the Due Process clause of the Constitution?

In the Linn case, the court reviewed the Illinois statutes and determined that it was unconstitutional to apply the tax under the particular facts of that case. The court held that a nonresident trustee of a trust created by a resident settlor was not taxable under the Due Process clause.

California Trust Income Tax Laws

Richard Kinyon then discussed the taxation of trusts in California.

With respect to non grantor trusts, unlike many other states, the residence of the settlor and the law governing the administration of the trust is irrelevant for California income tax purposes.

Net capital gains are taxed as ordinary income and trusts and estates are taxed the same as single individuals.

Taxes are imposed on:

- California source income
- If any of the fiduciaries or beneficiaries are residents of California then all or some of the undistributed income is taxed by California.
- If one or more of the resident California beneficiaries has a vested interest in the income then some or all of the undistributed income is taxed by the state

California also has a throwback rule which provides that if California is unable to tax any of the remaining accumulated net income of a trust currently because a California resident beneficiary's interest in that income was contingent such accumulated income is taxable to a beneficiary if and when it is distributed to him or her.

Planning opportunity is for the trustee to understand the tax ramifications under California law when considering distributions that could trigger the throwback rule.

It may be possible to partially "cleanse" accumulated income by distributing it from one California resident trust to another non-California resident trust.

Ohio Trust Income Tax Laws

Dick Nenno mentioned a recent Ohio case: 2016 WL 7449-356; the Testa case decided by Supreme Court of Ohio which also addresses the taxation of a trust under Ohio law.

General Concluding Comments

In planning for existing trusts determine which trusts are subject to state income tax and determine whether changes must be done through a court order.

Options available:

- Pay the tax
- Pay the tax and file the return but seek a refund
- Establish a residence of future beneficiaries
- Establish a place of administration
- Choose a jurisdiction for a long-term trust

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The Reporters

Our on-site local reporters who will be present in Orlando in 2017 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; **Herb Braverman Esq** ., an attorney with Braverman & Associates in Orange Village, Ohio; **Kristin Dittus Esq** . a solo attorney in Denver, Colorado, **Michael Sneeringer Esq** ., an attorney with Akermn, LLP in Naples, Florida, **Michelle R. Mieras** , a Fiduciary Risk Manager with Bank of the West in Denver, Colorado, **Beth Anderson Esq** , an attorney with Wyatt, Trrant & Combs, LLP in Louisville, Kentucky, **Bruce A. Tannahill Esq** , a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and **Patrick J, Duffey Esq** , an attorney with Holland & Knight in Tampa, Florida.

The **Report Editor** again in 2017 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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