

Heckerling 2017 - Report No. 1 (Monday 1/9/17)

Welcome to this year's series of over a dozen reports on the country's largest estate planning seminar. I forward and summarize these reports. If you do not want to be included on this list, please let me know. If you know anyone who would like to receive these reports, please encourage them to sign up at <http://www.thompsoncoburn.com/forms/gorin-heckerling>.

The first report (below) deals with portability. Portability is especially important for clients with large retirement plan balances. When the surviving spouse rolls over into an IRA, the surviving spouse may use the decedent's spouse's estate tax exemption to protect those assets from estate tax when passing them to beneficiaries.

Portability can be dangerous if the couple has children from prior relationships. The surviving spouse might use the decedent's exemption to fund gifts to the surviving spouse's children, leaving no exemption available for the decedent's children. Forcing the use of the decedent's exemption for the decedent's children – by making bequests to them or to a credit shelter (bypass) trust – may be required to protecting the children from that risk.

Consider whether a prenuptial agreement should require the spouse with a smaller estate to have a portability return filed so that the surviving spouse can save estate tax.

Steve

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From: Joseph G. Hodges Jr.

Sent: Monday, January 09, 2017 8:27 PM

Subject: Heckerling 2017 - Report No. 1 (Monday 1/9/17)

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 Errata: Heckerling Reporter Michelle R. Mieras has just informed us that her current title with Bank of the West is a Fiduciary Risk Manager. This is reflected in the list of the Reporters that is now at the end of each Report just before the General Information section.

Editor's Comments: This Report #1 kicks off our reporting of the proceedings at Heckerling 2017. Included in this report is the Report on the Fundamentals #1 Program about Portability from A to Z or soup to nuts. After lunch the Institute officially opened with remarks from Tina Portuondo, the Institute Director, and Patricia White, the Dean of the University of Miami School of Law. This was followed by an extended traditional session called Recent Developments 2016. Due to its extended length of this session due to the coverage of the Proposed Section 2704 Regulations, the report for this session will not be available for distribution until Report #2 that will be sent out sometime on Tuesday, the 10th.

Readers are reminded that the ABA Section of Real Property, Trust and Estate Law (RPTE) is holding forth at Booth #225 in the Exhibition Hall where they are offering 20% discounts on books, a chance to meet and greet many of the Authors, free breakfast tickets for their Tuesday morning Networking Breakfast, a book discussion and Q&A on Wednesday evening, and a chance to experience first hand some of the Section's free CLE presentations. Be sure to check out their booth early and often.

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Monday, January 9th, 9:00 am to 12:15 pm

Fundamentals Program #1

Portability, Lots of Questions, Few Easy Answers

Presenters: Lester B. Lawans and Howard M. Zaritsky

Reporter: Beth Anderson

Portability has created a new paradigm in estate planning. This program discussed portability from its inception through the most recent developments; addressed many issues planners will face in advising clients; suggested "portability-type" plans; covered state law issues (including pre-marital planning); and discussed the basis adjustment mechanisms for those with traditional bypass (or similar) trusts. Here are some of the significant highlights from this presentation.

The lecture started with a brief side note of Mr. Zaritsky's view on whether or not there would be estate tax repeal. He thought there would likely be repeal for a time followed by reinstatement.

Bottom line, don't throw out your old 2012 forms, and portability becomes more important for alternate tax planning with or without the estate tax.

The presenters followed their materials very closely often referencing page numbers in their discussion and pointing to examples and illustrations within their materials.

The presenters walked through the history of the portability code and regulations pointing out when the regulations varied between the temporary regs and the final regs, and cautioned with a reminder to keep the temporary regs around because they still have limited applicability.

The presenters discussed who could file when there wasn't an appointed executor and raised the issue that it's still unclear whether a non-appointed executor can make an election after the appointed executor role has ended and there is still time left to file. For example, if a small estate was closed fairly quickly and the court appointed executor did not file a portability return. The presenters noted that the regs didn't expressly prohibit a non-appointed executor from filing a return under those specific limitations and recommend going ahead and filing.

The regulations should be followed when computing the DSUE Amount because calculations under the Code can be different than the computation under the Regulations. Since the regulations enforce the code, the regulations should be followed when computing DSUE amounts.

Payment of gift tax does not affect the DSUE amount. Adjustments for taxable gifts do not include the taxable part of the gift but only the portion that was not taxed at the time of the gift. For example, gift of \$3,000,000 when the exemption was \$1,000,000 is only adjusted to include the \$1,000,000. §20.2010-2(c)(1)(ii)(B)

Audit issues. Portability leaves the DSUE amount open until the second spouse dies, but the IRS doesn't get to audit the full return only the amount of DSUE available.

Rev Proc 2016-49 limits Rev Proc 2001-38 and allows QTIP elections for portability purposes.

After the recap of how portability is calculated and reported, the second half of the lecture discussed different planning methods for using portability. The general theme is that portability should be the default rule. Port first then talk to the client about why his or her plan should not have the revocable trust and marital share with portability first.

Mr. Law discussed several illustrations with small, medium, large and jumbo asset values to determine whether the standard marital/by pass (credit shelter) plan or the portability plan or some hybrid plan yield the best results.

In almost all cases a Hybrid plan with portability and some gifting immediately following the death of the first spouse is the best number outcome. Make sure the gift covers any the state death tax credit.

Discussed at length were the potential advantages of portability and a partial gift of the QTIP income under §2519. May want to have a trust that can be divided into separate shares for 2519 purposes. May need to tweak the spendthrift limitations that would prevent the spouse from making any lifetime transfers of income interests.

In the final section of the lecture, the presenters discussed ways to deal with credit Shelter Trust Planning and other basis inclusion plans, including encroaching non-marital assets for benefit of spouse, adding general powers of appointment, and triggering the Delaware tax trap.

The final minutes of the lecture were dedicated to other state law issues with a focus on marital agreements which should address portability elections, including defining a portability executor which may be different than estate court appointed executor and setting forth a mechanism to force smaller estate to make the portability election and receive compensation for making such election. The presenters also touched on similar provisions in Wills to direct or authorize the executor to make the election and who should bear the cost of the election.

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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, Tarrant & 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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GENERAL INFORMATION ABOUT THE INSTITUTE:

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

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<http://mail.americanbar.org/archives/aba-ptl.html>