THOMPSON COBURN LLP

Heckerling 2017 - Report No. 14 (Friday 1/13/17)

This is the final report on sessions. The editor mentioned a wrap up report, which I will forward if it is substantive but will not if it is not.

The session on social security covered recent changes to permitted claiming strategies. The report describes well the considerations.

The report on the basis consistency rules is also a good read, for those who have to file those returns. If the estate tax is repealed, this becomes moot for those estate that are not required to file estate tax returns. Steve Akers' presentation went into a little more depth, and I encourage you to look at his materials regarding any questions you may have.

The report on the summary is a quick read. For first marriages, the speaker and I both tend to prefer bequeathing all residue to a trust for which a QTIP election can be made over all, part or none of it. that provides significant flexibility. Also, for many states (such as the speaker's) that impose an estate tax, the executor can opt to make or not make a QTIP election for state estate tax purposes that is inconsistent with the federal election, providing flexibility for deferring or avoiding state estate tax on assets that are sheltered by the federal exemption. That planning remains important, even if the federal estate tax is repealed.

Here are some free resources I offer between now and next year's Heckerling:

- A PDF with 1,200 pages of technical materials on business structuring, including income, self-employment, and estate tax planning. Feel free to email me for it.

- A quarterly newsletter, which has the most recent version of those materials and 3 short articles of interest. To subscribe to the newsletter and obtain the PDF, email me with a complete address block or have your secretary complete: http://www.thompsoncoburn.com/forms/gorin-newsletter.

- A quarterly webinar covering what was in the newsletter. Continuing education credits may be available. The next one is January 24: Self-Employment Tax and LLCs; New Partnership Audit Rules; Selected Issues from Heckerling.

- A February 7 webinar on Fiduciary Income Tax Refresher and Update.

- A blog that I intend to be much less technical: Business Succession Solutions.

You're welcome to freely forward these Heckerling report emails and to encourage people to sign up, either by emailing me or having their secretaries complete: http://www.thompsoncoburn.com/forms/gorin-heckerling. My secretary will send new subscribers all of the 2017 Heckerling reports.

I hope you have enjoyed these emails and would welcome more contact with you. Thank you.

Steve

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From: Joseph G. Hodges Jr.
Sent: Monday, January 16, 2017 7:17 PM
Subject: Heckerling 2017 - Report No. 14 (Friday 1/13/17)

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 #14 contains our coverage of the final three Friday morning Main Sessions of Heckerling 2017, those being When to Claim Social Security Benefits, Basis Consistency and Other Income Tax Issues, and the 2012 Tax Act in a Technologically Advancing World.

The next and last Report #15 will cover the vendors who exhibited at Heckerling this year in more or less alpha order. Due to the typical size of this Report, in may be issued in for that one Report #14 (e..g., #14-A, #14-B, etc. It will also include our usual final wind up remarks.

Now for the news of the day : This is the time to publically thank all 10 of the on site reporters (see the list of all of them at the end of this Report) who diligently covered over 50 separate sessions that took place over the four and one-half days that Heckerling was open for business. Without them and their immense efforts both days and nights, while at the same time trying to attend other Heckerling sessions and functions of interest to them and networking with at least some of the other 3,100 plus attendees, the publication of these annual Reports of the Heckerling Proceedings would not be possible, and for that I, as the Editor, and my able assistant, Joanne Hindel of Fifth Third Bank, are exceedingly thankful.

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Friday, January 13th - Final Day

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Friday, January 13th, 9:00 to 9:50 AM
When to Claim Social Security Benefits: Later Is Usually, but Not Always, Better [ELD]
Presenter: Lawrence A. Frolik
Reporter: Kimon Karas

Social Security retirement benefits are available at age 62, but many wait until the age of 66 or even age 70 to claim them. There is no "right" answer about when to start benefits. This session explored how attorneys should advise their clients, and help attorneys themselves, to decide when to claim benefits. Hint – it's not just about you; it's also about your spouse.

Social Security is Old-Age, Survivors and Disability Insurance. Social Security pays benefits to three groups: retired workers, disabled workers (not part of this presentation), and derivative spousal, survivor and family benefits. Social Security benefits are essentially a lifetime annuity adjusted annually for inflation.

Eligibility arises from a worker having worked in "covered employment" and paid wages-generally most employment in the private sector. To receive benefits a person must have at least 40 "quarters of coverage", 10 years in the labor force. For 2017 wages subject to tax is about $127K/ year. Theory of wage base is that maximum social security benefits are to be approximately 25% of the wage base. Benefit is paid by both employer and employee each contributing 6.2% of wages up to wage base.

Individuals are eligible for their primary insurance account (PIA) at "full retirement age." For those born before 1955, age 66, and after 1959, age 67. Application for benefits is made with the Social Security Administration in person or on-line. For purposes of summary when reference is made to age 66 it is intended to mean full retirement age.

A worker can claim benefits at age 62 but with a permanent reduction in benefits, i.e. 25% reduction compared with if worker waited until 66. Example for 2015 a worker eligible for maximum annual benefit at 62 would have monthly benefit of $2,025/month; worker at age 66, monthly benefit of $2,663, and worker at age 70, monthly benefit of $3,501. A worker who claims benefits before full retirement age is subject to an earnings test. The first $16,920 of earnings is exempt; but earnings above that amount benefits are reduced $1 for each $2 of earnings. If a person will continue to work and have earnings in excess of the exempt amount do not take benefits. Once person reaches full retirement age earnings have no effect on benefits; although in the year worker reaches full retirement age, only earnings in the months prior to reaching full retirement age count against this limit.

A worker can wait until age 70 to claim benefits. Every year that benefits are deferred benefits are permanently increased by 8%. A worker with full retirement age of 66 who defers benefits to age

70 will receive 32% more in monthly benefits. After age 70 there is no further increase in benefits.

Benefits are calculated on a worker's Average Indexed Monthly Earnings using the highest 35 years of earning indexed for inflation and if worker had less than 35 years the missing years are calculated at zero. If worker continue working after benefits commence and had less than 35 years, the benefit is recalculated.

Social Security also pay derivative benefits to spouses that are based on the worker's PIA, which is the amount the worker would receive if he elected benefits at full retirement age. Payments to spouse do not reduce worker's benefits. Spousal benefits are available among others categories if spouses were legally married for at least one year-marriage determined under state law. The spouse of a worker who has filed for benefits is eligible for a benefit equal to 50% of worker's PIA, adjusted for COLA. There is also a "deemed filing" where a spouse receives the greater of 50% of worker's benefit of what spouse would have received based on their own PIA. Called deemed filing because when spouse applies for own benefit they are deemed to have applied for the spousal benefit.

Restricted application . Social Security automatically pays higher benefit amount unless spouse files a restricted application that requests only spousal benefits. This option is available only to those born before 1/1/54. Refer to the written materials for an example of this alternative.

File and suspend is no longer available.

If applicant for spousal benefits applies before their full retirement age, they permanently reduce their monthly benefit.

If a person had commenced benefits there are methods to reverse benefits if circumstances have changed. Alternatives are:

1. Claim benefits but withdraw claim within 12 months and payback all amounts received;

2. Suspend benefits. No obligation to pay back rather suspends benefits until individual reaches age 70 or benefits automatically restarted. For period of suspension, benefits rise;

3. Suspend benefits but reverse suspension. In that case receive a lump sum equal to the foregone benefits.

Surviving spouse benefits. A surviving spouse has rights to benefits based on earnings record of deceased worker or spouse's work record if benefits would be greater. If surviving spouse has reached full retirement age receives benefits equal to 100% of what deceased spouse actually received, i.e. deceased spouse took early benefits at 62, spouse receives 100% of the reduced amount, or if deceased spouse waited until age 70, 100% of the greater amount. If spouse remarries before age 60, survivor is ineligible for benefits as a surviving spouse. Remarriage after 60 will not disqualify but if spouse remarries and has been remarried for one year; spouse receives the greater of benefits as surviving spouse of prior marriage or as current spouse of the new marriage. If surviving spouse has not reached full retirement age benefits are reduced based on number of months remaining until attaining full retirement age.

A divorce spouse who was married for at least ten years and has been divorced for at least two years can claim spousal benefits based former spouse's earnings record. Benefits are available when former spouse reaches full retirement age. Benefits are available without regard to whether former spouse applied for benefits based on former spouse's work record. Divorced spouse benefit is based on what former spouse would receive at age 66 and is not affected by when former spouse claimed benefits or even if benefits were reduced by reason of excess earnings.

Social Security benefits are subject to federal income tax.

Benefit claiming strategy. No certainty based on two unknowns, life expectancy (unless someone is terminal) and what one's future financial condition is-future income or future expenses. Generally it is better to wait until age 70 to claim benefits. On the other hand if a person is in ill health or has a financial need taking benefits early makes sense.

Some considerations on when to start benefits but again in all cases it varies from person to person. Consider the following:

a) Before 66, do not claim benefits before age 66 if projected wages exceed annual earnings limit;

b) Terminally ill, start benefits as soon as possible or are likely to die within 10 years;

c) Have not earned 35 years of highest earnings;

d) Before 70, delay if sufficient income;

e) Spend down savings in order to permit deferral of benefits;

f) For those who want to hedge bets may want to delay beyond 66 but start benefits prior to 70, i.e. 68.

In summary, it would be unusual to take benefits at age 62 if person is still working due to earnings limitation. Alternatively take benefits at age 62 if person is in ill health, a short life expectancy, or financial need (again if not working due to earnings limitation). If one does not take benefits at 62, next stage is age 66 and unless special circumstances person is well advised to wait until age 70.

For a more detailed analysis of this subject, including examples I would direct the reader to the written materials and session recordings.

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Friday, January 13th, 950 to 10;40 am
The Executor's Job Gets Tougher: Basis Consistency and Selected Other Income Tax Issues Facing Executors
Presenter: Steve R. Akers
Reporter: Kristin Dittus

The basis consistency rules, and the IRS forms and regulations executors must follow, create reporting headaches for advisors and significant additional fiduciary concerns for executors. The statutory rules, IRS forms, and proposed regulations were examined, including a variety of surprises in the regulations. The executor must also navigate a myriad of other income tax traps, some of which were highlighted. Here are the highlights of this particular presentation.

Steve Akers spent 50 minutes covering the essentials of basis consistency reporting and related liabilities faced by estate administrators. He covers three controversial issues below: zero basis rule, undistributed property rule and subsequent transfers rule.

Changes Ahead. With the newly unified parties of the presidency and Congress, there is a Budget Resolution Act forthcoming that may change the basis consistency rule. At this time the rule only applies to estates where there is an estate tax due, and creates additional liabilities for fiduciaries of those estates.

Section 1014(f). Under code § 1014(f), which became law on July 31, 2015, basis on property acquired from a decedent shall not exceed the final value as listed on form 706. Regs came out on March 31, 2016 with additional guidance. The basis consistency rules do not apply to marital deduction property or for estates below the estate tax exemption amount.

Who Receives Reports? New code § 6035, provides reporting requirements. The executive is responsible for reporting to the recipients of property and the IRS, or if there is no estate then the person in possession of the property is required to report. If property passes to trust, then the report goes to the trustee.

When Reports are Due. Statements are due 30 days after the return due date, but the instructions modify this to say within 30 days after the filing date. The IRS has been asked to include this update in the Regs.

Penalties. Penalties can be severe for intentionally disregarding the reporting requirements, starting at $500 and increasing to 10% of property required to be reported. Unintentional misreporting carries a lower penalty. See IRC section 6721 and 6722.

Form 8971 and Instructions. Mr. Akers included a sample in the physical books, however, find on the Heckerling website if you have materials on USB. Beneficiaries do not get to see what other beneficiaries receive, rather each beneficiary receives a schedule A with the basis of property passing to that beneficiary. The 8971 form should include beneficiary information, which assets pass to each beneficiary, valuation date and the value. If exact assets have not been identified, a list of all property that could potentially pass to the beneficiary should be listed on the schedule A. The instructions require a power of attorney from the beneficiary which includes, on line 3, "civil penalties."

Property Encumbered By Debt. The net value of assets subject to non-recourse debt is generally reported on the estate tax return. Values on schedule A should reflect the estate tax values without reflecting any post death adjustments for debt.

Final Values. If final values are less than originally reported, the executive may be responsible for a deficiency. People have indicated the unfairness of this to the IRS given the executor is working with the best information available at the time of the original reporting period.

After Discovered Property and Zero Basis Rule. Omitted property, or property discovered after the return limitation period expires (generally 3 years) will receive a basis of zero. While there may be an initial savings on the 40% estate tax, such savings will be diminished by a 23.8% federal capital gains tax. The zero basis rule seems unjustifiably harsh, and unfairly applied since it will not affect estates unburdened by estate tax reporting.

Exceptions to Reporting. Exceptions include: cash, IRD, tangible personal property, and sold assets. If in doubt, it is better to over-report rather than not report. There is no exception for property includable in the estate under the “string” statutes of §§ 2035-2042 even though the executor does not have the values. There is no report required if a beneficiary gets an excepted asset. If all assets are sold, there will be no reportable assets but this information should be included with the tax return.

Undistributed Property Rule. If the beneficiary has not been determined for certain property, all beneficiaries who might receive the property should be listed and each beneficiary will receive a mini-706 on the Schedule A.

Subsequent Transfers. Not included in the statute, but in the proposed regs is a requirement to provide the IRS with a “supplemental statement” for any subsequent distribution of property to a “related transferee.” The original beneficiary must also give the executor and transferee a copy of the Statement, imposing significant reporting burdens on estate recipients for possibly many years.

Executor Protections. Suggests attorneys inform beneficiaries what Schedule A is (especially if looks like a mini-706), advise to seek tax counsel regarding the same, and clarify there is no representation. Alternatively, as provided in the statute, the executor come to the law office to sign and date letters to beneficiaries to minimize confusion and ensure the attorney has the proper dates.

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Friday, January 13th, 10:50 am to 12:00 noon
Wrap-Up:The 2012 Tax Act in the Context of a Technologically Advancing World — A Tsunami for the Estate Practitioner
Presenter: Louis S. Harrison
Reporter: Kimon Karas

The combination of accelerated advances in technology, information, and the speed at which information is conveyed and stored, and the American Taxpayer Relief Act of 2012, has had major impacts on the estate planning practice. Not only have techniques been required to be modified, but the day-to-day practice has had to evolve, with certain strategies being rendered obsolete, and others gaining in priority. Most of these changes are subtle and have not been the subject of substantial discussion, or direction, and changes are occurring without even the planners being aware of them. This presentation focused on the practical impact that these developments have had on the estate planning world, and what planners should be doing going forward to modify or accommodate their practices for these changes. Strategies discussed during this week will be used as examples of how the practice has iterated to absorb these changes.

Lou started his presentation by summarizing his topic of a summary of a number of guiding principles.

First principal, making money and spending money are two different traits that are why trusts are needed to hold and control the disposition of wealth.

Next principal, is what is the guiding principle in drafting wills and trusts: is it intellectual stimulation or mercenary pragmatism. Lou suggested in the past it may have been intellectual stimulation but now he believes, starting with the changes in the estate tax laws enacted by ATRA, that mercenary pragmatism is the guiding drafting principle. With the enactment of ATRA, drafting has morphed to single fund QTIP that clients understand. Single fund QTIP + portability and if the estate tax is repealed an estate plan based upon a single fund QTIP does not result in a bad result. Lou emphasized do not draft trusts with withdrawal rights at ages but rather keep assets in trust to protect assets from creditors, spouses, and to protect beneficiaries from themselves. Consider making certain trust allows for distributions for best interests to allow for distributions for basis purposes. Even if a client does not have a flip Clayton, i.e. where non-marital share provides for discretionary distributions, a single fund QTIP is still fine as most likely the spouse will desire all of the income in any event. Lou prefers the single fund QTIP.

Even with estate tax repeal, Lou suggests estate planning will still be important. In addition to pure estate planning he also suggests trust planning for family reasons and trust compliance should be in the forefront of planning. As stated above, still non-tax reasons may be even more important than tax reasons for trusts, creditor protection, protection from divorce, and protecting the beneficiaries from themselves.

A complement to trust planning is trust administration. Trustees need and require advice not only for transfer tax compliance but income tax compliance as well. On the issue of compliance Lou believes more time needs to be spent and devoted not only to implementation but execution. Examples include having created a GRAT for a client, follow up to make certain annuity is timely paid; trusts with Crummey powers confirm beneficiary notifications have been made. Focus practice not only on the implementation but on compliance and follow up.

Next principal: Assist trustee with state income tax issues on income tax compliance issues. Is current trust domicile proper. With respect to trust administration confirm trust is properly being administered and terms are complied with. Investment decisions are probably more critical today than ever before. In order to avoid surprises, disgruntled beneficiaries, is open communication between the trustee and beneficiaries.

Next principal: Client communication is paramount. Use technology to increase client happiness by communicating with client. More client contact and communication equals a happy client. A happy client helps defend against possible claims against the attorney. We all make mistakes. Client assumes advisor is competent. What advisor needs to do is to convey to client that the advisor cares about the client, client's concerns. What the client wants to know is that the advisor cares and has the client's best interests at heart.

Lou summarized a number of tax opportunities he sees in 2017. A summary includes:

- GRATs, he feels should be the #1 planning choice;
- IDGTs, not as prevalent as GRATs, but in the right situation should be considered;
- Section 2701 preferred partnership freezes;
- Income tax basis planning;
- Unwinding limited partnerships;
- Caution on making taxable gifts in this period of uncertainty;
- Discounting even with Section 2704 regulations is still proper planning. Lou does not feel the regulations will be finalized even in 2017.

The take away from the presentation:

- Estate planning is still important in 2017;
- Shift to mercenary pragmatism planning;
- Single fund QTIP;
- GRATs as strategy of choice;
- Valuation variables beyond minority and marketability discounts. Example is being a critical reviewer of appraisal reports. Is the multiple the appraiser used appropriate based on facts known, as to operations, management, etc.?
- Maybe most importantly of all, client communications.

Tina closed the 51st Annual Heckerling Institute On Estate Planning by announcing another record attendance of 3,145 attendees.

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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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