Heckerling 2017 - Report No. 7 (Wednesday 1/11/17)

The report on art included very interesting and creative ways to maximize sale price, avoid sales tax, and offset gain on sale. Reading it was a joy.

The report on cybersecurity made me wish I had attended that program in person. In addition to reading the report, consider that nobody can fully protect against breaches. One needs processes not only to reduce the likelihood that a particular attack will succeed but also to be able to contain the damage to one's clients and one's own operations when a breach occurs until it has been stopped and remedied. Our firm has a practice group devoted to helps clients be proactive or react, led by Melissa Ventrone in Chicago but with skilled partners in St. Louis.

The report on charitable contributions made a number of important points. Here are some additional ones when donating an interest in an LLC or other entity taxed as a partnership: First, try to reduce debt allocated to the partnership interest, to minimize unrelated business income tax on the sale. Also, the partial interest prohibition of Code § 170(f)(3) appears to require donating a vertical slice of economic and voting rights; my business structuring materials cover this in part II.Q.6.e. Charitable Partial Interest Prohibition. For any complex asset, whether an interest in a partnership or other entity, consider giving to a donor advised fund that has significant experience and then making a grant from that fund to the desired charity.

The last report discussed the panel in which I participated, regarding various provisions to include in one's trust. The report captured many of our ideas. Also:

- I led the discussion on grantor trust provisions. Even if estate tax is repealed, leveraged grantor trust strategies (whether sales, GRATs, or otherwise) can shift wealth down the line to family members who might have lower combined federal and state income tax rates, turning off grantor trust powers after any note is sufficiently paid down. A power to substitute assets or to authorize unsecured loans to the grantor would be within the grantor's control; be sure that the former does not require prior approval of a person in a fiduciary capacity and that the latter does not require the consent of an adverse party, and in any case authorize not only the grantor but also the grantor's agent under a durable power of attorney to turn off the power. I use nonvoting stock, which Rev Rul 81-15 protects from estate inclusion, so I don't worry about swap powers and closely held business stock (which the IRS has informally indicated is fully protected by Rev Rul 2008-22).

- I led the discussion on drafting for S corporation trusts. I recommend that any irrevocable grantor trust make an ESBT election in case the trust the trust is not absolutely, completely owned by only one person; the grantor trust rules supersede ESBT annual income tax reporting, so there is little downside, and the ESBT election can protect against overly cautious tax advisors of a strategic buyer. I also tend to draft for being able to toggle between QSST and ESBT; in my materials, see part III.A.3.e.iv. Flexible Trust Design When Holding S Corporation Stock. A QSST election can be unfair when tax distributions are paid to the remaindermen, leaving the income beneficiary's estate to fend for itself, so consider whether the beneficiary should made a deal with the trustee before making the election. However, if the remaindermen are beneficiaries of the income beneficiary's estate plan, the consider including special language to make the trust's QSST election stay in place for their benefit during post-mortem trust administration, so that income is not trapped in the trust during that time and taxed at high rates.

For those who are ACTEC Fellows, the Fiduciary Income Tax Committee will have a long discussion of our panel's topics at the Summer Meeting. For those who are not, consider attending my free webinar on January 24: Self-Employment Tax and LLCs; New Partnership Audit Rules; Selected Issues from Heckerling. Those attending the webinar are welcome to submit questions in advance or at the time.

Steve

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From: Joseph G. Hodges Jr.
Sent: Friday, January 13, 2017 6:23 PM
Subject: Heckerling 2017 - Report No. 7 (Wednesday 1/11/17)

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 7 continues our coverage of the Wednesday afternoon Special Sessions #s 1 and 2, starting with Special Session #1-E. Included in this report are four Special

Sessions, 1-E on Managing Inherited Art, 1-F on Privacy and Personal Security, 2-A on Charitable Giving for Family Businesses, and 2-B on Fully Loaded Trusts.

Coverage of the Wednesday Special Sessions #2 will continue in Report #8.

According to Prof. Beyer's Wills, Trusts and Estates Prof Blog dated 1/8/17, the Office of Government Ethics is seeking input from members of the public with expertise in Trust Law with regard to the following question "Are there any circumstances under which an eligible income beneficiary of a discretionary trust might, in the absence of a vested remainder, be able to compel the trust to make a distribution or payment?" (FR-2017-01-03, Vol. 82, No. 1, Tuesday 1/3/17). Sounds to us like attorney Marc A. Chorney of Denver, Colorado and recently of the Wade, Ash, Woods, Hill and Farley law firm there might want to chime in on this one in light of his very popular book entitled "Trusts in Divorce Property Divisions" 2nd Edition (2014), Continuing Legal Education in Colorado, Inc.

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Wednesday, January 11th, 2:00 to 3:30 pm
SS 1-E Managing Inherited Art and Encouraging Clients to Plan Ahead
Presenters:
Diana Wierbicki, Bonnie Brennan, Courtney Booth Christensen, Paul R. Provost and Jennifer Schantz
Reporter: Patrick Duffy

Art and other collectibles as estate assets can present unique challenges for estate administration. A panel of experts discussed the legal, financial and practical issues faced by estates with respect to art assets, and presented planning opportunities and practical tips for clients considering what to do with their art.

Art law combines tax law and commercial considerations. One example is restitution issues. For example, the university of Oklahoma recently returned a Pissarro to a holocaust victim. Forgeries are also an issue. In one example, a forger confessed to forging a number of works of a still living artist, who later indicated that some of those forgeries were actually originals. Here are some of the significant highlights from this Special Session.

<u>Valuation Issues.</u>

In 2015 there were 446 items reviewed in 59 taxpayer cases. The Art Panel recommended adjusting 65% of the appraisals. This, according to DW, is a fairly common trend. <u>*Estate of Newberger v. Comm'r*</u> confirmed that a sale is the best evidence of the fair market value of art, even if that sale occurs after (though not too far after) date of death. In <u>*Newberger*</u>, the sale price was adjusted to take into account the change in the art market.

<u>***Case Updates.***</u>

<u>*Allbritton v. U.S.*</u> Art rental and Section 2036. Not an estate tax issue but rather an income tax issue. A family owned company owned real property, art, investments. Parents rented real property with art on the walls, but did not pay extra value for the art. The IRS asserted that there was a constructive distribution for the rental value of the art. Reached a settlement, but it is not yet final.

Guy Wildenstein Tax Trial in France. A complex trust structure owned art. At Wildenstein's death, France took the position that Estate Tax was owed.

New York state has been aggressively targeting art transactions. The trend is that the tax department would review tax returns (3 years) for sales and use compliance. The NY AG has been reviewing these under the false claims act, that allows for a 10 year look-back. With the potential appreciation, there are significant consequences for clients.

Gagosian Gallery Settlement. A nexus issue. A California affiliate sold art and shipped it to buyers in NY. NY asserted that there was nexus to NY because of employee actions. Fine arts shippers were not, according to NY AG, common carriers—they were agents of the buyer. Fix? Conservative approach is to make sure that the sellers—and not the buyers—are arranging for the shipment.

Aby Rosen Settlement. Involved improper use of resale certificates. The art should have been purchased as "exclusively for resale." In fact, the art was "diverted" for personal use. This resulted in a $7M settlement.

Proposed TAAR Act (Terrorist Art & Antiquity Revenue Protection). Proposed in Senate in September, 2016 but did not come for a vote.

How can Advisors Plan Ahead for Art Collections?

It's important to consider whether the art fits within the mission of the institution, whether the institution is qualified to maintain the art, and whether the institution wants the work of art. Some institutions will request a cash gift to assist in maintaining the gift.

The approval process can take some time. A curator decides whether the work fits within the mission of the institution, he or she recommends it to the acquisition and loan committee, who then recommends it to the board of trustees.

PP predicted that promised gifts might change depending upon potential changes to the estate tax.

Restrictions are a significant topic for donations and, as a practical matter, become a negotiation. For example, donors may look to restrict the ability of the museum to later sell the collection (and replace it with other art). Most museums, especially larger museums, are "tough" on restrictions. Smaller institutions may be more flexible. If a bequest comes with a "dowry," it can change the dynamics of the negotiations. Also important to consider, is that some restrictions may reduce the fair market value of the gift for purposes of income tax donations.

Example. A planned gift of fine furniture to the Metropolitan Museum of Art was publically announced prior to the sale of other pieces in a collection. Because of the publicity, the sale price exceeded 50% of pre-sale estimates.

General Tips for Sales. Consider selling a collection together and without reserve. Be an informed collector and understand the value of what you have; get updated appraisals to take into account market fluctuations. Pay attention to the storage of art. Work with a trusted advisor from an auction house or an independent advisor. For example, should the work be sold at auction or privately? Sold in the U.S. or internationally? When is the best time (of the year) to sell that particular type of art. Ensure that you aren't competing directly with other comparable works.

Example. Winslow Homer's *Returning from the Spring* (1874). The painting was inherited from the owner's great grandfather along with a sketch book from Winslow Homer. The client had a very low cost basis, which would have given rise to a significant capital gains tax. The client was concerned that the sketch book would not be kept intact. To address these issues, PP put together a donation to the museum of the sketch book at the same time as selling the painting (about $700,000). The gains on the sale were significantly offset by the gift of the sketchbook.

Example. Sales tax on the sale of a work by Francis Bacon for more than $140 Million. The client avoided NY sales and use tax by taking delivery of the work outside of NY. The work was sent (by the consignor) to Oregon (where there is no sales and use tax) for display.

<u>*Art Advisory Panel*</u>. Volunteer group of museum professionals and art dealers. The AAP provides advice to art appraisal services group, which is a group of IRS employees with art expertise. There are representatives with a wide range of expertise in subject matter, artist, and medium.

<u>***How can Advisors help Executors with Art Assets?***</u>

Process for an executor: often times TPP is not considered by decedents during their life and left for an executor to clean up. A simple walk-through by an appraiser is usually the first step. Safe-keeping is a critical responsibility of the executor. Records and paperwork (invoices, history of exhibitions, receipts, old catalogues) are helpful (authenticity, provenance) and add value.

All of the auctions have a Trust & Estate department and can serve as a resource.

What about restricted materials such as ivory, antiquities, cultural properties. Since July of 2016, there is almost a total ban on trade of ivory, with relatively few exceptions. Executors should be careful if the art is an antiquity; provenance is important and the executor should ensure that the work was not stolen or illegally purchased. If the work was in Germany or occupied territories during World War II, the executor should investigate because the estate may have significant liability.

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Wednesday, January 11th, 2:00 to 3:30 pm
SS 1-F Planning for Privacy in a Public World: The Ethics and Mechanics of Protecting Your Client's Privacy and Personal Security
Presenters: John F. Bergner, R. Kris Coleman and Mark Lanterman
Reporter: Herb Braverman

As public access to information increases, clients are seeking solutions to protect their privacy and personal security. This panel discussed how the professional advisor can structure estate plans and financial transactions in a confidential manner and protect clients against physical and cyber-attacks. Here are some of the more significant highlights from this particular Special Session.

This session was heavily attended and was one of the most interesting ethics sessions I have ever attended. On the other hand, it is quite difficult to adequately report on this session because of the wide range of material that was covered by the three gentlemen on the panel.

John Bergner is an attorney from Dallas and I recommend his voluminous materials to you in connection with this subject; you will be able to relate to much of what he observes and recommends. On the other hand, although he made a valiant effort to cover his material, he did not have near the time to do so in this session.

R. Kris Coleman is a former CIA and FBI operative, who is now in the private sector in Virginia; his comments throughout the presentation about mechanics and privacy issues that came up were very interesting and helpful.

However, to large extent, the show was stolen by Mark Lanterman, the Chief Technology Officer for Computer Forensic Services in Minnesota. He had his laptop before him and took the session into the infamous dark web, where as a criminal investigator he showed us all how available all of our data is to the hackers of the world...really the world. He took us to the web pages where all of this nefarious activity is done and, if his goal was to scare us to death, I am pretty sure he did so. Google is about 14% of the web, even though we think of it as all consuming; the dark web was created by the U. S. Navy for military purposes, of course, but ....He gave us the name of the "fellow" who owns about 85% of the commercial hacking market we visited and it was quite alarming. His stories and those of Mr. Coleman were riveting and shocking as well.

Mr. Coleman focused on the four "phases" of planning in this area, including assessment of threats and vulnerability, designing countermeasures for your circumstances, implementing those countermeasures and then providing operational support ever after in the form of staff support, equipment, updating, etc. He spoke about surveillance, intelligence gathering, technology and procedures that private security companies provide to highly visible and high net worth customers of all kinds.

At one point, Mr. Bergner took back control of the session and spoke about privacy aspects and planning, including some tools in our planning quiver. The areas he focused on included charitable planning, political contributions, medical privacy, privacy at death, in the Courts and, among others, titling real estate, arms and other assets. He also addressed cybersecurity and personal security in one's own home. His materials also discussed attorney ethics and best practices as they relate to the privacy issues for our firms, ourselves, our clients and others. I certainly can recommend his materials to your attention, including (spoiler alert) Justin Bieber's Purported Non-Disclosure Agreement for Party Attendance, which restricts what can be done at parties he is attending, including his own.

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Special Sessions 2 - Wednesday, January 11th, 3:50 to 5:20 pm
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Wednesday, January 11th, 3:50 to 5:20 pm
SS 2-A Charitable Giving for Family Business Families [CHR]
Presenters: Turney P. Berry, Susan L. Abbott, Paul S. Lee and Jeffrey C. Thede
Reporter: Michelle Mieras

Owners of a family business often have significant personal and family charitable goals as well as charitable obligations to the communities in which the business is located and operates. Charitable contributions of business interests are one strategy that can be used and that was discussed by the panelists, but they went beyond these basics to review how other family assets often may be used to meet the family's objectives and obligations more effectively and efficiently. Among other issues, the panelists discussed how to select the best kind of charitable donee, the best asset to give, and the best charitable technique to use, as well as new opportunities recently created by congressional action. Here are some of the significant highlights.

This session discussed opportunities and obstacles for making charitable donations of various types of family businesses. Mr. Berry cautioned at the beginning that this would not be a comprehensive discussion, but instead it would address the most common and effective strategies.

Ms. Abbott began with a brief refresher on basic charitable deduction rules, focusing on the amount of the deduction and when the deduction is available for the full fair market or limited to basis. She reminded us that the donor bears the burden to substantiate the value of a deduction, and of the receipt and contemporaneous written acknowledgment requirement for charitable contributions over certain amounts. Sometimes these simple steps get overlooked, such as when a client is giving to his own private foundation – you still need to follow these rules. Also be sure to adhere to all appraisal requirements (use a checklist) if donating anything other than cash or appreciated stock.

Mr. Thede then discussed some of the gifting pitfalls with private foundations, in particular the prohibitions against self-dealing, the failure to distribute the required 5% per year, taxable expenditures, and the scrutiny over high risk investments. He called the self-dealing rules Draconian as they are not based upon the legitimacy of the transaction, but rather on the relationship of the parties.

He discussed two important exceptions for self-dealing.

<u>First</u>, the corporate adjustment exception permits transactions (e.g., stock redemption) between a foundation and a corporation that would otherwise constitute a disqualified person as long as the bona fide offer of redemption is extended to all shareholders at a price of at least fair market value.

<u>Second</u>, the probate exception permits many transactions to occur during the reasonable period of administration of a donor's estate that would otherwise be self-dealing (subject to certain restrictions and requirements, such as court approval).

Mr. Thede explained how this all works with <u>shares of C corporations</u>, stating that this is relatively easy. Unlike stock in an S corporation or an interest in a partnership, C corporate stock in the hands of a charitable donee does not cause tax problems. Instead, the issue with C corporations arises in the context of exit strategies. Rarely will a charity want to hold onto a family business long-term; instead, the charity wants to convert it to cash. Often this occurs in the form of a redemption. In that case, the corporate adjustment exception or probate exception may be available.

<u>Be cautious</u>, however, as the <u>prearranged exchange (redemption) doctrine</u> has been successfully applied by the Service. This means that if they can establish that there was an enforceable agreement in place to redeem the shares, the charity will be treated as an agent of the donor, causing the donor to be taxed on the cash that the charity receives. Mr. Berry pointed out that the first question to ask is what would happen if the charity does not sell? If the response is that the charity doesn't have a choice, be wary of the potential application of the prearranged exchange

doctrine.

After pointing out an apparently lack of concern on the Service's part over a fundamental issue related to whether redemptions from charity should be allowed at all given the resulting benefit to the other owners of the closely held business, Mr. Berry suggested that a recently-created loophole might be utilized in clients' plans in the context of gifting.
In December 2015, the Protecting Americans from Tax Hikes Act excluded certain organizations, including 501(c)(4) organizations, from the gift tax, meaning lifetime gifts to a 501(c)(4) are not taxable gifts. 501(c)(4) organizations can function very similarly to a private foundation (i.e., make grants to public charities). Mr. Berry suggests that you don't completely operate it as a 501(c)(3) so that there is no argument that it's really a 501(c)(3) with all the resulting effects; throw in some political contributions. He doesn't think this loophole will last forever, but while it is available, consider how it might be used in clients' plans.

Ms. Abbott then raised issues related to gifting with S corporations. As of 1998, charities are eligible S corporation shareholders, as are Charitable Lead Trusts that are grantor trusts or that make an ESBT election. However, Charitable Remainder Trusts and Pooled Income Funds are still not eligible shareholders, so there are limited options if the client is looking for lifetime income. Charitable gift annuities are possible, but complicated and likely to generate a lower than normal payout due to the discount on the value of the interest in a family business. Even direct charitable gifts of S corporation stock have implications due to limits on the charitable deduction and resulting tax issues to the charity due to automatic treatment of earnings and gains as EBTI.

One possible solution presented to mitigate, but not fully resolve, the issue is to ask the charity whether there is a Type 1 supporting organization that could hold the stock. The supporting organization could receive and recognize the income, contribute funds to the charity, and receive an income tax deduction for those contributions. Sometimes better results can be achieved by having the S corporation donate assets directly to charity (rather than the individuals gifting their shares in the S corporation), since the deductions will flow through to the individuals without the related complications.

Moving on to gifting with partnership interests and LLCs, Mr. Thede noted that he has seen an explosion of business and exit strategies with LLCs over the last few years. He has a matrix of potential donor and donee issues to examine. With regard to the donor, he addressed phantom income, bargain sale rules, valuation and substantiation, and prearranged sale rules. With regard to the donee, he cautioned about UBTI, debt-financed income, payments of income tax, potential capital calls, environmental liability, and donor indemnities.

Mr. Lee then focused on interesting and more complex techniques to enhance gifts of using partnership, noting that these often work best with experienced public charities or smart community foundations. He walked through how a charitable gift of a partnership interest can be used to ultimately shift basis between assets within the partnership. He then gave another example to show how lifetime gifts of partnership assets to charity could be used to transfer basis among partners.

Mr. Lee then discussed the charitable family limited partnership. After discussing the technicalities, he noted that this is on the IRS's radar. He provided tips on how to avoid potential exposure. Mr. Berry agreed that it is a viable technique when properly executed.

In closing, Mr. Berry discussed charitable lead trusts, which remain popular in our low interest rate environment. Mr. Lee noted that he is increasingly seeing clients who are interested in using testamentary CLATs to zero out their estates. Mr. Berry observed that one downside of this technique is interest rate uncertainty.

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Wednesday, January 11th, 3:50 to 5:20 pm
SS 2-B Yes, I'll Order That Trust "Fully Loaded"
Presenters: Steven E. Trytten, Jonathan G. Blattmachr, Mickey R. Davis and Steven B. Gorin
Reporter: Kimon Karas

This session presented the latest thinking on how to draft a trust that is income tax efficient (including net investment income tax), transfer tax efficient, qualifies for retirement stretch-out, and protects from creditors. Sample forms were included.

This presentation was the product of two substantive committees of ACTEC. The task force consisted of all of the presenters. The task was to compile sample forms illustrating how a dynasty trust can be drafted to accomplish different possible objectives, and to address coordination that may be needed when drafting to accomplish multiple objectives. The materials are the result of that. The materials consist of over 350 pages of form language, commentary, and that I would commend the reader to obtain as a complete reference source.

The panelists stated that drafting and planning to accomplish any one objective may be difficult enough, but for the client who "wants it all," planning and drafting to accomplish multiple objectives can be challenging. The materials primarily are designed for drafting dynasty trust formed during the grantor's life, but some of the commentary extends to dynasty trusts that may arise at death due to 1) additional assets may pass to dynasty trusts at death and 2) retirement plan assets generally do not pass until death.

Because of the breadth of the material and topic, the panelists covered, and we are reporting, only the highlights of some of the form provisions and concepts. For a more thorough review refer to the written materials.

The presentation started with building flexibility for distributions to charity. In order for an estate/trust to receive a charitable deduction under Section 642(c) the payment must be of gross income and pursuant to the trust language. There are sample provisions in the materials. Some of the benefits of using a trust or estate for a charitable contribution consist of the following: The deduction is allowable from gross income, even if from a prior year so long as not yet distributed; the deduction is allowed for 'charitable purposes' which is broader than the 170(c) standard applicable to individuals; generally not limited by percentage of AGI; trust may reduce NII; and not subject to the 170(f) partial interest rules. Special consideration must be given with S corporation stock as S corporation K-1 income does not support a deduction unless the S corporation distributes that income to the estate/trust; a Section 642(c) deduction would not be available to a conduit trust.

If estate or trust does not contain the relevant language, consider creating a partnership and using the theory of RR 2004-5 allowing for the passthrough of the charitable deduction to the estate/trust partner.

The panelists then discussed flexibility in defining and allocating income and gain between the trust and beneficiary. Dynasty trusts generally do not mandate payment of income. Gains by default are allocated to principal, although the trust can override this default. Special drafting is required to accomplish that pursuant to the regulations under Section 643. Also panelists discussed the concept of income and defining it in terms of a unitrust amount. If so, how is that to be defined for example with hard to value assets, or assets in the trust that do not generate income, i.e. personal residence that beneficiary has a right to use?

The panelists then discussed the NII tax. To the extent the trustee materially participates in an activity that material participation avoids the NII. The NII can be reduced by above the line deductions, such as trustee fees. Consequently a beneficiary or family member may want to accept trustee fees if it produces an income tax savings.

The next topic addressed was grantor trust status. The panelists discussed a number of grantor trust powers including the swap power. The IRS has rules that a grantor's retained swap power does not result in inclusion of assets subject to the power under any of Code Section 2036, 2038 & 2042(2). RRs 2008-22 & 2011-28. The panelists cautioned a grantor retaining a swap power over voting stock in a controlled corporation under Section 2036(b).

The next topic addressed was retirement plan assets payable to a trust and addressing the minimum distribution rules. See through trusts can qualify as a beneficiary. The conduit trust and the accumulation trust qualify. A conduit trust to qualify as a beneficiary requires that any distribution, not just the minimum distribution, distributed by the plan to the trust must be distributed to the trust beneficiary. In other words this form of trust cannot accumulate amounts distributed from the retirement plan. The alternative is the accumulation trust and there are three approaches that commentators believe are safe: Outright to next level beneficiaries (must pass outright to the next level heirs after primary beneficiary's death)-generally not best choice for exempt assets as part of a dynasty trust; age restriction (trust cannot have any beneficiary or permissible appointee older than a specified age); and last one standing (trust cannot have any beneficiary or permissible appointee outside a defined class of persons). For dynasty trusts the preferable approach is either the "age restriction" or "last one standing." The age restriction is generally viewed as the default choice although it is more difficult to draft and could arbitrarily exclude certain contingent beneficiaries if they are too old. The last one standing approach is less complex to draft, but carries a significant disadvantage-the trust will terminate and distribute outright at such time that only one class member remains, regardless of the class member's age, health, or other circumstances.

The panelists then discussed managing whether a dynasty trust is taxed under Chapters 11 or 13 at the beneficiary's death. It is difficult to predict in advance whether it is better for non-exempt assets to be subjected to estate tax (including state death tax) or to GST tax. Provide flexibility so that decision can be put off until the time for the decision arises.

The panelists then discussed considerations with S corporation stock as a trust asset. Keeping with the theme of flexibility, the trust that may hold S corporation shares needs flexible mechanisms to allow the trust to maintain compliance as an eligible S shareholder. Consider being able to toggle between a QSST that distributes all income and an ESBT that may accumulate income. A QSST is a potential trap if the remaindermen receive distributions intended to pay the beneficiary's taxes.

Next the panelists discussed the concept of including trust protector provisions. In order to maintain flexibility trust protector expands the potential flexibility to respond to changes in law or circumstances. Panelists cautioned against making a trust beneficiary the protector.

The panelists devoted time to discussions of trust reformation/construction. RR 73-142 was discussed where a modification prior to the tax event occurring is binding. Key the modification happened prior to the triggering event. The panelists also recommended that the trust document include a statement of intent that will assist a later construction if necessary to give retroactive effect instead of the prospective effect of RR 73-142. Will provide the reviewer, court or otherwise, the grantor's intent to consider.
The panelists discussed consideration of state and local income tax benefits. State income taxes can have a significant economic impact. Flexibility in the trust to move the trust situs can be helpful in managing state income taxes. A trustee's state of residence could cause a higher state tax at the trust level, i.e. if trustee resides in California. Trustee may be concerned whether he has a duty to resign, or whether there is exposure for continuing to serve. Explicit exoneration may be helpful, if it is consistent with grantor's intent. If there is a change of situs clause should that authority be granted to the trustee or an independent party.

The panel concluded consideration should be given if it is anticipated that additional amounts may be added from existing trusts to the existing inter vivos trust. Drafter should allow for the possibility that future events such as creditors' claims, tax disputes, or other circumstances might render the inter vivos trust unsafe for additional assets passing at the client's death. Consider adding language to the inter vivos trust that the trustee has authority to form a new trust to receive assets based on the terms of the inter vivos 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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