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Heckerling Institute 2017 – Day 2 Afternoon Notes

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The following are rough draft meeting notes prepared at the 2017 51st Heckerling Institute on Estate Planning sponsored by the University of Miami School of Law, and published in Leimberg Information Services, Inc. (LISI). These notes were published within a very short time of the conclusion of the proceedings and could not have been reviewed in order to be completed so quickly. There are no doubt errors, typos, etc. in these notes none of which should be attributed to the presenters. LISI obtained special permission from the Heckerling Institute to publish these notes. Bear in mind that no notes appear below on more than 20 concurrent and other sessions. These sessions can be purchased from the source listed below. The final papers presented at this year's Heckerling Institute can be obtained from Lexis Nexis. For recordings of the sessions contact Convention CDs, Inc. 800-747-6334.

1. **Tuesday: Morning: Preferred Partnership Freezes: Angkatavaich**.
    a. Freezes.
        i. Shift assets from less efficient bucket (red), e.g., not GST exempt, to a more efficient bucket (green), e.g. GST exempt.
        ii. Freeze planning generally involves an exchange of the growth potential for something more secure, e.g. more cash flow from more secure type of interest. This can take many different forms. GRATs are an example of this. You put assets into a GRAT in exchange for an annuity payment. What you put in, in a zeroed out GRAT, is such an exchange. In a sale to a grantor trust you take back a more secure asset in the form of a promissory note. A preferred partnership is a different variation of this. You are splitting an entity into different economic pieces: a preferred frozen interest and a common growth interest.
        iii. GRATs
            1. Blessed under IRC Sec. 2702.
            2. You can do a gift tax free shift of future appreciation if the annuity paid equals value of what you put in.
            3. The Greenbook proposals have included changes like a 10-year minimum term. A minimum gift requirement was also proposed to be the greater of $500,000 or 25%.
            4. Not sure what Trump might do.

5. Hearing from practitioners of increased audits of GRATs. There are strict requirements that if you trip over them there will be issues.

iv. Sales to grantor trust –
   1. Is note is a true debt? IRS argues not true debt and parties did not intend to respect the note.
   2. Woelbing/Karmazin arguments. More technical types of arguments. In Karmazin argued that note should be characterized as something different. In Woelbing should be characterized as disguised transfer into trust with retained interest which did not meet qualified interest under GRAT regulations so entire transfer should be taxable. In Woelbing argued what was included in parent's estate on death was the appreciated stock.
   3. Valuation issues. Unlike a GRAT which has a self-adjustment mechanism with the annuity, a note sale does not unless a defined value mechanism is added. In the note sale you have to address other risks.

v. Trump.
   1. Possibility of estate tax repeal.
   2. Trump has proposed a mark to market at death after estate tax repeal. If we have that type of regime there will still be a need application of freeze planning to shift value away from parent's estate.
   3. Will still need appraisals and that will entail valuation issues.

b. Preferred partnership.
   i. Exchange where parent gifts assets and takes back preferred equity interest. The parent is giving up the growth interest.
   ii. Must be IRC Sec. 2701 compliant.
   iii. A number of applications.
      1. Straight preferred partnership.
      2. Can use to freeze a GRAT
      3. Can use it to freeze a QTIP trust, etc.
   iv. Perceived abuse. Pre 2701. 2701 is a deemed gift tax provision that can have sharp teeth. Look at pre-1990 preferred partnership. Recapitalize LP and large value was attributed to the preferred interest. This value was enhanced or loaded up with discretionary rights that the parent held on to. Made gift of common interest which was valued lower based on subtraction method. After gift the discretionary rights were not exercised and value shifted to the common interests.
   v. 2701 puts a lot of limitations on the preferred interests.
   vi. 2701 applies when the transferor makes a transfer to an applicable family member and holds an applicable retained interest after making the transfer to a member of the transferor's family.
   vii. Transfers include recapitalizations, capital contributions and change sin capital structure.

viii. 2701 compliant partnerships post-1990 you must comply with a right that is mandatory and quantifiable. Parent cannot opt to take or not to take the right. A qualified payment right is a common way to do this: annual payment, cumulative and at a fixed rate.
ix. The attribution rules are something that need to be carefully considered as they can change the analysis.
    1. Entity attribution rules.
    2. Trust attribution rules
    3. Multiple attribution rules
    4. Grantor trust attribution rules.
    5. Tie-breaker rules.

c. Forward preferred freeze.
    i. The client has a trust that is existing and at the time it was created the old trust distributed assets outright to the child at some age, or perhaps the old trust was not GST exempt, a red bucket trust. The goal is to contain the growth in this old trust.
    ii. You could make distribution out of the old trust to G2 and let G2 fund their own dynasty trusts and assets will be outside of any estate.
    iii. If the new dynastic/green trust created by G2, and the old bad/red trust can combine together to create a preferred partnership interests.
    iv. Must be 2701 compliant. Goal is to shift common growth interest to the new/green GST exempt new trust. Over time the use of the preferred partnership will hopefully shift growth in the entity to the next generation trust.
d. QTIP trusts.
    i. Will be included under IRC Sec. 2044 at date of death value of surviving spouse.
    ii. Have QTIP make contribution into a preferred partnership for a preferred interest. Perhaps a trust for the children could make a contribution to the same preferred partnership and take back common interest. This may give a steady stream of income to the QTIP to be paid to spouse and shift growth to children.
    iii. Be mindful of IRC Sec. 2519.
    iv. FSA 1999 that addressed QTIP that made a contribution into a single class FLP. IRS looked at whether this would be a 2519 disposition. It is a facts and circumstances determination. Because of the current distributions to the QTIP it was not deemed a distribution of an income interest.
    v. So in a preferred LP the QTIP is getting a mandatory right not a mere expectation that should give a strong basis to avoid a 2519 argument.
    vi. You could alternatively make the distribution to the surviving spouse and let her do the preferred partnership without this issue.
e. Trump Proposal.
    i. You would still have a death tax but in the form of a capital gains tax on death.
    ii. This new tax regime might favor planning that is a mark to market freeze.

iii. Have parent's interests given to a preferred partnership and they receive back preferred interests. Structure the plan so that the growth beyond that shifts to a trust that is not taxed under the mark to market rules.
iv. You might be able to build up basis. Now you want low basis assets in the parents' estate but you might want to do a "reverse Paul Lee." And try to get appreciated assets out of the estate to avoid the Trump capital gains on death if enacted.

f. Adequacy of coupon.
   i. If adequate coupon might be 7-8% and perhaps a 5% interest may be provided so you will still have a gift because of the shortfall. There is still a gift tax component.
   ii. Determine adequacy of coupon under Rev. Rul. 83-120.
      1. What do high grade public stocks pay?
      2. Adjust to yield as compared to risk adjusted market comparables.
      3. Dissolution rights?
      4. Coverage of coupon is very important which is influenced by capitalization of the partnership.
      5. 50/common 50% preferred paying 7% versus 90%/10% paying 7%. The second partnership is much riskier than the 50/50. As a much riskier investment with weaker coverage it will require a higher coupon. Consider these factors when structuring coupon.
      6. These concepts give some flexibility to structure the coupon.
   iii. The preferred coupon will generally be significantly higher than AFR since it is different methodology.
   iv. See: Richard Dees article for Notre Dame
   v. De minimis rule your common must be at least 10% of the capitalization. This will impact the coupon based on the coverage.

g. Reverse preferred partnership.
   i. Parent takes back common growth interest.
   ii. Child gets income preferred interest.
   iii. Under 83-120 you may have a risky investment and hence a higher coupon. If explodes in value common growth goes back to parents' estate and you have a reverse wealth transfer.
   iv. Parent is not taking back a distribution right.
   v. You still need to make sure you don't have an extraordinary payment right

h. Private equity.
   i. Vertical slice has become synonymous with hedge fund planning.
   ii. It is a proportionality exception.
   iii. If you have different interests into an entity.
   iv. GP interest may have a 20% profits allocation and you may have LP interests in the fund. If you give a proportional interest in each interest to the next generation you cannot manipulate discretionary rights since you gave proportionate interests.
   v. This exception has limitations.
   vi. If want to gift ½ of carried interest, you would have to gift ½ of LP interest that could trigger a large gift tax that is not desirable.

vii. Non-vertical preferred partnership

i. Preferred partnership GRAT.
    i. GRATs are subject to ETIP and cannot allocate GST to them until after the ETIP ends.
    ii. Parent creates preferred partnership and takes back a 2701 complaint interest.
    iii. Gift that interest into a long term GRAT and GRAT uses that to make annuity payments,
    iv. Old and cold trust makes contribution into 2701 complaint partnership. This green trust will hold the common interest. Now growth can inure to green GST exempt trust.
    v. At end of GRAT term the preferred interest drops into a GST non-exempt trust.
    vi. If we end up with 10-year minimum GRATs you can minimize estate tax exposure if die in GRAT term since growth is shifted to GST exempt trust from inception. No 2036 inclusion since parent never owned that common interest.
j. Preferred CLAT.
    i. Section 457A end of 10-year grace period for keeping deferred fees offshore. Grace period ends this year for fund that have been offshore since 2008.
    ii. No magic bullet but may be able to lessen the blow.
    iii. Contribution to grantor CLAT. Get income tax deduction because CLAT is structured as grantor trust. Income of CLAT in later years is taxable to grantor too.
    iv. Preferred partnership can make income tax free investments into private placement life insurance. insurance funds under it.
    v. Rising tide CLAT fund without vertical slice.
k. Intentionally defective preferred partnership.
l. Throw-back freeze.
    i. Foreign non-grantor trust with undistributed income will be taxed as a non-US person. When undistributed income is distributed to US beneficiaries you have a draconian tax that can come into play.
    ii. Use a preferred partnership approach to shift value to a preferential/green bucket.
    iii. What if foreign trust takes back a growth interest and other trust takes preferred interest and under 83-120 you have an appropriate preferred coupon.
    iv. Another application may be if foreign non-grantor trust has a preferred interest that might set a ceiling so can make distributions without triggering throwback tax.
m. Preferred partnerships.
    i. Many moving parts.
    ii. Section 2036(a) can be an issue. Parent takes back preferred interest. Based on risk/reward analysis. Common interest may go in from inception. Should be a strong argument that 2036 should not apply.

iii. Bona fide sale exception – best practices. Have separate counsel. Have appraisal to corroborate adequacy of coupon. Lillistrand case. Bad facts. Income generated by the partnership was $43M and coupon to parents was $43M and court viewed this as being "engineered."
iv. Liquidation of participation rights. If you violate IRC sec. 2701could be a deemed gift of the entire interest.
v. Disguised sale "reasonable payment." Safe harbor. If preferred interest is not more than 150% of AFR not considered a disguised sale. But with historically low interest rate you will be higher than this threshold.
vi. Qualified payment right election.
vii. "Lower of" rule.

2. **<u>Tuesday: Afternoon: Trustee Liability: Wolven.</u>**
   a. Pitfalls for trustees.
      i. Loan from trusts present issues.
      ii. Common transactions for family businesses, real estate and concentrated positions that create issues for fiduciary.
      iii. It is easy to create bad facts and we need to create and document good facts to protect the fiduciary.
      iv. Must prove that fiduciary had a plan and followed necessary steps.
      v. What actions can trustee take to document decisions?
      vi. What can be drafted differently, or amended/corrected to obtain a better result (e.g., via decanting, etc.)? What can be done?
   b. Loans to beneficiaries.
      i. Is a loan a substitute for a distribution?
         1. Some call loans a "chicken trust distributions." Is it really a chicken distribution? The trustee may not want to tell beneficiary no but doesn't want to upset other current and remainder beneficiaries when they see a distribution. This is exactly the situation when you should be cautious of making a loan.
         2. Older trust permitting only income distributions may need or want to make a loan because the income may have declined so much that a beneficiary cannot meet living expenses without more.
         3. Perhaps the beneficiary has been successful but has an illiquid estate and needs cash but don't want to increase beneficiary's taxable estate so make a loan.
         4. Want beneficiary to have some skin in the game. So instead of giving beneficiary money to buy a house, make a loan so the beneficiary is more vested in the new house purchase.
      ii. What is entailed in making the loan right?
      iii. Loans are investments. You are investing trust assets in that loan. So if trust is invested in securities earning 4% and needs to liquidate some of the portfolio to make a loan, can the trustee then issue a loan at the AFR at say 2%? Can you justify reducing the trust's investment return?
      iv. Checklist.
         1. Too often loans are made without proper authorization? Does the trust instrument permit it? What are the prerequisites?

2. Would a large loan cause too great a concentration of trust assets?
3. Does trust permit concentration of investments? Could someone sue for concentration?
4. Is interest rate on loan higher or lower than return on other assets that were previously held?
5. Are there clear purposes of the trust that support making the loan? Is making the loan consistent with settlor objectives?
6. Can you charge the beneficiary's share of the trust? Some state statutes permit that if a loan is made from a trust to a beneficiary you automatically charge their share? If the beneficiary agrees to this if not in trust provisions this should work but if trust has a spendthrift clause it may not.
7. Even if trustee does not have statutory authority to charge beneficiary share may have right to recoup. Beneficiary went bankrupt and loan discharged so trustee with discretion under doctrine of recoupment could charge beneficiary's share using equitable powers. In re Lunt 477 B.R. 812.
8. Does trust require security, interest, limit class of permissible borrowers? What due diligence should the trustee make on borrower's ability to repay, etc. In a litigation scenario should be able to corroborate how these points were considered? Even if security was not required it may be prudent for trustee to secure the loan using a UCC filing or mortgage. If you take the security and have not taken the follow up steps that could be problematic.
9. Example, trustee wants to help family business stay afloat which may be a significant trust asset. Conant v. Lansden 341 Ill. App. 488. At some point the trustee should not have made loans when they knew it wasn't viable for beneficiary/borrower to repay.
10. If trustee takes collateral what type of due diligence must be done? May take back a mortgage. Do you trust the beneficiary as to the value of the house? It is a private loan so they may not get an appraisal but any commercial lender would get an appraisal. It is a good idea for a trust to get an appraisal. Some due diligence should be done to corroborate that the decision by the trustee was rational. Determine what an independent lender would do and decide how much you might deviate from that.

v. If there is an incurable default with trustee take action? If trustee won't proceed against the collateral, why take the collateral? If you are taking commercial real estate as collateral do you know if there are environmental issues? Would the trustee make a distribution to the beneficiary to pay off the loan?
vi. Who will sue if don't collect? Who will sue if do collect? Who will sue if the trustee makes a distribution to enable the beneficiary to pay off the loan?

vii. Corporate fiduciaries are held to a higher standard and may have multiple relationships with trust beneficiaries. Smith v. First National Bank 254 Ill. App. 3d 251.

viii. Make sure the correct parties sign off. If a loan is an investment the investment adviser must sign off. Unless the trust agreement says otherwise the investment adviser must sign off. If a revocable trust holds most of beneficiary's assets may have the beneficiary sign in individual capacity and as trustee of the revocable trust. Might have revocable trust sign off as a guarantor.

ix. How do you cure a default? Is there a penalty while the beneficiary is in default?

x. Non-waiver – if you make a loan to a beneficiary and they are late get a non-waiver clause if do not pursue them now.

xi. How the trustee signs any type of contract is important. Under common law there is no entity, a trust is not a legal entity. The contract is between the trustee and the third party. So unless the document or trust instrument says that the trustee is not liable the trustee could have personal liability for signing the instrument. Uniform Trust Code permits trustee to avoid liability if signs "as trustee." However, since may not be sure as to the terms of the trust instrument always have trustee sign in this capacity.

xii. Revocable trust issues do crop up. Cresta v. Tepper. Contracts signed in name of revocable trust. Surviving spouse took position that since revocable trust signed and the trust did not die the result should not follow. Trust had a taxpayer ID number and filed its own tax return. The argument did not succeed.

xiii. Trustees were held liable. They had not done a public records search against the real estate developer nor had they had an appraisal, nor had they obtained personal financial statements from those who gave guarantees. Estate of Ralph W Collins 72 Cal. App. 3d 663. Trustees should take steps and if deviate from commercial norms should document reasons for doing so that are consistent with the terms of the trust.

xiv. If making a non interest bearing loan interest may be imputed under the original issue discount (OID) rules.

xv. Guidelines for making loans.

1. Would loan be prudent if made to third party.
2. Weighing prudent investments versus purpose of trust.
3. Do you get other beneficiaries to sign off? Many states permit trustee to limit liability through a non-judicial settlement agreement, or a consent (agreement before transaction), ratification (after transaction). Documenting consent should work if you give adequate disclosure. Must advise beneficiaries to obtain independent counsel and if they do not there should be something in a letter sent to them.
4. It is a conflict/self-dealing transaction so get siblings and others to sign off. Give them details of the transaction and copies of documents.

5. What happens when beneficiary dies? Do you need to file a claim in probate court? Do you need to notify trustee of the borrowing beneficiary's revocable trust?

c. Concentrated positions.
   i. A loan discussed above may be a concentrated position.
   ii. Kettle and Dumont were Kodak stock cases. Will of Dumont, 791 NYS2d 868. In re Estate of Kettle 73 AD2d 786.
   iii. Trustee had direction to hold stock but did not address what a "compelling reason" was. While the case was overturned it was on technical reasons so the court's admonitions of the trustee still are valid.
   iv. Dumont case: Where a fiduciary is administration an estate … must understand testator's words… critical that fiduciary's actions that the retention clause does not exculpate from poor judgment and laziness…demands a delicate balancing act….
   v. In Kettle the fiduciary sold and was held liable. In Dumont the fiduciary did not sell and was held liable.
   vi. Third case Matter of James 223 A.D.2d 20 (NY App. Div. 1996).
   vii. Trustee does have duty to diversify even with retention language unless there are special circumstances. Wood v. US Bank, NA 828 N.E. 2nd 1072 (Ohio App. 2005). Court of Appeals said retention language alone is insufficient. Authorization to retain must be specific. If intend trustee to hold a concentrated position, then must expressly state that. If want trustee not to be liable, then should so state that as well.
   viii. A prime example of this issue is the holding interests in a family business.

d. Family business.
   i. When one sibling put in charge often have conflicts of interest or issues with power.
   ii. Child in business did not 'behave' and JP Morgan went to court to get child to behave and thereafter to sue. Other children sued JP Morgan. This case demonstrates the benefits of having an independent fiduciary but they are hamstrung when a family member is controlling family business and prevents the institutional trustee from getting information. Scherer v. JP Morgan Chase & Co. 508 Fed Appx. 429.
   iii. Consider permitting trustee to suspend distributions if information not disclosed.
   iv. Rollins v. Rollins, 338 Ga. App. 308. Inserted partnerships to prevent beneficiaries from getting assets at age 45 as trusts provided. Were actions they took in good faith?
   v. Shares were owned by trust and trustees could not get anything done. Trustees sued. Court said that the corporation was not a beneficiary and did not have standing. Yost v. Yost, 713 S.E. 2nd 758.
   vi. Insurance problem. Langdale Co. v. National Union Fire Ins. Co. 609 Fed. Appx. 578. Beneficiaries got judgement against trustee. Company indemnified. D&O insurance said transactions were not done in capacity as officer of the company and they would not cover. Court said to extent

they were acting as officers and directors it was so inextricably intertwined with actions as trustees that D&O did not apply.

e. Real estate.
    i. There is a reason corporate fiduciaries charge extra for managing a real estate investment portfolio.
    ii. Must seek expertise to manage real estate.
    iii. Must know limits of expertise. Trustee has general duty to protect property from damage and destruction.
    iv. How much money do you have to spend to keep property in shape? "….as a reasonably prudent man…..to accomplish objectives of trust"
    v. Matter of Trust of Rosati, 441 NW2d 30. Trustee had forgotten to pay water bill and pipes froze. Court found trustee had not cared for the property. The trustee did not have a plan to manage the property. The trustee did not take charge in the way it should have. The trustee should have had a plan.
    vi. Trustee sold 5 parcels of the many it owned. Quality Stores developed those parcels creating drainage problems on the related parcels. Wells Fargo Bank Wyoming v. Hodder, 144 P.2 3d 401. Trustee failed to market or promote the property. The court found that the trustee should have hired a realtor and taken more steps. Trustee failed to obtain approval from trust oversight committee and did not hire real estate expert. So trustee did not act faithfully.
    vii. Environmental issues affect real estate. Important that if trustee is aware of environmental issue it may have duty to remediate before it sells or transfers the property.
f. Trustees that lack capacity.
    i. What is standard for removing trustee?
    ii. What steps are necessary to move to the next trustee and avoid gaps.

3. **<u>Tuesday: Afternoon: Senior Financial Exploitation: Bear.</u>**
    a. What is senior exploitation?
    b. Signs or red flags.
        i. Withdrawals of money inconstant with spending habits.
        ii. Will bequeathing to one person, e.g. 4 children but one child is beneficiary.
        iii. Withdrawals of money inconsistent with income.
        iv. Will or title or beneficiary designations favor a "new" beneficiary.
        v. Lack of necessities.
        vi. New credit card accounts. Seniors generally don't pay finance charges and often pay bills like clockwork so that is a sign.
        vii. Caregiving disproportionate to net worth or income.
        viii. Documents missing.
        ix. Suspicious signatures on documents.
        x. Mail redirected.
        xi. Acquaintance takes up residence with the elderly person.
        xii. Incessant phone calls – walling her off from other family members.
        xiii. Change in advisers.

c. Steps.
    i. Revisit plan every 3-5 years.
d. Mental capacity and undue influence.
    i. Capacity
    ii. Requirements to sign will, testamentary capacity.
        1. Nature of one's bounty. I have a house a farm, some money in the bank, etc.
        2. Objects of bounty. I know I want it to go to the natural objects of my bounty, spouse, partner, certain kids.
        3. Holding in one's mind.
        4. While doing legal document.
    iii. Less than capacity to sign contract including other conveyance documents like a beneficiary form or a deed of trust.
    iv. Transitory nature of capacity – e.g. different times of day.
    v. Due an assessment. Recommend that client have an assessment completed in writing to corroborate capacity.
e. Avoidable Change.
    i. **Example**: Mary elected lower benefit to provide for husband. At 60 becomes incapacitated stops and changes beneficiary election to higher payout and no death benefit. Change is voidable and would have been foolish in light of her life expectancy. Restatement of Contracts 2 Sec. 15(1).
f. Signs of diminished capacity.
    i. Confusion as to time or place.
    ii. Challenges solving a problem.
    iii. Misplacing things.
    iv. Withdrawal from social activities.
    v. Changes in mood.
    vi. Difficulty completing familiar tasks.
g. SEC red flags.
    i. Investor appears unable to process simple points.
    ii. Investor appears to have memory loss.
    iii. Investor appears unable to recognize or appreciate the consequences of his or her decisions.
    iv. The investor's behavior is erratic.
h. Who is the client?
    i. Take care to identify and confirm who your client is.
    ii. Visit client at hospital.
    iii. A mere diagnosis of Alzheimer's disease may not render person incapable of completing estate planning documents.
i. Undue influence.
    i. Vulnerability.
        1. Any impairment of cognition.
        2. Loss of mood control.
        3. Recent personal losses that are significant.
        4. Little or no social contacts.

ii. Assessment.
    1. Medical records.
    2. Observations.
    3. Live examination.

j. Powers of attorney.
    i. General durable power of attorney.
        1. Durable remains effective even if principal incapacitated thereafter.
    ii. Springing power.
    iii. Statutory short form power.
        1. Creatures of legislature to make powers of attorney documents more readily available.
        2. Smaller banks pushed for this so it would be easier for bank officer to discern if valid.
        3. Consumer concerns.
        4. Most contain gifting restrictions.
    iv. Special or limited power of attorney.

k. Health care documents.
    i. Name an agent who thinks like the principal.
    ii. Be certain it is disseminated.
    iii. Send to agent via email.

4. **<u>Tuesday: Afternoon: Non-Tax Developments: Pennell and Cohen.</u>**
    a. Uniform Probate Code.
        i. No need for witnesses if signed or acknowledged before a notary.
        ii. If don't have two witnesses the notary who signed self-proving affidavit can serve as one of two witnesses.
            1. **<u>Comment</u>**: In re Estate of Harris, 2016 WL 1588826 (Ohio Ct. App.) the drafting attorney was notary and testified that he wasn't certain that another witness actually witnessed the signing. The attorney's signature as notary was allowed to count as the required second witness. Flawed execution one witness is not valid. Have a self-proving affidavit and notary. Question is whether the notary who witnessed the execution ceremony counts as the second witness. The answer is yes. UPC has gone so far as to say if you have a notary signature you do not need other witnesses but it is not clear if any states have adopted this.
        iii. Michigan case. Will not signed at all is valid under UPC harmless error provision.
        iv. Will execution formalities are evolving in the direction of trust execution formalities.
        v. Haste case – With respect to an IRA the court applied the doctrine of substantial compliance test under will execution rules to the IRA beneficiary designation. Haste v. Vanguard Group, Inc. 2016 WL 3382038.
    b. Debt provision in will.

i. A will provision that stated: "Pay all my debts." How should that be applied? How broad? What does it mean? Real estate is held TOD does will require repayment of debt that is not probate real estate? Court held yes. But do you really want to pay off long term mortgage? Most clients think of credit card debt but without specificity are non-probate assets covered? What about mortgages? Do you really want to accelerate this? "Pay my debts" is boilerplate language. State law mandates any way. The language is really meant to describe from what source you pay debts not whether you should. Carlson reminds us that this common provision deserves more attention.
ii. Consider how you draft pay debt provisions.

c. Transfer to trust.
   i. Carne v. Worthington, 246 cal. App. 4th 548. No recorded deed just an indication on Schedule A to the client's revocable trust of the property. The court held that the listing on schedule sufficed. Recordation only important as to trustee's ownership as to third party claim
   ii. **Comment**: Might this suggest listing all of a client's assets that are intended to be transferred to the revocable trust on Schedule A to at least provide a fallback position in the event the client dies before consummating the intended transfers?

d. Revocation.
   i. Under common law if a trust was silent as to whether or not it was revocable, it had been deemed to be irrevocable.
   ii. UTC deemed to be revocable if silent. Opposite of old common law.
   iii. Be clear in document.
   iv. If trust is revocable how do you revoke or amend it. Provide the mechanisms
   v. In re Hyde Trust individual created revocable trust in 2006 and transferred real estate and a Schwab account holding company stock. Signed 5+ codicils to his will some with attorney help some not. In one codicil said Schwab account should pass to siblings not to charities name in trust. Did his will amend the revocable trust? Where codicil provided that Schwab goes to siblings and not charity court said not clear enough.
   vi. In FL case individual created revocable trust and provided for all assets to pass to four charities on death. Language of subsequent will "I declare this to be my last will and testament and revoke all prior wills and trusts…". Court said will can amend trust and permitted extrinsic evidence to amend.
   vii. Above cases reached opposite results.
   viii. Suggestion is to provide that a revocable trust cannot be amended by will to avoid this confusion.
   ix. This is becoming a trend of court allowing extrinsic evidence to interpret wills.

e. Power of appointment.
   i. Shott Trust 2016 WL 1056969.
   ii. Court found exercised by codicil to will.
   iii. Codicil satisfied the requirement.

iv. If you want a power of appointment to be subject to amendment, make it clear how that should be exercised.
v. For POA may said has to be delivered inter-vivos to avoid issues.

f. Modify 1930 trust to include removal power.
   i. Current trustee is Wells Fargo and they objected to modification.
   ii. Lower court said you cannot use trust modification to end run trustee removal provisions.
   iii. If one statute more specific and one more general, follow the more specific statute. At superior court level said only need to get into statutory construction unless statute is ambiguous and therefore it is OK to modify the trust to add a removal power.
   iv. Issue presented is whether court erred in whether trust beneficiaries can circumvent removal of trustee.
   v. Cassatt 2016 WL 5122265 "Subject to all provisions… and with all powers thereby conferred…gave power to remove and replace…"

g. Decanting
   i. Harrell v. Badger 171 So. 3d 764. SNT would pass on death to others. Initial trust would pass to siblings. Some time had passed before sibling found out about this. The decanting added new remainder beneficiaries and FL law of decanting says cannot change trustee. At trial court held they had no cause of action and held siblings responsible for fees. Note that before that trustee had already been convicted of taking trust funds. On appeal the court held that decanting was invalid and remanded to find value of trust before decanting.
   ii. Not clear if you can exclude beneficiaries in decanted trust. You may be able to exclude beneficiaries even if you cannot add. But if trustee did exclude a beneficiary does that beneficiary have a cause of action? If cause of action is not asserted will that constitute a gift?

h. Swap power.
   i. Trustee was wife and mother of daughter who was beneficiary of trust. Divorced. Now ex-husband tried to exercise swap power and now ex-wife trustee refused. He tried to swap in a note and the ex-wife/trustee objected saying it was not of equivalent value as required by the trust.
   ii. Schinazi v. Eden 2016 WL 5867215.
   iii. **Comment**: In the divorce the issue of trustee and trust actions should have been addressed. It may have been preferable for all involved to have had the wife/ex-wife to be resign as trustee in favor of an independent and ideally an institutional trustee.

i. Is trust a will substitute?
   i. UTC law in 2/3rds of states.
   ii. UTC is confident that a trust is a will substitute. UTC provides that while settlor is alive and competent (only in some states the latter is an add on that UTC does not require) the trustee only owes duties to the settlor.
   iii. Does trust require formalities of will?
   iv. Babbit v. Superior Court, 246 Cal. App. 4th 1135 (2016). The settlors of a joint revocable trust were both trustees. The remainder beneficiaries had

no rights to receive accountings, nor any cause of action while the trust was revocable.

v. In re Trimble Trust, 826 NW2d 474. Mom relinquished trusteeship to bad daughter during gap period after mom incapacitated but while alive. Court said good daughter had no right to an accounting while mother was still alive.

vi. A recent FL case denied petition for administrator ad litem since courts are saying beneficiary has no standing.

j. In Terrorem.
   i. Every practitioner sees cases where these are warranted.
   ii. They are clearly disfavored in some jurisdictions.
   iii. Stewart v. Ciccaglione, 2015 WL 1283481. Held that the in-terrorem clause was boilerplate and settlor was not fully apprised.
   iv. Include a good faith exception.
   v. Heathman v. Lizer 2016 WL 3753328– Trustee tried to invoke when beneficiaries brought action to limit trustee compensation. This was certainly not the intent of an in terrorem clause.
   vi. A majority of courts are adverse to enforcement of anti-contest provisions.
k. Binding Arbitration provisions.
   i. Original arbitrator often makes errors.
   ii. Why should arbitrator be immune to same type of challenge.
   iii. Nursing home admission arbitration provisions are not valid per Department of Health. They are contracts of adhesion and nursing home with these will forfeit Medicare and Medicaid benefits.
   iv. POA does not have authority to enter into binding arbitration.
l. Joint estate plans.
   i. Important in community property states.
   ii. What about in separate property states? Often don't make sense. If opt to do so be careful.
   iii. Many things can go wrong with joint estate plans particularly where one spouse is trying to bind what surviving spouse can do in a will contract. Too often these do not succeed.
m. Misconduct.
   i. State laws disqualify a surviving spouse for misconduct like adultery.
   ii. 3 cases have recently been published: In re Estate of Peterson, 2016 WL 2992474 (Mich. Ct. App.); In re Estate of Racht, 2016 WL 2909701 (Pa. Super. Ct.).
   iii. 12-13 states have these types of statutes, including Michigan.
n. Elective Share.
   i. There has been an explosion of elective share cases. A common issue is determining which non-probate assets or transfers should be subject to the reach of an elective share claim. What is included in the "augmented estate" the surviving spouse can claim against? See UPC Sec. 2-205.
   ii. Beneficiary designations may not be included in share of surviving spouse.

iii. Bays v. Kiphart, 2016 WL 2064789 (Ky.). Wife was terminally ill and modified her plan cutting out her husband. In issue was change made to life insurance beneficiary designations. The court held the insurance proceeds were beyond the reach of the husband's elective share.
iv. Beren v. Beren, 349 P.3d 233 (Colo. 2015). The court held the surviving spouse was not entitled to an equitable adjustment to the elective share based on appreciation during the period of contest. The court did permit interest to be paid on the delayed distribution of the elective share. See UPC 2-202(a). Colo. law views the elective share as a pecuniary amount and not as a fractional interest in the estate.
v. Dinin v. Patten, 116 A.3d 275 (Conn. 2015). This reached the opposite conclusion of Beren because of CT law views the elective share as a fractional interest in the estate not as a pecuniary amount.
vi. Ammerman v. Callender, 245 Cal. App. 4th 1058 (2016) – A pecuniary is different than a fractional share. The share of the royalty income earned during an extended period of probate administration $67M of income. What is the fraction for the surviving spouse and other family members?
vii. Elective share calculation and marital funding. A pecuniary vs fractional share.

o. Equitable Distribution.
i. Is trust to be considered as part of the marital estate?
ii. Mass. Has considered trusts as part of marital estate if more than an expectancy and then subject to division. Instead of dividing 50/50 if one spouse is beneficiary of substantial trust might divide 80/20. Facts not favorable to Husband.
1. Court decided when divorce took place 11 beneficiaries, Husband, 2 siblings and grandchildren and not a closed class because other descendants would be added as born.
2. Ascertainable standard of sorts was included: support, etc.
3. Lower court said it was part of the marital estate and said value was 1/11 x full value since husband was one of 11 beneficiaries and gave wife 60% to wife.
4. Appealed. Court noted that it was manipulative of trustees to stop making payments on eve of divorce
5. SJC decision. Found that it was a mere expectancy so it is not subject to division. Note that does not mean it cannot impact how marital assets are divided.
iii. Lessons
1. Don't include ascertainable standard.
2. Better to have pooled trust for many beneficiaries then a trust just for one child.
3. Even if you don't practice in Mass. You have no idea where beneficiaries may eventually reside.
iv. State law is changing. Mass. Is out there but it is not that unusual a case. Under a conflicts of laws application, it will be the laws of the jurisdiction that governs the divorce that may determine the rights of the beneficiaries.

p. SNT.
    i. Pikula v Department of Social Services 138 A.3d 212 (Conn. 2016).
    ii. Trust was not SNT but court held it was.
q. Reformation.
    i. UPC and UTC reformation.
        1. Duke CA case. They do not have legislation authorizing reformation but court concluded court by fiat fixed formed with botched survivorship provision. Court fixed document even in absence of legislative authority.
    ii. Flynt case.
        1. DE Case. 80% in one stock. Trustee wanted to diversify. Beneficiaries wanted to amend trust to make it a direction trust.
        2. Court said they would not permit reformation.
        3. DE court said they respect settlor intent.
        4. Tension between dead hand of settlor and beneficiaries who say that the trust doesn't' reflect their desires or modern trends.
r. Secondary disclaimers.
    i. In re Friedman, 7 NYS3d 845 (Surr. 2015).
    ii. Daughter wanted to disclaim on her behalf and on behalf of infant child so estate would pass per a marital deduction.
    iii. Was this in the best interests of the child? If mom did not disclaim child would not get anything so it is in child's best interests.
    iv. Court said they don't see how this would be in child's best interests.
    v. So if there is a minor child you need to be careful as to whether you can meet the best interest of the child test.
s. Conflicts of law.
    i. Steiger v. Steiger 2016 WL 4156689. Provision stating governing law but will it apply?
    ii. If decant will new state's laws apply? Yes, as to administration but perhaps not as to construction or validity. You need a broad governing law provision.
t. Adult adoption.
    i. State law varies.
    ii. Can you adopt an adult to change inheritance?
    iii. What if adopt law in state that permit adult adoption but state of where will is does not permit?
    iv. Law of state of adoption should govern.
u. Defacto parents.
    i. Unmarried couple has child.
    ii. What parental rights does parent have if did not adopt child?
    iii. If they created child together and held themselves out as parents, they should have right to visitation and custody.

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