Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2597

Date:	**02-Nov-17**
From:	**Steve Leimberg's Estate Planning Newsletter**
Subject:	**Martin Shenkman's Day 1 Notes from the 43rd Annual Notre Dame Tax and Estate Planning Institute**

The **43rd Annual Notre Dame Tax and Estate Planning Institute** was held on **October 26th and 27th** at the **Century Center** in South Bend, Indiana. Members should click this link to review the meeting agenda: 43rd Annual Notre Dame Tax and Estate Planning Institute**.**

The Institute presented topics of interest to a broad range of estate planning professionals, whether their clients are high net worth individuals exposed to the estate tax or more moderate net worth individuals who are below the estate tax exemptions. Of particular interest was the fact that a number of **LISI** commentators served as faculty.

Congratulations go out to program director and **LISI** commentator **Jerry Hesch** for this amazing two-track conference.

As in the past, the Institute provided topics focused on income tax planning, such as assignment of income to taxpayers in lower marginal income tax brackets, including elimination or deferral of state income taxes. With dual sessions, individuals attending the Institute could choose topics relevant to their clients.

An area of particular interest were the sessions devoted to evaluating different life insurance policies and proposals using life insurance that sometimes seem too good. Another topic covered that will become increasingly important did not exist a few years ago: Electronic Wills.

Over the course of many years, **LISI** has been delighted to provide members with **Marty Shenkman**'s notes from the proceedings at the **Heckerling Institute on Estate Planning**. Marty was a speaker at the **Notre Dame Tax and Estate Planning Institute** and has graciously agreed to share his amazing meeting notes from the sessions with **LISI** members.

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in Fort Lee, New Jersey and New York City who concentrates on estate and closely held business planning, tax planning, and estate administration. He is the author of 42 books and more than 1,000 articles.

Marty is the Recipient of the 1994 Probate and Property Excellence in Writing Award, the Alfred C. Clapp Award presented by the 2007 New Jersey Bar

Association and the Institute for Continuing Legal Education; Worth Magazine's Top 100 Attorneys (2008); CPA Magazine Top 50 IRS Tax Practitioners, CPA Magazine, (April/May 2008). His article "Estate Planning for Clients with Parkinson's," received "Editors Choice Award." In 2008 from Practical Estate Planning Magazine his "Integrating Religious Considerations into Estate and Real Estate Planning," was awarded the 2008 "The Best Articles Published by the ABA," award; he was named to New Jersey Super Lawyers (2010-15); his book "Estate Planning for People with a Chronic Condition or Disability," was nominated for the 2009 Foreword Magazine Book of the Year Award; he was the 2012 recipient of the AICPA Sidney Kess Award for Excellence in Continuing Education; he was a 2012 recipient of the prestigious Accredited Estate Planners (Distinguished) award from the National Association of Estate Planning Counsels; and he was named Financial Planning Magazine 2012 Pro-Bono Financial Planner of the Year for his efforts on behalf of those living with chronic illness and disability. In June of 2015 he delivered the Hess Memorial Lecture for the New York City Bar Association. His firm's website is www.shenkmanlaw.com where he posts a regular blog and where you can subscribe to his free quarterly newsletter Practical Planner. He sponsors a free website designed to help advisers better serve those living with chronic disease or disability which is in the process of being rebuilt: Chronic Illness Planning

Because of the length of Marty's commentary, **LISI** has made his notes from Day 1 available to members through the following link:

43rd Annual Notre Dame Tax and Estate Planning Institute - Day 1

Important Update: Members should note that "H.R. 1 Tax Cuts and Jobs Act: Section-by-Section Summary Prepared by House Ways & Means Committee" was posted to the **LISI** homepage and can be accessed at this link: H.R.1

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Martin Shenkman

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LISI Estate Planning Newsletter #2597 (November 2, 2017) at http://www.leimbergservices.com

Notre Dame 43rd Annual Tax Institute
Day 1
By Martin M. Shenkman, CPA, MBA, AEP, PFS, JD

1. **<u>Charitable Planning with Retirement Assets</u>** – Hoyt.
    a. Income tax consequences of IRA make it an ideal asset to bequeath to charity.
        i. If IRA paid to estate and included in income but not offset by contribution deduction the result can be adverse.
        ii. IRS may not respect reformation of will by court to achieve intended tax result (resolution respected only if court reformation is to resolve conflict). PLR 201438014.
            1. **<u>Comment</u>**: Should durable powers be amended to permit agents to make advancements of charitable bequests to obtain an income tax deduction.
    b. Best approach is to transfer IRA to charity in a manner that does not trigger any income to the estate.
        i. Name charity not estate to receive IRA.
        ii. Will/revocable trust should provide that if estate/trust is to make charitable bequest it must be made first from IRD. Will this direction be respected if only impact is tax? Reg. Sec. 1.642(c)(3)(b)(2).
        iii. If no direction in will may be able to distribute to charity if instrument permits non-pro-rata distributions.
        iv. May still have an issue for a pecuniary rather than residuary bequest. PLR 201438014.
        v. May be able to pay expenses and noncharitable beneficiaries in year one and charities in year two.
    c. Income based charitable bequest.
        i. Most clients will not realize any estate tax charitable deduction since most estates not taxable.
        ii. Consider restructuring charitable bequest into a bequest of income of the estate up to a cap (cap being the maximum amount requested).
        iii. Use IRD to fund charitable bequests if feasible.
        iv. See requirements of IRC Sec. 642(c).
        v. If will contains a pecuniary bequest and distributes appreciated property triggers gain. Reg. Sec. 1.661(aa)-2(f).
            1. **<u>Comment</u>**: If estate tax repeal occurs or a doubling of the estate tax exemption as recently proposed is enacted, this planning idea may be the only means of obtaining any tax benefit for a bequest. How long can the estate be kept open for income to continue to inure to charity?
2. **<u>Non-Judicial Settlements: Your Irrevocable Trust is Not Set in Stone</u>** – Lucina and Flubacher.
    a. Introduction.
        i. Move, amend or change in a trust, include a silent trust provision, ratify trustee's action, approve an accounting, grant or limit a power of appointment, etc.

    ii. Issues exacerbated by long term trusts that could not contemplate changes to law, family, etc. that might occur at a date long after trust created.
    iii. A non-judicial modification agreement ("NJMA") may provide a solution.

b. Options.
    i. Court proceeding.
    ii. Decanting.
    iii. Mergers.
    iv. Non-judicial settlement.

c. Non-Judicial Settlement Agreement.
    i. Private settlement agreement.
    ii. Concept get all stakeholders to agree on whatever is in question or to be changed.
    iii. Can they do this privately without going to court? Yes, as discussed below, but in some instances, it may be preferable to have the NJSA approved by a court even if not necessarily required.
    iv. If done correctly will it be binding?
    v. Corporate trustees find the NJMA approach particularly useful, e.g. to solve ambiguity, to ratify action, as a means of client service, to approve accounting, to correct error in document grantor did not intend.
        1. **Comment**: in contrast to a trustee modifying an instrument using provisions within the instrument, or decanting, which is a trustee action, the NJSA is consented to (or at least non-objected to) by all interested parties which changes the exposure for the trustee in a positive manner.
    vi. Can it be used to modify trust and change provisions? If requirements met.
    vii. 37 states permit NJSAs.
    viii. Sec. 111 of the UTC.

d. Who are parties to a NJSA.
    i. Need correct parties involved, signing and properly represented.
        1. Comment: What about persons holding certain powers in a non-fiduciary capacity? If they are not trustees or beneficiaries they may not be within the technical ambit of a statute but it may be advisable to have them at least acknowledge or non-object to the modifications to be made.
    ii. Who are these people?
    iii. Beneficiaries of a long term dynastic trust might be unborn or minors, so must determine who can represent them and do so without a conflict of interest.
    iv. If don't have correct signers agreement won't be valid.
    v. Everyone affected should be bound by the NJSA and should be represented directly or by virtual representation. **Comment**: In some instances, e.g. under DE statute, non-objecting may be necessary.
    vi. Who are the interested people? This is not always clear, e.g. depending on the statute, beneficiaries, etc.
    vii. In contrast to decanting which is an exercise of the discretion of the trustee, this does not require all parties to sign, and validity does not depend on making certain that you have all interested persons involved.

viii. Rules vary by state. Some follow UTC Sec. 111 with a clear list of permissible or required signers for an NJSA, others do not. Those persons who would be necessary to consent to obtain court approval of relief.
ix. Illinois, DE, WY, etc. include list of specific parties in the statute.
x. Some statutes might include "beneficiaries" but who does that include? In DE those currently entitled to receive distributions and presumptive remainderman. What about contingent remainderman? Will they be bound by virtual representation and not be necessary parties? What does statute state? Florida requires anyone that could be effected by NJSA which might leave the issue open as some could come forth later and try to overturn the NJSA.
xi. Virtual representation – agreement of representative sufficient to bind other party. This could be used to bind class of beneficiaries like minors or unborn or even unascertainable beneficiaries. Uniform Trust Code and Uniform Probate Code have expanded concept of virtual representation. Some states may require both parents to consent on behalf of a minor. In DE if the custodial parent of the minor must sign so that might be one or both parents depending on who is/are the custodial parents. Under Illinois law it appears only one parent must sign but must not have a conflict of interest. If there is a disagreement between the parents the parent who is a lineal descendant of the settlor can bind the minor. DE uses a different approach.

e. Conflicts of interest.
   i. Conflicts are not limited to only economic conflicts of interests.
   ii. If bifurcating investment powers, powers to appoint fiduciaries, additional protection for a beneficiary, are non-economic issues that might affect virtual representation.
   iii. Difficult analysis when have to consider subjective as opposed to objective standards, e.g. Mennen case in which brother of person being sued was in a position to virtual represent his children, but court found he was under such a close representation with brother that should not be permitted to do so. Mennen v. Wilmington Trust Co.
   iv. NJSA used to affect accounts is there an argument that distributions create a conflict with more remote beneficiaries being bound?

f. What are limits of NJSA.
   i. Cannot conflict with material purpose of the trust.
   ii. This is a subjective test. Must analyze and determine.
   iii. If uncertain can have court "bless" the arrangement.
   iv. UTC 111 should permit to modify. 8 states went further and permit more. Illinois permits any modification for administrative or non-administrative purposes. Iowa, MI and Kansas prohibit modification and limit NJSA only for certain matters set forth in their respective statutes.
   v. Most statutes do have some type of overall limitation that you cannot conflict with a material purpose of the trust. Rationale is to preserve the settlor's intent.
   vi. Subjective tests. Someone could claim you are violating a material purpose of the trust so this is an issue the fiduciary must be concerned with.

vii. Illinois approach separates out those items which are more administrative in nature, such as appointing trustees, modifying for administrative purposes, or approving an accounting. So, if on that list you do not have to be concerned with the subjective material purpose test. Cannot violate a "clear" material purpose of the trust. Contrast with the UTC which will not permit violation of "a material purpose."

viii. Termination of trust might still require court approval.

ix. Determining material purpose of a trust is difficult. If you had a spendthrift clause that was historically deemed a material purpose, but now almost every trust has a spendthrift clause so the law has evolved to treat this akin to "boilerplate."

x. Determining material purpose is hard. Consider that if there is a material purpose stated in the trust instrument.

xi. Flint Case. In re Trust Under Will of Flint for the Benefit of Shadek.

1. Concentrated position of IBM stock.
2. Corporate trustee was concerned about issues of stock falls so corporate trustee requested indemnification from beneficiaries.
3. Beneficiaries felt better to modify trust to create a directed trust with an investment advisor. Court denied petition stating it was against settlor's intent noting that a corporate trustee was appointed and if made it into a directed trust that would relegate the role of the corporate trustee to a more of a rubber stamp which was not, in the court's view, not consistent with settlor's intent.

g. Some states permit trust to opt out of NJSA.

i. Is that a good idea to prohibit a trust from having a NJSA?

ii. That could be a concern.

iii. Better approach may be to have discussion with client as to stating in instrument key objectives and purposes.

h. Tax issues.

i. There might be tax issues with signing a NJSA.

1. Gift tax issues.
2. Income tax issues.
3. GST tax issues.

ii. General.

1. UTC 411. A noncharitable irrevocable trust may be modified or terminated on consent of the settlor and all beneficiaries even if inconsistent with a material purpose of the trust.
2. Regardless of material purpose of trust is settlor is alive can rewrite trust. DE law permits anything in NJSA even if not permitted at time of original trust creation so gives broad ability to modify.
3. PLR 201233008.
4. Shifting of beneficial interests.

iii. Estate.

1. If shift benefit might there be an estate tax implication?

iv. Gift.

1. If shift interests could trigger gift tax.
2. If result if NJSA is a beneficiary diminishing her interest in favor of another that could be deemed a gift.

v. GST.
    1. Could affect GST exemption.
    2. Be cautious with any NJSA for a GST exempt trust.
    3. Regulations contain some safe harbors for modifications of a GST exempt trust that will not trigger adverse GST tax consequences.
    4. Settlement safe harbor for court approved settlement of bona fide issue of construction and settlement is result of arm's length negotiations and within range of reasonable settlement, no problem. This could be useful if construing ambiguous provisions or if document leaves an open final distribution clause, but need court approval and most NJSA statutes do permit court approval. Might need to take this extra step and/or obtain a PLR.
    5. Other changes safe harbor valid under state law, does not shift interest to lower generation and does not postpone vesting beyond period it would have vested under original trust. So, an administrative change only may fit in this safe harbor.

i. Fixing a broken trust.
    i. Example, you had what was supposed to be a directed trust but there are ambiguities as to what trustee is to do with direction.
    ii. Settlor's intent was to have directed trust.
    iii. Corporate trustees are reviewing older directed trusts to confirm if language is clear. If not might decant or might use NJSA and if bifurcation was a material purpose of the original trust and use NJSA to clarify language.
    iv. Another approach is an NJSA wrapper. Not all states permit modification of a trust to affect a particular concern. If you cannot modify what else can you do to modify a trust?
    v. What if want to use a separate investment manager, or beneficiaries all want a special purpose trustee? UTC includes in examples in non-exclusive list four items that can be brought together to form a "wrapper."
        1. Grant trustee power.
        2. Direct restriction of trustee power
        3. Address compensation of trustee.
        4. Limit liability of trustee.
    vi. The convergence of the above four items could permit grant trustee power to retain LLC interest, refrain from exercising powers with respect to LLC, appoint special purpose trustee and separate powers of two trustees and limit the liability of one trustee for the actions of another. This could be used when decanting is not an option and going to court is not a viable option (e.g. because of Flynt case)

j. Ferri v. Powel case.
    i. Contrast decanting versus NJSA where beneficiary must sign the agreement.
    ii. An NJSA would likely not work in Ferri.
    iii. Could you decant the trust in the midst of a divorce? May depend on state law.

k. Case Study.

i. 1943 created a dynast trust. Grantor died. Son is alive. Trust required corporate trustee to act at all times. Spendthrift provision included and trust waived duty to diversify. Remainder to kids of first marriage.
ii. Trustee concerned about lack of diversification and determine a directed trust would be better so modify trust into a directed trust.
iii. Modifying trust to include investment adviser must first evaluate state law and if state law does not permit may have to move to another jurisdiction. Making it a directed trust sounds familiar with the Flynt case and the issue as to whether this would conflict with a material purpose of the trust.
iv. Who has ability to remove or appoint investment adviser?
v. If having assets in a concentrated position would benefit current versus future beneficiaries differently that may be viewed as a conflict of interests.
vi. What if wish to modify the trust to make it discretionary rather than an income distribution standard? Can this be done in an NJSA? Consider what the material purpose of the trust is? If trust has a spendthrift provision what does that imply as to material purpose? Perhaps protecting the assets of the trust is consistent with a material purpose? However, others might argue that the settlor intended to create a support trust and changing to sole discretion might undermine a material settlor intent.
vii. GST concerns may be raised if shut off valve of income distributions to current beneficiaries. That might be viewed as a shift of economic benefit to the next generation so you do not have a safe harbor to rely on. Shifting to fully discretionary distributions could permit trustee to shift economics to later generations.

3. **High Returns and Tax-Free Compounding: Keys to Building Wealth and Achieving the Best Estate Planning** – Blattmachr' and Glickman.
   a. Key is net investment return.
      i. GRAT and other strategies are only successful if have sufficient rate or return.
      ii. IRC Sec. 7520 rate is about 2.4%. A GRAT must beat 2.4% return on average to succeed. But if GRAT has lower returns, or similarly on note sale at AFR if have bad returns in early years, the plan will fail.
      iii. Importance of compounding. Einstein – compounding is the most important powerful force in the universe.
      iv. Contrast simple versus compounded return. 9 x more with compounding.
      v. Should start savings as early as possible in your life.
      vi. Return reduced by income tax is dramatically reduced. Current income tax can dramatically erode wealth by reducing compounding.
      vii. Avoiding tax is therefore critically important to accumulating wealth.
      viii. The higher the return the more the return is eroded by current income tax.
      ix. Tax free compounding is the most important step to maximizing wealth.
      x. Using a qualified plan or IRA, as early in life as possible, because it at least defers tax, or a Roth which can provide tax free compounding.
      xi. Advantages of permanent buy and hold investment strategy is significant.

xii. Life insurance key benefit is that it grows free of income tax and on death receive full benefit. Private placement life insurance for those of sufficient means should be considered. Caution – Weber case controlled investments inside the policy and Tax Court upheld.
xiii. 2.6% is average return average American makes when investing on their own.

b. Background.
   i. Drive by humanity desire to explain the inexplicable.
   ii. First breakthrough was reduction of monuments to mechanical means. Brass clockwork mechanism developed 150 BC. Earliest clockwork mechanisms.
   iii. Basics for robotics.
   iv. 1822 Charles Babbage analog calculation capabilities. Analytical engine built in 1837.
   v. Program controlled computers World War II rapid development of computational capabilities. SSEM (baby) built in Manchester.
   vi. 1945 John von Neuman. EDVAC. Schematic of modern computer. All computers are derived from his diagram.
   vii. 1948 machine did 1,000 instructions per second. Each succeeding generation has been more powerful.
   viii. 1996 IBM Deep Blue beat world chess champion.
   ix. 1965 Gordon Moore founding Fairchild and Intel defined Moore’s law.
   x. Super computer means a computer more powerful than an average machine at some point in time.

c. Computers on Wall Street.
   i. Began with mundane tabulation.
   ii. Now automated trading, run all exchanges, etc.
   iii. Look for pricing discrepancies.
   iv. Value investing is a filter. Look at fundamental data and try to identify a stock that is underpriced.
   v. Use statistics, expectation of trade distribution.
   vi. Chart patterns.
   vii. Quants search for correlations.
   viii. Relationships of different indices.
   ix. Random walk on Wall Street.

d. Artificial Super Intelligence (“ASI”).
   i. Massive amounts of computing power and discovery of non-von-Neuman code.
   ii. Dynamic not static.
   iii. Does not see market as random walk.
   iv. Adaptive to market. Thinking. Writes its own code.
   v. Resolving dysfunction – moral, ethics, values.

e. Future of ASI.
   i. Computers have been displacing jobs since invented. Originally intended to do calculations more quickly. But more technology jobs have been created then jobs displaced. But now job displacement with driverless vehicles, etc. is accelerating.
   ii. ASI will be vastly disruptive.
   iii. What if data sets unlimited?
   iv. Can operate on data in any field.

v. ASI is disruptive to all things including financial markets.
vi. Secretaries, draftsman etc. have been replaced.
vii. Lawyers, brokers and accountants will be replaced.
viii. Over time the opportunity to profit in the market has been eroded.
ix. Storms have patterns, comparable patterns exist in the financial markets. Find the pattern and you find opportunity.
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vii. Use a qualified plan or IRA, as early in life as possible, because it at least defers tax, or a Roth which can provide tax free compounding.
viii. Advantages of permanent buy and hold investment strategy is significant.
ix. Life insurance: key benefit is that it grows free of income tax and on death receive full benefit free of income tax. Private placement life insurance for those of sufficient means should be considered. Caution – Webber case taxed the insurance policy income to the owner because he controlled investments inside the policy, with the Tax Court upholding the IRS position on investor control.
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t. Storms have patterns, comparable patterns exist in the financial markets. Find the pattern and you find opportunity.

4. **<u>Practical Planning for Digital Assets and Administration Of Digital Assets by Fiduciaries</u>** – Beyer.
   a. Access.
      i. Username, password, secondary authentication (e.g. send text with number to enter).
      ii. Social media.
         1. Facebook.
         2. LinkedIn.
         3. Twitter.
         4. Instagram.
      iii. Social media sites store photos, data, and so forth and all require username and passwords.
   b. Financial accounts.
      i. Bank accounts.

ii. PayPal.
iii. Bitcoin.
iv. Investment and brokerage accounts.
v. Utility bills.
vi. Loan payments.
vii. IRS e-Filing.

c. Notes on financial accounts.
   i. Many have forgone paper statements.
   ii. Both in business and personal context.
   iii. E-Bay accounts.
   iv. Cash back points stored digitally.
   v. Consider how much has become digitized.

d. Business accounts parallel to individual accounts mentioned above.
   i. Patient records as example.

e. Gaming money.
   i. Second life.
   ii. World of Warcraft.

f. Consider how much digital “stuff” everyone has.

g. Reasons planning is so critical.
   i. Make things easier if disabled or die.
   ii. 60% changes of being disabled 90 days or longer.
   iii. Without a plan family, guardians, trustees, etc. will not know what to do.
   iv. Few people have given this data to a significant person to handle in an emergency. The percentage of clients who have done this is insignificant.
   v. What happens if not addressed?
   vi. If not alive and competent you cannot check accounts. If incapacitated who can monitor them? This is a significant exposure to identity theft.
   vii. Need to prevent financial loss to estate.
   viii. If pay bills and credit cards online. If no one has access to email then bills won’t be paid which is very different than having access to paper which use to be the norm. Without planning how will you know where accounts are.
   ix. Domain names. Some can be quite valuable.
   x. Encrypted files.
      1. Who can access and decrypt?
      2. What is value of assets encrypted?
   xi. Video games on line.
      1. Some of “rights” gamers have could be valuable.
      2. What does the client own?
   xii. Avoid losing decedent’s story.
      1. Family history in photographs and more.
   xiii. Prevent confidential information from being disclosed.
      1. Attorneys have all client matters on computers which is confidential.
      2. How do you plan for this?
      3. How do you prevent inadvertent disclosure?

h. Obstacles to Planning.
   i. Terms of Service Agreement (TOSA).

1. May govern what happens upon death.
2. Did decedent really know or agree to it?
3. Google agreement upon receipt of certificate of death Google will close your account and thereafter cannot retrieve information from account.
4. Name drop included giving first born child to company and many users simply agreed.
5. Will be agreeing to many things that impact estate planning in TOSA that did not read or understand.

ii. When buy books or music on line you really only get a life estate or license and you have nothing to transfer on death.

iii. Can provider turn over without violating Stored Communications Act?

1. Daftary case (2012).
2. Ajemian case (2017). October 16, 2017 Mass Supreme Court. Mass has no statutes on digital assets. Ajemian vs. Yahoo. Wanted access to emails. Executor can give lawful consent but court said that provided does not have to do so. If the provider does turn over information it would not be a violation of Stored Communications Act if the provided opted to turn over information.

iv. Court said could not force Facebook to turn over material posted.

i. Safety of data is an issue.

i. Information changes rapidly.

ii. Some provides make you change passwords every six months.

iii. Equipment is bought and sold.

j. Online Afterlife Companies.

i. Store all data and turn over but there are risks and their reliability is uncertain.

ii. Can these companies do what they promise?

k. Fiduciary access.

i. Perspective.

ii. National conference of commissioners was working on a uniform act and Uniform Fiduciary Access to Digital Assets approved in 2014. Gave fiduciaries default access to digital assets. Estate planning community liked this approach – default access unless client opted otherwise. This law was introduced in 26 states and was defeated in 26 states. The industry lobby (providers) challenged this because it put them in an intolerable provision since if reveal violate Federal law and if don’t provide would then violate state law. The ACLU and other privacy groups who opposed the law.

iii. Industry provided “Privacy Expectation Afterlife and Choices Act” PEAK which provided no access unless person opted to permit and personal representative obtained a court order.

iv. A Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) was proposed. No default access, only if user consented to disclosure. This was endorsed by privacy groups, Google, and Facebook. 37 states have enacted and it is pending in 8 states. California enacted ½ of the law.

l. RUFADAA.

i. Covers wide range of fiduciaries including executors, administrators, trustees of trusts and agents under POAs and court appointed guardians.
ii. Act makes distinction between access to content and catalogue information.
iii. To get contents (e.g. read text message or email or private postings) there is a priority order as to how can consent.
    1. Can consent via an online tool. This is provider gives setting and user can put into contract.
    2. Express directions in will or another document.
    3. If none of above default to terms of service.
iv. Catalogue is sender, date and time but not the content of the email or the subject line. Access to catalogue can be helpful to at least see that got email from power company, or mortgage company, etc. This at least provides a lead to follow up on in the estate administration process.
v. If fiduciary wants to get access to actual text send Google, etc. a request with certified death certificate, a copy of the will with express consent (consider in drafting), and a certified copy of document granting authority (e.g., letters testamentary). They might ask more information to link user to the account (i.e. proving that decedent was linked to or owned the account in case name on account was generic). Could still ask for court order.
vi. If fiduciary only wants catalogue just end request to custodian with certified copy of death certificate and document granting authority. Custodian can still ask for linking information.
vii. Providers have stated that they will always require a court order. They do not care about protections in statute. They want the protection of a court order. So as early in the estate administration process as possible get a court order since provider is likely to require this.

m. How does agent get access to content?
    i. POA must have language. Some default forms have been changed some not.
    ii. What does state statute have?
    iii. Need certification under penalties of perjury that POA is still valid.
    iv. If agent only wants access to catalogue it is easier and an older POA might suffice. Provider/custodian may still request linking information.
    v. If trustee or agent opened the account they have access.
    vi. Guardian has no automatic access to get to contents of social media, texts and email. If there is an actual court hearing the court can grant access. Can still get the catalogue without it.
n. What does custodian do?
    i. They have 60 days to respond.
    ii. They can request a fee.
    iii. They can refuse to disclose.
    iv. If custodian ignores no remedy.
    v. May have to go to court at fiduciary’s expense
o. Planning suggestions.
    i. Use providers online tool. Google provided one in 2013 and Facebook did in 2015. This is the best approach but the settings are hard to find in user settings or profile settings. They made it hard to find as they did not want users thinking about death.

ii. Back up tangible media. Family photographs, etc. don't only have it on a cloud. Download it to a DVD, or other media that can be easily transferred.
iii. Client should create a comprehensive inventory.
iv. Who should have this information/data?
    1. Trusted person. But how trusted is this person?
    2. Encrypted.
    3. Safe deposit box. Difficult to keep current.
    4. Online password storage.
    5. Some providers set up accounts designed for multiple users, e.g., Google docs, Dropbox or Shutterfly.
v. Authorize agent to act. Have an express provision. If client does or does not wish agent to access actual texts and email specify this.
vi. Create a digital asset trust if valuable rights.
vii. In will create a digital asset clause to transfer assets on death if do not wish it to fall to residuary. Should executor be authorized to read texts and emails? Include express authorization to contents of electronic communications if that is what client wishes.
viii. Online afterlife company that provide information on death automatically. They can send automatic email communications. Many of companies that did this have gone out of business, merged, etc.

p. Conclusion.
    i. ACTEC has given sample language to Congress to address some of issues but not clear what if anything will be done.
    ii. RUFADAA will continue to be enacted.
    iii. Hopefully more providers will provide online tools addressing these issues.

5. **<u>Section 1202: QSBS Gain Exclusion Is Not as Easy as It Seems</u>** – Kirk.
    a. Exclusion.
        i. Non-corporate taxpayer can exclude 100% [for stock issued on or after Sept. 28, 2010] of the gain on Qualified Small Business Stock ("QSBS") held more than 5 years under IRC Sec. 1202. IRC Sec. 1223 provides when holding periods may tack for purposes of this test.
        ii. May also defer gain on QSBS by reinvesting in another QSBS under IRC Sec. 1045. See Rev. Proc. 98-48.
        iii. A per issuer limitation applies.
        iv. The exclusion is intended to be limited to post-stock issuance appreciation so basis in the QSBS is based on the FMV of property contributed for the stock for this purpose.
        v. A 28% capital gains tax rate applies so if ½ of gain on QSBS is excluded the effective rate is 14%.
    b. QSBS requirements.
        i. Stock issued after 8/9/93 (lower exclusion percentages apply on issuance prior to 9/28/10).
        ii. Domestic C (not S) corporation.
        iii. Aggregate corporate gross assets under $50M. Certain controlled entities are aggregated for purposes of this test.
        iv. Stock must be original issue to the taxpayer and must be acquired for money, property or as compensation. There are some exceptions. For example, stock acquired by gift, death or from a partnership to a partner

are still deemed original issue to the subsequent holder. A transfer of QSBS stock to a partnership or trust will terminate QSBS qualification.

v. 80% of the corporation's assets must be used in an active trade or business. Banking, insurance, investment, farming, hotel motel and other businesses are excluded from the listing of qualified business.

vi. Special rules apply to working capital to prevent excessive holdings of liquid assets.

vii. The corporation must meet corporate reporting requirements but none have been issued yet.

6. **<u>Protecting Your Client's Data: Ethics, Security and Practicality</u>** – Ries.

a. General.

i. Great threats to confidential electronic data.

ii. Particular concern for attorneys because of the duty of confidentiality owed clients. Model Rule 1.6. Requires protection of information relating to representation of the client. Lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorize access to information relating to the representation of a client.

iii. Model Rule 1.1 competence.

iv. Model Rule 1.4 appropriate communications with clients about the means by which the client's objectives are to be accomplished. May require informed consent.

v. These may be minimum standards and attorneys should strive for higher care.

b. Bar Opinions.

i. ABA Formal Opinion 477. "Securing Communications of Protected Client Information". Issued May 2017.

ii. Law firms are targeted by hackers because they store sensitive information about client

iii. See also, NJ Advisory Committee on Professional Ethics, Opinion 701.

iv. NY Opinion 1019 cautions lawyers that cyber-security issues are a major concern for lawyers.

v. Lawyers may need to make a determination that the selected precautions are reasonable, or to obtain informed consent of clients after explaining the risks.

Lawyers need to stay up to date as technology changes and new threats are identified.

vi. NY Bar Assoc. Ethics Opinion 842 "Using an outside online storage provider…" Sept. 2010. Can use online data storage consistent with obligations under Rule 1.6 but should take reasonable care to protect confidential information, should exercise reasonable care to prevent other from disclosing confidential information, etc.

vii. Need to take reasonable steps and safeguards to protect confidential data (including email) transmitted electronically.

c. Attacks.

i. Lawyers are viewed by hackers as having significant well organized confidential data on many clients.

ii. Fraudulent schemes with overseas clients.

iii. Device issues.

        1. Stolen laptops, tablets and smart phones and USB drives can pose a problem.
        2. Consider encryption where feasible.
    iv. Threats from employees and others.
    v. One survey found 66% of law firms have had some type of breach.
  d. Encryption.
    i. Increasingly required in banking and health care.
    ii. Encryption is not generally required for confidential attorney email. But there are qualifications to this.
    iii. Factors to consider.
        1. Nature of threats.
        2. How confidential client information is transmitted and stored.
        3. How electronic communications of client should be protected.
        4. Due diligence of vendors.
    iv. Use encryption in appropriate circumstances.
  e. States have general laws governing protecting personal information.
    i. These may apply to attorneys.
    ii. Covered personal information may include Social Security numbers, driver's license numbers, financial account numbers, etc.

7. **<u>Dealing with Individuals with Diminished Capacity</u> –** Karibjanian.
  a. Aging population.
    i. Clients may not be fully aware of what they are doing with respect to their estate plans.
    ii. Alzheimer's.
        1. 200,000 under age 65.
        2. 2/3rds are woman.
        3. African Americans 2 x more likely to be affected.
        4. Number growing substantial with aging population.
  b. What are standards of capacity for various transactions.
    i. Rule 1.14.
    ii. When a client's capacity to make adequate decision is diminished.
    iii. Maintain as reasonably as possible a normal attorney client relationship.
    iv. When a client's capacity to make adequately considered decision in connection with a representation is diminished whether because of minority, mental impairment or for some other reason.
    v. See comments to rules. Comment 1.
    vi. 1.14(b) if lawyer believes client has diminished capacity, or is at risk of substantial physical or financial or other harm, unless action is taken and adequately act the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability o take action to protect the client. This is a burden on the lawyer. But it says lawyer "may" take. What does "may" mean? Is it "shall" or permissive "may"?
    vii. When the presence of other persons is necessary it does not affect attorney client evidentiary privilege. This means seeking help should not diminish attorney client privilege.
    viii. Must look to the client, not the people in the room.
    ix. What is protective action? See Comment 5. It could include reconsideration period, consulting with family, bringing in the attorney in fact or health care agent.

x. Rule 1.14(c) if lawyer needs to disclose something this permits it. It is an exception to Rule 1.6.
xi. Normally a lawyer would not seek compensation for emergency action.
xii. See: Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005) by ABA and American Psychological Association.
xiii. Are their cognitive, emotional or other signs. Lack of mental flexibility? Are they disoriented?
xiv. Not everyone with capacity issues will be elderly. There could be medical or other reasons.

c. Elder abuse.
   i. State laws vary as to whether attorney has duty to report.

d. Testamentary capacity.
   i. Must understand the points below to have testamentary capacity.
      1. The nature and extent of his property.
      2. Must know natural objects of bounty. Does not mean they must leave assets to them, but must know them.
      3. The disposition he wishes to make of his estate.
      4. The act of making a will. The document being signed is the document of testamentary disposition.
   ii. Testamentary capacity is low on the chart of capacities. Testamentary capacity can be low since it does not affect during life.
   iii. Lowest standard as it may be the last of the testator. Does not require the sharpness of mind of someone involved in a business transaction.

e. Compare other forms of capacity.
   i. Contrast donative capacity, the right to make a gift. Includes 4 prongs above but must also understand that the gift is irrevocable. Must understand that a gift diminishes their estate. Does the client understand whether they will have adequate assets to live on after the gift?
   ii. Contractual capacity. Higher standard since must live with it.
   iii. Revocable trust. This is complicated to understand. Is it a gift or donative capacity or testamentary capacity? UTC 601 provides that to create or add property to a revocable trust is testamentary capacity.
   iv. What capacity is necessary for creating or funding an irrevocable trust? Is this like a gift or since it provides for testamentary dispositions is it testamentary standard? Must research law as rules and court opinions vary.

f. Lucid interval.
   i. Capacity at a moment in time when signing is what is relevant. So, testator can be adjudicated incapacity abut have a lucid moment and can sign.
   ii. Opposite of lucid moment is a person with capacity who has an insane delusion when signs.

g. Who has burden of proof?
   i. FL as an example requires two witnesses.
   ii. Proponent of will may have burden.
   iii. Is following the formalities sufficient?
   iv. Shifts burden to contestant of will but if person executing will is incapacitated the burden shifts back to the proponent of the will.

h. Undue influence.

i. Testamentary capacity entire will is out. If undue influence only the provision subject to undue influence is removed.
ii. How define undue influence? Coercion that destroys testators free will and substitutes another's objectives in its place.
iii. Anytime there is a confidential relationship you should be on the alert for this.
iv. Person affected by undue influence is usually not aware of it.
v. Question of fact. Is there a confidential relationship? But that alone does not mean that there is undue influence.
vi. What is undue influence?
vii. What types of relationships might create a confidential relationship?
    1. Guardian and ward.
    2. Trustee and beneficiary.
    3. Agent and principal.
    4. Doctor and patient.
    5. Bank employee and customer.
    6. Husband and wife. Spouses are together. Does not create presumption of confidential relationship under some state laws, but does under others.
viii. Factors of undue influence.
    1. Knowledge of contents of will by the influencer.
    2. Execution of will kep secret from other.

i. Burden of proof.
    i. Carpenter case.
        1. 2002 enacted new FL law Sec. 733.107(2) shifting burden to proponent.
    ii. Why would burden shift? Public policy.
    iii. Restatement Third of Property Approach Sec. 8.3 Undue influence.
    iv. Presumed undue influence presence if confidential relationship and suspicious circumstances.

j. Lawyer shall not solicit a substantial gift from a client.
    i. Rule 1.8.
    ii. Consider giving up representation if named for bequest.
    iii. Diminished capacity and conflicts of interest with counsel.
        1. Texas Estates Code Sec. 254.003.
        2. Cal. Prob. Code Sec. 21380.

k. Assessing Capacity.
    i. Determining whether client lacks sufficient legal capacity to perform particular acts such as execution a will or understand its testamentary dispositions is one of the most difficult and important obligations of an estate planner.
    ii. Depending on the degree of impairment that is suspected the lawyer may only need to make an informal inquires that are intended to satisfy possible doubts about a client's ability to understand the consequences of the specify legal act.
    iii. At the on the other end of the spectrum a lawyer may need to consult with health care and or gerontology professionals who are qualified to make evaluations concerning competency and capacity and who can provide appropriate interventions and treatment if necessary.

iv. Does client have capacity to engage lawyer by signing retainer agreement? That is a higher standard then a will.
v. Warning signs.
1. Dementia or delirium present? Delirium is disoriented as to space, time or place.
2. Is client confused?
3. Is there disorientation as to time?
4. Memory deficits?
5. Talking about old events from a decade ago but cannot remember conversation from 5 minutes ago?
6. Is client using cover tactics to cover up for not being aware of what is going on and perhaps saving face.

l. Should lawyer administer tests?
i. Some do, not certain advisable if lawyer is not trained.
ii. MMSE mini-mental status exam.
iii. Legal capacity questionnaire to highlight issues.

m. Considerations.
i. Meet with client alone.
ii. Comfortable chairs and warm environment.
iii. Be consistent with what you do to avoid bad repercussions.
iv. Who is bringing the client to the will signing.

8. **<u>How Interest Rates Affect Commonly-Used Estate Tax and Income Tax Planning Strategies</u>** – Zeydel.

a. Interest rat
i. August 1989 7520 11.6% was highest.
ii. September 2016 all-time low at 1%.
iii. Relatively low for some time.
iv. Lower interest rates may mean less economic performance since assets have to outperform assumed rate. Tax free wealth shifted only if outperform rate.
v. AFR has on occasion been higher than long term rate. If mid-term rate is more than the long-term rate consider sales for debt when can use long term AFR instead of a GRAT that uses 7520 rate. It is not just use this technique all the time. Depends on rate applicable.

b. If doing a QPRT and retaining income interests when rates are higher the income interest will be valued higher. This may be a myth as there are other elements that enter calculation of a retained interest in a QPRT.

c. When interest rates are low annuity interests are more valuable. IF you have an obligation to pay a fixed some the fixed some is worth more as it is harder to get, you don't have as much return. It will take more assets to hit the target then if interest rates were higher. CLATs and GRATs may be better opportunity when interest rates are lower.

d. There are times historically when 7520 rate is higher than all other rates i.e., 110% of AFR is more than long term rate. When interest rates decline the rate relationship is more "normal."

e. October 2017 Short term is 1.27, mid 1.85, Long term 2.5% and 7520 Rate is 2.2%.

f. Reconsider 10 year QPRT. Two components to retained interest the income interests which is a hypothetical right to use the property and the second being the reversionary interest which has value. The income interest become more valuable as rates rise. But the older the client gets the more valuable the reversion is. Consider that wealthy clients tend to outlive tables so at older age the greater value of the reversion. Consider actual life expectancy and relationship to table expectancy and assumptions embodied in the technique/IRS tables.

g. Consider 15-year CRT. 10% remainder 5% payout requirements to have exempt CRT. If interest rates are lower payouts must be lower to qualify. Higher the 7520 rate is the higher the payment can be and still qualify.
h. Consider CRT not for fixed term but for life expectancy. As 7520 rate is low won't work. If interest rates low it may be difficult to achieve requirements so consider fixed term which may control outcome.
i. CRTs more important to liquidate low basis assets for retirement. Consider that many people are not in the ambit of the transfer tax system but may need income tax benefits. Even if client is not particularly charitably inclined they may still benefit. If client lives in high income tax state the CRT may be an even better result. Consider CRTs as part of a retirement plan.
j. CRUTs. Age drives what the maximum payout can be. Steady regardless of interest rate since not paying a fixed dollar amount but rather a percentage of the asset value. The payment you are making is relative. CRUTs don't give the opportunity for the tax-free bonus. If assets decline in value then payments decline so consider CRUTs for clients that can afford this type of fluctuation. The fluctuation is why more clients prefer CRATs then CRUTs.
k. What about GRATs?
    i. Consider a zeroed out 5 year GRAT. What is future value of GRAT but as interest rates rise the annuity has to be higher and the remainder will decline.
    ii. Consider 2 year GRAT invested in the S&P with return 2% above 7520 rate. Consider 2 year GRAT using Monte Carlo simulation of returns. Correlation between positive remainders and 7520 rates is not strong, perhaps not as correlated as one might think. 66% dependent on asset performance in year one, 33% dependent on asset performance in year 2, and 1% on interest rates. So, key for successful GRAT is careful management of GRAT not interest rates, e.g. immunization. The results and conclusions might be different when GRAT'ing a closely held business for which you anticipate significant growth. Will have estate tax inclusion if die during GRAT term. With longer term GRATs mortality risk is greater. At age 80 89% chance of surviving 2 year GRAT, 71% chance of surviving 5-year term but only 41% chance of surviving a 10-year term. At age 90- 74% chance of surviving 2 year GRAT. National Center for Health stats.
    iii. Probably of GRAT being successful. If 7520 rate is 2% at age 80 62% of success (positive remainder) on 5 year GRAT.
    iv. Might be better off doing rolling GRATs.
    v. At younger ages percentage likelihood of success is greater for a longer term GRAT as more likelihood of successful return increases. At some age, it reverses as mortality risk becomes more pronounced.
    vi. If interest rates decline value of annuity is down perhaps can transfer the annuity.
l. CLATs.

i. Pay annuity to charity and hoping to outperform and deliver tax free benefit to remainder beneficiaries.
ii. You can control payments to charity during duration to CLAT so long as you can calculate them exactly at the time the CLAT is formed. But taking the risk of a large payment at the end, what if that is a 2008 year. So many would only escalate like a GRAT say 20%/year to minimize risk of large deferred payment at market low.
iii. Escalating some is usually better than no escalation.

m. Installment sale to grantor trust.
i. Can pay only interest and balloon at the end in contrast to a GRAT that has to annuitize and may a fixed larger installment. This gives a longer time period for the economics to be viable.
ii. What if in year 5 assets decline 40% and growth thereafter is only 4% the chance of the transaction working out is greatly diminished.
iii. Consider a serial installment sale. Key is to manage techniques.
iv. Probability of positive remainder 9-year installment sale to a graentr4o ruts with 8.6% expected return and 15% volatility.

n. Who has an estate tax problem?
i. Who is the client? What is the client's financial circumstance?
ii. Do projections. Depends in many cases on spending.
iii. If no likely estate tax issue refocus on income tax planning, e.g. basis step up, etc.
iv. $10M client 20 years if spend 3% 27% chance of estate tax, 4% spend 11% and if spend 5% only 3% chance of having an estate tax.
v. Is it advisable for a $10M client to rely on portability?
vi. Clayton QTIP executor moves by election assets from QTIP to credit shelter trust. Only issue is that spouse might not be the person to make that decision to avoid argument spouse is making a gift by making the election. But Clayton QTIP election relies on an estate tax being in effect. If gift tax is not to be repealed and disclaimer law will still be there perhaps providing for a disclaimer mechanism. QTIP approach may provide basis step up but disclaiming to credit shelter may provide flexibility if want some assets available to other than spouse or to avoid an estate tax should that exist. Gives flexibility for post-mortem planning.
vii. For $30M estate portability will leave too much exposed to estate tax. Start with QTIP and GST allocation and deploy exemption on each death. Don't dismiss the credit shelter trust. Lifetime planning has most impact on grandchildren. Middle planning is spousal lifetime access trusts.

o. Gifts.
i. Consider return necessary to make up for loss of basis step up.
ii. Planning early generally the right answer.

p. Flexible planning.
i. Buy back asset.
ii. Repay note.
iii. Make spouse a beneficiary.

q. Planning is always better than not planning.

9. **<u>GRATs</u> –** Handler and Herzig.
a. GRAT Basics.

b. Estate inclusion.
    i. Amount included in estate is annuity divided by 7520 rate at grantor's death.
c. Planning considerations.
    i. Succeeds if GRAT return exceeds 7520 rate.
    ii. Walton zeroed out GRAT.
    iii. Rolling (cascading) GRATs.
    iv. Short term 2 year rolling GRATs reduce mortality risk and lower investment risk.
    v. Interest rate risk, rates rise make re-GRAT'ing less effective, but this negative may be more than offset by lower investment risk of short term GRATs.
    vi. Increasing rolling GRATs – 20% increase leaves assets in GRAT for more return in later years. However, decreasing GRAT gets bad performing assets out quicker to be re-GRAT'd. The regulations do not prohibit decreasing GRATs.
        1. **Comment**: This also presumes no change in GRAT rules as part of tax reform/simplification. See Senate Committee on Finance report "Estate Tax Schemes: How America's Most Fortunate Hide Their Wealth, Flout Tax Laws, And Grow the Wealth Gap," October 12, 2017," page 4: "Sophisticated tax planners have devised methods to maximize the tax avoidance potential of GRATs which include the use of "zeroed-out" GRATs. Under this structure, planners design a GRAT that has a deemed value of $0 for gift tax purposes, but in actuality, transfers significant value to the heir. This is achieved by structuring the annuity payments to the grantor so that their present value (based on the IRS actuarial tables) is equal to the fair market value of the property transferred to the trust. The example below illustrates the tax avoidance potential under this structure." Might tax reform eliminate GRAT planning in exchange for a higher exemption? If that is the case perhaps longer term GRATs, even if not optimal, may be wiser at present. Longer term GRATs will require addressing mortality risk and different approaches to immunization.
    vii. Use multiple GRATs with different assets. The more granular the asset class per the multiple GRATs the more upside asset volatility can be removed since there is no downside to losing GRATs.
    viii. Use disclaimer under IRC Sec. 2518 to fund GRAT. Example gift transfer to general power of appointment marital trust and if spouse disclaims passes to GRAT. Disclaim only if assets appreciate.
    ix. 99-Year GRAT, an interest play.
    x. Locking in GRAT benefits (immunization).
        1. **Comment**: If longer term GRATs are used out of concern of rising rates and possible legislative changes different immunization planning may be required as merely holding cash will be insufficient.

10. **Reciprocal Trusts; Language That Causes Problems and Reciprocal Consideration** – Such.
    a. History of reciprocal trust doctrine.

    i. Estate of Grace.
    ii. Estate of Levy.
    iii. PLR 9643013.
    iv. PLR 20406008.

b. SLATs and predecessors.
    i. SLATs are not a new strategy. Also called non-marital spouse gift trust.
    ii. In 1990s planning included gifts to spouse, including annual exclusion gifts. Used for large estates because exemption was only $600,000.
    iii. 2012 fear of exemption dropping to $1M and a lot of SLAT planning was done in light of this concern.
    iv. Could give spouse access to assets so assets could be given away but could benefit. Two risks, mortality risk and divorce risk.
    v. Couple SLAT with post-nuptial agreement. If couple divorces can the SLATs be addressed in a post-nuptial agreement to avoid a later battle if the divorce occurs?
    vi. Many practitioners did not address reciprocal trust issues in drafting trusts.
    vii. Similarity to ILIT and SLAT. Will old ILIT suffice for planning? Spouse may be expressly characterized as a primary beneficiary of the SLAT distribution provisions.

c. In current environment use non-reciprocal SLATs for moderate wealth estates.
    i. SLATs more popular.
    ii. Reciprocal but outside doctrine.

d. Differences.
    i. Change in beneficiaries, i.e. wealthy spouse is not a beneficiary, can avoid reciprocal trust issue.
    ii. Power of appointment. Include POA in one but not in another should avoid doctrine.
        1. **Comment**: Leaving out a POA in an irrevocable trust limits flexibility at a time when flexibility may be important. Need to weigh options that can be used in particular situation.
    iii. Different distribution standards. What if add discretionary provision to one trust. One is HEMS and the other trust is discretionary.
    iv. Timing differences between the two trusts especially if sufficient to negate possibility of single plan.
    v. Assets if can fund one with a business interest and the second trust with cash that should be material.
    vi. Remainder purchase marital trust ("RPM") gift to spouse that does not qualify for the marital deduction. They will get an income interest for life without inclusion.
    vii. **Comment**: Here is a checklist of differences that might be used to differentiate two trusts:
        1. Draft the trusts pursuant to different plans. A separate memorandum or portions of a memorandum dealing with each trust separately may support this.
        2. Don't put a husband and wife in the same economic position following the establishment of the two trusts. For example, the husband could create a trust for the benefit of his wife and issue, and the wife could create a trust for the benefit of her issue, in which her husband isn't a beneficiary. Or one spouse could be a

beneficiary of the trust he creates, if the trust is formed in an asset protection jurisdiction such as Alaska, Delaware, Nevada or South Dakota, and the other spouse could create a trust in which he isn't a beneficiary (that is, a trust that's not a domestic asset protection trust).

3. Use different distribution standards in each trust. For example, one trust could limit distributions to an ascertainable standard, while the other trust could be fully discretionary. However, limiting distributions to an ascertainable standard reduces flexibility may prevent decanting and may expose the trust assets to a beneficiary's creditors.
4. Use different trustees or co-trustees. If each spouse is a trustee of the trust the other spouse creates, add another trustee to one or both trusts. If adding another trustee to each trust, consider adding a different trustee for each trust and using different institutional trustees.
5. Give one spouse a noncumulative "5 and 5" power, but not the other. This power permits the holder to withdraw up to the greater of $5,000 or 5 percent of the trust principal each year. The amount the powerholder could have withdrawn at the time of death is includible in his estate. However, the lapse of the power, not in excess of the greater of $5,000 or 5 percent of the trust assets each year, isn't considered a release of the power includible in the powerholder's estate or a taxable gift. However, this power may expose assets of the trust to the powerholder's creditors.
6. As in Levy and PLR 9643013, give one spouse a special power of appointment, but not the other. However, the absence of a power of appointment reduces the flexibility of the trust. This might be viewed as particularly significant in light of the continued estate tax uncertainty.
7. Give one spouse the broadest possible special power of appointment and the other spouse a special power of appointment exercisable only in favor of a narrower class of permissible appointees, such as issue, or issue and their spouses.
8. Give one spouse a power of appointment exercisable both during lifetime and by will and the other spouse a power of appointment exercisable only by will.
9. In the case of insurance trusts, include a marital deduction savings clause in one trust, but not the other. A marital deduction savings clause provides that if any property is included in the grantor's estate because the grantor dies within three years after transferring a policy on his life to the trust, some or all of the proceeds of the policy is held in a qualified terminable interest property trust or is payable to the surviving spouse outright. Alternatively, if each trust has a marital deduction savings clause, the provisions of the two could be different.
10. Create different vesting provisions for each trust. For example, the two trusts could mandate distributions at different ages, or in a state that has repealed or allows a transferor to elect out of the

rule against perpetuities, one trust could be a perpetual dynasty trust. However, mandating distributions severely reduces the flexibility of the trust, throws the trust assets into the beneficiary's estate for estate tax purposes and exposes the assets to the beneficiary's creditors and spouses.

11. Instead of mandating distributions, give the beneficiaries control or a different degree of control, at different ages. For example, the ages at which each child can become a trustee, have the right to remove and replace his co-trustee, and have a special power of appointment could be different in each trust.
12. Create the trusts at different times. In Lueders' Estate v. Commissioner, a husband and wife each created a trust and gave the other the power to withdraw any or all of the trust assets. Since the trusts were created 15 months' apart, the Third Circuit, in applying Lehman, held that there was no consideration or quid pro quo for the transfers. However, it should be noted that Lueders preceded Grace, in which, while the trusts were created two weeks apart, the Supreme Court held that the motive for creating the trusts wasn't relevant. If the difference in time is a factor post-Grace, a short time might be sufficient in light of Holman v. Comm'r in which a gift of partnership interests six days after the formation of the partnership wasn't a step transaction.
13. Contribute different assets to each trust, either as to the nature or the value of the assets. Contributing different assets may not negate the application of the reciprocal trust doctrine, since the assets in a trust may be susceptible to change over time. However, if one trust is funded with non-liquid assets, or assets subject to contractual restrictions on sale (e.g., operating agreement restrictions on transfer of interests in an LLC) that may be viewed as a more meaningful difference in assets that may not be susceptible to ready modification.

e. Conclusion.
   i. Reciprocal trust doctrine is a trap for spouses, even siblings, there is a risk that the plan could be unwound by control (Grace) or other factors.

11. **<u>Planning for Uncertainty: Should Clients Continue to Implement Planning Techniques? Changing Irrevocable Trusts. Drafting Flexible Trusts</u>** –Lipp (Moderator), Handler, Kamin, Shenkman.
   a. Should clients continue to implement planning techniques at this time?
      i. Consider likelihood of actual transfer tax changes: Proposals? Likely outcomes? Timing? Permanence?
      ii. What is the importance of basic estate planning. Clients absolutely should update any basic planning if current plan isn't up to date!
      iii. Think about "no harm" gift planning techniques that accomplish desired wealth transfers at no real cost (e.g. continuing a GRAT strategy or selling business interests to already seeded-trusts). If no step-up in basis, may not even face current basis issue trade-off concerns. Even if step-up, could repurchase from grantor trust before death to get step-up.
      iv. Consider more aggressive planning. If utilizing exemption, perhaps more in the no harm category? May be time pressure to act if low

valuations now will be gone in a couple of years or other situational issues make planning pressing. Some clients may not mind, but if transfer tax is “permanently” repealed will they be annoyed at having incurred costs and expended energy on this now? Better to wait until such time as hopefully might gain more information? Some of our clients who are not in a hurry are being advised to wait-and-see by their attorneys and other advisors.

v. Even if no estate tax, gift tax is likely to stay. If clients want to transfer more than $11m to their kids before they die, they need to do lifetime planning. Projections for 2018 exemptions are $5.6 million per person.
vi. Wealth concentration worse than ever before in history. How might this affect estate tax changes?
vii. High end – many wealthy clients feel that the government will tax them one way or another so planning should proceed. Lower end or more moderate wealth clients, one answer may be use of non-reciprocal flexible SLATs.
viii. State income taxation planning considerations.
ix. When will client be sued or divorced? Don’t delay planning.
x. When might health issues impact options to plan?
xi. Incapacity – at minimum update POA for broader gifts if appropriate? Or fund revocable trust with special power in someone to divide and revoke grantor’s rights.

b. How can clients change irrevocable trusts?
    i. Old trusts often don’t have modern provisions infusing flexibility but read the “boilerplate.” Sometimes surprising options are found.
    ii. Big issue is moderate wealth clients just terminating trusts as they see no tax need for it. Practitioners need to guide these clients to better decisions that consider the myriad of trust benefits.
    iii. Transactions to restructure old trusts
        1. Call principal on note.
        2. Contribution of assets to preferred partnership structure.
        3. Sale of assets for AFR to new trust, e.g. dynastic trust sells discounted asset to new SLAT for note; Have one grantor trust buy assets from another grantor trust.
        4. Shifts assets and changes economics.
        5. Evaluation of fees and related party transactions, e.g., can/should settlor be entitled to a fee from an LLC that had not heretofore been taken.
        6. Swap assets e.g. take cash cows out of trust for non-cash producing assets in.
    iv. Decanting
        1. pursuant to terms of trust agreement (e.g., distributions in further trust pursuant to “best interests” standard).
        2. Statutory vs. common law decanting.
        3. Powel Ferri divorce case. When the choice of a decanting, versus a non-judicial modification may have significant non-tax implications.
    v. Modification pursuant to statutes that allow amendments by agreement of the beneficiaries (and possibly the settlor) – discussion of Delaware non-judicial modification.

vi. Exercising powers of appointment.
    1. Inter-vivos vs. Testamentary.
    2. Some include exercising in favor of new trusts even to same beneficiary exercising power as long as their rights are same under new instrument.

vii. Disclaimers.
    1. E.g. disclaim interests in discretionary DAPT to make it non-DAPT if concerned about development of DAPT law

viii. Use of Trust Protectors.
    1. Don't make assumptions as provisions are very diverse depending on draftsperson and a range of factors.
    2. Language is unclear in that some call person with power to loan a protector.
    3. What is scope of all powers granted to all fiduciaries and those appointed in a non-fiduciary capacity.

ix. Merging "substantially similar" trusts.

x. Merge old ILIT into existing dynasty trust to have trust instead of settlor/client fund premiums thereby enhancing client's cash flow. Eliminates redundant trusts and redirects cash flow and changes legal ramification.

c. What are some tips for drafting flexible trusts?

i. Include best interest's standards for independent trustee.

ii. Include broad special powers of appointment when clients are comfortable with them (held by spouse, beneficiary or a third party).

iii. Include Trust protectors. Consider what powers to give trustee versus protector.

iv. Include decanting permission.

v. Include flexible provisions for naming trustees and empowering others to do so.

vi. Allow appointment of different types of trustees (distribution trustee, investment trustee, administrative trustee).

vii. Allow trustee to change situs and governing law.

viii. Give trustee power to grant or eliminate general powers of appointment.

ix. Other provisions?

x. Nonreciprocal SLATs or DAPTs to provide flexible access to assets.

xi. Community property trust in AK, TN, SD to get full step up on first death.

xii. 2038 power provision to add.

xiii. Flexible techniques Loan director, charitable beneficiary 642(c), inverse swaps, etc.

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