Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2698

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From: Steve Leimberg's Estate Planning Newsletter

Subject: **Martin M. Shenkman's Meeting Notes from Heckerling 2019, Day 1 Morning Notes**

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**. Heckerling, as it is affectionately known, is the nation's leading conference for estate planners, attorneys, trust officers, accountants, insurance advisors and wealth management professionals. 2019 is the 53rd installment of Heckerling, and for those not fortunate enough to be in sunny Orlando, the meeting this year runs from Monday, January 14th through Friday, January 19th.

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Steve Leimberg recently noted that:

> Every tax professional in the country will (or should be) reading this book! This is the most complex and far reaching tax law passed in the over 50 years I've been studying, teaching, and writing about tax law and this resource arms you not only with the necessary and vital information you need to know but also the thinking and planning concepts of three of the brightest minds in the tax world!

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 posts video clips to www.laweasy.com, and blogs on Forbes.com.

Click this link to read Marty's Day 1 Morning Notes.

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

Marty Shenkman

CITE AS:

<u>Heckerling Institute 2019</u>

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1. **<u>Monday Morning: Basis After 2017 Tax Act - Law and Zaritsky</u>**
    a. Gifts.
        i. Increase in donee's basis in gifted asset for gift tax paid on date of gift. Code Sec. 1015.
        ii. If multiple gifts made allocated based on amount of gift (less annual exclusion)/total gifts plus exemption allowed x gift tax.
        iii. If sell before gift tax paid still get adjustment.
        iv. With a grantor trust another issue arises – law is uncertain – see discussion later in outline.
    b. Death.
        i. Property acquired from a decedent. IRC Sec. 1014.
        ii. Code Sec. 1014 is referred to many times in the following discussion, so portions of the provision are reproduced at the end of this outline to help readers.
        iii. For most assets included in decedent's gross estate basis adjustment to FMV, other than IRD, but this is not always true. Includes property acquired from or passing from decedent (e.g. will, intestacy, revocable trust) you get adjustment to fair market value except for excluded assets, e.g. IRD.
        iv. Property can pass from a decedent in other ways even if not included in decedent's gross estate and may qualify for a basis step up. Example – foreign person with no US estate but has property that passes at death to a US beneficiary get basis adjustment (increase) even though no US estate. Rev. Rul. 84-139. See also PLR 201245006 addressing cash and stock in a foreign trust. (This is relevant to the issue of basis with respect to grantor trust – discussed below).
    c. Community property.
        i. Since 1948 when first spouse dies all community property gets a full basis step up on both sides, both decedent and survivor's half.
        ii. This made sense at that time that in most cases you would have one spouse holding all the property, e.g. husband. If husband only got ½ basis step up, then a community property couple could be worse off than had they been under a non-community property state regime. Now each spouse may have their own separate assets and if those are held as community property that provides a huge advantage and they get an adjustment at first death for all property.
            1. **<u>Comment</u>**: See Dealing with Foreign and Domestic Community Property Issues in Your State presentation and outline by Joshua S. Rubenstein from the 2018 Heckerling Institute materials.

iii. This is quite important as three states so far allow you to create community property even though the state does not generally have community property. Three states have created elect or opt in community property regimes: AK, TN and SD. See discussion below.
iv. If client moves from community property state to non-community property state, you may want to preserve the community property character. This may require segregating these assets so not commingled with other assets. In some states if income passes to joint account from community assets that may negate the community property character of those assets.
v. Community property has other consequences besides tax, e.g. division of property in the event of divorce. Speakers also stressed the importance of the economic implications so while considering tax planning the non-tax implications could be significant.

d. Code Sec. 1014(e).
i. There is no date of death value adjustment for property received by decedent if received from person who it is being left to. This is not an "in contemplation of death" rule but a strict 12-month rule. This is important in many planning transactions. IRC Sec. 1014(e). How do you determine if property has passed back to donor? Not a simple matter. Legislative history and few private rulings are not that helpful with respect to this. But if property passes back to donor in trust you may still have a problem. If donor is income beneficiary of recipient of income it may be a proportionate adjustment to basis. What if donor is discretionary beneficiary and no standard? No answer. Speaker believes it may be still proportionate, but it also presents a valuation challenge.
ii. **Comment**: This might be a reason to at least include a credit shelter discretionary trust in wills (revocable trusts) even if they might only be funded by disclaimer. If the approach of a one-fund (one-lung) QTIP is used and a disclaimer (or Clayton) mechanism to fund a credit shelter trust to solely benefit the surviving spouse, it may make the likelihood of avoiding 1014(e) less likely. If instead a more robust credit shelter for surviving spouse and descendants with discretionary distribution authority is used it may provide better near-death basis planning. If one spouse develops a health issue transferring appreciated assets to that spouse that will be bequeathed into the robust credit shelter may qualify for a basis adjustment whereas the simpler spouse only credit shelter may not.

e. Often clients do not know basis.
i. Many believe that if you do not know your basis it is zero.
ii. The actual rule is if you can provide some information you shift the burden back to the IRS for the IRS to have to present a different basis analysis. IRC Sec. 7491 – you can shift burden to the IRS.
iii. Cohan v. Comr., 39 F.23 540. This is current rule. It is a "close enough is good enough" rule. Can approximate basis.
iv. Speaker suggests that many IRS agents use threat of no basis if it cannot be proven but that is contrary to the law.

f. Basis consistency rules.
    i. We always had basis consistency rules under case law. The Surface Transportation Act did not really change that in adding Code Sec 1014(f) and 6035. Added penalty rules under 6662 and 6724.
    ii. Form 8971.
    iii. 6035 says how to report.
    iv. Temporary and proposed regulations published about 3 years ago. At end of 3 years of time the proposed regulations are no longer effective. If no one is working on regulations what is status? Priority guidance plan wanted to reduce burden with respect to those regulations. Some of the issues that were highly criticized by practitioners may be reduced in final regulations.
        1. Consider so-called zero basis rule that was not prescribed by statute but in proposed regulations said after discovered assets have zero basis unless reported.
        2. Another issue is the continual reporting. Once Form 8971 is filed and then if beneficiary transfers inherited assets to her revocable trust she must issue an 8971 to herself for such transfer. Speakers believe that these subsequent reporting rules will be simplified.
        3. Secondary transfer rule is unreasonable. Does not make sense and rules are not sufficient. Speaker believes that this rule might be fine-tuned or more likely eliminated in final regulations.
        4. These rules contain an exception for cash. There is no single definition of cash in the Code and Regulations. Does cash include checks? Perhaps but one regulation suggestions that a check is not cash as you can stop payment on a check not cash. Is foreign currency equivalent of cash? The answer varies. Money market funds are probably not cash. Cash or "cash equivalents" would be preferable.
    v. There are no penalties for over reporting, e.g. for reporting a transaction that does not have to report. "When in doubt report." Clients do not like the costs, but the penalties could be substantial. Isn't it more prudent to over-report than risk a penalty by underreporting.
        1. **Comment**: The speakers recommendation above is logical, but it is not clear that many practitioners are doing so for subsequent transfers at least. The Proposed Regulations governing basis reporting require reporting on subsequent transfers and that would require, for example, excessive reporting. If a QTIP trust is funded and thereafter distributes principal to the surviving spouse that would under the proposed regulations trigger a requirement for a filing. If the spouse then contributed those assets to a partnership or DAPT, another filing, and so on. The rules appear to be overreaching and according to commenters not supported by the statute. There appears to be no logic for repeated reporting on each transfer. However, penalties may apply for non-compliance. "The proposed regulations also affect beneficiaries who acquire certain

property from these estates, and subsequent transferees to whom beneficiaries transfer the property in transactions that do not result in the recognition of gain or loss for Federal income tax purposes." T.D. 9757. "Accordingly, pursuant to the regulatory authority granted in section 6035(b)(2), the proposed regulations require additional information reporting by certain subsequent transferors in limited circumstances. Specifically, proposed §1.6035-1(f) provides that, with regard to property that previously was reported or is required to be reported on a Statement furnished to a recipient, when the recipient distributes or transfers (by gift or otherwise) all or any portion of that property to a related transferee, whether directly or indirectly, in a transaction in which the transferee's basis for Federal income tax purposes is determined in whole or in part with reference to the transferor's basis, the transferor is required to file and furnish with the IRS and the transferee, respectively, a supplemental Statement documenting the new ownership of this property. This proposed reporting requirement is imposed on each such recipient of the property. For purposes of this provision, a related transferee means any member of the transferor's family as defined in section 2704(c)(2), any controlled entity (a corporation or any other entity in which the transferor and members of the transferor's family, whether directly or indirectly, have control within the meaning of section 2701(b)(2)(A) or (B)), and any trust of which the transferor is a deemed owner for income tax purposes." When this issue was faced, conversations with many practitioners, failed to identify anyone who had made such filings. It seems as though most view the requirement as so onerous and unreasonable that it is simply being ignored by many if not most practitioners.

g. Basis and portability planning.
    i. Portability is much more complicated than many initial thought.
    ii. Do you file a return for portability? Some firms take the position that you should always do so. What liability risk might a practitioner face if no filing is made?
        1. **Comment**: See the IRS statistics on returns filed. Very few portability only returns seem to be filed. Not enough clients are heeding their advisers' recommendation to file and secure the DSUE.
    iii. Speaker suggests putting client on notice of benefit of filing a return to secure the DSUE in writing.
        1. **Comment**: Consider going further to protect yourself. Some clients, particularly those with smaller estates, do not come back to counsel on the first spouse's death. They view the high exemptions as suggesting that the estate tax is irrelevant to their families and that coming back to counsel is an unnecessary waste of money. Put a caution about filing for the DSUE on firm websites and in firm

newsletters (along with other general pointers like reviewing formula clauses in documents and updating partnership and LLC documents post-Powell, etc.).

iv. What types of planning should practitioners be doing?
    1. A portability plan of some type should be the default approach to planning.
    2. Own assets jointly.
    3. Consider one-fund or one-lung QTIP.
    4. If you run the "numbers" the portability type plan will almost always (unless huge rates of return realized on assets) it will be a superior result getting the double basis step up (on first and again on second death).
    5. Some clients have a forced credit shelter trust which does not permit the basis adjustment on the death of the second spouse. On death of the second spouse there is no basis step-up. When the exemption was $600,000 a default credit shelter trust was the right answer but that is not necessarily the case.
    6. **Comments**: The speakers did an excellent job of balancing the pros/cons of different approaches, but here are a few more thoughts. See Lou Harrison's special session and his discussions of making the plan simpler. See also Hugh Magill's lecture notes on Tuesday about the changing dynamics of American family units. "Traditional" family units are perhaps ½ of all family units. So, for perhaps ½ of clients the new default approach (e.g. Clayton QTIP) suggested may not be optimal. So, use a portability plan might be the new default starting point. But for a lot of clients, a different approach may be needed. For example, funding a credit shelter trust for various beneficiaries appropriate to client circumstances might make sense for a lot of clients regardless of basis considerations. Life insurance might not be necessary to pay an estate tax but might be repurposed (or purchased) to address the personal issues involved. Keeping life insurance in a trust (since it doesn't need a basis step up) and other assets in the estate to gain a basis step up (whereas those other assets may have been gifted to trusts under prior tax law circumstances) might be useful. Also, consider the facts of the client's particular situation. Some of the basis issues can be addressed by wealth management approaches. The portion of an actively traded portfolio that is appreciated at any point in time is rather modest. So, asset location decisions might be part of the solution as well.

v. Can we build in some mechanisms to get a basis step up on the second spouse's death if assets increased in value significantly?
    1. Give independent trustee right to distribute assets. This is the simplest approach. Trust merely directs moving assets from credit shelter trust into the beneficiary's estate. Can also pick and choose moving only appreciated assets. This provides considerable

flexibility without much complexity. The trust might already have this authority in it without any modification or decanting. Consider drafting the flexibility of an independent trustee to make a discretionary distribution of principal.

   a. **Comment**: In the outline the speakers state: "The greatest risk is that the independent trustee may be shy in exercising the authority..." Will the trustee do this? What of liability risks? Silver divorce should be considered. What of remarriage of the surviving spouse? Will an institution ever be willing to make a distribution of appreciated assets given the loss of trust protections, exposure to the surviving spouse's creditors, etc.? If an institutional trustee might be wary of making such a distribution how should a family or other non-professional trustee feel?

2. Use contingent general power of appointment. Under IRC Sec. 2041 this causes inclusion in the gross estate of decedent holds a GPOA. Sec. 1014(b)(9). You can use a formula. You can build a formula into the document. The challenge is the cost and complexity of the different scenarios. Can you have a power of appointment over specific property rather than just over the trust? Speakers believe that you can have a power over specific property.
   a. Kruz v. Commr., 101 TC 44 (1993).
      i. Spouse had right to withdraw specific assets after exhausting the marital trust.
      ii. If marital trust not exhausted are those assets included?
      iii. Yes, because they controlled ability to exhaust marital trust.
      iv. Unless independent act of significance you are presumed to have the power to exercise power to the maximum permitted.
   b. Give power to exercise the POA to amount of applicable exclusion. But can spouse control that amount? Yes, by making gifts. All the things that create deductions change the power of appointment. The Kurz case could create a difficulty in this context.
   c. There is no good definition of an "act of independent significance." Getting married, divorced or having a child is an act of independent significance. So, if you are going to avoid the Kurz issue the formula should be "inaccurate." It should be the amount of the available exemption if ignore marital and charitable deductions. This means you are working off the gross estate not the taxable estate. Kurz should not have application to such a power. But the power of appointment will be smaller than you might want it to be

as it might ignore, for example, charitable gifts. The formula to be safe from Kurz has to sacrifice accuracy.

   d. So, if you want to use a contingent general power of appointment structure it so person does not have the ability to affect the formula.
   e. You might then use, in addition to the gross or imperfect contingent GPOA, the next approach of giving a trust protector the right to grant a general power of appointment, etc. to try to capture what the above contingent formula may miss.
   f. Consider drafting a power of appointment that only applies to appreciated assets and not to depreciated assets. Remember the adjustment under 1014 is an adjustment to FMV so if applicable to depreciated assets it would reduce basis. Bifurcate appreciated assets. For example, art is subject to 28% tax and other assets may have a lower tax, so perhaps you stratify the power to apply only to assets that have the largest or highest taxed gain.
   g. You might also factor in how soon the asset will be sold. Unless the assets are sold, or can be depreciated, when will a benefit be realized? Will the heirs keep or sell the asset? When?
   h. This type of planning gets very complicated very quickly.

3. Trust adviser or protector can give beneficiary a general power of appointment.
   a. **Comment**: Be careful of who is given what power. Some practitioners appoint a trust protector to act in a fiduciary capacity (or state law may characterize the protector as a fiduciary). If a protector is acting as a fiduciary are they able to grant the GPOA? Perhaps a person who does not hold other powers a protector might be given (e.g. to remove and replace trustees) should be named, expressly in a non-fiduciary capacity, and given only the right to act with respect to the GPOA.
4. Delaware tax trap. Won't work in certain states, e.g. Florida.
   a. If you have a LPOA that is exercised to create another power that extends the perpetuities period that the power that creates the other power will be taxed as if it is a GPOA even though it is a LPOA.
   b. Historically, Congress had been worried about the creation of perpetual trusts.
   c. Only need LPOA so holder does not have to have broader power.
   d. If state has repealed rule against perpetuities (RAP) cannot extend perpetuities.

e. How do you explain the Delaware tax trap to a client? "It's hopeless." Beneficiaries will never do this. Children may have other planners and may not identify the provision.

5. Planning.
   a. You may add some of the above planning to an existing credit shelter trusts by decanting.
   b. Use a contingent formula power of appointment.
   c. Give protector ability to grant additional power of appointment if modifications understate exemption.
   d. This way if fiduciaries are not able or don't act, or lack information to act, etc. there is something automatically then have distribution of assets and granting GPOA as backstops. This can increase opportunities to get a good basis result in a non-marital trust. These are sight modifications to the traditional use of GPOAs.
6. Don't think only of surviving spouse. Consider that beneficiaries in the future may have unused exemption. Might be to give protector power to grant GPOA to any beneficiary not only the spouse.

vi. Issues.
1. What if surviving spouse has a new significant other? Will independent trustee permit movement out of assets? Trustee may face liability?
2. When do you move assets? May not have much advance notice of surviving spouse's health. This becomes a practical issue of what can be done.
3. Creditor protection issues. If there is any type of general power of appointment, if assets are distributed, what of creditor risks?
4. What if exemption is reduced after you pulled assets out of the credit shelter trust?
5. If the GPOA is not exercised most jurisdictions say not reachable by creditors. That is also the position of the 1st and 2nd Restatement, but not of the 3rd Restatement - considered that possession of GPOA may be reachable by creditors. If you are going to use a GPOA look at particular state law to see which Restatement view applies. There is a federal bankruptcy law case that addresses this issue.
6. We always want property in trust. You cannot get property back into the trust and if distribute all trust benefits are lost.

h. **Comment**: Some of the discussions following are based quick reviews of a series of planning concepts the speakers discussed to possibly create basis adjustment opportunities. The outline is 261 pages and provides far more detail on each of the techniques and readers are encouraged to refer to those details.

i. Power of Appointment Support Trust ("POAST").
   i. Use upstream gifts, e.g. G2 is wealthy and G1 is not so wealthy and has excess exemption.

ii. How do you get funds to G1 from G2 and protect from G1's creditors reaching assets or other issues reaching assets?
iii. Consider power of appointment support trust. This is an irrevocable grantor trust that includes an upstream beneficiary as a beneficiary of the trust. So instead of trust for only descendants add parents as beneficiaries. Give the trustee the ability to distribute to mother and to children, etc. The power can be discretionary and HEMS, etc.
iv. Add a contingent GPOA. If give a contingent GPOA on G1's death under 1014(b)(9) you get a basis adjustment on mom's death.
v. If G1 does not exercise GPOA the trust remains a grantor trust as to G2 who is initial settlor.
vi. What about the issues/concepts in Cristofani (AOD 1992-09) wherein the court found mere naked Crummey powers went too far and were not valid. Might similar concepts as in Cristofani be raised by the IRS with the use of GPOAs? How far can you go with GPOAs? Must there be a reasonable basis to benefit the person given the GPOA? Speakers suggest that there should be.
vii. While the law does not require that the holder know about the power he or she has, that power holder. per the speakers, should know of the power. The law does not care if you are able to exercise the power. So, a power holder in a coma cannot from a practical perspective exercise the power, but that is not an issue.
viii. Apart from tax considerations, might the trustee have an obligation to inform a power holder?
ix. Consider the burden on mom's estate tax return. 6018 requires filing return for a taxable estate. When drafting contingent GPOA perhaps limit it to being $10,000 less than the unused exclusion amount so not caught for filing estate tax return. For GST purposes, if the automatic allocation rules may apply so return filing requirements should also not be triggered.
x. Can use trusts reciprocally but consider reciprocal trust doctrine issue.
xi. What if G2 dies prematurely? How do you evaluate this risk?
xii. Must fund the trusts so G2 must use exclusion amount. What if G2 does not want to make a gift? POAST is a grantor trust giving G1 discretionary right to receive income and principal during lifetime and a GPOA is granted. If G2 doesn't want to make a gift you can use a GRAT. When pour over comes from typical GRAT flows to a non-GST trust. The receptacle trust at the back end of the GRAT can be the POAST trust and it can use G1's GST exemption. Similar planning can be done with a CLAT.

j. Can you affirmatively use 2036?
   i. Can you try to cause inclusion of assets from trusts using 2036-2038 rules?
   ii. In the past getting assets out of the estate was the goal, now the exemption is so much larger, and the grantor may have unused exemption available. How can you get previously transferred assets back into the estate? Can you?

iii. Example – have grantor stop paying rent on house in trust. Then argue that because the grantor disregarded the form of the transaction it should be included in his estate. Taxpayers cannot raise substance over form generally. So, taxpayer cannot mismanage a trust and argue for it to be included in the estate.

iv. Can you decant and give the grantor a GPOA? That depends. Regulations state that the person who creates the trust can retain a power of appointment over it under 2041. They can retain a power to alter, amend or revoke. But if the trust is decanted is that effectively retaining a power of appointment? Not certain. What if you decant and give grantor the power to alter, amend or revoke – a 2038 power?

v. The Skifter case raises problems in this regard.
   1. Estate of Skifter v. Comm'r, 468 F.2d 699 (2d Cir. 1972), aff'g 56 T.C. 1190 (1971). It appears that you cannot add a 2038 power to a trust and claim estate inclusion unless the power was reasonably anticipated when the trust was created.
   2. Skifter is looking for something planned by the grantor initially. If you grant the settlor a GPOA after the trust was created, what happens? Grant settlor GPOA. 2041 is a tougher standard. Actual retention will meet the Skifter standard which is a lesser standard. If grantor petitions court to be granted a GPOA there "seems to be no way you lose."

vi. The rules on insurance under IRC Sec. 2042 should be read similarly to rules under 2036-2038 and under those rules the law is clear that you can only take into account powers that the grantor personally planned to have. Grantor had to be materially a part of retaining that power. Decanting does not involve the grantor. Under Skifter then, decanting to add these powers won't bring the trust assets back into the settlor's estate. Consider reformation if grantor asks for the reformation. A problem is what is or is not motivated/anticipated by the grantor? An issue is the lack of precedent. It is difficult to anticipate all the arguments the IRS might raise.
   1. **Comment**: Consider non-judicial modification. But that requires, unlike a decanting, grantor involvement. The grantor may, however be able to merely non-object. Does that suffice?

vii. What of client who puts house in trust and does not pay rent? Can you argue 2036(a)(1) applies? If the facts bore that out from day 1 you might be able to argue this (i.e. that the rent-free use of the property as anticipated from inception) that might improve the argument. But really must show that this was always the plan that grantor was to have use of the property it might work. But the attorney would not have created an irrevocable trust that was intended to be included in the gross estate. If the taxpayer/settlor filed a gift tax return stating that she made a gift wouldn't this later argument contradict that filing? Taxpayers don't generally make gifts (outside of a GRAT or QPRT) expecting a "come-back." This type of situation is more likely to happen where the client put something into the trust that counsel was not aware of.

viii. Difficulty is trying to turn a trust plan into something it was never intended to be by mis-administering. The IRS "will go to the mats on this one."

k. Double basis increase.

i. Clients in non-community property state complained that they could not get the double basis step up. To address this the tax basis revocable trust was created to endeavor to get a double basis step up. See PLR 200101021.

ii. Joint revocable trust (could do in separate trusts and PLRs have permitted). H and W put all assets into trust. Each retains right to terminate trust at any time and get back all assets, so transfer is revocable. First spouse to die has right to appoint the entire trust, not just what they put in, to satisfy debts and taxes of their estate. This is GPOA. H dies first, and he has right to revoke his contribution to the trust as well as he holds a GPOA over wife's contributions. This would seem to provide a basis step up on H's death over all assets.

iii. But IRS said H can only exercise if W does not revoke and since W is trustee H has to notify her and she would just revoke. IRS argued it was not a GPOA as only exercisable with consent of creator. IRS agreed it was in gross estate but no basis step up on W's share of the assets as she had right to revoke her contribution until the moment of H's death, so she is getting back assets as recipient of the marital share assets she gave a moment before H's death and that is caught under 1014(e) and there is no basis step up.

iv. Various rulings followed with same conclusion that basis step-up did not work.

v. Alan Gassman, Esq. came up with modified version called "JEST" = Joint Estate Step-up Trust. Similar to the above but when first spouse dies, to extent that do not have personal assets in excess of exemption amount. If more assets excess goes to non-marital trust that spouse is not a beneficiary. So, assets do not transfer on first death to the surviving spouse. But the drawback is that the surviving spouse is not a beneficiary of the entire estate and that might not be acceptable to the client.

vi. What if you use a JEST and have an adviser who can add spouse back as beneficiary. But if IRS can show that spouse would be added back the IRS would argue against basis step-up. But "pre-arrangement" depends on what was done originally. Have a trust protector to be named later. What if grantor does not name trust protector but rather the trustee names the protector without discussion with the grantor. There cannot be "prearrangement" between the grantor and someone they did not know.

vii. What if go further and provide that spouse can only be named as a beneficiary if there is a compelling reason, e.g. running out of money.

viii. Another option is to sell all the assets and report them on the income tax return then wait three or six years for the income tax statute limitation before appointing spouse. You can rebuy the same portfolio right after sale as there is no rule affecting repurchasing assets that were sold at a gain.

l. Grantor Retained Interest Step-Up Trust ("GRISUT").
    i. QPRT.
        1. Before Chapter 14 put house in trust, retained the right to live in it, and after that period house passed to children. Subtracted the value of the right to live in house, i.e., the reserved use, and this reduced a large portion of the taxable gift.
        2. Chapter 14 provided limitations on this using QPRT with various requirements.
        3. Unless interest rates are high discount is small.
        4. Issue with QPRT is once you outlive reserved use period it is out of your estate and you cannot get a basis step-up at death.
        5. For a period, you could swap out house and turn house into GRAT and the regulations were changed to prevent this and governing instrument must prohibit this.
        6. So, you give up basis step up for getting asset out of the estate. In current environment that is not a good trade-off.
        7. There may be other negative consequences. In some states this type of planning might invalidate qualification for a homestead exemption, etc.
    ii. What if create trust with a term of years set to be longest period you think is likely to outlive. If die during term included in estate. No prohibition that if created QPRT for life it would be valid but at end of day its included in client's estate. While this won't affect estate taxes it might be useful for income tax purposes.
    iii. Create QPRT saying on earlier of death of me or my spouse the house goes to my spouse. This means spouse has remainder interest. Is gift of remainder interest subject to marital deduction? Yes. What about the interest retained is that subject to a deduction? For gift tax purposes this would not be a gift.
    iv. Why are you better off then had you just kept property? If H dies first he retained interest in QPRT with right to live there so included in estate. But if wife dies first it is included in her estate. So, no matter who dies first it is in that spouse's estate 1014(b)(9) the entire value of the property should get a step-up. If just held it jointly and not in a community property state, you would get a full basis step up on the first death. Once you have full step up, say if wife died first, she would bequeath it back to husband.
    v. 1014(e) may raise an issue. To the extent 1014(e) comes into play if the property comes back to the spouse will it apply? It may depend on when the trust was created. 1014(e) speaks of the time of the gift that created W's property right. What if under W's will state that if receive property from the GRISUT in less than a year provide that it passes elsewhere. Alternatively, if w dies first and 1014(e) is implicated H could disclaim. Consider a trust adviser who adds spouse more than a year later.

m. Step-Up Grantor Retained Income Trust SUGRIT.
    i. Purpose is to get a basis step up on earlier death of two individuals.
    ii. Use tangible personal property.

n. Tangibles SUGRIT.
    i. 2702 does not apply to a trust funded with non-depreciable tangible property. Reg. § 25.2702-2(c)(2)(i). Artwork, antiques, and undeveloped land, are examples. These assets can be put into a QPRT type of trust, reserve use to the grantor, remainder after some number of years to other family members.
    ii. Until recently there was no one who had a means to value the right to use these assets. Regulations say must look to comparable leases over a similar period of time. Recently people have begun to lease art and antiques and appraisers can provide workable numbers. Income not estate tax is the primary objective.
    iii. This is similar to a QPRT but a QPRT is measurable. Here with a GRIT must use an appraiser to value the retained interest with respect to the property.
o. Step-up GRAT/GRUT.
    i. Speaker not certain it works.
    ii. Seems to be contrary to a regulation.
p. Reciprocal GRISUTs.
    i. Reciprocal trust doctrine under Estate of Grace.
    ii. Can you use reciprocal trust doctrine to negate? Different trustees, different state law, add spouse a later point, etc. to make look non-reciprocal.
    iii. Want basis adjustment on the first to die for all of property.
q. Alaska, South Dakota and Tennessee
    i. "More states will adopt this concept."
    ii. Alaska adopted community property statute based on Wisconsin community property law. Difference between WI and AK is that in AK you have to opt in to the community property treatment. In Wisconsin if a married couple buys property it is community property.
    iii. In AK you can create community property in AK if assets have situs in AK. This would include a brokerage account, or an LLC interest held in an AK trust in an AK LLC.
    iv. TN an SD went a step further. You can only have community property inside a trust. Speaker is concerned as to whether this approach will work. **Comment**: Others certainly view this differently.
    v. Trust must declare that property is community property, you need a trustee in that state (e.g. a corporate trustee), some of the administrative functions and reporting be done by trustee in that state, not a lot is required to comply with the statutory requirements.
    vi. Question is whether this works? 1014 requires that the property be community property under state law. IRS has not taken a position yet on opt in states yet. Speaker's concern is the issue of where is the situs of the assets? Each of the state statutes creates a set of minimum rules for situs. Suggestion is not to be guided by the minimum rules but rather to go beyond the minimum requirements. You want as many contacts in that

state under which you are opting in, and to minimize contacts of the trust to other states (e.g. settlor's home state).

vii. Huber case involved an asset protection trust not a community property trust. Huber recognized that meeting minimum state requirements did not suffice. **Comment**: Huber was also a bad fact case and it is not clear how the IRS will weigh a reasonably planned and administered community property opt in trust to a bad fact DAPT case, but the recommendation to do more than the minimum to bolster the community property opt it certainly seems prudent.

viii. The Harmon case, involving the Oklahoma community property opt in statute. Couple wanted to split US income equally for income tax purposes. For assignment of income principals would tax original owners of the property. Some suggest that this implies that the opt in does not work. The case suggests that the assets are community property but that does not negate the assignment of income doctrine. Comm'r v. Harmon, 323 U.S. 44 (1944).

ix. Opting in or out of community property by signing a contract agreeing it should (or would not) be community property [**comment**: a transmutation agreement], why would the same concept not apply to AK law? Speaker worries about TN and SD since can only be community property inside a trust which does not comport with traditional concepts of community property.

x. What does state law say about community property? If move from Texas to Virginia what happens with the property that was community property? If it was community property when you brought it in, it will pass at death as if it were community property. This is not saying that the property will continue to be treated as community property for all reasons. See Uniform Disposition of Community Property Rights at Death Act which governs the disposition of community property rights at death. 1014(b)(6) property representing ½ share of community property under the community property laws under any state laws. This is not a "deeming" statute. The law must be that the property is community property not that it is deemed community property.

xi. FL case - Quintana v. Ordono, 195 So. 2d 577 (Fla. 3rd DCA 1967) Property earned in Cuba and moved to FL and surviving spouse wanted community property rights in that property. Case said H held property in a resulting trust for spouse as to her ½. The court did not say it was community property but through the resulting trust gave W the interest.

xii. Consider how much benefit will be achieved from the planning. Negative basis real estate may have a substantial benefit from this type of planning.

r. Grantor trust rules.

i. Rev. Rul. 85-13 a grantor trust is treated as if the grantor still owns the assets. A sale to the trust by the grantor is not a sale. A gift to the trust, however, is a gift.

ii. Gift or sale of assets to a grantor trust you get transferred basis as there is no actual sale.

iii. Do you get an increase in basis for gift tax payment? Grantor trust rules apply for all of income tax code, including basis rules. So, if transaction is a non-event for income tax purposes so is your gift tax payment really a gift tax payment? Yes, for gift tax purposes. The question is which trumps the other. Based on the Post case, it appears that you don't increase the basis as long as it is a grantor trust, but that you would get the basis adjustment when it is no longer a grantor trust. Speaker says he always claims the basis adjustment and that the argument is "every bit as good" that you get the basis adjustment. Post v. Comm'r, 26 T.C. 1055 (1956), acq., 1958-1 C.B. 5.

iv. What if grantor trust status terminates during grantor's life. It should not affect basis except in one circumstance, a debt in excess of basis. On that the law is clear that the termination of grantor trust status is a change and you would get the effect of the transfer of underlying asset and if that asset has debt in excess of basis you realize gain. If assets are appreciated but there is no debt or debt is less than basis there is no basis adjustment because grantor trust status terminates.

v. Grantor sells assets to trust and grantor trust status terminates do you recognize gain? The original installment obligation was not a real installment obligation (since the sale was not recognized for income tax purposes so how could the note be?). It might become an installment obligation but wasn't before so perhaps you only prospectively recognize gain. There is no authority either way.

vi. Since trust is not included in Grantor's gross estate should not be basis adjustment. 1014 speaks of property acquired from decedent. The grantor owned the trust assets for income tax purposes and the assets are now passing on death to someone else. Key point grantor died and on account of that the assets passed and that looks like a 1014 basis adjustment situation and appears supported by Rev. Rul. 85-13. 1014(b)(1) property acquired by bequest devise or inheritance. It is incorrect to state that you have to have inclusion in the estate. File Form 8375 with income tax return.

vii. What is basis of note on grantor's death? Should be FMV of note at the time of death. But there is no instrument during grantor's lifetime while it is a grantor trust. Note should not be IRD – it would not have been taxable to grantor had grantor lived. Is death a recognition event? No, it is not. That is logical. Rev. Rul. 85-13 even if debt in excess of basis death is not a recognition event, although a lifetime transfer sometime is and gets treated differently.

s. Basis adjustment for GST tax payment.

   i. Only for taxable distribution or taxable termination.

t. Code Section 1014 – selected provisions.

   i. Code Sec. 1014(e). Many points in the discussion refer to Code Section 1014 so selected portions of 1014 are reproduced below and annotated [highlights added] which can be referred to as you review the outline.

   ii. (a) In general

1. Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be—
    a. (1) the fair market value of the property at the date of the decedent's death…

iii. (b) Property acquired from the decedent - For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:
    1. (1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;
    2. (2) Property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent, with the right reserved to the decedent at all times before his death to revoke the trust;…
    3. (4) Property passing without full and adequate consideration under a general power of appointment exercised by the decedent by will;…
    4. (6) In the case of decedents dying after December 31, 1947, property which represents the surviving spouse's one-half share of community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate under chapter 11 of subtitle B (section 2001 and following, relating to estate tax) or section 811 of the Internal Revenue Code of 1939;
    5. (9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. This paragraph shall not apply to…
    6. (10) Property includible in the gross estate of the decedent under section 2044 (relating to certain property for which marital

deduction was previously allowed). In any such case, the last 3 sentences of paragraph (9) shall apply as if such property were described in the first sentence of paragraph (9).

iv. (c) Property representing income in respect of a decedent
    1. This section shall not apply to property which constitutes a right to receive an item of income in respect of a decedent under section 691…

v. (e) Appreciated property acquired by decedent by gift within 1 year of death
    1. (1) In general In the case of a decedent dying after December 31, 1981, if—
        a. (A) appreciated property was acquired by the decedent by gift during the 1-year period ending on the date of the decedent's death, and
        b. (B) such property is acquired from the decedent by (or passes from the decedent to) the donor of such property (or the spouse of such donor),
    2. the basis of such property in the hands of such donor (or spouse) shall be the adjusted basis of such property in the hands of the decedent immediately before the death of the decedent.
    3. (2) Definitions For purposes of paragraph (1)—
        a. (A) Appreciated property
        b. The term "appreciated property" means any property if the fair market value of such property on the day it was transferred to the decedent by gift exceeds its adjusted basis.
        c. (B) Treatment of certain property sold by estate
        d. In the case of any appreciated property described in subparagraph (A) of paragraph (1) sold by the estate of the decedent or by a trust of which the decedent was the grantor, rules similar to the rules of paragraph (1) shall apply to the extent the donor of such property (or the spouse of such donor) is entitled to the proceeds from such sale.

vi. (f) Basis must be consistent with estate tax return - For purposes of this section—

vii. (1) In general - The basis of any property to which subsection (a) applies shall not exceed—
    1. (A) in the case of property the final value of which has been determined for purposes of the tax imposed by chapter 11 on the estate of such decedent, such value, and
    2. (B) in the case of property not described in subparagraph (A) and with respect to which a statement has been furnished under section 6035(a) identifying the value of such property, such value.

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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2696

Date:	**15-Jan-19**
From:	**Steve Leimberg's Estate Planning Newsletter**
Subject:	**Martin M. Shenkman's Meeting Notes from Heckerling 2019, Day 1 Afternoon Current Development Notes**

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**. Heckerling, as it is affectionately known, is the nation's leading conference for estate planners, attorneys, trust officers, accountants, insurance advisors and wealth management professionals. 2019 is the 53rd installment of Heckerling, and for those not fortunate enough to be in sunny Orlando, the meeting this year runs from Monday, January 14th through Friday, January 19th.

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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 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), on the Board of the American Brain Foundation, and the American Cancer Society's National Professional Advisor Network.

Marty's latest book, **Estate Planning After the Tax Cut and Jobs Act of 2017**, is available as an e-book or as a PDF download**. Steve Leimberg** recently noted that:

> Every tax professional in the country will (or should be) reading this book! This is the most complex and far reaching tax law passed in the over 50 years I've been studying, teaching, and writing about tax law and this resource arms you not only with the necessary and vital information you need to know but also the thinking and planning concepts of three of the brightest minds in the tax world!

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 posts video clips to www.laweasy.com, and blogs on Forbes.com.

Click this link to read Marty's Day 1 Afternoon Current Development Notes from the proceedings on Monday.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Marty Shenkman

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Heckerling Institute 2019

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1. **Monday: Afternoon: Recent Developments: Akers, Donaldson, Kanyuk**
    a. 2017 Tax Act. Blue book just issued. Some of the points addressed:
        i. GST.
            1. Effective date concerning GST trust.
            2. For a trust created and funded before 2018 it is possible to use increase in large increase in GST exemption.
            3. Effective date provision is not clear.
            4. Blue book Footnote 372 has a detailed example making clear you can allocate GST exemption to prior trust.
        ii. Kiddie tax.
            1. Earned income of child.
            2. Technical corrections acknowledged to be needed.
        iii. 60% deduction limit on contributions of cash.
    b. 199A.
        i. New deduction under 199A for QBI = qualified business income to deduct up to 20% of net ordinary income from that business.
        ii. Available as a below the line deduction but claimed in addition to standard or itemized deductions.
        iii. May be realized on S corporation income, sole proprietorships or partnerships.
        iv. Proposed regulations have not yet been finalized.
        v. Whether you can claim 199A deduction is a function also of taxable income. If taxable income puts you in 32% bracket on ordinary income if you are a specified service trace or business (SSTB) the deduction is phased out. If not an SSTB if you do not pay enough W2 wages or have enough depreciable property your business will be subject to phase out.
        vi. If taxable income is high enough to put you in 35% or 37% bracket SSTBs get no deduction. If non-SSTB deduction is lesser of 25% of W2 wages and tangible property x 2.5% or 50% of W2 wages.
        vii. If you're an S corporation shareholder, you generally have to reduce your stock basis by amount of deduction pass through. Proposed Regulations clarify that 199A is not a pass through but rather is a deduction that belongs to shareholder/partner and you do not reduce basis for it, nor do you have to have sufficient basis to claim the QBI deduction.
        viii. SSTB definition. Prop. Reg. Sec. 1.199A-5.
            1. Businesses in the field of: health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, investing, investment management, or trading or dealing in securities, or any trade or business where the

principal asset is the reputation or skill of one or more of its employees or owners
2. Other business in which reputation and skill at the heart of the business, the principal asset is quite open ended. But the Proposed Regulations read it narrowly to only include 3 additional business, endorsement, licensing likeness, name, etc. and receiving appearance fees.
3. Engineers and architects excluded.

ix. Trusts own businesses, how does deduction get allocated as between trust and beneficiaries?
    1. Divide the same way the trustee allocates DNI.
    2. Beneficiary share of QBI tracks share of DNI.

x. Multiple trust rule.
    1. What if divide income from say an S corporation among multiple trusts. Proposed regulations included new rules under 643(f) if have substantially the same grantor and substantially the same beneficiary will be aggregated if principal purpose is avoidance of income tax. Regulations provide that if you get an income tax savings you are presumed to have this principal purpose of tax avoidance. So, the creation of multiple trusts will not work if clones.
    2. How do you create a trust that is not substantially the same beneficiary, etc.
    3. **Comments**: Prop. Regs 643(f) – Multiple Trusts
        a. If you are not establishing a new trust, not contributing new capital to existing trusts, and not creating multiple trusts, might some planning remain viable? Might the conversion of grantor SLATs to non-grantor trusts avoid this new rule in the Prop. Regs?
        b. Section 643(f) further provides that, for these purposes, two spouses are treated as a single person. The proposed regulations would establish anti-abuse rules under section 643(f) to prevent taxpayers from establishing multiple non-grantor trusts or contributing additional capital to multiple existing non-grantor trusts in order to avoid federal income tax, including abuse of section 199A. In the case in which two or more trusts have: (1) substantially the same grantor or grantors; and (2) substantially the same primary beneficiary or beneficiaries, and (3) a principal purpose for establishing such trusts or contributing additional cash or other property to such trusts is the avoidance of Federal income tax, then such trusts will be treated as a single trust for Federal income tax purposes.
        c. What is a "Principal Purpose" Under 199A? A principal purpose for establishing or funding a trust will be presumed if it results in a significant income tax benefit unless there

is a significant non-tax (or non-income tax) purpose that could not have been achieved without the creation of these separate trusts. If the trust uses the client's temporary exemption and provides asset protection, neither of which could have been achieved without the trusts involved (certainly one non-grantor trust, perhaps more than one), a principal purpose of income tax avoidance should not be presumed.

d. Example from Prop. Regs. X establishes two irrevocable trusts: one for the benefit of X's son, G, and the other for X's daughter, H. G is the income beneficiary of the first trust and the trustee is required to apply all income currently to G for G's life. H is the remainder beneficiary of the first trust. H is an income beneficiary of the second trust and the trust instrument permits the trustee to accumulate or to pay income, in its discretion, to H for H's education, support, and maintenance. The trustee also may pay income or corpus for G's medical expenses. H is the remainder beneficiary of the second trust and will receive the trust corpus upon G's death. Under these facts, there are significant non-tax differences between the substantive terms of the two trusts, so tax avoidance will not be presumed to be a principal purpose for the establishment or funding of the separate trusts. Accordingly, in the absence of other facts or circumstances that would indicate that a principal purpose for creating the two separate trusts was income tax avoidance, the two trusts will not be aggregated and treated as a single trust for Federal income tax purposes under this section.

e. Proposed Reg. 1.199A-6(d)(3)(v) provides, under a heading saying Multiple Trusts, that trusts formed or funded with a significant purpose of receiving a deduction under section 199A will not be respected for purposes of section 199A. If the client had created and funded grantor trusts in 2012 with family business interests and now converts those trusts by decanting into non-grantor trusts should that work?

c. Anti-Clawback Regulations.
   i. Prop. Regs. 20.2010-1(c); ReG-106706-18 provide favorable results assuring no clawback of the current high temporary exemption.
   ii. If a client gifts $11.4M in 2019 and dies in 2026 when the exemption is $5M inflation adjusted assume $6M. The $11.4M is an adjusted taxable gift in the estate tax calculation so do you owe estate tax on the additional $5M. IRS held that taxpayers will not have this problem.
   iii. What is the manner in which the calculations will be made to avoid a clawback? Start with gross estate + adjusted taxable gift. Calculate tentative estate tax. Subtract hypothetical gift tax (using rates in effect at

the date of death) but using the basic exclusion amount (BEA) at the time of the gift. That was $11.4M. Subtract deductions, calculate estate tax due and apply credits. Applicable Exclusion Amount (AEA) is Basic Exclusion Amount + DSUE. Most would have thought the issue was how the gift tax was calculated, but the proposed Regs address this at the last stage of the calculation. Use the higher of the BEA that applied at the time the gifts were made, or at death.

iv. Example - Make $9M gift sheltered by exclusion. Dies after 2025 when exclusion has dropped to $5M indexed. BEA to determine how much estate tax credit to be received is BEA used in determining the gift credit which was $9M or the BEA at death. So, assume BEA is $9M and prevents decedent from paying estate tax on a gift made when exclusion was higher.

v. Off the top gift tax issue. What if make gift of $5M today and makes no further gifts. If dies after 2025 no benefit of the larger exclusion. Some had speculated that gift would have been made off the top of the exclusion amount, but that was not addressed in the proposed Regs.

vi. What if died during period of higher exemption and calculate DSUE off that larger amount. Surviving spouse dies after exclusion has declined. Does the surviving spouse on death get the DSUE based on the larger amount? Should be the DSUE calculated at the time of the first spouse's death? Yes, so the surviving spouse should obtain the benefit of the larger DSUE (i.e., based on the temporary high exemption that existed when the first spouse to die passed).

vii. **Comment**. The fact that the clawback issue has been resolved should serve as a strong incentive for "moderate wealth clients ("moderate" relative to the current high exemptions) should be encouraged to plan now, certainly before 2026 when the exception is going to decline, but perhaps even before the 2020 election. If the "blue wave" of the 2018 mid-term election continues, the exemption amount could be reduced before the 2026 scheduled halving of the exclusion. Practitioners should proactively educate and encourage clients to plan and hopefully avoid a repeat of the 2012 deluge of clients trying to get planning done just prior to a possible change in the exemption. Also, consider more robust planning than many executed in 2012. Gifts should not only be made in trust and not outright, but for many clients to trusts that they can access such as non-reciprocal spousal lifetime access trusts or domestic asset protection trusts. See comments below concerning the Wacker case and the reciprocal trust doctrine.

d. Trust and estate administrative expenses.

   i. See Notice 2018-61.

      1. **Comment**: The IRS clarified in the Notice that "the deductions for costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such estate or trust, and the deductions allowable under sections 642(b), 651, and 661" are

excluded from the category of "itemized expenses" and will continue to be deductible for federal income tax purposes. The IRS further clarified that "nothing in section 67(g) affects the ability of the estate or trust to take a deduction listed under section 67(b). These deductions remain outside of the definition of 'miscellaneous itemized deduction.

ii. New Code Sec. 67(g) suspends deductions previously allowed under Sec. 67(a) until 2026 when the new rule sunsets. This should not, however, prevent trusts and estates from deducting expenses under Code Sec. 67(e) that are allowed if an estate or trust has expenses incurred because of being a trust or estate.

iii. Can deduct for estate or trust in arriving at AGI those expenses solely incurred because of being a trust or estate.

iv. Supreme Court has said that part of trustee fee incurred solely for investment advice is not deductible, but the balance of the trustee fee can be.

v. **Comment**: IRC Sec. 67(e) applies only to non-grantor trusts and estates. Because the income earned by a grantor trusts are taxed as part of the grantor's individual income, fiduciary fees and trust administration expenses incurred by grantor trusts would generally not be deductible, as the rules applicable to individuals would apply to the income and expenses of the grantor trust. Might taxpayers consider turning off grantor trust status in order to get the benefit of non-investment portions of trustee fees or other expenses which would be deductible by the trust but for its grantor trust status?

e. Priority Guidance Plan.

i. Final regulations under 1014(f) and 6035 on basis consistency. The- IRS may relax some of the burdensome reporting requirements.

ii. Basis of assets in grantor trust on death.

iii. Administrative expenses – this might eliminate Graegin notes.

f. Badgley GRAT assets.

i. Badgley v. United States, 2018 WL 2267566.

ii. Mortality risk is an issue with GRATs. Because the settlor died before the conclusion of the GRAT term there was estate inclusion. GRATs are also not useful for GST planning as you cannot allocate GST exemption until the GRAT term expired. **Comment**: Some have the GRAT remainder paid to an existing irrevocable trust so that the remainder is vested and then may have that trust, also not GST exempt, sell its remainder interest in the GRAT to another GST exempt trust thereby leveraging some portion of the value to a GST exempt receptacle.

iii. In this case the GRAT was funded with 50% interest in general partnership that owned income producing property. Income was greater than annuity payment.

iv. Executor included entire value of GRAT assets then filed later a claim for refund which IRS disputed.

v. Agreed 2036 controls the issue.

vi. 2036(a)(1) includes in gross estate trust property if decedent retained income from property. The taxpayer argued that 2036(a)(1) did not apply since there was no authority that provided that the right to the annuity payment was equivalent to the right to the possession, enjoyment or right to income from the property transferred. IRS said it did apply. Court concurred with the IRS because a GRAT annuity provided the grantor the enjoyed the trust property. Right to the GRAT annuity was an implied right to the income.
vii. The case is on appeal to 9th Circuit.

g. Powell, Cahill, Morrissette.
   i. Powell
      1. Held 2036(a)(2) applied right on transfer of property retention of right alone or in conjunction with another person to designate who might receive income from property.
      2. Other partners could have with decedent dissolved partnership and decedent could have received back the property and designate who could enjoy.
      3. Great concern as to how far idea might be taken? How far might this be applied?
      4. This is background to Cahill.
   ii. **Comment**: This "in conjunction with," as the speakers pointed out, is concerning as the scope of how far and in what circumstances it might be applied is uncertain. Following are some excerpts from Powell that explain the concept. The Cahill court quoted the Powell FLP case on the requirement of "in conjunction with" ("Decedent's ability to dissolve * * * [her limited partnership] with the cooperation of her sons constituted a 'right * * * in conjunction with * * * [others], to designate the persons who shall possess or enjoy the property [she transferred to the partnership] or the income therefrom', within the meaning of section 2036(a)(2)." The Powell case included the following three paragraphs addressing "in conjunction with:"
      1. It is determined that the decedent retained at her death the possession, enjoyment, or right to the income from property she transferred to NHP * * * or the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income there from such that the property transferred to the partnership valued at $10,022,570 on the valuation date is includible in the gross estate under IRC §2036(a).
      2. Alternatively, it is determined that the decedent retained at her death a power to change the enjoyment of property transferred to NHP * * * through exercise of a power * * * by the decedent alone or in conjunction with any other person * * * to alter, amend, revoke, or terminate such that the property transferred to the partnership valued at $10,022,570 on the valuation date is includible in the gross estate under IRC §2038(a).

3. Alternatively, it is determined that the decedent retained at her death a power to change the enjoyment of a 99% limited partnership interest in NHP * * * through exercise of a power * * by the decedent alone or in conjunction with any other person * * to alter, amend, revoke, or terminate such that the value of the 99% limited partnership interest is includible in her gross estate under IRC §2038(a) at its fair market value of $10,022,570. The fair market value of the 99% partnership interest is determined without regard to certain rights and restrictions identified in IRC §2703(a)."
4. See LISI Estate Planning Newsletter #2651 (July 17, 2018).

iii. Cahill.

1. Irrevocable trust purchased policies on life of son and son's wife for $10M. Decedent's revocable trust borrowed $10M from the bank loaned pursuant to a split-dollar arrangement the $10M to the ILIT.
2. Estate reported right to receive back this advance at $183,000 since not paid until death of son and son's wife so a large discount applied to the $10M advance. The IRS argued that the full cash surrender value at date of death of $9.6M should be included in decedent's estate.
3. Court denied taxpayer's motion for summary judgement on 2036, 2038 and 2703.
4. Reasoning of Judge Thornton is that irrevocable trust could have joined with the decedent's revocable trust and terminate the split-dollar agreement and decedent would have received back cash surrender value.
5. **Comment**: Both Code Sections 2036 and 2038 provide for inclusion if the decedent held 2036 or 2038 "strings" "alone or in conjunction with any other person." The court in Cahill focused on this requirement and noted that the decedent (through his son as trustee of decedent's revocable trust) had the right to terminate the split- dollar agreements in conjunction with the trustee of the ILIT. That, in the Court's view, satisfied the 2036 and 2038 requirements because the two trustees could have terminated the split-dollar agreement and the Revocable Trust would have received the cash value of the policy.
6. 2703 was also involved in the case. If there is a transfer, in valuing the asset, do not take into account any agreement under 2703(a)(1) to uses the property for less than FMV. An argument made was that the trust could veto the termination of the split-dollar arrangement so that should be ignored. Taxpayer argued that there was a bundle of rights under the split-dollar agreement that sh0udl be valued. The Tax Court agreed with the IRS and said restriction of preventing decedent from getting back value cannot be taken

into account. Court made clear that the safe-harbor did not apply on these facts.

7. Two months later the case settled with the taxpayer giving up all issues on the split-dollar arrangement including $2M in penalties.
8. 2703 issue – where might this get extended? To almost any contractual arrangement?

iv. Morrissette.

1. Similar motion for summary judgement.
2. Tax Court judge issued order based on Cahill denying taxpayer's motion.

v. Where are we with respect to intergenerational split-dollar agreements. "It's an uphill battle." Loan regime arrangements may be better facts then economic benefit regime.

h. Streightoff FLP case.

i. Estate of Streightoff v. Commissioner, T.C. Memo. 2018-178 (Oct. 24, 2018).

ii. Facts – daughter acting under power of attorney set up a partnership using dad's securities. Created an LLC as the general partner and made herself manager. 99% interest is owned by dad's revocable trust. On same day gift transfers made 10% owned by 7 children and ex daughter in law and 89% approx. held by dad's revocable trust. Consider how bad some of these facts are: formed under POA, 99% held by parent, gifts made same day, any business purpose?

iii. Dad died 3 years later with his revocable trust owning about an 89% of the FLP interest. Issue was how to value that interest.

iv. Estate tax return valued interest using alternative valuation date and 37% approx. discount. IRS replied that an 18% discount.

v. Bad facts case, no documented non-tax business purpose, no subsequent gifts of interests. Estate argued greater discount should apply to assignee's interest then a LP interest. Assignee has no access to records, no right to accounting demands, etc.

vi. Limited partnership agreement provided that an assignee would be treated like an LP and the documentation signed by daughter met those requirements.

vii. Court said as an 89% interest a LP under Texas law can force out the GP. If a GP leaves the partnership terminates the partnership. So, decedent had power to terminate the partnership.

viii. Exercise caution – Practitioners really should be careful about suggesting to clients that the result in Streightoff will be realized.

i. Crummey clauses.

i. What does the Crummey clause contain?

ii. In the PLR 201837005 the trust Crummey power was not properly drafted. All assets subject to the power were withdrawable. The power should have been limited to the gift tax annual exclusion and the improper drafting might have created a general power of appointment and there was no 5/5 limit. The PLR stated that it was a scrivener's error.

        iii. Reviewed Bosch case - reformation based on scrivener's error. Change is effective as if made at outset, i.e. retroactive to inception.
        iv. Lapse of withdrawal right did not have any gift tax consequences (i.e., from inception) which was clearly an effect of the reformation.
        v. GST not allocated as put on wrong page of the gift tax return but deemed valid if enough information put on return. **Comment**: Practitioners often attach statements to gift tax returns affirmatively opting in or out of the automatic allocation rules. Consider including in the statement a clear indication of what is intended to be accomplished for GST purposes as well.

    j. Turner III.
        i. Clyde and Jewel formed investment partnership. Next year made gifts of FLP interests to children and to trust and made gifts to the grandchildren of predeceased child. Next year Clyde dies. This case has continued for 15 years.
        ii. Latest chapter in Turner FLP versus the IRS.
            1. Turner I – transferred LP interests were included in the donor's estate under 2036.
            2. Turner II – LP interest included in the estate under 2036 did not constitute property passing to surviving spouse, so no marital deduction was permitted.
            3. Turner III – What is the final amount of tax that the estate has to pay based on the inclusion. IRS position was that estate must reduce marital deduction by extra estate tax owned based on the surviving spouse bearing burden for extra estate tax. Estate prevailed as Tax Court 2207B gives executor power to seek reimbursement for extra estate tax from beneficiaries.
            4. Estate tried to claim extra marital deduction for income that has accrued on marital assets since the date of death. You do not get marital deduction on growth in assets post-death. Post-death income is not part of the gross estate.
        iii. Do not have right of reimbursement when inclusion under 2035 three-year rule or if included in gross estate because revocable under 2038. The right of reimbursement is not universal every time there is a right of reimbursement.

    k. QTIP division.
        i. PLR 201834011.
        ii. Revocable trust created a QTIP for spouse then a charitable trust, i.e., the residue to charitable trust.
        iii. Spouse and trustee petitioned to divide trust into two trusts. Trust one to be funded with pecuniary amount and trust two with balance. Assets to be divided on a non-pro-rata basis. Spouse intended to disclaim all of property of QTIP trust 1 so it would pass to charity.
        iv. Division of marital trust on non-prorata basis would not cause gain since each beneficiary held same interest sin trusts 1 and 2 as in prior trust.
        v. Division would not disqualify trust 1 and 2 as QTIPs.

vi. 2519. Marital deduction sensitivity risk is with surviving spouse giving away income interest. If dispose of any of income interest deemed to have made a gift of all of interests in the QTIP principal.

vii. When spouse disclaimed interests of trust 1 she would make gift of all income and principal of trust 1 it would all qualify for the charitable tax deduction. This would not cause a gift of trust 2 so no 2519 problem for trust 2.

viii. **Comment**: See Letter Ruling 201426016 (Mar. 11, 2014), which provides similar concepts. The PLR provided as follows: "*Decedent's executor elected to treat Marital Trust as qualified terminable interest property (QTIP) under § 2056(b)(7) of the Internal Revenue Code...The trustees of Marital Trust propose to divide Marital Trust into three separate trusts, Trust 1, Trust 2, and Trust 3. The terms of Trust 1 will be identical to the terms of Marital Trust. Following the division, the trustees intend to convert Trust 2 to a total return unitrust with an annual unitrust payment equal to not less than three percent or more than five percent of the fair market value of the assets of Trust 2 determined as of the first day of each taxable year. The trustees, with the consent and joinder of the trustees of Family Trust and Decedent's children, will petition Court for a court order to terminate Trust 3 and distribute the assets of Trust 3 equally to Decedent's children…the division of Marital Trust into three separate trusts each separate trust will be a QTIP trust under § 2056(b)(7) and the division will not be a deemed gift or other disposition under § 2519*."

ix. **Comments**: For clients with existing funded QTIP trusts that are seeking to use their temporary estate tax exemption, these QTIP division rulings provide a valuable approach. Divide the QTIP and make an intentional 2519 transfer to trigger use of the remaining exemption with the remaining portion of the QTIP remaining intact and deferring estate tax. If the QTIP permits distribution of principal for planning purposes a distribution may provide an alternative planning option.

l. Gift tax return, gift splitting and GST.

i. PLRs 201811002.

ii. H created and funded irrevocable trust for children and descendants.

iii. CPA did not read the return, tax law etc.

iv. Married couple cannot file joint tax return. But if donor and spouse both consent all gifts made during the calendar year are deemed made ½ by each spouse.

v. 2513 gifts by husband and wife to third party. 2513(a) indicates considered made ½ by each. If spouses elect to split gifts they cannot pick and choose what to split all gifts must be split subject to very limited exceptions.

vi. CPA reported 25% made by W and 75% by H and failed to allocate GST and GST automatic allocation rules did not then exist. Years later H made a late allocation of GST to the property, but W did not make a late allocation of GST.

vii. Wife died perhaps decades later. Was H transferor of 75% of gift tax purposes? The amount of taxable gifts is the amount finally determined for gift tax purposes and cannot be adjusted later. Could not change the amount of the gift back later to 50/50 since reported 75/25 even though wrong. H was nonetheless treated as transferor of 50% of the property for GST purposes no matter what percent the husband was treated as being donor for gift tax purposes. Reg. 26.2652-1(a)(4). Therefore, H's late allocation of GST only applied to ½ the property, and W had not made a late allocation.
viii. IRS permitted Wife to make late allocation of GST to get a zero inclusion with 9100 relief.

m. Modifications.
    i. GST ruling PLR 201814001.
        1. The issue was whether adopted children would not be included as settlor had wished as a result of a drafting ambiguity.
        2. A judicial construction of the trust was necessary to resolve the ambiguity and correct a scrivener's error. The PLR held that this would not cause a grandfathered GST exempt trust to be subject to GST tax.
        3. IRS reasoning was that the Court settlement of bona fide dispute and the construction was consistent with state law.
        4. Cannot increase time of vesting and cannot shift beneficial interests to a lower generation.

n. Portability PLRs.
    i. Portability rulings issued where estate was not required to file return, taxpayer acted reasonably and in good faith. Rev. Proc 2018-1.
    ii. Rev. Proc. 2017-34 grants relief procedure if estate is not required to file an estate tax return. Must act by second anniversary date of death of decedent.

o. Liability for Estate Tax.
    i. United States v. Paulson, 2018 WL 4282682, 122 AFTR 2d 2018-5808.
    ii. Who is executor? Executor is usually not liable for paying estate tax unless makes distributions before tax paid.
    iii. Gross estate of 200M deferred some under 6166. 10 years later IRS rescinded 6166 elections as estate missed some payments. Five years later still had outstanding liability. Children and third wife filed cross claims.
    iv. Executor can follow procedure to be released from personal liability after filing the estate tax return. If executor is released from personal liability other fiduciaries can also file.
    v. Decedent's son was held to be executor and held liable to the extent of estate assets and liable under 6324(a) as trustee of decedent's revocable trust. Decedent's third wife was also liable under 6324 because she became trustee three years later.

p. Charitable contributions and charities.
    i. CCA 201747005.

1. Trusts are not subject to percentage limitations that individual taxpayers are for charitable contributions.
2. However, trusts are subject to the Code Sec. 642(c) special limitation that is not applicable to individual donors. Donations for trusts must be made pursuant to terms of governing instrument. Trust should authorize donations for trust to claim deduction.
3. Trust was modified and then made donations.
4. IRS held that it was created by court approving modification that was not contained in initial instrument. So, the charitable deduction was lost.
5. **Comments**: With the growth in use of non-grantor trusts for income tax benefits, and the continuing trend to pass wealth in long term trusts, practitioners should consider including permission for trusts to make charitable contributions more often. Trusts can avoid the loss of donations because of the higher double standard deduction for some clients. For other clients, as a greater portion of wealth tends to be received in trust, this can add important flexibility. If a trust cannot make a contribution because of the lack of authorization in the governing instrument consideration might be given to investing in a partnership that makes donations and passes deductions back to the trust.

ii. Charity or Assignment of Income?

1. Chrem v. Commissioner, T.C. Memo. 2018-164.
2. Shareholders made donation of shares to charity. The IRS claimed that the assignment of income doctrine applied so shareholders should have to pay tax on gain and should not be able to shift some of that gain to charity.
3. It is a question of fact as to whether charity could stop transaction. Was the charity obligated to complete the transaction?
4. Another issue in the case was the questionable appraisal the taxpayers submitted. The taxpayers used an ESOP appraisal which did not clearly meet the substantiation regulations for a charitable contribution.

iii. Green - Appreciated property.

1. Green v. US, 880 F.3d 519 (10th Cir. Jan 12, 2018).
2. Charitable donation rules differ for trusts from the rules applicable to individuals.
3. Trusts are limited to a contribution deduction to basis. Trusts can only deduct amount of gross income paid to charity, so no gross income is being donated.
4. The trust donated appreciated real estate. It should have sold the real estate and donated the proceeds.
5. **Comment**: Most clients will not qualify for a charitable contribution deduction. Estimates were that 30 million taxpayers itemized in 2017 and that will drop to a mere 5 million. As a result, using Qualified Charitable Distributions from IRAs, bunching

deductions and using non-grantor trusts, may all become more common planning tools. The Code Sec. 642(c) requirements trusts must meet for those donations to qualify for contribution deductions will become more important as the use of trusts for the purpose of circumventing restrictions on itemized deductions and higher standard deductions, will grow.

iv. Platts lost deduction.
    1. Platts v. Commr. TC Memo 2018-31.
    2. Reported donation of house to camp and deducted 100% appraised value.
    3. Taxpayer was not entitled to a deduction.
        a. Taxpayer filed return late, a year after extended due date.
        b. Made in 2000 and tried to deduct in 2001. Can only deduct in year made.
        c. Appraisal did not meet any of the requirements of a qualified appraisal. The taxpayer donated a house but in fact the house was disassembled by the camp/charity and used for or as building supplies. There was no rationale for deducting the value of a house. The value that should have been appraised and deducted should have been limited to the parts of the disassembled house.
    4. 76 months in prison for tax evasion, money laundering, etc.

v. Rev. Proc. 2018-32, 2018-23 IRB 739.
    1. Taxpayer can rely on status of exempt organization
    2. Grant making and reliance on IRS recognition of exempt status.
    3. Replaces four prior Revenue Procedures as to reliance issues.
    4. Publication 78 is only available electronically. Lists organizations that can receive tax deductible donations.
    5. Tax exempt Organization Business Master File. Can look at information on tax exempt organizations including determination letters, Forms 990, etc. Need to download information form to interpret the data base.

vi. Substantiation Regulations finalized.
    1. TD 9836. Reg. Sec. 1.170A-15 – 18.
    2. Different substantiation requirements if have one form from charity you do not need separate acknowledgments for each requirement.
    3. Blank pledge card is not sufficient for cash gifts.
    4. Appraisal must be from qualified appraisal.

vii. Valuation and Substantiation Issues.
    1. Grainger v. Commissioner, T.C. Memo. 2018-117.
    2. Taxpayer purchased product at discount with loyalty appoints. Donated and claimed deduction based on fair market value supported by a blank goodwill receipt. The tax deduction was more than what she paid. Substantiation problem.

            3. Also, large donation requires substantial acknowledgement from charity, etc. Valuations were wrong cannot use what retailed for, but rather what was paid for it is the measure.

q. Inflation Adjusted Amounts 2019.
    i. Rev. Proc. 2018-57.
    ii. Gift exclusion $15,000.
    iii. Estate exemption BEA $11.4M.
    iv. Non-citizen spouse annual exclusion $155,000.
    v. Standard deduction $24,400 MFJ (consider for need to plan other ways to qualify charitable contributions).
    vi. QBI Thresholds increase for MFJ from 315,000 to $321,400 and for single taxpayers from $157,500 to $160,700.

r. Split-Dollar.
    i. Machacek v. Commissioner, 2018 WL 4939080.
    ii. S corporation. Doctor was sole shareholder of S corporation. When distribution treated as distribution of property first offset with basis thereafter capital gain treatment (not ordinary income as compensation).

s. Qualified Opportunity Zones.
    i. What are estate planning implications? Issues?
    ii. New Code Secttions1400Z-1 and 1400Z-2
        1. Provide benefits for investing in distressed communities referred to as opportunity zones.
        2. About 8700 identified by census track.
        3. Two tax benefits. You can defer and potentially partially exclude capital gains that you invest in qualified opportunity funds.
        4. If hold it for at least 10 years can exclude gain from fund.
        5. Gain deferral is until 2026.
        6. If dispose of qualified opportunity fund will trigger gain.
        7. Qualified opportunity fund is a corporation or partnership that invests 90% of its assets on June 30 and December 31 in qualified opportunity zone properties.
            a. Qualified tangible property in trade or business when original use commences with that corporation or partnership, so this is new property in a distressed area.
            b. Substantial improvement to existing property to be substantial must double basis.
            c. Invest in stock that has qualified opportunity zone property.
            d. Invest in partnership interests that own qualified opportunity zone property.
    iii. What if investor dies in 2024? It is treated as IRD and there is no step up in basis on inheriting this.
        1. What if tax beneficiary on decedent's deferred gain.
        2. If at end of 2026 must recognize initial gain and there is no step up in basis?

3. Can you make a gift of a qualified opportunity fund? Believe there is a carryover in income tax basis, but clarification has been requested.
4. Must make this investment within 180-days of realizing gain. What happens if a trust has a capital gain? Does beneficiary have 180 days from when trust has gain or does 180 days begin on date beneficiary gets distribution? What if beneficiary gets K-1 after close of year? Should begin on last day of tax year not when trust realizes gain.

iv. Speaker cautioned that although the tax benefits might sound seductive, these are investments and clients should consider investment risks before proceeding.

t. State tax developments.

i. State estate tax statutes.
1. In light of increase in federal exemption some states have backed off of using federal exemption.
2. Maryland has adopted portability for state estate tax and state estate tax exemption is equal to federal.
3. Hawaii has portability.

ii. See Skip Fox's chart on state death taxes. This is also available on line at: http://media.mcguirewoods.com/publications/State-Death-Tax-Chart.pdf

iii. State QTIP issues.
1. Controller of the Treasury v. Taylor, 189 A.3d 799.
   a. H died in Michigan. W moved to Maryland which has a separate estate tax. MD said QTIP property included in MD estate for MD estate tax. Court said no as there was no MD QTIP election made .
   b. Win for taxpayer.
   c. Case is on appeal so result not certain.
2. In re Estate of Seiden, NYLJ 10/12/18 p.23 Col. 5.
   a. H died in NY in 2010 when no federal estate tax. NY QTIP election was made but no federal return filed so no federal QTIP.
   b. W died in 2014 in NY.
   c. Resident gross estate is defined as federal gross estate. But because H died in 2010 no federal QTIP so QTIP could not be included in federal gross estate and could not therefore be in NY gross estate.
3. Holdings are quite specific. May have multiple state QTIP trusts. May be advantageous to pay state estate tax on first death.

iv. States that have separate estate tax – some allow state QTIP to defer state estate tax until second death e.g. when state estate tax is less than federal exemption. 13 states have state estate tax but not all permit state QTIP.

v. State income taxation of undistributed income of a trust.
1. If trust has minimal contacts with a state will it suffice to let the state tax income of that trust?

2. Can a state where a beneficiary lives tax trust income even though the trust has no other contacts to that state?
3. Several states including Illinois, Minnesota, NJ, and PA held no.
4. Two cases this year adding to trend.
   a. NC – current beneficiary in NC and that was enough for taxation, but NC Supreme Court held that it violated the constitution to tax. Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Dept. of Revenue, 814 S.E.2d 43 (N.C. June 8, 2018), aff'g 789 S.E.2d 645 (N.C. App. 2016). The court referenced Quill and minimum contacts that might be required. Important to the analysis was that the trust was a separate taxpayer from the beneficiaries who lived in NC. Kaestner – the settlor of the trust was NY and trustee initially was NY and changed to CT, contingent beneficiaries were not in NC. Infrequent communications with beneficiaries in years involved. Is that enough to establish minimum contacts so that NC could subject trust to income taxation? The case made an analogy to an entity. A beneficiary might be analogous to a shareholder. That should not be enough.
   b. MN – no other connections with MN and MN Supreme Court said if violated due process. . Fielding v. Commissioner of Revenue, 2018 WL 3447690 (Minn. July 18, 2018), aff'g 2017 WL 2484593.
5. Wayfair.
   a. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (June 21, 2018).
   b. May affect the state taxation of trusts.
   c. The Supreme Court concluded that a state can require company to collect a sales tax. The taxpayer had no physical presence in most states so does that mean those states cannot require that they collect sales tax? The Supreme Court held that physical presence is not the right test with the internet and electronic commerce. No longer need physical presence.
   d. The Quill case had required physical presence to charge sales tax. In Quill the court found that the sales tax requirements did not violate the due process clause – found a deluge of mailings to states that satisfied due process. Quill v. North Dakota, 504 U.S. 298 (1992).
   e. Quill had been cited in many of the recent federal income tax cases in terms of minimum contacts.
   f. In the Wayfair case how did they establish substantial nexus? Under NC law companies in other states will be required to collect sales tax? 200 or more separate transactions and $100,000 of sales into NC?

6. Does the Wayfair holding affect trust taxation? If Quill, which required physical presence, has been overruled by Wayfair, will trust taxation change?
7. MN and NC filed with US Supreme Court.

u. Pretermitted Share.
   i. Kulig (PA).
   ii. How should a surviving spouse's rights to an elective share be determined and on what asset base? Some believe that looking at the aggregate of both spouse's entire estates is the right base. However, some pretermitted statutes usually are confined to probate estate. Thus, a spouse could reduce the amount potentially reachable by the surviving spouse by changing the composition of assets to remove them from the base. What rights might a child born after a will was signed have?
   iii. Kulig H created trust while W-1 alive. Then he married W-2 but did not amend will. H died a mere 35 days later.
   iv. PA protects surviving spouse. The surviving spouse can claim a share that would he or she would have received had the decedent died intestate and an elective share based on 1/3rd of probate estate and revocable trust. W claimed that revocable trust was part of estate for purposes of calculations. If the surviving wife took her elective share she would get 1/3rd. If she was correct under the pretermitted heir statute, she would get ½ of the estate.
   v. Court concluded W's intestate share did not include revocable trust.
   vi. Practitioners should determine the amount the surviving spouse may receive under each of the available options under state law, which may differ significantly. The differing amounts should also be evaluated from the perspective of costs of obtaining and possible litigation risks.

v. In re Craig NH case for non-spouse pretermitted heir.
   i. NH legislature changed the NH trust code to make clear that pretermitted heir statute is not a rule of construction to which the NH trust code applies.

w. Holographic Will.
   i. Bradway executed will naming Coleman (Partner 1) as executor etc. Relationship ended and Bradway signed holographic will to name Partner 2.
   ii. Bradway died. Partner 1 claimed holographic will was not effective. Claimed codicil had not been signed at death.
   iii. Court upheld validity of codicil. NJ recognizes holographic unwitnessed written wills if signed. NJ also recognizes validity of unsigned wills if clear and convincing evidence that the decedent intended the document to be his will. The court found the codicil prepared in testator's own blood as evidence.

x. In Terrorem provisions.
   i. 46 states will recognize in terrorem.
   ii. 28 of these states have exceptions if beneficiaries bring will contest in good faith, with probable cause or both.
   iii. Court did not recognize a probable cause exception.

1. Duncan v. Rawls, 812 S.E. 2d 647 (Ga. 2018).
2. Trustees of revocable trust made distribution and beneficiaries asked for higher bequest not reflecting a later change that reduced their distributions.
3. GA statute did not include an exception to challenging the document that would have provided protection from the impact of an in terrorem clause. Court said it would not create an exception so court would not recognize a good faith exception.

y. What is required for valid will?
   i. In re Estate of Horton, 2018 WL 3443383.
   ii. Court held "document" did not meet requirements of a valid will.
   iii. Harmless error rule – if clear and convincing evidence decedent intended it to be a will it was recognized as such.
   iv. Few states have the harmless error rule, so the applicability of this case/reasoning is limited.

z. Electronic wills.
   i. Nevada was first state to pass an electronic wills statute.
   ii. Uniform Electronic Wills Act will be completed this summer and sent to states for consideration.
   iii. Electronic wills "may be coming." Whatever most people think of the them (one speaker was deeply opposed given the risks they create), but another commented whatever we think today may be quite different in 20 years. A discussion ensued pointing out the benefits of the ease of an electronic. But what will become of safeguards?
   iv. Some of the factors to consider concerning electronic wills.
      1. Consideration of remote notarization and remote witnessing.
      2. How do you revoke an electronic will?

aa. Digital Assets.
   i. Stored Communications Act (SCA) did not prohibit disclosure by Yahoo of information to executor. Cert has been denied.
   ii. Ajemian v. Yahoo!, Inc., 84 N.E. 3d 766 (Mass. 2017), petition for cert. docketed sub nom. Oath Holdings, Inc. v. Ajemian (U.S. No. 17-1005, Jan. 19, 2018).

bb. Forgey.
   i. In re Estate of Forgey, 298 Neb. 865 (2018).
   ii. Trustee filed estate tax return late and incurred substantial penalties. He failed to account to beneficiaries and failed to divide trust into separate shares for 20 years.
   iii. Trustee had statutory duty to keep beneficiaries informed even before UTC was enacted. Once UTC was enacted he had a statutory duty to inform beneficiaries.
   iv. Beneficiaries should not have to litigate to get trustee to account. Beneficiaries said that was not sufficient. The remedy for a trustee failing to inform or account is to account. The beneficiaries wanted fees and costs and court awarded those to the beneficiaries. Court reasoned that had they

not done that there would have been no penalty against the trustee for not having accounted.

cc. Trust modifications.

i. Horgan v. Cosden, 249 So.3d 683 (Fla. Dist. Ct. App. May 25, 2018), review denied, No. SC18-1112, 2018 WL 3650268 (Fla. July 30, 2018).
ii. Beneficiaries agreed to a trust modification, but court refused to permit it.
iii. Beneficiaries wanted to terminate trust. Co-Trustee did not agree that settlor intended termination and objected.
iv. FL statute considers best interests of beneficiaries, etc. Reasons cited in the case were avoiding market fluctuation and fees.
v. Co-Trustee argued settlor did not intend what was being attempted.
vi. The beneficiaries preferred a different course then what settlor intended, including intent that income beneficiary would get income distributions not a lump sum. Settlor expressly provided for income payments over his life even if did not spell out in the trust document.
vii. **Comment**: With decanting, trust protector actions, non-judicial modifications, exercise of powers, etc. having grown so common, some beneficiaries assume anything that they want done to an irrevocable trust will be rubber stamped by the courts. This case is a reminder that is not the case.
viii. Modification of Trust Rejected.
    1. Shire v. Unknown/Undiscovered Heirs, 907 N.W.3d 263 (Ne. 2018).
    2. The trust provided for a modest $500/month payment to daughter then granddaughter.
    3. A good case could be made that such was not the settlor's intent so requested modification of the will. No beneficiary that were located disagreed.
    4. Judge appointed attorney to represent unknown beneficiaries did not consent.
    5. Court concluded looking at various modification statutes (411(a) UTC, 411(b) consent of all beneficiaries, 411(e) court could have modified if all beneficiaries agreed, 412(a) unanticipated circumstances but when Nebraska adopted it was for trusts after a certain date so it did not apply).
    6. Do not assume that trust can be modified just because beneficiaries agree.
    7. Be careful using pecuniary amounts in long term trusts.

dd. Domestic Asset Protection Trusts (DAPTs).

i. Can settlor create a DAPT?
ii. 17 states permit DAPTs.
iii. The question is to what extent does a client living outside an asset protection jurisdiction protect himself from
iv. Toni 1 Trust.
    1. Toni 1 Trust v. Wacker, 2018 WL 1125033 (Alaska, Mar. 2, 2018).

2. Montana judgements issued by Montana court issued, etc.
3. Put Montana real estate into Alaska DAPT after the judgements have been entered.
4. Fraudulent transfers.
5. Trustee of the DAPT brings an action in AK asking an AK court to determine that Montana law has no jurisdiction.
6. AK law provides that AK law has exclusive jurisdiction over challenges to assets in an AK trust.
7. AK Supreme Court said cannot bar MT court in this fact pattern.
8. It was a transfer to defraud creditors and because of that some may suggest that the case provides little new law on the matter. Others say its bad facts so don't be concerned.
9. What can be concluded:
    a. We know a DAPT works if all assets and other matters are within one DAPT state.
    b. We know a DAPT does not work when all connections are in the non-DAPT state (like in Toni 1 Trust). **Comment**: Not all would agree with this conclusion and might state this differently, e.g. we know from Wacker that if there is a fraudulent conveyance a DAPT doesn't work regardless of which state is involved, but no more. Self-settled trusts are clearly different than fraudulent transfers. Nearly everyone in America takes some action to avoid future claims that might otherwise arise. Informed individuals enter prenuptial agreements when they marry to protect their assets if they get divorced. In fact, a common use of DAPTs is not nefarious or inappropriate avoidance of creditors, but as a backstop to legitimate premarital planning. See Sandra D. Glazier, Martin M. Shenkman & Alan Gassman on "DAPTs & Klabacka - At the Intersection of Estate Planning and Family Law," Steve Leimberg's Asset Protection Planning Email Newsletter Archive Message #357, Date: 01-Feb-18.
    c. What we do not know is what happens when there is a mix. We do not know how conflict of law issues will be resolved.
10. **Comment**: All that the Supreme Court of Alaska held was that Alaska could not require that proceedings relating to the transfer of assets to an Alaska self- settled trust be before an Alaska court. It did not invalidate self-settled trusts created in that state. Although courts in other jurisdictions entered a default judgment on fraudulent transfer allegations, the viability of Alaska self-settled trusts to shield trust assets from the claims of the grantor's creditors was not disturbed. See Asset Protection Planning Newsletter #362 (March 19, 2018).

11. **Comment**: With such current large temporary estate tax exemptions many clients should transfer substantial wealth to irrevocable trusts to secure as much exemption as feasible. How many moderate ("moderate" relative to the new exemptions) wealth clients will be willing to make such transfers will depend, in part on what practitioners can offer in terms of access to the assets transferred. Whether it is a DAPT, hybrid DAPT or some other variation, access will be the critical factor. Most or perhaps all of such clients might have no issues with fraudulent conveyances, or any creditor issues, but will want to merely take advantage of the current temporary exemptions. For married clients use of non-reciprocal spousal lifetime access trusts (SLATs) may be viewed by some as a more secure means of securing exemption and providing access. But single clients cannot avail themselves of SLATs. The differing result that some imply for the validity of DAPTs versus SLATs could put single clients at a substantial disadvantage compared to married clients in effecting such planning.

CITE AS:

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2699

Date: 22-Jan-19

From: Steve Leimberg's Estate Planning Newsletter

Subject: Martin M. Shenkman's Meeting Notes from Heckerling 2019, Tuesday-Friday Notes

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. Heckerling, as it is affectionately known, is the nation's leading conference for estate planners, attorneys, trust officers, accountants, insurance advisors and wealth management professionals. 2019 is the 53rd installment of Heckerling, and for those not fortunate enough to be in sunny Orlando, the meeting this year runs from Monday, January 14th through Friday, January 19th.

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Steve Leimberg recently noted that:

> Every tax professional in the country will (or should be) reading this book! This is the most complex and far reaching tax law passed in the over 50 years I've been studying, teaching, and writing about tax law and this resource arms you not only with the necessary and vital information you need to know but also the thinking and planning concepts of three of the brightest minds in the tax world!

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 posts video clips to www.laweasy.com, and blogs on Forbes.com.

Click this link to read Marty's Tuesday-Friday Heckerling notes.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Marty Shenkman

CITE AS:

Heckerling Institute 2019

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1. Tuesday: Morning 1: 199A: Willms
    a. Comment: Friday afternoon just after the Institute concluded final regulations and additional pronouncements were issued on 199A:
        i. Final regulations.
        ii. Rev. Proc. 19-11 providing guidance on determining W2 wages under Sec. 199A.
        iii. Notice 2019-07 contains a proposed revenue procedure that provides for a safe harbor under which a rental real estate enterprise will be treated as a trade or business solely for purposes of section 199A of the Internal Revenue Code (Code) and §§ 1.199A-1 through 1.199A-6 of the Income Tax Regulations (Regulations) (26 CFR Part 1), which are beingpublished contemporaneously with this notice. To qualify for treatment as a trade or business under this safe harbor, the rental real estate enterprise must satisfy the requirements of the proposed revenue procedure. If an enterprise fails to satisfy these requirements, the rental real estate enterprise may still be treated as a trade or business for purposes ofsection 199A if the enterprise otherwise meets the definition of trade or business in § 1.199A-1(b)(14).
        iv. The comments and discussions below do not yet reflect the changesmade in the final regulations and additional pronouncements above.
    b. Introduction.
        i. Deduction for individuals that receive qualified business income from pass through entities.
        ii. Must be connected with active US trade or business.
        iii. QBI = qualified business income.
            1. Excludes dividends and capital gains.
            2. PTP and REIT income comes in separately.
    c. Definitions and basic concepts.
        i. QBI is at the heart of the 199A deduction.
        ii. Alternative limitation = wage and capital calculation.
        iii. It can apply at certain levels of taxable income, level 2 and 3.
        iv. 50% of W2 wages or 25% of W2 wages and 2.5% of qualified property.
        v. Must net negative QBIs against positives.
    d. Property.
        i. Unadjusted basis of qualified property = UBIA. UBIA = unadjusted basis immediately after acquisition of qualified property held for use in thetrade or business.
        ii. Depreciation – look at placed in service date and property is includedfor lesser of 10 years or qualified service life.

iii. Later improvements to property become a separate UBIA qualified property that must be tracked.
iv. Must use unadjusted basis. Look at Code Sec. 1012. Code Sec. 1014 basis adjustment seems to apply.

e. Wages.
   i. Calculations determined at an individual level.
   ii. W2 wages are not what is earned but what is allocated from the trade or business to the owner.
   iii. W2 wages determine W2 wages. Must report timely and on W3 no later than the 60th day after the due date or they are presumed to be zero.
   iv. Must allocate W2 wages among different trades or businesses.
   v. More wages, mean more 199A deduction but it's a balance as more wages reduce the profits on which the 20% deduction is calculated.

f. Taxable Income threshold.
   i. 2018 threshold amount is 157,500 single and 315,000 MFJ. <u>Comment:</u> See inflation figures for 2019 in current development notes from Monday.
   ii. Phase in amount. If have \$50,000 more single or \$100,000 MFJ moves taxpayer to level 2.
   iii. Non-grantor trusts are treated as single filers.
   iv. Taxable income is calculated in the normal manner, but you do not reduce it by the 199A deduction (avoids circulate calculation).

g. <u>Comments:</u> Can non-grantor trusts be used to expand the taxable income threshold?
   i. Can the client gift entity interests to heirs/non-grantor trust and enhance 199A benefits? Clearly the Proposed Regulations restrict this type of planning, although there may be some limited planning that is still feasible despite those regulations.
   ii. Apart from the Proposed Regulations under 643(f) and the anti-abuse rules under the 199A proposed regulations, there is another issue that has received scant attention. If a parent, for example, wants to gift interests in a family business to a child or non-grantor trust to enhance 199A benefits, another issue should be considered. For a partnership (LLC taxed as partnership, GP or FLP) will Section 704(e) (the Family Partnership Rule) and the requirement that capital be a material income producing factor impede the effectiveness of the gift? If the family partnership rule does not apply another hurdle remains.
   iii. Can a taxpayer use several non-grantor trusts? Might non-grantor trusts work? Each non-grantor trust may take a section 199A deduction and have its own income thresholds. hence, each such trust can have QBI and, if not in excess of the threshold for single filers (that is, not in excess of \$157,500), take an above the line deduction, equal to 20% of its QBI and the balance of the income can be separately taxed to the trust (and assuming the income is not deemed distributed to beneficiaries as DNI) and have its own deduction for state and local income tax (up to \$10k).

h. <u>Comments:</u> 643(f) Proposed Regulations and the multiple trust rule affects 199A planning.

i. The proposed regulations contain an anti-income tax avoidance rule under Section 643(f) to treat multiple trusts as a single trust in certain cases. Section 643(f) further provides that, for these purposes, two spouses are treated as a single person.
ii. The proposed regulations would establish anti-abuse rules under section 643(f) to prevent taxpayers from establishing multiple non-grantor trusts or contributing additional capital to multiple existing non-grantor trusts in order to avoid federal income tax, including abuse of section 199A.
iii. in the case in which two or more trusts have: (1) substantially the same grantor or grantors; and (2) substantially the same primary beneficiary or beneficiaries, and (3) a principal purpose for establishing such trusts or contributing additional cash or other property to such trusts is the avoidance of Federal income tax, then such trusts will be treated as a single trust for Federal income tax purposes.
iv. Proposed Reg. 1.199A-6(d)(3)(v) provides, under a heading saying Multiple Trusts, that trusts formed or funded with a significant purpose of receiving a deduction under section 199A will not be respected for purposes of section 199A.
v. What is a "Principal Purpose" Under 199A? A principal purpose. A principal purpose for establishing or funding a trust will be presumed if it results in a significant income tax benefit unless there is a significant non-tax (or non-income tax) purpose that could not have been achieved without the creation of these separate trusts.
vi. If the trust uses the client's temporary exemption and provides asset protection, neither of which could have been achieved without the trusts involved (certainly one non-grantor trust, perhaps more than one), a principal purpose of income tax avoidance should not be presumed. As discussed in the Thursday afternoon session "Planning with increased Exemptions" there are significant estate tax and asset protection benefits to the creation of trusts. Might that deflect an IRS challenge that the principal purpose of the trust is income tax avoidance. Would salvaging a $5M or greater exemption (the temporary exemption that will be lost in 2026) not exceed the value of the purported income tax savings?
vii. An example from Proposed Regulations is useful to consider in this regard: "Example 2. (i) X establishes two irrevocable trusts: one for the benefit of X's son, G, and the other for X's daughter, H. G is the income beneficiary of the first trust and the trustee is required to apply all income currently to G for G's life. H is the remainder beneficiary of the first trust. H is an income beneficiary of the second trust and the trust instrument permits the trustee to accumulate or to pay income, in its discretion, to H for H's education, support, and maintenance. The trustee also may pay income or corpus for G's medical expenses. H is the remainder beneficiary of the second trust and will receive the trust corpus upon G's death. (ii) Under these facts, there are significant non-tax differences between the substantive terms of the two trusts, so tax avoidance will not be presumed to be a principal purpose for the

establishment or funding of the separate trusts. Accordingly, in the absence of other facts or circumstances that would indicate that a principal purpose for creating the two separate trusts was income tax avoidance, the two trusts will not be aggregated and treated as a single trust for Federal income tax purposes under this section."

i. Implications by Taxable Income level (Stratum).
    i. Level one taxable income below threshold amount. 20% of QBI. Lesser of taxable income reduced by capital gains or 20% of QBI is the deduction plus 20% qualified REIT and PTP.
    ii. Level 3 – if above $207,500 or $315,000. Calculate taxable income. If SSTB no deduction for SSTB income. For non-SSTBs its 50% W2 wages or 25% W2 wages + 2.5% of UBIA, whichever is less, and that amount or 20% of QBI is the deduction. Combined QBI amount compared to taxable income less capital gains, and lesser of the two is your deduction.
    iii. Level 2 – SSTBs are subject to applicable percentage – phases out part of benefit.

j. SSTB.
    i. Impacts 199A deduction.
    ii. Only matter to individuals at income levels 2 or 3 as it will mean the reduction or complete loss of 199A deduction.
    iii. Business can have both SSTB and non-SSTB trade or business.
    iv. SSTB is based on both type of business and gross receipts.
    v. Discrepancy from Publication 535 a PTP must advise owners that it is a SSTB. Pub. 535 does not state that.
    vi. SSTBs include businesses in Health, law, accounting, actuarial sciences, trading in securities, etc. Based on Section 1202 categories but excluding architecture and engineering.
    vii. Proposed regulations add a great detail on this.
        1. Comments: The proposed regulations do add substantial detail. In most instances the detail is harsh and restrictive and in many cases the details are so narrow that they do not give the guidance practitioners may need.
        2. "Meaning of services performed in the field of health. For purposes of section 199A(d)(2) and paragraph (b)(1)(i) of this section only, the performance of services in the field of health means the provision of medical services by individuals such as physicians, pharmacists, nurses, dentists, veterinarians, physical therapists, psychologists and other similar healthcare professionals performing services in their capacity as such who provide medical services directly to a patient (service recipient). The performance of services in the field of health does not include the provision of services not directly related to a medical services field, even though the services provided may purportedly relate to the health of the service recipient. For example, the performance of services in the field of health does not include the operation of health clubs or health spas that provide physical exercise or

conditioning to their customers, payment processing, or the research, testing, and manufacture and/or sales of pharmaceuticals or medical devices."

3. Is a radiologist different then the provider that took the x-ray or MRI since it is not directly provided to a patient? If a radiologist does not provide services to a patient directly are they then covered under consultant. Does a pharmacist generally provide medical advice? Generally, not. Also, pharmacists are paid not for advice but for products. See PLRs under Section 1202 existing law excluded lab work. Is the distinguishing feature that work like lab work that has no judgment would be differentiated from a radiologist that has judgement? How does this relate to the treatment of pharmacists?
4. "Meaning of services performed in the field of law. For purposes of section 199A(d)(2) and paragraph (b)(1)(ii) of this section only, the performance of services in the field of law means the performance of services by individuals such as lawyers, paralegals, legal arbitrators, mediators, and similar professionals performing services in their capacity as such. The performance of services in the field of law does not include the provision of services that do not require skills unique to the field of law, for example, the provision of services in the field of law does not include the provision of services by printers, delivery services, or stenography services."
5. If a divorce mediator who is not a lawyer is that included? The regulations say "legal arbitrators" what about "legal mediators" versus just "mediators"?

viii. Regulations explicitly say when defining brokerage services includes stock brokerage but not life insurance brokers or real estate agents. Publication 535 says these are all SSTBs.

ix. If less than 10% of gross receipts from SSTB or if gross receipts more than 25M then 5% SSTB status is ignored. If you go $1 over de minimus rule all is tainted as SSTB.

x. Cannot easily split off SSTB as proposed regulations include attribution rules based on 50% of common ownership, etc.

xi. Incidental rules based on 50% common ownership and shared expenses.

xii. Comments:

1. SSTB planning issues abound and have changed significantly from what many practitioners anticipated prior to the issuance of the Proposed Regulations. For example, in the 2018 Institute we speculated, before any proposed regulations were written, what we could do to help a physician who operates a practice.
2. An FLP, separate from the practice entity, owns the building where the practice operates and leases the facilities to the practice entity.
3. Another FLP, independent from the practice and the real estate entity, was created by various family trusts and hired a graphics

designer and marketing firm. Those contractors created a practice name, logo, slogan, consumer facing website (i.e., one without client data), and related marketing materials that were licensed to the practice. The practice operates under the licensed name, uses the licensed logo and marketing materials on all letterhead, advertisements, signage, website and more.

4. Equipment was purchased and held in a third FLP. The equipment FLP leased equipment to the practice.
5. These ancillary entities would all seem to be non-SSTB's independent of the medical practice. Further, so long as the prices are arm's length for the rents and license fees the earnings in those entities should qualify for the Section 199A deduction.
6. Unfortunately, the aggregation and common ownership rules under Prop. Regulations prevent this type of planning, even if the structure was implemented for asset protection or estate planning reasons, and even if implemented before the 2017 tax act.
7. Aggregation and common ownership tests prevent anticipated planning.
8. (i) 80% and 50% Rules. An SSTB includes any trade or business that provides 80 percent or more of its property or services to an SSTB if there is 50 percent or more common ownership of the trades or businesses.
9. (ii) Less than Substantially All of Property or Services Provided. If a trade or business provides less than 80 percent of its property or services to an SSTB within the meaning of this section and there is 50 percent or more common ownership of the trades or businesses, that portion of the trade or business of providing property or services to the 50 percent or more commonly-owned SSTB is treated as a part of the SSTB.
10. (iii) 50 Percent or More Common Ownership. 50 percent or more common ownership includes direct or indirect ownership by related parties within the meaning of Sections 267(b) or 707(b).

k. Trust or estate.
   i. Use DNI rules to determine what passes out to beneficiaries or held in trust.
l. Information.
   i. Distribution deduction is not taken into account, but separate share rule is.
   ii. Publication 535 on business expenses released in December 2018 which includes discussions of 199A.
m. Aggregation of Trades or businesses.
   i. May need to aggregate.
   ii. Only level 2 and 3 taxpayers are concerned.
   iii. SSTBs are not allowed to aggregate.
   iv. 3 tests
      1. Common ownership.
      2. Common tax year.

3. Common business.
v. Family attribution: spouse, children, grandchildren and parents. Siblings are missing from the list. Nothing provided for trusts and estates and their beneficiaries to address attribution.
vi. Schedule B – regulations require statement be attached to return showing aggregation. If not, the IRS may disaggregate.

n. Rules of thumb.
i. Make pension contribution to reduce taxable income.
ii. 2/7ths Rule – if you know W2 wages exceeds 2/7ths gross QBI then the alternative limitation will never apply. 20% of QBI will always be less. So UBIA will not matter. But if W2 wages don't exceeds 2/7ths of gross QBI the alternative limitation may apply. Even if no W2 wages UBIA may provide some benefit.

o. Comments: Net leases raise uncertainty and planning issues under the Proposed Regulations.
i. Multiple commenters stated that section 162 is the most appropriate definition for purposes of section 199A. Although the term trade or business is defined in more than one provision of the Code, the Department of the Treasury (Treasury Department) and the IRS agree with commenters that for purposes of section 199A, section 162(a) provides the most appropriate definition of a trade or business. This is based on the fact that the definition of trade or business under section 162 is derived from a large body of existing case law and administrative guidance interpreting the meaning of trade or business in the context of a broad range of industries. Thus, the definition of a trade or business under section 162 provides for administrable rules that are appropriate for the purposes of section 199A and which taxpayers have experience applying and therefore defining trade or business as a section 162 trade or business will reduce compliance costs, burden, and administrative complexity.
ii. "Trade or business means a section 162 trade or business other than the trade or business of performing services as an employee. In addition, rental or licensing of tangible or intangible property (rental activity) that does not rise to the level of a section 162 trade or business is nevertheless treated as a trade or business for purposes of section 199A, if the property is rented or licensed to a trade or business which is commonly controlled under §1.199A-4(b)(1)(i) (regardless of whether the rental activity and the trade or business are otherwise eligible to be aggregated under §1.199A-4(b)(1))." Does this imply that a triple net leased property is not a trade or business? See examples following.
iii. "Example 1. D, an unmarried individual, owns several parcels of land that D manages and which are leased to several suburban airports for parking lots. The business generated $1,000,000 of QBI in 2018. The business paid no wages and the property was not qualified property because it was not depreciable. After allowable deductions unrelated to the business, D's total taxable income for 2018 is $980,000. Because D's taxable income exceeds the applicable threshold amount, D's section 199A deduction is

subject to the W-2 wage and UBIA of qualified property limitations. D's section 199A deduction is limited to zero because the business paid no wages and held no qualified property."

iv. Does the above example from the regs imply that a 162 business is necessary because of the use of the term "manages?" Does the fact in the example that there are "several" parcels imply a trade or business that would qualify for 199A and thereby imply that a single parcel of net leased real estate would not rise to the level of a trade or business and hence not qualify under 199A? However, this appears to be a mere land lease? Also, expenses are modest and there are no wages? With a mere $20,000/$1,000,000 of expenses and leasing mere land, would this suggest that the 162 test does not apply to rental real estate for purposes of 199A qualification as QBI as this states it does qualify as QBI.

v. "Example 2. Assume the same facts as in Example 1 of this paragraph (d)(4), except that D developed the land parcels in 2019, expending a total of $10,000,000 to build parking structures on each of the parcels, all of which is depreciable. During 2020, D leased the parking structures and the land to the suburban airports. D reports $4,000,000 of QBI for 2020. After allowable deductions unrelated to the business, D's total taxable income for 2020 is $3,980,000. Because D's taxable income is above the threshold amount, the QBI component of D's section 199A deduction is subject to the W-2 wage and UBIA of qualified property limitations. Because the business has no W-2 wages, the QBI component of D's section 199A deduction will be limited to the lesser of 20% of the business's QBI or 2.5% of its UBIA of qualified property. Twenty percent of the $4,000,000 of QBI is $800,000. Two and one-half percent of the $10,000,000 UBIA of qualified property is $250,000. The QBI component of D's section 199A deduction is thus limited to $250,000. D's section 199A deduction is equal to the lesser of (i) 20% of the QBI from the business as limited ($250,000) or (ii) 20% of D's taxable income ($3,980,000 x 20% = $796,000). Therefore, D's section 199A deduction for 2020 is $250,000."

vi. Does this imply that a 162 business is not necessary because expenses are modest and there are no wages? With a mere $20,000/$1,000,000 of expenses and leasing mere land, would this suggest that the 162 tests does not apply to rental real estate for purposes of 199A qualification as QBI as this states it does qualify as QBI. This does appear to sanction a triple net lease regardless of the application of the 162 definitions of trade or business.

p. Comment: Section 199A applies to taxable years beginning after 2017 and before 2026. While obvious to all practitioners it warrants emphasizing the sunset of these rules. When evaluating the cost of planning to enhance whatever benefits might remain consideration of the years for which that benefit may be limited is important.

2. <u>Tuesday: Morning 2: 1202 Qualified Business Stock: Lee</u>
    a. Qualified Small Business Stock Code Sec. 1202
        i. Benefits.
            1. Estate planners should think about Sec. 1202 more than before.
            2. QSBS can provide 100% capital gain exclusion on sale of stock.
            3. Can rollover gain in 1035 exchange by reinvesting in other QSBS companies.
            4. While there are limitations with the amount of exclusion you can multiply that exclusion many times over using gifts, death transfers, etc.
        ii. Negative considerations.
            1. QSBS is not elective. You are stuck with it if you are a QSBS.
            2. Has to be C corporation.
            3. Hold on to stock for 5 years
            4. In past had to sell the stock not the assets.
    b. Background.
        i. Regulations have two subsections -1 and -2. The -1 Regulations is for old section 1202 so ignore it. The -2 regulations only address a small amount of the qualifications for 1202. Much of the literature on 1202 has errors.
        ii. 1993 when 1202 enacted LTCG (long term capital gain) rate was 28%. In 1998 15% LTCG rate came into existence. There is a special rate for small business stock 28% rate, and worse at that time a large portion of the exclusion was an AMT preference item.
        iii. It was made a 75% exclusion rate, then in 2010 100% and AMT preference was removed.
        iv. If you have 50% QSBS because acquired when prior laws applied, you are still subject to that rule.
    c. TCJA makes a perfect opportunity for QSBS.
        i. 199A 20% deduction reduces 37% to 29.6% but few taxpayers will get that entire reduction. 199A will expire at end of 2025. Companies will look for exit strategies as will go back to 39.6% + 3.8% tax rate.
        ii. C corporate rate is permanently 21%.
        iii. Expensing of property.
        iv. Qualified opportunity zones (QOZ). Deferral reduction and exclusion. They may add a rollover feature similar to 1202.
    d. C corporation.
        i. If QSBS and held shares 5+ years if fully liquidate company in a taxable sale qualifies for 1202 100% exclusion getting rid of shareholder gain.
        ii. So even on asset sales QSBS may save.
    e. Venn Diagram of Qualified or Business overlap.
        i. Some companies may fall into some or all categories.
        ii. All trades or businesses do not qualify for 1202 or 199A.
        iii. 1202 Qualified trade or business.
        iv. 199A defines qualified trade or businesses. This encompass all of 1202.
            1. <u>Comment:</u> The speaker points out that despite all the excitement around 199A it is a temporary provision that will not be available

to many taxpayers. The outline suggests: “Unfortunately, most pass-through businesses will not get the full benefit of the 20% deduction. Generally, for taxpayers whose taxable income exceeds the threshold amounts the section 199A deduction will be limited based, in whole or in part, on: (i) the type of trade or business engaged in by the taxpayer; (ii) the amount of W-2 wages paid with respect to the trade or business; and (iii) the unadjusted basis immediately after acquisition of qualified property held for use in the trade or business. The latter two limitations are often referred to as the “wages and basis” limitations, and these limitations can significantly limit the deduction under section 199A of the Code. As such, many individual owners of pass- through businesses will continue to be taxed at 37% or at a slightly lower rate.”

v. Consider C corporation conversion since 199A is not permanent.

f. Overview

i. Exclusion percentage.

1. Exclusion percentage depends on acquisition date of stock. Was 50, then 75% after September 27, ,2010 100%.
2. Maximum rate about 23.8%.

ii. Per-issuer limitation.

1. Per issuer has nothing to do with amount of gain. Title is misleading. Two limitations are not mutual exclusive. Stacking per issuer limitation “down the line.”
2. 10 x basis in stock. This is not reduced by previous gains. If had 351 gain aggregate basis is not actual basis but the fair market value of the property when you acquired, it to get the QSBS. Also, any additions to basis are ignored. A step up in basis, for example, cannot be multiplied 10 x over. Sec. 1202(i)(2) says if you add basis, e.g. add capital, you can get it and if you add property its FMV of the property.
3. 10M per taxpayer reduced by aggregate gains in previous years.

iii. Qualified QSBS shareholder.

1. Any shareholder who is not a corporation.
2. Can acquire QSBS through a pass-through entity like a partnership, S corporation, regulated investment company or common trust fund.
3. Have to have held pass through on date of acquisition and at all times thereafter.
4. Does QSBS apply to carried interests in private equity funds?

g. QSBS definition.

i. Stock in C corporation. This is in 3 definitions in 1202.

ii. Issued after August 10, 1993. There is an internal inconsistency in the statute.

iii. Must be qualified small business on date of issuance.

iv. Acquired by taxpayer at original issuance for cash property or services. They do not want to give exclusion benefits to anyone who is not putting capital into business, they don't want to benefit someone buying it on secondary market.

v. Permissible transfers by gift, at death or in a transfer from a partnership to a partner. Definitions are not as anticipated. Note that transfer from S corporation to S corporation shareholder is not a permissible transfer even though from partnership to a partner is.

vi. Disqualifying corporate redemptions/purchases.

h. Eligible gain.

   i. 1202 exclusion and per issuer limitation is applied against "eligible gain" which his any gain from the sale or exchange of a QSBS which has been held by taxpayer for more than 5 years.

   ii. Tacking of transferor's holding person to the transferee is allowed for permissible transfers.

i. 1045 Rollover.

   i. If you have acquired and held for 60 days before selling you can rollover into new qualified small business stock but time period is only 60 days. Compare to QOZ funds which is 180 days.

   ii. Taxpayer has the option to elect rollover for each sale if there is more than one sale of QSBS in a year.

   iii. Applies based on the amount of sale proceeds used to acquire replacement stock.

   iv. Separate lot account is critical to maximize deferral otherwise FIFO.

   v. Section 1045 has detailed guidance and detailed guidance on rollovers including partners and partnerships.

   vi. You can rollover gain at partner or partnership level. You can replace in the partnership or not.

   vii. Taxpayer may defer recognition of gain on the sale of QSBS if

      1. Original QSBS has been held for more than 6 months.
      2. Make election.

j. Qualified Small Business.

   i. Domestic C corporation.

   ii. Aggregate gross asset requirement. Reads as if you must meet the requirement at all times. Less than $50M for every day after 1993 both before and after issuance. Aggregate gross assets ignore all liabilities, it is all the cash and the adjusted basis of the property you have, not the fair market value, unless you contributed property to the corporation.

   iii. Meets reports the Secretary may require. If not detailed enough might IRS just say you don't qualify?

   iv. Active business requirement.

      1. During substantially all of the taxpayer's holding period, not just the 5 years, must meet active business requirement.
      2. At least 80% by value of all assets are in the active conduct of one or more trades or business. Consider 1400-Z regulations for substantially all and asset-based test to interpret 1045 requirements.

3. Corporation must be an eligible corporation – domestic C corporation.

k. Sec. 351 formation of C Corporation.
    i. No gain or loss on transfer of property in exchange for stock in the corporation if immediately after transferors are in control of at least 80% of the stock.
    ii. Confronting partnership including an LLC to a C corporation.
        1. Assets over.
        2. Assets up.
        3. Interests up.
        4. Check the box (treated as assets over).
l. Reporting requirements.
    i. Sec. 1202 is not elective.
    ii. QSB corporations currently have no reporting requirements.
    iii. QSBS shareholders report sales on Schedule D of Form 8949.
        1. Exclusion is reported as a negative number.
        2. 28% rate gain worksheet.
        3. Special instruction for installment sales.
    iv. State taxation.
        1. Many follow QSBS rules.
        2. Some do not allow (CA and PA).
        3. Some modify QSBS rules (MA, NJ, HI).
m. Questions.
    i. Can QSBSs be put in INGs?
    ii. Stocking and packing to multiply and leverage the per issuer limitation.
    iii. Charitable planning.
    iv. Basis adjustment on death?
    v. QSBS and carried interests.

3. <u>Tuesday: Morning 3: Family Structure: Magil</u>
    a. <u>Comments:</u> Considering generalizations about the generation of a client, and about the generational assignments of different family members, can provide insight into how to approach wealth management and estate planning for the family. Also, drafting and planning techniques should be changed to account for these different perspectives. The speaker recognizes the limitations of these generalizations, but the result/consequences are profound to what we do as practitioners. It is also clear from the speakers remarks, and the demographic data presented, even if only approximations, is that the nature of our client base and how we have to practice has been transformed and will continue to change. Many of our traditional planning constructs have long ago been outdated.
    b. Blended family hypothetical.
        i. How many generations comprise a client family? May depend on ages of different children from different marriages.
        ii. Multiple generations in one household. How do you allocate financial wealth?
    c. Generalizations about Generations.

    i. Greatest generation to millennials who are reshaping expectations and norms.
    ii. Pew research center, census bureau, etc.

d. GI Generation and Silent Generation are the "traditionalists."
    i. The adaptive generation.
    ii. Defining question is where were you on D-Day?
    iii. Technology question – when did your family get a radio?
    iv. Parental model – breadwinner and bread baker.
    v. Character trait – strong sense of duty.
e. Boomers.
    i. Coming out party was Woodstock.
    ii. Defining question where were you when Kennedy was shot?
    iii. Parent model breadwinner and bread server.
    iv. Technology question when did your family get its first TV?
    v. Children – accommodated adults.
    vi. Grew up in two generation household.
    vii. 83% religiously affiliated.
    viii. High confidence in the American dream.
    ix. Hard working to the point of imbalance.
    x. Decision making model to consensus.
f. Generation X.
    i. How old were you when your parents got divorced?
    ii. Parents 2 breadwinners. Gen X was the first generation to grow up increasingly in two-career households.
    iii. Increases in parental divorce rates is a defining characteristic.
    iv. Character traits are skepticism and suspicion of organizations, government, and authority.
g. Millennial.
    i. Parents – helicopter parents.
    ii. High self-esteem.
    iii. Student loan debt.
    iv. Millennials are the first generation of digital natives.
        1. Comment: Consider what this means to practice. Web based meetings, online presence, use of social media, adapting new technologies that are more efficient, and more. To serve the Millennial generation estate planners may be required to adapt technologies and practices that push them out of their comfort zone.
    v. They are the first generation to grow up in a much broader array of household structures.
    vi. Entered the Gig economy where full-time employment is difficult.
    vii. Post-racial generation.
h. Life expectancy.
    i. Trends of dramatic increase in life expectancy.
    ii. In 2016, an American female could expect to live to the age of 81, and an American male to age 76.1.4.

1. Comment: What does this mean to the services wealth adviser, estate planners and allied professionals offer? Planning for later life and the attendant health and cognitive challenges aging often brings, the risks of elder financial abuse, identity theft and more, should be more significant component of service offerings. How do we provide services differently to aging clients? Might web meetings be useful to minimize the difficulties of travel for an aging client? What about quarterly web meetings to "check-in"?

iii. 20-year-old living today is more likely to have a living grandmother than a 20-year-old in 1900 was to have a living mother.

i. Reshaping American family.
   i. Dramatic change in household composition.
   ii. Married households were 80% in 1950% now less than 50%.
   iii. Increase in non-family and other households.
   iv. Fastest growing segment unmarried heterosexual couples.
   v. The number of cohabiting adults who are age 50 and older has increased 75% in the last 10 years. Men's and women's marital status reflect a decreasing preference for marriage.
      1. Comment: These nontraditional non-marital family structures will increase the need for living together and similar agreements. Planning that in an intact traditional family may have been confined to a will, may require more tailored and unique contractual arrangements to protect our client's interests in the myriad of new arrangements.
   vi. 18-29 only 18% are now married contrasts starkly with past statistics.
   vii. Number of adults age 50 has increased 75% since 2010.
   viii. Marriage are at older ages. There is correlation with age and wealth to deferral.
   ix. More likely to marry someone of a different race or ethnicity. 2017 it was 17%.
   x. Today's couples want financial security before having children. Teenage in USA today has less chance of being raised by both biological parents than anywhere else in the world.
   xi. Marriage is a declining and some say unimportant institution.
   xii. Extraordinary deference and benefits to marriage legally. Many listed in Obergefell decision in 2015.
   xiii. 50 most common family types in America Nathan Yau, Flowingdata, July 2016 community survey.
      1. Comment: The import of all of the above is significant. The characteristics of the typical client decades ago is quite different from those of a typical client today. This should have already had an impact on how each of the allied professions practice, document drafting, planning and more. It also increases the importance of collaboration as all advisers endeavor to grapple with the ripple effects of these changes. At this year's institute several speakers discussed the use of a one-fund or Clayton QTIP as a default

portability type plan for many clients. But the reality is that intact married families is not the norm for clients today. The broader discussion is what type of planning should be used for the large number of clients that do not fit this mold. In the special session on planning with increased exemptions (Rothschild, Borowsky and Nelson) there was extensive discussion of the need to us DAPTs or variants for single clients seeking to use their new high temporary estate tax exemptions. The attention given to planning for single clients and variations of the family unit is important and what we all will see more of.

j. Family Structure.
   i. Traditional families.
      1. 3 children.
      2. Husbands statistically predeceased wife.
      3. If divorced did so after children raised.
      4. This family unit gave rise to QTIP legislation as husbands were fearful wives would divert assets outside family.
      5. Only 8% remarried and waited 8 years. 20% of men remarried and only waited 4 years.
   ii. Boomers.
      1. Less social stigma attached to divorce.
      2. Remarriage more common.
      3. 1 of 6 children are in blended families.
      4. 42% of Americans have blended relatives.
   iii. Gen X/Millennial Family.
      1. Changing views of family structure.
      2. 3 parent families. 2nd spouse may be given defacto parental rights and biological parents spouse is not required to relinquish parental rights.
      3. 2017 Sec. 613 of Parentage Act.
      4. Recognized in 4 states by legislation.
   iv. Co-parenting arrangements.
      1. Reproductive technologies.
      2. Modamily – 20,000 subscribers. People meet to have a child by reproductive technology no relationship.
      3. Post-humus reproduction through banking of genetic material. Fertile octogenarian has evolved to the fertile decedent.
      4. “Diblings” – donor sibling a decedent of one male genetic donor born by several women in an open arrangement. Recent article in Washington Post discussed male that has 29 daughters and 16 sons that he has been able to identify.
      5. 15 variables that affect reproduction using hybrid eggs via spindle nuclear technology.
      6. 231,936 ART cycles in the US in 2015.
      7. 1 million embryos are in storage.
      8. 1.5% of children are born through ART.

k. American family composition.
    i. 35% traditional heterosexual married with children.
    ii. 31% no children.
    iii. 34% blended, multi-generation, same sex, single parent.
    iv. Consider impact on life insurance, financial planning and estate planning must consider the growing third segment.
        1. Comment: Consider what the evolving family structure means to trustee selection. Compound that with the growth of silver divorce for older clients. The Tuesday afternoon discussion "Fiduciary Selection" by Baer will continue to take on increased importance as the usual cast of spouse and children will no longer fit the bill for more clients. The use of institutional trustees will almost assuredly increase as the independence and objectivity of an independent trustee will grow in importance. We are likely to see more of a Lego approach to fiduciary selection to tailor fiduciary roles to the unique circumstances of each client. For example, if an institutional trustee is named will it be in a mere administrative capacity, as co-trustee or sole trustee. The role of various protectors and powerholders should also grow, and the number of permutations evolve to fit client circumstances.

l. Implications of trends.
    i. Changes in generational attributes.
    ii. Decline in marriage.
    iii. How and tow how will financial wealth be allocated?
    iv. 56% of Americans intestate.
    v. University Michigan health and retirement study. Survey every 2 years 20,000 Americans age 50+. Look at wide range of issues income, savings, retirement activities, housing, geography, intestacy.
        1. 42% have no will.
        2. 38% will die without a will.
        3. These numbers are lower as there is an inverse correlation with aging and intestacy (older people get wills).
        4. 49% of respondents who have a step child have no will.
        5. If fell out of contact with adult child intestacy jumps to 59%.
        6. If respondent is divorced intestacy increase to 62%.
    vi. Broken relationships make intestacy higher.
    vii. More difficult for such individuals to answer fundamental questions in the estate planning process. Who will inherit, how much will they get, and how will they receive it and who will be an agent or fiduciary.
    viii. Most Americans tend to leave wealth equally to children.
        1. Altruistic model – equality or balance the scales.
            a. Comment: With the growth of genetic testing for a wide array of genetic diseases might parents leave larger inheritances to heirs more at risk for health challenges? Even if disproportionate distributions are not provided, if an heir is proved by testing to be at great risk, perhaps a

different dispositive scheme might be used. If there are three children perhaps the estate is divided into four equal shares with the fourth share in a sprinkle trust earmarked to defray health costs of all family members. As the accuracy of such testing improves at some point why would a genetic predisposition not be addressed no differently than a current known condition, e.g. a supplemental needs trust for a special child?

2. Evolutionary model leaves most to those who will have children.
3. Lawyers don't like litigation so discourage balancing to avoid litigation.
4. Survey of American mothers indicated preference for equality for wealth allocation.
5. Changes in American family are reshaping this.
6. Americans are free to allocate wealth with only limited public policy constraints. This contrasts with forced heirship jurisdiction.

ix. Blended multi-generational family.

1. Consider age differences between first and second children and new spouse and children.
2. Concern that step-children would see step-parent as impediment to their inheritance.
3. Consider lifetime gifts to provide for children earlier.
4. This rejects traditional life estate construct of wealth transfer.
5. Children advised that transfers they were receiving from rolling GRATs would constitute entire inheritance, so step-mother should not be viewed as impediment to inheritance.
   a. Comment: Using life insurance to address the different generational assignments of family members may also become more common as the nature of family units continue to morph in a myriad of ways. So, in the hypothetical example posited by the speaker of a blended family with children from the first marriage close in age to the second spouse, providing life insurance on the life of their parent is a simpler solution especially for a smaller estate, to provide them an inheritance on their parent's death and similar to the GRAT illustration above deflect at least some of the angst directed at the new spouse.

m. Dialogue in estate planning process.

i. Prior generations no discussions.

ii. Today leading generation of boomers wants to discuss issues but needs advisers help.

iii. Wide range of issues should be raised for contemporary families.

1. Adequacy of financial wealth.
2. How much wealth is enough? How much is too much?
3. Traditional planning constructs – how useful are they?
4. Shared asset like family cottage.

5. Evolution is occurring in our approaches in estate planning process.

iv. Elements.

1. Less focused on transfer taxes.
2. Family goals more important.
3. Less colloquial.
4. More adaptable to family composition.
5. More cognizant of diverse cultural perspectives.
6. Enlarge its perspective beyond just a balance sheet as wealth.
7. Grantor intent may move to aspirational and flexible expressions of intent.

n. Trusts design.

i. Codify grantor intent in trust agreement.

ii. Spray trusts, incentive trusts, special assets trusts, purpose trusts, perpetual trusts.

iii. What role do trusts play?

iv. How do and should documents express purpose.

v. Withdrawal power – 5/5 trust. Is it an ILIT?

vi. HEMS standard might infer grantor only intended modest benefits for beneficiaries?

vii. What if grantors were encourage and equipped to communicate why they entrusted capital to a particular trust – a statement of intent.

1. Tension between grantor intent, beneficiary goals, and fiduciary duties.
2. Claflin v. Claflin (Mass) can terminate trust early if doesn't violate material purpose of trust. But without a statement of intent how can intent be shown?

o. Statement of intent.

i. Audience is trustees and beneficiaries.

ii. It is not internal precatory language nor an external letter of wishes.

iii. Expresses grantor's unique rationale for trust.

iv. Expresses grantor's views for lifespan of trust.

v. May be valuable to protectors who have latent powers.

vi. Trust documents are or could be a means of communications from the grantor.

p. Trusts and family growth.

i. Family growth will result in 5th generation – if a spray trust were crated would have 28 living beneficiaries.

ii. If trust designed to last 20 generations and family reproduced at statistical reproduction rate there would be 524,288 beneficiaries in 20th generation.

iii. Trust should have thoughtful set of beneficial interests.

iv. What standards govern discretionary distributions of principal.

1. Span from emergencies on one end to "pleasure" on the opposite.
2. Some standards are ascertainable and others non-ascertainable.
3. Many lawyers believe too many trusts instruments are artificially constrained by ascertainable standards.

4. These could be designed to spring in the future.
5. Sprinkle trusts – not compatible with modern families. Useful for minor beneficiaries of same degree but present fiduciaries with multiple challenges. The speaker's outline contained the following instructive paragraph: "Let me offer a final observation on substantive trust design concerning spray or sprinkle trusts. I believe that these trusts have limited utility for contemporary families. We all understand their advantages: they permit unequal but equitable distributions; they offer efficiencies in the comingling of assets; they are very useful for minor beneficiaries of the same degree. But they present fiduciaries with multiple challenges. One of these is that of competing fiduciary duties, such as the duty of confidentiality as to each beneficiary and the duty to provide information to all beneficiaries. Spray trusts can also present insurmountable difficulties in building a trust portfolio which is well suited to each beneficiary's unique risk tolerance and marginal tax rate." The dramatic changes in the composition and structure of the American family must be reflected in different drafting approaches.
6. How structure portfolio for each beneficiary?

q. Role of trustees.
   i. Trustees role historically was straight forward.
   ii. Owed duties to current and remainder beneficiaries.
   iii. So much has changed.
   iv. Increasing array of powers to modify design of trust.
   v. Trust documents often grant broad powers.
   vi. Current beneficiaries, explicitly powers to modify, remainder beneficiaries, statutory modify cation powers, trust design, etc.

r. Evolving trusts.
   i. "One such trust states that "during cryopreservation, the grantor will no longer be living but the grantor will nevertheless not be dead." Another trust would permit distributions to the grantor's Bionic Analog Version, or BAV, and this trust contemplates that if multiple BAVs of the grantor are revived, each will be entitled to discretionary distributions, and each may live rent free in any trust property. It makes me wonder how many BAVs can you have living in one home?"

4. <u>Tuesday: Morning 4: Charitable Estate Plan: Hoyt</u>
   a. Introduction.
      i. How plan in new environment post TCJA?
      ii. How get deduction with limitations on standard deduction/itemized deductions.
      iii. How does shift to income tax planning change charitable planning?
   b. Itemized deductions.
      i. Most state and local tax that can be deducted is $10,000.
      ii. Doubled standard deduction.

iii. If paid off home mortgage and only $10,000 of SALT hard to get charitable contribution deduction.
iv. 21 million people will no longer itemize.
v. 16 million will still itemize and will get deductions.
vi. 21 million will no longer get benefits.

c. 3 concepts: Bunching, QCDs and Bequests of Income.
d. Bunch gifts to a donor advised fund ("DAF").
    i. Can pay legally binding pledges from DAF.
    ii. <u>Comment:</u> How many taxpayers will really benefit from bunching? If the taxpayer is well below the doubled standard deduction, especially with restrictions or eliminations on so many other deductions, how many years might have to be bunched? What about the time value of money of the assets given to a DAF and the return on those investments that does not inure to the client? Will clients want to consider this? Other than perhaps discretionary medical expenses, assuming they are deductible, few if any other itemized deductions can be timed. Will clients be willing to time elective medical procedures along with DAF contributions? For wealthier/high income clients bunching and the new standard deductions may not be an issue as their charitable gifts put them over the threshold each year. Older clients (see below) are likely to be better served by QCDs. So how many clients are really bunching candidates?
e. Qualified Charitable Distribution (QCD).
    i. Have required distributions RMDs paid from IRA directly to charity and gain the equivalent of a dollar for dollar charitable contribution deduction.
    ii. On form 1040 list total distributions so IRS knows you took out RMD.
    iii. List amount of taxable distribution and note "QCD" to explain why the numbers are different.
    iv. This works for those who don't itemize deductions.
    v. Use QCDs to get other benefits, e.g. Medicare B premiums, or below $200,000 for NIIT, etc.
    vi. State may not provide charitable tax benefit but QDC avoids this.
    vii. 60% limitation – giving from IRA avoids this.
    viii. The best asset to give to charity had been appreciated stock. But really the best asset to give is the IRA.
    ix. Must be over 70.5. No itemize deduction but did not get that anyhow.
    x. Only applies to IRAs not 401(k).
    xi. Distribution must be made directly from trustee of IRA to the charity. The check be issued in the name of the charity. Cannot deposit and then write check to charity.
    xii. Brokerage houses offer IRA checkbooks for this purpose. Every check is a distribution from an IRA. That is the best way to take advantage of this law.
    xiii. QCD can go to public charity or a private operating foundation but not DAF or supporting organization or private non-operating deduction.
    xiv. Cannot get any benefit (dinner) etc.

xv. Most is $100,000 year, or $200,000 on a joint return ($100,000 each spouse).
xvi. Must get documentation from charity.
xvii. Inherited IRA – if beneficiary over 70.5 can use inherited IRA for making QCD.
xviii. Can use QCD to satisfy a pledge which is better than a private foundation.
xix. <u>Comment:</u> Consider QCD benefits when planning how much of your regular IRA to convert to Roth. Converting IRAs to Roth's can be a valuable planning tool. The impediment or challenge to conversion is managing the income tax cost on the conversion. But the QCD provides another possible limitation. If the client gives certain dollars to charity each year and is age 60, perhaps it is worth forecasting what should be retained in a regular IRA, not converted to Roth, and preserved to use for QCDs once the client attains age 70.5. It would seem unproductive to convert a portion of the IRA to a Roth and pay an income tax then in future years use non-Roth assets to make non-deductible contribution deductions. Contrast that with preserving at least an estimated amount of IRA as a regular IRA and using it in future years for the donations thereby saving the tax cost of conversion and avoiding tax on those IRA funds by donating them.

f. Charitable bequest.
   i. Overview.
      1. IRD what is it? Source is retirement accounts.
      2. If write one check for $10,000 from an estate to a charity can you take a charitable deduction on the estate tax return and estate income tax return?
      3. What is the economic effect? IRS will ignore gifts to charity without an economic effect.
      4. Will a pecuniary (fixed dollar) bequest trigger taxable gain to the estate? It might? Is there a solution?
      5. Planning charitable bequests.
   ii. Basics of charitable deduction.
      1. If leave $100,000 to college pay all income of estate to child.
         a. May qualify for $100,000 charitable bequest.
      2. Leave nothing to college but pay all income of estate to the college.
         a. Estate cannot claim income tax or DNI deduction for typical charitable bequest distribution of corpus to charity.
         b. If income from estate goes to charity no DNI deduction. You need a charitable income tax deduction under 642(c) and need language in governing instrument.
      3. IRD.
         a. Retirement plan accounts are large source of IRD.
         b. Can a single charitable payment generate deductions on both income and estate tax returns? If have estate with IRA that pays to probate estate how is that taxed? Have to report

on estate tax return if owed at time of death. Estate has taxable income. IRD on large estates is taxed by the estate tax as an asset owned at death, and when estate receives the income it has to report that. So, you can deduct on both returns if to charity. Asset but to charity. Income if have instructions to go to charity that is deductible. 642(c)(3)(A).

c. IRD is both corpus (and asset on date of death) and income.
d. CCA 200848020 IRA with $800,000 payable to trust with 8 beneficiaries, 6 children and 2 charities. Got checks for $100,000 each endorsed to each charity. IRD went to trust and out to charities. IRS held that $200,000 of taxable income and no charitable income tax deduction because governing instrument did not say income would go to charity.
e. Does there have to be an economic effect? If have instructions to give income to charity but if it has no economic effect will disregard. This goes to character of the income.
f. Economic effect regulation only goes to character of income. Example if direct IRD to charity and charity would get $100,000 in all instances. No effect. If instead bequeath all IRD to charity that has economic effect because do not know amount of IRD.

4. If estate or trust distributes appreciated property to satisfy a pecuniary obligation it will have to recognize gain. Triggers taxable gain to the estate. What if changed facts and leave $100,000 to charity. What if give appreciated stock? If governing instrument says gain is to be paid to charity get a deduction. Charity does not mind getting gain as it is tax exempt. So, estate can get a contribution deduction.

g. Income based charitable bequest.
   i. Sample language:
      1. "All of this estates' [trust's] income (including capital gains and IRD) shall be distributed to Charity. If the cumulative amount of income of this estate [trust] exceeds $50,000 then Charity shall receive only a cumulative amount of $50,000 and all excess income shall be retained or distributed to my beneficiaries at the discretion of the executor [trustee]."

h. Tier system.
   i. DNI Two tier system of beneficiary distributions.
   ii. Tier one beneficiary is taxed first. Amount of income required to be distributed currently. Second tier beneficiary is taxed on remaining income even if distribution is greater.
   iii. Charitable income tax deduction for DNI is like tier 1.5 – in between tier 1 and tier 2.

iv. Reg. Sec. 1.662(b)-2 discretion to give to human beneficiary, charity or accumulated. If trust has $40,000 of interest and $10,000 dividends (tax exempt interest is subjected to more complex rules). Trust distributed $90,000 but only $50,000 of income. $30,000 taxed to tier 1. Next tranche is taxed to the charity and qualifies for a deduction. The tier 2 beneficiary may therefore have no taxable income under the DNI rules.
v. Change example, no tier 1 beneficiary, complete discretion. Distribute $90,000 when had $50,000 of income. Who is taxed. No tier one beneficiary. All is soaked up by charitable beneficiary and no taxable income is allocated to individual beneficiaries. The charity absorbed all of the income.

i. <u>Comment:</u> TCJA changed, but did not eliminate, the benefits of donating appreciated assets. Donating appreciated property. This is a tried-and-true planning technique because the client/taxpayer could avoid paying capital gains on the appreciated property donated and obtain a tax deduction, too. Post-TCJA there may be no deduction unless the taxpayer's deductions exceed the new high standard deductions. So, while donating appreciated property can still avoid a gain, there will be no income tax deduction to bolster the benefit for most client/donors. Wealth advisers in particular must be alert to this new status as it had become almost second nature to contact clients late in the year to send appreciated securities to meet client charitable commitments.

j. <u>Comment:</u> Non-grantor trusts can also be used to optimize charitable contribution deductions for clients that would otherwise not realize any deduction as a result of the doubled standard deduction and other restrictions on itemized deductions. The non-grantor trust should be in the planner's toolkit as well.
i. Here is a simple illustration of how a grantor trust can provide what may be one of the better post-TCJA charitable plans. Client transfers $200,000 of investment assets to an irrevocable, non-grantor (meaning the trust pays tax on its income) trust. Assume the investments generate 5 percent current income or $10,000. The trust can donate the $10,000 of income and offset that $10,000 charitable contribution deduction against the income earned so that no income tax is due. The trust has effectively obtained a full deduction for the charitable contribution.
ii. Meanwhile, the client still qualifies for the $24,000+ (married filing joint) standard deduction on his or her income tax return. Shifting the contributions to the non-grantor trust provides full tax benefit with no commensurate loss of deductions on the client's personal income tax return.
iii. The clients/taxpayers will have to have enough income/wealth to transfer to an irrevocable trust securities that produce enough income to pay the contributions. But there is a safety valve that income or trust principal can be distributed to other named beneficiaries, e.g. children or other named heirs (but not a spouse as that, absent consent of an adverse party, will trigger grantor income status and negate the intended charitable contribution income tax planning benefits.

iv. The client can name a family member or friend of the client as trustee to avoid the cost and complexity of using an institutional trustee. Consider that the dollar amounts may be more modest and the trust itself quite simple.
v. A relatively simple trust can be used. Perhaps the only special requirements might be including a requirement that donations be made from trust income to comply with the trust income tax deduction requirements of Code Section 642(c).
vi. The trust can be created in the client's home state to keep the plan simpler and less costly. There would be no particular need to have the trust in one of the trust-friendly states that has a more favorable tax system. Thus, this special type of charitable trust might be less complex and less costly to both create and administer than the more complex trusts many clients create.
vii. Planners should consider investment location decisions if they create this new type of non-grantor trust. The first layer of the income earned in this "bucket" will be effectively tax-free because it will be offset by the charitable deduction. Income above that level can avoid state income tax if the settlor resides in a high-tax state and the trust (in contrast to the general description above) is formed in a state that does not tax trust income (e.g., a New York resident creates a Delaware trust).
viii. The trust must realize the income to obtain a tax deduction. Unlike for the client creating the trust, there is no contribution deduction for the trust donating appreciated property to a charity. The trust must sell the property, realize a gain, and then donate the proceeds to obtain a deduction to offset the gain.
ix. The trust beneficiaries can include all the settlor's descendants (except for the spouse because that might recharacterize the trust as a grantor trust) as well as charities. The trustee can allocate distributions to heirs, if that is desired in any year, and then in a future year revert to charitable distributions.

Tuesday: Afternoon 1: Marriage and Divorce: Mccaffrey

a. Marriage determined by state law not federal law.
   i. Motive is not relevant.
   ii. Windsor case made clear look to state not federal law to determine if marriage exists. United States v. Windsor, 133 S. Ct. 2675 at 2691
   iii. (2013).
   iv. Similarly, divorce is a matter of state law.
b. Principal benefits of marriage.
   i. Joint income tax returns.
   ii. Transfer tax marital deduction for gift and estate tax purposes. Code Secs. 2523 and 2056.
   iii. Gift splitting.

iv. Alimony had been deductible if divorce prior to 2019. After 2018 the TCJA eliminated the deduction for alimony.

c. Burdens

i. Marriage penalty for income tax purposes attributable to rate schedule only applies to income above about $600,000 of income.

ii. Higher marriage penalties before 2018 will be reinstated in 2026.

iii. Deduction for state and local taxes (SALT) limited to $10,000 on the joint return.

iv. Home mortgage deduction. Limited to deducting interest on mortgage up to $1M and $750,000 after 2018. In contrast two unmarried individuals would be able to deduct interest on the amount of mortgage. If interest is 5% and 37% bracket can be $18,500/year penalty. Code Sec. 163(h).

d. Alimony.

i. Absent divorce and alimony could not split income with another taxpayer. Prior to 2019 this was feasible.

ii. 1942 alimony deduction for first time overruling Gould case. Created deduction for payor of alimony and inclusion by Payee. That is what until 2019 permitted splitting income post-divorce.

iii. For divorces after 2018 alimony is not deductible nor taxable.

iv. This is permanent change unlike many of the TCJA individual changes that are scheduled to sunset in 2026.

v. What is rationale for change? $6.9 Billion dollars of estimated additional revenue. It was characterized as a divorce subsidy. But for middle tax couples it was a protection from increased tax costs caused by divorce. Married with taxable income of $165,000 paid $28,179 in 2018. If only one earned income and divorced tax liability increases by 38% but same income has to support both ex-spouses post-divorce. Alimony deduction avoided that increase.

vi. Repeal is costly but percentage wise is not as costly for wealthy taxpayers. Also, wealthy taxpayers can put income producing assets in trust. Example: H agreed to pay $200,000 to W. In past could have paid alimony. Now if transfer $5M to trust and require $200,000 be paid to W and beneficiary spouse will pay tax on income received up to income of trust.

e. Prenuptial and Postnuptial agreements.

i. May have required payment of spousal support and were based on anticipation or expectation of a deduction to the payor.

ii. It is unlikely that a prenuptial or post-nuptial agreement will be treated as a divorce agreement. If don't qualify as divorce or separation instruments under tax law, then benefit will change.

iii. Review postnuptial agreement and see if it has a severability clause. Saying each provision shall be severable and if a provision is invalid, unenforceable, etc. that shall not impair the operation or portions that are valid, etc. Upon any determination that a term or provision is incapable of being in force then parties shall negotiate agreement to effect original intent of the parties. A similar type clause may give payor spouse a basis to argue that payment amounts should be renegotiated based on that. Payor's spouse's position is that required payments should be reduced by tax savings payee does not have. Payee spouse would argue reduction should not be more than the tax she would have had to pay on receipt of the alimony had it been taxable.

1. The speaker's outline included the following illustrative provision: "Each provision of this Agreement shall be considered severable and if for any reason any provision or provisions herein are determined to be invalid, unenforceable or illegal under any existing or future law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those portions of this Agreement which are valid, enforceable and legal. Upon any determination that any term or other provision of this Agreement is invalid, illegal or incapable of being enforced, the parties to this Agreement shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner to the end that the transactions contemplated by this Agreement are fulfilled to the greatest extent possible."

iv. <u>Comment:</u> Practitioners should alert clients in newsletters and other communications that if they have prenuptial or post-nuptial agreements they should have those agreements reviewed now to determine if an adjustment might be advisable. But also, given the seemingly constant changes in the tax law, and the strong stance taken against this change, consideration should also be given to the possibility that a future administration may in fact revert the alimony rules to what they were, perhaps coupled with stronger penalties for failing to report, an issue the speaker pointed out in her outline as a source of revenue loss.

f. Trusts.

i. Trusts may be able to avoid the impact of loss of alimony deduction for wealthy spouses.

ii. TCJA also repealed Code Sec. 682.

iii. Planning with new trusts and existing trusts in divorce context.

1. Married individuals can make tax free transfers to each other, even if in discharge of an obligation.
2. Tax free transfer rule extends to trusts if spouse is beneficiary and under 1041 transfers pursuant to divorce or within 1 year of divorce are not taxable. Even if the children are also beneficiaries along with the spouse/ex-spouse the tax free 1041 rules apply.
3. If trust is non-grantor trust that trust is taxed on income if not distributed to a beneficiary (i.e., not DNI). Trust for which former spouse is a beneficiary, trust will get deduction for DNI distributed to that spouse/former spouse beneficiary and he will be taxable on receipt of that trust distribution, if grantor trust status can be avoided.

4. Must be certain that the trust is not a grantor trust to achieve the above result. If the trust is characterized as a grantor trust, then all income would be taxable to settlor.
5. How do you avoid grantor trust status?
    a. Power to borrow without adequate interest or security, or the power to reacquire (swap) trust assets must be avoided.
    b. If payments from trust discharge settlor's obligation to former spouse its grantor under Code Sec. 677. This is a challenge to address in the planning proposed to salvage the post-TCJA effect of trying to salvage the equivalent of an alimony deduction.
    c. Transfer of property must completely terminate obligations to former spouse under state law. Even if trust is depleted the recipient spouse cannot have a continuing claim.
    d. Trust cannot have spouse of grantor as beneficiary. If spouse is a beneficiary, it will treat trust as grantor trust under Code Sec. 677.
        i. The outline provided: "The grantor trust rules apply when the grantor or any person other than an adverse party has retained certain interests in or powers over trust income and assets. For purposes of determining the powers and interests held by a grantor, CODE SEC. § 672(e) provides that he or she will be treated as holding any power or interest held by an individual to whom the grantor was married at the time of the creation of the power or interest or whom he or she married after such creation. There is no provision of the Code that causes this treatment to terminate if the spouses divorce. An individual is an adverse party as to a particular power if he or she is a person who has a "substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of [his or her] power."
    e. For agreements prior to 2019 Code Sec. 682 protected the settlor as under 682 if property distributed to spouse or ex-spouse the grantor spouse would be not be responsible for taxes and would not have to pay tax on income distributed to the ex-spouse. The repeal of 682 changes this result, and that is the result that the planning suggested below endeavors to replicate.
    f. 672(e) spousal unity rule trust grantor treated as holding any power held by spouse or person who grantor was married to at time of creation of power and this does not change after divorce.
    g. Treasury recognized that repeal of 682 would be a problem.

h. Notice 2018-37 – 682 would not apply to pre-2019 divorces unless modified after 2018 unless modified after 2018 and stating that TCJA should apply. IRS asked for comments on how 672(e) should apply following divorce or separation in light of the change.
i. ACTEC requested that 672(e) should be changed. There is ambiguity in that provision when you look at its purpose, which is that married people create economic unity. But when that unity is severed by divorce no reason to treat them the same under the grantor trust rules. If this is changed it may make it easier to create effective spousal support trusts. If not have to wait until after the divorce is affected. Separation agreement should not mandate the creation of the trust so give spouse option to pay alimony or in lieu of that to set up trust.

g. Creating a non-grantor trust post-TCJA.
   i. Settlor spouse cannot retain a reversion in the trust (e.g. payee ex-spouse dies cannot receive reversion back of trust).
   ii. If the settlor/payor spouse's transfer to the trust does not completely terminate obligation to support payee ex-spouse trust would be grantor trust to extent payments made from trust to payee ex-spouse. Those payments would be treated as made for payor ex-spouse benefit since they would discharge a continuing legal obligation of alimony.
   iii. If the settlor/payor spouse and the payee/beneficiary ex-spouse when trust created trust will be a grantor trust because of marital relationship. Trust income distributed or accumulated for future distribution to settlor/payor spouse (without the consent of an adverse party) trust is grantor as to settlor spouse . 677 (a).
   iv. Post-TCJA, creation of a trust by payor/settlor spouse for the benefit of payee/beneficiary ex-spouse should occur after the divorce finalized if it is not intended that the payor/settlor spouse pay income tax on income paid to the payee/beneficiary spouse.
   v. Might negotiate in the marital settlement agreement that payor spouse after divorce has option of how to settle payments using a trust or not so it is not mandated, and trust is created after divorce finalized.
   vi. <u>Comment:</u> Might the payee/beneficiary ex-spouse be amendable to having the children as adverse parties remainder beneficiaries of the trust approve distributions to him/her? That might be agreeable in some instances, provide non-grantor status, and facilitate negotiating a large settlement to the payee/beneficiary ex-spouse. This might provide more certainty?

h. If an existing trust will continue and will remain grantor as to the settlor ex-spouse, consider negotiating a tax reimbursement clause in the marital settlement agreement.
i. How different trusts might be handled.

i. Evaluate possible restructure of existing trust in some way to achieve preferred post-TCJA result.
ii. SLAT.
    1. Beneficiaries usually settlor's spouse and descendants.
    2. If nothing done settlor will be taxed on trust after divorce. May not be problem if distributions are not made to ex-spouse.
    3. If have invasion power could make distribution outright to spouse but that would destroy estate planning goals as it would then all be included in the spouse's estate.
        a. <u>Comment:</u> If the size of the estate is not in excess of the new temporary exemptions new planning might be done to address that with the temporary exemption remaining, e.g. retransfer to a completed gift DAPT following termination of the SLAT.
        b. <u>Comment:</u> If the SLAT had a floating spouse clause and the trustee did this what liability might there be to the remainder beneficiaries?
    4. Decant to preserve savings and cut off grantor trust status. If trustee has unlimited power to distribute to descendants may be able to distribute to trust only for descendants and cut off spouse and grantor trust status. But that may not be agreeable to the ex-spouse/beneficiary.
    5. If trust contains spendthrift clause. Give independent person power to terminate the spendthrift clause to facilitate more flexible later changes.
iii. QTIP
    1. Since distributions only to spouse then cannot decant to add say children beneficiaries. <u>Comment:</u> But a non-judicial modification might permit this but what would the tax and other consequences be?
    2. Might distribute all to spouse and end grantor trust status.
    3. If trust terms don't permit invasion perhaps simultaneous purchase of the remainder interest and terminating the trust with the beneficiary spouse getting her actuarial interest.
    4. Dissolution of trust may be a gift under 2519 but could be protected by marital deduction.
    5. If trust contains spendthrift clause. Give independent person power to terminate the spendthrift clause.
    6. FL protects remainder interest in QTIP that passes to the creator of the QTIP. H creates trust income to spouse for life and on her death back to H, H's creditors cannot reach that remainder trust as its treated as if set up by W not by H. It will continue to be a grantor trust even if effective date of 682 is fixed. This is because it will remain a grantor trust because of H's interest.
iv. QPRT.
    1. Generally, QPRT settlor retains right to live in residence.

2. Usually two QPRTs each with ½ of the house.
3. When divorce generally will not live together.
4. If marital settlement agreement provides that one spouse live in house, then other spouse has to transfer interest in QPRT to spouse intended to live in the trust. But want to delay transfer until after divorce to avoid grantor trust status, but that might not be an issue in a QPRT (but if the house is sold during term that could be costly).
5. Avoid gift tax under Sec. 2516 special rule for property settlements: made pursuant to a written marital settlement agreement, divorce occurs within either the one-year period before the execution of the agreement or the one-year period after the execution of the agreement.

j. Why create/modify/ trusts during divorce?
   i. See above – means of shifting income without alimony deduction.
   ii. 2516 creates special exception for marital settlements. No gift taxes.
   iii. Special problems if spouse transfers term interest to another spouse. Code Sec. 2702 if transfer term interest in property to a family member and retains an interest, spouse is an applicable family member, value of applicable interest is zero. This increases amount of gift by interest retained. Such transfers would seem to be caught by 2702.
   iv. Relief under regulations 25.2702 say 2702 does not apply to transfer protected by 2516 if only spouses have interests. But this exception does not apply to transfers protected by other than 2516. Code Sec. 2516 may inadvertently not apply e.g. spouse dies before divorce. Regulatory exception does not apply if children have interests in the trust. Often trust may be created by wealthy spouse to pay less wealthy spouse for set number of years, remainder to children. In such a case 2516 would not provide protection. Spouse's interest is acquired not retained and 2702 should not apply. But transferee spouse may have a problem under the joint purchase rule under 2702.
   v. Ways to avoid impact of 2702.
      1. Structure transaction as a GRAT or QPRT to avoid 2702.
      2. Transferee spouse if doesn't insist on immediate transfer of remainder interest to the children can avoid 2702.
      3. After divorce spouse who made initial transfer can thereafter transfer remainder interest to children and 2702 won't apply because divorce has already happened.
      4. Transferee spouse could be given power of appointment over remainder of trust if recipient spouse does not want the remainder to be with the transferor spouse. That power could be exercisable to the children.

k. Estate planning with divorce.
   i. Entity freeze.
   ii. 2701 has bad gift tax consequences if have common and preferred interests and gives common interest to children unless meet safe harbor.

iii. 2701 does not apply if common interest given to children and preferred interest given to someone else. If give preferred interest to spouse and after divorce can transfer common interest to children because no applicable family member has an interest (post-divorce ex-spouse is not an applicable family member). The speaker's outline included the following example of this clever planning idea:

iv. "Example – A, pursuant to the terms of a marital settlement agreement entered into between him and his spouse, B, transferred $100,000 in trust to pay her income for life. At her death, the trustees were to return the principal to him. A's transfer to the trust was protected from gift tax by Code Sec. 2516. The actuarial value of B's interest in the trust was $90,000. Two years after A's divorce from B, he transferred his remainder interest, then worth $11,000, to his daughters, D1 and D2. Code Sec. 2702 does not apply to A's transfer to B since it was protected from the gift tax by Code Sec.2516 and because only he and B had interests in the trust after his transfer to it. Because his later transfer to Jenny and Kate was made after his divorce when B was no longer related to him, Code Sec.2702 does not apply to A's transfer. Code Sec.2702 will not apply to B because her acquisition of an income interest was not part of a series of transactions in which D1 and D2 acquired an interest."

l. Comment:

i. Another divorce issue practitioners might want to consider is the impact of TCJA on 529 plans. Proactively advising clients on the new issue and addressing it with them may be worthwhile. In cases involving children, it is commonplace for divorce agreements to include provisions governing the payment of college expenses and set forth terms governing any existing 529 college savings plans. TCJA changed 529 plans that no matrimonial settlement agreements could have anticipated. The qualified expenses under 529 plans now include elementary and high school education of up to $10,000 per year. Permissible distributions can also be made to both religious educational institutions and for home-based education.

ii. As 529 plans previously were reserved for payment of college expenses agreements prior to TCJA may not address requiring that the funds be reserved for payment of college expenses. The expansion of 529 plans could undermine the intent of existing divorce agreements. 529 balances intended for college expenses could be dissipated earlier to pay for non-college educational expenses, contrary to the parties' intent. It is important for the non-account owner exercise any rights he or she may have to review the account statements to track how the funds are being spent and to consult with his or her lawyer about taking action to address the issue before it may be too late to prevent dissipation of the funds.

iii. What happens if the divorce agreement is silent as to the application of the 529 funds? What if one ex-spouse was obligated to pay for private pre-college education and the agreement is not clear on limiting 529 plans for college? Can that spouse distribute funds from a 529 plan to pay his or her obligations for elementary school? What if that dissipates the funds intended for college? If the agreement is ambiguous regarding use of the funds, which is likely since it is doubtful one could have contemplated this change, what happens then? It remains to be seen whether this may constitute a change of circumstance warranting a modification.

1. Tuesday: Afternoon 2: Fiduciary Selection: Bear
    a. Fiduciary selection.
        i. Who should be selected?
        ii. What if one spouse dies?
        iii. Who are beneficiaries and how might that effect choice?
        iv. Who will settle estate?
        v. Who should be agent under power of attorney?
        vi. Who should be agent under health care document?
        vii. What are the roles and responsibilities of each fiduciary?
        viii. What are pros and cons of family versus corporate fiduciary?
    b. What characteristics and descriptions of fiduciary?
        i. Correspond with disgruntled beneficiaries.
        ii. Deal with dysfunction family.
        iii. Don't lose money.
        iv. Distribute money.
        v. Receive phone calls.
        vi. Compensation. What is reasonable compensation?
        vii. Beneficiaries may question "reasonableness."
    c. Financial power of attorney.
        i. Comment: The speaker's outline included a very important discussion of the dangers of powers of attorney: "The Financial Power of Attorney ("POA"), a staple of every estate and disability plan, has been described as…"a license to steal,"4 and "the most effective burglary tool since the crowbar." 5" The footnotes 4 and 5 follow:
            1. 4 Vincent J. Russo and Marvin Raclin. New York Elder Law and Special Needs Practice § 6:3. 2017.
            2. 5 Kristen M. Lewis. Financial Abuse of Elders and Other At-Risk Adults. The American Law Institute. Apr. 2015.
        ii. Comment: See the statistics on aging in Magill's Tuesday morning outline as well as the data on the changing composition of the American family. There are clearly a growing number of aging clients, and a fewer number of intact or traditional families from which to draw the typically named agents. Given the reluctance the speaker noted of institutions to serve as agents, alternative approaches to protect aging clients must be considered. The speaker's outline states: "Many clients wish to appoint a spouse/partner followed by adult children to serve as fiduciaries. Unless the practitioner asks probing questions to establish a sense of a client's family dynamics, he or she is unable to make a thoughtful recommendation regarding fiduciary selection." But Magill's outline stated: "Let us step back and see how they array themselves in the United

States. 31% of American households are without children; 35% are traditional, heterosexual, married couples with children; and 34% are modern households." So, for 65% of clients naming adult children may not be an answer.

iii. Corporate trustee named on trust or will may not be willing to serve. How address consistency?
iv. Clients should consider what they do to handle their finances. Pay bills, review credit cards, review for incorrect charges, review asset allocation in light of goals, consider cash flow needs, etc. This is the list of tasks the agent is trying to replicate.
v. Disability planning – no idea how long it will last. The role is not finite like that of an executor.
vi. Agent should pay attention to detail and get things done.
vii. Comment: The speaker's outline mentions the use of a POA Protector or Trust Protector. With aging clients, and a growing number of clients with health issues (for example, more than 130 million Americans are living with chronic illness) these types of additional safeguards should become more common. Note that some refer to a "monitor" rather than a POA protector. It may be that using a funded revocable trust might provide better protection than relying on a POA. Further, using a trust protector in a revocable trust has more support than a protector or monitor under a POA. Finally, using a revocable trust can add the opportunity of an institutional trustee serving which a POA generally cannot provide. Having the independence, processes and so forth that an institutional trustee can bring may be in many instances critical to protecting an aging isolated client. In such instances the revocable trust would be funded and the predominant document minimizing perhaps the role of the POA.

d. Health care directive.
    i. Many clients believe that health care and financial agent should be the same, but the skills are different.
    ii. Choose agent who can choose or understand your medical wishes. Spouse or partner might be initial selection, but not always.
e. Executor.
    i. Settles estate.
    ii. Smart enough to know what she doesn't know.
    iii. Similar to that of financial agent under POA.
f. Trustee.
    i. If children will they get along.
    ii. Give me an example of how they get along?
    iii. Does the child have the capacity to do the job?
    iv. Does the child have the time and ability to handle the tasks? Are they too busy with their own career and family obligations?
    v. How will each child feel if another child is paid a fee for handling these obligations?
    vi. Is there a family friend or third party the heirs respect?
g. General.

i. Educate client as to each role.
ii. Google search each individual named. Did something worrisome come up?

h. Drafting considerations.
    i. Use current/immediate power of attorney not a springing.
    ii. Test run, kick the tires while client has capacity.
    iii. Should it be a single fiduciary or multiple fiduciaries? A single fiduciary may "own" the situation and be proactive. On the other hand, multiple representatives may provide safety. If two heirs named might it be a good fit? Should they be permitted to act separately or only jointly?
    iv. Successors.

i. Family meeting.
    i. Grown in popularity.
    ii. Financial adviser, estate planner, CPA should be at meeting.
    iii. Opportunity to explain the estate plan, not to discuss share net worth.

j. Comments: Addressing challenges of aging, power of attorney abuse, changing American family units, the need for checks and balances to protect clients, etc. might be better achieved by integrating more complex modern trust positions (fiduciary and non-fiduciary) into trust instruments, including a modern revocable trust. Consider:
    i. Investment Advisor - Traditionally the trustee of a trust had control over all investment decisions. Bifurcating these roles might infuse additional checks and balances on the trust administration and provide more targeted expertise. It also changes the discussion of fiduciary roles and who should serve in each. A so-called "directed" trust must be formed in a state which permits this type of trust, not all do. In contrast to a traditional trust where there is one trustee with responsibility for all trustee functions, in a directed trust the trustee functions are bifurcated. The institutional trustee may serve as only a general or administrative trustee. A second person is designated to manage investments, called an investment trustee, although a variety of different titles are used for this role. If the institutional trustee is "directed" to follow the instructions of that investment advisor or investment trustee, the institution should have very limited or no liability for that investment. A bit of semantics might be useful. If a trust "delegates" investment management, the trustee will still have an oversight responsibility so that may not suffice as a structure for many client situations. In contrast if the trust agreement and state law permit the trustee to be "directed" as to investments, the trustee should not have any liability. Hence, directed administrative trustees may charge only an annual flat fee for serving as trustee, rather than a percentage of assets that may be more reflective of the risks associated of having investment responsibility.
    ii. Distribution Trustee – this function can also be bifurcated from the general trustee function to provide more flexibility and control. The trust could name a person, or group of persons acting as a committee, to be responsible for trust distributions. Caution should be exercised as the

power to distribute is a tax sensitive power that could cause trust assets to be included in the power holder's estate if not properly handled. The settlor may be safer in terms of accomplishing trust goals by leaving this function under the auspices of an independent institutional general trustee.

iii. Trust Protector – this was mentioned by the speaker but is so important to infusing protections and safeguards that it is noted again here. This is a person appointed in a fiduciary capacity (although some disagree and prefer that the protector can act in a non-fiduciary capacity) to hold important powers over the trust, and perhaps to perform certain other defined roles. The protector may be given the power to remove and replace existing trustees, correct scrivener's errors, modify administrative provisions, change trust situs and governing law, the power to restrict or eliminate the right of the Trustee to use income of the trust to pay life insurance premiums on the life of grantor to facilitate turning off grantor trust status if that becomes desirable, and other powers depending on the circumstances and goals. The Protector can also be a committee and not merely a single person.

2. <u>Tuesday: Afternoon 3: Ruling Requests: Kwon</u>
   a. Private ruling requests – when should you consider getting one?
      i. IRS can grant PLR on request. Written determination that interprets the law and applies to fact and done in interests of sound tax administration.
      ii. Only issued before taxpayer has filed return reporting.
      iii. Determination letters and information letters are not addressed. Speaker does not find them useful. A determination letter only issued when turning on clearly established law, and if law is clear why do you need it? Information letters are general statements of the law and not applied to a taxpayer specific fact.
      iv. PLR different from closing agreement.
      v. Beyond question of wanting for certainty, trustees/fiduciaries determining tax consequences to discharge their fiduciary responsibility will want PLR before adopting reporting position on a return.
      vi. First revenue procedure issued each year is the one that 2019-1, check this for changes or updates for requirements or statements that have to be included. May include fine points. Always should adhere to requirements.
   b. Why and when to request a PLR.
      i. Most useful when in the design stage and planning a transaction and tax consequences are not totally clear and might otherwise not proceed with if law is unclear.
      ii. If will proceed with transaction regardless, i.e. you will do it, why would you get a ruling?
      iii. IRS response in process can inform transaction structure and depending on answer might even have you stop the transaction and not proceed.
      iv. Must submit request before file return that reports transaction that is subject of the request. You may have a transaction that is done but still

want the certainty before reporting even if you cannot change the transaction, i.e., even if ruling is unfavorable.

v. On the other hand, if you have a completed transaction you may be precluding ability to report it how you wish.

c. What can PLR accomplish?

i. They can be useful but are not equivalent of a closing agreement which is a final agreement between taxpayer and IRS with respect to an issue that conclusively binds the IRS. Without a closing agreement the PLR may resolve many questions but there still may be issues with respect to the ultimate tax liability that won't be resolved with finality with a PLR. For example, there may be a trust transaction and ask for a ruling concerning design of the trust term and may describe sale or exchange which is predicated for equal or fair value. You can obtain a ruling but when report it if challenged on audit you still have to address it as a PLR will not address a factual question. Key is that a PLR will not foreclose all downstream challenges.

ii. If going to expense of PLR how many parties do you want to include? Including them as additional people to request for a small additional user fee so that the most people who may benefit can.

iii. Is there a simplified method for relief? If there are current issues that have been subject to repeated requests, so IRS may have simplified method. If denied relief through simplified method, you can go through the full or normal PLR process for a ruling. Common rulings for which there is a simplified process or method includes late filing for portability.

d. What is subject matter in the ruling to address?

i. IRS won't rule unless all affected parties are joining in the ruling and having same request. The IRS does not want to be the arbiter of issues between taxpayers.

ii. IRS is not required to respond to ruling. IRS can choose not to respond due to resource constraints and the IRS may have a moratorium on certain issues.

iii. Are the issues the appropriate subject of IRS discretion to determine? Are they within the scope of what the IRS is to address? IRS is an administrative agency and it is not the IRS' role to make new law. They are only to enforce and administer the law and provide guidance where law is not clear. Frame requests in a manner that you are not asking the IRS to "move boundaries." The combination of elements might be new, but the law is not. Keep this in mind when drafting request.

iv. IRS has stated areas they will not rule on.

1. Will not issue ruling if under audit or pending in court.
2. May issue PLR if return is filed (e.g. filing deadline required filing) but must notify IRS if that return is in review.
3. IRS publishes annual a "no rule" list due to matters factual nature or other reasons. There are two categories.

a. Will not issue. If your matter falls into that list it is pointless. Revenue Procedure 2018-3.

b. Areas where rulings normally won't be issued but might be if you demonstrate unique and compelling reasons.

v. Comfort rulings – when law is clear and there is no need for ruling. IRS may cite this as a reason not to process a ruling request. If you feel existing law is not sufficiently clear so that you need a ruling so perhaps do not be deterred by an initial response that the IRS dismisses it as a comfort ruling. Example – regulation on modification of a GST trust. Example 5 addresses division of a single pot trust along per stirpital lines. Many families want to sever. If you submit a PLR request addressing such a modification IRS may reply that it won't rule (i.e. that it views the ruling request as a comfort request). But the example in the regulations is quite limited. It describes a wide-open distribution standard and most trusts do not have that type of standard. That alone may be a factor to differentiate your request from a mere comfort ruling.

vi. If IRS won't change its mind on a request for a comfort ruling, i.e., IRS is saying law is so clear that you don't need a ruling, but you cannot cite that as there is no official letter from the IRS saying that the ruling request is a comfort ruling and being denied because the IRS views the law as so clear. So, there is no affirmative ruling to rely on. So, then you have to decide if you should proceed with the transaction.

vii. IRS will not issue a PLR on what-if scenarios. Must design specific transaction and if you get the ruling you will proceed. They do not want you wasting the time with a speculative transaction.

e. Timing of request.

i. They will respond to a request on a completed transaction if the return is not filed. Only will consider request for ruling after return filed if they consider circumstances unique and IRS field office consents. Speaker has never applied for ruling after return filed. Consider need for permission for field office. Will client be willing to agree?

ii. You can request a ruling on estate tax issues even if taxpayer is living but they will not address factual issues like valuation. Often you may be in the planning phase and the issue may come up during post-death administration. IRS may warn you to extend date to file estate tax return if you won't get the ruling in time. Since you do not know how long the PLR request will take you should extend. You will have to attach the request to the return and provide notice if deadline comes.

iii. All key facts must be disclosed.

iv. Estate tax issues.

1. Issues PLRs on transactions affecting the estate tax that will affect a living person's estate.
2. Will not determine computations of tax, actuarial factors or other factual matters.
3. Issues PLRs regarding the estate tax of a decedent's estate before estate tax return is filed but you should extend the due date for filing the estate tax return if it is initially due to be filed after the PLR is expected to be issued.

v. IRS tries to get rulings responded to in three months. Internal guideline is six months. But if the ruling request is complex and if involves multiple branches (e.g. income tax and transfer tax) it may take full six months. Exempt organization request may take longer.
vi. There is expedited handling if factors outside taxpayer's control and real business need. This is not often granted. Example, disclaimers that had to be done within nine months, a deadline that cannot be extended under 2518.
vii. Taxpayer must demonstrate prompt submission of request. There are specific examples that do not justify expedited treatment. Market volatility is not a factor the IRS will consider as justification for expedited treatment.
viii. Even if request is granted it only means it will be processed before others but it does not assure how long the review process will take or that they will grant a ruling within the deadline you are requesting.

f. Costs and benefits.
   i. Not inexpensive.
   ii. Legal fees.
   iii. User fee is $30,000 in standard case.
   iv. A lot of time on complex rulings in monitoring progress, follow up research, time to respond to questions, etc.
   v. There are reduced user fees for taxpayers with income under certain amounts. Even very wealthy taxpayers and trusts with large assets do not generate large income $1M or $250K, so may get a lower cost.

g. Process.
   i. Follow the instructions. Review the Rev. Proc. and identify each statement you must include and the checklists you have to provide. If there is any element missing the IRS might return the request to you without comment.
   ii. See and follow precisely the checklist the IRS provides in Schedule C. Give them the format the IRS wants.
   iii. Only statements in writing are binding. There may be a lot of dialogue with the IRS along the way, but anything said orally is not binding on the IRS.
   iv. Pre-submission conference. Request one. IRS has discretion to engage in pre-submission conference. If IRS is resource constrained, they may not agree to a pre-submission conference. If you can get one you may get feedback on modifications to the transaction might give you better idea on how to get a favorable ruling, etc. The IRS might tell you at the conference that they won't issue a ruling which will save the trouble of going through the process. The conference will not be anonymous.
   v. Consider that trying to get a pre-submission conference may take more time which should be considered if there is a time sensitivity.
   vi. If you have a pre-submission conference but do not submit a ruling request the IRS may notify the field office with audit jurisdiction.

h. Content of submission.

i. Make it easy to understand make it clear, provide all facts that arematerial and relevant, follow requested format.
ii. Be a client advocate but act in good faith.
iii. Make sure scope is appropriate. Make sure you have requested all the rulings you believe are necessary to give you the support you need. Example a ruling on a CLAT may be focused on income tax but ifthere are related gift or estate tax consequences include them.
iv. Make it easy to understand what you are saying.
v. Include all parties, e.g. trustee and beneficiaries as beneficiariescannot rely on PLR given to trustee even though it will affect their tax consequences.
vi. Use exact language you want IRS to use.
vii. Consider the order of the ruling. The first issue requested may be the branch that is sent the request. So, list the topic that is primary shouldbe listed first. This may differ from the logical or narrative order.
viii. Full disclosure, easy to understand, try to avoid further request for more documents or information as that slows down the process. Attach full documents not just summaries. Example, attach draft documents youare planning on using.
ix. The analysis section is the heart of where you make your case to the IRS. Demonstrate that you are being up front. Bring to IRS attention contrary authority.

i. 9100
   i. Must show good faith and won't prejudice government's position, e.g. election not made because taxpayer relied on adviser. IRS does not want to let taxpayers use this as hindsight. So, need to show that at the time the taxpayer intended a certain result and that it was not taxpayer's fault that election missed.

j. Modification.
   i. If issued but "not in accord with current views of IRS" can change.
   ii. IRS can exercise discretionary authority to exercise retroactively.
   iii. If facts in transaction were different the facts in ruling. If modifyfor reason other than change in facts will only be prospective.

3. <u>Tuesday: Afternoon 4: Parents of Minors: Johnson</u>
   a. Guardian.
      i. Parents will name guardian it is complete in AL, Ak, AZ, ID, MN,MS, MI, NE, NJ, etc.
      ii. Other states are called a "court appointed state" rather, the court appointsa guardian, but the will is given "due regard." So, parent may not have ultimate say, only court will.
      iii. How such a divide?
      iv. History – feudal times father could name guardian. Industrial revolution children no longer had to work and could be coddled, and courts gave less deference to parents and imposed "best interests of child" and this was

codified. In 1900s single families, divorce, etc. in 1991 uniform probate code, etc. made switch back to parental control laws.

v. What is difference between parent versus court appointed guardian? Parent appointed guardian must go to court by deadline (court confirmation) and assumes role on death of last parent. Court can reject parent appointed guardian if someone objects.

vi. In a court appointed guardian the court will consider workload of guardian, religious preferences, etc. Review statute and consider factors. Guardian must be interviewed by court and approved. Significant problem is the unnecessary delays they can cause as well as family issues.

vii. Lamar vs. Zimmerman (1969). Child became subject of a custody battle between family members when parents died in car crash. Court considered child's physical and emotional well-being. Then court looked at the will and saw who was named. If Iowa had been a will/parent controlling state, the yearlong battle could have been avoided.

viii. Guardian if the person is a non-parent who gets legal custody of the child, can consent to marriage or adoption of child, etc. Guardian has no personal financial responsibility for child's support.

ix. Mother and father are the natural guardians of the child. But does not confer on them the authority to manage property titled in the child's name. This will come as a shock to many parents. Example - Widow might have to be appointed as guardian of property of her own children.

x. The speaker's outline had the following which no doubt will truly shock and disturb most clients who are parents of minor children: "When it comes to a conservator, only Mississippi, New York, South Carolina and West Virginia are "parent-appointed" states. All other states require the conservator to petition the court for appointment, and the nomination of a conservator in the will may not have as much weight as other candidates. The court will select the conservator based on an order of priority set forth in the statute. For example, Maryland is a parent-appointed state for the guardian of the person, but the guardian of the minor's property is appointed by the court. In deciding who will act in the minor's best interests as guardian of the property, the Maryland statute lists the person appointed as guardian in the Will as fifth in the order of priority, behind the person nominated by a minor age 16 or older. Notably, the surviving parent will not necessarily be appointed as guardian of the property, so a divorced parent's designation of a guardian of the property may be respected by the court even if the other parent survives and takes custody of the minor."

xi. Types of guardianships.
    1. Natural guardian (above).
    2. Guardian of estate.
    3. Guardian of property.
    4. Conservator.
    5. Tutor - (In Louisiana, when a parent's will nominates a guardian, that person has "tutorship").

6. Standby Guardian - a standby guardian is a legal custodian or guardian of the person or property of a minor child whose service begins when the parent is living but no longer able to care for the child due to physical or mental incapacity
7. Agent - can give certain powers to an agent under a parent's power of attorney to help the minor, as an example.

xii. Uniform Probate Code states do not bifurcate generally, and same person can be appointed both unless property is significant.
xiii. Rules for appointing conservator differ so many states that are parent oriented for appointment of guardian may still be court appointed as to conservator. The surviving parent will not necessarily be appointed as conservator. So, in divorce might name someone else.
xiv. If all assets in a trust may not need a conservator. If parent dies in an accident a wrongful death claim or an IRA beneficiary designation was not updated and provides for outright bequest, may need a conservator.
xv. Another unexpected situation is that the child may not have to physically live with the person named guardian. Consider: "It is important to note that the child does not necessarily have to reside with the guardian. UPC states require only that the guardian "become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the capacities, limitations, needs, opportunities, and physical and mental health of the ward."….with the four children of differing ages, a client could appoint one family member as legal guardian for all four children but allow each child to reside with different family members or friends."

b. Bond and compensation.
   i. No conformity of states.
   ii. Guardian of person may not be entitled to compensation unless will expressly provide for it and even if it is may have to have court approval or conservator's approval.
   iii. Can you name a guardian when there is another parent? May not want ex-spouse to be guardian. Ex-parent could have drug abuse or other significant issues.
   iv. What can be done? The rule is that the surviving parent has first right to take custody of child on death of parent. But Supreme Court said that there is a constitutional right to parent. If divorced parents designate different guardians the designation made later in time controls, etc. He who plans or dies last wins.
   v. Guardian statutes can be used to appoint someone other than biological parent.
   vi. Obtain consent to guardian appointed. The other parent can consent. This is an option of parent has terminal illness.
   vii. Stepparent, grandparent and same-sex partner may obtain guardianship with consent of absent parent.
   viii. Another exception under UPC is if prove other parent is not fit to serve. If surviving parent is not fit, or cannot be found, etc.

c. Religion
    i. Client can nominate a spiritual guardian in will with precatory language or in a side letter.
    ii. Can spend religious holidays with child.
d. Suggestions.
    i. Ask children what they want.
    ii. Plan now and address contingencies if they happen.
    iii. Child at some age may be able to appoint own guardian.
    iv. Best to only list one spouse of a couple who the client wants to serve as guardians to avoid custody battle if designated couple as guardians later divorce.
    v. Should children be split up into different homes? Statutes permit this. It may be practical. Could name separate guardians and request family dinners, etc.
    vi. Money – don't rule out guardian because of financial circumstances, rather address support for child and guardian, use insurance.
    vii. Consider sprinkle trust followed by a dynasty trust. Fund common trust for all children so don't have to draw equal funds from various trusts for common needs. Also protects child with medical needs or special abilities. Include visitation provisions for children to visit relatives, etc. Consider permitting guardian to live in house without rent or pay or loan guardian money to put addition on her house.
    viii. Standby guardian form for minor child whose service begins when parent is living but cannot care for child because of health issues. Consider in POA and revocable trust.
    ix. "For states that have adopted the UPC framework for standby guardians, a parent may appoint a guardian to take office immediately upon the need. UPC 5-202 allows a parent to appoint a standby guardian in a will, trust or "other document". The "other document" can be a general power of attorney that includes the standby guardian provisions, or it can be a separate, stand-alone document that is executed for the sole purpose of appointing the standby guardian."
    x. Parent may prefer to delegate under a durable power of attorney instead of relying on a standby guardian appointment if the state standby guardian law requires the parent to be adjudicated incapacitated to be effective.
    xi. LPOA can delegate property care custody of minor. This would be used when parent is ill but expects to recover, travels, etc.
e. Emergency child medical forms should be prepared.
f. Costs.
    i. Consider the costs involved in raising a child.
    ii. College can cost $500,000.
    iii. It could cost $1M to raise a newborn child inclusive of college.
    iv. What about the costs a guardian might incur?
g. UTMA.
    i. Replaces UGMA in all states except South Carolina,

ii. 2041 estate inclusion since parent can use UTMA to discharge obligation of support if parent is custodian.
iii. If transferor is custodian included in transferor's estate. They can resign and appoint successor custodian but still UTMA assets will be included in estate for three-years under 2038.
iv. Courts have applied reciprocal trust doctrine to UTMA assets.
v. Gift tax rules – transfer is a completed gift and should qualify for annual exclusion. Problem in states that permit extending to age 25. 2503(c) permits contributions to minor trusts to qualify for annual exclusion so long as property is payable to donee by age 21. So, if UTMA continues beyond age 21 it may use lifetime exception. FL gives minor statutorily a 30-day withdrawal right at age 21.
vi. Accounts are taxed to child and subject to Kiddie Tax rules unless to extent used to discharge parental obligation of support that is taxed to parent, unless so large that the child is self-supporting in which case it is taxed to minor.
vii. What of child getting money before 21? Have custodian expend money, e.g. gap year of traveling, pay for college, etc. Consider options to extend the trust like protection by forming LLC and contributing UTMA property to LLC. Make it a manager managed LLC. Transfer to 529 plan but that must be cash only. If minor attains "applicable age" few options to restrict minor's access to funds. Could have child grant power of attorney to custodian. Might have child create revocable trust. If creditor protection is important could transfer to a DAPT.
viii. Contribute UTMA to 529 as enter college. UTMAs are bad for financial aid. Non-parent 529 plan should be used to pay for later years of college after that distributions won't be counted towards student's contribution and financial aid.

4. Wednesday: Morning 1: Incapacity Disability: Krooks
   a. Documents.
      i. Questionnaires and other documents to help client organize information and understand the implications and decide questions concerning when the client prefers that life support be stopped.
      ii. Last will
      iii. Revocable living trust.
      iv. Financial durable power of attorney.
      v. Health care durable power of attorney.
      vi. Advance health care directive
      vii. Irrevocable trusts, especially if there are public benefit or tax planning benefits.
      viii. Buy sell and other entity agreements
   b. Special needs beneficiaries.
      i. If any potential beneficiaries are sufficiently disabled to receive SSI or Medicaid benefits, then their share of the trust estate should be left in a trust for their benefit that will not disqualify them from those programs.

ii. Two options:
   1. Trust with special needs distribution standard.
   2. Trust that gives the trustee total discretion over distributions from the trust.
      a. Some states treat a totally discretionary trust as unreachable for Medicaid eligibility purposes even without supplemental needs language.
      b. Rationale - beneficiary cannot compel a distribution from the trust over which trustee has total discretion.

c. Revocable trust.
   i. "…useful asset management tools while the client is living. This is especially true if the client loses intellectual capacity. Asset management authority of a trustee is often better defined in state statutes and case law than is the authority of an attorney-in-fact under a financial durable power of attorney…"
   ii. Trustee selection. Consider pros/cons of individual trustee versus corporate fiduciary.

d. Incapacity of trustee.
   i. Sterling v. Sterling, 242 Cal. App. 4th 185 (2015) addressed removal of trustee for incapacity.
   ii. Clause in trust included the following:
      1. "Any individual who is deemed incapacitated, as defined in…shall cease to serve as a Trustee of all trusts administered under this document."
      2. The relevant provision provided: "'Incapacity' and derivations thereof mean incapable of managing an individual's affairs under the criteria set forth in California Probate Code § 810 et seq. An individual shall be deemed to be incapacitated if ... two licensed physicians who, as a regular part of their practice are called upon to determine the capacity of others, and neither of whom is related by blood or marriage to any Trustee or beneficiary, examine the individual and certify in writing that the individual is incapacitated…"
   iii. Special planning in revocable trust for incapacity.
      1. Give someone other than the settlor the power to amend the trust if desirable after settlor no longer has capacity to take action. This authority can be held by the trustee, a trust protector or trust advisor, the attorney-in-fact under the settlor's financial durable power of attorney, or a guardian, etc.
      2. "If long-term care planning is a concern and it is appropriate for the trustee to be given authority to follow the direction of the client's financial attorney-in-fact and give trust assets away to other people…then there should be a clause in the living trust document that directs the trustee to comply with the instructions of the attorney-in-fact."

a. Comments: Caution should be exercised. If the wealth level is such that this type of planning won't be necessary perhaps this mechanism should not be included. Also, whether it is advisable to have the agent under the POA direct a trustee under the revocable trust is quite fact specific. In many instances the revocable trust will be used as the primary instrument and be structured and planned to intentionally minimize the use and importance of the POA. For example, the revocable trust might integrate a trust protector with powers and thus provide safeguards the POA cannot as readily provide. The revocable trust might include an institutional trustee to provide independence, oversight, professionalism, processes, etc. that no individual as agent under a POA can provide. Consider the quotes in Bear's Tuesday morning discussion of fiduciaries as to POA abuse, and Magill's Tuesday morning presentation on changes in family units may make it less likely to have appropriate persons to name as agent under a POA.

e. Coordinate title to assets with management decision making.
    i. Title is usually viewed as a tax or asset protection consideration. The speakers point out a third component, for the client facing disabilities, that is far more important than the traditional considerations, i.e. management.
    ii. If the client names a spouse as agent, the client might prefer assets left in the client's name, so the agent can manage assets if the client has capacity issues in the future. If the client prefers the successor trustee under the revocable trust manage assets, then assets should be retitled to the revocable trust.
    iii. Consider also that retirement assets cannot be retitled to the revocable trust.
        1. Comment: It would seem that in some if not many cases structuring the fiduciary positions in the revocable trust can be made to accomplish these goals and that a client facing health or cognitive challenges might be better off using the revocable trust as the primary document not the POA.

f. Health care decision making.
    i. A client facing a known health challenge requires additional issues be discussed and perhaps addressed in health care documents.
        1. How aggressive do you want medical treatment to be?
        2. What are your thoughts and preferences concerning stopping life support if medical treatment becomes futile?
        3. Do you want to be an organ donor?
        4. Do you want organs or tissues used for medical research?
        5. Who are you comfortable appointing to make health care decisions?
    ii. Comments:

1. There are a host of special considerations for a client with a particular health challenge. To understand the questions to ask, and to be able to engage the client living with a health challenge in a meaningful conversation about health care decision making, practitioners need to have some general understanding of the disease course and challenges the client now and in the future may face.
2. Does the client want experimental medical treatments? If the client has a specific degenerative or chronic disease they may well want this.
3. Does the client have religious concerns that may affect any of the decisions? For example, a client with a chronic illness may have strong religious preferences on medical decision making generally but may as an exception to those beliefs insist on the donation of organs or tissues for medical research to endeavor to cure the disease he or she is living with.

g. Long-term care assistance - Housing.
   i. Are the client's current living arrangements appropriate?
   ii. If not, what should be done to prepare for the future?
   iii. If the client has difficulty with stairs, or requires the assistance of a walker or wheelchair, then many houses will not suffice unless they can be modified.
   iv. The speakers creatively suggest Grubhub and similar services for clients with health or aging challenges.
   v. <u>Comments:</u> points out how the changing world can make living with challenges so different then the past. Uber opens options for those that might have previously had difficulty traveling. The list is significant.
   vi. <u>Comments:</u> The clients of estate planning attorneys, wealth advisers, etc. are often at an income/wealth level where they can take full advantage of renovating a home and tailoring it to the client's specific needs. For example, home automation systems can enable a client with an array of challenges to operate many aspects of a home (door, alarms, thermostats, music, television, shades and more) remotely. This can be done using an iPad or remote, or depending on the client's challenges, another mechanism. The modifications should be tailored to the client's unique disease and challenges. For example, if a client has balance issues and a home is renovated flooring can be designed with varying level of plywood subfloors so that there is no variation of the height of any floor when moving to different finishes such as carpeted areas, tile in bathrooms, and wood floors. A pot filler over a stove can avoid the need to carry a pot or kettle with water from a sink. Faucets can be installed at the side sinks. Accessible handles can be used on all cabinets instead of knobs. Too often this decision making on these matters is limited to wheelchair accessibility when that may not be the only challenge the client has.

h. Long-term care assistance – Financial considerations.

i. Is the client's income sufficient to cover the possible cost oflong-term care?
ii. What total cash flow and resources will the client have?
iii. Long term care insurance?
iv. Pension and retirement plans?
v. Other?
vi. If the client will apply to Medicaid various items should be reviewed with the client and possibly changed in preparation for this event.
1. Titling exempt assets in spouse's name.
2. Changing the spouse's will and trust documents perhaps using a special needs trust for the ill spouse.
3. Change spouse's durable power of attorney documents and name a person other than the ill client.

i. Practice runs.
i. The speaker's outline offers the following advice which seems to rarelybe done but which if adhered to might eliminate many of the issues clients later face. It also highlights how important addressing practical implementation issues, not merely legal issues can be:
1. "After the financial durable power of attorney document is executed, if the principal is able, the principal and attorney-in-fact, or the first attorney-in-fact appointed in the document if there are more than one, should visit each financial institution and financial advisor that the attorney-in-fact may be required to work with in the future. A copy of the financial durable power of attorney should be provided to the institution. Typically, the document will be reviewed by the institution's legal counsel before the institution will honor it. By making this contact while the principal has capacity, any concerns of the institution can be handled by the principal and, if necessary, the document can be altered to accommodate the institution's concerns."

5. Wednesday: Morning 2: US Persons with Foreign Assets: Graham
a. Main Legal Systems.
i. United States is only one of two countries that taxes on citizenship- other one is Aratreya.
ii. Earlier this month a bill was introduced to update the US taxation system to come more in line with the rest of the world.
b. 4 Main legal systems.
i. Common Law.
1. US
2. UK
3. Hong Kong
4. NZ
5. Look not only to legislation, but to judicial decisions as well.
ii. Civil Law.
1. Majority of other countries.

        2. Look only to legislative decisions.
    iii. Sharia Law.
        1. Look to the Quran for their laws, although each country varies on how they interpret it.
        2. Iraq Iran Katar Yemen, Saudi Arabia
c. How does this effect estate planning?
    i. Civil law countries mostly do NOT recognize trusts.
    ii. Civil law countries have forced heirship- the law will state who the decedent MUST leave their assets to. They often leave a small portion of assets that the decedent can choose how it goes. Most times these assets must pass to the children. Sharia law follows more closely with civil law than with common law on this concept. In Sharia, often sons will get a double share versus daughters.
    iii. Civil law countries assets will invest immediately in the heir. With common law countries we have the probate process and held within the estate while the personal representative deals with the process to complete the estate, they take control of the assets. In most Civil law countries, you do not receive letters testamentary, they would use notary publics (a much more robust position than in common law countries) to help transfer assets directly from decedent to heir.
    iv. Civil law countries will have a matrimonial regime. This means community property regime. So, a surviving spouse will often automatically own half of the assets, hence the forced heirship concept discussed above. Due to this, there is few specialized estate planning attorneys in a civil law country, but this is improving.
    v. In Common law, the estate pays the estate tax. In Civil law countries, as there is not really an estate they would have an inheritance tax as the equivalent. This concept could lead to double taxation- where the US citizen has estate tax assessed against all international assets, and then needs to pay inheritance tax in the civil law country.
d. Conflicts of Laws.
    i. Most US courts will uphold your choice of law. That does NOT mean that the foreign country will also uphold your choice of law.
    ii. Disposition of real estate- common law countries will look to the laws of the country where the real estate is located. However, Civil law countries will often view nationality of the individual rather than the location of the real estate. Conflict between the two rules of law here.
    iii. Some countries, such as the EU, have dealt with this disparity. If your client has property in an EU member, we can use the EU regulation which attempts to harmonize all member laws. Default is where the decedent was habitually located- but you can file to have your nationality apply.
    iv. This gives you the option to choose strategically what body of law you want to apply if your client has property in an EU country. Discuss with your client to make a specific decision.
e. Acceptance/Acknowledgement by foreign countries of a US will.
f. Titling for international assets.

   i. Foreign countries will allow you to take title to property in an individual's name. Would create an issue when the holder of title passes away. May not be a concern if the individual is comfortable with the laws of that particular foreign country, but more often than not it will require estate planning to adjust the result more in line with the clients wishes.
   ii. Some countries will allow joint tenancy, along the same line as JTWROS in the US. Not always the case in civil law countries, so you will need to review what joint tenant means within that particular countries.

g. Trusts.
   i. Civil law countries do not recognize trusts.
   ii. Some civil law countries have signed the Hick convention on trusts, which simply means that even though they do not have trusts in their own countries, they will recognize them. However, as the people living within these countries do not deal with trusts often, frustration can be found trying to use a trust in these countries even if they would recognize it. Discuss with local counsel to get a feel for what the prudent path would be to take.
   iii. In civil law countries, trusts will often reach maximum tax bracket quickly and have almost no exemption, causing a very adverse tax result.
   iv. Danger in using a pour over will in this situation, as it pours into a revocable trust, which brings up the issues discussed above, along with additional concern that many international countries do not recognize revocable trusts.

h. LLCs.
   i. In some countries having entities such as LLCs established to hold the foreign countries and have a single US will may be able to simplify the myriad of issues. However, this is on a nation by nation basis and need to confirm with local counsel if it will work, as numerous countries (specific mention of Germany) local counsel have indicated it will not work.

i. Unique ways to take title. How title should be taken.
   i. Are there any restrictions?
   ii. Joint tenants may be different under many foreign laws work. You may still have process at first death to prove who had right to deceased spouse's interests.
   iii. Trusts are not recognized in Civil law countries. So be careful about titling property in trust. Some countries have signed Hague Convention and will recognize trusts even though not provided for in their laws (e.g. Italy and Japan). But be careful even if signed convention if trusts are not recognized and used under that countries law it may still create substantial headaches.
   iv. In some countries that have inheritance tax a trust is treated as an unrelated third party, you may trigger highest tax rate.
   v. An entity such as a partnership or corporation may be used to hold title. Work with foreign counsel. A disregarded LLC may be a good vehicle. In some countries it may avoid forced heirship and not trigger additional

reporting obligations. It also can dovetail with the US estate plan. But always clear with foreign country counsel.

vi. There are also unusual/unique ways to take title, e.g. for a foreign client.

1. Usufruct (this exists in Louisiana). It is analogous to a life estate. Example, ownership in child with parents retaining life estate. A German usufruct was treated as a trust and was thus subject to a foreign reporting obligation. May have tax on formation.
2. Fideicomiso – for beach or near beach property. Foreign cannot own beach area property so created this concept. Mexican financial institution serves as a trustee. It is a 50-year term that can be renewed and is analogous to a trust. There are planning opportunities. You do not want just one name on the Fideicomiso as when that person dies you would have Mexican legal issues. Might name LLC or revocable trust. There is a PLR if it is more of a nominee arrangement y9ou don't have to file Form 3520, etc.

j. Wills.

i. Will the will be recognized in foreign country?

ii. Some key conventions may provide guidance. Is country involved a party? Hauge Convention, Washington Convention (if will has list of requirements it will be accepted as valid).

k. Trusts.

i. Canada and UK are common law countries and accept trusts but there may be negative tax implications. Even a revocable trust might face a tax on funding, every 10 years and on termination. In Canada have a 21-year disposition rule.

6. <u>Wednesday: Morning 3: Q&A: Akers, Donaldson, Kanyuk, McCaffrey</u>

a. Electronic Wills.

i. In re Estate of Horton, 2018 WL 3443383 (Mich. Ct. App.) decedent left handwritten note with directions and password to an app on his phone, which included a suicide note and disposition instructions. It was admitted as his will based on the harmless error rule.

ii. Arizona and Indiana also have electronic wills, along with Nevada. It is being considered in other areas.

b. 199A.

i. <u>Comment:</u> Final 199A regulations and new pronouncements were issued after the Institute concluded.

1. Rev. Proc. 19-11 providing guidance on determining W2 wages under Sec. 199A.
2. Notice 2019-07 contains a proposed revenue procedure that provides for a safe harbor under which a rental real estate enterprise will be treated as a trade or business solely for purposes of section 199A of the Internal Revenue Code (Code) and §§ 1.199A-1 through 1.199A-6 of the Income Tax Regulations (Regulations) (26 CFR Part 1), which are being published contemporaneously with this notice. To qualify for treatment as a

trade or business under this safe harbor, the rental real estate enterprise must satisfy the requirements of the proposed revenue procedure. If an enterprise fails to satisfy these requirements, the rental real estate enterprise may still be treated as a trade or business for purposes of section 199A if the enterprise otherwise meets the definition of trade or business in § 1.199A-1(b)(14).

3. The comments and discussions below do not yet reflect the changes made in the final regulations and additional pronouncements above.
4. Here is the text of IR-2019-4: "Treasury, IRS issue final regulations, other guidance on new qualified business income deduction; Safe harbor enables many rental real estate owners to claim deduction.
5. WASHINGTON — Today the Treasury Department and the Internal Revenue Service issued final regulations and three related pieces of guidance, implementing the new qualified business income (QBI) deduction (section 199A deduction).
6. The new QBI deduction, created by the 2017 Tax Cuts and Jobs Act (TCJA) allows many owners of sole proprietorships, partnerships, S corporations, trusts, or estates to deduct up to 20 percent of their qualified business income. Eligible taxpayers can also deduct up to 20 percent of their qualified real estate investment trust (REIT) dividends and publicly traded partnership income.
7. The QBI deduction is available in tax years beginning after Dec. 31, 2017, meaning eligible taxpayers will be able to claim it for the first time on their 2018 Form 1040.
8. The guidance, released today includes:
    a. A set of regulations, finalizing proposed regulations issued last summer, A new set of proposed regulations providing guidance on several aspects of the QBI deduction, including qualified REIT dividends received by regulated investment companies
    b. A revenue procedure providing guidance on determining W-2 wages for QBI deduction purposes,
    c. A notice on a proposed revenue procedure providing a safe harbor for certain real estate enterprises that may be treated as a trade or business for purposes of the QBI deduction
9. The proposed revenue procedure, included in Notice 2019-07, allows individuals and entities who own rental real estate directly or through a disregarded entity to treat a rental real estate enterprise as a trade or business for purposes of the QBI deduction if certain requirements are met. Taxpayers can rely on this safe harbor until a final revenue procedure is issued.
10. The QBI deduction is generally available to eligible taxpayers with 2018 taxable income at or below $315,000 for joint returns and

$157,500 for other filers. Those with incomes above these levels, are still eligible for the deduction but are subject to limitations, such as the type of trade or business, the amount of W-2 wages paid in the trade or business and the unadjusted basis immediately after acquisition of qualified property. These limitations are fully described in the final regulations.

11. The QBI deduction is not available for wage income or for business income earned by a C corporation."

ii. New 1040 has been overhauled- How does one claim the new 199A deduction on the 1040? Line number 9 is the qualified business deduction. This is in addition to your standard or itemized deduction- but it does not change your AGI (it won't jeopardize a charitable deduction for example).

iii. There is no schedule that goes through the 199A computation. The draft instructions to the 1040 gives you a one-page worksheet (page 37) that the IRS calls the simplified worksheet. Need to check publication 535 for more detailed analysis.

iv. If dealing with triple net lease property, will rental income from that property be considered qualified business income? In most situations, Sam does not feel a triple net lease would rise to the level of being a trade or business, as the design of the triple net lease is for the landlord to be as hands off as possible. However, it is NOT automatically disqualified- it is a case by case basis.

v. Only get deduction on US source income. Under US sourcing income rules, royalties from use of Intellectual Property is based upon where that IP is used. Therefore, it would not count towards income for the deduction.

c. Kaestner.

i. Supreme Court has granted Cert. for Kaestner and it may go a step further and grant Cert. for Fielding as well.

ii. Issue is state taxation of income accumulated in non-grantor trusts. This is particularly important with restrictions on deduction of state income taxes SALT.

iii. How do states tax trusts that accumulate income? No consistent pattern. Different states have different approaches. Some tax if beneficiary lives in the state. Some believe that if resident of state created trust that suffices for taxation. Others tax based on residence of trust. Another common pattern is taxation based on situs of trust administration.

iv. NC in Kaestner based on beneficiary in state. MN in Fielding taxed based on residence of settlor.

v. Does Constitution prevent this?

vi. Quill v. ND – for state to impose tax must have nexus between state and person taxed, and some rational relationship between what state is taxing and benefits provided by state. In Quill do not need a physical presence but still need nexus. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

vii. Kaestner court decided that residence of beneficiary was not a sufficient nexus.

viii. Supreme Court recently reversed Quill in Wayfair. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (June 21, 2018). That, however, has little to do with our issue. The part of Quill that was not reversed was that Due Process clause requires nexus. Quill required physical presence under Commerce Clause and that was the part of Quill that Wayfair overruled.
ix. There are decisions in many other states that have decided that you need something more substantial than the presence of the settlor or current presence of a beneficiary to tax a trust.

d. Can grantor of grantor trust be reimbursed if trust is silent on the payment of tax.
   i. Millstein v. Millstein, 2018 WL 3005347 (Ohio Ct. App.), and 2018 WL 1567801 (Ohio Ct. App.).
   ii. With grantor trust the grantor is deemed to own trust property for income taxes and grantor pays all income on trust property. Also allows grantor to engage in swaps and asset sales without income tax consequences. Grantor's payment of income tax on income of trust is not a gift nor will it cause estate inclusion.
   iii. What if grantor tires of paying income tax on trust phantom income?
   iv. Trust might authorize trustee to toggle off grantor trust status. Be careful this is not in the beneficiary's best interest and may raise questions of fiduciary liability to beneficiaries. It will also turn off ability to engage in tax free transactions after that.
   v. Could instead have a tax reimbursement clause. This can be helpful if there is a large one-time recognition event, e.g. sale of a business.
   vi. Give trustee discretion to reimburse, but do not obligate trustee to do so.
   vii. Some states have statutes clarifying that reimbursement won't cause estate tax inclusion. NY and NH have statutory trustee power to reimburse grantor for taxes paid. In NY can only reimburse for capital gains.
   viii. Millstein father sued trust for reimbursement and court dismissed. Brought action under UTC to reform trust for tax purposes. But court said only beneficiary and trustee can bring such an action, not the grantor. Grantor created the situation and had no basis to change it.
   ix. Caution that if reimbursement clause regularly exercised it may be a pattern and could create a problem. This could raise a 2036 inclusion issue if done over. It also raises fiduciary issues. "Not too often." Leave grantor with sufficient powers to turn off grantor trust status if it becomes problematic to continue to pay tax.
   x. It also appears from the discussion that the Court in Millstein viewed the situation as having been created by the father, so he had controlled the creation of the situation.

e. Asset protection.
   i. Trust in state 1. Trustee in state 2. Trust administered in state 2. Beneficiary lives in state 3. Creditor in state 3 sues beneficiary in state 3.
   ii. Creditor gets judgement and cannot satisfy the judgement and realizes that there is a trust creditor must go where trust is. This is where the trustee is. What if the institutional trustee operates in all states? That is state 2.

iii. What law would apply concerning creditors ability to get beneficiary's interests in the trust?
iv. If it is a spendthrift trust not created by child, then child's creditors cannot reach the trust unless there are exception creditors. Baring that it should be difficult to reach the trust in any state.
v. What if the child/beneficiary is also the trustee of the trust? Does that make
    1. Restatement 3rd of Trusts Sec. 60 Comment g. If beneficiary is also the trustee, the creditor can reach as much as trustee/beneficiary could distribute to herself under terms of the trust.
    2. Many of cases concluded that even with a HEMS standard the beneficiary had power to withdraw at will. Example one case permitted trustee to distribute as much as "desirable."
    3. The UTC reacted by adopting 504(e) if the trustee's discretion to make distributions for trustee's own benefit a creditor cannot reach or compel distribution except to extent creditor could reach trust assets if beneficiary were not acting as trustee.
vi. What if child is in a state that did not adapt 504(e) then have conflict of law issues. Instrument can designate governing law. Some treatises suggest that the trust can select state law if there is some relationship to that state. Restatement 2nd Conflict of Laws – state to which administration is most substantially related may govern. Overlay that some might suggest that there is a public policy exception. Restatement 2nd Sec 270 Conflict of Laws." So, look at state designated by settlor provided state has substantial relationship to the trust, and provided that doesn't violate a strong public policy of the state that has the issue.

f. Proposed Sec. 643(e) Regs.
i. Comment: As indicated earlier final regulations and additional guidance have been issued.
ii. Treasury has authority to consolidate multiple trusts and treat as single trust if:
    1. Same or substantially the same grantors.
    2. Same or substantially the same beneficiaries.
    3. Principal income tax avoidance purpose.
iii. 199A regs issue proposed 643(e) regs. Presumes principal income tax avoidance method if no non-tax purpose.
iv. Does this new presumption apply to pre-existing trusts or only to new trusts created after date proposed regulations were issued? Prop. Regs. Say it applies to new trusts entered into or modified after August 8, 2018. The preamble to the proposed regs suggest that the new rule is consistent with and reflects the intent of Congress regarding arrangements with multipole trusts.
v. So, IRS is taking the position that clone trusts have tax avoidance motive.
vi. How can you make 'clone" trusts a bit distinctive? Consider that for this purpose spouse is considered same person. You need to do something more meaningful.

vii. Multiple children and grandchildren can differentiate trusts.
    1. Comment: The Proposed regulations contain a specific example of how to differentiate trust beneficiaries. It is also not clear that the existence of a tax avoidance motive taints the trusts for purposes of the multiple trust rule if all three conditions are met. In other words, if the beneficiaries are sufficiently differentiated then a tax avoidance motive alone should not suffice to aggregate the trusts. Finally, consider the discussions in the Thursday afternoon special session with Rothschild "Planning with Increased Exemptions." There is a strong asset protection and estate tax planning motive. Might that suffice to negate the principal purpose of income tax avoidance?

g. Section 1(h).
    i. Taxpayer in 24% marginal rate. Will not pay 25% recaptured Sec. 1250 gain presumes you are in a bracket higher than 25% if not recapture income will be taxed at marginal rate.
    ii. Similar rule on Sec. 1202 stock or collectibles.

h. Charitable gifts and bequests.
    i. What is downside of maintaining control over private foundation until death?
    ii. Gets 1014 basis adjustment and although 2036 includes in the estate there should be a charitable contribution deduction.
    iii. However, also consider that there are potential negative consequences to such an inclusion.
        1. The assets in foundation, since included in the decedent's gross estate, will be subject to lien for decedent's estate tax.
        2. Sections in Code are based on size of estate, e.g. Sec. 303 redemption of stock without dividend treatment depends on value of stock included in gross estate being more than 35% of adjusted gross estate causing inclusion of the private foundation may fail the 303 tests and similarly under 6166 estate tax deferral provision.

i. Inter-vivos CLAT.
    i. What if grantor dies before term. Should not be included in grantor's estate unless she retained some type of control or interest, e.g. over who charitable beneficiaries would be during term of CLAT. That would be a 2036 situation.
    ii. If another person held that power, it should not be.
    iii. Be certain gift is not incomplete if want it out of settlor's estate.

j. Conflicts.
    i. Estate planning attorney represents parents. The children later contact that attorney and want the attorney to represent the children as well. Children also live in another state then the state in which the attorney practices.
    ii. Conflicts of interest issues. You can represent if there is a potential conflict, or a conflict that can be waived.
    iii. Need waiver in writing signed by parents and children explaining that you are going to do planning for younger generation and request that they

waive conflict. State no current conflict exists, but one could develop. If it ripens into a real conflict you will withdraw. Might say withdraw from representation of children and remain with parents.

iv. See sample engagement letters on ACTEC website with conflict waiver.

v. Children live out of state so cannot advise on local law. Its unauthorized practice of law in that other state. Some states have very broad rules on unauthorized practice of law. Also, rules of professional responsibility come into play. Are you competent to give advice in another jurisdiction? Also, it may raise malpractice issues. So, you could refer children to lawyer in the other jurisdiction, but children may not want that. The other choice is to partner/co-counsel with attorney in that second jurisdiction.

k. Trust Wrongful Termination.

i. Trustee/beneficiary distributes all assets in trust to himself and other beneficiaries equally in violation of trust instrument and state law. Is there a tax issue?

ii. This could be viewed as embezzlement by trustee followed by a gift by the trustee.

iii. Receipt of money received illegally by taxpayer is taxable income even if there is an obligation to repay the money.

iv. Report as other income on Form 1040.

v. Trust might be able to claim a loss.

vi. If trustee repays money no deduction since miscellaneous itemized deductions have been eliminated.

vii. Comment: Some clients are terminating old trusts, e.g. credit shelter trusts that no longer provide an estate tax benefit (often without professional adviser involvement). Practitioners should consider adding the above risk to the warnings given to such clients.

l. GPOA.

i. If grant right to create and revoke general power of appointment (GPOA).

ii. Does the mere right to a GPOA may open door to beneficiaries' creditors? Not correct.

iii. Right to create GPOA is big issue. Use a broad exculpatory clause.

iv. Is there a continuing duty to monitor this? Perhaps trustee or powerholder has no authority to exercise until requested to do so.

v. Merely holding GPOA does not give creditors of power holder access.

vi. To extent exercised there have been some inroads. CA, MI and NY say creditors can reach unexercised GPOA if cannot satisfy claim with other assets.

1. Comment: Perhaps before an exercise of a GPOA some of the steps taken with respect to self-settled trusts such as having a solvency affidavit and perhaps lien and judgement searches might be considered as a precaution if the dollars involved justify such steps.

vii. Uniform Powers of Appointment Act - If there is a presently exercisable GPOA creditors can reach it. Does not require exercise. But this is a controversial part of the Act.

m. Legal fees deductible?
    i. 67(e) notice – expenses incurred solely because in a trust or estate still deductible under 67(e) remain deductible. So, question is what were legal fees paid for? Classic representation of an estate or trust would be.
n. 642(h).
    i. If deductions exceed income the excess is lost.
    ii. In last year (including carryovers) can be taken by beneficiaries. Excess deductions are carried out to beneficiaries.
    iii. But deductions for beneficiaries have been suspected until 2026. Would seem once carried out to beneficiaries it's a beneficiary deduction and suspended.
    iv. Notice 2018-61 IRS intends to issue regulations saying trust can still deduct expenses incurred solely because it is a trust or estate, i.e. expenses unique to the administration of a trust or estate. Also indicated that if trust expenses in last year, when carried out to individual beneficiary, should it be deductible despite 67(g)? IRS is considering this.
    v. Blue Book give as an example the deduction of such termination costs.
    vi. What do you do since guidance not yet provided? Extend hoping for guidance before filing date. At filing date pay the tax then file a protective claim for refund so if the IRS gives favorable answer statute will remain open.
o. Charity.
    i. If a college offers opportunity to purchase stadium seating should charitable gift amount be reduced and if so by what amount?
    ii. Old tax law you could treat as charitable contribution 80% of what you paid college for season tickets. One of the JCTA revenue raisers was to eliminate this and convert 80% to zero so no deduction for season tickets for college athletic events.
    iii. The above question seems to be trying to get around the TCJA change. It is a payment for the right to buy tickets. This is a quid quo pro and it's not a charitable gift if you are receiving a value back.
p. Exoneration and Abatement.
    i. Decedent dies with just $500,000 and a home. Decedent's trust gives $500,00 to x, and gives home to Y, and finally gifts any residue to Y. Decedent owes $400,000 secured by home. Y wants trust to use money to repay loan citing state law rule on abatement. Gift of cash to x is cash, so take cash to pay off loan as that is the first source to pay off debt. X argues that encumbered assets are not entitled to exoneration of debts unless will or trust says so and since will did not then house should be distributed encumbered and x should still get $500,000 cash unreduced by abatement.
    ii. Only use abatement if not enough assets in the estate to pay off gifts. Abatement should not arise since estate is not involvement.
q. Double basis adjustment regardless of which spouse dies first.
    i. 1014 basis adjustment on death of either spouse.

ii. A owns property and puts the assets into a discretionary trust for B's benefit. On B's death all assets pass into trust over which A is trustee with distribution power to control enjoyment.
iii. This technique should work.
iv. When A makes transfer to the above trust the transfer to the trust by A is a completed gift notwithstanding the powers retained. So, it's a completed gift.
v. A gets the marital deduction since it's not a non-deductible terminal interest. Spouse's interest won't terminate permitting property to pass to someone else.
vi. A's estate is entitled to marital deduction since property is in form of marital deduction.
vii. When B dies property is included in B's estate and qualifies for the marital deduction.

r. Long term GRAT.
   i. GRAT designed to be 100 years.
   ii. Badgley affirmed that regulations are valid. Badgley v. United States, 2018 WL 2267566, 121 AFTR 2d 2018-1816 (N.D. Cal. May 17, 2018), app. filed (9th Cir. June 7, 2018).
   iii. Interest rate at time of death was lower than when the GRAT as set up so entire corpus of the GRAT was included in her estate under formula.
   iv. Regulations require including portion of GRAT to satisfy the retained annuity based on the then 7520 rate.
   v. Create 100-year trust when 7520 rate is 3.4%. GRAT gives $35,245/year of an annuity for 100 years. That is worth $1M.
   vi. Settlor will die before term.
   vii. Benefit of technique is that it can succeed even if estate inclusion because the way the formula works.
   viii. 7520 Rate increases substantially before settlor's death. May only have $705,000 at 5% 7520 rate to generate annuity.
   ix. If 7520 rate stays the same but property increases substantially. So, amount to be included is $1,036,000 so excess is still excluded.
   x. Raises issues on marital deduction.
   xi. Would seem that have to operate the GRAT for the full 100 years.
      1. Comment: If the client is confident that interest rates will rise significantly then the very long term GRAT could present an interesting planning option especially if the client has already used all of her temporary exemption.

s. Marital trust ascertainable standard.
   i. Trustee wants to make distributions to spouse larger than HEMS to make gifts for estate planning.
   ii. Who is being benefited? Is it within scope of fiduciary duties?
   iii. What does HEMS mean in this context? Terms are not well defined. Is it broad enough to permit larger gifts?
   iv. Can you decant and change the standard? Trust agreement must provide for it or state law must permit.

    v. Every state requires trustee to have discretion to decant so does this fact pattern permit this.
    vi. Decanting does not permit adding beneficiaries but perhaps can broaden trustee's discretion beyond ascertainable standard.
    vii. Consider whether notice to beneficiaries is required and even if not, advisable.
    viii. Consider Code Sec. 2519 issues. Consider PLRs and divide trust first and then intentionally trigger a post-division portion of the trust to intentionally trigger 2519.
        1. <u>Comment:</u> See for example, Letter Ruling 201426016 (Mar. 11, 2014) which addressed a number of issues pertinent to dividing a QTIP and disclaiming a portion of the post-division QTIP intentionally triggering 2519.
    ix. If distributions are made in excess of what instrument provides those may be ignored.
        1. <u>Comment:</u> Include in the QTIP language along the following lines: "The trustee has the right to make principal distributions of assets held in the marital trust to the surviving spouse for purposes of business succession or tax planning (including by way of example and not limitation, gift or other transfer tax planning by my spouse)."

t. State Uniform principal and income act.
    i. Distributions partnership to trust, if greater than 20% of entities gross assets as shown on entities financial statements, could be deemed in liquidation.
    ii. Is it total assets or do you add back depreciation and amortization to arrive at total assets? Would see that gross assets should be unreduced by depreciation and amortization, but it is as show on year-end financial statements, so it is book not FMV.
    iii. New uniform act approved in 2018 Sec. 401(d)(2) replaced by permissible or elective safe harbor in 401(e)(2). Under new act look at what the trust received by value of trust interest and trustee can estimate. This is more flexible under the new act.

u. Clawback.
    i. Doesn't address GST exemption.
    ii. Claw back regulation did not address GST, index numbers (examples in proposed regulations don't use indexed numbers).
    iii. Issue of whether DSUE remains same even if exemption later declines.
    iv. "It seems clear that there will be no kind of clawback." Does not believe there should be GST clawback.

v. Sale of S Corporation Stock to Grantor Trust.
    i. Sale to IDIT for promissory note. Seeded gifts with guarantees.
    ii. As to guarantees and seed gifts one speaker stated: "I don't think they are required."

iii. Trustee paid beneficiaries a guarantee fee. Beneficiaries are reporting guarantee fee as income on their 1040s. Trust passes out guarantee expense to grantor.
iv. Can the grantor take a deduction for the guarantee fee paid to the beneficiaries? Is this a business or investment expense?
v. When analyzing the question, consider whether if this were not a grantor trust, would the complex trust be able to deduct expense? There is an argument that it could be deducted as investment expense.
vi. But is this a 212-ordinary investment expense? Not certain. But since it's a grantor trust, the beneficiaries are paying a guarantee to the grantor and what are they guaranteeing? That trust will fulfill obligations to the grantor. In a grantor trust this is not a recognized transaction (it's a sale by the settlor to herself) so how can that be an ordinary expense? But in all events no miscellaneous deductions are allowed until 2026.

w. Trustee.
i. Client has no children and no friends older than them, and siblings that have no time. How can client name a trustee under her will if she does not want an institutional trustee?
ii. Make it a directed trust and have someone direct distributions separately to beneficiaries. Name a trust protector, that is an easier role to fill.
iii. Let beneficiaries name trustees.
iv. Form a private trust company if company is wealthy enough.
v. Carve up role into more digestible pieces.
vi. Comment: First reframe the conversation for the client to not just about a will and post-death planning but about later life planning. It's not just about the will. "Who should manage your assets for you if you are disabled?" Perhaps if the client has no one to name she might want the professionalism and independence of an institutional trustee. But even that decision can come in several flavors if her issues with an institutional trustee can be identified through a discussion. It might be feasible to name an administrative trustee. A separate person or arrangement could be created for investments if that is a concern. As noted above it could be structured as a directed trust. The trust protector role might use a single independent professional to provide a check and balance on the institutional trustee if that is a concern. The trust protector role could be expanded to a committee of 2 or 3 independent persons. For example, one of the family members who had little time, a CPA and attorney could comprise a committee and work with the institutional trustee. There is a myriad of variations that can be cobbled together to meet whatever specific concerns and objectives the client has.

x. Reformation.
i. Mistake in drafting resulted in loss of marital deduction.
ii. Trust agreement has a provision that disallows the marital deduction. Can you reform the trust after death of first spouse?
iii. Reason for mistake may affect answer.
iv. Reformation corrects scriveners error to reflect original intent.

1. This may work.
2. IRS, if it concludes reformation is consistent with local law, it will generally permit the tax consequence to prevail.
3. 1989 Krause v. Comr. Marital trust needed GPOA and scrivener gave LPOA. Court conformed trust to convert LPOA to GPOA and IRS allowed marital deduction since local law allowed.

v. Second type of reformation is to put the document where it should be.
1. Example decedent did not know you had to give surviving spouse income to satisfy marital deduction.
2. Rapp vs. Commr. 1998 after decedent death got together and changed trust to get surviving spouse all income for life but the IRS would not apply it retroactive to date of death as there was no showing that this is what decedent intended.
3. <u>Comment:</u> See comments in Magill's presentation about including a statement of intent in a trust document.

y. Trustees.
i. Spouse or child is beneficiary and trustee and also a disinterested trustee who can direct distribution to beneficiary of principal to get basis step up.
ii. Can or should beneficiary also serve as trustee?
iii. Must limit distributions of trustee/beneficiary to herself to HEMS to avoid estate inclusion.
iv. Disinterested third party fiduciary has authority to direct distributions to herself. Trustee must follow orders of trust adviser who has power to direct the distribution.
v. Once the money is out of trust it is subject to risks, creditors, etc. of the beneficiary. What of divorce? State estate tax? Must weigh all of this against benefit of basis step-up.
vi. Consider tailored power of appointment.

z. Decant GST exempt trust.
i. What if decanting extends perpetuities period?
ii. Four exceptions for trustee action that can be taken without consent of settlor or beneficiaries under local law at time trust was created. You can extend perpetuities period but cannot extend beyond state law.
iii. "d" exception is broadest but has limitations one of which is you cannot extend time of vesting.
iv. Decanting – IRS announced years ago a project on decanting tax issues. That has disappeared from the priority guidance plan for years.
v. If you make a modification that does not meet exceptions, you may lose some benefit.

7. <u>Afternoon Fundamentals Evolutionary Planning: Harrison and Hughes</u>
a. Technology changes are transforming practice.
i. See speaker's outline for a discussion of how technology helps estate planners' complete tasks more quickly and efficiently than in the past but that billing constructs have not really changed to reflect that. This is

critical to address as technology will continue to transform practice and billing methods will have to continue to be modified.

ii. The outlines raises a host of issues and considerations that need to be discussed but which rarely are. The presentation and outline are the estate planners version of 7 Habits of Highly Effective People, self-help book written by Stephen Covey. This presentation could be the "20 Habits of Highly Effective Estate Planners."

b. Importance of estate planning will remain.

c. Drafting. Consider simplification if feasible.

   i. Marital credit shelter formula in 2019.

      1. Old style credit shelter trust for maximum estate tax exemption.
      2. Marital trust for balance.
      3. 3rd trust for a state QTIP trust (or gap trust if state exemption less than federal exemption).

   ii. Consider single-fund QTIP.

      1. Allows tax planning.
      2. Achieves many goals desired for credit shelter marital formula.
      3. It allows deferring portability decision until first death.
      4. Avoids difficult of having portability discussion with both spouses while both are alive.
      5. Consider Clayton QTIP approach so can avoid, for example, mandatory income distribution if you wish.

   iii. Focus on simplification of documents and still having planning flexibility to make it all easier.

d. Issues of getting clients to update old documents with old formula clauses that may not work.

e. Technology.

   i. Changes how you manage client expectations.

   ii. Technology means more communications.

   iii. The speakers suggested considering the use of the "delay send" feature on emails. Here are a few of the examples of this feature mentioned below. Comment: While some might not find these as exciting as a juicy 199A tidbit, these are nothing less than brilliant and I have already implemented some.

      1. Example: I happen to be on the email system and a client asks me a real interesting question about whether the Credit Shelter Trust can be a grantor trust. I like the question and the mental challenge of answering it. I type an answer; it takes me 15 minutes. The client asked me the question at 1 pm; I am ready to send at 1:15 pm. Do I really want to hit send?
      2. Example: I don't want to bug my associates or colleagues over the weekend, but I have a lot of good thought and emails I draft and want to send. Delay deliver on Saturday to arrive on Monday or later next week.

3. Example: I have an email that I need to work on three days from now. Send it to myself using Delay Delivery to arrive 3 days when I am ready to work on.
4. Example: I want to slow down the colloquy that goes with immediate responses. You can answer immediately, but your immediate response can be slowed down thereby slowing down the responses.

f. Client expectations.
   i. Practice management tips to manage expectations. Non-performance if make commitment is a problem. Be realistic when make promises to clients about work load and commitments.
   ii. "Not on call." Make it clear to client what your schedule is.
   iii. Try to avoid creating a sense of emergency if there is not an emergency.
   iv. Limit number of client meetings per day to allow time to get work done.
   v. Manage client expectations. Example – new client pushes for meeting ASAP. Unless there is a real urgency and immediacy meeting with them creates an expectancy that could be problematic.

g. Project management.
   i. Break large projects into digestible components.
   ii. Better to send out parts or phases of a project rather than all at once. Prioritize and give client list.
   iii. Also helps billing, so you are not billing by components and not at the end.

h. Cell phone.
   i. If you give a client your cell phone number, they might tend to call cell phone before calling office.
   ii. Software can make it look like you are calling from the office when it is really from your cell phone.
   iii. Exceptions – when/if you give cell phone advise client not to abuse it.
   iv. Hybrid approach – give cell phone but leave volume off and not interrupted.

i. Texts.
   i. Speaker will text clients.
      1. Comment: Here's one that I have a different view of (well for now). How can you save and record text messages? Difficult. If you are tethered to your desk or in meetings can you be sure that you will notice a text message in a timely manner? Also, difficult.
      2. Here's a provision we use in our retainer agreement/engagement letter: "You consent to our use of Email and cellular telephone communications in representing you. Please do not assume we have received any text message unless you verbally confirm that we have."
      3. Consider how financial advisers may be affected:
         a. A recent article in Financial Planning magazine Mark Mersman, "Voices Why advisors can't ignore text messaging," https://www.financial-

planning.com/opinion/text-messaging-for-financial-advisors-client-communication

b. "FINRA enforcement actions in 2017, for example, indicated the emergence of a new trend of disciplinary measures and fines against financial advisors who communicate with their clients via unauthorized text messages. Specifically, if a firm "intends to communicate, or permit its associated persons to communicate, with regard to its business" through text messaging, then that firm "must first ensure that it can retain records of those communications as required by SEC Rules 17a-3 and 17a-4 and FINRA Rule 4511."

c. If you do not fully understand the complexities of the FINRA rule — you're not alone. In an explanation of Regulatory Notice 17-18, the wording "intends to communicate" has a somewhat ambiguous meaning, according to experts. Consequently, advisors who text need to set up the requisite compliance tools for supervision and record-keeping."

j. Value proposition for client.
   i. What is client "macro" objective? They want to make sure that their assets go to their beneficiaries and are used to enhance their beneficiaries lives and purposes. They don't want their assets to go to predators (tax authorities, mean spirited lending institutions that might place a client/beneficiary into default, fraudsters, divorcing spouses, etc.).
   ii. Avoid these issues with trusts. The discussion on protecting assets is the most important discussion to have in terms of value perceived by clients. Value of independent co-trustee with children and surviving spouse.
   iii. Consider private foundations and testamentary CLTs as these are the trust equivalent for charitable planning.

k. Protecting assets from creditors.
   i. Planning for spouses and spouse to spouse transfers.
   ii. In 1984 $600,000 exemption would discuss transferring assets to other non-monied spouse to fund his/her credit shelter trust.
   iii. In 2019 exemptions are so high and there is portability, so it is different. But if in 2019 clients divorce what happens to the prior asset transfers say made in 1984? If it was done for estate planning purposes and was separate property of say the husband that should not transmute the property to marital property. The wife who received the property will argue that it was a gift to her from husband and is now her separate property. Regardless of which argument/spouse succeeds with respect to the transmutation of the property it can add considerable complexity and angst to the divorce.
   iv. Because of portability and $11.4M exemptions much less likely to need to retitle assets.

            1. <u>Comments:</u> What has happened with all the old asset transfers? Why haven't clients reversed them? Also, still transfer assets and may do so with large dollars to use temporary exemptions. These issues will remain and be significant for many clients.

l. Family meeting.
    i. Is a more valuable tool than ever before.
    ii. Will clients pay hourly rates to facilitate an annual meeting?
    iii. Tough decisions are how to raise children not to be trust fund babies. How to educate them as to where family wealth came from and what it is for.
    iv. Do you bring in an expert to lead the discussions at a family meeting?
    v. What to discuss? Tax planning, asset protection issues, estate plan, family dynamics, etc.
    vi. Bring children "along," teaching them how to be a good steward of family wealth, introducing topic of prenuptial agreements.
    vii. Educate children as to use of trusts.
    viii. Many clients do not initially want to disclose financial information.
    ix. Location is important and should not be the client's office. Is the lawyer's office intimidating?
    x. Are "in-laws" included in the meeting? Do not pick and choose, it should be all or none.
    xi. Consider whether a life coach or psychologist should be brought in.
    xii. Should you include the investment adviser and add an investment discussion?
        1. <u>Comment:</u> It should be collaborative including all advisers.

m. Trust protectors.
    i. Build in flexibility into irrevocable trusts.
    ii. Even if uncomfortable because you have not done it consider doing it as its important.
    iii. Trust protector provisions are hard to draft.
        1. <u>Comment:</u> The speakers echo a comment made in several other programs. See the discussion by Krooks on planning for incapacity and his recommendations for protectors as a safety tool.
    iv. What about a special limited power of appointment, e.g. giving third party power to appoint to children, spouses, etc.

n. Grantor trust status.
    i. Grantor trust status is incredible powerful for planning.
    ii. Swap power is favored way to characterize a trust as a grantor trust.
    iii. Swap power is powerful as a planning tool.
        1. <u>Comment:</u> Consider Revenue Ruling. 2008-22 (Apr. 21, 2008). Meeting the requirements for a swap power is not always as simple as some may anticipate. If interests in a family business are swapped out is it assured that there is no shifting of benefits among beneficiaries as provided in the Ruling below?
        2. "In situations where the grantor of a trust holds a nonfiduciary power to replace trust assets with assets of equivalent value, the trustee has a duty to ensure that the value of the assets being

replaced is equivalent to the value of the assets being substituted. If the trustee knows or has reason to believe that the exercise of the substitution power does not satisfy the terms of the trust instrument because the assets being substituted have a lesser value than the trust assets being replaced, the trustee has a fiduciary duty to prevent the exercise of the power. See Restatement (Third) of Trusts § 75 (2007) and Uniform Trust Code §§ 801 and 802

(2005).

3. In the instant case, unlike the situation presented in Estate of Jordahl, the trust instrument expressly prohibits D from serving as trustee and states that D's power to substitute assets of equivalent value is held in a nonfiduciary capacity. Thus, D is not subject to the rigorous standards attendant to a power held in a fiduciary capacity. However, under the terms of the trust, the assets D transfers into the trust must be equivalent in value to the assets D receives in exchange. In addition, T has a fiduciary obligation to ensure that the assets exchanged are of equivalent value. Thus, D cannot exercise the power to substitute assets in a manner that will reduce the value of the trust corpus or increase D's net worth. Further, in view of T's ability to reinvest the assets and T's duty of impartiality regarding the trust beneficiaries, T must prevent any shifting of benefits between or among the beneficiaries that could otherwise result from a substitution of property by D. Under these circumstances, D's retained power will not cause the value of the trust corpus to be included in D's gross estate under § 2036 or 2038."

iv. Swap with a trust must have exact equivalent consideration.
v. Third party can add charitable beneficiaries. If non-adverse party creates grantor status. Gives flexibility to add charities to deflect assets from heirs to charity.
vi. Add flexibility to toggle between grantor and non-grantor trust status.
vii. How do you turn on grantor status? Can you decant a non-grantor trust into a grantor trust? Do you give a protector a power to recharacterize the trust?

o. Death bed planning.
   i. Assets won't get step up so if you have grantor trust swap appreciated assets back into the estate.
   ii. Selling life insurance policy to a trust if there is a valuation play.
   iii. 1014(e) issue. If live past a year get a step up in basis even if assets come back to you.

p. Working with focus.
   i. Turn off your cell phone, email chimes, etc.
   ii. Work at home one day a week to be away from phone, computer, etc. Get more done in that day then all week.
   iii. Here's an excerpt from the speaker's outline: "Set aside a day each week to work "away" (at home, in a conference room, etc.). Leave your phone

and email turned off so that you can focus for long periods of time on getting the heavy lifting done. Be disciplined about protecting this day. Get your staff on board so that they also are disciplined about it."

q. Email.
    i. Email can destroy focus.
    ii. Use delay delivery to change recipient's expectations.
r. Client selection.
    i. How technology effects client selection.
    ii. Clients want quicker response then ever – enhanced communications.
    iii. We need fewer clients.
    iv. Client intake is more critical.
    v. 90/10 rule – 90% of grief comes from 10% of our clients.
    vi. 80/20 rule – 80% of our revenue comes from 20% of our clients.
    vii. "I'm leaving soon on a trip," "kid calls for 92-year-old saying she wants to disinherit my brother," "I need it ASAP."
s. Firing a bad client.
    i. How do you do it ethically?
    ii. Lawyers are not indentured servants. Be nimble and get out of it as it will you better off.
    iii. Don't put it off.
    iv. End it as well as you can.
    v. Maintain your reputation.
    vi. Organize the file, clean up the file before you turn it over.
    vii. Send them a "blue print" for the future. Examples: If they have to change a deed, tell them. If life insurance was not transferred to an ILIT tell them. Give them a blue print for the future so they cannot come back to you.
    viii. Here's Lou's list of steps for firing a bad client and making life easier (and safer):
        1. "…give written notice of disengagement, preferably after you have had a conversation with the client.
        2. The notice should provide the client sufficient time to engage a new lawyer…
        3. The notice should include a refund of any fees paid in advance.
        4. The notice should identify any filing deadlines (e.g., gift tax return; estate tax return) and should disclose the status of any work in process.
        5. The notice should recommend that the client engage a new lawyer.
        6. The notice should include the delivery of the client's file (and you should retain an electronic copy of the file)."

8. Wednesday: Afternoon II-C: Fiduciary Cases - Fitzsimons
    a. Knox v. Vanguard Group, Inc. 2018 US Dist. LEXIS 1993 (Mass. 2018).
        i. Power of attorney (POA).
        ii. Sec. 199 of uniform law can request agent certification.
        iii. Customer changed the company standard form.
        iv. Refused to provide the one page requested certification.

v. Account agreement said that the company could require forms.
vi. Agreements selects PA law. Firms need to state firm law so can track one state's laws as to agreements and changes in the law.
vii. People are trying to shift the burdens of elder financial abuse to financial firms (and no doubt professional advisers as well) and they are trying to protect themselves.
viii. Case thrown out.

b. In re Guardianship of Robbins, 2018 Ind. App. LEXIS 262 (2018).
   i. Persons with SNT trust can access SSI.
   ii. Judge concerned about burden on society of wealthy ill people.
   iii. Limited amount of dollars that could be placed in trust.
   iv. Court believed the ward had adequate resources from the settlement from the accident.

c. Taxation of income of non-grantor trust.
   i. 2013 Lynn and McNeil.
      1. State taxation of a trust based on the domicile of the settlor is constitutionally prohibited - McNeil v. Commonwealth, 67 A.3d 185 (Pa. Commw. 2013).
   ii. 2015 Kaestner case in NJ.
   iii. 2017 an unfortunate Mass. Case.
   iv. 2017 Hansjoerg Wyss 2004 Descendant's Trust, Docket 1608934 (2017).
      1. Two of four trustees in state but tax rules did not permit taxation.
      2. Historically, the domicile of settlor is weak.
   v. Paula Trust.
      1. Only 50% of trustees in CA and CA apportions based on trustees.
   vi. 2018 Legg case in OH state one and Supreme Court would not hear.
   vii. 2018 Fielding v. Commissioner of Revenue, File Nos. 8911-8914-R (Minnesota Tax Court 2017); A17-1177 (Minn. 2018).
      1. Residence of settlor insufficient.
   viii. 2018 Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue, 2015 NCBC LEXIS 39 (2015); 2016 N.C. App. LEXIS 715 (July 5, 2016); 2016 WL 7189950 (2016); 2018 B.C. LEXIS 431 (2018).
      1. Violates constitution to tax based on discretionary beneficiary in the state.
   ix. Kaestner and Fielding filed appeals to US Supreme Court.
   x. Wayfair. South Dakota v. Wayfair, Inc., 585 U.S. (2018).
      1. Quill sales tax case required physical presence.
      2. Wayfair overruled Quill. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
      3. Quill was cited as support for taxpayers win in trust cases, so states may feel that this gives them an opportunity to push fort a different result as to the nexus required for state income taxation of trusts.
      4. Supreme Court has granted Cert. in Kaestner but not sure what will happen in Fielding.

5. Trusts may have arguments about unconstitutional double taxation that might affect them.

d. QTIP elections.
   i. Comptroller of the Treasury v. Taylor, 2018 Md. App. LEXIS 717 (2018).
      1. MI husband died and will created QTIP for surviving wife.
      2. She moved from MI to MD and died intestate. MD then tried to tax QTIP trust.
      3. QTIP elections are MI and federal. Lower court held MD could tax the QTIP but on appeals it was reversed. Maryland could not impose its estate tax on the trust.
      4. MD tax law imposes estate tax on the transfer of the Maryland estate of a Maryland decedent. The MD estate is defined as the "federal gross estate," but the tax law also refers to a QTIP taxable in MD as one for which an election was made for the decedent's predeceased spouse on a timely filed MD estate tax return.
   ii. Estate of Evelyn Seiden, 2018 N.Y. Misc. LEXIS 4477 (New York County Surrogate 2018).
      1. NY tax rules provided NY gross estate is based on federal gross estate and since died in 2010 no federal estate tax and no federal gross estate so no NY gross estate.
      2. A New York Technical Services Bureau Memorandum (stating that a state QTIP election is enough to cause state inclusion) is only the tax department's view and has no legal effect.
      3. NY tax department did not appeal the case.

e. Estate of Edith Chernowitz V. Director, Division of Taxation, Docket No: 004863-2017, November 16, 2018.
   i. State and federal transfer tax rules are not consistent.
   ii. 3 year of death rule under 2035 scaled back in 1997 so only applies to incomplete transfers, 2042 life insurance, etc. NJ still has broader 2035 classic inclusion rules.
   iii. 98-year-old woman made 5M of gifts 2 years before death.
   iv. Court held gifts were in contemplation of her "own mortality."
   v. Court ignored that it was December 2012 and that she may have made gifts to use exemptions that may have dropped in 2013.
   vi. A gift for an emergency situation can be exception to NJ 3-year emergency rule but a tax law change does not qualify.

f. In re JP Morgan Chase Bank, N.A., 2018 Tex. App. LEXIS 1883 (2018).
   i. Situs and governing law.
   ii. JP Morgan Chase Bank, NA 2018 Tex App. LEXIS 1883 (2018).
   iii. Only required to account in NY courts.
   iv. Texas refused to enforce clause and permitted beneficiary to sue in Texas.
   v. Appellate court granted Mandamus relief because forum selection clauses are enforceable.

g. In re Doll Trust, 2018 Micha. App. LEXIS.
   i. MI has statue that probate court cannot hear cases for trusts administered outside MI so long as another court can hear the case.

h. Lund v. Lund, No. 27-CV-14-20058 (Minnesota District Court 2018).
    i. Fault requirement.
    ii. Removal of trustee "at any time" does not include a requirement to show fault.
    iii. Trend in law is to favor best interest of beneficiaries if not contraryto beneficiary intent.
i. Perpetual charitable trust.
    i. Beneficiaries demanded control over trust that runs afoul of terms oftrust and state law.
    ii. Trusteed added onerous requirements as to loan terms for charities.
    iii. Bank trustee retained counsel and started correcting contractswith schools/charities.
    iv. Individual co-trustees sued bank claiming bank did not takeformal meeting minutes.
    v. Court dismissed.
j. In re Trust of Ray D. Post, 2018 N.J. Super. Unpub. LEXIS 1932 (2018).
    i. Review investment policies.
    ii. Unusual case concerning diversification.
    iii. Trust provided: "the trustee shall retain, without liability for loss or depreciation resulting from such retention, the property received fromthe grantor".
    iv. Funded in 1975 with marketable securities. Bank taken over and newbank in 2000 after enactment of prudent investor act counsel to new bankraised issue of diversification and opined that the trust terms did not relieve the trustee of the duty to diversify. Outside counsel recommended that bank should get beneficiaries consent to diversify or if not ask court to approve diversification plan. Bank diversified without doing either.
    v. The court held that the prudent investor act mandates diversificationbut recognizes that the grantor's intent controls.
k. Matter of Wellington Trusts, 2015 NY Slip Op 31294(U) (NassauCounty Surrogate, 2015); 2018 N.Y. App. Div. LEXIS 6675 (2018)
    i. Diversification issues.
    ii. "Bank co-trustee did not breach duties by retaining concentratedpositions in U.S. large-cap securities during a market down turn, where co-trustee refused diversification, had power to remove bank trustee, and was not clearly incapacitated, the trust terms permitted the investments, and the investments were part of a successful long-term family investment philosophy."
l. In re Adrian Chen Trusts, 2018 Pa. Super. Unpub. LEXIS 1144 (2018).
    i. Hong Kong resident created domestic non-grantor trust distributed taxable gains to foreign persons and trusts. Created new trust to receive trust distributions that would qualify as foreign trusts. New trust qualified as foreign grantor trust. Tax laws changed. Stopped qualifying as foreign grantor trust. Trustees not aware of change and continued same filing position. Trust gave right to trustees to modify the trust with court approval to change tax status to accomplish goals. It was a well draftedtax

savings provision. Trust reformed retroactively to remove children as beneficiaries. Trustee retained counsel and removed children as beneficiaries. Adrian sued trustees to challenge them on every dollar of trustee fees and counsel fees for the 18 years of the trust. Tried to use tax issue as reason to terminate the trust and distribute assets to him. No IRS problem.

ii. Court viewed action as overreaching. There was no harm as trustees hired qualified counsel and acted reasonably.

iii. Take aways – clients that are not comfortable paying fees to professionals should not engage in complex planning.

m. Millstein v. Millstein, 2018 Ohio 1204 (2018); 2018 Ohio 2295 (2018).

i. Trust was grantor trust but had no tax reimbursement provision.

ii. Annual income taxes in millions and no reimbursement.

iii. 2010 son gave father some money from another bucket.

iv. Son turned off grantor trust on his trust but not his sister's trust.

v. Father sued for full accounting. UTC only gives accounting rights to beneficiaries not settlors.

vi. Trust only required trustee to give letter not accounting.

vii. Court would not give tax reimbursement

viii. 2036 string rules would apply if there was an implied agreement.

ix. Only trustees and beneficiaries have standing, not the settlor.

x. What if only power is swap power and no power given to relinquish? Can settlor relinquish the power at common law? Not certain.

1. Comment: See discussion in Current Developments and Q&A sections.

n. Patrick v. BOKF, N.A., 2018 Kan. App. LEXIS 204 (2018).

i. Brother hid trust assets from bank and then sued bank for not wrapping up trust fast enough.

ii. Bank sued brother for tortious interference which was dismissed.

iii. Court punished bank for aggressive conduct and made bank pay its own legal fees.

o. In re Estate of Danford, 2018 Tex. App. LEXIS 3045 (2018).

i. Circumstances gave rise to presumption of undue influence.

ii. Testatrix signed a self- proving will leaving her estate to Robert and named him as executor. She also signed a durable power of attorney naming Robert as agent. Robert

iii. Robert brought two witnesses and a notary to Annie's house to witness the documents. But they couldn't verify that she knew she was signing a will, and it was not announced at the signing that the document was a will. Annie kept over 70 raccoons, a peacock, cats and other stray animals at her home.

p. Passarelli v. Dalpe, LC No. 16-005565-DE (Unpub. Michigan Court of Appeals 2018).

i. A writing that is not executed with the requisite will formalities, and is not holographic will, can be admitted to probate if proves by clear and convincing evidence that the decedent intended the document to be her will.

ii. In this case they could not prove that unsigned draft met these requirements, so it was not admitted to probate. There was no proof that she had reviewed the draft or final will or that she intended the document to be her will.

q. Horgan v. Cosden, 2018 Fla. App. LEXIS 7375 (2018).

i. Spendthrift trust income only to son and remainder to charity.

ii. Beneficiaries agreed to commute trust.

iii. Court rejected as settlor wanted to give son only income and protect him. It was a violation of settlor intent and cannot commute trust just because beneficiaries want to.

iv. "The plain trust terms reflect the settlor's intent to provide the son with only incremental income distributions for life, and then give the principal to the colleges after his death. Terminating the trust would frustrate that intent and the trust purposes."

v. Trustee fees and market risk are normal part of trust expenses.

vi. Comment: See discussion in Current Developments – Monday Notes.

r. In re Trust of Shire, 299 Neb. 25 (2018).

i. UTC Sec. 411 increasing distributions to current beneficiaries.

ii. Current beneficiary received $500/month and they wanted to increase that amount.

iii. Court rejected modification.

iv. Notice and failure to object is not enough for UTC 411.

v. "Where court appointed attorney for unidentified beneficiaries objects, trust cannot be modified by consent under the Uniform Trust Code to increase distributions to the current beneficiary."

vi. Guardian ad litem was appointed and objected to the modification you cannot have modification by consent.

vii. Comment: See discussion in Current Developments – Monday Notes.

s. Peterson v. Peterson, 303 Ga. 211 (2018).

i. If settlor intends to favor one generation over another it should be stated.

ii. The trust stated that the "primary desire is that my wife be supported in reasonable comfort during her lifetime and that my children be supported in reasonable comfort during their lives".

iii. In this case the trust terms were not clear. Were there two primary desires of settlor? Who was primary beneficiary?

t. Kliman v. Mutual Wealth Management Group, 2018 Ind. App. Unpub. LEXIS 526 (2018).

i. Cannot sue trustee for failing to make distributions not requested, etc.

ii. You cannot make initial distribution requests by suing the trustee.

iii. The plaintiff beneficiary in this case was a real winner: "His challenges included: (a) requests that lacked documentation; (b) requests he had not actually ever submitted to the trustee; (c) requests to be reimbursed for expenses he later admitted he had not actually incurred; (d) requests for disbursements the trustee had actually already paid to him; and (3) a request for $10,000 for his first marriage even though that trust term did not apply until after Marjorie's death."

u. Kent v. Kerr, No. 55A01-1612-ES-02907 (Indiana Supreme Court 2018).
    i. Tried to invalidate estate settlement agreement signed while testator was alive.
    ii. Statute was only intended to apply after testator died.
    iii. Post-mortem compromises have been part of Indiana law for at least 130 years. This agreement is a pre-mortem agreement and cannot use the Compromise Chapter to enforce it.
v. Montoya v. Connell, 2018 Nev. LEXIS 72 (2018).
    i. Public policy limitation on forfeiture classes.
    ii. Right remedy is surcharge award and not disinheritance.
    iii. Forfeiture clauses should deter and not incentivize litigation.
w. Attorney client privilege.
    i. Protects discussions with counsel.
    ii. Fiduciary exception to privilege. Concept is that a fiduciary is not just another private person but owes duties including a duty of disclosure.
    iii. Talbot vs. Marshfield 1865 trustee could obtain legal advice for trust administration. Under these narrow circumstances thee real client was the beneficiary and the beneficiary can pierce the privilege and see the advice.
    iv. No exception if trustee paid for it or if litigation.
    v. Morgan v. Superior Court, 2018 Cal. App. LEXIS 496 (2018).
        1. Trustee does not have to turn over legal advice to successor trustee.
        2. Exculpatory clause in trust does not control.
        3. The burden is on the trustee to show that at the time of getting the advice it was personal legal advice to defend the trustee from litigation and not administrative advice that would transfer to the successor trustee.
x. Trust protector cases.
    i. Background.
        1. Protectors provide for flexibility. Hot powers are with protector not beneficiary or settlor.
        2. Little case law defining duties, etc. of the trust protector.
        3. What should protector do and not do? Cannot rely on common law as there is none.
        4. Sec. 808 UTC says a protector is presumptively a fiduciary and must act in interests of beneficiaries. However, states that enact to Uniform Trust Act (MI, GA, NM) repeals old Sec. 808 of UTC. Act doesn't apply to bare power to remove and replace trustee. Protector has right to compel trustee to provide accounting.
    ii. Carberry v. Kaltschmid, 2018 Cal. App. Unpub. LEXIS 3900 (2018).
        1. No duty to audit books or monitor.
        2. Protector demanded settlement agreement.
        3. Beneficiaries and trustees asked protector to stay out of it.
        4. Protector sued trustees to account.

5. The trust terms do not entitle the protector to compel an accounting. The trust terms require the trustee to account to the beneficiaries only. None of the powers granted to the protector include the power to compel an accounting.
6. Court dismissed suit as state law only gives accounting rights to beneficiary. Note that new Uniform Trust Act would change that.

iii. In re Quintanilla Trust, 2018 Tex. App. LEXIS 8223 (2018).

1. Settlor and business partner had fight.
2. Andrew who was the Protector demanded accounting and threatened to remove trustee and insert a bank.
3. Trustee moved assets into a new trust via a merger or decanting with notice to beneficiaries and no notice to protector.
4. Neither the trust terms nor the trust code merger provision required giving notice of the merger to the protector.
5. Court permitted since trust terms did not give protector the right to an accounting and court saw no harm to beneficiaries.

y. Rollins v. Rollins, 2013 Ga. App. LEXIS 332 (March 29, 2013).

i. Case has been to GA Supreme Court four times.
ii. Allegations that sons abused corporate and trustee power to enhance their control over family business Orkin.
iii. 2018 son Gary's children argued that trustee duped them and reduced income for their mother and that he tricked them by giving them blank signature sheets to sign which he later attached to documents.
iv. "Trustees must account for corporate level activities of entities held in trust where they have the individual control over the entities and are subject to trustee duties for their entity level actions."

z. Restaino v. Northern Trust Company, 2017 Ill. App. Unpub. LEXIS 2171 (2017); Second District Appellate Court 123144 (2018).

i. There is uncertainty about an estate, but it was reasonable for estate assets to be held in cash and not exposed to market risk.
ii. Of note the bank informed beneficiaries that it intended to liquidate.

aa. Minassian v. Rachins, No. 4D13-2241 (December 3, 2014); 251 So. 3d919 (Florida Court of Appeals 2018).

i. Protector could not remove children from another marriage.
ii. Children as remainder beneficiaries had standing.
iii. Protector could validly amend trust to clarify settlor's intent in the middle of litigation between beneficiaries over ambiguous provisions.

bb. Simms v. Estate of Blake, 2018 Ky. App. LEXIS 132 (2018).

i. Never asserted parental rights. Only saw son twice from birth to age 18. Did not attend son's funeral when died in car accident. Could not claim part of judgement.

9. <u>Thursday: Morning 1: Powers of Appointment: Berry and Blattmachr</u>

a. POA Terminology.

i. Definition POA per Restatement 3rd: "…power of appointment traditionally confers the authority to designate recipients of beneficial ownership interests in or powers of appointment over property that the [powerholder] does not own."

ii. Most powers of appointment (POA) non-fiduciary powers of disposition over property. Non-fiduciary means no duty to persons who can receive if power exercised.
    1. Comment: The concept of a hybrid DAPT which has been discussed with increasing frequency relies on a powerholder to add back the settlor as a beneficiary. In considering this consider the fact that the powerholder is acting in a non-fiduciary capacity. Consider the following excerpt from the speaker's outline: "Thus a non-fiduciary powerholder does not have a duty to act in the best interests of the permissible appointees and in fact may exercise the power maliciously as long as any limits on the power are respected and the exercise does not violate public policy." While hybrid DAPTs are not only a powerful planning technique, are clients really comfortable relying on a powerholder to add them back to a hybrid DAPT? Hybrid DAPTs will no doubt see increasing attention before the 2026 decline in the temporary exception (and perhaps in advance of or after the 2020 election if the perception is that the blue wave will continue and put the current high exemptions in jeopardy earlier).

iii. POA granted by the owner of property called donor in a will or trust.

iv. POA given to person called "donee of power" (Restatements of Property) and "powerholder" in Uniform Powers of Appointment Act.

v. Powerholder appoints property a person permitted under the POA called "permissible appointee."

vi. If powerholder doesn't exercise power person gets property if no exercise takes and is called "taker in default."

vii. Two types of powers based on timing of exercise:
    1. Testamentary POA – exercisable at death e.g. by will.
    2. "Presently exercisable" POA.

viii. Two types of POAs by scope.
    1. General POA = GPOA.
        a. At common law GPOA had no restrictions on permissible appointees. Tax law defines GPOA as a power to appoint to: powerholder's estate, creditor of powerholder, or creditor of powerholder's estate
        b. 2041 excludes from definition of GPOA:
            i. If powerholder authority limited to ascertainable standard = HEMS.
            ii. Power can be exercised only with donor of the power.
            iii. Powerholder can only exercise POA in conjunction with person with adverse interest in the property.
    2. Limited or special POA = LPOA. Limits class of appointees. Broadest LPOA would be power to appoint to anyone other than

powerholder’s estate, creditor of powerholder, or creditor of powerholder’s estate.

ix. Relation back doctrine - appointed property passes directly from donor of POA to permissible appointee. Appointment is deemed to relate back to the original instrument (e.g. trust) in which the donor created the POA.

b. What’s included in powerholder’s estate?

i. 2041 requires powerholder estate include all property over which powerholder has GPOA at death.

ii. Limitations on exercise or the impracticability of exercise do not matter. The speaker’s outline states: “Mere existence of the power is sufficient, even if the powerholder does not know about the power or is incapable of exercising it at death (for instance, due to incapacity). See Estate of Freeman v. Commissioner, 67 T. C. 202 (1976); Rev. Rul. 75-350 (marital trust deduction allowed where surviving spouse was mentally ill during term of the trust); Rev. Rul.75-351 (minor had a general testamentary power of appointment even though minor couldn’t execute a Will as a minor).”

1. Comment: GPOAs are becoming a nearly ubiquitous recommendation in the mission of maximizing tax basis step-up. The above forms the foundation of that recommendation. It also confirms that even if say an elderly relative is granted a GPOA but she cannot exercise it do to cognitive issues. The GPOA nonetheless is effective.

c. Other tax effects to Powerholder of POAs.

i. Exercise or release of GPOA is a transfer by powerholder. 2514

ii. Exercise/release, itself, of LPOA generally has no transfer tax effect.

iii. If exercise/release changes powerholder’s interests in trust transfer tax might be triggered.

iv. Example: powerholder entitled to receive all income from trust during the powerholder’s life. Powerholder has a presently exercisable LPOA to appoint trust to powerholder’s kids. If exercise negates powerholder’s income interest and vests property and income in kids, the powerholder may be argued to have made a gift.

v. Contrast “lapse” vs. release. If POA expires by its terms (not action of powerholder) it’s a lapse. Lapse of POA during the life of powerholder = release of POA = transfer of property to extent exceeds 5/5 power. 2514(e).

vi. Powerholder treated as the owner for income tax purposes of part of trust over which powerholder has power, exercisable by herself, to vest the corpus or income in herself unless trust is treated as grantor trust as to settlor. 678(a)(1).

d. Code Sec. 2207.

i. “Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the taxable estate. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section."

ii. Comment: This might offset the tax cost to the powerholder's estate if the planning is not precise. For example, son creates a SLAT for spouse and descendants and his elderly mother and grants GPOA to mother. Son places in trust $4M, the estimated remaining exemption mom has. The estimates are off (or the value of the property increases) 2207 mayprovide a means to adjust.

e. Small trust termination.
   i. It is not uncommon for a trust to include a provision permitting the trustee to terminate the trust if it is too small to continue. This may be characterized as a GPOA if the trustee is a potential beneficiary. PLR 9840020.
      1. Comment: Would the result be different if the trust were instead terminated under state law permitting termination of a small trust instead of under the trust provision?
f. Delaware tax trap.
   i. The speaker's outline contains the following explanation of the DE trap: "…property subject to a non- general power of appointment will be includible in the estate of the powerholding beneficiary (or will be subject to gift tax upon exercise) to the extent the power is exercised to create another power of appointment that "can be validly exercised so as to postpone the vesting of any estate or interest in [the] property, or suspend the absolute ownership or power of alienation of [the] property, for a period ascertainable without regard to the date of creation of the first power." In more simple terms, exercise of a non-general power of appointment to create a new power of appointment that has the effect of postponing the period of the Rule Against Perpetuities converts the non-general power of appointment into a taxable power for purposes of sections 2041 and 2514."
g. Use POAs to modify trusts.
   i. Powerholder may appoint old trust assets to new trust with differentadmin provisions (governing law, situs) or even change disposition (remove old beneficiaries adding new beneficiaries).
   ii. Decanting cannot change beneficiaries but POAs can.
h. Use POAs to control beneficiaries.

i. Example: Husband creates SLAT for wife and descendants. He wants to be sure assets go to descendants not a new spouse, so Wife is given an LPOA. Also, while wife is primary beneficiary husband wants to be sure descendants take care of her and do not hassle the trust excessively for money. If wife is given narrow LPOA as to descendants a new spouse cannot pressure her to divert money. She can also use the LPOA to allocate amongst descendants to encourage appropriate attention and behavior.

i. GPOA to qualify for marital deduction.
   i. Give spouse income interest for life and GPOA exercisable in favor of the property owner's spouse or the spouse's estate (not only to her creditors or those of her estate) can qualify for estate tax marital deduction 2056(b)(5), or gift tax marital deduction 2523(e).

j. GPOA to avoid GST tax.
   i. Give GPOA to avoid imposition of GST tax and instead force imposition of estate tax.
   ii. Which result is better? How might state estate tax affect decision?

k. Can you add a 2038 Power?
   i. Adding a 2038 power at inception of a trust can cause estate inclusion. But can you decant and add a 2038 power to an existing trust to cause estate inclusion and basis adjustment on an old trust?
      1. Comment: Consider permitting a named disinterested person, acting in a non-fiduciary capacity, i.e. not a trustee or trust protector (if you conclude or provide that the protector will be acting in a fiduciary capacity), in his or her absolute discretion, to give the Grantor one or more powers to control the beneficial enjoyment of trust property such that the subject property would thereby become taxable in the Grantor's gross estate under IRC Section 2038. For instance, the Grantor might be given such a Section 2038 power(s) over all or a specific portion of the trust property (or even specific assets) following a possible repeal of the Federal estate tax and in order to obtain a step-up in basis for appreciated trust property should that be available under the new regime.
   ii. In Skifter "…decedent gave his wife an insurance policy on his own life. Within three years his wife died and left the policy to a trust of which the insured/decedent was trustee; as trustee, he could change the policy beneficiaries. The Tax Court and the Second Circuit both held that despite the incidents of ownership the insured's estate should not be taxed under section 2042 because section 2042 should be applied like sections 2036 and 2038 are. Because the insured/decedent had acquired that incident of ownership from an unexpected, uncontrolled source, it was not a "retained" power." Estate of Skifter v. Comm'r, 468 F.2d 699 (2d Cir. 1972), aff'g 56 T.C. 1190 (1971), nonacq. recommended AOD (Dec. 22, 1971), acq. 1978-2 C.B. 1.

l. Avoiding completed gifts.

    i. Some trust transfers, e.g. ING, are intended to be incomplete for gifttax purposes. LPOAs retained by the transferor can be used to make a gift transfer incomplete and avoid incurrence of a gift tax.
    ii. Avoid gift tax by settlor retaining a lifetime and testamentary power of appointment. In the ING context these powers retained must be sufficient constrained to avoid tainting the trust as a grantor trust.
    iii. See: PLR 200148028, PLR 200715005, CCA 201208026, 20131002, and 201426014.

m. Use POAs to direct trust distributions.
    i. For a trust to qualify for a charitable contribution deduction the governing instrument must include the right to distribute to charity. Code Sec. 642(c). An LPOA that gives the powerholder the right to appoint income to charity should suffice to meet the "pursuant to the terms of the governing instrument" requirement. PLR 201225004

n. Upstream Sale to a Power of Appointment Trust (UPSPAT).
    i. <u>Comment:</u> See notes also from Special Session IIIA Berry, Blattmachr and Harrington, Thursday afternoon.
    ii. Example.
        1. Son creates grantor trust. Sells assets to the trust for note. Trust gives mom testamentary GPOA over the trust assets so that the assets included in mom's estate getting basis step-up. Trust uses assets to pay off note. Trust remains grantor trust to son even after mom dies. Mom's estate is increased by zero but son gets basis step-up.
        2. Sale not intended to remove assets from son's estate so 2036 issues that some might interpret as requiring trust have seed gift not relevant. But sale to unseeded trust could have IRS argue note worth less than face. Similar to other sales to trusts with no or inadequate seeding a guarantee of part of the note might be used. Example, mom if she has any assets could guarantee part of the note to reduce that risk.
        3. Does mom's GPOA cause asset in trust to be stepped up to FMV, or will the value of the note reduce the amount of the step-up? If mom guarantees note then this concern would be reduced. While that might be a safer approach some view the 20.2053-7 regulations as optional. Also, Crane v. CIR, 331 US 1 (1947) has basis increase based on FMV of property regardless of the associated debt.
        4. Watch out for creditors of mom.
        5. Mom (or whoever the GPOA holder is) should also be a beneficiary of the trust created to avoid an issue analogous to naked Crummey power holders that the courts have ruled against. in Cristofani v. Comm'r, 97 T.C. 74 (1991), acq. in result only 1992-1 C.B. 1.

o. Uniform Powers of Appointment Act.
    i. Limited to non-fiduciary POAs. Sec 102(13).

ii. Exclusionary power - powerholder can appoint to any one or more of the permissible appointees to the exclusion of the other permissible appointees, "to such of my descendants as the powerholder may select."
iii. Non-exclusionary power - power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select." Powerholder doesn't have to exercise but if she does the appointment must abide by the power's non-exclusionary nature.
iv. Governing law unless instrument granting power changes is donor's domicile. Exercise, release, or disclaimer of the POA governed by the law of powerholder's domicile at time of exercise. Sec. 104.
v. Substantial compliance only is required. Powerholder's substantial compliance with a requirement of appointment suffices if powerholder knows and intends to exercise, and manner of attempted exercise doesn't affect a material purpose of the donor requirement. Sec. 304.

10. Thursday: Morning 2: Money Laundering: Terrill, Riches
   a. Introduction.
      i. Financial Action Task Force ("FATF")
      ii. Banks financial institutions have client due diligence requirements. Must report suspicious activity and transactions. Face no-tipping off requirements.
      iii. These are expensive, client-unfriendly but routine in many countries.
      iv. US remains one of the few countries not on board. ABA has fought this to protect traditional US role of attorneys and out of belief that ethics rules suffice.
      v. US still protects independence of attorneys per Constitutional law, common law, state ethics rules, etc. viewing these are more important than demands by international community that US advisers address the FATF recommendations.
   b. What is money laundering.
      i. Money laundering is when profits from criminal activity are cleaned so cannot be traced back to illegal source.
      ii. It disguises the source of profits.
      iii. Three stages:
         1. Placement stage - illegal profits introduced into the financial system usually geographically close to criminal activity, e.g. by "smuggling, gambling, loan repayments or cash deposit schemes through banks or cash-intensive businesses."
         2. Layering stage - money moved through transactions, entities or investments, to distance from its illegal source. Move money to more stable financial jurisdiction.
         3. Integration stage - money inserted into legitimate economy, spent or invested by the criminals. Example, by US real estate.
   c. "Panamanian law firm Mossack Fonseca include revelations that the firm formed thousands of anonymous shell corporations for the wealthy and elite (including athletic stars and heads of state) and the corrupt and criminal (including known

drug lords and the Hezbollah terrorists).7 The Panama Papers revealed tax evasion, corruption and other criminality deploying the opacity of shell corporations as the primary vehicle for evading exposure."

d. High level of suspicion with which trusts are regarded by the FATF and the resulting high level of scrutiny of trust structures
e. FATF's recommendations relevant to estate planners include:
    i. Customer due diligence (CDD) and record-keeping requirements
        1. Should be required when:
            a. establishing business relations.
            b. carrying out occasional transactions.
            c. there is a suspicion of money laundering or terrorist financing.
            d. has doubts about the veracity or adequacy of previously obtained customer identification data.
        2. The CDD measures to be taken are as follows:
            a. Identifying the customer and verifying that customer's identity.
            b. Identifying the beneficial owner and taking reasonable measures to verify the identity of the beneficial owner.
            c. Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
            d. Conducting ongoing due diligence on the business relationship.
    ii. If a third-party purports to act on behalf of the client counsel must verify the fact that the third party is authorized to act on behalf of client, and identify the third party with appropriate documents.
    iii. Other measures relating to internal controls, higher risk countries, Suspicious Transaction Reporting (STR) and No Tipping Off (NTO).
    iv. Transparency and beneficial ownership of legal persons and arrangements retain information on the beneficial owners (i.e., the individuals) of legal entities, corporations and trusts, respectively.
    v. Know Your Customer ("KYC") procedure
    vi. Maintaining CDD records
    vii. Monitoring customers and transactions on an ongoing basis
    viii. SARs and Suspicious Transaction Reports ("STRs")
f. Good practices Guidance.
    i. <u>Comment:</u> The summary below extracted from the speaker's outline may help practitioners highlight or be more attuned to risky situations.
    ii. FATF identified specific activities at risk for money laundering.
        1. Buying and selling real estate;
        2. Management of client money, securities, or other assets;
        3. Management of bank, savings, or securities accounts;
        4. Organization of contributions for the creation, operation, or management of companies; and

        5. Creation, operation, or management of legal persons or arrangements and buying and selling businesses entities.
    iii. Identification of risks by category.
        1. geographic risk.
        2. client risk.
            a. Significant and unexplained geographic distance between the client and the location of the organization/subject of the work for which the client has retained the legal professional, and/or where there is no logical nexus among the type of work being undertaken, the client, and that organization.
            b. Where a client has instructed the legal professional to undertake a single transaction-based service (as opposed to an ongoing advisory relationship), the instructions from the client are not received face to face, and/or the client has not been referred from a reliable source.
            c. Situations where the structure or nature of the entity or relationship makes it difficult to identify the true beneficial owner or controlling interests in the transaction.
            d. Clients that are cash (and cash equivalent) intensive businesses.
        3. risk associated with the particular service offered by the legal professional.
            a. Services where legal professionals acting as financial intermediaries handle the receipt and transmission of cash proceeds on behalf of clients.
            b. Services to conceal improperly beneficial ownership from competent authorities.
            c. Services requested by the client for which the legal professional does not have the requisite expertise.
            d. Transfer of real estate between parties in a time period that is unusually short for similar transactions, with no apparent legal, tax, business, economic, or other legitimate purpose.
            e. Services knowingly designed to illegally evade revenue or other government authorities' claims concerning an asset or other property.
            f. Payments received by an attorney from unrelated third parties and payments of fees in cash.
            g. Transactions where it is readily apparent that there is inadequate consideration.
            h. Legal entities and arrangements where a client/owner cannot be identified in a timely fashion.
            i. Clients who offer to pay extraordinary fees for services which would not ordinarily warrant such a premium.
            j. Other unusual, risky, or suspicious transactions.
g. Concerns are significant.

i. Special category of offense for lawyers and CPAs that you commit if you have reason grounds to suspect someone is involved in money laundering.
ii. It's not just your own client but rather if there are any indicia around the transaction you need to make a report at the earliest opportunity that is reasonable.
iii. These are criminal offenses.
iv. Everyone in the firm has to be sensitized.
v. Cannot accept payment from anyone other than named client without doing the same money laundering due
vi. There is no grandfathering, no time limit. Makes no difference how long-ago money was obtained from crime.

h. EU has similar laws.
    i. It is expanding through FATF style bodies which adapt similar regulations.
    ii. In US have imposed obligations on financial institutions.
    iii. On lawyers and CPAs, while Congress attempted to include lawyers involved in certain transactions (senator Levin from MI) but those efforts were unsuccessful. Those efforts were fought by the ABA.
    iv. ABA said it would actively educate members on money laundering issues. We also have rules of conduct as attorneys that prevent us from being complicit in money laundering.
    v. ABA and ACTEC put together good practices guidance that set forth red flags that might have to do with money laundering and terrorist financing.
        1. Someone from another state in a rush.
        2. Someone dealing with a cash intensive business.
        3. Desire of client to bring cash into US and convert cash into a valuable asset.
    vi. ABA Model Rules have been modified significantly and believe that body of ethical guidance is sufficient and asked Congress not to impose further restrictions.

i. Rules.
    i. Must competently represent client. Must understand what client is bringing in to the engagement. Need to have a sense of the who the client is and what they are.
    ii. Rule 1.2 lawyers shall not participate or help client commit a crime or fraud.
    iii. But how do you know? How do you smoke out crime or fraud?
    iv. Rule 1.4 when represent client must represent client by describing limitations on representing them. Example I cannot represent you in State X.
    v. On boarding due diligence. Rule 1.4 is violated by no tipping off. Complying with UK obligations could conflict with ethical rules in the US.
    vi. Rule 1.6 privilege is different from confidentiality. Duty not to disclose.
    vii. Some states require disclosure if client may murder someone. Other states permit ('may') disclose.

viii. Filing a suspicious activity report like require in the UK would in the US violate duty not to disclose unless it met one of the exceptions permitting disclosure. One of the exceptions is "unless require by another law."
ix. Rule 1.16 leaving relationship if client persists in conduct not comfortable with.
x. ABA has developed a description of rules that requires lawyers that fulfill their obligations.
xi. AICPA rules have confidentiality rule and have rule that shall not do things that discredit the profession.

j. Beneficial ownership.
   i. GTO = geographic targeting order.
   ii. FINCEN has named as participants in their efforts to combat money laundering, title companies. If a title company participates in a transaction with a legal entity where there is no bank financing (if bank financing the bank has done due diligence). If no financing must file information indicating owners of entity.
   iii. If open account must file report as to the human owners of more than 25%. Designed to prompt beneficial ownership information since entities are used in most money laundering.

11. <u>Thursday: Morning 3: Disclaimers: Henry</u>
   a. Introduction.
      i. Too often ignored until a disaster strikes and used to try to resolve (the "repair" side).
      ii. But disclaimers are useful on the planning side as well and deserve more attention.
      iii. Disclaimers often arise at emotionally hard times, e.g. a death. Example we might be taught to not reject a gift, but a disclaimer may be helpful. It should not be viewed as a pushback but a way to redirect and plan.
   b. What is a disclaimer.
      i. Use to defer a tax or other decisions to a later date.
      ii. We are looking at how we can help based at the taxes at the time to accomplish the best estate, gift and GST tax results.
      iii. Changes in tax laws have opened doors to use disclaimers more frequently. Plan ahead but use disclaimer to build in flexibility.
   c. Fundamental concepts.
      i. Sec. 2518 recipient is treated as if never received the gift or bequest if they disclaim arcuately and timely.
   d. Must be in writing.
      i. Must identify property.
      ii. Must be signed by disclaimant or representative.
   e. Must be delivered within 9 months of date of transfer with an extension for minors.
      i. Deliver to correct person, e.g. trustee of trust.
      ii. Look to local law to determine who the right person is for disclaimant to deliver disclaimer to.

f. But must be in time frame.
    i. In time requirement is generally 9 months from the date of the transfer.
    ii. Extension for under 21. 21-year-old birthday starts the 9-month clock.
    iii. Complicated, e.g. must determine when the transfer happened.
    iv. Clock starts when you have a completed gift regardless of when file a gift tax return.
    v. Transfers at death become effective at date of death.
    vi. What about both a lifetime gift and testamentary transfer? If lifetime gift is included in the estate the disclaimer clock starts when it became an irrevocable transfer.
    vii. An issue with time is knowledge and awareness of other transfers.
    viii. Consider state law. May not be concerned about federal tax issues so if state law permits longer period then can use that.
g. Need a third-party backup to show you made the time frame, e.g. file in court, file with estate tax return, etc.
h. Must pass without disclaimers direction.
    i. You cannot direct property, e.g. "I'll disclaim if you put it in this trust."
i. Disclaimant must not have accepted benefit from the property being disclaimed.
    i. What does no acceptance mean?
    ii. May be able to accept some of property and disclaim other of property.
    iii. If exercise GPOA to any extent that is deemed an acceptance.
    iv. Fiduciary can accept taking possession of property does not prevent disclaimer.
    v. Local law may accept for you. In LA seisen at decedent's death, that does not close door on disclaimer.
    vi. Co-owner, e.g. surviving spouse living in home, can still renounce.
    vii. PLR 200503024 Surviving spouse got securities account that had both community and separate securities. She purchased and sold in account and took some income. In PLR looked asset by asset and determined which assets accepted benefit and which could still be disclaimed.
    viii. May be able disclaim portion of trust. Must be sure that the trust provides and disclaiming process permits separating assets. Plan in administration to move assets as necessary. Example want cash but to disclaim family business. Drop business into trust and disclaim interests in that trust.
    ix. Formula disclaimers may be useful to get to the tax result you want.
    x. Can you disclaim severable interests? Rulings are generally favorable. You can retain one interest in a trust and disclaim others.
    xi. PLR 200516004 is it possible to disclaim contingent remainder beneficiary interest and move up descendants? PLR walked through how to accept one severable interest and disclaim another.
    xii. Consider state law merger.
j. GPOA.
    i. Has different set of rules then LPOA.
    ii. Holder of GPOA has 9 months from date power was created to disclaim that power.

iii. A transfer, if you would take if holder did not exercise GPOA, the lapse or exercise of the GPOA starts the clock for the person receiving on the GPOA (e.g. receiving by lapse or exercise).

k. LPOA.
    i. Holder or permissible appointees have 9 months (or 21 years + 9 months) from creation of LPOA to decide to disclaim.
    ii. Can you retain an LPOA subject to ascertainable standard? Regs seem to indicate that you can.

l. Life-tenants and remainder beneficiaries.
    i. 9 months after original transfer creating interest.

m. QTIP proper.
    i. If elected QTIP do you get additional 9 months? No.
    ii. Make disclaimer decisions within 9 months of death of first spouse.

n. GST.
    i. Must stay within lane of GST tax exemption.
    ii. 2651 regs say even if state law means certain people take you cannot ignore them for GST purposes.

o. Successive disclaimers.
    i. May need a series of disclaimers to get property where desired.
    ii. All disclaimers in the series may have to happen within the nine months.

p. Knowledge.
    i. Older trusts. Different level of timing.
    ii. Pre-77 trusts.
        1. PLR 201831003 – if have disclaimer of pre-1977 trust what amounts to knowledge. If did not have knowledge and did not receive benefits can renounce.
            a. Comment: What about UTC requirements to inform beneficiaries affect this?
    iii. Have opportunity if did not have knowledge may still have option to renounce.
    iv. How can you disclaim if you do not know you have it? Under current law lack of knowledge will not provide an extension.

q. Who may disclaim?
    i. Incapacitated person may disclaim but must comply with local law.
    ii. Fiduciaries may disclaim.
    iii. The speaker's outline illustrates: "...§ 2-1.11(d) of New York Estates, Powers and Trusts Law provides that: "[a] renunciation may be made by: (1) The guardian of the property of an infant, when so authorized by the court having jurisdiction of the estate of the infant, (2) The committee of an incompetent when so authorized by the court that appointed the committee, (3) The conservator of a conservatee, when so authorized by the court that appointed the conservator, (4) A guardian appointed under article eighty-one of the mental hygiene law, when so authorized by the court that appointed the guardian, (5) The personal representative of a decedent, when so authorized by the court having jurisdiction of the estate of the decedent, (6) An attorney-in-fact, when so authorized under a duly

executed power of attorney, provided, however, that any renunciation by an attorney-in-fact of a person under disability shall not be effective unless it is further authorized by the court with which the renunciation must be filed…"

r. Where to assets go?
    i. Document or beneficiary designation may designate.
    ii. If not state law may address.
s. State law/Uniform Act.
    i. Disclaimer laws may be different.
    ii. How do powers of appointment work with disclaimers.
t. How and why to use.
    i. Charitable planning to reduce income tax of beneficiaries.
    ii. Retirement accounts when paired with charitable planning.
    iii. Family flexibility.
        1. Pressure to simplify planning.
        2. Disclaimer can help.
        3. Outright gift to surviving spouse.
        4. One child needs trust and another may not. Build in GST planning option. Include an independent trustee to grant GPOA at intervening generation.
    iv. Clayton QTIP option.
        1. If disclaim have limitations on powers of appointment.
        2. Independent person can have option to make election that by electing or not electing can shift assets to CST.
        3. Clayton option for funding credit shelter but surviving spouse can have power of appointment over CST.
u. Asset protection.
    i. What is overlap of asset protection and disclaimers.
    ii. Planning to limit creditors, creating a "prenuptial agreement" by trust, etc.
    iii. A disclaimer might help.
    iv. You cannot always disclaim and avoid creditors. If you renounce it relates back to initial transfer date so may limit creditor claims. Relation back doctrine.
    v. Limitations on avoiding creditors by disclaiming.
        1. Drye v. United States, 528 U.S. 49 (1999) case.
v. Charitable planning.
    i. Formula disclaimers - Estate of Christiansen v. Commissioner, 586 F.3d 1061 (8th Cir. Nov. 13, 2009), aff'g 130 T.C. 1 (2008).
    ii. Option to renounce to donor advised fund of which disclamant is adviser but cannot serve on board of private foundation as that would amount to direction. Client could put in place a gift agreement with the charity.

12. Thursday: Morning 4: Unwinding Insurance Transactions: Mancini
    a. Introduction.
        i. How can you get out of bad policy with best consequences?

    ii. Bad transaction but a good policy you want to keep. What are alternatives?

b. What makes a good policy?
    i. Good policy can mean different things.
    ii. If uninsurable every policy may be a good policy especially if need liquidity at death.
    iii. Good policy is one in which the cash value has built up to extent it is performing quite well. More recently policies are performing better.
    iv. A well performing policy with big cash value can make the transaction be bad, so it's a catch-22 about whether the policy and transaction are both good.
    v. May have riders that are good and cannot purchase those any longer. E.g. 98-year-old insured who has riders to continue the policy. That is reason to continue policy.
    vi. No lapse guarantee policy you don't want to lose this since you have paid for this guarantee and may not be able to get that guarantee in a new policy today.
    vii. Policy with rate of return that is better than current policies rates of returns.
    viii. Policy that carrier offers higher reserves then is offered on new policy.
    ix. No lapse guarantee policy doesn't have cash value but the reserve supports the policy.
    x. Some policies offer creditor protection. Better to have an old policy purchased before needed creditor protection.

c. Policy not working.
    i. Split-dollar arrangement that doesn't work.
    ii. Policy owned by business that doesn't need it.

d. Trust.
    i. A trust might "not work" for many reasons having nothing to do with the trust itself.
    ii. Family dynamics might change but beneficiaries of old trust might no longer be appropriate. Often clients sometimes want to start over so they don't want now incorrect beneficiaries coming in and seeing that trust was change (e.g. removing the).
    iii. There may be drafting problems in the trust.
    iv. Changes in the law may make the trust no longer desirable, e.g. increase in the estate tax exemption.

e. Split-dollar.
    i. Loan arrangement.
        1. If interest rates rise arrangements may suffer.
        2. Regs provide that if a split-dollar loan and file statement it is a bona fide loan.
    ii. Economic benefit arrangement.
        1. May not "work' and may want to terminate if the economic benefit arrangement the amount each year that is advanced by taxpayer into the arrangement is the economic benefit of the arrangement,

the cost of the insurance protection when premium paid. It is not the payment itself. Example premium is $100,000 and for 85-year-old the economic benefit might be $200,000.

2. Point in time where economic benefit arrangement becomes too expensive. It can be a gift by the client who created and is funding the arrangement. Perhaps there is no trust and insured owns policy and is getting benefit as an employee that could be taxable income to the employee.
3. When set up economic benefit split-dollar measure economic benefit in several ways, e.g. using 2002 tables.
4. If have an arrangement that is materially modified, or a new arrangement do non-equity economic benefit. Owner of policy has to repay is the greater of CSV or premiums paid. Cannot keep equity.
5. Rate on tables for survivorship policies are very low (lower than current interest rates). That will change when one of the insureds dies and arrangement may not work and may have to get out. Policy may be good so how do you do that?

iii. Change in law may make split-dollar stop working.

1. 2003 instead of old Revenue Rulings new split-dollar arrangements governed all split-dollar arrangements entered into after the final regulations or materially modified after those regs were issued. These regs were very different than how split-dollar was treated before.
2. 2002-8 If terminate before 2004 equity won't be taxed. "Not inference to be drawn from rulings about gift, estate, tax."
3. Neff case. Equity split-dollar $35,000 of equity in arrangement. Owed back to company (employee owed) $850,000 and CSV $877,000.Could borrow against policy to repay company but would destroy the policy. Owner of policy discounted the $850,000 and only paid about $175,000. IRS said no have to pay full $850,000. There was no mention of the equity in the arrangement.
4. Be careful changing or materially modifying (no one knows that this phrase means, Regs have some simple changes that provide little help) a grandfathered policy.

iv. Intergenerational split-dollar.

1. Two ways to structure.
    a. Non-equity economic benefit split dollar arrangement.
    b. Loan arrangement.
2. Insured often advances money.
    a. Patriarch may loan money to trust.
    b. Child is usually insured.
    c. Since economic benefit is based on mortality it's a more economic arrangement.
3. Agreement strictly prohibits repayment before death of child.

4. Want to give away split-dollar rights since in their estate if they die.
5. What is value? Shouldn't it be discounted if child is healthy since cannot be paid for long time?
6. IRS did not like and does not like these transactions because they feel the discounts are too steep. IRS tried to argue that they were not a split-dollar arrangement. In Morrissette the court held it was a split-dollar arrangement. Then IRS said it was a gift on the transaction, but Tax Court said no. Then IRS said it's an equity split-dollar arrangement. Under the Regs a non-equity split-dollar only occurs if owner of the policy gets no other benefit then the economic benefit. IRS argued that patriarch is giving an additional benefit by paying money up front. That would undermine all split-dollar. Tax Court throughout that argument. The issue we don't know is two-fold. Morrissette Court did not address value of the receivable.
7. There was another issue Two other cases Cahill and Levine. Morrissette because of Tax Court ruling made motion in Cahill and Levine for summary judgement that only valuation issue is to be discussed. Final regs do not apply for estate tax purposes, which is true. Some commentators say that is a mistake, but speaker suggests that it is deliberate. Regs address transfer of contract by owner or deemed owner (i.e., on death). Have deemed transfer of contract and set forth how it is valued and there is little discount.
8. IRS questioned 2703 – isn't this an agreement designed to artificially reduce value of transfer between family members? Regs don't exist for estate tax purposes so do you re-evaluate for estate tax purposes and under 2036-2038 if can change beneficial interest have estate inclusion. Perhaps all comes back into estate at FMV.
9. Levine – further on in the process than Morrissette.
10. Morrissette filed taxpayer motion but court has only denied summary judgement requested by taxpayer agreeing with IRS that there are additional issues to look at.
11. This all may change split-dollar and make a client want to get a policy out of the split-dollar arrangement.

v. <u>Comments:</u> The Cahill case was just settled on August 16, 2018.
   1. The Stipulation of Settled Issues contains 17 items:
      a. Items 1 to 10 are related primarily to the valuation of notes receivable by the estate. These notes were issued when loans were made by the Richard and Shirley Cahill Revocable Trust to trusts for other family members. These loans were not related to the split dollar agreements. The IRS originally claimed that the notes were undervalued but agreed to accept the values reported on the estate tax return as part of the settlement.

b. Items 11, 12 and 13 – These items relate to the value of the split dollar receivables in the Cahill Estate. The Estate reported an aggregate value of $183,700. The IRS asserted a value of

c. $9,611,624, equal to the aggregate cash surrender value of the policies as of the date of the decedent's death. The Estate conceded that the correct value was $9,611,624.

d. Items 14 and 15 relate to the value of total adjusted taxable gifts – the amount was increased by $7,902 by the IRS. The taxpayer conceded. All these gifts, except for a small gift in 2010, were made before the split dollar agreements were created.

e. Item 16 – Taxpayer is liable for the accuracy-related penalty on the deficiency under IRC Section 6662 at the rate of 20%.

f. Item 17 – The only issue remaining in computing the deficiency is the correct amount of additional administrative expenses to which the estate is entitled.

2. In summary, the estate's valuation of the notes receivable did not change, but the estate's value of the split dollar receivable was increased by $9,427,924.
3. The net change for the estate is essentially a deficiency for the tax payable on a $9.4 million split dollar receivable.
4. The estate will be liable for a penalty on the deficiency.
5. The Cahill settlement is a victory for the IRS and likely will embolden the IRS to challenge other economic benefit intergenerational split dollar cases, especially if the facts are "bad." It may also embolden the IRS to challenge loan intergenerational split dollar arrangements, even though these were not directly implicated in the Cahill or other cases. The Cahill case is not a statement of law – we will have to wait for Levine and Morrissette to be decided to know the final position of the Tax Court.

f. Corporate buy out.

i. May no longer want partner owning insurance on life.
ii. May distribute policy out of entity.
iii. Are transfer of contract issues in final split-dollar regs an issue?
iv. If have a lot of cash value it's an appreciated asset, value of policy, to pay off a set amount, and that could trigger a tax consequence.
v. Sec. 101 transfer for value rules. If transfer a policy for valuable consideration (broadly construed) you lose the Sec. 101(a) exclusion from income tax that life insurance death benefits normally receive. There are five exceptions to the transfer for value rule, and a sixth that doesn't get discussed often. The later permits you to fix the transaction by making a transfer that fits into the exception.

g. 2009-13.

i. Even though a sale or exchange and should have capital gain characterization part can be deemed ordinary income under Sec. 72.

h. Comments: TCJA Updates to insurance planning. The following are some of the new rules enacted by the 2017 tax act affecting life insurance.
   i. Life Settlements: New Rules
      1. Although life settlements occupy a narrow space in the life insurance sector, the changes could be significant for individuals who do use them.
      2. The new rule is found in section 13521(a) of the TCJA and reverses the IRS' previous position on these transactions.
      3. Life settlements allow holders of policies, that would otherwise be cancelled, to sell their policy to an institutional buyer willing to pay a percentage of the face amount of the policy.
      4. This particularly applies when the insured is expected to live 10 years or less.
      5. Some tax may be owed on the policy sale, but the net may be higher than it would have been without the life settlement.
      6. This change in the definition of basis applies retroactively to transactions entered into after August 25, 2009, meaning some taxpayers may be eligible to apply for a refund.
   ii. Life Settlements: New Rules
      1. An in-depth analysis of any life settlement should be made prior to engaging in the transaction. Trustees will want a well-documented rationale to show beneficiaries why they recommend the life settlement.
      2. The TCJA also added new reporting requirements applicable to sales and the payment of reportable death benefits after December 31, 2017.
      3. Any transaction that qualifies as a "reportable policy sale" must make a return setting forth certain information.
      4. The TCJA provides that, for transfers made after December 31, 2017, exceptions to the transfer for value rules do not apply to transactions that qualify as reportable policy sales.
   iii. Tax reporting for Life Settlement Transactions.
      1. The Act imposes reporting requirements in the case of the purchase of an existing life insurance contract in a reportable policy sale and imposes reporting requirements on the payor in the case of the payment of reportable death benefits.
      2. The reporting requirement applies to every person who acquires a life insurance contract, or any interest in a life insurance contract, in a reportable policy sale during the taxable year. This is the acquisition of an interest in a life insurance contract, directly or indirectly, if the acquirer has no substantial family, business, or financial relationship with the insured (apart from the acquirer's interest in the life insurance contract).

3. An indirect acquisition includes the acquisition of an interest in a partnership, trust, or other entity that holds an interest in the life insurance contract.

iv. Tax reporting for Life Settlement Transactions – Report Details

1. Under the reporting requirement, the buyer reports information about the purchase to the IRS, to the insurance company that issued the contract, and to the seller. The information reported by the buyer about the purchase is: (1) the buyer's name, address, and taxpayer identification number ("TIN"), (2) the name, address, and TIN of each recipient of payment in the reportable policy sale, (3) the date of the sale, (4) the name of the issuer, and (5) the amount of each payment.
2. On receipt of a report described above, or on any notice of the transfer of a life insurance contract to a foreign person, the issuer is required to report to the IRS and to the seller: (1) the name, address, and TIN of the seller or the transferor to a foreign person, (2) the basis of the contract (i.e., the investment in the contract within the meaning of section 72(e)(6)), and (3) the policy number of the contract.
3. When a reportable death benefit is paid under a life insurance contract, the payor insurance company is required to report information about the payment to the IRS and to the payee. Under this reporting requirement, the payor reports: (1) the name, address and TIN of the person making the payment, (2) the name, address, and TIN of each recipient of a payment, (3) the date of each such payment, (4) the gross amount of the payment (5) the payor's estimate of the buyer's basis in the contract. A reportable death benefit means an amount paid by reason of the death of the insured under a life insurance contract that has been transferred in a reportable policy sale.

v. Transfer for Value Rules and Policy Sales

1. The Act provides that the exceptions to the transfer for value rules do not apply in the case of a transfer of a life insurance contract, or any interest in a life insurance contract, in a reportable policy sale. Thus, some portion of the death benefit ultimately payable under such a contract may be includable in income.

vi. Basis of Life Insurance Not Reduced by Cost of Sale

1. In Revenue Ruling 2009-13,1003 the IRS had ruled that income recognized under section 72(e) on surrender to the life insurance company of a life insurance contract with cash value is ordinary income. In the case of sale of a cash value life insurance contract, the IRS ruled that the insured's (seller's) basis is reduced by the cost of insurance, and the gain on sale of the contract is ordinary income to the extent of the amount that would be recognized as ordinary income if the contract were surrendered (the "inside buildup"), and any excess is long-term capital gain.

2. Gain on the sale of a term life insurance contract (without cash surrender value) is long-term capital gain under the ruling. The Act overrules the above and provides that in determining the basis of a life insurance or annuity contract, no adjustment is made for mortality, expense, or other reasonable charges incurred under the contract (known as "cost of insurance").
3. This change specifically reverses the position of the IRS in Revenue Ruling 2009-13 that on sale of a cash value life insurance contract, the insured's (seller's) basis is reduced by the cost of insurance.

13. Thursday: Afternoon III-A: Powers of Appointment: Berry, Blattmachr, Harrington

a. POAs.
   i. Speakers see vastly more POAs because of basis issues.
b. Upstream planning.
   i. Circumscribed general powers around various trusts.
   ii. If you have old taxpayer that does not have long to live or significant assets, endeavor to use their unneeded exemption.
   iii. Move assets to targeted senior's estate.
   iv. Comment: Practitioners should also give consideration to a different perspective on downstream planning as well as upstream planning in light of the large temporary exemptions. For wealthy families what can be done to harvest the likely unused exemptions of descendants of wealthy matriarchs and patriarchs?
c. Upstream Power of Appointment Trust ("UPAT")
   i. 1.742-1 get full step up in basis.
   ii. This plan uses very little of client's exemption because the assets are sold to the trust.
   iii. Grantor creates trust for income tax purposes that is a grantor trust.
   iv. Grantor sells assets to the grantor trust for a note.
   v. This is an income tax play not trying to remove assets from client's estate.
   vi. At the powerholders' s death, the assets are included in powerholder's estate.
   vii. The assets now have new basis (presumably higher than before) and upon repayment of the note the grantor benefits from the higher basis.
   viii. Grantor trust that continues after the death of the powerholder.
   ix. Guarantee is real. If the assets decrease in value, the powerholders estate is diminished. Unrelated powerholders who cannot mitigate this risk in their estate plan are not going to like this feature.
   x. GPOA is real. Thus, the powerholder might exercise the power yes, the powerholder's estate is liable on the note, but the specific asset may be diverted, or creditors might
   xi. Can use a narrow GPOA and could even make its exercise subject to the approval of a non-adverse person.

xii. If the value of the note does not equal the value of the assets transferred, then the grantor has made a gift. If the assets transferred would not cause the grantor to make a gift that's terrific; otherwise a reality check on the guarantee is warranted.
xiii. Although repayment of the note is the same as a return of assets by Will, outright the grantor transfers the note to a trust (even if an incomplete gift trust) to minimize the risks.
xiv. Guarantee is real. If the assets decrease in value, the powerholders estate is diminished.
xv. Note again that this is an income tax plan having nothing to do with the other upstream planning like having the grantor make a gift to the powerholder outright, using Crummey powers or a Crummey trust, or an upstream GRAT.
xvi. Estate of John Stone (9^{th} Cir) son had GPOA over trust revocable by mother. Son died, and court said son had GPOA even though gift not complete. 1930s case. Not sure it's right.
xvii. Consider risks. What if elderly individual gets in car accident will GPOA be reachable is there is a lawsuit? Under most states an unexercised GPOA is not reachable but uniform law has options and may be reachable. In AK a presently exercisable GPOA is not reachable except to the extent exercised.
xviii. Another option is to trigger DE tax trap under 2041(a)(3). In NY grantor of GPOA will start new rule against perpetuities. In AZ if grantor presently, exercisable special power you can start new RAP. Beneficiary can control how much is included in her estate.
xix. Can you put a formula in? Yes.

d. Creditors.
    i. Suppose that you owe someone $100 and you have GPOA over trust with $1M. Can you appoint $1M or can you appoint only $100 to person you owe $100? No law on this. Common law general powers were unrestricted the appointment to estate and creditors etc. is a tax construct.
    ii. The fact that someone is a creditor can appoint $100 that is all you can appoint to them. Others might say you can appoint to that creditor as a person. Some believe that the power to appoint is limited "to the extent that he is a creditor."
    iii. Under state law, unlike tax law, don't need full and adequate consideration.

e. Contracts to exercise powers
    i. Comes up in a property law context.
    ii. Fraught with peril.
    iii. Trying to settle dispute and as part of settlement deal want to agree to exercise power or not exercise powers. These may be non-taxable LPOAs. At common law contracts to exercise powers are not valid if testamentary powers. Theory was you were to remain unfettered to exercise power or not up to the moment of death.

iv. If exercising power as part of settlement that is fraud on the power. You are trying to use the LPOA to benefit yourself which you cannot do. So, you can generally not ever contractually agree to exercise or not.
v. You might be able to contract to exercise a GPOA or pledge a GPOA.
vi. Settlement of litigation,
vii. premarital agreements – may want to have commitment on exercise of a power in the prenuptial agreement. May want new spouse to agree to exercise LPOA to assure they get money but this may not be feasible.

f. Charity.
i. Do enforceable charitable pledge to charity for $10M but do not have but in a trust, you are a powerholder with testamentary LPOA to allocate/direct to charity or descendants. You can't do this since you cannot appoint to a creditor of your estate.
ii. Be sure if you do exercise that you do not have an enforceable legal pledge.

g. Release.
i. Be careful about releases.
ii. At common law you could release anything. But common law may be different. Many state statutes listed only ways to release (disclaim) but that may negate the old common law right of disclaimer. But there may be times we want to violate the 9-month rule. We may not always care about tax qualification of the release.
iii. Recent DE case Tigani (sp?). Mother tried to exercise GPOA to remove child. Chancery Court said you cannot irrevocably exercise GPOA.

h. Testamentary powers.
i. Example special testamentary LPOA to control beneficiaries. Might let primary beneficiary eliminate troublesome child through presently exercisable LPOA.
ii. We've seen elderly taken advantage of by new spouse/partner or care giver, could turn against child. The power of appointment could be disastrous in this case if used to remove a child/beneficiary.
    1. Comment: With the growing incidence of elder financial abuse (see both Krooks and Magill outlines) and the ubiquitous discussions of powers of appointment and their growing use, this could be a terrible problem. How can you guard against undue influence in the exercise of powers? Will the fraudsters praying on the elderly discover this new potential goldmine? While solutions exist, e.g., granting an LPOA and give someone the power to make it a GPOA, that runs the risk of the grant not occurring prior to death.

i. Special power.
i. Power to appoint to another trust for descendants and yourself so long as your rights under the new trust are no greater than under old trust.
ii. Instead might give person power to amend administrative provisions of the old trust and power to change rights of other individuals but not change

your rights. That is actually tough because if you bring in a new beneficiary doesn't that affect your rights?

j. Decanting.
    i. Can decanting be analogous to a power of appointment.
    ii. If you convert income trust to unitrust you may have negative tax consequences such as loss of GST exemption or a taxable exchange for income taxes. But if you do it pursuant to a state statute its ok. What if you are in a state that doesn't? Change governing law.
    iii. Can decant an income trust that might disqualify special needs beneficiaries into a supplemental needs trust.
    iv. If decanting watch out for grandfathered GST trusts as there are very few exceptions and they are hard to meet. There is not a lot of authority. Don't forget you must qualify, if under "d" cannot shift an interest. These are only safe harbors and there is no law on it.
    v. Consider a savings clause but IRS is not supportive of saving clauses.
    vi. Can exercise LPOA and extend term of grandfathered GST trust so long as meet terms in Regulations But in a decanting, you cannot ignore the restrictions (e.g. decanting in document, etc.).

k. LPOA.
    i. May include LPOA to address risk of descendant "going off the rails."
    ii. May decant to modify, but only occasionally.
    iii. Other than DE tax trap most states will not tax exercise.
    iv. In KY if you die holding a special power = LPOA it will be subject to inheritance tax.
    v. What if have LPOA in perpetual jurisdiction and create new trust, it can go on indefinitely. Consider Murphy case in WI. Most states have no clear authority. Murphy is entirety of authority on DE tax trap.
    vi. Self case. Exercise of special power relates back to donor of power and no gift. Self v. United States, 142 F. Supp. 939 (Ct. Cl. 1956).
    vii. Register case adopted by IRS in Rev. Rul. If lose income interest in property by appointing it you have made a gift. Regester v. Commissioner, 83. T.C. 1 (1984).
    viii. Lifetime exercise of LPOA of trust of which you are a beneficiary, if no definite and fixed external standard, is a gift.
    ix. 5% withdrawal right over trust and don't exercise. Is that a gift so that there is more property in the trust? It's a lapse. Should not be a gift 2514 exception.

l. Fiduciary changes.
    i. If settlor tells trustee what to do that is OK as trustee has independent fiduciary duties. But if you have a non-fiduciary powerholder the IRS has a credible argument that the powerholder is just the agent of the settlor and might then argue that settlor never gave up
    ii. Problem with protector not having fiduciary standard. Rev. Rul. 95-58 deals with fiduciary powers. But if power is held in a non-fiduciary capacity it may be problematic.
    iii. Risk of non-fiduciary powers is that they could be mis-used.

iv. What if use fiduciary power and give standard like willful, etc.
v. Wiley case.
vi. Speaker has seen too many decantings over trivial matters and it starts to look like the person is acting as an agent of settlor.

m. Choice of Law.
   i. If you have a power of appointment you can use a power to move a trust to another jurisdiction. That has issues.
      1. Example, KY trust with KY law applying and move to DE.
      2. The above is a concern is you move trust and important different law can give you GST issues and issues with beneficiaries.
      3. Decanting is like a power of appointment so cannot ignore original instrument and ignore it. If decant from a state with traditional RAP, which is a validity issue, to a new state with no RAP, it's a problem. Might that make the trust void ab initio since trust cannot vest within lives in being and 21 years.
      4. May leave to court to decide at what point you run out of trust.
      5. Consideration alone.
      6. On construction if you change law on construction might that change who might actually be a taker? Perhaps rules of construction should remain under laws when trust was created. State laws differ significantly as to definition of descendants, treatment of reproductive technologies, illegitimate children, etc.
      7. On administration side that traditionally follows situs of trust so should be able to move trust and situs for administration. But there is some uncertainty as to what administration is.
   ii. If you have a power of appointment, what law governs the instrument that is the substance of what you can do. For example, what law governs who is a spouse, etc.
      1. What is a will? Electronic wills. Three states have a statute and a uniform act governing electronic wills should be approved soon.
      2. Electronic will is a will not on paper that is electronic and is witnessed and notarized as to certain procedures. Most likely there will be a period of time, perhaps a long one, during which what is a will in say New York will be a will in KY. So, if can exercise a power of appointment "by will," does an electronic will suffice. This could all be problematic.

n. Generation Jumping.
   i. As you put property in trust as moves down generation lines you'll pay GST unless in trust with zero inclusion ratio.
   ii. GST tax only applies only once regardless of how many generations you jump.
   iii. Grandpa dies and assets bequeathed to grandson = GST tax, etc. What about having assets jump over all intervening generations. Include in trust on death of primary beneficiary held in trust for youngest generation and after 5 years opens up to a normal per stirpital distribution.

iv. Decant into new trust and give special power of appointment and powerholder exercises so not held in trust for grandchildren, but for great-great-grandchildren, = 5th generation.
v. Pay only one GST tax.
vi. Has enormous impact.
vii. Might give trustee authority to adjust.

14. Thursday: Afternoon IV-B: Self Settled Trusts, etc.: Rothschild, Borowsky, Nelson
    a. Background.
        i. Temporary high exemptions of $11.4M in 209 reduce to $5M inflation adjusted in 2026.
        ii. Could be reduced earlier if change in Washington.
        iii. IRS has announced that clawback won't happen.
        iv. For many clients to make gifts sufficient to use a meaningful portion of their exemptions they must have access to funds. Approaches might include:
            1. Loan power in grantor trust.
            2. DAPT.
                a. The speaker's outline states the following: "The use of self-settled spendthrift (or "asset protection") trusts has become very popular in the United States over the past 20 years since the enactment of self-settled spendthrift trust legislation by Alaska and Delaware in 1997."
            3. Hybrid DAPT.
                a. Add settlor after 10 years and one day to avoid Bankruptcy Act issue discussed below.
                b. Give person power to add settlor back as beneficiary so it is not a DAPT if that is not done.
                c. Give person LPOA to appoint assets to settlor.
                d. Have settlor become a beneficiary only after an act of independent significance such as divorce.
            4. SLATs.
                a. Must address risk of divorce or premature death.
            5. Variations of the above.
    b. Transfer to self-settled is it a completed gift.
        i. Private Letter Ruling 9332006 foreign trust concluded that transfer was completed gift. Creditors could not reach under local law.
        ii. Private Letter Ruling 9837007 AK trust, IRS concluded gift complete.
        iii. last ruling PLR 200944002 addressing completed gift transfer issue. Taxpayer requested IRS to rule if trust would be included in settlor's estate. IRS concluded that right of trustee to distribute to settlor does not cause 2036 inclusion but conclusion depends on facts and circumstances. If an implied agreement or pattern of distributions 2036 could cause inclusion in estate.
        iv. CCA 201208026 matters beyond settlor control should not trigger inclusion.

v. ING rulings are analogous if can relegate to creditor then trust will be a grantor trust which is not desire.
vi. Contrast traditional DAPT not concerned about removing from estate and may have been incomplete gift on purpose. Example, if $1M exemption and wanted to protect more transfers intentionally structured as incomplete gift.
vii. Now to use exemption need DAPT jurisdiction and no retention of powers that would cause estate tax inclusion:
    1. No veto powers.
    2. No implied agreement.
    3. Settlors creditors should not get access.
viii. To avoid an implied agreement, attack the settlor should view the DAPT as emergency fund and ideally no distributions should be taken.
ix. If settlor has power to remove and replace trustee estate inclusion issue. Successor trustee should not be related or subordinate.
x. DAPT statutes have window during which claimants can reach trust assets. Consider state law exception creditors in DAPT jurisdiction. Is that a retained interest that might cause estate inclusion? Common exception creditor is spouse with alimony claim.
xi. Bankruptcy Sec. 548(e) clawback. If file for bankruptcy protection within 10 years after funding theoretical concern that had there been a bankruptcy filing could be a clawback. 548(e) requires finding of intent to hinder delay or defraud a creditor. Consider that this is no different than any gift. If you give $3M to daughter the fact that there is a fraudulent conveyance doesn't affect whether or not the gift is complete.
xii. Taxpayer in gift tax made argument that because he could relegate trust to his creditors via spouse or children he did not make a completed gift.

c. Asset Protection Cases.
    i. Only one case in which court held self-settled trust was protected by creditors.
    ii. FAPTs - Cases the courts applied public policy. The cases are result oriented. Debtors transferred assets offshore after cause of action accrued. the effect that the validity of a self-settled spendthrift trust should not be upheld. See, e.g., In re Portnoy, 201 B.R. 685 (Bankr. S.D.N.Y. 1996); In re Brooks, 217 B.R. 98 (Bankr. D. Conn. 1998); In re Lawrence, 227 B.R. 907 (Bankr. S.D. Fla. 1998).
    iii. DAPTS – all the cases were really fraudulent conveyances. Sec. 270 of Restatement instead of 273 which is more specifically a question of an interest of trust in movables and which law should govern.
        1. In re Mortensen, (Adv. D. Alaska, No. A09-90036-DMD, May 26, 2011).
        2. In re Huber, 201 B.R. 685 (Bankr W.D WA, 2013).
        3. Rush University Medical Center v. Sessions, 980 N.E.2d 45 (2012), Toni 1 Trust v. Wacker, 2018 WL 1125033 (2018). In Wacker they directly transferred real estate in Montana into an AK trust.

iv. Rikers – Cook Island trust. Court held it was established to protect family assets and wife's rights had to be determined by Cook Island court.

d. Issue.

i. Will a DAPT by a client in a non-DAPT state work? No certainty.

ii. Consider a SLAT or hybrid DAPT if you are not sure a DAPT will work.

1. Give third party power to add settlor as a beneficiary so it will only become a self-settled trust as needed.
2. Consider wealth and ability to have money outside the trust to fund lifestyle costs.
3. Tax reimbursement clause provides economic benefit to the settlor if or while the trust is a grantor trust.
4. Loan provision – can loan without adequate security.
    a. "Trust can give trustee power to make loans with adequate interest. Such power would allow for bona fide loans to be made to the settlor. And if the power to lend to the settlor does not require adequate interest or security the trust will be a grantor trust under IRC § 675."
    b. <u>Comment:</u> An issue may be what is adequate security or adequate interest? How many loans can be made and for how much before a claimant or the IRS asserts and implied agreement?
5. Consider whether you want it to be a grantor or non-grantor trust?
    a. If non-grantor no loan power and no power to add settlor as beneficiary as those will taint as grantor.
    b. If distributions to a spouse in a SLAT are subject to consent or approval of an adverse party (or as in an ING a committee) the trust will be not be a grantor trust under Code Sec. 677(a).
    c. <u>Comment:</u> Consider for many clients the benefits of a so-called non-grantor SLAT that has been referred to as a SALTy-SLAT or a SLANT. A combination of grantor and non-grantor trusts can be created to achieve a variety of client tailored goals.

iii. SLAT.

1. Floating spouse provision – defined who settlor is married to from time to time.
2. Could provide if divorce spouse deemed deceased but then you lose access.
3. Give spouse LPOA to appoint back to grantor. How does relation back doctrine impact that?
    a. It's a problem because what clients would like to do, H creates trust for W and W has benefit of distributions, but H needs assets back when W dies. Give W LPOA to appoint back to H (as in a credit shelter trust).
    b. But if W predeceases H and funds go to trust for H, that might be deemed a self-settled trust as to H.

c. A power of appointment is a power not a property interests. So, it's as if the property came from H not from W since W as a mere power holder did not have a property right. Those assets arguably could be included in H's estate.
d. Set up credit shelter trust = CST in a DAPT jurisdiction. That is not a perfect result. If instead create an inter-vivos QTIP trust 17 states have addressed relationship back doctrine. Problem with inter-vivos QTIP is assets in estate so need further planning.
e. AZ, KY, NC, TN, TX and DE. Do not need QTIP election to cure relationship back doctrine.
f. 17 DAPT states. Most say to cure relationship back doctrine need to make a QTIP election.

4. SLAT use life insurance on life of donee spouse so do not need to address LPOA back to donor spouse.
   a. Comment: Life insurance can be used effectively to address the risk of premature death of the beneficiary spouse in a SLAT. Uses financial modeling to determine the quantum of life insurance.
5. Since spouse is beneficiary no gift-slitting. Reg. 25.2513-1(b)(4).

iv. But if representing a single client may have no options to the use of a DAPT to preserve access by the settlor.

e. Compare Inter-Vivos QTIP (see below) to SLAT.
   i. "Inter vivos QTIP trust planning has limitations compared to similar plans that use a SLAT because inter vivos QTIP trusts do not freeze values of its assets for estate tax purposes. The advantage of the SLAT is that post gift appreciation is removed from future estate and generation-skipping transfer taxes. However, the disadvantages of SLATs as compared to inter vivos QTIP trusts include the following: (i) assets conveyed to a SLAT do not benefit from a step up in income tax basis upon the death of the primary beneficiary of the SLAT and (ii) distributions upon the death of the initial SLAT beneficiary back to the initial donor spouse are not protected by…statutes of most inter vivos QTIP trust jurisdictions. Therefore, the assets that return to the initial donor spouse (whether outright or in trust, whether based upon a reversion in the SLAT or through the exercise of a power of appointment) could be subject to the initial donor's creditors' claims under the Relation Back Doctrine and to estate taxes. As a result, careful analysis of estate and potential income taxes, and loss of asset protection is required when SLATs are considered." Excerpted from Nelson's outline.
f. Positive characteristics.
   i. Set up to save estate tax and assets protection may provide more substance to trust then if purely for asset protection.
   ii. Don't put real estate into DAPT, instead put into LLC and transfer LLC to trust.
   iii. Move assets into the trust.

iv. Fund the trust.
v. Consider FAPT.
    1. Assets should be transferred offshore and not left in US partnership, etc.

g. Reciprocal Trust Doctrine.
    i. If one person makes a transfer for another and the other party makes a similar transfer for the benefit of first donor you can uncross both transactions/trusts resulting in including each in the respective donor's estate.
    ii. Can avoid rule by going to self-settled trust jurisdiction and avoid this risk or lessen risk with differences in trusts.
        1. Give different distribution discretion.
        2. different standards and different powers of appointments.
        3. Use different trustees. Different assets in each trust.
        4. Try to infuse sufficient difference to negate the reciprocal trust doctrine.
    iii. Comment: Checklist of possible differences to deflect a reciprocal trust challenge (based on a Trusts & Estates magazine article by Steiner and Shenkman):
        1. The trusts could be drafted pursuant to different plans. A separate memorandum or portions of a memorandum dealing with each trust separately may support this.
        2. Make one trust a SALTy-SLAT or non-grantor trust and the other a more typical grantor trust.
        3. The husband and wife should not be in the same economic position following the establishment of the two trusts. For example, the husband could create a trust for the benefit of the wife and issue, and the wife could create a trust for the benefit of the issue, in which the husband is not a beneficiary. Or one spouse could be a beneficiary of the trust he or she 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 or she is not a beneficiary (i.e., a trust that is not a domestic asset protection trust).
        4. 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 reduced flexibility, may prevent decanting, and may expose the trust assets to a beneficiary's creditors.
        5. 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. Consider using different institutional trustees.

6. 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% of the trust principal each year. The amount the powerholder could have withdrawn at the time of death is includible in his or her estate. However, the lapse of the power, not in excess of the greater of $5,000 or 5% of the trust assets each year, is not 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.
7. 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.
8. 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.
9. 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.
10. 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 or her life to the trust, some or all of the proceeds of the policy is held in a QTIP 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.
11. Each trust could have different vesting provisions. 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.
12. 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 or her co-trustee, and have a special power of appointment could be different in each trust.
13. Vary the beneficiaries. For example, one spouse could create a trust for the spouse and issue, and the other spouse could create a trust just for the issue. Note that if, for example, the husband creates a trust for the wife and their first child, and the wife creates

a trust for the husband and their second child, the gifts could still be viewed as reciprocal.

14. Create the trusts at different times. Apropos to current planning complete one spouse's SLAT in 2019 and the other in 2020. 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. Inasmuch as 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 was not relevant. If the difference in time is a factor post-Grace, a short time might be sufficient in light of Holman v. Commissioner, in which a gift of partnership interests six days after the formation of the partnership was not a step transaction. The closer to the end of 2012 and the possible end of the $5,120,000 gift tax exempt amount the more difficult it will be to interpose any meaningful time difference between the formation of the two trusts.
15. Contribute different assets to each trust, either as to the nature or the value of the assets. However, if the purpose is to contribute $5,120,000 to each trust, it may not be feasible to contribute assets of different value, and in any event varying the value of the trust only serves to reduce the amount to which the reciprocal trust doctrine may apply. Contributing different assets may not negate the application of the reciprocal trust doctrine, since the assets in a trust can change over time.

h. Inter-vivos QTIP.
   i. Set up inter-vivos QTIP.
   ii. Must be US citizen. Cannot create an inter-vivos QDOT.
   iii. May need pre/post-nuptial agreement.
      1. "…negotiate and enter into a Postnuptial agreement as part of the restructuring of marital and non-marital assets to reduce the likelihood that the donee spouse, due to the financial windfall from the donor spouse, could be incentivized to seek a dissolution of marriage. A Postnuptial agreement will also address post-dissolution of marriage income tax issues that could result in the inter vivos QTIP trust donor being subject to income tax on trust income distributed to the donor's spouse upon dissolution of marriage for the remainder of the donee spouse's life from the inter vivos QTIP trust based, in part, upon repeal of Code Section 682."
   iv. 682 issues post TCJA. <u>Comment:</u> See McCaffrey outline Tuesday morning.

v. Inter-vivos QTIP H creates trust and will be subject to income tax on trust income even after divorce due to repeal of 682 by TCJA. Address this in a post-nuptial and protect whichever spouse may bear tax cost.
vi. Testamentary and inter-vivos QTIP trusts should be considered as option especially in states that override relation back doctrine. This approach may be safer to create two inter-vivos trusts is safer from an estate tax and asset protection perspectives then using a DAPT, unless you live in a DAPT jurisdiction.
vii. Get step up in basis in full on first death.
viii. This is a completed gift transfer and must file a gift tax return. Make QTIP election.
ix. Many clients after being burned in 2012 may now think they have until 2026, and even if Democrats get control in 2020 there should be time and notice, so many are pushing off decision. Doing it early you compound wealth out of estate over next several years.
    1. Comment: Do one SLAT in 2019 and the other in 2020 to help deflect a reciprocal trust doctrine challenge. This is a good reason to encourage clients to plan now.
x. Consider using grantor trust so have swap power to enable basis step up.

i. Diminished life expectancy.
    i. Client can transfer wealth to spouse in inter-vivos QTIP trust. Trust can provide
    ii. As to use of exemption no timing. If want basis step up must survive 1 year.
    iii. If donee spouse survives one year and one day and assets return to donor spouse in credit shelter it will benefit from a basis step up.

j. Testamentary Existing QTIP.
    i. If do nothing and exemption drops included in estate and could then trigger estate tax.
    ii. Renounce some of QTIP income interests and trigger 2519. If renounce any it's a renunciation of all. Many PLRs support dividing the trust into multiple trusts and renounce only that portion you are looking to trigger.

k. Fraudulent transfers.
    i. Many trustees used 30% rule of thumb on self-settled trusts. Now may wish to transfer so much more.
        1. Comment: Given the size of the current temporary exemptions the old rules of thumb may prove to be the limiting factors and they will likely have to be exceeded to safeguard/use exemption. But practitioners might wish to exercise additional caution when doing so.
    ii. Still may want affidavit of solvency signed by grantor that no claims, no threatened claims, no judgement creditors and have enough funds to meet obligations and living expenses.
    iii. Perform due diligence on the client.

1. <u>Friday: Morning 1: Minimum Distribution Rules Trusts: Choate</u>
    a. Overview.
        i. On death must pay out from plan.
        ii. Individual beneficiary's life expectancy determines payout.
        iii. If beneficiary is infant payout may be over 80 years. 1/80th, etc. This long-life expectancy of a young beneficiary is the stretch out.
        iv. That plan would diminish over the infant's life expectancy. By age 79/80 should theoretically take out last dollar.
        v. When child attains age 18 might pillage trust so use trust for her instead.
        vi. Can name trust as beneficiary and keep stretch out "RMD trust rules" but must comply with them for trust to use payout over life of oldest trust beneficiaries.
        vii. Must fit within those rules.
        viii. What do you have to do to get stretch payout for IRA trust?
        ix. Why bother? Is it really helping? Is that the only point we should care about?
        x. What if you cannot jump through all hoops?
    b. How qualify see-through trusts?
        i. Two ways.
            1. Conduit trust. Example is in regulations but phrase "conduit trust" is not.
                a. If you have trust with everything distributed from IRA is in trust and must be paid out of trust to that person, pass-through the trust to that person, trust qualifies as a see-through trust and the conduit beneficiary is considered the sole beneficiary of an IRA.
                b. Example – leave $1M IRA to daughter but don't want her to get a lump sum and prefer to force a life expectancy payout. Name trust as beneficiary of IRA. You don't have to tell trustee to take RMD because they are required to whether or not that's what the Code says. Must make it clear anything else taken out of IRA must also be paid to daughter. For example, you might authorize trustee to take out additional funds for beneficiary, e.g. for HEMS. But those too must be paid to same named beneficiary so that trust meets conduit trust rules.
        ii. Accumulation trust.
            1. Trustee has power to take distributions from IRA and hold on to them and not pay out to them.
            2. Accumulation trust may or may qualify as a see-through trust.
            3. On child 1 death child 2 gets asset out right. So, no need to look beyond child 2 = remainder beneficiary. Stop with remainder beneficiary as that is last beneficiary you have to look at. Go down chain of beneficiaries to find one who will get IRA outright and immediately on death of a prior beneficiary.

4. If all beneficiaries to that point are individuals, then it's a see-through trust.
5. This has created problems with trust for younger people. X died and left to kids who get outright at age 30 but if died before age 30, money would go back to older relatives, one age 68. So, IRS said 68-year-old is oldest beneficiary getting it outright. IRS has been consistent its rulings addressing age related distributions like the above example.
6. The above was the "landscape" coming into 2016.
7. In Married 2016 got a ruling that was out of sync with the above. What does that ruling mean to planning?

iii. PLR 2016-33025 - Participant died and left IRA to trust. Pay income and principal to my daughter or her minor children for HEMS until daughter attains age 50. Then terminate trust and give it to her outright. If she dies before 50 given to children outright unless under 21 give to daughter's children at age 21. If die goes to their estates. If both die to aunt (daughter's sibling). Under prior rulings if daughter dies IRA goes to grandchildren, but if they die to estate. An estate is not an individual beneficiary so under classic rules the trust should not work.
1. This is not consistent with prior letter rulings that said the opposite where an age delay was counted as not being last beneficiary.
2. One theory said grandchildren estates not considered as the estates don't exist yet. But that doesn't explain why IRS disregarded donor's siblings.
3. Another theory was that IRS ignored delay to age 21 as minors never get money outright. In prior PLRs age delays were to older ages

a. Conduit trust case study.

i. Conduit trust should pay RMD to life beneficiary and any additional amounts drawn out should be paid to life beneficiary. A trust was silent on what to do. But since payments were stated to be over life expectancy it showed intent to be conduit trust since there were non-individual remainder beneficiaries.
ii. Trustee's only powers were to pay income and more if needed for HEMS.
iii. Should be read that trust can only take out more than RMD for HEMS.
iv. Result will depend on state law.

b. May not care if flunk IRA Trust Rules in some instances.

i. "Complying with the RMD Trust Rules is not a prerequisite of making retirement benefits payable to a trust. If a trust named as beneficiary of a retirement plan "flunks" the rules, the trust will still receive the benefits; it just will not have the option of using the life expectancy of the oldest trust beneficiary as the Applicable Distribution Period for those benefits. There are some situations in which it may make little or no difference whether the trust complies with the trust rules:"

1. Estate needs (e.g. have no choice but to cash out IRA and pay tax or other expenses), client's goals, needs of the beneficiaries might negate benefits of see-through trust status.
2. Beneficiary same age or older than participant.
3. Charitable trust.

c. Tax brackets.
   i. individuals have to have taxable income in excess of $612,000 before getting into 37% bracket. So how many beneficiaries are really worried about being in the top income tax bracket?
   ii. But the trust will be in the maximum tax bracket at about $12,000 of individuals.
   iii. Traditional IRA taxes have been deferred. No tax paid when earned or when investments earned income. The income is deferred and will be taxed. It is only a question of when the tax will be due. The only way to avoid the income tax is to leave IRA to charity.
   iv. Example. Family with 3 children in 20s and one of child is special needs receiving government benefits that are means tested. Wealth level is such that they cannot pay all expenses of special needs child, will need government benefits. Want to leave IRA to trust to help disabled by providing supplemental benefits. Cannot leave to a conduit trust for a disabled beneficiary since the income would flow out and would lose benefits. Can we still get a life expectancy payout using an accumulation trust? Yes, name accumulation trust as beneficiary but say when disabled daughter dies trust qualifies and goes outright to her siblings. Now have $1M IRA going into a trust that will not distribute all income to disabled daughter, so income not distributed will be taxed at the maximum income tax bracket.
   v. Who will pay income tax on the trust income and when? Perhaps parents should take out distributions during their lifetime from IRA that will be taxed at a lower bracket or do a partial Roth conversion.
   vi. So merely qualifying for see-through trust rules may not suffice for income tax planning purposes.

d. Qualified disability trust.
   i. IRA distributions are not treated as unearned income for Kiddie tax.
   ii. It appears that an accumulation trust for a special needs beneficiary may also qualify as a see-through trust, and it may also qualify as a Qualified Disability Trust to obtain the above income tax benefit and a higher exemption.

e. IRAs to charity.
   i. Leaving retirement benefits to charity, simplest way is name charity as beneficiary. But that is not simple.
   ii. Name charity as beneficiary. Charity goes to IRA provided and asks for funds. IRA provided says it cannot take orders unless a customer of the firm. Have to open inherited IRA first and then you can transfer and take out decedent's IRA.

iii. Large charity, filling out an account application with a board of 300 overseers, and IRA provided wants name, address, social security number and other data on every director, etc. So, it is a substantial burden on the charity for what might be a small IRA.
iv. Way around the problem. So, don't name charities directly name a donor advised fund. And name charity in beneficiary form for DAF.

4. Friday: Morning 2: Engagement Letter: Wolven
    a. Communications/Intro.
        i. Communicating terms of new or changed relationship.
        ii. It's an art, not a science.
        iii. "If you practice long enough you are likely to have an ethics complaint or malpractice claim."
        iv. Client's come to us unhappy. Unhappy about taxes, unhappy about litigation issues. Unhappy about family issues. So, their unhappiness may have nothing to do with counsel.
        v. Being careful may be sacrificed as a result of the frantic pace of practice, or the fear of losing business.
        vi. Engagement letters set expectation for attorney client relationship, delineate who is client, etc.
        vii. Many clients do not know the rules that apply that lawyers are familiar with, how often you will communicate, etc.
        viii. If put it writing clients can understand it. Clients often do read the engagement letters.
        ix. Engagement letters establish rules of confidentiality "secrets." No secrets in joint representation among couple and attorney.
        x. Client getting divorced – might need permission from soon to be ex-spouse.
        xi. Push issue if client does not sign and send back engagement letter.
        xii. Client who does not want to sign engagement letter is a red flag. If you use engagement letters get them from everyone.
        xiii. ABA model rules and ACTEC commentaries on model rules consistently and strenuously encourage the use of engagement letters.
        xiv. How do you craft engagement letter? Look at mistakes others have made, and things others have done right.
        xv. Leighton v. Forster 8 Cal. App. 467 (1st Dist. 2017).
            1. Leighton engagement letter with James said no contact with clients, just background work, no direct work. James because very ill and Bob and Leighton communicated, and later Leighton emailed Bob an engagement letter. Cover email said don't need to sign just email back confirmation. Letter itself said had to sign. Don't have inconsistencies.
            2. Bob's wife wrote a few checks to the attorney but had no contact. Bob became ill and Bob's wife signed two notices that Leighton filed on their behalf. Bob's wife never signed an engagement letter. Bob's wife was upset and stopped paying. Leighton moved to end

being counsel in June 2008 and Leighton closed practice. In June 2012 Leighton filed a complaint against Bob's wife in 2012. Don't wait 4 years to seek fees. May 2007 letter that had not be responded to was not an engagement letter.

3. Clear from case that Leighton was trying to be considerate of Bob's health issues. Good folks can finish last.

xvi. In re Romansky Case 938 A.2d733 (D.C. App. 2007).

1. Worked for large law firm with standard engagement letter. Firm moved to new engagement letter that provided could premium bill for other facts and circumstances.
2. Romansky billed the client and wrote up number of hours spent, never discussed with client and never indicated on bill and was using old engagement letter saying bill only for time. 30-day suspension.

xvii. Bishop v. Maurer 823 N.Y.S.2d 366 (App. Div. 2006).

1. How you should handle these matters. Joint estate planning with husband and wife. By countersigning you each acknowledge that you have had the opportunity to consult independent legal counsel concerning your estate and you each waive any conflict of interest, etc.
2. During the engagement H and W began to fight. H sued law firm for malpractice that there was a conflict and should not have represented both. Law firm moved to dismiss as the engagement letter expressly addressed. The court said engagement letter said that and case dismissed.
3. This is why it is so important to have language in the engagement letter.

b. Limiting scope of liability.

i. You might be able to do this.

ii. William Davidson. Deloitte (CPA) handled estate tax return. Large audit. Notice negotiated down Family sued CPA claiming bad advice. Engagement letter said no action can be brought more than one year after. Family did not dispute letter but doctrine of continuous representation. Because the letter said no tolling the family had not brought action in time.

iii. The Supreme Court of NY dismissed claims against Deloitte as time-barred due to the one-year limitations provision in Deloitte's engagement letter.

iv. Lawyers differ from CPAs and cannot adjust the statute of limitations that applies to legal malpractice. You may be able to do that, but client needs to be represented by separate counsel. So, it will never happen.

v. Model Rule 1.8 or state corollary. Consider rule and Davidson case. If have large client where you are doing cutting edge planning, "uncharted territory" be clear what you are responsible for.

vi. Can limit liability by limiting scope of representation. If client gives informed consent it should be binding. Courts give deference to scope in engagement letter. Be specific what you are and are not responsible for.

vii. Engagement letter is a contract. Define scope in contract. Think through all components:
    1. Who is client and who do you represent.
    2. Who do you not represent.

viii. Bayoud v. Shank, Irwin, Conant & Williamson, 774 S.W.2d 22 (Texas App. 1989).
    1. Court of appeals of Texas uphold jury awarding law firm most of money. Client signed engagement letter personally so corporate solvency was not relevant. If he intended to sign on behalf of company should indicate that.
    2. "…might have foreclosed Bayoud's argument by having him sign individually and on behalf of his corporation, and by specifically stating in the letter that both Bayoud and the corporation would be jointly and severally liable for the fees."
    3. Comment: There are several aspects so the point above as to payment. If a client pays personal expenses out of a business entity that payment might be a factor a court considers in later disregarding the entity in a lawsuit. Further, if the client has a trust or entity pay a personal expense what tax implications might that have? If a dynasty trust pays the settlor's personal legal bills that could create an indication of the client having retained control over the trust contributing to an estate inclusion argument. The flip side of this is the client pays the legal fees for work done for a GST trust that value/payment may constitute an additional gift to the trust creating gift and GST issues.

ix. Co-counsel send engagement letter for co-counsel to client and ask their permission to engage on behalf of client.

x. Pinckney v. Tigani, 2004 WL 2827896 (Del. Super. Ct. 2004).
    1. Pickney = beneficiary. Trust was drafted correctly and executed, and estate had assets to fund, but because of restrictions on assets beneficiary only got a portion of bequest.
    2. Attorney asked for asset information. Client said not enough time. Attorney spoke with testator on Feb 1, 2000 and Feb 7, 2000 to confirm no undue influence. On Feb 8 attorney sent letter and draft of trust and letter confirming engagement stating that could not discuss entire estate plan and limited engagement to preparing the one document.
    3. Feb 12, 2000 client sent letter indicating receipt and desire to proceed. Court found that letter sufficed. Attorney told client that financial information should be considered. Court said letter was well done engagement scope limitation.

c. Payment.
    i. Some states require engagement letter to get paid.
    ii. NY requires a list of items be included in an engagement letter.
    iii. Morgan, Lewis & Bockius LLP v. IBUYDIGITAL.COM, 836 N.Y.S.2d 486 (Sup. Ct. N.Y. 2007).

1. Alternate fee arrangement case.
2. Law firm charged more for work beyond scope of engagement letter.
3. Reason law firm had trouble is they could not show that they had an office procedure for outgoing mail. Could not prove that sent bills to the client.

iv. Recommendation - Must document fee arrangement and tell client how you will charge them.

d. Beginning and end of engagement.
   i. Allmen v. Fox Rothschild LLP 946 N.Y.S.2d 65 (Sup. Ct. NY 2012).
      1. When did engagement begin and end.
      2. Send new engagement letter to client for handling an estate.
      3. Now representing wife on her estate and plan and as executrix of husband's estate. Send a new engagement letter.
      4. Fox had surviving daughter of client they represented sign new engagement letter as executor.
      5. Estate tax return audited. Issue as to where accounts were listed on the return. She sued firm for malpractice claiming return was prepared wrong. Fox said drafting claims time bared. Daughter argued ongoing representations. Having the new engagement letter was objective proof of no continuing representation.
      6. Recommendation - Get new engagement letter for every estate.

e. Bad clients.
   i. Ruckman v. Zacks Law Group LLC, 2008 WL 660438 (Ohio App. 2008).
      1. Client was in dispute with condo association.
      2. Analyzed case and made recommendations and requested more information. Client was not responsive. After 11 months with no activity. Client called law firm and asked why lawyer was not present. Lawyer had never filed appearance and said do not represent her.
      3. If they knew they would not proceed they should have sent letter saying, we are terminating representation.
      4. Lawyer was not responsible, a lot of time passed, etc.
   ii. Fire the bad clients in writing.

f. Conflicts of interest.
   i. Come up with joint estate plan, partners in an entity, family business, etc.
   ii. Discuss what happens if they do not agree. Can you represent one and not the other?
   iii. Parents with wealth and children ask to represent them. Multi-generational representations include in child's representation letter that representing parents and you can get your own counsel.
   iv. Conflict may be significant if address in engagement letter how you will handle it in the engagement letter.
   v. A v. B v. Hill Wallack 726 A.2d 924 (New Jersey 1999).
      1. Lawyers represented H an W but did not address what happens if a conflict arises. Conflict system failed, and H had child with

another woman. Notified W of conflict and H sued firm. Court said firm could have just withdrawal.

2. Recommendation - Be certain to have language like: "I can withdraw" in engagement letter. Indicate how withdraw. State laws differ as to whether you have to disclose.

g. External advisers.
    i. U.S. v. Kovel 296 F.2d 918 (2nd Cir. 1961).
    ii. Kovel letters elements.
        1. Outside advisor retained by law firm to assist in obtaining advice for client from lawyer.
        2. The outside advisor understands that all information will be confidential and should be kept separate from other client files.
        3. The outside advisor will not disclose any information to anyone other than client or law firm without written permission of client or law firm.
    iii. Kovel is a criminal law case. A contempt case. Tax expert worked for law firm and attorney at law firm and was providing advice. Client was sued for criminal acts. Grand Jury called Kovel as a witness. Kovel said attorney client privilege and I cannot testify. He was not an attorney, so privilege does not apply. Judge put Kovel in jail for contempt and case went up on appeal. 2nd Circuit discussion was about whether non-attorneys in a law firm are part of attorney client privilege. Analogized those services to a translator. Rule sets arbitrary line depending if client communicates with attorney or outside adviser. Lawyer should reach out to expert and bring them into the engagement.

1. Friday: Morning 3: Wrap Up: Berry, Redd
    a. TCJA subsection 67(g) to suspend until 2026 miscellaneous itemized deductions.
        i. Notwithstanding "(a)"… how does it relate to non-grantor trusts and estates.
        ii. July 13, Notice 2018-61 confirmed result 67(e) says unique administration expenses of trust or estate that would not have been incurred but for in trust or estate should be treated under (e) as allowable, so they cannot be itemized deductions anyway so new (g) cannot interfere with them.
        iii. IRS continued in notice to address administration expenses passed out to beneficiary in year of termination on K-1, so-called 643(h) excess deductions. IRS is studying whether when individual beneficiary gets unique admin. Expenses whether they should be deducted notwithstanding (g). What do beneficiaries do in the interim who get a K-1 with excess deductions on trust termination?
        iv. In the instructions 2018 for Schedule K indicate that all excess deductions on termination without exception are allowed to beneficiaries. Line 16 Schedule A form 1040
    b. Supreme Court Review of state taxation of trusts.
        i. Kaestner NC case will be taken to the Supreme Court, and it may be joined by Fielding.

ii. This will have significant impact.
iii. If court says cannot move trusts easily that will enhance use of BDOTs and other ways to make a trust a grantor trust to have taxed in another state even if leave where it is.
iv. If court says easier to move trusts around, then may have many states change laws on how they tax trusts.

c. 199A.
i. Multiple trusts rules should be considered.
ii. Business combinations – how you think about it differently because of 199A.

d. 1202.
i. QSBS.
ii. It has been around for 25 years. Why so important now? Because of the reduction in the corporate tax rate from 35% to 21%.
iii. Obtaining exclusion from gain from sale of qualified small business stock. If can meet the rules it is a wonderful result, potentially a 100% exclusion of gain.
iv. 199A requires pass through entity but 1202 suggests you want C corporation status because a C corporation stock may qualify for the 1202 treatment.
v. An S corporation shareholder may gain 1202 advantage. S corporation can contribute assets to C corporation under Sec. 351 and take back stock in the C corporation that is QSBS. Cannot distribute to S corporation shareholders as it would disqualify. But S corporation can serve as holding company for small business stock. Excluded 1202 gain increases basis in each S corporation shareholders' stock so can distribute cash proceeds from sale to S corporation shareholders tax free.

e. Demographics.
i. 62% of divorced people do not have wills. Family disruptions and lines frayed so harder to decide how assets should be distributed etc. so more reluctant to do estate planning.

f. Charitable bequests.
i. $50,000 bequest to charity in plan what should you do?
ii. Give $50,000 to charity now is one answer, but client may respond that they may need it.
iii. What if in will first $50,000 of income of the estate (income, dividends, IRD) will go to charity.
iv. Estate will now get an income tax deduction.
v. This avoids having to just trust kids to make gift to charity post-death.
vi. Need to rethink and change manner of handling bequests.
vii. 642(c) deduction requirements.

g. Divorce.
i. Prenuptial agreements and post-nuptial agreements. Does it have provisions for alimony or spousal payments. Those may now not work if 2017 provisions remain in law.

ii. Trusts with spouses. If there is a later divorce. 682 had helped under prior law as it would cut off spousal linkage if there is a divorce. Now that may not happen.
iii. Wealthy client getting divorced. Spouse wants income. Do an old-style partnership freeze creating class of interest paying spouse income and that is given to poor spouse. Now wealthy spouse post-divorce has common interests he or she can gift to the children. Code Sec. 2701 should not apply because of intervening divorce.
iv. Existing marital agreements in place they were created and designed based on assumption that alimony would be deductible by payor and included in income of payee. The TJCA changed the impact of these agreements has been dramatically changed in a serious way. Is there a possibility the severability provision in the prenuptial agreement may enable those harmed to point to severability provision and say that now that we have an unexpected change in the law that is not a basis to renegotiate the marital agreement?

h. Fiduciary selection.
i. Baer lists of questions to ask when trying to choose a professional fiduciary.
ii. How many client families will a trust officer be assigned to manage? If that number materially changes that could be grounds to remove and replace a trustee. But that is not a good measure of the pressure on a trust officer.
iii. If work load of officer increases what is impact?
iv. Perhaps that is just a starting point to consider. If your trust will be short changed is that grounds to look for a new fiduciary. But the problem is that the number of accounts a given trust officer has is not reflective of work load as there are so many different trusts, different circumstances. Some are very labor intensive, and others are not.

i. PLRs.
i. Insights as to comfort rulings – IRS does not want to issue. But they will not tell you they are not ruling because it is merely a comfort ruling. But IRS doesn't tell you if they are not ruling because the position is obviously right or wrong.
ii. First revenue procedure of each year sets out rules for getting a PLR so be certain to review those.
iii. If you get an adverse ruling will not likely proceed with plan. That could be worthwhile but if you will go forward with the transaction in all events why proceed to request a ruling?

j. Planning for Guardians/Minor Children.
i. UTMA accounts - child creditors can reach assets in UTMA account.
ii. What do you do when a client calls and says child is 18/21 and UTMA is going to end, and child will get money. What can be done? 529 contribution, roll money into an LLC, suggest to child to transfer to irrevocable trust (and if you don't your future inheritance will decline), etc. But if child might sue the parent may lose.

k. Elder law.
    i. Pour over wills and revocable trusts. If doing Medicaid planning for surviving spouse. Medicaid distinguishes between trust under a will or under a revocable trust. Might want revocable trusts to pour back into the client's will for Medicaid planning purposes.
l. Offshore.
    i. US individuals with foreign assets. Should there be a single will for all worldwide assets or rather a separate will in the US and each other country. Not everyone agrees.
    ii. Do you prefer one will for US assets and foreign assets or do you prefer to have multiple wills?
    iii. Different practitioners have opposing views on this. Some prefer a single will some prefer multiple wills.
    iv. With multiple wills concurrently in operation be certain that they are coordinated. That is a potentially significant risk.
m. Money laundering.
    i. Know your client.
    ii. NYC bar committee ethics opinion if lawyer suspects services would assist in carry out fraud or crime lawyer has duty to investigate. Must consider readily available facts.
    iii. Model rule 1.2(d) forbids knowingly assisting a client's fraudulent conduct.
n. Disclaimers.
    i. Consider a disclaimer to a charitable fund.
    ii. Example: Mother has $13M and exemption is less. Do discount planning to reduce estate down below exemption. Mother leaves all to son. If son disclaims assets pass to son's donor advised fund (DAF). So, what if estate tax reform and rate is lower, maybe son would prefer to take all. If estate tax rates rise significantly perhaps son would prefer to disclaim part into a DAF and avoid the estate tax.
    iii. Disclaimer to private foundation can be done but its riskier as cannot have control over assets. In contrast a DAF is advice not control.
o. Mancini Life Insurance.
    i. Split-dollar intergenerational Cahill and Morrissette. New developments will come.
    ii. Discussion of valuation of life insurance.
    iii. Using partnerships to ensure that you do not violate the transfer for value rule. If will amend and move old ILITs even if all grantor trusts, consider creating a partnership and have each trustee be a partner with the insured.
p. Engagement letters.
    i. Unlike CPAs attorneys cannot limit liability unless get another lawyer and no one will do that.
    ii. Difficult beneficiaries. Behavioral problems, learning disabilities, other considerations.
    iii. Consider provisions dealing with drug testing.
q. Tax Audits - John Porter.

i. Appraisal considerations – no certainty of outcome. Consider getting alternative appraisals.
ii. Estate of Streightoff v. Commissioner, T.C. Memo. 2018-178 (Oct. 24, 2018) decision where taxpayer got 18% discount which was quite favorable. Taxpayer's appraisal was based on assumption that interests were assignee interests. Court said that they were LP interests not mere assignee interests. Taxpayer's appraisal only addressed that issue. Since the taxpayer had no valuation, the court had to rely on IRS appraisal.
iii. Look at actual sales that occur after death. Do not ignore actual sales merely because they were after death.

r. Donor charitable agreements. Rothschild.
    i. Federal constitutional restrictions on scholarships and what they can and cannot do and how they can be crafted to fit into federal standards.
s. Crypto currencies. Walsh
    i. From a tax standpoint there are a few certainties and many unknowns.
    ii. Concept – think of crypto currencies as a private key to move gold from one box into another box that you will never get.
t. Donor advised funds. Hoyt
    i. Use donations to DAFs to bunch deductions and exceed the new larger standard deduction.
u. Jim Lamb - Tech
    i. Info to put in engagement letters on email
v. Artificial reproductive technology. Bass
    i. Uniform acts that deal with topic but not all are consistent and are not adopted everywhere.
w. Family offices - Todd Angotavich
    1. Growth of family offices.
x. Retirement plans.
    i. Maximizing ability to take advantage of RMD rules when qualified plans and IRAs are paid to trusts.
    ii. IRAs what to do if miss 60-day rollover deadline.
    iii. Prohibited transaction rules. Only two types of transactions you can do with respect to an IRA making contributions and taking distributions. Anything else is prohibited.
y. Practice management. Harrison
    i. Phrase what you are doing in the billing in a positive way.
    ii. Get rid of problem clients. 90% of problems come from 10% of clients.
    iii. Consider a range of factors to consider when billing.
    iv. Don't oversell creditor protection aspects of trust if using HEMS standards as they may not produce creditor protection.
z. Kirkland Post - Mortem planning.
    i. Consider checklist provided.
    ii. Letters to executrix
    iii. How to administer estates with digital assets under revised RUFADA.
aa. Beckwith - Lifecycle of Charity.
    i. Choice of entity.

ii. What kind of charity you should create.
iii. Discussion of charities and
bankruptcies. bb. Basis – Zaritsky and Law.
i. Basis, trusts, transactions, etc. that may impact basis.
ii. Powers of appointment to increase
basis. cc. State fiduciarycases.
i. Post and Wellington cases.
ii. Clear directive in trust that inception assets should be retained.
iii. In Post diversified out of US large cap securities and court said should not have.
iv. In Wellington diversified out of large cap stocks and court said it was fine.
v. Lawyering and witness quality can make a difference in trust litigation cases.

dd. Ability to amend a trust
i. Horgan case FL. Trustee said that this should not be done just because beneficiaries wanted to eliminate the trust doesn't make it appropriate or consistent with grantor intent.
ii. Schier case NE Lawyer representing unknown contingent remainder beneficiaries by increasing current distributions will detrimentally impact remainder beneficiaries and court agreed.
iii. Income beneficiary wants lump sum and remainder beneficiaries wanted to accelerate.
iv. In each case courts said trusts were set up to pay out income over time so would not permit acceleration of remainder. These are reminders that there are some principals as to trust administration.
v. 411(a) and 411(b) UTC allow changing irrevocable trusts. But the cases suggest that the word "irrevocable" still means something.

CITE AS:

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