newsletter

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The Alaska Asset Protection Trust

Summary

On April 2, 1997, Alaska began competing for business with such offshore jurisdictions as Barbados, Belize, the Cayman Islands, the Channel Islands, the Cook Islands, and Nevis. The state legislature enacted a law authorizing the Alaska Asset Protection Trust.[1]

Advantages. The intended advantage of this trust is shelter from certain creditor claims. Shelter would be most likely to occur against future creditor claims, due to Alaska's retention of the fraudulent conveyance doctrine.[2] A settlor can transfer property into this type of trust, protect the property from these types of claims, and retain a degree of benefit and control over trust property.

Limitations. There are two basic limitations of this trust: (1) at least four years must pass after funding the trust before the statute of limitations extinguishes fraudulent conveyance claims, and (2) the settlor must surrender a significant degree of control over trust assets.

Surrender of control occurs in several ways: (1) the settlor must not retain a power to terminate or revoke the trust, (2) the settlor cannot dictate distributions from the trust, (3) the settlor cannot serve as trustee, (4) the settlor cannot be the only beneficiary, and (5) the settlor's beneficial interest can be only that of a discretionary beneficiary. It is up to the trustee—someone other than the settlor—to decide whether the settlor should receive any distribution from the trust.

Indirect Retention of Control. The settlor might retain some measure of indirect control over trust assets. Two optional features can be authorized in the trust instrument: (1) the settlor's power to veto distributions and (2) the settlor's special testamentary power of appointment over trust assets.

Dynastic Estate Planning. The Alaska Asset Protection Trust could also facilitate estate plans intended to cover multiple generations of beneficiaries.

Powers That Might Be Retained by the Settlor

Veto Power. The first optional feature is the settlor's power to forbid discretionary distributions. This is not a power to prescribe distributions but rather to prevent them if they do not meet with the settlor's approval. AS 34.40.110(b)(2).

Testamentary Special Power of Appointment. Second, the trust instrument can reserve for the settlor a testamentary power to appoint trust assets to persons other than the settlor's creditors or estate. *Id.* Power that the settlor surrendered during life—the affirmative power to dictate distributions—would return to the settlor upon death.

In This Issue

Distributions by Consent. These two optional features might lead to distributions that were indirectly prompted by the settlor. The trustee—probably a financial institution—would receive some sort of consent from the beneficiaries to distribution of trust assets to whichever beneficiaries were specified. The settlor might be the only beneficiary specified to receive a distribution.

Friendly Trustee. As a legal matter, the trustee would have power to disregard such promptings. In fact, it would be prudent for the trust instrument not even to mention such procedures. As a practical matter, however, the trustee would have good reason to act as a so-called "friendly trustee" and cooperate with any reasonable suggestion from the beneficiaries. As further assurance of harmony between trustee and beneficiaries, there could be a "trust protector" provision for removing and replacing an uncooperative trustee.

Cooperative Beneficiaries. Also as a legal matter, some beneficiaries could oppose a request for distribution that was initiated by the settlor for the settlor's benefit. In practice, however, beneficiaries would be persons whom the settlor had selected and whom would have a strong incentive to cooperate with the settlor. The incentive would stem from the settlor's retained powers to veto distributions and to appoint ultimate distributions by means of a will.

This arrangement may work to protect the settlor's assets from creditors. It may also help the settlor to retain some indirect benefit and control over those assets. The separate issue of estate tax consequences is discussed later in this article.

How This Differs from the Law of Most States

The Predominant Rule. The predominant rule of law throughout the United States is that a transfer into trust is void or voidable against the settlor's creditors, if the settlor is entitled to distributions from the trust or is even eligible for discretionary distributions. This is the rule of the Restatement (Second) of Trusts § 156(2) (1959). It appears to be the law of Oregon.

Until this year, the only recent departures from this rule were a couple of tax decisions of uncertain application from Maryland and Indiana. *In re Uhl's Estate*, 241 F2d 867 (7th Cir 1957); *Estate of German v. United States*, 85-1 USTC (CCH) ¶ 13,610 (Cl Ct 1985). Americans preferred to entrust billions of dollars to locations outside of the United States, in jurisdictions offering clear statutory protection.

The Alaska Rule. Now Alaska offers statutory protection. A settlor can make a lifetime transfer into an Alaska Asset Protection Trust, cause trust assets to be protected from creditor claims, and remain eligible for discretionary distributions from the trust.

In any state, a distinction might be drawn between laws of substantive liability and laws of exemption. The new Alaska statute tends toward the latter concept. For example, the statute does not alter liability for the tort of professional negligence. On the other hand, the statute does affect which assets might be seized to satisfy a judgment for malpractice. In this sense, the Alaska law resembles a debtor exemption statute, such as a homestead law.

Will It Work?

The burning issue is whether an Alaska Asset Protection Trust could be subjected to the debtor/creditor laws of a state that followed the predominant rule described above. If that happened, asset protection would end. This conflicts-of-law issue could be litigated in a federal forum such as a U.S. Bankruptcy Court. It could also arise from an effort to enforce a judgment from outside of Alaska in the Alaska court system, under the full faith and credit clause of the U.S. Constitution. It might even occur in litigation originating in Alaska, although this seems less likely.

The new Alaska statute is untested. Court challenges could result in rulings that cut both ways. Opposite outcomes are suggested by two conflicting lines of authority.

The Situs Rule. Supporting Alaska Asset Protection Trusts would be a line of authority led by the Restatement (Second) Conflicts of Laws § 273 (1971). According to this view, the situs of a trust as decreed in its governing instrument determines the jurisdiction whose debtor/creditor laws apply to it.[3] *In re Remington*, 14 BR 496 (Bankr D NJ 1981), for example, involved a trust created under Pennsylvania law, a New Jersey beneficiary, a New Jersey creditor, and a liability arising in New Jersey. The court applied Pennsylvania law because the trust instrument provided that the trust was situated and governed by the laws of that state. In sum, the "situs rule" would allow an Alaska Asset Protection Trust to be covered by Alaska's debtor/creditor laws.

One reason that a court might balk at applying the situs rule is that a creditor will never be privy to a trust agreement's provision regarding governing law. It might seem unfair for a creditor's rights to be restricted by an agreement to which the creditor was not a party. On the other hand, the "rights" being restricted would not involve substantive liability, but only exemption. Furthermore, the situs rule would still leave the creditor with the remedies of Alaska's fraudulent conveyance statute, which is comparable to laws of other states. Where a debtor acted to defraud a creditor, the creditor would continue to have four years to make a claim against trust assets.

The Significant Relationship Rule. An opposite line of authority would be much less receptive to Alaska Asset Protection Trusts. These cases hold that the jurisdiction with the most "significant relationship" to a trust is the one whose debtor/creditor laws govern that trust. *In re Portnoy*, 201 BR 685 (SDNY 1996); *In re Brown*, 4 Ak Br Rpt 279 (Bankr D Ala 1995). Under this rule, a trust provision claiming coverage by Alaska law would not necessarily be enforced. If the trust bore a significant relationship to some state other than Alaska, then Alaska's asset protection laws might not shield the trust's assets from creditors.

The significant relationship rule seems intended, however, for unusual situations. Decisions adopting this rule began with fact patterns of gross bad faith, liability arising outside of the state where the trust was situated, and a potentially inequitable result. The court's apparent response was to look for a significant relationship between the trust and a jurisdiction whose laws might afford the creditor a decent remedy.

This author believes that both of the foregoing rules will be applied in future cases. Risk factors that could imperil an Alaska Asset Protection Trust would include (1) gross bad faith by the settlor, (2) liability arising outside of Alaska, (3) trust administration occurring outside of Alaska, and (4) trust assets, particularly real estate, located outside of Alaska. On the other hand, a trust that was not heavily burdened by these characteristics would stand a good chance of surviving a court challenge.

Tax Issues

Overlaying the Alaska Asset Protection Trust are various gift, estate, and generation-skipping transfer tax issues that are common to all estate planning. A few of those issues are discussed below.

Estate Tax Exemption. To make use of the lifetime exemption (and associated unified credit) against the federal estate tax, Alaska attorneys have developed two general versions of the Alaska Asset Protection Trust.

The "incomplete gift" version might be attractive to clients who care more about influencing distributions than removing post-transfer appreciation from their estates. In this version, powers retained by the settlor are maximized, including both of the optional powers discussed earlier in this article. The results are (1) inclusion of trust assets in the settlor's gross estate and (2) preservation of the estate tax exemption to shelter some or all of those assets.

The "completed gift" version, on the other hand, might be attractive to clients who care more about estate tax minimization than retained ability to influence distributions. In this version, powers retained by the settlor are minimized. The optional retained powers discussed above are entirely omitted. The intended results are (1) removal of trust assets (and their subsequent appreciation) from the settlor's gross estate and (2) depletion of the settlor's estate tax exemption.

There is controversy over whether it would always be possible to make a completed gift into this type of trust. The Internal Revenue Service has stated that a completed gift does occur, if a settlor transfers assets into a trust, surrenders all dominion, control, and beneficial interest except that of a discretionary beneficiary, and the assets become unavailable for satisfaction of creditor claims against the settlor. Rev Rul 76-103, 1976-1 CB 293. But an Alaska Asset Protection Trust might not protect against all creditor claims, for reasons previously discussed. So, there might not be assurance, at time of funding, that a transfer into trust succeeded in removing assets from the settlor's gross estate.

One response to this uncertainty would be to use only the incomplete gift version and abandon any hope of removing post-transfer growth from the settlor's gross estate. A different response might be to use both versions and create two trusts. One trust would attempt to remove assets from the gross estate with an inter vivos completed gift. It would be funded to the extent of the settlor's unexhausted exemption. The other trust could maximize the settlor's retained powers with an incomplete gift. Both trusts could obtain asset protection.

Assuming that a completed gift was accomplished, it might be dangerous for that transfer to be followed by a regular stream of distributions to the settlor. This could cause inference of a de facto agreement to that effect, under IRC § 2036(a)(1), with resultant inclusion of trust assets in the settlor's gross estate. On the other hand, sporadic distributions to the settlor would not tend to trigger such an inference. *See, e.g., Skinner's Estate v. United States*, 197 F Supp 726, (ED Pa 1961), *aff'd* 316 F2d 517 (3d Cir 1963).

Annual Gift Tax Exclusion. A second issue is whether transfers into an asset protection trust can be sheltered by the annual $10,000 gift tax exclusion.

This would be unnecessary if the incomplete gift approach were followed. Such a transfer would not deplete the lifetime estate tax exemption.

On the other hand, the annual gift tax exclusion would be useful as a setoff against a completed gift transfer. There would be a potential obstacle — the "present interest rule." Subject to a few exceptions, transfers into trust constitute gifts of future interests, which do not qualify for the annual gift tax exclusion. This problem can probably be averted or minimized through the use of "Crummey" powers of withdrawal. If beneficiaries other than the transferor were furnished with Crummey withdrawal powers for an appropriate period of time after transfers into trust, then those transfers would probably be sheltered by the $10,000 annual gift tax exclusion.

Nonresidents of Alaska

Settlors and Beneficiaries. Oregon estate planners might wonder whether nonresidents of Alaska can enjoy the benefits of an Alaska Asset Protection Trust. The answer is yes. The statute does not impose any residency (or nationality) requirement on settlors or beneficiaries of such trusts. Only trustees need to be Alaskan.

Trustees. Oregon trust companies might wonder whether they could participate in the administration of such trusts. The answer is yes, with some qualifications.

To qualify under Alaska's asset protection statute, a trust must satisfy the following four requirements: (1) the trustee must be either an individual who is a resident of Alaska or a trust company or bank with trust powers with principal place of business in Alaska, (2) some or all trust assets must be deposited in Alaska, (3) the Alaska trustee must be empowered to maintain trust records in Alaska and to file tax returns for the trust, and (4) "part or all of the administration" must occur in Alaska. AS 13.36.035(c).

The phrase "part or all" suggests that some fractional involvement by non-Alaska fiduciaries would be permissible. In response to this language, Alaska trust companies have already begun developing procedures for sharing administration with non-Alaska fiduciaries. Their brochures and forms suggest a subcontractor relationship. Investments, distributions, and customer service interaction might be handled by a subcontractor located outside of Alaska, wherever the settlor or other beneficiaries resided. Meanwhile, activities occurring within Alaska would include trust accounting, tax compliance, and maintenance of at least one fund, which might be used to cover expenses of trust administration.

A note of caution should be raised. Use of a non-Alaska

fiduciary is one of the risk factors identified earlier in this article. The more non-Alaskan the trust, the more vulnerable the trust becomes to the debtor/creditor laws of states other than Alaska.

Shifting to Other Jurisdictions

There could be several reasons for wanting to shift an Alaska Asset Protection Trust to a different location. For example, other states might enact asset protection legislation. Delaware already appears to have done so. Del Code Ann 12 § 3501, *et seq*. Under such circumstances, it would be helpful if a trust originating in Alaska could be moved elsewhere in the United States.

An opposite set of facts might also provide impetus for removing a trust from Alaska. If courts broadly embraced conflict of laws doctrines such as the significant relationship rule discussed above, then it might be desirable to move a trust to an offshore location such as the Cook Islands.

One of the trust companies in Alaska suggests that trust instruments include a "trust protector provision" to remove the trust from Alaska. It would be prudent for someone other than the settlor to hold the removal power, since removal would in some ways resemble a termination and reconstitution of the trust. Termination is one of the powers a settlor is not allowed to retain.

Client Profile

Wealthy Clients with Future Liabilities. Alaska Asset Protection Trusts could be attractive to clients with large estates and the potential for large future claims.

A stereotypical client might be a wealthy professional who wanted to retire in a few years with the knowledge that a large pool of assets, beyond funds in IRAs and qualified retirement plans, was protected from malpractice claims. This client could establish the trust, fund it, remain individually solvent, and continue to work for at least four more years. At the end of that time, the client could look forward to retiring with access to funds that were exempt from creditor claims.

This type of trust would be less useful to clients who were already being pursued by creditors. The Alaska statute provides that creditors can bring an action for fraudulent conveyance for four years after the settlor funds the trust. Furthermore, this type of trust is unavailable to settlors who are 30 days or more in default of a child support obligation. AS 34.40.110(b)(4).

Dynasty Trusts. A related profile would be clients interested in establishing so-called "dynasty trusts." These multigenerational trusts are limited in most states by the Rule Against Perpetuities. The new Alaska law repeals this doctrine's applicability to discretionary trusts situated in Alaska. AS 34.27.050(a)(3). An Alaska Dynasty Trust can therefore operate in perpetuity.

Alaska is not the only state to have embraced dynasty trusts. Delaware, Idaho, Illinois, South Dakota, and Wisconsin have passed similar laws repealing the Rule Against Perpetuities. Alaska, however, offers the combined advantages of perpetual trusts, asset protection, and no state income tax. These advantages could magnify the initial size and subsequent growth of an Alaska Dynasty Trust.

First of all, the trust could compound from a base that included both the initial transfer and any appreciation or income that occurred between the time of transfer and the settlor's death. This would result from the settlor funding the trust with an inter vivos completed gift equal to the settlor's estate tax exemption or GST exemption. (The earlier discussion of Rev Rul 76-103 explains how asset protection might make a completed gift and resultant leverage of one or both exemptions possible.) Second, corpus would be enhanced to the extent that the trust avoided losing assets to creditor claims. Finally, the trust could grow faster by not losing revenue to a state income tax. Over several generations, an Alaska Dynasty Trust might compound to a size significantly larger than if it had operated under traditional trust, debtor/creditor, and tax laws.

Conclusion

The Alaska Asset Protection Trust offers clients an opportunity to shield wealth from future claims while retaining some degree of benefit and control. It might also enhance the funding and growth of a related estate planning vehicle, the Alaska Dynasty Trust.

Bob Casey

End Notes

1. SCS CSHB 101(JUD) of the Alaska Legislature became effective on April 2, 1997. Its provisions are distributed throughout the Alaska Statutes 13.12, 13.36, 34.27, and 34.40. The statutes do not use upper- and lowercase spellings to refer to qualifying trusts; this article does so for purposes of readability.

2. Exceptions cutting both ways could occasionally occur. For example, an Alaska Asset Protection Trust might also protect against current creditors (those whose claims arose before the trust was funded), if they (1) failed to commence legal action within four years of the date of funding or (2) were unable to prove that the settlor's insolvency was caused by the transfer into trust. On the other hand, an Alaska Asset Protection Trust would not protect against any creditor who commenced legal action within four years of funding and was able to prove the settlor's actual intent to hinder, delay, or defraud. AS 34.40.010, *et seq*.

3. If the trust property consists of real estate, however, the law of the situs of the real estate will govern. Restatement (Second) Conflicts of Laws § 280.

Questions, Comments, or Suggestions About This Newsletter?

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Estate Planning With Proceeds of Installment Sales

Whenever an estate includes promissory notes based upon installment sales of property, the attorney must consider several significant issues. The promissory notes are included in the gross estate for estate tax purposes, and the notes constitute income in respect of a decedent for income tax purposes.

Assume, for example, that a client with a small taxable estate has the following assets: a house, some cash and securities, and a series of promissory notes (secured by Deeds of Trust) from the sale of real property that the client held as rental units prior to his retirement. One of the notes is between the client and his son. The client would like to make a gift of $50,000 to charity and give the rest of his estate to his son and daughter.

Assume also that the client has not elected out of the installment method of reporting the income from the sale of the rental properties. The installment method of reporting permits the tax on sale of property to be paid as the installments are received. Each payment received by the taxpayer is treated in part as a return of basis and in part as gain. Installment sales are usually evidenced by promissory notes and secured by deeds of trust.

For estate tax purposes, the promissory notes will be included in the value of the client's gross estate under Internal Revenue Code § 2031(a). The estate tax value of the promissory notes (secured or unsecured) is "the amount of unpaid principal, plus interest accrued to the date of death, unless the [personal representative] establishes that the value is lower or that the notes are worthless." Treas Reg § 20.2031-4. By their nature, promissory notes generate estate tax without providing a cash reserve to pay the tax liability. Therefore, it is important to ensure that the personal representative will have sufficient liquidity (e.g., bonds, certificates of deposit, life insurance) to meet the estate's needs.

Promissory notes are also tricky because they constitute income in respect of a decedent (IRD) under IRC § 691. The IRD rules are intended to recover income tax that was not imposed before death because income recognition was deferred (e.g., gains from installment sales, IRAs) or earned income was not yet received by the decedent during the decedent's lifetime (unpaid salary, accrued interest, etc.). Items of IRD are governed by unique rules that may cause unintended income tax consequences if the planner is not careful.

The transfer of the promissory notes as a result of the death of the holder of the note, to the estate of the decedent or a person who receives the note by bequest (other than pecuniary bequest), devise, or inheritance from the decedent's estate, does not trigger income tax. IRC § 453B(c). However, the decedent's estate or other recipient must include in gross income when received the same proportion of any payment in satisfaction of the note as the decedent would have included had he lived. Treas Reg § 1.691(a)-5(a). The notes will not receive a step-up in basis upon the client's death, because items of IRD are specifically excluded from step-up treatment. IRC § 1014(c). The income will retain the same character as it would have had if received by the decedent had he lived. IRC § 691(a)(3).

The subsequent sale, exchange, or other disposition of a promissory note by the estate or other recipient is a taxable event and will accelerate recognition of all of the gain. IRC §§ 453B, 691(a)(2). The transferor will recognize income to the extent the fair market value of the note exceeds the basis of the note. IRC §§ 691(a)(2), 691(a)(4)(B); Treas Reg § 1.691(a)-5(b). Therefore, it is important that the personal representative avoid transferring the promissory note in a manner that is treated as a sale or exchange of the note.

If the estate distributes the note to satisfy a specific bequest of the note or as part of a residuary bequest, the transfer will not be treated as a sale or exchange and no income tax will be triggered. IRC § 691(a)(2). However, if the estate distributes one or more of the promissory notes to satisfy a pecuniary (dollar amount) bequest, the transfer will be treated as a sale or exchange of the note. *Kenan v. Commissioner of Internal Revenue*, 114 F2d 217 (2d Cir 1940). The deferred gain will be accelerated and recognized as taxable income by the estate. A pecuniary bequest determined under a formula will also trigger gain if the pecuniary share is funded with an item of IRD. When gain recognition is triggered, the estate will need liquid assets to pay the income tax (unless the gain is included in distributable net income and included in the gross income of the beneficiaries under IRC § 662).

The client in the hypothetical would like to make a pecuniary bequest of $50,000 to a charity. Using one of the promissory notes to satisfy the bequest will have income tax consequences. Since the transfer of an item of IRD to satisfy a pecuniary bequest is treated as a sale, the remaining unreported gain would be recognized as income by the client's estate.

In addition, there is a significant issue regarding the promissory note between the client and his son. When a promissory note is transferred to the debtor, the transfer is treated as a sale of the promissory note and the remaining unreported gain must be recognized as income by the transferor. Further, a cancellation of the note is treated as a transfer to the debtor. IRC § 691(a)(5). In this case, if the client's personal representative transfers the note to the client's son as part of the son's share of the estate, or if the note is canceled, the client's estate will recognize the unreported gain as income. IRC § 691(a)(5).

Proper planning is important to avoid unintended consequences. In this example, the personal representative must be careful to satisfy the charitable gift with assets other than the notes. The estate planner must ensure that the estate will have liquid assets available to pay estate taxes and should inform the client of the tax consequences resulting from the cancellation of the note between the client and his son, or from a bequest of the note to the son.

Brian Thompson

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Guidelines for Recommending Mediation in Probate

Mediation has played a role in dispute resolution for centuries in legal systems as diverse as those of China and various American Indian groups. In the United States, interest in mediation has grown dramatically since the 1970s. One area of the law in which mediation plays an increasingly important role is family law, where parties use mediation to resolve divorce and custody disputes. Surprisingly, in probate, another area of the law in which family issues are paramount, mediation is still in its infancy. Although mediation will not be appropriate for all probate disputes, in many cases, mediation may allow parties to reach agreements preferable to the decision a court would reach and may promote healing of strained family relationships.

Disputes arise in probate for a variety of reasons. In connection with the disposition of a decedent's property, conflict may occur because relatives are dissatisfied with the decedent's will. Grief associated with the death of a loved one creates tension and lawsuits may follow from misdirected anger over the death. Death may cause dormant family disputes to resurface, and a dispute over property may actually be a dispute over family relationships.

Disputes may arise because family members have different views of a fair distribution of the decedent's property. If the decedent left his or her property to the children, one child may regard equal distribution among all the children as fair, while another child may believe that he or she should receive more because of care he or she gave the parent when the parent was older or incapacitated. A dispute may arise between children of one marriage and the surviving spouse of a subsequent marriage. The children may view their father's estate as theirs, while the surviving spouse may feel that she has a right to a sizable portion of the property. Litigated solutions to these problems ignore the complex emotional issues that may underlie the dispute.

Probate is also the venue for conservatorships and guardianships. Disputes may arise in connection with these proceedings if the older person involved contests the guardianship or if family members disagree among themselves over the appropriate approach for their older relative. Disputes may develop between a care facility and family members. These disputes all involve emotional issues.

Benefits

Some benefits of using mediation, as compared with litigation, to resolve disputes are of particular interest in the probate context.

Confidentiality. Mediation allows the parties to air their grievances in a private manner. Although the level of confidentiality depends on agreement between the parties, and in some cases, state law, much of what is discussed may be kept out of the public record. If the family is airing "dirty laundry" or if information about an older person's eccentric behavior is relevant for a guardianship, the family will benefit from privacy.

Emotional benefits. Emotional benefits can be significant. Mediation gives parties a chance to be heard. For some family members, being able to air grievances, receive an apology, or get an explanation for troubling behavior may be more important than receiving a property settlement. In addition, giving parties more control over the outcome may increase psychological well-being.

In a guardianship proceeding, mediation involves the older adult in the process, giving that person a voice and helping the person to listen to the concerns of other family members. Mediation may leave the person less angry and confused than would a more formal court proceeding.

Mediation also helps families avoid some of the emotional costs of litigation. Mediation may be less stressful and traumatic than litigation since litigation pits parties against each other and tends to escalate the conflict.

Ongoing relationships. Mediation can repair, maintain, or improve ongoing relationships. Probate disputes involve family members and, in most cases, ongoing relationships will benefit the families. Since the parties must work together during the mediation to develop a solution to their conflict, the parties may develop communication and problem-solving skills that will aid them in the future. Mediation is less likely than litigation to drive family members further apart.

Unique solutions. Mediation allows the disputants to forge their own solution to the dispute. The remedies available to a judge in resolving a dispute over property are limited, but mediation allows the parties to take nonlegal as well as legal interests into consideration. The division of property with sentimental value may best be handled in this way.

Recent reforms have made guardianship proceedings more flexible in Oregon, but, in other states, a judge deciding whether to appoint a guardian may face an all-or-nothing choice. Through mediation, the parties can develop less intrusive solutions that will protect the older person while minimizing the person's loss of rights.

Financial costs. Mediation may also be more cost-effective than litigation. Particularly in small estates, litigation costs may be disproportionate to the amount at issue. More parties may be able to protect their interests if a less expensive alternative is available.

Potential problems

Although mediation is appropriate in many situations, some characteristics of probate disputes may make mediation difficult or even inappropriate.

Grief. If the dispute involves a decedent's estate, the family may still be grieving over the death of a loved one. Grief may be a factor in the dispute itself, since one family member may blame another for the death. For example, if parents of a decedent have not accepted the fact that the decedent is gay, grief over the death may be misdirected as anger at the decedent's gay partner. Grief may also affect the parties' ability to mediate and delay may be necessary to allow the parties to progress through the grieving process.

Power Imbalance. Power imbalances are always a concern in mediation, but may be of particular concern in probate disputes. In a guardianship proceeding, if the older person contests the guardianship, mediation will be appropriate only if the person can participate effectively. An advocate can assist the older person, not to take his or her place but to facilitate his or her expression of her concerns. If the older person cannot participate, even with assistance, mediation is inappropriate.

Power imbalances may also exist in disputes between family members over a guardianship for a relative or in disputes over

property. An older surviving spouse may be intimidated by younger family members or preexisting power imbalances between siblings may adversely affect the mediation. A skilled mediator should be aware of potential power imbalances and manage them during the mediation so that all parties are protected. If minors are involved, it may be necessary to arrange for one or more advocates to represent their interests.

Guidelines for the use of mediation

In contemplating the use of mediation in resolving probate disputes, a number of factors should be considered. The presence of some factors makes mediation more appropriate, while other factors may mean that mediation should not be used. Each case is unique and should be reviewed individually. The guidelines that follow may help in determining whether mediation should be recommended.

Desire for an ongoing relationship. If the parties would benefit from an ongoing relationship—the case with most family relationships—mediation may help. Further, if the parties express concern about maintaining an ongoing relationship, they are likely to work together constructively in mediation.

Parties are willing to mediate. Mediation works best if all parties want to participate. Mandatory mediation has been criticized and is inappropriate in probate. If the parties have entrenched positions due to a long-standing dispute or moral or religious beliefs, then a negotiated or litigated resolution of their dispute will be more appropriate than mediation.

Parties are competent and able to mediate. All parties must be able to participate effectively. It may be important to make accommodations for older persons who may have restricted mobility, may have difficulty hearing, or may be confused by new settings. Arranging the mediation to take personal concerns into consideration and allowing an advocate to participate when necessary may make mediation possible. If any party is mentally incapacitated, so overcome by grief that they cannot function, or physically unable to attend the mediation, mediation should not be recommended.

Nonlegal as well as legal issues are important. If the dispute involves nonlegal issues, mediation may benefit the parties. Mediation permits parties to create their own solution to the dispute and allows them to address nonlegal as well as legal issues in reaching that solution. Mediation also allows parties to express their personal concerns, their anger, or their grief. Being heard by other family members may be part of what some disputants want or need.

Confidentiality is desirable. If parties want confidentiality because of the sensitive nature of the dispute, mediation will provide greater privacy than litigation. In family disputes, minimizing the public record may benefit the parties. If one of the disputants is a public figure, this factor may be of particular importance. If the dispute involves relationships outside society's accepted norms, the privacy associated with mediation may also be desirable.

Power imbalances are minimal. A lawyer or judge recommending mediation should consider whether power imbalances would adversely affect the mediation. Although a skilled mediator can manage some power imbalances, and although power imbalances can affect litigation as well as mediation, concern over effective participation remains an important factor. An older person with weakened physical or mental abilities may not be able to participate adequately. If there is a history of dominance in the family, either between generations, between spouses, or between siblings, the power imbalances may be too great to overcome. If there is an indication of physical or mental abuse, mediation will be inappropriate. In addition, if an entity such as a hospital or nursing home is on one side of the dispute and an older person or the person's family is on the other side, the individual or family may feel intimidated by the institution.

Conclusion

Although mediation will not be desirable in every case, the personal and family aspects of probate make this area of the law particularly appropriate for mediation. Attorneys practicing in this area should familiarize themselves with the benefits of mediation and be able to recommend it to their clients when appropriate.

Susan N. Gary

For a more extended discussion of these issues see Susan N. Gary, "Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance," 23 Wake Forest L Rev 397 (1997).

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The Estate Planning Section is proud to offer a video for your office that will assist your clients when making end of life decisions. On the videotape, Dr. Susan Tolle, M.D., one of Oregon's leading experts on the withdrawal of life support, discusses these very important decisions and explains medical terminology associated with these issues. Dr. Tolle also describes the symptoms and symptom management associated with the withdrawal of life support. This video will be an invaluable tool for every estate planning and elder law lawyer. The video will be available from the Bar in January 1998.

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Legal Assistants' Workshop:
Family Law Update & Estate Planning/Probate Developments
Friday, February 20, 9:00 am - 4:15 pm, DoubleTree Lloyd Center
5 MCLE credits and 1 Ethics credit

Designed for legal assistants and new lawyers, this workshop will focus on the recent changes in state and federal law in family law, estate planning, and probate, as well as tax changes and ethics issues. The afternoon's four breakout sessions give you the opportunity to learn more about estate planning/probate topics, family law issues, or both. Program highlights include: elder law developments; federal tax law changes in probate; estate planning tax issues involved in divorce; current developments in child support matters; the legal assistant's role in developing mediated agreements; and avoiding malpractice in estate planning/probate practice.

For more information, or to register, please call OSB CLE Registration at (503) 684-7413, or toll-free in Oregon at 1-800-452-8260, ext. 413.

CALENDAR OF SEMINARS AND EVENTS

- January 5-9, 1998 (Sponsored by University of Miami School of Law) **Thirty-Second Annual Philip E. Heckerling Institute on Estate Planning**, Fontainebleau Hilton Resort and Towers, Miami Beach, Florida. Telephone: (305) 284-4762.
- January 12-14, 1998 (Sponsored by University of Southern California) **50th Annual Institute on Federal Taxation**, Beverly Hilton, Los Angeles, California. Telephone: (213) 740-2646.
- January 15, 1998 (Sponsored by ALI-CLE) **Nuts and Bolts of Financial and Retirement Planning**, live from New York, New York, via satellite. For viewing locations, telephone: (800) 285-2221 or (312) 988-5522.
- January 23, 1998 (Sponsored by the Estate Planning Council of Portland) **27th Annual Estate Planning Seminar**, Oregon Convention Center, Portland, Oregon. Telephone: (503) 224-5858.
- January 25-30, 1998 (Sponsored by National Law Foundation) 1998 **Mid-Winter Tax & Estate Planning Conference**, Wyndham's Palmas del Mar Resort, Humacao, Puerto Rico. Telephone: (302) 656-4757.
- February 4, 1998 (Sponsored by ALI-ABA) VLR: **Annual Winter Estate Planning Practice Update**, live satellite TV nationwide. For viewing locations, telephone: (800) CLE-NEWS.
- February 4, 1998 (Sponsored by National Business Institute) **Estate Planning and Probate for the Paralegal**, Doubletree Hotel Columbia River, Portland, Oregon. Telephone: (715) 835-7909.
- February 18-21, 1998 (Sponsored by Intertec Trade Shows) **9th Annual Conference on Estate Planning and Administration**, The Fairmont Hotel, San Francisco, California. Telephone: (303) 220-0600.
- February 19-21, 1998 (Sponsored by ALI-ABA) **Advanced Estate Planning Techniques**, Grand Weilea Resort & Spa, Maui, Hawaii. Telephone: (800) CLE-NEWS.
- March 3-6, 1998 (Sponsored by ALI-ABA) **Uses of Insurance in Estate and Tax Planning**, Biltmore Coral Gables, Coral Gables, Florida. Telephone: (800) CLE-NEWS.
- March 9-11, 1998 (Sponsored by National Law Foundation) **Great Western Tax and Estate Planning Conference**, The Monte Carlo Hotel, Las Vegas, Nevada. Telephone: (302) 656-4757.
- March 12-14, 1998 (Sponsored by ALI-ABA) **Estate Planning for the Family Business Owner**, Fairmont Hotel, San Francisco, California. Telephone: (800) CLE-NEWS.
- April 27-May 1, 1998 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, The Plaza, New York, New York. Telephone: (800) CLE-NEWS.
- April 19-May 1, 1998 (Sponsored by ALI-ABA) **Basic Estate and Gift Taxation and Planning**, Ritz-Carlton, Boston, Massachusetts. Telephone: (800) CLE-NEWS.
- May 5-6, 1998 (Sponsored by National Law Foundation) **Estate Planning with Richard B. Covey, Esquire**, The Marriott Marquis, New York, New York. Telephone: (302) 656-4757.
- May 7-9, 1998 (Sponsored by ALI-ABA) **Charitable Giving Techniques**, Stanford Court, San Francisco, California. Telephone: (800) CLE-NEWS.
- May 20, 1998 (Sponsored by ALI-ABA) **Annual Spring Estate Planning Practice Update**, live satellite TV nationwide. For viewing locations, telephone: (800) CLE-NEWS.
- June 14, 1998 (Sponsored by ALI-ABA) **Estate Planning in Depth**, University of Wisconsin, Madison, Wisconsin. Telephone: (800) CLE-NEWS.
- July 16, 1998 (Sponsored by ALI-ABA) **Estate Planning for the Family Business Owner**, RitzCarlton, Boston, Massachusetts. Telephone: (800) CLE-NEWS.
- September 10-11, 1998 (Sponsored by ALI-ABA) **Sophisticated Estate Planning Techniques**, Westin Copley Place, Boston, Massachusetts. Telephone: (800) CLE-NEWS.
- October 8-10, 1998 (Sponsored by ALI-ABA) **PostMortem Planning and Estate Administration**, Charleston, South Carolina. Telephone: (800) CLE-NEWS.

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Oregon Estate Planning and Administration Newsletter

Susan N. Gary
Editor-in-Chief

newsletter

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Distributions of IRAs or Qualified Retirement Plans to or for the Benefit of Spouse: Comparison of Outright Dispositions and QTIP Trusts

A frequent concern when a qualified plan or IRA is a principal asset of the estate is whether to designate the spouse as an individual beneficiary or to designate a trust for the spouse as a beneficiary. If the spouse is the designated beneficiary and can take a lump sum rollover, the spouse will be able to designate his or her own beneficiary to take plan assets at the spouse's death. For example, if the spouse remarries or has children from a prior marriage, the new spouse or stepchildren may be the ultimate beneficiaries of the plan assets.

Naming a trust for the spouse as the beneficiary poses its own problems, however, given the complex set of rules governing IRAs and qualified plans. These rules can pose problems when a client names a marital trust as the beneficiary.

Spousal Consent

The spouse must consent to most beneficiary designations that do not name the spouse as primary beneficiary. In addition, if a qualified plan is subject to the joint and survivor annuity rules, the spouse must consent to any form of payment other than a joint and survivor annuity with the spouse as survivor (not applicable to IRAs). IRC §§401(a), 417. A consent to a waiver signed before a marriage (such as a premarital agreement) is not a valid consent, Treas Reg §1.401(a)-20, Q&A 28, but there may be a breach of contract claim against the nonconsenting spouse. Spousal consent would therefore be required to leave the plan or IRA to a marital trust.

Required Minimum Distribution

Many clients want to maximize the income tax deferral available with IRAs and qualified plans. To do so, it is important to be able to spread out the required minimum distributions for as many years as possible. The minimum distribution rules of IRC §401(a)(9) require that distributions to the participant must begin no later than (i) April 1 of the year following the year in which the participant attains age 70 1/2 or (ii) April 1 of the year following the year in which the participant retires.

Generally, distributions other than a lump sum must be made over the life of the participant or over the life of the participant and a designated beneficiary, based on actuarial projections. For a designated beneficiary other than the spouse, the rules treat any designated beneficiary more than 10 years younger than the participant as being exactly 10 years younger.

In This Issue

Designated Beneficiary

The "designated beneficiary" is a term of art meaning an individual whose life expectancy can be used (along with the life expectancy of the participant) in calculating minimum distributions. Not all beneficiaries named by the participant can be "designated beneficiaries." Because required minimum distributions can be calculated over the joint life expectancies of the participant and the designated beneficiary, naming a designated beneficiary will extend the time period over which the benefits must be paid. This extends the tax deferral.

The designated beneficiary must usually be an individual, such as the participant's spouse. The participant's estate does not qualify as a designated beneficiary.

A trust named as a beneficiary can be a designated beneficiary under certain circumstances. If a trust is the designated beneficiary, the life expectancy of the oldest trust beneficiary is used in calculating minimum distributions. Previously, the biggest stumbling block to using trusts as a designated beneficiary was that the trust had to be irrevocable as of the required beginning date. Proposed Regulations, issued December 30, 1997, 62 Fed Reg 67,780 (1997), relaxed the requirements for a trust as a designated beneficiary. Under the Proposed Regulations, the trust must be irrevocable at the required beginning date or, by the terms of the trust, at the date of death of the participant. Prop Treas Reg §1.401(a)(9), Q&A D-5. Marital trusts (usually qualified terminable interest property or "QTIP trusts" established under a revocable trust) appear to qualify as designated beneficiaries. If so, it will no longer be necessary to create an irrevocable trust before the required beginning date ("RBD"). To be safe, the trust itself should explicitly provide that it becomes irrevocable at death, even though this occurs by operation of law. Testamentary trusts should probably not be used as beneficiaries until the regulations clarify whether they would suffice. It is also still necessary to provide the plan administrator either with a copy of the trust or with a summary of information outlined in the Proposed Regulations.

Distributions After Participant's Death

The rules governing distributions after the participant's death turn on whether he or she dies before or after the RBD, not whether distributions actually begin before the RBD. If the participant dies after the RBD, benefits must be distributed as least as rapidly as the method used for distribution at the time of his or her death. IRC §401(a)(9)(B)(i). If the participant dies before the RBD and if there is no designated beneficiary, benefits must be distributed by December 31 of the fifth calendar year following the year of death. IRC §401(a)(9)(B)(ii). If a nonspouse individual or an irrevocable trust is the designated beneficiary, distributions can be made over the life expectancy of the beneficiary, beginning within the year following the participant's death.

If the qualified plan or IRA designates a U.S. citizen spouse as the beneficiary, the spouse can defer distributions until the date the participant would have reached age 70-1/2. If lump sum distribution is possible, the spouse can also make a direct spousal rollover to an IRA. IRC §402(c)(9). The spouse can then defer distributions until April 1 of the calendar year following the year in which he or she attains age 70-1/2. IRC §402(c)(9). After rollover, the spouse can elect to recalculate life expectancy.

Outright lump sum distribution to the participant's spouse (or leaving the benefit in the plan) qualifies for the unlimited estate tax marital deduction. If the spouse is a beneficiary of a joint and survivor annuity, the annuity will qualify for the marital deduction unless the participant's personal representative makes an election not to so qualify it. Paying the plan benefits to a QTIP trust may *not* qualify the plan for the marital deduction unless certain requirements are met.

If possible, the spouse should designate a beneficiary. If not, when the spouse dies, the remaining benefit must be paid over the spouse's remaining life expectancy or, if it was being recalculated, before the end of the year following the year of the spouse's death. IRC §401(a)(9)(B).

QTIP Trust vs. Outright Disposition

With these rules in mind, we can compare the benefits of naming a QTIP trust or the spouse as the beneficiary of an IRA or qualified plan.

Control. If the plan names the spouse as beneficiary, the spouse—and not the participant—will control the ultimate disposition of the assets in the plan. If the participant wishes to control the disposition of the plan assets after his or her spouse's death, the participant can designate a QTIP trust as the beneficiary. A QTIP trust enables a client to determine who the beneficiaries of the trust will be after the surviving spouse's death, while still qualifying for the marital deduction at the client's death (apart from the issues related to qualified plans and IRAs). While other forms of trusts can qualify for the marital deduction, QTIP trusts usually give the surviving spouse more control over disposition of the trust's assets at the spouse's death. One requirement of a QTIP trust is that it pay all its income to the surviving spouse.

Marital Deduction. A lump sum distribution to a U.S. citizen spouse qualifies for the marital deduction.

A distribution to a QTIP trust will qualify for the marital deduction only if the QTIP trust and the plan have special provisions. The QTIP trust must provide that all the trust's income be paid to the spouse. In addition, the greater of (i) the required minimum distribution amount or (ii) the internal income of the participant's interest in the plan must be paid to the trustee and then to the spouse. The trust and the plan itself must permit the trustee to demand all the internal plan income even if the internal income is greater than the required minimum distribution amount. Rev Rul 89-89, 1989-2 CB 231 (followed by Private Letter Rulings, such as PLR 9229017 [Apr. 17, 1992] and 9245033 PLR [Aug. 11, 1992]). The marital deduction rules require that a QTIP trust provide the surviving spouse the right to demand that the trust make the assets productive of income. The trustee should also be able under the plan and the trust to demand the amount of income that should be earned by productive assets and should have the right to satisfy the spouse's demand with other assets of the trust. A QTIP election should be made both for the trust and the plan benefit or IRA by listing them on Schedule M of Form 706.

Rollover. A lump sum distribution qualifies for rollover, so the participant's spouse can defer distributions until the spouse reaches age 70-1/2, just as the spouse could with his or her own IRA. The spouse's designation of a beneficiary after rollover can further extend minimum required distributions (and defer income tax) if the spouse's designated beneficiary is younger than the spouse. Balanced against this is the participant's desire to control the disposition of any remaining principal on the spouse's death.

If the spouse does not roll over the distribution, there is immediate recognition of income for income tax purposes, which results in a large tax bill in the year of receipt and a loss of the tax-free buildup in the future. (The income tax blow may be softened if 5 or 10 year averaging is available.)

No rollover is available for a distribution of the benefit to the trustee of a marital deduction (QTIP) trust. Therefore, the proceeds of the plan or IRA will be subject to income tax as distributions are made. A rollover may be available if the spouse has the right to withdraw the plan from the trust, but this may defeat the purpose of the QTIP trust, which is to give the participant control over the ultimate disposition by the spouse.

Spousal Consent. Spousal consent may be required to designate the QTIP trust as a beneficiary. This can pose ethical problems if the attorney represents both spouses.

Comparison of Spouse or QTIP Trust as Beneficiary

In summary, distribution to a QTIP trust, even if done correctly, qualifies the distribution only for the unlimited marital deduction from estate tax. It does not defer income taxes (either there will be immediate recognition of income or all the plan income will be paid to the spouse) or permit the spouse to name his or her own designated beneficiaries.

Comparison Table

	Spouse (Rollover)	QTIP
1.	Spouse is a measuring life for minimum distribution purposes.	Trust beneficiary can only be a measuring life if trust is irrevocable as of the required beginning date or at the participant's death.
2.	Spouse does not need to pull out income. Continuing income tax deferral.	Trust distributions will constitute taxable income. No income tax deferral.
3.	Spouse is able to designate a new beneficiary so minimum required distribution is less.	Plan distributions must be pulled out either over lifetime or as quickly as already being paid out, depending on whether participant dies before or after RBD.
4.	If spouse dies, distributions will be paid out over lifetime of beneficiary because spouse can designate spouse's own beneficiary.	If spouse dies, distributions will be paid to remainder beneficiaries of trust.

Conclusion

Designating a QTIP trust as the beneficiary of a qualified plan or IRA has the advantage of control by the participant spouse. The recent Proposed Regulations, if they are ultimately adopted, make this planning option easier. However, lawyers should compare the tax effects carefully before recommending that a client designate a QTIP trust, rather than the surviving spouse, as the beneficiary of a qualified plan or IRA.

Emily V. Karr

Oregon State Bar CLE Upcoming Program

Mastering Estate Planning Techniques
Friday, June 26, 9:00 am - 5:00 pm
DoubleTree Lloyd Center
6.5 MCLE credits

Learn how to help your clients get the results they want from their estate planning documents. This program will focus on using trusts and business entities as estate planning tools. Learn planning opportunities associated with the different trusts and how to select the appropriate form of trust. Understand the estate planning opportunities of LLCs, FLPs and LLPs and how to choose the appropriate entity. This intermediate/advanced course is designed for attorneys who want to enhance their estate planning and drafting skills. Cosponsored by the Estate Planning and Administration Section.

Regular registration $125
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To register with a credit card, or for more information, please call OSB CLE Registration at 503-684-7413, or toll-free in Oregon at 1-800-452-8260, ext. 413.

Questions, Comments or Suggestions About This Newsletter?

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IRS Issues Final Disclaimer Regulations Favorable to Oregon Tenancies by the Entirety

Joint Property; Tenancies by the Entirety

Effective for disclaimers made on or after December 31, 1997, the final regulations for IRC §2518 no longer require jointly held property to be unilaterally severable for a survivor to disclaim an interest in the property. Thus, a surviving spouse may now disclaim his or her one-half survivorship interest in tenancy-by-the entirety (TBE) property within nine months of the death of the first tenant. For disclaimer purposes, this change puts Oregon on an even level with other states that have benefitted from liberal treatment of joint-property disclaimers because of the nature of their property laws.

Under the final regulations, the surviving spouse may disclaim a one-half interest in TBE real property regardless of the portion of the consideration furnished by the disclaimant and regardless of the portion of the property that is included in the deceased spouse's gross estate under IRC §2040. Note, however, that if the surviving spouse disclaimant is not a U.S. citizen and the tenancy was created on or after July 14, 1988, the disclaimer may be made with respect to the entire portion of the joint interest that is includible in the decedent's gross estate under IRC §2040. Treas Reg §25.2518-2(c)(4)(i), (ii) (*see* examples (7)-(9); *see also* example (10) which permits continued occupancy by the disclaimant spouse).

The 1997 Oregon legislature enacted revisions to ORS 105.625 to 105.640 "Uniform Disclaimer of Transfers Under Nontestamentary Instruments" designed to accomplish this same result. Effective October 4, 1997, Oregon law provides that a disclaimer of a surviving joint tenant's one-half interest in TBE property within nine months from the date of death of the first-deceased tenant results in a unilateral severance of that property as of the date of the first tenant's death. Oregon practitioners have been hopeful, but uncertain, that the IRS would treat such a TBE disclaimer as a qualified disclaimer under IRC §2518. The final regulations make this statute unnecessary, as to post-1997 disclaimers.

Practice Tip: If a client made a disclaimer of a survivorship interest in TBE property in 1997, under either version of ORS 105.625, *et seq.*, and if the nine-month disclaimer period has not yet expired, the disclaiming spouse should make a "back-up" disclaimer under the final regulations to ensure IRS approval.

The new final regulations provide an extraordinary post-mortem planning opportunity for advisors of married individuals with mid-size to large estates consisting primarily of real property. Clients with estates comprised largely of real estate will be the major beneficiaries. In many cases their estate planning attorneys can now prepare simple disclaimer-receptacle trust wills without severing the property but still take advantage of the decedent's applicable credit amount (formerly unified credit exemption).

Joint Bank, Brokerage and Other Investment Accounts

The special rule for joint bank and brokerage accounts has been expanded to include mutual fund accounts. However, the rule applies differently to these accounts than to real property joint tenancies or tenancies by the entirety. The surviving co-owner (spouse or non-spouse) may not disclaim any portion of the joint account attributable to consideration he or she furnished. The surviving co-owner can only disclaim account funds contibuted by the deceased owner that were subject to that person's unilateral withdrawl prior to death. Thus, the survivor may disclaim the entire account if the decedent contributed all the funds and could withdraw the entire account without the survivor's consent. The rationale for this rule is that the initial transfer to a joint account is not treated as a completed gift, because the transferor did not release dominion and control. Thus, the date of the transfer creating the interest in the surviving co-tenant is the contributing co-tenant's date of death. Treas Reg §25.2518-2(c)(4)(iii) (*see* examples (12)-(14)).

Practice Tip: The surviving co-tenant's written disclaimer should include a statement that the disclaimant did not furnish any portion of the disclaimed account and that the deceased co-tenant contributed the entire portion that is being disclaimed and had not relinquished dominion and control over that portion. This statement should be supported by a factual affidavit tracing the source of the disclaimed funds.

Laurie Neilson Lee

Common Mistakes in Probate Files

The clerks in Multnomah County's Probate Court compiled this list of mistakes they commonly see. Lawyers in all counties should try to avoid these problems.

- Fiduciaries who loan money or commingle assets.
- Establishing accounts that do not return original canceled checks. (Clerks need to see *both* sides of a check.)
- Failing to present prima facie cases for guardianships/ conservatorships.
- Failing to attach exhibits referred to in petitions.
- Neglecting to attach copies of Notices served (mail/personal) to the Affidavit of Service.
- Not including either *stamped*, self-addressed confirmation cards or blank copies of the Order with a self-addressed stamped envelope.
- Submitting Orders for signature before expiration of the Notice period.
- Not listing OSB numbers or fiduciary names and addresses on pleadings and Orders.
- Not using third-party service when required.
- Submitting final distribution petitions and Orders that do not provide the specifics of distributions.
- Stapling all of the papers in a multi-document packet as if it were *one* document.
- Not mentioning tax returns filed and taxes paid in estate final accounts.
- Failing to attach first and last bank or brokerage statements for each accounting period. (The clerk does not need to see twelve statements for each accounting.)
- Submitting documents without Notary Seals, Verification or Acknowledgment language.
- Not completing each narrative accounting with a recapitulation of assets list, valued as of the end of the accounting period.
- Failing to adequately monitor the need for additional bonds or restrictions on assets.
- Submitting Petitions and Orders to distribute or sell property not listed on the inventory.
- Taking Orders to Ex Parte without setting up an appearance date.
- Not including Trial Counsel's Affidavit in support of a proposed PI/WDA settlement.
- Not submitting an extra copy (for the Court Visitor) of all guardianship documents.
- Not listing all heirs and devisees (including ages of minors or notes that an heir predeceased the decedent) in petitions to appoint a Personal Representative.
- Not responding to Courtesy Notices or other inquiries from the Court within 30 days.
- Not ensuring that a settlement check is actually placed into a restricted account.
- Failing to list the person in your firm who provides specific services (and the hourly rate charged) when submitting affidavits in support of fees. (Make sure to explain why the service was necessary to the client.)
- Paying attorney or fiduciary fees without a specific Court Order allowing those fees.
- Waiting until the last minute to submit requests for Orders and requesting expedited processing.
- Submitting accountings, inventories and bonds without the signature of the fiduciary. Attorneys cannot sign these documents.

What's New

Batt and Batt 149 Or App 517 (1997)

In a marital dissolution proceeding, the trial court awarded husband assets valued at $1,368,304 and awarded wife assets valued at $1,048,745. This award was affirmed on appeal, with the exception of an adjustment to correct the erroneous valuation of the husband's interest in certain real property. The assets awarded to husband included "the parties' interests in the family farms." While the opinion does not elaborate on the nature and source of each of the farm assets, it appears that they had been acquired from husband's family. The main reason for the court's award of the farm assets and certificate of deposit to the husband, however, was to preserve husband's ability to earn a living by conducting farming operations.

The most interesting aspect of the case concerned the valuation of the husband's interest in certain real property. Estate planners routinely expect valuation discounts of fractional interests for lack of marketability. This case demonstrates that in the family law context, fractional interests in family business assets cannot always be discounted for lack of marketability. The interests at issue were fractional interests in farm property jointly held by husband and his family members. Although husband argued that a discount should apply because there was a limited market for his interest, the court held that a marketability discount was inappropriate because (1) most family-owned farming operations are sold as a complete operation, and (2) husband testified that if he sold his interest, he would likely sell it only to other family members and there was no evidence that he would be forced to sell to his family at a discount rate. The court noted that valuation is a fact-based analysis that must be considered on a

case-by-case basis. In support of its decision, the court cited *Barlow and Barlow*, 111 Or App 179 (1992), which held that a lack of marketability discount was inappropriate because the husband was not contemplating a sale and expert testimony had indicated that small farm corporations are usually sold as a complete unit, not as individual stocks.

Budge and Budge 150 Or App 209 (1997)

In another marital dissolution case, wife appealed the trial court's dissolution judgment, arguing that the trial court had erred in splitting only the appreciation in value of certain stock, a family partnership interest, and an interest in a joint venture, which the court had awarded to husband. The assets at issue had been transferred from husband's parents to husband primarily as part of the parents' "estate plan to distribute assets to their children with minimal tax consequences." According to wife, husband had failed to rebut the presumption that she had equally contributed to the acquisition of those assets. The court found that with respect to the stock and joint venture interest, husband had rebutted the presumption by demonstrating that the parents did not intend to benefit wife with the gifts, such gifts were part of a larger estate plan to distribute family assets to husband and his siblings and wife in no way contributed to the acquisition of the gifts. Although the court found that husband had also rebutted the presumption with respect to the partnership interest, it held that the value of husband's partnership interest should be divided because this asset was income producing, it had been incorporated into the financial affairs of husband and wife during their marriage, and the parties had treated the partnership as a retirement savings vehicle.

On another interesting note, husband argued on cross-appeal that the trial court had erred in its determination of the value of the stock. According to husband, the trial court should not have adopted the stock values reported to the IRS as the value of each gift at the time of transfer, because "as every lawyer knows, . . . it is customary and proper" to report to the IRS values that are less than the fair market value at the time of transfer. As a result, the husband argued, the trial court's valuation had the effect of inflating the appreciation in the value of the stock (which he was ordered to divide with wife). The court rejected husband's argument, citing Treas Reg §25.2512-1, which provides that the value of property at the date of a gift is the "price at which such property would change hands between a willing buyer and willing seller."

Shannon M. Connelly

Wharff v. Rohrback 152 Or App 68 (1998)

Wharff v. Rohrback arose out of an automobile accident, causing the death of decedent Marlisha Rohrback. After Marlisha Rohrback's death, Marleeta Rohrback, Marlisha's mother, was appointed as personal representative of Marlisha's estate. The primary beneficiary of the estate was Marlisha's infant daughter, Sonja. Following her appointment, the personal representative filed a wrongful death claim. The personal representative's version of the accident was that the personal representative was driving her vehicle, that the baby Sonja spit up, and that Marlisha undid her seatbelt to tend to the baby. The personal representative then looked in the rearview mirror and saw a semi truck coming toward the vehicle. The truck struck and knocked her vehicle off the road. Marlisha was thrown from the vehicle and killed.

While investigating the accident, the police found the personal representative's purse, which contained a black case with three marijuana pipes, marijuana residue, two baggies and a snort straw, all with methamphetamine residue. Upon discovery of such evidence, appellants filed a Motion to Remove the Personal Representative, alleging that the personal representative's potential culpability in the accident would prevent the personal representative from objectively evaluating whether the estate should bring a separate personal injury action against the personal representative. The probate court denied the motion to remove the personal representative, and the appellate court reversed.

The appellate court recited basic probate law stating that a personal representative of an estate has a fiduciary duty to the beneficiaries of the estate, ORS 114.265, and that the personal representative must be in a position to act indifferently in matters of the estate. *In re Estate of Mills*, 22 Or 210, 212 (1892). The court held that where there is a substantial and bona fide claim of interest in the estate adverse to the interest of the personal representative, the personal representative must be removed. Further, the appellate court stated that a probate court's refusal to remove the personal representative with such a substantial and bona fide conflict of interest constitutes an abuse of discretion. The appellate court also stated that whether a personal representative should be removed must be decided on the particular facts of the case.

The appellate court reviewed the facts of *Wharff* and concluded that a substantial and bona fide conflict did exist between the personal representative, Marleeta Rohrback, and the interest of the estate. The appellate court ordered the probate court to remove Marleeta as personal representative.

Lisa N. Bertalan

In re Complaint as to the Conduct of Morris, No. S43700, 1998 WL 99098 (Or Mar. 5, 1998).

Decedent died intestate, leaving children and grandchildren as heirs. His daughter, June Powell, retained Attorney Morris to petition for her appointment as personal representative of the estate. Powell's two brothers retained separate counsel to represent their interests. Over the course of several months, the brothers' lawyer filed a petition to remove Powell as personal representative, filed objections to the prospective sale of certain real property, filed objections to the purchase of estate personal property by Powell, and filed a petition for imposition of a trust on assets under Powell's control.

After trial on the foregoing issues, the probate court in an oral decision stated that it would be best for Powell not to continue as personal representative. The court also stated that it would have no objections to Attorney continuing as the estate's attorney but noted that choosing an attorney would be the decision of the successor personal representative.

The court did not actually appoint a successor personal representative for several months. It then issued a written opinion removing Powell as personal representative and appointing Donald Michael as successor personal represen-

tative. Until Michael was appointed, Attorney continued to represent Powell as personal representative in connection with estate matters, such as the sale of estate assets and accounting for estate income. After the court appointed Michael as successor personal representative, Michael met with the judge and the judge suggested that Michael consider selecting Attorney because of her familiarity with the estate. Following a meeting with Attorney, Michael selected her to serve as his lawyer in his capacity as successor personal representative.

When the outstanding estate matters were concluded, Attorney received a letter from Powell seeking payment of her personal representative's fee and reimbursement for the attorney fees incurred when as personal representative she defended herself on the various matters raised by her brothers. Powell had personally paid over $20,000 to attorneys from another law firm who had represented her in those matters. In response to this request, Attorney prepared an affidavit in support of Powell's request for a personal representative's fee and a second set of documents requesting reimbursement of the attorney fees, supported by a separate affidavit. Powell executed both affidavits. Attorney then prepared a motion regarding Powell's request for reimbursement of attorney fees together with the pertinent supporting affidavit. Attorney served Michael and the heirs with that motion, but she did not call the matter to Michael's attention. At no time after receiving Powell's request did the Attorney ever directly discuss Powell's request for reimbursement of attorney fees with Michael.

In the meantime, Attorney had already completed a final account and petition for decree of final distribution. She mailed both documents to Michael and he signed them before a notary and returned them to Attorney. After Attorney received the documents, she realized that the final account made no reference to the reimbursement of Powell's attorney fees and that the final account understated her own fees. In the next few days, Attorney had her secretary make changes to the final account. She altered the format of certain information, changed the amounts set for her attorney fees and added the reimbursement of Powell's attorney fees to the section concerning remaining expenses that should be paid out of the estate. Because the final account had already been signed, Attorney told the secretary she would speak to Michael about the changes. She then telephoned Michael concerning her underestimate of her own fee and requested and obtained his approval to increase her fee. She did not mention or obtain approval for the change regarding Powell's reimbursement. That same day, the altered final account and related documents were mailed to the probate court for filing. A file copy of the revised final account was also mailed to Michael, who did not read it. In addition, Attorney's secretary later sent a cover letter to Michael that contained a postscript stating that Attorney had made a change to the final account to include Powell's reimbursement of attorney fees.

Powell's brothers objected to Powell's request for attorney fees, arguing that the fees were personal expenses and not chargeable to the estate. Attorney did legal research and made notes about how to overcome these objections at the upcoming hearing.

At the hearing, Attorney appeared for the estate and also filed a trial memorandum on behalf of Powell. The brothers called Michael as a witness. It became clear that there was a difference between the account Michael signed and the one that was filed with the court. Attorney then stipulated that Michael's copy of the final account had not included Powell's claim for attorney fees. Michael testified that he did not intend to approve Powell's claim, because it had occurred before he was involved with the estate and he would not approve it without knowing the background. Attorney then questioned Michael and he confirmed that his objection was that he did not have any information about the merits of Powell's claim. He also said he probably would not have allowed the claim even if he had received the information and found it satisfactory, because of his feelings toward the law firm that had represented Powell.

After this testimony, the probate judge took the matter under advisement and later denied Powell's claim. Attorney then completed a revised final account, and the court closed the estate.

The Oregon Supreme Court agreed with the trial panel that Attorney was guilty of conduct involving misrepresentation, in violation of DR 1-102(A)(3), and of knowingly making a false statement of fact in representation of a client, in violation of DR 7-102(A)(5). The court stated that to find Attorney guilty of violating those rules it was necessary to show that she acted knowingly, but not necessarily with an intent to injure or defraud. The court determined that given the timing of Attorney's phone call to Michael and the filing of the final account, when Attorney filed the final account she must have known that she was filing an altered and misleading document with the court.

The court also found Attorney guilty of violating DR 1-102(A)(4), which prohibits lawyers from engaging in conduct prejudicial to the administration of justice. The court rejected Attorney's argument that since the probate court knew about opposition to Powell's claim for reimbursement, there was no chance that the misrepresentation would go unnoticed and thus there was no potential for prejudice to the procedural or substantive aspects of the proceeding.

Finally, the court found Attorney guilty of violating DR 5-105(E), which provides that a lawyer shall not represent multiple current clients in a matter where such representation would result in an actual or likely conflict. Attorney had not discussed her filing of the motion and affidavit in support of Powell's claim with Michael, despite the fact that she identified herself as "Attorney for the Personal Representative" on the certificate of mailing. In addition, she represented Powell at the hearing and submitted two trial memoranda on Powell's behalf. This representation of Powell included questioning Michael in a manner that was designed to further Powell's claim at the expense of Michael's assessment of the estate's interest.

In determining the appropriate sanction, the court stated that Attorney's good character and reputation served as mitigating factors. The court suspended Attorney from the practice of law for 120 days.

CALENDAR OF SEMINARS AND EVENTS

- April 8, 1998 (Sponsored by Practicing Law Institute) **Use of Trusts in Estate Planning: Drafting Tips, Tax Consequences and Ethical Considerations**, NYC-PLI Conference Center, New York, New York. Telephone: (212) 824-5700.

- April 25, 1998 or May 2, 1998 (Sponsored by Southern California Tax & Estate Planning Forum) **Drafting Wills and Trusts - "A Form for All Seasons"**, April 25 - Los Angeles, California; May 2 - San Francisco, California. Telephone: (800) 332-3755.

- April 27-May 1, 1998 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates**, The Plaza, New York, New York. Telephone: (800) CLE-NEWS.

- April 29-May 1, 1998 (Sponsored by ALI-ABA) **Basic Estate and Gift Taxation and Planning**, Ritz-Carlton, Boston, Mass. Telephone: (800) CLE-NEWS.

- May 5, 1998 (Sponsored by National Law Foundation) **Estate Planning with Richard B. Covey, Esquire**, The Marriott Marquis, New York, New York. Telephone: (302) 656-4757.

- May 6, 1998 (Sponsored by National Law Foundation) **1. Richard B. Covey, Esquire Explains 1998 Important Estates, Gifts and Trusts Developments *and* 2. Valuation Discounts 1998 Update: What's Available and How To Get Them**, The Marriott Marquis, New York, New York. Telephone: (302) 656-4757.

- May 6, 1998 or May 20, 1998 (Sponsored by Southern California Tax & Estate Planning Forum) **1. Planning and Drafting for the New Qualified Family-Owned Business Interest Under §2033A Including Everything You Ought To Know About the Special Valuation Rule of §2032A *and* 2. A Multimedia Presentation on the Family Limited Partnership Including an Analysis of the IRS's Position Set Forth in the TAMs and the Recent Court Decisions**, May 6 - Los Angeles, California; May 20 - San Francisco, California. Telephone: (800) 332-3755.

- May 7-8, 1998 (Sponsored by ALI-ABA) **Charitable Giving Techniques**, Stanford Court, San Francisco, California. Telephone: (800) CLE-NEWS.

- May 13, 1998 (Sponsored by Practicing Law Institute) **10th Annual Elder Law Institute: Representing the Elderly Client of Modest Means**, NYC-PLI Conference Center, New York, New York. Telephone: (212) 824-5700.

- May 13, 1998 (Sponsored by Professional Education Systems, Inc.) **The Estate Planning Course**, Doubletree Jantzen Beach, Portland, Oregon. Telephone: (800) 843-7763.

- May 15, 1998 (Sponsored by Oregon Law Institute) **Probate From the Ground Up**. Oregon Convention Center, Portland. Telephone: (503) 243-3326.

- May 20, 1998 (Sponsored by ALI-ABA) **Annual Spring Estate Planning Practice Update**, live satellite TV nationwide. For viewing locations, telephone: (800) CLE-NEWS.

- May 21, 1998 (Sponsored by ALI-ABA) **Planning for Distributions from Qualified Plans and IRAs**, live satellite TV nationwide. For viewing locations, telephone: (800) CLE-NEWS.

- May 28-30, 1998 (Sponsored by ALI-ABA) **Partnerships, LLCs and LLPs: Uniform Acts, Taxation, Drafting, Securities, and Bankruptcy**, Westin Hotel, Seattle, Washington. Telephone: (800) CLE-NEWS.

- June 12, 1998 (Sponsored by Professional Education Systems, Inc.) **Oregon/Federal Estate and Gift Tax Workshop**, hotel to be announced, Portland, Oregon. Telephone: (800) 843-7763.

- June 14, 1998 (Sponsored by ALI-ABA) **Estate Planning in Depth**, University of Wisconsin, Madison, Wisconsin. Telephone: (800) CLE-NEWS.

- June 25-26, 1998 (Sponsored by ALI-ABA) **Representing Estate and Trust Beneficiaries and Fiduciaries**, MCLE Conference Center, Omni Parker House, Boston, Massachusetts. Telephone: (800) CLE-NEWS.

- July 15-17, 1998 (Sponsored by New York University) **Introduction to Trusts and Estates**. Midtown Center, New York, New York. Telephone: (212) 790-1320.

- July 16, 1998 (Sponsored by ALI-ABA) **Estate Planning for the Family Business Owner**, Ritz-Carlton, Boston, Mass. Telephone: (800) CLE-NEWS.

- September 10-11, 1998 (Sponsored by ALI-ABA) **Sophisticated Estate Planning Techniques**, Westin Copley Place, Boston, Mass. Telephone: (800) CLE-NEWS.

- October 8-10, 1998 (Sponsored by ALI-ABA) **Post-Mortem Planning and Estate Administration**, Charleston, South Carolina. Telephone: (800) CLE-NEWS.

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FLLC or FLP: Which Is Better?

Putting family businesses and/or investments into family entities has become very popular. This is small wonder. Family entities can produce many business, family planning and tax benefits, including substantial transfer tax savings in passing ownership to succeeding generations of family members, either during the owner's life or at death, without sacrificing the transferor's lifetime control over the entity's decision making process.

However, which family entity is best? Certainly most estate planners accept that corporations give up too much in the way of flexibility and/or income taxes to compare favorably with any tax "partnership," i.e., a general partnership, a limited partnership or a limited liability company ("LLC"). Planners also tend to dismiss general partnerships both because of the partners' lack of limited liability and their statutory cash-out rights, which are inimical to transfer tax benefits like valuation discounts.

Thus, estate planners have long focused on the family limited partnership (the "FLP") and more recently, the new kid on the block, the family limited liability company (the "FLLC"). After the 1997 changes to Oregon's Limited Liability Company Act (ORS ch 63), the FLLC is superior to the FLP.

With the exception of transfer tax benefits, there is little difference in choosing between an FLLC and an FLP whose general partner(s) are all corporations or other limited liability entities (hereafter referred to as a ''corporate general partner"). The FLP's need, however, to have the additional complexity (and annual expense) of a corporate general partner is itself a noticeable disadvantage.

In either the FLP or the FLLC, the owner can retain absolute control over the decision making process even though a majority of the economic benefits are transferred to other family members (e.g., to minimize income and/or transfer taxes). FLLCs use a manager-managed LLC with the owner/donor being appointed the sole, irrevocable, lifetime manager. Similarly, FLPs will appoint the owner/donor (or a corporate general partner he/she controls) as the FLP's general partner(s).

The other side of the control coin is that, in either an FLLC or an FLP with a corporate general partner, the donor/owner can still delegate as much managerial power to other family members as the owner/donor desires, while retaining the right to recall that power at any time. In the FLLC this is done directly (i.e., the owner/donor, as manager, delegates authority to other family members), while in the FLP, the other family members, in addition to being limited partners, are made officers, directors or employees of the corporate general partner. Thus, both of these family vehicles facilitate the owner/donor's fully reversible ability to bring other family members into the venture's operations and/or management as (and when) the donor/owner feels appropriate.

FLLCs allow the best available creditor protection, both from the point of view of the interest owner's protection from entity debts ("inside-out protection") and from the view of the entity's protection from an interest holder's creditors ("outside-in protection"). That is, FLLCs allow all members limited liability and limit the recourse of any member's creditors to the member's economic distributions, when and as made, without any say in the FLLC's management. ORS 63.165, 63.259. FLPs offer similar outside-in protection (ORS 70.295), but only the limited partners enjoy limited liability. ORS 70.135. Thus, this is another reason FLPs usually use corporate general part-

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ners, and FLPs that do so are on a par with FLLCs on both sides of the creditor protection fence.

LLCs have the reputation of being the most flexible of all entity forms. This reputation is well earned. LLCs have the fewest absolute rules regarding internal owner relations and as such maintain the greatest ability for the owners to establish their own rules regarding operational, economic and tax interrelations. But, in truth, FLPs are only slightly less flexible. They are subject to a few statutory mandates inapplicable to FLLCs, such as a general partner's unlimited liability (ORS 67.105(1)), a limited partner's limited ability to engage in FLP management (ORS 70.135) and the partnership's contingent dissolution on a general partner's dissociation (ORS 70.325(4)).

However, some of these "inflexibilities" can be ameliorated with proper planning. For example, use of a corporate general partner effectively cuts off any individual's unlimited liability and allows limited partners to engage in FLP management as the corporate general partner's officer, director, employee or agent. Also, where a corporate general partner is used, general partner dissociation is left to those running the corporation and would not necessarily occur upon the owner/donor's death.

Both FLPs and FLLCs will normally opt to be taxed as partnerships. Treas Reg § 301.7701-3. As such, any income tax differences are, for most family entities, inconsequential. However, for entities with substantial real estate investments and that incur tax losses, FLLCs might allow losses that would otherwise be suspended under the basis or at-risk rules. IRC §§ 704(d), 465; Prop Treas Reg § 1.465-27.

It is in the area of transfer taxes that Oregon FLLCs currently have substantial advantages over Oregon FLPs. The transfer tax benefits derived from placing business and/or investment assets into a family entity come when the owner/donor makes lifetime and testamentary gifts of entity interests to other family members. Remember, the owner can safely do this without sacrificing any necessary control. The ensuing advantages normally arise from one or more of the following: (a) transfer of future appreciation; (b) a going concern versus asset liquidation entity value; and (c) valuation adjustments to the gifted and retained interests' proportionate share of that entity value (e.g., value fixing buy-sell agreement, marketability discounts and minority discounts).

A discussion of these benefits is beyond the scope of this discussion. The important thing to note is that the value of certain of these benefits (in particular, any applicable valuation reductions attributable to going concern value, minority discounts and marketability discounts) can be substantially undercut by the recipient's ability to liquidate (a) the recipient's interest in the entity at or about asset liquidation value or (b) the entity in its entirety. That is, if the recipient receives either (or both) of these rights, the recipient can cash out at approximately asset liquidation value, and the value of that interest (as passed to the recipient) cannot be substantially less than that liquidation value.

Moreover, as will be seen, IRC § 2704(b) provides that, for transfer tax valuation purposes, a family entity member's ability under the state law default rules to liquidate either the member's interest or the entity ("liquidation rights") cannot be restricted by agreement (even though the enabling statute allows such restrictions). Thus, any such liquidation rights under the state law's default rules can reduce or eliminate the transfer tax benefits of any otherwise available reductions from an asset liquidation valuation. As will also be seen, while Oregon LLC members have no default liquidation rights, general partners in Oregon limited partnerships do. And while these rights probably will not dramatically affect any favorable gift tax valuations, they appear certain to adversely affect either the donor/owner's entity control or any valuation reductions to the donor/owner's entity interests held until death.

IRC § 2704 attempts to limit valuation reductions in intrafamily transfers of family controlled entity interests that occur due to lapsing voting or liquidation rights (IRC § 2704(a)) or revocable cash-out restrictions (IRC § 2704(b)). The section only applies to family controlled (50% or more) entities and, for this purpose, family is construed broadly to include both spouses, both spouses' siblings, ancestors and lineal descendants; and the spouses of such siblings, ancestors and lineal descendants.

While IRC § 2704(a) is certainly of interest, it is IRC § 2704(b) that is germaine to the FLP/FLLC analysis. IRC § 2704(b) is Congress's answer to valuation depressant cash-out restrictions in a family controlled entity that can be removed by family members when convenient. IRC § 2704(b) ignores restrictions (termed "applicable restrictions") on an intrafamily transferred interest's liquidation rights unless (a) the restriction is no harsher than the state law default rule or (b) the restriction is nonlapsing and family members cannot, after the transfer, remove it (e.g., by amending the partnership or operating agreement). That is, assuming the family members can amend the underlying entity agreements,[1] a liquidation right allowed under the applicable state law default rule will be given effect for transfer tax valuation purposes regardless of any restrictions to that liquidation right found in the entity's controlling documents. On the other hand, as long as these relevant state law default rules allow members no liquidation rights, IRC § 2704(b) is rendered inapplicable.

In applying these principles, consider first the FLLC. After the 1997 amendments to ORS ch 63, there is no longer any statutory default rule that would allow a member a liquidation right. That is, unless the articles of organization or operating agreement provides otherwise, an LLC only dissolves upon the unanimous vote of the members. Cessation of membership is no longer treated as a dissolution event, and the former member or his/her successor in interest is treated as an assignee (i.e., with the same economic right as the former member had to subsequent partnership distributions, as and when made, but with no other membership rights). ORS 63.249(3), 63.265, 63.621. Economically, the holder of the former member's interest is treated as if there had been no cessation of membership. Thus, the Oregon statutory default rule is that neither a gifted LLC interest nor an LLC interest passing from a decedent carries with it any right to dissolve the LLC or cash out his or her interest. It follows that if the FLLC's operating agreement does not provide any liquidation rights to the transferred interest, none will arise under IRC § 2704(b) and any otherwise available valuation reductions from liquidation value will apply for transfer tax purposes both in the case of lifetime gifts and any retained interest transferred at death.

Next consider the FLP. The critical factors here are that, under ORS 70.255(1), a general partner always has an immediate and unilateral right to withdraw, and, under ORS 70.005(3) and 70.325(4), a general partner's death, withdrawal or other cessation as general partner (under ORS 70.180) causes the partnership's dissolution, winding up and liquidation unless (a) there are remaining general partners who elect to continue the partnership pursuant to an express partnership agreement provision allowing them to do so, or (b) the remaining partners unanimously elect to continue the partnership within 90 days of the

withdrawal.

By contrast, note that, except as otherwise provided by the partnership agreement, a limited partner has an absolute right of withdrawal on six months' notice unless the partnership agreement limits the partnership term, in which case the limited partners have no withdrawal rights. ORS 70.255(2). However the cessation of a limited partner's interest does not cause a partnership dissolution. ORS 70.325 .

In assessing the affects of these statutory rules, note there are three likely forms of the FLP. In one, the individual owner/donor is the general partner ("GP") and also initially owns most of the limited partner ("LP") interests ("individual GP form"). Next, the GP is a corporation controlled (more than 50%) by the individual owner/donor who initially owns most of the LP interests ("controlled corporate GP form"). Finally the GP is a corporation not controlled by the individual owner/donor who initially owns most of the LP interests (the "uncontrolled corporate GP form"). In each instance, the individual owner/donor plans to gift some or all of the LP interests to other family members. However, in each situation it is also altogether possible (even likely) that the owner/donor will die holding some of the LP interests.

In any of the above forms, gifts of minority LP interests should be largely unaffected by IRC § 2704(b). This is true notwithstanding the IRS position that any provision providing a term to a limited partnership is ignored as an IRC § 2704(b) applicable restriction. *See, e.g.,* Priv Ltr Rul 9735003, 9725002. Even assuming the IRS position is correct, and the gifted limited interest carries with it an IRC § 2704(b) withdrawal right, that withdrawal right will not cause the partnership's dissolution. Instead, it will allow the limited partner only a right to receive, in liquidation of the withdrawn interest, the value provided in the partnership agreement or, if none, the fair value of the interest based upon the withdrawing LP's right to share in partnership distributions, as and when made. ORS 70.260. This, in turn, should approximate the current value of a going concern interest after imposition of any discounts. In sum, little valuation reduction should be lost.

However, transfers of the individual donor/owner's remaining limited interests at death may not be so kindly treated.

In the case of the individual GP form, the death of the donor/owner (a GP) causes a contingent partnership dissolution. Even if there is another GP to continue the partnership, ORS 70.325(4) requires an express partnership provision allowing the remaining GPs to continue the partnership. Any such partnership provision (and the continuation) would almost certainly be ignored as an "applicable restriction" under IRC § 2704(b). *See, e.g.,* Priv Ltr Rul 9730004, 9723009 (holding a partnership agreement provision prohibiting an LP's withdrawal to be an IRC § 2704(b) applicable restriction). Moreover, the deceased GP's retained LP interests being valued carry with them the right to block any continuation vote of the remaining partners, which must be unanimous. ORS 70.305. Even if the GP's retained interests cannot themselves block the continuation vote, it appears likely the IRS would ignore such a continuation vote by the remaining family members as an IRC § 2704(b) applicable restriction.

In the case of the controlled corporate GP form, the owner/donor's death, as an LP only, will not cause the FLP's dissolution. However, the corporate GP has the statutory right at any time to withdraw, causing the FLP's dissolution. And, the owner/donor controlled the corporate GP. Thus, passing with the retained LP interests in the owner/donor's estate is the right to cause the FLP's dissolution. Again, a partnership provision giving any other GPs the right to continue the FLP will likely be ignored under IRC § 2704(b), as would any continuation vote by the remaining partners.

Finally, in the case of the uncontrolled corporate GP form, there should be no statutory dissolution right attributable to the owner/donor's death. The death of an LP is not a dissolution event, and the owner/donor could not have compelled the corporate GP's withdrawal or dissolution. Thus, as in the gift situation, any otherwise available valuation reductions from liquidation value should largely survive IRC § 2704(b).

The uncontrolled corporate GP form carries with it, however, a loss of the owner/transferor's unfettered control. Even if the corporate GP's stock is held 50% each by owner/donor spouses, with the first-to-die's 50% passing to the surviving spouse, interests held at the surviving spouse's death will presumably be taxed at liquidation value (since the surviving spouse then owns 100% of the corporate GP). One possible solution to this problem might be passing the first-to-die's 50% to the surviving spouse in a QTIP. *Cf. Estate of Bonner v. U.S.,* 84 F3d 196 (5th Cir 1996).

What this rather extended analysis shows is that, under current law, any FLLC interests passing in a deceased owner's estate appear to carry with them a much higher likelihood of avoiding any valuation increases attributable to IRC § 2704(b) than similarly held LP interests passing to the same deceased owner's estate. It is principally for this reason that FLLCs have eclipsed FLPs as the preferred family estate planning vehicle in Oregon.

A note of caution here is appropriate. As explained in preceding issues of this newsletter, the IRS is actively contesting FLPs and FLLCs established after the diagnosis of the owner/donor's imminent death and (as the IRS sees it) with little business motive other than transfer tax valuation reductions. *See, e.g.,* Priv Ltr Rul 9736004, 9730004. These rulings employ a number of alternative grounds for disallowing the valuation reductions, two of which involve applications of IRC § 2703 and appear questionable. If confined to deathbed situations, they are innocuous enough, but if they signal a broader attack (e.g., to all family investment entities) they are worth notice.

More importantly, and perhaps implicitly acknowledging the IRS's difficulties in the area, the President has gone to Congress for a cure, at least with respect to the passive investment variety of FLLC/FLP. Excerpts from President Clinton's FY 1999 Budget Submitted to Congress Feb. 2, 1998, BNA DTR Text Supplement No. 22 (Feb. 3, 1998) at S-135. Under this proposal, entity interests will be valued for transfer tax purposes at a proportionate share of the entity's net asset value to the extent the entity holds "readily marketable assets," including publicly traded securities and real estate. While it appears unlikely to pass this year, it is possibly a sign of the future. And, should such legislation pass, it is unlikely that post-effective date transfers from

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preeffective date entities would avoid the legislation's operation.

In sum, FLLCs and FLPs (at least FLPs with corporate general partners) show a similar ability to satisfy most family entity goals. However, Oregon FLLCs are vastly superior in preserving valuation reductions from asset liquidation values for the owner/donor's retained interests at death. As such, FLLCs have become the family planning entity of choice in Oregon, at least for now.

Mark A. Golding

[1] The IRS position is that a "straw" member's unilateral ability to block partnership amendments will not be respected. Priv Ltr Rul 9723009.

Keeping Assets in the Family: Planning for a Beneficiary's Future Divorce

Estate planners spend a lot of time thinking about the future. Much of the estate planner's work is to ensure that all contingencies are dealt with in a manner that protects the client's estate plan. The prudent planner imagines possibilities that the client would never dream of and devises strategies to avoid unintended consequences years after the client, and the attorney, is dead.

Planners now consider the effects of their client's later divorce on a well-crafted estate plan.[1] Planners also are aware of the necessity of changing their client's estate planning documents if the client later divorces.

However, planners appear to spend less time thinking about the effects of the divorce of one of their client's beneficiaries on the client's estate plan. Given the prevalence of divorce, the estate planner should give careful thought to whether a beneficiary's divorce would cause redirection of a portion of the client's estate to an unintended party and whether it is possible to ameliorate or eliminate such effects through artful drafting.

Property Division on Dissolution of Marriage

Oregon is a common-law property state, but Oregon's dissolution statutes effectively convert property ownership into something akin to community property. Oregon law provides for a rebuttable presumption that the parties equally contributed to property acquired during the marriage. ORS 107.105(1)(f). Thus, absent other factors, an equal division of marital assets between the parties is proper. *Stice and Stice*, 308 Or 316, 327, 779 P2d 1020 (1989).

Nevertheless, the court, sitting in equity, has much greater authority over the property of the parties. Oregon law provides that the court may divide or otherwise dispose of any real or personal property "of either or both of the parties as may be just and proper in all the circumstances." ORS 107.105(1)(f). The Oregon Supreme Court has interpreted this to mean that regardless of whether the parties acquired property before or during the marriage, the courts have power to dispose of it pursuant to a divorce decree if just and proper to do so. *Pierson and Pierson,* 294 Or 117, 122, 653 P2d 1258 (1982).

Thus, in long-term marriages, a court generally will attempt to create a property division that leaves the parties in roughly equal positions. *Hill and Hill,* 90 Or App 493, 495, 752 P2d 1264 (1988). Length of marriage is not the controlling factor; rather, the extent to which the parties' financial affairs are commingled controls. *Jenks and Jenks,* 294 Or 236, 242, 656 P2d 286 (1982). Generally, in long-term marriages the parties' financial affairs are so significantly intertwined that putting the parties in roughly equal positions is the equitable solution.

In shorter term marriages, or those in which the parties have not commingled financial affairs, the court will attempt to return the parties to status quo ante. *Id.*

There are three avenues by which a nonbeneficiary spouse could cause a redirection of the value of an ostensibly separate interest in a trust.

For purposes of this discussion, the term "direct" means that the nonbeneficiary can claim an actual interest in the property, and "indirect" means that the nonbeneficiary can claim that the property should be included in the equation in such a way that the nonbeneficiary receives other property or an equalizing judgment in lieu of an actual interest. Note that this causes a redirection of family wealth to a party now outside of the family unit by reducing net family wealth, even if the specific assets of the client's estate reach their target(s). Also, for purposes of simplicity the term "*A*" means the beneficiary, "*X*" means the nonbeneficiary, and "*C*" means a child of the beneficiary.

Presumption of Equal Contribution Not Rebutted. The first avenue is for X to assert that the presumption of equal contribution is not rebutted and that roughly equal division of a marital asset is appropriate. To rebut the presumption that the parties equally contributed to the acquisition of a gifted or inherited interest in the property, A must demonstrate that X did not contribute to the acquisition or that X was not the object of the donor's intent. Thus, if A fails to carry his or her burden on non-contribution, X receives the benefit of the presumption. Additionally, if X can demonstrate that X was an object of the donor's intent, X may be able to benefit from the presumption despite the lack of affirmative contribution by X.

Notwithstanding Rebuttal, the Property Was Commingled. The second avenue is for X to assert that although the presumption of equal contribution is rebutted, to the extent that the property was commingled into the financial affairs of the marital estate it should be included in the property division equation.

Reliance-Based Interest. The third avenue is for X to assert that although the presumption of equal contribution is rebutted, A's representations concerning the use of the separate property, and X's detrimental reliance on those representations, require that the property interest be included in a just and proper division of property.

In *Taylor and Taylor*, 121 Or App 635, 856 P2d 325 (1993), the court considered whether it was error for the trial court to include in property division certain trust interests and inheritances, some of which were created after filing for dissolution but before the decree and some of which were created while the marriage was fully intact. The parties married in 1972 and lived relatively well through gifts from the husband's parents. The parties separated in 1990, and the husband filed for dissolution in October 1990. After filing for dissolution, but before the decree, the husband learned that he had a remainder interest in a trust that his grandmother created in 1957 with the husband's mother as (apparently) the life income beneficiary. Before the decree, the husband received a distribution from this trust of $126,492.70 upon the death of his mother.

The husband was also the beneficiary of a trust created under

his father's will. The husband was entitled to income during his life, as well as discretionary payments of principal. The trust had no spendthrift provision, and the husband's remainder interest was contingent.

Finally, the husband's mother had executed a will while the husband's marriage remained intact that included bequests to the spouses of each of her children and devised the residue to a trust. After the parties filed for dissolution, the husband's mother executed a codicil to her will that excluded the husband's wife from any bequests. As noted before, the husband's mother died while the proceedings were pending.

The husband argued that the wife was not entitled to share in his trust interests and inheritances because his interests became possessory after the parties separated, the wife did not contribute to their acquisition, and the wife was not the object of the donors' intent.

The wife argued that, notwithstanding the foregoing, since the parties commingled her income with gift money from the husband's family in supporting their lifestyle and relied on those gifts in maintaining their lifestyle, and since she did not save for retirement because her husband assured her that "'[w]e'll always have my parents' inheritance,'" she should share in the husband's trusts and inheritances.

The Oregon Court of Appeals noted the various theories of inclusion. First, the court found that the husband had rebutted the presumption of equal contribution because the record lacked evidence of the wife's contribution to the acquisition of the trusts and inheritances.

Next the court turned to whether the inclusion of the trust interests and inheritances would nevertheless be "just and proper" under the circumstances. Relying on *Howard and Howard,* 92 Or App 347, 758 P2d 416, *rev den* 307 Or 101 (1988), for the proposition that inclusion may be a result of reliance upon the representations of one of the parties, the court concluded that it was proper to award the wife a share of the husband's trust interests and inheritances.[2] However, the court did not allow wife to share in the husband's distribution of his grandmother's trust since there was no knowledge by either party that he had such an interest and thus there could be no reliance on the expectancy. Ultimately, the wife received an indirect share of the husband's interests through the use of a money judgment in her favor. Note how the result caused a redirection of family wealth despite the estate plan being technically accomplished.

The Estate Planner's Perspective

Protecting from Allegations of Donative Intent. Evidence that the interest was acquired during the marriage and/or that X was an object of donative intent supports the presumption of equal contribution. Clearly, if the donor names X as a beneficiary, then donative intent is established. The more troublesome case is where the donor creates an interest in A during A's marriage to X, without naming X, but X asserts that A intended the gift to benefit both parties. Implied intent might be considered sufficient proof of donative intent. In *Coote and Coote*, 112 Or App 342, 831 P2d 32 (1992), the Oregon Court of Appeals noted that the husband had the burden of proof, by a preponderance of the evidence, that the donor intended the gift of an investment account to be for the husband's benefit alone. The court held that the husband failed to rebut the presumption where his only evidence of lack of donative intent was that the property was solely in his name. Furthermore, the wife had affirmative evidence that her relationship with the husband's parents "'was one of mutual love and affection.'"112 Or App at 346. Thus the wife put on affirmative evidence of donative intent.

The lawyer should query a client about the marital status of all known beneficiaries or intended donees of a gift program.[3] The lawyer should find out whether any marriages are in jeopardy. Furthermore, the lawyer should inquire as to whether the client intends to benefit both the beneficiary and the beneficiary's spouse, or just the beneficiary. Depending on the client's intent, the lawyer can take steps to indicate clearly that the client does or does not intend that X should benefit.

Outright devises give the lawyer an opportunity to build in some protections from allegations of donative intent. A bare devise such as

> *I give to my daughter, A, 100 shares of TUF Corp. stock, if she survives me.*

might be sufficient, without other evidence, to rebut the presumption. However, if the will was executed long before separation or filing for dissolution, reliance on such slim evidence may be risky. The better practice for wills might be to include a general paragraph such as the following:

> *All devises or beneficial interests provided for under this will are solely for the benefit of the indicated devisee or beneficiary of a trust created under this will and are not made for the benefit of any person not specifically included as a devisee or beneficiary in this will. For the purposes of this paragraph, a devisee or beneficiary includes named individuals and class members.*

The lawyer also might include specific references to the marital status of any known devisee or beneficiary of a testamentary trust in conjunction with the foregoing clause to clearly indicate that the testator was aware of the existence of the marital relationship and chose not to include the spouse as an object of donative intent.

If a donor has any concern about the stability of a beneficiary's marriage, making a gift in trust will afford the greatest protection of family wealth. First, a finding of donative intent may be avoided through the use of a clause similar to the one stated above. Second, identification of the marital status of known beneficiaries in conjunction with the general clause provides further evidence of intent not to include the spouse as an object of the donor's bounty. Finally, the use of techniques to control the distribution of income and/or principal can reduce inclusion of trust assets in property division on the ground of commingling.

Commingling. Outright gifts of property or cash, whether inter vivos or testamentary, are easily and likely to be commingled into the financial affairs of the beneficiary's family. As illustrated by *Day and Day*, 137 Or App 264, 904 P2d 171 (1995), the conversion of an outright inheritance into the family's finances, even where some of the proceeds went to pay off a mortgage on a house held solely in the name of the beneficiary-spouse, constituted commingling sufficient to cause a failure of proof to rebut the presumption of equal contribution with respect to the acquisition of the home. Similarly, in *Nightwine and Nightwine,* 129 Or App 358, 879 P2d 877 (1994), the commingling of a $55,000 outright devise to husband into the financial affairs of the parties by purchase of an investment account

was sufficient to allow the court to include the value of the account in property division even though the husband had rebutted the presumption of equal contribution to acquisition of the asset.

The estate planner can structure a gift in trust to limit commingling problems. However, this must always be balanced against other concerns of the client, such as tax considerations or providing a stream of income or payments of principal to the beneficiary. One simple technique to limit the inclusion of a significant portion of trust assets in property division is to divide the income and remainder interests between two beneficiaries. For example, rather than give an interest as "income to A until age 65, and if A attains the age of 65, then the trust shall terminate and the corpus shall be distributed," one can simply give the gift as "income to A for life, remainder to C if C survives A." By creating a remainder in C, the donor effectively removes the corpus of the trust from any arguments about inclusion in property division because there is no right to the property.

In contrast, in *Becker and Becker*, 122 Or App 567, 858 P2d 480 (1993), the wife held both income and remainder interests in some of the trusts, which caused inclusion of the present value of the remainder interest in the property division balance sheet. Note that the technique of separating interests does nothing if C is the divorcing beneficiary. However, if C were known to the settlor and known to be married, the settlor could evaluate the need to deal with the possibility of C divorcing.

Alternatively, the lawyer could make payments out of the trust wholly discretionary. This technique has to be considered in light of other considerations such as grantor trust income tax rules and retained interest estate tax rules, particularly if the donor will be the trustee. Such considerations are beyond the scope of this article.

The settlor might also empower the trustee to cut off payments to a beneficiary if the beneficiary is commingling the funds with marital assets or community property:

> *The trustee may withhold and accumulate income or withhold discretionary payments of principal from a beneficiary if the trustee, in the trustee's sole discretion, determines that a beneficiary is commingling the income or discretionary principal payments from the trust with community property or marital assets of the beneficiary and the beneficiary's spouse. The trustee shall not be liable for any failure to withhold or decision to withhold under this paragraph, nor is the trustee liable for failure to investigate the existence of commingling.*[4]

Note that even if A does not commingle property, the court nevertheless has dispositional power over the property. ORS 107.105(1)(f). However, the accumulation of factors suggesting the separate character of the property should assist in balancing the equities in favor of removing the interest from the property division equation.

Finally, in any situation in which divorce of a beneficiary is a concern, a spendthrift clause can be employed to protect the family wealth from a *direct* redirection to an unintended beneficiary. If an equalizing judgment was decreed in favor of the nonbeneficiary spouse, the trustee could resist attachment in order to prevent redirection of family wealth. However, this may put severe financial strain on an intended beneficiary by effectively removing him or her from beneficial enjoyment of the interest.[5]

Making the trust a wholly discretionary trust may also avoid a *direct* redirection to an unintended beneficiary. Doing so will not remove the value of the asset from property division and the resulting *indirect* effect on family wealth, but would cause a steep discount to apply to the valuation of the trust interest.

Reliance-Based Interest. Generally, there is little the estate planner can do to avoid redirection of family wealth if the beneficiary represents to the spouse that they can rely on an income stream or remainder interest for future family financial goals and the spouse forgoes financial opportunities based upon that representation. The recognition of the reliance interest is an example of the full reach of the court's equitable power over the party's property. The estate planner could suggest excluding that beneficiary from the plan or limiting the benefits conferred upon that beneficiary, but such a suggestion is likely to be appropriate only if divorce were a relative certainty within a short time from the creation of the estate plan.

Conclusion

The power of the courts to fashion equitable property divisions in divorce cases is far-reaching. Estate planners should recognize that they will be unable to draft documents that completely avoid the redirection of family wealth upon the divorce of a beneficiary of the client's estate plan. However, the planner can apprise the client of the effects that the divorce of a beneficiary could have on the client's estate plan. The planner can then assist the client in creating a plan to ameliorate some of the unintended consequences for any known at-risk beneficiaries.

[1] *See, e.g.*, Donna G. Barwick, "Divorce: Right up There With Death and Taxes, Estate Planning Techniques in the Context of Divorce,"

Powers of Attorney for Health Care and Advance Directives

Many lawyers, as part of an estate plan, have assisted clients with the preparation of a Power of Attorney for Health Care. This document provides for medical decision making when an individual is unable to communicate for himself or herself. The Power of Attorney for Health Care, adopted by the 1989 Oregon Legislature, is generally valid for seven years. Practitioners who prepared Powers of Attorney for Health Care shortly after the legislation was enacted, undoubtedly have clients whose Powers of Attorney for Health Care have expired. Lawyers should notify the clients that their Power of Attorney for Health Care is no longer in effect and was replaced in 1993 by the Advance Directive.

As a convenience to the client, the practitioner may wish to forward to the client the pamphlet entitled "Making Health Care Decisions," published by Oregon Health Decisions. The pamphlet contains the Advance Directive along with instructions for completing and signing the form. The pamphlet also answers common questions about the Advance Directive.

Marylee A. Lowry

Twenty-Ninth Annual Phillip E. Heckerling Institute on Estate Planning (Tina Portuondo, ed., 1995); Michael A. Yates, "The Estate Planner and Divorce Lawyer: A Marriage Made in Heaven," 12 Or Est Plan & Admin Sec Newsl, April 1995 at 1.

[2] *Taylor*, 121 Or App at 640. The court's reliance on *Howard* is unusual given that the decision appears to rest more on commingling than on reliance-based considerations.

[3] With respect to prospective marriages of known beneficiaries, the client may want to insist on the execution of an antenuptial agreement wherein the spouse disclaims any interest in inherited or gifted property. Antenuptial agreements are enforceable in Oregon under the Uniform Premarital Settlement Act, if properly executed. ORS 108.700, *et seq.* However, the potential intra- and interfamilial strife that can arise in even broaching this subject cautions some prudence in its employment. *See* Yates, *supra* note 1.

[4] There is the difficulty of whether the trustee would be able, in any event, to discover commingling. However, the clause may be most useful as a prophylactic against commingling by allowing the beneficiary to claim in all honesty that commingling could cause the stream of income to be cut off. This shifts the "blame" for segregating assets from the beneficiary-spouse to the "older generation."

[5] *See, e.g., Becker,* 122 Or App at 571-72. Had the trustee elected to withhold payment under the spendthrift clause in Becker, the wife would have not enjoyed the benefits of at least part of the family wealth and would have had the added burden of a $1,024,644 judgment. Certainly in that case the wife had other sources from which to make good on the debt. A different case could result in the beneficiary being forced into bankruptcy. As always, the estate planner should counsel the client regarding moral choices and not always opt to recommend draconian dead hand controls.

Eric J. TenBrook

What's New

Smith v. Brannan
152 Or App 505

In *Smith v. Brannan*, 152 Or App 505, 954 P2d 1259 (1998), the Oregon Court of Appeals held that a testator's wife had failed to exercise a power of appointment granted to her in the testator's will and that the Rule of Approximation did not apply. The will at issue had been executed by the testator in 1988 and granted to the decedent's spouse a power of appointment over the assets in the marital trust established under the will. The language creating the power of appointment in the 1988 will was identical to language granting the decedent's wife a power of appointment in the decedent's prior 1978 will. Although the decedent's wife had validly exercised her power of appointment contained in the 1978 will, she failed to exercise the power of appointment granted under the 1988 will, since the language granting the power of appointment required that she specifically refer to that will.

The Rule of Approximation gives a court equitable power to cure a donee's defective exercise of a power of appointment if the donee's action "reasonably approximates the donor's prescribed manner of appointment and the appointee is a member of a favored class," but such relief is not available if it would defeat the donor's "substantial purpose." See *Matter of Strobel,* 717 P2d 892, 898 (Ariz 1986). According to the court, the requirement that any exercise of the power must refer specifically to the will executed in 1988 evidenced an intent to take advantage of the marital estate deduction. Because this purpose would be defeated by applying the Rule of Approximation, the court held the Rule of Approximation did not provide relief.

Estate of Rapp v. CIR
81 AFTR 2d 98-1151

In *Estate of Rapp v. CIR*, 81 AFTR 2d 98-1151 (9th Cir 1998), the Ninth Circuit affirmed the Tax Court's decision holding that the California probate court's reformation of the decedent's will did not cause a trust created thereunder to qualify as a QTIP trust. The decedent's attorney, who was not an estate planner, prepared the decedent's will in 1986. Pursuant to the will, all of the decedent's assets except personal effects were left in trust during the life of his wife, with the balance of the trust estate to be distributed to the decedent's children or their issue. The language governing that trust permitted the trustee to distribute income or principal in its absolute discretion for health, education and support, and did not require the trustee to distribute all of the income to the surviving spouse at least annually.

After the will was admitted to probate, Mrs. Rapp petitioned the probate court to modify her husband's will so that the trust created thereunder would qualify for the marital deduction as a QTIP trust. The probate court granted the petition, which had alleged that the decedent had intended to qualify for the QTIP election. Following the court's decision and entry of the court's order reforming the will, the executor filed the federal estate tax return electing a marital QTIP deduction. The IRS, however, allowed the marital deduction only to the extent of property that passed directly to Mrs. Rapp under her husband's will.

In considering the executor's appeal of the IRS's decision, the Tax Court held that the probate court's reformation order was not binding because it had not been affirmed by the California Supreme Court, and absent such an affirmation, the Tax Court had the authority to determine whether the probate court's order conformed with California law. According to the Tax Court, because the will was not ambiguous and there was little or no evidence that the decedent had intended to create a QTIP trust, the tax court's decision was contrary to California law. The Ninth Circuit agreed, under the rule that a state trial court's decision is not controlling if the application of a federal statute is involved and the state's highest court has not ruled on the underlying issue of state law. *See* Erie R. Co. v. Tompkins, 304 US 64 (1938).

Erik S. Schimmelbusch

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Gift and Estate Tax Consequences of Joint Trusts

Joint trust articles appear in tax and estate planning periodicals from time to time, each describing the author's approach to drafting joint trusts, and each describing to a varying extent the advantages and disadvantages involved in using them.[1] In an unpublished outline by David N. Andrews, "Joint Trusts and Community Property Trusts: Some Observations on Their Use" (Mar. 28, 1995), the author lists 11 advantages, but only two disadvantages, of using a joint trust. The advantages include the preference of clients of having one "pot" for their assets, continued mutual ownership with full access by each spouse, the need for fewer brokerage and bank accounts, no decisions needed as to which trust pays which expenses, and automatic equalization of assets for unified credit planning. The two disadvantages? The difficulty for the practitioner of adjusting to doing something a new way and the increased complexity and difficulty of drafting.

Clearly, the advantages of using joint trusts far outweigh the disadvantages (and note that the disadvantages fall on the practitioner, not the client). Therefore, absent some compelling reasons why joint trusts should be avoided, why not use them?

For married couples with sizable estates, joint trusts require extreme care in drafting to avoid unintended, and very adverse, tax consequences. The purpose of this article is to focus on the major tax-related errors to avoid in drafting joint trusts. The potential errors are as follows:

- Drafting the trust so that unequal contributions by the spouses create inter-spousal gifts that fail to qualify for the marital deduction or that create completed gifts to remainder beneficiaries.
- Drafting the trust in a manner that creates completed gifts from the surviving spouse to the trust remainder beneficiaries at the death of the first spouse.
- Drafting the trust so that assets in which the surviving spouse has an ownership interest are used to fund the credit shelter trust, resulting in the inclusion of the assets in the surviving spouse's estate under IRC § 2036.

Error No. 1: Failing to qualify for the marital deduction at formation.

Assuming that property has been contributed to the trust unequally by the two trustors, care must be taken to avoid a taxable gift from the spouse contributing the greater share to the spouse contributing the lesser share. One way to avoid a gift is to maintain separate shares, with each spouse's share

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consisting of the property contributed by that spouse. However, this is often easier to do in theory than in practice. The assets may be commingled, exchanged, etc., or no records kept of the contribution, so that the identity of the contributor is lost. How many times have you received a trust agreement prepared by another attorney with no list of assets attached?

To avoid this problem, the trust agreement can provide for equalization of shares, so that each trustor is deemed to own an equal share. In this situation, to avoid a taxable gift from the spouse contributing the greater amount of assets to the spouse contributing the lesser, either the gift must be incomplete or the gift must qualify for the marital deduction. The gift would remain incomplete if the contributor retained the unilateral right to revoke the trust as to property contributed, but this would require the same record keeping that leads to problems with separate shares.

Another, and perhaps better, solution is to draft the trust so that gifts between the trustor-spouses are complete and qualify for the marital deduction under Treas Reg § 25.2523(e), as gifts of a life estate with a general power of appointment. The trust must be drawn very carefully, but if done correctly, there is very little the *clients* can do to mess things up, unlike where separate shares are required. To qualify under IRC § 2523(e), Treas Reg § 25.2523(e)-1(a) sets forth five conditions that must be met:

> "(1) The donee [non-contributing] spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.
>
> "(2) The income payable to the donee spouse must be payable annually or at more frequent intervals.
>
> "(3) The donee spouse must have the power to appoint the entire interest or the specific portion to either herself or to her estate.
>
> "(4) The power in the donee spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.
>
> "(5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the donee spouse."

The right to income (conditions (1) and (2)) is satisfied if the spouse has the right to have the corpus (including accumulated income) distributed to him or her at any time during her life. Treas Reg § 25.2523(e)-1(f)(6), (8). The power of appointment requirement (condition (3)) is satisfied if the donee spouse has the power to appoint the assets to himself or herself at any time during his or her life. Treas Reg § 25.2523(e)-1(g)(1)(i). Condition (4) is satisfied if the power of appointment is not suspended or eliminated during periods of incapacity. Rev Rul 55-518, 1955-2 CB 384; Rev Rul 75-350, 1975-2 CB 367. To satisfy condition (5), the trustee must not be given any power in "opposition" to that of the donee spouse. A power in a trustee to distribute corpus to or for the benefit of the donee spouse will not disqualify the trust. Similarly, a power to distribute corpus to the spouse for support of minor children will not disqualify the trust if the spouse is legally obligated to support the children, Treas Reg § 25.2523(e)-1(h), nor will a power exercisable by someone other than the spouse only after the spouse's death, Treas Reg § 25.2523(e)-1(h), Example (1).

The "specific portion" language of § 2523(e) comes into play in determining whether the donee spouse's interest in a joint trust qualifies for the marital deduction. To qualify as a "specific portion," the rights of the donee spouse in income from his or her share of the trust, and the powers of appointment over the share, must:

> "constitute a fractional or percentage share of the entire property interest, so that the donee spouse's interest reflects its proportionate share of the increase or decrease in the value of the entire property interest to which the income rights and the power relate. Thus, if the spouse's right to income and the spouse's power extend to a specified fraction or percentage of the property, or its equivalent, the interest is in a specific portion of the property." Treas Reg § 25.2523 (e)-1(c)(2).

A gift from one spouse to the joint trust falls within this "specific portion" rule. The donee spouse must have an interest in the income, and a power over the principal, that extends to one-half of the trust property. However, there is *no requirement that separate shares be established.* The separate share issue was put to rest with the enactment of the 1954 Tax Code, in which § 2056(b)(5) and § 2523(e) were enacted in essentially their current form. The changes made in 1954 added the "specific portion" language to the statute, to allow partial interests in a trust to qualify for the marital deduction.

A Fifth Circuit case decided a few years after the change provides an interesting analysis of the partial interest issue and underscores the reason for the change. *Stallworth's Estate v. Comm.*, 2 AFTR2d 6339, *rev on reh'g* 2 AFTR2d 6438 (5th Cir 1958). In *Stallworth's Estate,* the decedent gave his entire estate to his wife and son, in a trust that provided as follows:

> "(b) 'My said wife . . . shall be the beneficial owner of an undivided one half interest in and to all of my said estate, and shall have the right to deal with and dispose of the same as she alone may see fit. If she elects to have her one half thereof set apart to her, then and in that event said trustees shall *divide said property into two fairly equal* shares and shall convey title to her for *the share she may choose or designate*; and in any event, so long as her said share remains a

part of the trust she shall be entitled to have and receive one half of all income there from." *Id.* at 6340 (emphasis added; citation omitted).

A codicil provided for annual payments of her share of the income to her and provided that to the extent she did not withdraw all of her interest in the trust before her death, the remaining assets should go to her heirs at law.

The Internal Revenue Code of 1939 was in effect when the decedent died, and the marital deduction was governed by § 812(e)(1)(F) of the 1939 Code, which was the precursor to § 2056(b)(5) of the 1954 Code. In originally deciding (before rehearing) whether the marital deduction would be allowed, the court examined the law as it then existed and concluded:

> "To meet the test for the marital deduction the surviving spouse must not only be entitled to income for life with a power of appointment over corpus, but as the statute provides, the spouse must be entitled for life, 'to all the income from the corpus of the trust,' and must have power to appoint 'the entire corpus free of the trust.' *It seems rather a harsh rule that would deny an estate a marital deduction in the case of a single trust where the deduction would have been allowed if two trusts to accomplish the same purpose had been created.*" 2 AFTR 2d at 6344 (emphasis added; citation omitted).

In the same year as the *Stallworth's Estate* case was decided, however, Congress retroactively amended § 812(e)(1)(F) of the 1939 Code to add the "specific portion" language that it had included in the 1954 Code. On petition for rehearing, the court reversed its earlier decision. The Commissioner of the IRS filed a memorandum with the court commenting on the effect of the retroactive change, stating that "the wife clearly had the right to one-half the trust income plus an unrestricted power to appoint one-half the trust corpus, and the marital deduction is accordingly allowable with respect to one-half of the trust property."

The trust in *Stallworth's Estate* provided that if the spouse desired to withdraw her one-half share of the trust, then it would be divided into two "fairly equal" shares, after which she could choose which share she wanted. There was no question that the wife qualified under the "specific portion" rule, even though the trust was not segregated into equal shares, and at the spouse's election to withdraw her share, the trust would be divided on a non-pro rata basis.

Although the regulations under § 2523(e) address the "specific portion" rule in some detail, they do not expressly address the non-pro rata share issue. Several examples in the regulations, however, indicate that a testamentary power to appoint one-half of the corpus as constituted at the time of the donee spouse's death would satisfy the power of appointment requirement as to one-half of the trust. *See* Treas Reg § 25.2523(e)-1(c)(5), Examples (1), (2); Treas Reg § 25.2523(e)-1(h), Example (2).

In a closely related context, that of a partial QTIP election under § 2523(f)(4), the same "specific portion" rule applies. The regulations provide that a partial election must relate to a "defined fraction or percentage of the entire trust . . . or specific portion thereof *within the meaning of § 25.2523(e)-1(c),*" referring back to the "specific portion" language in the very regulation under § 2523(e) that is the subject of this discussion. Treas Reg § 25.2523(f)-1(b)(3)(i) (emphasis added). Treas Reg § 25.2523(f)-1(b)(3)(ii) allows, but does not require, the division of a trust into separate shares if the governing document or local law allows such a division. The regulation provides as follows:

> "*Division of trusts.* If the interest of the donee spouse in a trust meets the requirements of this section, the trust may be divided into separate trusts to reflect a partial election that has been made, if authorized under the terms of the governing instrument or otherwise permissible under local law. A trust may be divided only if the fiduciary is required, either by applicable local law or by the express or implied provisions of the governing instrument, to divide the trust according to the fair market value of the assets of the trust at the time of the division. *The division of the trusts must be done on a fractional or percentage basis to reflect the partial election. However, the separate trusts do not have to be funded with a pro rata portion of each asset held by the undivided trust.*" *Id.* (Emphasis added).

This regulation clarifies that the "fractional or percentage" shares requirement does not mean a fractional or percentage share of each asset in the trust. Thus, the requirements of § 2523(e) can be met if, in the case of lifetime revocation or upon division at death, the trust authorizes a division and distribution on an equal but non-pro rata basis, based on fair market values at the date of distribution.

In two cases involving a residuary bequest to a trust, the Tax Court and Second Circuit, respectively, held that the bequest qualified for the marital deduction to the extent of the surviving spouse's percentage or fractional interest in the trust as a whole. Presumably, each of the trusts was funded with the residuary assets of the estate in each case and not solely with cash, but the issue was not discussed. *Gelb v. Comm.*, 9 AFTR2d 1888 (2d Cir 1962); *Estate of Hollingshead v. Commissioner*, 70 TC 578 (1978).

The donee spouse's income and powers must extend to the "entire interest" or to a specific portion of the "entire interest." Treas Reg § 25.2523(e)-1(d) provides that

> "each property interest with respect to which the

donee spouse received some rights is considered separately in determining whether her rights extend to the entire interest or to a specific portion of the entire interest.

"*Example (1)*. The donor transferred to a trustee three adjoining farms, Blackacre, Whiteacre, and Greenacre. The trust instrument provided that during the lifetime of the donee spouse the trustee should pay her all of the income from the trust. Upon her death, all of Blackacre, a one-half interest in Whiteacre, and a one-third interest in Greenacre were to be distributed to the person or persons appointed by her in her will. The donee spouse is considered as being entitled to all of the income from the entire interest in Blackacre, all of the income from the entire interest in Whiteacre, and all of the income from the entire interest in Greenacre. She also is considered as having a power of appointment over the entire interest in Blackacre, over one-half of the entire interest in Whiteacre, and over one-third of the entire interest in Greenacre."

Caution should be exercised to avoid giving a donee spouse what amounts to a separate property interest in trust assets, if his or her income interest and power of appointment do not extend to the same assets. For example, if the trust is set up so that each spouse "owns" an undivided one-half interest in *each* asset, this ownership approach should be followed consistently within the agreement, so that each spouse's power of appointment applies to an undivided one-half interest in each asset. On the other hand, if the agreement describes each spouse's ownership as one-half of the trust as a whole, then the power of appointment can extend to one-half of the value of the trust assets but need not apply to one-half of each individual trust asset.

Consider a form that gives each spouse a unilateral right to revoke the trust, and to receive one-half of the trust assets in equal shares upon revocation, the make-up of which is to be determined by the trustee using date-of-division values, and that also gives each spouse the right to direct the trustee to make distributions to themselves in equal shares. The power in one spouse to distribute income and principal equally is not a power "in opposition" to that of the donee spouse, as proscribed by Treas Reg § 25.2523(e)-1(h), and is thus a permitted power. In the event of incapacity, the agreement should provide that the trustees must make discretionary distributions in equal shares and can make distributions for the benefit of (rather than directly to) the incapacitated spouse. Consider also giving each spouse the power to direct the trustee to make disproportionate distributions to the *other* spouse, i.e., a limited special power of appointment. If the donee spouse has the requisite power to appoint to him or herself or his or her estate, it is immaterial that he or she also has one or more lesser powers. Treas Reg § 25.2523 (e)-1(g)(5). This power could come into play, for example, if one spouse is ill and is in a nursing home and has a greater need for income; the well spouse can direct the trustee to make disproportionate distributions to or for the benefit of the ill spouse. Neither spouse, however, should have the power either as trustor or as trustee to make disproportionately greater distributions to himself or herself.

This form of trust perhaps comes closest to meeting the expectations of clients when they think of a "joint trust" and is the easiest for them to administer. No tracing of assets is required, no separate shares must be established, no accounting of distributions from separate shares is required, and there is no need to be concerned about equalizing ownership before funding. In short, it imposes no administrative responsibilities on the trustors or trustees that would have an impact on gift or estate tax matters. It does, however, require careful drafting and a thorough consideration of the requirements of IRC § 2523.

Error No. 2: Drafting the trust in a manner that creates completed gifts from the surviving spouse to the trust remainder beneficiaries at the death of the first spouse.

This error can take two forms. First, the entire trust may become irrevocable on the death of the first spouse, so that the surviving spouse is deemed to have made gifts of the remainder interests in the trust to the remainder beneficiaries after his or her interest has expired. This trap is easy to avoid by expressly providing that the surviving spouse's share remains revocable after the death of the first spouse or by giving the surviving spouse a special power of appointment over the trust assets, thereby avoiding the completion of any gift to the remainder beneficiaries.

Second, a gift is present if the surviving spouse's assets are used to fund the credit shelter trust. This problem is discussed in connection with the discussion of error No. 3.

Error No. 3: Drafting the trust so that assets in which the surviving spouse has an ownership interest are used to fund the credit shelter trust, such that § 2036 will cause inclusion of the assets in the surviving spouse's estate.

Both errors No. 2 and No. 3 primarily occur when the trust is drafted with ambiguous or inconsistent ownership provisions. Ambiguous ownership provisions are usually a result of sloppy drafting. One common form is to provide for two (apparently) equal shares in one provision, such as by declaring that the trustors own the trust property "jointly" but in another provision allow each spouse to withdraw his or her contributions. If property contributed by the surviving spouse is used to fund the credit shelter trust, the power in the surviving spouse to withdraw this property (pursuant to the latter provision) would be an IRC § 2038 power.

Careless record keeping or trust administration can also cause problems. Ownership provisions often take the

form of separate shares for separately contributed assets, and perhaps a third joint share for jointly contributed assets, or a division of the jointly held assets into the two separate shares. Each spouse has the right to withdraw his or her own contributions. This form requires careful record keeping on the part of the trustors/trustees and perhaps physical separation into separate shares. After the death of the first trustor, the survivor may not be able to identify which assets belong to which share. The assets may have been so commingled that the surviving spouse (or the spouse's advisors) cannot tell which assets he or she can withdraw from the trust. If a determination cannot be made, the IRS may simply presume that the surviving spouse's assets were used to fund the credit shelter trust, absent evidence to the contrary.

A better form is one in which each asset is deemed divided into fractional shares, with one share in each trust. Each spouse has the right to revoke the trust and to receive only his or her undivided one-half interest in each asset. Record keeping is eliminated or reduced because tracing is eliminated. The trust has two separate shares in theory, but actual division is avoided. Neither spouse can withdraw assets from his or her share alone -- all distributions are deemed to come equally from both shares. At the death of the first spouse, that spouse's share is easy to identify because by the terms of the trust, he or she owns an undivided one-half interest in each and every asset. As long as the assets in the spouse's share (or the proceeds from the sale or exchange of such assets) are used to fund the credit shelter trust, there is no basis for claiming any of the deceased spouse's assets were used to fund the trust.

The disadvantage of this scenario is that funding the credit shelter trust or other bequests out of the deceased spouse's share must be made with undivided interests in property, unless the surviving spouse is willing to recognize capital gains (except as to community property assets) in an exchange of assets with the trustee of the deceased spouse's share. This could produce a major administrative headache for the trustees after the death of the first spouse, especially where the trust consists of low-basis real property.

A third, and perhaps the best, form does not purport to establish separate shares (which in practice are never established anyway) but gives each spouse equal beneficial interests in the trust during their joint lifetimes. Under this form, separate shares for the two trustors are not established at formation. However, there are several provisions that establish during the joint lifetimes of the two trustors that they own the trust in equal shares. First, the trust provides that any income or principal distributed to them, at the direction of either, will be distributed to them in equal shares. Second, the trust provides that either trustor, acting alone, has the right to revoke the trust in whole or in part, and that in the event of revocation the assets shall be distributed to them in equal shares. At the death of the first trustor, the trust is to be divided in equal shares for each trustor. The division can be made on a pro rata or a non-pro rata basis. For income tax purposes, a non-pro rata division, authorized in the agreement, allows different assets to go into different shares without the recognition of gain or loss on the division. *See* Priv Ltr Ruls 9625020 (June 21, 1996) (most recent ruling on this issue), 8119040 (Feb. 12, 1981). Under IRC § 1014(b), the beneficiaries of the deceased spouse's estate should receive a stepped-up basis for the assets acquired from the decedent's share of the trust.

The critical issue, of course, is whether a non-pro rata division after death creates any gift or estate tax problems. Assume the donee-spouse dies first. If the assets of the donee-spouse's share are used to fund a credit shelter trust in which the donor-spouse has an income interest or special power of appointment, do §§ 2036 or 2038 apply to bring the assets back into the estate of the donee-spouse at his or her death? In other words, are the assets traced back to the donor spouse for purposes of applying §§ 2036 or 2038?

The funding of the two shares at the death of the first spouse in effect creates two separate trusts, with each trust receiving assets of a value of one-half of the total value of the trust assets and relinquishing ownership rights in the other half. If a third party established the trust, there is no doubt that if authorized by the trust agreement or law, the trustee may make non-pro rata distributions and that after such distributions each beneficiary owns no interest in the share of any other beneficiary. Consequently, there is no basis for concluding that the surviving spouse's assets were used to fund the credit shelter trust.

In two private letter rulings, the IRS held that a general power of appointment in the donee spouse prevents § 2036 from applying to an income interest retained by the surviving donor spouse in the trust assets. In one ruling, the wife proposed to make a gift to her husband in trust, giving him a lifetime income interest and a special power of appointment over the remainder at death. In the event the power was not exercised, the wife would retain a lifetime income interest in the trust if she survived him. The husband also would have a general power of appointment over the trust assets beginning immediately after the trust was funded, and expiring 30 days thereafter. The ruling holds that although the wife originally transferred the assets to the trust, the husband's 30-day power would prevent inclusion of the trust property in her estate under § IRC 2036(a) if she survived him, notwithstanding her survivor's income interest. Priv Ltr Rul 9026036, Issue 2 (Mar. 28, 1990). In two other rulings under similar facts but in which the donee spouse had a testamentary general power rather than a lifetime power, the Service reached the same conclusion. Priv Ltr Rul 8944009, Issue 4 (July 31, 1989), Ruling Request 9109029 (Nov. 30, 1990). Surely, the donee-spouse's lifetime power of appointment over the donee-spouse's share eliminates any application of §§ 2036 or 2038 to bring the assets back into the

donor-spouse's estate at his or her death.

The real danger lies in not establishing separate shares at all, even after the death of the first spouse, and this is compounded if other provisions in trust are ambiguous as to the beneficial ownership of assets. For example, assets contributed by the surviving spouse and which the surviving spouse could reclaim by revocation (*e.g.*, by a trust provision that allows the contributor to reclaim contributed assets) should not be used to fund the credit shelter trust.

Conclusion

Certainly, there are tax risks aplenty for the inexperienced or careless drafter. But with careful drafting and both eyes on the tax code, the risks can be avoided. Joint trusts are not a vehicle for taxpayer abuse, and there is no reason the IRS should go out of its way to attack them, provided care is taken to ensure the donee-spouse's interest qualifies for the marital deduction and that each spouse's ownership interest is carefully and consistently maintained. The relevant authority is ample to lend certainty to the tax consequences of the well-drafted joint trust.

Endnotes

[1] See Melinda S. Merk, "Joint Revocable Trusts for Married Couples Domiciled in Common-law Property States", 32 *Real Property, Probate and Trust Journal* 345 (1997); David N. Andrews, "Joint Trusts and Community Property Trusts: Some Observations on Their Use," (unpublished outline dated Mar. 25, 1995); Jeffrey C. Thede, "The Continuing Joint Trust Debate," *Est. Plan. & Admin. Sec. Newsl.* (July & Oct. 1994); Robert A. Esperti & Renno L. Peterson, "Joint Trusts are a Good Planning Tool for a Married Couple," *Estate Planning* 148 (May/June 1993); Richard A. Williams, "The Benefits and Pitfalls of Joint Revocable Trusts," *Trusts & Estates* 41 (Nov. 1992); Roy M. Adams & Thomas W. Abendroth, "The Joint Trust: Are You Saving Anything Other Than Paper?" *Trusts & Estates* 39 (Aug. 1992); Timothy L. Flanagan, "Designing Trusts for Couples Owning a Substantial Amount of Jointly Held Assets," *Estate Planning* 84 (Mar./Apr. 1988).

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1998 Federal Estate Tax Law Changes

Although the IRS Restructuring and Reform Act of 1998 (the "1998 Act") deals largely with issues of IRS-taxpayer relations, it also contains several provisions affecting estate planning. Some of these changes are briefly summarized below.

Qualified Family Owned Business Interest. The Taxpayer Relief Act of 1997 created an "exclusion" under IRC § 2033A, for the value of a decedent's qualified family-owned business interests ("QFOBIs"), in the amount of the lesser of (1) the adjusted value of the QFOBIs or (2) the excess of $1,300,000 over the applicable exclusion amount. The 1998 Act contains several technical corrections to the QFOBI provisions. Most significantly, the 1998 Act changes the exclusion to a deduction. The deduction is described in IRC § 2057, which provides a maximum deduction of $675,000 for QFOBIs. Under that section, if the maximum $675,000 deduction is taken, then the applicable exclusion amount is limited to $625,000 (the difference between $675,000 and $1,300,000). The applicable amount is adjusted upwards for any amount less than $675,000 that is taken as a QFOBI deduction.

Finality of Gift Values. The 1998 Act provides further clarification to the prohibition of the IRS' revaluation of gifts for estate tax purposes after expiration of the statute of limitations. By amending IRC §§ 6501(c)(9) and 2001(f), the 1998 Act provides that the value of a gift will be treated as final, even if the gift was not reported on a gift tax return, if its value was either specified by the IRS or determined by a court or pursuant to a settlement agreement with the IRS.

Conservation Easements. The 1998 Act clarifies that a decedent's estate is eligible for the estate tax charitable deduction under IRC § 2055(f) and the conservation easement exclusion under IRC § 2031(c) only if no income tax deduction is taken with respect to the grant of the easement. In addition, the conservation easement exclusion must be claimed on a timely filed estate tax return, including extensions.

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Timber, Timberland, and Charitable Trusts

A survey of private timberland owners conducted in 1994 by the U.S. Forest Service and the National Association of State Foresters, the first national survey of private timberland owners since 1978, found the following:

• There are an estimated 9.9 million private timberland owners in the United States, an increase of 2.2 million owners (28%) over the 1978 study.

• Oregon has 10.6 million acres of timberland in the hands of 166,000 private owners (non-corporate entities). Washington has 9.7 million acres in the hands of 91,000 private owners, and California has 14.5 million acres and 346,000 private owners.

• Other data from the survey suggest that a growing number of private timberland owners are key candidates for estate planning. Those listing themselves as "retirees" own 30% of the private timberland, up from 13% reported in the 1978 survey.

This article will focus on the use of charitable remainder trusts in connection with timberland (timber and the underlying land) and then will identify issues that arise when a donor contributes trees but not the underlying land to a charitable remainder trust. For a source with an extended discussion of timber and many other charitable planning techniques -- charitable annuities, lead trusts, bargain sales, conservation easements, etc. -- see the note at the end of this article.

Issues Common to All Gifts of Real Property

Complex issues arise because of the special nature of timberland as an asset, but practitioners should not lose sight of the fact that timberland is real property. Planners should review and resolve the issues common to all types of real property used to fund a charitable remainder trust ("CRT").

Debt. Before 1990, the IRS permitted a CRT to hold encumbered real property as long as the debt was five years old, the donor had owned the property for five years before the gift, and the charity did not assume the mortgage. Priv Ltr Rul 8931023 (May 3, 1989). Since 1990, however, the IRS has taken the position that a CRT may not use any of its income (which includes realized gains) to pay mortgage debt on which the donor is personally liable. Priv Ltr Rul 9015049 (Jan. 16, 1990).

Environmental issues. Planners should review CERCLA issues for any potential problems, paying particular attention to uses of surrounding properties. A practitioner should not assume that there will be no clean-up issues, just because the timberland has not been developed in the past.

Pre-arranged sale. Donors of timberland are often concerned that a charity not sell the donated property for less than market value. In an effort to avoid this outcome, a donor may propose that he or she locate a buyer in advance of the gift, arrange the terms of the sale and leave the trustee merely to consummate the sale once the CRT is funded. If the donor has proceeded too far with sale negotiations, the IRS will attribute the sale to the donor, not the CRT, with the attendant capital gains tax consequences for the donor. In attributing the sale to the donor, the IRS will rely either on the assignment of income doctrine, *see Horace E. Allen*, 66 TC 340 (1976), or the step transaction doctrine, *see* Rev Rul 67-178, 1967-1 CB 64.

How far is too far? Rev Rul 74-53, 1974-1 CB 60, 61, provides the basic rule: There must be "no express or implied obligation imposed upon the trustee to sell or exchange" the donated property. However, Rev Rul 78-197, 1978-1 CB 83, suggests that as long as the trustee is free to choose the buyer and determine the price, no step transaction will be found. *See also Daniel D. Palmer*, 62 TC 684 (1974); Priv Ltr Ruls 8411029 (Dec. 9, 1983), 8309150 (Nov. 30, 1982), 8307134 (Nov. 19, 1982), 8042032 (July 22, 1980), 8042030 (July 22, 1980).

Donor as trustee. When donors wish to act as trustee of their own charitable trusts, self-dealing problems arise if the trusts are funded with hard-to-value assets such as timberland. IRC § 508(e) prohibits self-dealing between the trust and "disqualified persons." Donors are "disqualified persons" as to charitable trusts, as are close family members. IRC § 4946(a).

In Private Letter Ruling 8648048 (Sept. 2, 1986), the IRS referred to the legislative history of the Tax Reform Act of 1969, Pub L No. 91-172, 26 USCA § 1, *et seq.* (1988), indicating that an independent trustee would be required if a CRT were funded with property that did not have "an objective, ascertainable market value, such as real estate or stock in a closely held corporation." A solution in such cases is to incorporate language into the trust document that appoints an "independent appraiser" or an "independent special trustee" for purposes of valuing the asset. Once the asset is converted to cash, the independent trustee may resign in favor of the donor.

Alternatively, proposed regulations under IRC § 664, issued by the IRS on April 17, 1997, would allow a donor who acts as the trustee to obtain a qualified appraisal valuing the asset, similar to the qualified appraisal required to claim the income tax charitable deduction.

Issues Specific to Timberland

Forest practices requirements. Privately owned timberland is subject to both federal and state restrictions relating to environmental concerns such as preservation of endangered species habitat. Although much attention focuses on federal legislation, special note should be taken of state restrictions that may affect timberland value and sale timing.

In Oregon, for example, the Oregon Forest Practices Act (ORS 527.610, *et seq.*) governs such things as har-

vesting methods, road construction and maintenance, reforestation requirements, disposal of slash, preservation of air and water quality, and preservation of fish and wildlife habitat. Similar laws exist in most timber-producing states. The Washington Forest Practices Act is found at RCW 76.09.010 *et seq.*

Forest practices laws may limit the number of trees that can be cut, thereby lowering the value of the timberland. Forest practices laws may also assign the responsibility, and thus the cost, of reforestation to a specific party in the transaction. The responsibility can usually be shifted from one party to another via contract, but the parties must take affirmative steps to shift the cost of reforestation, if that is desired.

Appraisals. A donor claiming an income tax deduction of more than $5,000 for a gift of property other than marketable securities must obtain a qualified appraisal from a qualified appraiser. The requirements for a qualified appraisal are set forth in Treas Reg § 1.170A-13(c)(3). In general, the appraisal must be obtained before the due date, including extensions, of the tax return on which the deduction is claimed and cannot be made more than 60 days before the date of gift.

A qualified appraiser is someone who publicly holds himself or herself out as an appraiser and who is qualified to appraise the particular type of property. The donor and the charity, as well as employees and related parties to the donor and charity, are prohibited from acting as appraisers, even if they would otherwise be qualified.

In the case of timberland, the appraisal is typically a two-part process: a "timber cruise" to establish the value of the stumpage and a separate appraisal of the land. The valuations may be performed by the same person but only if that person is qualified to appraise both types of property.

Trap to avoid: There appears to be no cure for a late appraisal. In *Hewitt v. Commissioner*, 109 TC 258 (1997), the Tax Court ruled that a donor could not introduce evidence after the fact to make up for the lack of an appraisal at the time the donor's tax return was filed. Therefore, if one person values both the timber and the underlying land, the practitioner should be certain that the person is qualified to appraise both items.

Unrelated business income. IRC § 512(a)(1) defines unrelated business taxable income ("UBI") as "income derived from any unrelated trade or business ...regularly carried on." A charitable remainder trust that has any amount of UBI in any year loses its tax exemption for that year. Instead, it will be taxed as a complex trust. *Newhall Unitrust v. Commissioner,* 104 TC 236 (1995). Note that the tax liability is not limited to the tax on the UBI itself. Instead, the entire undistributed income of the trust is subject to tax. Treas Reg § 1.664-1(c).

The UBI issue arises for a CRT holding timberland if the CRT plans to retain the timberland and harvest sufficient timber each year to make the required payments to the income beneficiaries. Based on a number of letter rulings in timber-related cases, it would appear that a regular series of timber harvests, particularly where those harvests are tied to trust payments, would be found to be UBI, with the resulting negative consequences for the trust. *See, e.g.*, Tech Adv Mems 9608002 (Sept. 29, 1995), 9541002 (Feb. 3, 1995), 9214009 (June 7, 1995), 8839002 (June 14, 1988); Priv Ltr Ruls 9547040 (Aug. 30, 1995), 9535051 (June 7, 1995), 9533015 (May 5, 1995), 9428037 (July 15, 1994), 9412039 (Dec. 23, 1993), 9252028 (Sept. 28, 1992), 9212002 (Dec. 4, 1991), 9207033 (Nov. 20, 1991), 9144032 (Aug. 6, 1991), 9108034 (Nov. 27, 1990), 8708052 (Nov. 26, 1986), 8628049 (Apr. 15, 1986).

Note that a charitable trust can hold an interest in a C-type corporation, a partnership or other pass-through entity, but partnership income will retain its character in the hands of the recipient. *See* Priv Ltr Rul 9114025 (Jan. 7, 1991). If the CRT holds partnership interests, the partnership should not distribute UBI to the trust.

Four types of income are exempt from the UBI definition: dividends, interest, royalties, and rent. IRC § 512(b). If the trustee does not wish to sell the timberland in a single transaction, it may be possible to structure a transaction so that the income falls into one of the four exempt categories. Further, an argument may be made that it may be appropriate to hold some timberland as a trust investment and sell other portions of timberland, or timber alone, at irregular intervals to take advantage of market conditions and diversify trust holdings. *See* Treas Reg § 1.513-1(c)(2)(iii); *Robert L. Adam v. Commissioner*, 60 TC 996 (1973).

Tax Consequences of Timberland in a CRT

Tax treatment for a gift of timberland to a CRT is the same as for any other gift of appreciated property. The donor can take an income tax charitable deduction for the present value of the charity's remainder interest, calculated using the FMV of the property contributed. The deduction may be taken up to 30% of the donor's adjusted gross income in the year the gift is made, with a five-year carryforward for any unused amount. The donor also avoids capital gains tax on the appreciated value of the property at the time the gift is made.

Changes made by the Taxpayer Relief Act of 1997 require that to qualify as a charitable trust, the payout amount can be no greater than 50% and the anticipated charitable remainder amount must be at least 10% of the amount contributed to the trust.

Income from a CRT is reported and paid out under a four-tier structure that provides some interesting planning possibilities when highly appreciated property is used to fund the trust. Treas Reg § 1.664-1(d)(1). This four-tier structure characterizes payments in the following order:

- First, ordinary income from the current year and any undistributed amounts from prior years,
- Second, capital gain income from the current year and any undistributed amounts from prior years,

• Third, other income, including tax-exempt interest, and

• Fourth, corpus.

Where there is a substantial gap between the donor's maximum tax rates for ordinary income and capital gains, it may be advantageous to the donor to structure the trust investments so that the donor receives trust payments as capital gain income.

Defining Realized Capital Gain as Income if Using a NIMCRUT

When a CRT is funded with an illiquid asset such as timberland, the form of trust chosen is often a net-income-with-makeup ("NIMCRUT"). A NIMCRUT pays out only its net income in years when trust income is less than the required payout rate. Then, when net income exceeds the payout rate, the trust can distribute the missed payments.

Structuring a trust holding timberland as a NIMCRUT allows the trustee to dispose of the timberland and reinvest the proceeds before making the required payments to the income beneficiary. However, once the illiquid asset is sold, the net-income limitation is generally undesirable because it encourages investment for income rather than investment for total return. To solve this problem the trust can provide that realized capital gains are to be allocated to trust income, assuming that applicable state law permits (which Oregon does). The IRS has approved such language in a series of rulings—Private Letter Rulings 9442017 (July 19, 1994), 9511007 (Dec. 12, 1994), 9511029 (Dec. 16, 1994) and 9609009 (Nov. 20, 1995)—but has stated that the accrued makeup amount must be treated as a liability in determining the fair market value of the trust assets in future years. Priv Ltr Rul 9609009.

Note that proposed regulations under § 664, issued April 17, 1997, allow only post-contribution gain to be allocated to income. This is a change from the position taken by the IRS in Private Letter Rulings 9511007 and 9511029. The proposed regulations also provide for the use of a "Flip" unitrust, which allows a CRT to begin as a NIMCRUT, then "flip" to a standard CRT. To qualify, the trust must:

• Consist of at least 90% "nonmarketable" assets (assets other than cash, cash equivalents, and marketable securities),

• Flip to a standard CRT in the first taxable year after it disposes of 50% of the nonmarketable assets or sells a specified asset, and

• Forfeit any makeup amount remaining from the time when the trust was a net-income trust.

Standing Timber Where the Donor Owns the Underlying Land

A donor who wants to transfer standing timber to a CRT while retaining ownership of the land faces several issues. The threshold question is whether standing timber constitutes real or personal property. While the IRS has not addressed this question specifically, the majority of commentators take the view that a gift of the timber alone, where the donor retains ownership of the underlying land, is a gift of a partial interest in real property. Commentators do this by analogy to Rev Rul 76-331, 1976-2 CB 52, which concerned mineral rights.

The basic rule with respect to a charitable contribution of a partial interest is that no deduction is allowed for "an interest in property which consists of less than the taxpayer's entire interest in such property." IRC § 170(f)(3)(A). If standing timber is characterized as a partial interest, not only will the deduction be disallowed, the trust itself may be disqualified. The IRS has taken this position in Private Letter Ruling 9501004 (Sept. 29, 1994), stating that to qualify as a CRT a trust "must be one with respect to which a deduction is allowable under one of the specified sections." IRC §§ 170, 2055, 2106, 2522. Under this reasoning, a partial interest would appear to disqualify the trust because no income or gift tax charitable deduction is allowed under § 170 for a contribution of a partial interest.

If timber rights are analogized to mineral rights, then standing timber will be treated as a partial interest. A contrary view is that standing timber is more like a crop than a mineral right. That is, timber is a renewable resource and may be severed without a fundamental change in the land. If one accepts this view, then Private Letter Ruling 9413020 (Dec. 22, 1993) provides an argument that the trust should qualify from its inception.

Private Letter Ruling 9413020 involved a donor who wanted to transfer cattle, machinery, and growing crops to a CRT. The IRS deemed the crops personal property, even though the crops were not required to be harvested before the transfer. Because the personal property was given for an unrelated use (a use unrelated to the charity's exempt purposes, in the case of a CRT the exempt purpose of the charitable remainderman, *see* IRC § 170(e)), the donor's income tax charitable deduction was limited to basis, which in Private Letter Ruling 9413020 was zero. Nevertheless, the trust qualified. If this ruling were applied to growing timber, the donor's income tax charitable deduction would likewise be limited to basis, but the donor would still avoid capital gains tax upon the trust's subsequent sale of the timber.

If timber rights are treated like mineral rights, however, is there a way to deal with the partial interest problem? Various commentators have put forth suggestions:

Proposed solution #1. The donor contributes the timber and the land to the CRT. The trustee then sells the timber rights to a third party and sells the land back to the donor.

A major flaw with this proposal is that a direct sale from the trust to the donor is prohibited self-dealing because a sale or exchange of property between a CRT and a disqualified person is an act of self-dealing, Treas Reg § 53.4941(d)-2(a)(1), and both the donor and mem-

bers of the donor's family are disqualified persons as to the trust, § 4946(a). However, if the trustee were to sell both timber and land to a buyer who wanted only to harvest the timber and not retain the land, the buyer could sell the land back to the donor once the trees were harvested. Note that such an arrangement could not be compelled or guaranteed in the CRT document.

Proposed solution #2. The donor sells or gives the land to family members first, retaining only the timber rights. Then the donor contributes the timber rights to the CRT.

This proposal offers more promise. The partial interest rule would not apply where the donor gives an interest that, even though partial, is the donor's entire interest in that property. IRC § 170(f)(3)(A). Query whether the IRS would disallow the deduction on the theory that the donor created the partial interest solely to avoid having the deduction disallowed. *See* Treas Reg § 1.170A-7(a)(2)(i). It appears there must be some reason for creation of the donor's partial interest beyond mere avoidance of the partial interest rule, but query how substantial those other reasons must be. *See* Rev Rul 76-523, 1976-2 CB 54; Rev Rul 88-37, 1988-1 CB 97; Priv Ltr Rul 9205012 (Oct. 31, 1991). At the very least, some time should pass between creation of the partial interest and the subsequent gift of that interest to a CRT.

Proposed solution #3. The donor cuts the timber before making the gift. It is well settled that cut logs are tangible personal property. As such, the donor's deduction will be limited to basis, but the trust will not be disqualified.

IRC § 631(a) allows a taxpayer who cuts his or her own timber to elect to treat the cut timber as a capital asset, provided the donor has owned the timber or timber rights for more than one year. If the cut timber were then contributed to a CRT, the donor's deduction would be based on fair market value. However, the donor would have realized capital gain at the time of cutting, so it is hard to see that this transaction provides anything other than a wash for the donor.

IRC § 631(b) also allows for capital gain treatment upon the disposal of timber rights owned for more than one year. However, to qualify for capital gain treatment, the donor must retain an economic interest in the timber, which would disqualify the CRT by making it a grantor trust.

Standing Timber if Donor Does Not Own the Underlying Land

Ordinarily, a gift of a future interest in personal property (such as a gift of timber rights to a CRT) will not qualify for an income tax deduction until all the intervening interests have expired or all the intervening interests are held by persons other than the donor or donor's family. IRC § 170(a)(3). However, the IRS has approved a charitable trust funded with tangible personal property. Priv Ltr Rul 9452026 (Sept. 24, 1994). In allowing the trust, the IRS stated that an income tax charitable deduction would be allowed but that the donor could not claim the deduction until the contributed property was sold by the trustee. At that point the donor no longer held an "intervening interest" in the property, but rather held an income interest in the sale proceeds of the asset, said the Service.

Although it appears such a trust will qualify, note that the donor's income tax charitable deduction will be limited to his or her basis in the property, because it will be considered put to an "unrelated use." IRC § 170(e).

Conclusion

Although practitioners must pay careful attention to many details—forest practices requirements, appraisals, prearranged sale issues, etc.—timberland makes an excellent asset for a CRT, especially given its often highly appreciated nature. A gift of timber alone, without the underlying land, is more problematic, but careful planning may allow this to work also.

Nancy J. Brucker
Member, California Bar

A comprehensive guide, including forms and examples, to charitable planning using timber and timberland is available at a cost of $60, plus $5 shipping, from Northwest Planned Giving Roundtable, P.O. Box 2548, Portland OR 97208-2548.

From the Bench

Many guardianship and conservatorship cases involve family issues that are not particularly relevant to the court's determination regarding the need for or selection of a guardian or conservator. There may be long term disputes among siblings. There may be territorial issues between immediate family and step family. When the petitioner gives notice, people may object for reasons that do not constitute "legal" objections. Disputants often have unreasonable expectations as to the scope of the hearing and the relevance of their testimony.

Problems of this sort prevent family members from working together in the best interests of the person for whom the family seeks protection. A trained mediator can help the family resolve many of these issues. Deschutes County has a pool of trained mediators who are available at no cost. Some court visitors have also been trained as mediators. The mediators have been very successful at assisting family members in sorting through old grudges and disputes and ultimately focusing on the needs of the protected person. The mediation process has proven essential in engaging family members in the process and avoiding further estrangement. The result ultimately benefits the protected person as well as the family.

Judge Alta J. Brady

What's New

Estate of Davis v. Commissioner
110 TC 35
June 30, 1998

In November 1992, Artemus Davis, one of the founders of Winn-Dixie Stores, Inc., gave each of his sons a 25-share block of stock in a closely held corporation. The corporation was essentially a holding company. Mr. Davis filed a gift tax return, reporting a value of $297,777 per holding company share. The IRS disagreed and determined a value of $481,879 per share.

On the date of the gifts, the holding company had $26.7 million in built-in capital gains, mostly attributable to the Winn-Dixie stock. Mr. Davis' estate argued that the value of the holding company stock should take into account the built-in capital gains tax on the underlying assets. In support of its position that no discount for built-in capital gains tax should be allowed, the IRS argued that the holding company could have avoided the built-in capital gains tax by electing S corporation status and retaining its assets for 10 years. In addition, the IRS pointed out that there was no evidence that liquidation was contemplated.

While the IRS cited two recent cases to support its position, the Tax Court noted that in the prior cases there was no indication that any expert believed a reduction for built-in capital gains tax was appropriate. *See Estate of Welch v. Commissioner,* No. 27513-96, 1998 WL 221313 (TC May 6, 1998); *Irene Eisenberg* 74 TCM (CCH) 1046 (1997). In the *Davis* case, the taxpayer's expert and the IRS' own expert agreed that the value of the closely held stock should include a discount attributable to built-in capital gains tax.

In holding that a discount for built-in capital gains tax was appropriate, the *Davis* court reasoned that a hypothetical willing buyer and seller would have taken the tax into account in negotiating the price, even though no liquidation of the holding company or sale of its assets had been contemplated. The court disagreed with the estate's assertion that the full amount of the built-in gains tax should be subtracted from the holding company's net asset value. It held that if no liquidation of the corporation or sale of its assets is contemplated, only a portion of the tax is allowed in calculating the discount. The court held that $9 million of the built-in capital gains tax was warranted, as a component of the lack of marketability discount.

Hahn v. Commissioner
110 TC 140
March 4, 1998

In *Hahn v. CIR*, the Tax Court held that a surviving spouse was entitled to a stepped-up basis equal to 100 percent of the date-of-death value of real property owned by the spouse and decedent as joint tenants in 1973. In reaching its decision, the Tax Court followed *Gallenstein v U.S.,* 975 F2d 286 (6th Cir 1992), holding that the Economic Recovery Tax Act of 1981 did not alter the "contribution rule" relating to joint tenancies created before January 1, 1977.

Pursuant to the contribution rule, if a surviving spouse did not make any financial contribution in the acquisition of property held in joint tenancy with right of survivorship and the joint tenancy was created before January 1, 1977, 100 percent of the property's value is included in the deceased spouse's estate and the surviving spouse receives the property with a stepped-up basis. Before the *Hahn* case, several federal courts had reached the same conclusion, including *Patten v. U.S.*, 116 F3d 1029 (4th Cir 1997); *Anderson v. U.S.*, 78 AFTR2d 96-6555, (D Md 1996); *Wilburn v U.S.*, 80 AFTR2d 97-7553 (D Md 1997),

Erik S. Schimmelbusch

Notice to techno-savvy members:

Newly formed Computer and Technology Subcommittee needs volunteers to help update the Section's Website and consider technology issues. Contact Wes Fitzwater, Committee Chair, at 503-786-8191

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CALENDAR OF SEMINARS AND EVENTS

- October 22-24, 1998 (Sponsored by Southern California Tax & Estate Planning Forum) **18th Annual Southern California Tax & Estate Planning Forum**, Hyatt Regency La Jolla at Aventine, San Diego, California. Telephone: (800) 332-3755.

- October 25-29, 1998 or November 15-19, 1998 (Sponsored by New York University) **57th Institute on Federal Taxation**, October 25-29 - The Sheraton, New York, New York; November 15-19 - The Hotel Del Coronado, San Diego, California. Telephone: (212) 790-1320.

- October 25-30, 1998 (Sponsored by Chaminade University Tax Foundation) **35th Annual Hawaii Tax Institute,** Hawaiian Regent Hotel, Honolulu, Hawaii. Telephone: (808) 946-2966 ext. 130.

- October 29-30, 1998 (Sponsored by ALI-ABA) **International Estate Planning,** New Orleans, Louisiana. Telephone: (800) CLE-NEWS.

- November 2-3, 1998 (Sponsored by Washington State Bar) **Estate Planning,** Convention Center, Seattle, Washington. Telephone: (206) 727-8202.

- November 4, 1998 (Sponsored by Practising Law Institute) **Basic Estate Planning**, NYC-PLI Conference Center, New York. Telephone: (800) 260-4754.

- November 6, 1998 (Sponsored by University of Southern California) **24th Annual Probate and Trust Conference**, Westin Bonaventure Hotel, Los Angeles, California. Telephone: (213) 740-2582.

- November 16-20, 1998 (Sponsored by ALI-ABA) **Planning Techniques for Large Estates,** Ritz Carlton, San Francisco, California. Telephone: (800) CLE-NEWS.

- November 19-20, 1998 (Sponsored by ALI-ABA) **Tax Exempt Charitable Organizations**, Madison Hotel, Washington, D.C. Telephone: (800) CLE-NEWS.

- December 4, 1998 (Sponsored by Oregon State Bar Continuing Legal Education) **Basic Estate Planning**, Oregon Convention Center, Portland, Oregon. Telephone: (800) 452-8260.

- January 4-8, 1999 (Sponsored by University of Miami) **33rd Annual Philip E. Heckerling Institute on Estate Planning**, Fountainebleau Hilton Resort and Towers, Miami Beach, Florida. Telephone: (305) 284-4762.

- January 11-13, 1999 (Sponsored by University of Southern California) **51st Annual Institute on Federal Taxation**, The Beverly Hilton, Beverly Hills, California. Telephone: (213) 740-2582.

- January 22, 1999 (Sponsored by Estate Planning Council of Portland) **28th Annual Estate Planning Seminar,** Oregon Convention Center, Portland, Oregon. Telephone: (503) 224-2223.

- February 10-12, 1999 (Sponsored by Intertec Trade Shows and Conferences) **Trust & Estates Tenth Annual Conference on Estate Planning & Administration**, Fairmont Hotel, San Francisco, California. Telephone: Kim Greenway at (770) 618-0423.

- February 18-20, 1999 (Sponsored by ALI-ABA) **Advanced Estate Planning Techniques**, Grand Wallea Resort and Spa, Maui, Hawaii. Telephone: (800) CLE-NEWS.

Special thanks to retiring board members

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