

2017 HECKERLING HIGHLIGHTS

Rachel D. Burke
Kristopher C. Morin
FUREY, DOOLAN & ABELL, LLP
7600 WISCONSIN AVENUE, SUITE 600
BETHESDA, MD 20814

The presentation topics for the 2017 Heckerling Institute were finalized in August 2016 (as the Prop. Regs. under § 2704 were issued) and the presenters' written materials were due on November 7, 2016 – the day before the U.S. Presidential and Congressional elections. Despite the curve ball that was thrown to the presenters, they did a wonderful job pivoting on their topics as needed and opining about the future of the U.S. transfer tax system. As the audience, we could not help but listen with an ear toward items that will be relevant to our industry regardless of whether or not there is a federal estate tax. We have tried to highlight those items below.

The complete list of programs can be found at:

http://media.law.miami.edu/heckerling/2017/Brochure/51_Heckerling_Brochure.pdf.

1. Forecasting 2017 Tax Legislation and Regulation

Recent Developments 2016 (Part I) (Belcher, Aucutt, Hughes, and Porter)

Recent Developments 2016 (Part II) (Belcher, Donaldson, Heller, and Hughes)

- a. **Federal Tax Legislation:** Many panelists opined on both the Trump proposals and the Republican Blueprint from June 2016 (“A Better Way for Tax Reform”), which can be found at www.donaldjtrump.com/policies/tax-plan and <https://abetterway.speaker.gov/assets/pdf/ABetterWay-Tax-PolicyPaper.pdf>

The general consensus seemed to be the following forecast:

- i. Estate & GST Tax Repeal
 1. Repeal
 - a. Many presenters expected a full estate tax repeal in 2017.
 - b. If achieved through Budget Reconciliation (likely), there will be a 10-year phase-out.
 2. Replacement with carryover basis regime?
 - a. Trump's website suggests a repeal of “death tax” and a capital gains tax for \$10M and up – with an exception for small businesses and family farms. If there is no exemption from capital gains, estates under \$10M may fair worse under the carryover basis regime.
 - b. Presenters commented that estate tax does not pay for the current stepped-up basis regime.

- c. Aucutt and others commented that a carryover basis regime could be problematic because most Americans don't do a very good job keeping basis records.
 - 3. Might a new tax system look like the Canadian System?
 - a. Canada imposes a capital gains tax at time of gift or death.
 - b. The Canadian system still has valuation issues (i.e. 2704 type matters).
 - c. Canadian planners focus on discounting values to minimize gain and planning with tax-free dispositions such as life insurance.
 - d. Aucutt commented that the only reason for so much discussion about the Canadian system is that we have no idea what will happen and we are desperate...
- ii. Gift Tax Remains
 - 1. The Trump proposal and Republican Blue Print are both curiously silent about repealing the gift tax. Intentional?
 - 2. Panelists suggested that this is because the gift tax is a backstop to the income tax. The gift tax prevents shifting income taxation to lower brackets. However, with compressed income tax brackets and large gift tax exemptions the backstop argument may be less significant.
- iii. Income Tax Changes
 - 1. Trump proposals
 - a. Establish 3 income tax brackets
 - b. Tax carried interest at ordinary income tax rates
 - c. Repeal 3.8% net investment income surtax
 - d. Increase standard deductions
 - e. Favor mortgage interest, charitable, and education deductions or credits
 - 2. Republican Blueprint proposals
 - a. Repeal AMT
 - b. Establish 3 income tax brackets
 - c. Reduced tax on investment income
 - d. Postcard return
 - e. Larger standard deductions

b. **State Tax Legislation:** In October 2016, New Jersey repealed its estate tax effective 1/1/18. For 2017, the NJ exemption goes from \$675K to \$2M.

c. Regulatory Developments

- i. Priority Guidance Plan (available at https://www.irs.gov/pub/irs-utl/2016-2017_pgp_initial.pdf)
 - 1. Guidance on qualified contingencies of charitable remainder annuity trusts under § 664.
 - 2. Guidance on definition of income for spousal support trusts under § 682.13.

3. Grantor trust assets at death under § 1014.
4. Final Regulations under §§ 1014(f) and 6035 regarding consistent basis reporting between estate and person acquiring property from decedent. Proposed and Temporary Regulations were published on March 4, 2016.
5. Revenue procedure under § 2010(c) regarding the validity of a QTIP election on an estate tax return filed only to elect portability.
6. Guidance on the valuation of promissory notes for transfer tax purposes under §§ 2031, 2033, 2512, and 7872.
7. Final Regulations under § 2032(a) regarding imposition of restrictions on estate assets during the six month alternate valuation period. Proposed Regulations were published on November 18, 2011.
8. Guidance under § 2053 regarding personal guarantees and the application of present value concepts in determining the deductible amount of expenses and claims against the estate.
9. Guidance on the gift tax effect of defined value formula clauses under §§ 2512 and 2511.
10. Guidance under §§ 2522 and 2055 regarding the tax impact of certain irregularities in the administration of split-interest charitable trusts.
11. Regulations under § 2704 regarding restrictions on the liquidation of an interest in certain corporations and partnerships. (See below)
12. Guidance under § 2801 regarding the tax imposed on U.S. citizens and residents who receive gifts or bequests from certain expatriates. Proposed Regulations were published on September 10, 2015.

But, see memo from Reince Preibus (January 20, 2017) issuing regulatory freeze calling for (i) no new regulation unless approved by a Trump appointee; (ii) prior unpublished regulations to be withdrawn; and (ii) 60-day delay on the effective date of published Regs that are not effective yet. <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>

ii. Proposed Regulations under § 2704

1. Section 2704 was enacted in 1990 and the current Regs under 2704 were enacted in 1992.
2. 2704(a) and 2704(b) address the treatment of (i) lapsed voting or liquidation rights and (ii) certain disregarded restrictions, respectively. 2704(b)(4) gives IRS authority to provide other disregarded restrictions in Regs.
3. 2704 Regs were enacted in 1992 in response to Harrison (TC Memo 1987-8 in which a decedent's liquidation right as GP lapsed at death). Partnership and LLC planning has substantially evolved since 1992.
4. 2704 Prop. Regs issued on August 2, 2016 aimed to reduce valuation discounts for intra-family transfers of interests in corporations, partnerships or LLCs. Response to Harrison and Kerr (292 F.3d 490

in which charitable non-family membership interest avoided application of 2704(b)).

5. The major provisions:
 - a. Defines “covered entities” broadly as business entities controlled by a family.
 - b. 2704(a) lapse
 - i. Applies to transfers to “assignees.”
 - ii. Subject to a 3-year lookback rule.
 - c. 2704(b) restrictions
 - i. “Applicable restrictions” re ability to force liquidation of an entity.
 - ii. “Disregarded restrictions” re ability to force the liquidation or redemption of *an interest in* the entity – do you read in a deemed put right? What if agreement is silent?
 - iii. Addresses favorable state laws: State law default restrictions are ignored for valuation purposes.
 - iv. Non-family members interest will be disregarded if:
 1. Interest is held less than 3 years
 2. Interest is less than 10%
 3. All non-family members interests amount to less than 20%
 4. Non-family member does not have put right to receive “minimum value” on no more than 6 months notice
 - v. Safe Harbor for “commercially reasonable restriction”
6. Proposed Regs received 10,000 comments
7. December 1st hearing: 6.5 hours, 36 witnesses (many business owners)
8. Important Takeaways
 - a. For transaction after August 2, 2016, you should disclose that you are taking a position contrary to Proposed Regs.
 - b. 3-year rule and lapses: not intended to be retroactive. Final Regs will make clear that it is not effective for transfers made before regulations became effective.
 - c. Effective dates:
 - i. For 2704(a) lapses = date of publication
 - ii. 2704(b) = date of publication
 - iii. Disregarded transactions = 30 days after publication because it is deemed a legislative regulation
9. Future for 2704 Regs in light of election
 - a. Panelists indicated that the concepts behind Proposed 2704 Regs will be relevant even if the estate tax is repealed.
 - b. Valuation discounts are still important for gift tax and capital gains tax planning.
 - c. If there is a new carryover basis regime at death, then planners may use valuation discounts to lessen the capital gains hit.

2. Do No Harm Planning

Placebo Planning (Pennell)

Getting Gratify GRAT Results (McCaffrey)

Settlements and Modifications (Willms)

- a. Do Not Take On Planning That Involves The Payment of Current Gift Tax but continue to shift appreciation out of estate in tax-free manners.
- b. Lifetime Giving with GRATs
 - i. Good technique when there is a lot of uncertainty.
 - ii. Does not trigger gift tax and works in a low interest environment.
 - iii. Requirements for GRAT
 1. Annuity payment at least once a year
 - a. No later than 105 days after the anniversary date of the creation of the trust if based on the anniversary date.
 - b. No later than the date on which the trustee must file the trust's income tax return if based on the taxable year of the trust.
 2. Cannot use note or financial arrangement to pay the annuity
 - a. Does not prevent the use of notes issued by other persons to satisfy the payment obligation (*e.g.* a note issue by the grantor's spouse, by another trust, etc.) or borrowing from third parties to finance the payments.
 - b. Beware of the step transaction doctrine. *Ex.* GRAT cannot borrow from a bank to pay annuity and then borrow from the grantor to repay the bank.
 3. Annuity must be fixed dollar or percentage
 4. Adjustment clause must satisfy regulation (See Treas. Reg. § 25.2702-3(b)(2) citing Treas. Reg. § 1.664-2(1)(1)(iii))
 5. Must prohibit additional contributions to the trust
 6. Must prohibit commutation
 7. Must prohibit payment to anyone other than Grantor before the qualified term
 8. Term of annuity must be (i) for life of annuitant, (ii) term of years, or (iii) the shorter of (i) and (ii)
 - iv. How to draft GRAT to ensure compliance?
 1. Only the provisions mandated by the Regulations are required. However, on audit, the IRS occasionally takes the position that a GRAT does not provide a qualified annuity payment if there has been an actual failure to comply with one of the GRAT requirements.
 2. Include a clause to address an inadvertent failure to pay annuity (*e.g.* portion of GRAT will terminate to the extent an annuity payment is not made on time).

- a. Provides a basis for the argument that the annuity was in fact paid because the trustee was holding the trust assets merely as a nominee.
 - 3. Include a clause that any inadvertent addition is required to be held in a new trust.
- v. Things to consider
 - 1. In light of the possibility of repeal of estate tax, consider having a hybrid DAPT (Delaware Asset Protection Trust) as the recipient for the GRAT remainder so that grantor can access the assets.
 - 2. If funding GRAT with hard to value assets, define annuity by formula not by fixed amounts.
 - 3. Make sure to file a gift tax return when you create the GRAT.
 - a. You want the SOL to run on the valuation and other positions taken in the GRAT.
 - b. Be sure to include all gifts, including charitable gifts. If you do not include all gifts for the year and GRAT exceeds 25% of gifts made during the year, the SOL will increase to 6 years.
 - 4. Reduce mortality risk (risk of grantor dying while GRAT is in existence) by using short term GRATs. Short term GRATs also reduce the risk of poor performing years bringing down good performing years.
 - 5. Use an increasing annuity payment.
 - a. Increasing annuity payments will produce more value for the beneficiaries at the end of the term.
 - b. Suggest 120% per year: any portion of a required annuity payment that exceeds 120% of the amount payable in the prior year will not be treated as a qualified annuity interest.
 - 6. Consider using multiple GRATs for multiple assets. The poor performing assets won't drag down the good performing assets.
 - 7. If GRAT underperforms in early years, consider having the Grantor repurchase the assets (can use a note if insufficient cash) and then re-GRAT the purchased assets.
 - 8. If GRAT over performs in early years, consider purchasing assets as well (*e.g.* swap securities for cash).
 - 9. If mortality is certain, consider having an entity owned by the grantor purchase the remainder interest for its then actuarial value.
 - a. The purchase will result in the GRAT property being included in Grantor's estate, but the purchase will also deplete Grantor's gross estate by the amount of the purchase price.
 - b. Have an entity purchase the interest rather than the Grantor herself to avoid the argument that there has been commutation (after the purchase, the right to receive the annuity and the remainder interest are held by the same person).

c. Testamentary Plans

i. Clayton QTIPs

- ii. QTIPable Trusts
 1. Provide flexibility.
 2. Give the ability after the fact to determine if credit shelter trust or QTIP is better.
 3. Give a mechanism to get a basis step up on death of surviving spouse by leaving assets in the QTIP.
 4. Might be better in a post-estate tax repeal world because you will not be making a QTIP election if there is no estate tax.

- d. Drafting Suggestions
 - i. Consider 3rd party with power to grant GPOAs for flexibility
 - ii. Use GST trusts when possible
 - iii. Use Grantor Trusts when possible

3. Estate Planning Techniques That Shift Appreciation

Warming Up to Preferred Partnership Freezes (Angkatavanich)

Frozen Tasting Menu (McCaffrey, Angkatavich, and Eastland)

Critical Pressure Points with Sophisticated Estate Plans (Porter and Eastland)

- a. Freeze Techniques: Gifts, GRATs (see above), Sales to Grantor Trusts, Preferred Partnerships
- b. Partnership Planning
 - i. Preferred Partnership or “Freeze Partnership”
 1. Preferred partner receives a fixed stream of income (and liquidation preference) from a preferred interest. Future growth of preferred interest is frozen to the fixed rate of return. Preferred interest typically structured as a “qualified payment right” under 2701. Better to structure the preferred interest as non-voting to avoid 2036 issues.
 2. Other partners receive common interests – they receive future growth less preferred coupon payment.
 - ii. Consider Reverse Freezes – generally not subject to 2701
- c. Sales to Intentionally Defective Grantor Trusts (IDGTs)
 - i. Transfers using Sales to IDGTs are complete for estate and gift tax purposes but disregarded for income tax purposes
 - ii. Continue to be a valuable tool as you can shift appreciation without incurring a gift tax
 - iii. Grantor typically sell assets to the grantor trust in exchange for a promissory note. For the Grantor’s estate – the value is frozen at the balance of the unpaid note.
 - iv. Benefit: unlike a GRAT, the IDGT can be made GST exempt from creation

- v. *See* Woebli cases which resulted in March 2016 favorable settlements with IRS. Underlying issue involved a \$59 million of stock (Carmex) sale to a trust (with 10% seed money) using a formula clause. IRS attacked the valuation and alleged that 2702 applied resulting in a note with zero value. The IRS also said that 2036 and 2038 applied. The settlement appears to center around the valuation issue and the IRS dropped the 2702, 2036, and 2038 arguments.
- d. Consider combining with GRATs, QTIPs, GST Exempt Trusts, CLATs, etc.
 - i. LAIDGT: Leveraged Asset Intentionally Defective Grantor Trust
 - ii. LAGRAT: Leveraged Asset Grantor Retained Annuity Trust
- e. Consider all of the above in light of Prop. Regs. under Section 2704 and gift tax disclosure requirements

4. Basis Consistency

The Executor's Job Gets Tougher (Akers)

Recent Developments Part 3 (Belcher, Hughes and Heller)

- a. Adopted in Section 2004 of the Surface and Transportation and Veterans Health Care Choice Improvement Act of 2015.
- b. Applies to returns filed after July 31, 2015.
 - i. Provided temporary relief: persons required to file an information statement under 6035 need not do so until June 30, 2016 (See Notice 2016-27).
- c. Official revised Instructions to Form 8971 were released on October 13, 2016 (with a September 2016 date).
- d. Prior to 1014(f), taxpayers could outmaneuver the IRS.
 - i. A low value could be used on the estate tax return, but the beneficiary could use a higher value when selling the asset after the SOL (arguing that the value on the return was too low).
 - ii. After 1014(f), basis is limited to the “finally determined” value for estate tax purposes.
- e. When is it “finally determined?”
 - i. When the value of the asset as shown on a 706 is not contested by the IRS.
 - ii. When the value is set by the IRS and is not contested by the executor.
 - iii. When the value is determined by the court.
 - iv. If the value has not been “finally determined,” it is the value provided in a statement to the decedent’s recipients.
- f. Filing
 - i. Under 6035, the executor must furnish this notice to beneficiaries within 30 days of the return being filed.

1. Beneficiaries only receive Schedule A, not Form 8971.
- ii. Executor must submit Form 8971 with a copy of each complete Schedule A to the IRS within 30 days after the due date. If the return is filed late, must submit within 30 days of the filing date.
- iii. Must be filed separately, not with the 706.
- iv. If values are adjusted, a Supplemental Form 8971 and Schedule As must be filed with the IRS within 30 days after the adjustment, and a Supplemental Schedule A must be given to each beneficiary within 30 days of the adjustment.

g. Recent Developments

i. Form Problems

1. Schedule A indicates that the beneficiary has received property, when in fact he or she probably has yet to receive it.
2. Beneficiary is getting a list of assets of which he or she may receive some or none.
3. What if beneficiary is a trust that has not yet been created?
 - a. Suggest that you should look through to the beneficiaries.
 - b. If trust has been created, trustee is the recipient.

ii. Only applies to those who have an estate tax.

1. Estates below the threshold amount or marital property have no duty of consistency.

iii. Must list all assets, not just those that are subject to estate taxes.

1. You must check a box for assets that increase estate tax. If you check yes, basis consistency rules apply.
2. Basis consistency rules do not apply to marital and charitable deduction property and tangible property for which an appraisal is not needed (under \$3,000).

iv. After-discovered or omitted property that is not reported on a supplemental estate tax return before the SOL period expires will have a basis of ZERO.

1. But what about cash?
2. Unfairly punishing beneficiary for error and inaction by the executor. In addition, beneficiary is not involved in the process at all.
3. ACTEC issued strong comments opposing this harsh result.

v. Under the Proposed Regulations, cash, IRD, tangible personal property for which an appraisal is not required, and assets sold do not need to be reported on Form 8971 or Schedule A.

vi. Both executor and preparer must sign Form 8971.

vii. If the executor is a beneficiary, he has to send himself a Form 8971 and Schedule A.

viii. If the beneficiary's distribution has not been funded when the Form 8971 is filed, the executor "must list all items of property that could be used, in whole or in part, to fund the beneficiary's distribution on that beneficiary's Schedule A."

1. The final Instructions state that a supplemental Form 8971 and Schedule A "may, but aren't required to, be filed once the distribution to each such beneficiary has been made."

- ix. If you make a gift of inherited property, you must give a Schedule A to that recipient and file it with the IRS.

5. **Fiduciary Income Tax Matters**

Reprise “The State Taxation of Trust Income Five Years Later (Nenno)

Distilling the Essence of Subchapter J: Fiduciary Income Tax Essentials for Estate Planners (Willms, Cushing, and Goldsbury)

- a. Income Tax Result of “Fixing Your Trust”
 - i. Bosch rule: taxing authorities not required to follow holding of a lower court.
 - ii. Construction/reformation instead of modification in order to have relation back to time of formation.
 - iii. Decanting
 - 1. Grantor Trust to Non-Grantor Trust
 - 2. Non-Grantor Trust to Grantor Trust
 - 3. Cottage Savings
 - 4. Partnership Rule Violation?
- b. State Income Tax Planning
 - i. ING trusts: income non-grantor trusts
 - 1. Used to save state income taxes without a completed gift to trust.
 - 2. Very fact specific because it is hard to have an incomplete gift and also have non-grantor trust status.
 - 3. PLR 201642019: revoked a 2014 ING ruling.
 - ii. State Income Taxation
 - 1. Kaestner v NC, 2015 WL 1880607 (NC): The state fiduciary income tax statute held unconstitutional by NC Court of Appeals. N.C.G.S. Section 105-160.2 provided that a tax would be imposed on taxable income of estate and trusts that are “for the benefit of a resident of this State.” The trust in question did not have a NC trustee and custody of all assets was kept outside of NC. The trust challenged the basis for taxation under the Commerce Clause and NC Constitution. NC held the statute unconstitutional because there were not sufficient minimum contacts.
 - 2. Bank of America v. Comr. of Revenue, 2016 WL 3658862 (Mass). MA’s Supreme Judicial Court upheld a decision of the Appellate Tax Board finding the Bank of America, as trustee of 34 inter vivos trusts, was an “inhabitant” of Massachusetts for the purposes of applying a Massachusetts fiduciary income tax to those trusts.
 - 3. Nenno survey on state income taxation:
www.actec.org/assets/1/6/Nenno_state_nongrantor_tax_survey.pdf
 - iii. Trust as “Grantor” of a Trust
 - 1. PLR 201633021: Trust 1 was partially decanted to Trust 2 with same beneficiaries. Trust 1 retained right to withdraw Trust 2’s income

(which was defined to include capital gains). PLR finds that Trust 1 is grantor for income tax purposes of Trust 2. PLR opens the door for a trust to assume the tax liability of another trust –for example, could GST Non-Exempt Trust be treated as grantor of GST Exempt Trust and pay income taxes associated with GST Exempt Trust?

6. Portability (Still Important?)

Portability: Lots of Questions, Few Answers (Law & Zaritsky)

- a. The panelists indicated that portability will remain important, no matter what happens with the estate tax – they did not indicate why. Perhaps it is due to the likelihood that (1) the gift tax will remain and/or (2) an estate tax “sunset.”
- b. The portability election is made on a complete and properly prepared Form 706.
 - i. Must be filed within 9-month period (or any applicable extension).
 - ii. Only required when 6018 estate tax is required.
- c. Important regulations
 - i. Reg. § 20.2010-2 (applies to the first deceased spouse)
 - ii. Reg. § 20.2010-3 (applies to the second deceased spouse)
 - iii. Reg. § 25.2505-2 (gift tax Regulation that applies to the deceased spouse) Reg. § 25.2505-3 (gift tax Regulation that applies to the second deceased spouse)
 - iv. If there is a difference between the Code and the Regulations, follow the Regulations.
- d. Who can make the election?
 - i. Appointed executors
 - ii. Non-appointed executors
 1. if there is no executor, than any person in actual or constructive possession of any property of the decedent
 - iii. Appointed executor supersedes non-appointed executor as to the right to file Form 706.
- e. What qualifies as a complete and properly prepared return?
 - i. Return with mistakes can still qualify. Return does not have to be perfect, but there must be a good faith effort.
 - ii. Must be signed by executor and preparer.
 - iii. No need to provide valuations of assets if only filing 706 for portability purposes and all property is passing to spouse and/or charities and gross estate is below filing threshold. If estate is greater than threshold, even if everything passes to spouse, must provide values of assets and appraisals.
 - iv. Regulations require you to value marital share if the value of the marital share will affect other distributions.
- f. What if 706 is not filed on time?

- i. 9100 relief will be granted if you are below the threshold.
 - ii. If you are over the threshold, no relief will be granted.
- g. Use by surviving spouse
 - i. Can only use DSUE of your last deceased spouse.
 - ii. If client is going to remarry, consider using unused DSUE to fund an irrevocable trust.
 - iii. Black Widow(er) issue
- h. Audits: IRS can audit return of the deceased spouse through the period of time during which the surviving spouse's return can be audited, but can only audit the amount of the unused DSUE, not the entire return.
- i. QDOTs
 - i. Do not mesh well with portability.
 - ii. Side note: what would you advise a surviving spouse with respect to pursuing citizenship if estate tax is likely to be repealed?
- j. GST
 - i. Not portable.
 - ii. If you want to use deceased spouse's unused GST amount, need to create a reverse QTIP for the surviving spouse in the amount of the unused GST exemption.
- k. Planning
 - i. When there will be no estate tax, a simple portability plan (a plan where a full QTIP trust is funded) appears to be better than the traditional plan (a plan with non-marital and marital trusts).
 - ii. When an estate will be subject to federal estate tax, the traditional plan is better than the simple portability plan.
 - 1. If the portability plan is supplemented by making gifts soon after the first death, however, this "hybrid approach" is better than the traditional plan.
 - iii. When there is state estate tax, use of the state estate tax exemption is almost always better.
 - iv. Small estate (e.g. \$5 million)
 - 1. Might be better to use a full QTIP trust on the first death
 - 2. Simple
 - 3. Defers all Federal estate taxes until the second death
 - 4. Double step up in basis
 - v. Medium estate (greater than exemption, but by no more than 2x, e.g. \$10 million)
 - 1. Portability plan is better in first 3 years, traditional plan is better after the first 3 years.
 - vi. Large estate (e.g. \$20 million+)
 - 1. Traditional plan is best

2. When there is state estate tax, hybrid portability plan with surviving spouse gift plan is best
- vii. Disclaimer vs. QTIP
 1. In the case of disclaimers, only the surviving spouse can make the disclaimer.
 2. Disclaimers must be made within 9 months vs. up to 15 months for a partial QTIP election (if there is an extension).
 3. QTIP trust can give surviving spouse a limited power of appointment.
- l. Rev. Proc. 2016-49
 - i. Modified and superseded Rev. Proc. 2001-38 (which provided a procedure by which the IRS would disregard a QTIP election where the election was not necessary to reduce estate taxes).
 - ii. Holds that so long as the taxpayer elects portability, the use of a full QTIP trust would be respected.
- m. Portability and Marital Agreements: make sure portability is addressed in the prenuptial agreement.

7. Fiduciary Litigation & Liability

Non-Tax Developments Panel (Penell and Cohen)

With Great Power Comes Great Liability (Wolven)

Review of Past Year's Significant, Curious or Downright Fascinating Fiduciary Cases (Fitzsimmons)

Mom Wanted Me to Have It (Bear)

Impact Investing (Gary)

- a. Loans to Beneficiaries: whether tax motivated or “chicken distributions”
 - i. Checklist:
 1. Permitted under instrument or statute? Security requirement, etc.?
 2. Create a concentration?
 3. Interest rate compared to other investments?
 4. Consistent with settlor objectives?
 5. Charge beneficiary's share?
- b. Swap Powers & Hard to Value Assets
 - i. Benson v. Rosenthal, 2016 U.S. Dist. LEXIS 33909: lawsuit regarding grantor's ability to substitute a promissory note for non-voting interests in LLCs owning New Orleans Saints and Pelicans.
 - ii. Schinazi v Eden, A16A0769 (Ga. Court of Appeals, 2016): swap of partnership interests in trust for promissory note unsuccessful for failing to comply with requirements of partnership agreement.

- c. Investment Matters
 - i. Adams v. Regions Bank, 2016 U.S. Dist. LEXIS 1027 (S.D. Miss 2016): trustee did not breach duty to diversify when trust terms authorized retention and beneficiary signed retention letter.
 - ii. Glass v. SunTrust, 2016 Tenn. App. LEXIS 305 (2016): trustee not liable for diminution in assets during administration when beneficiary elects distribution in kind.

- d. Family Businesses Matters
 - i. Rollins v. Rollins, 2016 Ga. App. LEXIS 254 (2016): trustees must account for corporate level activities of entities in trust where they have individual control over the entities.
 - ii. Osborn v. Griffin, Civil Action No, 2011-89 & 2013-32 (E.D. Kentucky 2014): brothers found to abuse multiple fiduciary offices by preventing sisters from acquiring interest in family company and related properties when parents' estate plan left it equally to all siblings.

- e. Fiduciary Compensation
 - i. Rauschenberg Foundation v. Grutman, 2016 Fla. App. LEXIS 181 (2016): during period of estate administration, estate/revocable trust assets increased from \$606M to \$2.2B. Court granted trustee \$24.6M in "reasonable compensation." Statute was silent as to "reasonable compensation" measure and Court applied the factors under West Coast Hospital Assn., 100 So. 2d 807 (1950) which is based, in part, on the amount of capital and income received and disbursed.

- f. Duty to Account/Disclose
 - i. Schrage v. Seberger, 2016 Ind. App. LEXIS 62 (2016): specific distributee is not a beneficiary under UTC entitled to a complete copy of trust.
 - ii. Hilgendorf v. Coleman, 2016 Fla. App. LEXIS 15934 (2016): remainder beneficiary may not demand accounting of revocable trust during life of settlor absent claims of breach of trust affecting interest of settlor.
 - iii. In re Estate of Lottie Dixon, 2016 Pa. Dist. & County Dec. LEXIS 433 (2016): trustee only owed duty to settlor of revocable trust during settlor's lifetime.
 - iv. Glass v. SunTrust, 2016 Tenn. App. LEXIS (2016): durable power of attorney authorizing attorney-in-fact to fund revocable trust does not give rise to a duty to fund a revocable trust.

- g. Spousal Rights & Expectancy Rights
 - i. Pfannensteihl v. Pfannensteihl (MA): MA Supreme Court reversed decision of MA Appeals Court which had upheld a probate and family court judge's decision to award wife 60% of husband's interest in the present value of discretionary spendthrift trust. Supreme Court held that the interest was too speculative and was a mere expectancy interest.
 - ii. Desertion and Adultery

1. Lovett v. Peterson, 2016 Mich. App. LEXIS 1053 (2016): emotional absence does not eliminate spousal election right.
2. King v. Nash, 2016 Mich. App. LEXIS 911 (2016): physical separation not enough to establish abandonment that would bar intestate inheritance.
3. Estate of Telerico, 2016 PA Super 66 (2016): extramarital affair causes loss of spousal rights to estate.
4. Estes v Young, 2016 Miss. App. LEXIS 225 (2016): desertion and abandonment extinguishes intestate rights.

8. Spousal Issues & Asset Protection (Non Tax Reasons for Estate Planning)

Estate Planning Through An Asset Protection Lens (Rothschild)

Protecting the Estate from In-Laws and Other Predator (Rothschild, Rubin, and Stone)

- a. Retirement Accounts in 1st and 2nd marriages
 - i. Congress may attempt to impose 5-year stretch limit
 1. Exemption for minors under 21, disabled persons, and beneficiaries less than 10 years younger than decedent.
 - ii. IRAs governed by state law; 401k and other employer plans are governed by federal law
 - iii. Divorce
 1. Need a Qualified Domestic Relations Order (a “QDRO”) with precise requirements to divide 401ks.
 2. Do not need QDRO for IRAs, can divide by property settlement agreement.
 - iv. Spousal rights
 1. Spouse is entitled to 100% of 401ks (unless waived by surviving spouse)
 - a. Prenuptial agreement is usually not effective as a waiver because the parties were not “married” at the time of the prenuptial agreement.
 2. Not entitled to IRAs
 - v. Rollover
 1. ONLY surviving spouse can rollover.
 2. Do not do rollover for spouse who is less than 59.5 years and needs the money because of the 10% penalty tax. Instead, rollover everything other than what is need by the spouse before age 59.5.
 3. After spouse does a rollover, the spouse can name his or her own beneficiaries.
 4. You have 60 days to rollover; however, there are now 11 exceptions to the 60-day rule.
 - vi. Think hard before naming estate as beneficiary. Must liquidate w/in 5 years.
 - vii. Plan to keep IRA as large as possible for as long as possible.
 1. General rule is that you stretch it out for the life expectancy of the beneficiary.

2. If you name the trust as the beneficiary, may have to use the shortest life expectancy of the trust beneficiaries.
- b. Drafting trusts with a goal of asset protection
 - i. Make sure to consider a number of issues when drafting trusts (*e.g.* age of beneficiaries, marital status, state of domicile, taxes, etc.)
 - ii. Completely discretionary trusts offer the greatest creditor protection.
 - iii. Consider pot trusts to make interest more speculative.
 - iv. Consider having an independent trustee.
 - v. Avoid ascertainable standards and 5/5 powers.
 - c. Specific Spousal Issues
 - i. Disclose future inheritances in prenuptial agreements.
 - ii. Clients should protect their children because it is easy to convert/commingle inherited property.
 - iii. Family lawyers are actively studying up on how to attack trusts.
 - iv. Should a child really be trustee for himself/herself?
 1. Consider giving a child a removal and replacement power instead.
 2. The less strings a child has the better.
 - v. Bruce Stone suggested incorporating language into a trust making a child's distributions contingent upon their spouse waiving all rights to the trust.
 - vi. If child has a role in a family business held by a trust then it could be subject to spousal claims.
 - vii. Think about gifts for estate planning purposes (See Nelson v. Nelson – a Florida case in which family home in inter vivos QTIP was not a marital asset because it was part of an irrevocable inter vivos gift).
 - viii. Consider Pfannensteihl (MA case cited above)
 - ix. A number of lecturers cited the large number of cases citing desertion, adultery, etc. as a reason to overturn intestate share, elective share, etc. (See Section 7g above)

9. Technology Matters

Wrap-Up: The 2012 Act in a Technologically Advancing World (Harrison)
Planning for Privacy in a Public Work (Bergner, Coleman, and Lanterman)
Planning for Digital Property (Prangley, Coventry, Kirkland, and Lamm)

- a. Electronic Wills Act
 - i. Act provides that testator can now execute will online without witnesses being in the same room.
 - ii. Being introduced in Florida Senate bill 206. Also being considered in NH, VA, and NV
- b. Michigan case: will that was not signed by testator was held to be harmless error (In re Attia Estate)
- c. Uniform Fiduciary Access to Digital Assets Act

10. International Issues

Around the World in 80 Donations (Bjorklund)

Tax and Estate Planning Considerations for Foreign Persons Owning U.S. Assets (Graham)

International Recent Developments (Bowman, Moore, and Sanna)

- a. No charitable deduction for gifts to foreign charities.
- b. Solution is using “American Friends of” groups, but make sure it is not a conduit for international charity.
- c. Planning for foreign persons owning US assets and US persons owning foreign assets
 - i. Consider common law v. civil law v. Sharia law issues (over 75% are civil law systems)
 - ii. Look for treaties to alleviate double tax
 - iii. Consider income tax issues
 1. Sometimes clients do not recognize that they are US citizens by birth
 2. If non-US person
 - a. Does the person have effectively connected income (US trade or business)?
 - b. FATF income (US sourced income from dividends, interest, rents, royalties, etc.)?
 - iv. Estate tax matters
 1. Taxation of U.S. Situs Assets (Non-Resident) vs world-wide assets (Resident)
 2. Sometimes you want to be US resident to get full estate tax exemption