

Side Bar Conversations

Internet security becoming a big issue. Any client sensitive information needs to be encrypted, somehow. One lawyer pdfs and adds a password to anything having sensitive client information including name and address of client. Ultimately, we may have to move to systems like the banks and financial institutions use where you sign up as a users of a destination "vault" of sorts. We've seen how these work and they are inconvenient but it may be demanded as time moves on...otherwise, there could be liability for not doing so. The days of easy emails back and forth may be coming to an end in our profession...[Comment: I've always been very sensitive to what is sent (content wise) out, but, we can't control what the client sends back to us. Do we have a duty to protect their communications back to us? Probably so.]

Subject: Transferring assets to a spouse who expect to die first to get step up in basis...

Congress was concerned about one spouse moving low basis assets to spouse's name and getting step up when spouse dies...reverse contemplation of death rule...

If surviving spouse receives assets back directly or indirectly within one year after transfers...then "contemplation of death" rule applies--1014(e)--but not really, it's simply a gift within one year

of death rule...

Wealthy people have a lot of capital gain potential...if can generate basis by transferring to a terminally ill spouse why not try it...? So says Zaritsky.

But, better be sure transferee has spouse no creditors, and be sure you are getting property back

It would be best to leave to Martha and she leaves to kids...no 1014(e) here and works a basis step up...but maybe if only bring up to \$5.43 Million...get the basis step up and to kids. The rest you would want to qualify for marital deduction.

Basis step up technique: Spouse who is going to die gives all high basis property to spouse.

What if property comes back to a trust of which survivor is a beneficiary?...no regs on this issue says Zaritsky.

Reasonable answer to Zaritsky...if comes back in such a trust then basis step up should be disallowed to extent of proportionate interest in trust...income beneficiary, hems...maybe can quantify...but what if discretionary?...there's a value there but don't know how much for purposes of allocation of basis...

If doing planning and do intentional gift within one year of death...

a. Make sure you've not provided a living will...keep alive...use a medical directive...hold on for a day or

two...time sensitive planning think it through...give someone discretion...don't make it your decision and keep it from being your decision to protect you, the advisor...

b. Consider a bifurcated marital share...I leave assets to my children non-marital trust to extent they turn out to be less within one year from date of transfer from my spouse and the rest to spouse...this should work to guarantee basis step up.

c. Say you use a trust protector...add spouse to a trust later set up for kids? Pre-arrangement?...do a good job of not documenting pre-arrangement...Don't say in email or letter you can add spouse= in later after statute of limitations...IRS good at finding facts...Confidential memos get handed to you by the government

d. But Zaritsky thinks it could work...don't add spouse in until statute runs...its the income tax statute you are worried about...a month or two after statute runs...you could sell assets right away and buy new assets...can by same assets back...loss sale rules not a problem...recognition of gain is fine...so sell and then consider adding back spouse as a beneficiary...that starts statute...add back 3 years and 2 months later after sale by trust protector...need to prove lack of pre-arrangement. Under Wiley case SD NY it may be harder to prove lack of pre-arrangement. Lack of being subordinate or not related may not be enough...add back after that statute

expires...even if pre-arranged, statute will protect.

Subject: Holding period of inherited property for LTCG purposes

Inherited property...all Long Term Capital Gain...even if sell a day later regardless of holding period of deceased person...but person who sells has to be the person who inherited the property...if gift to someone else...then LTCG rule does not apply, seller needs 1 year holding period! No LTCG...only person who got it from decedent gets that rule so if inherited and pass to child and child sells, must hold for one year and a day. Only inheritor gets special rule. 1015, 1022

Subject: Portability.

According to Zaritsky: Should be the default planning option today...it's what client had before came into the office. Rule "Do no harm" says Sam Donaldson...Client will get full use of unused exemption and full basis step up at date of first spouse's death. Walked in with a pretty good estate plan. If going to change it, better be better...

DSUE amount. Amount unused by first spouse to die...carries over...to ss...step up in basis...at date of first to die's death...if goes to ss and all assets go too, she gets a step up when she dies...leave all assets to her...concept of double step up...two step ups...payment of income tax a tremendous burden...then we hear "what about using a credit shelter and it

grows so much to avoid estate taxes later?..."

Do math first, double step up...look at impact...if a client never above \$5 million always go for double step up...there may be non-tax reasons...but for tax reasons look to double...what about "inbetweeners?" Those between \$5M and \$10 M? Why not use for pure tax purposes...may be non-tax reasons to use other plans...if GST...non-tax reason...collateral...less than \$5 Million not a huge issue...\$10 Million...becomes more of an issue...but portability plan can be more than outright...can use QTIP trust to get to same place roughly as portability...can still be a sophisticated plan

...to avoid GST issue consider QTIP trust with reverse QTIP election. But includable back in estate? Say both spouses have 10 million. All assets to QTIP and do reverse QTIP election for \$5 Million...ss \$5M, if day after husband dies and puts into an IGT as= irrevoc gift to grantor trust then just like a credit shelter trust and preserves growth of exclusion...subsequent gift the very next day to keep growth out of estate

...still see a lot of these credit shelter trust. How tinker with them to get double step up?—:

- a. Trustee can give assets to ss
- b. Independent trust protector to create a GPOA in ss under 2041
- c. Contingent GPOA, to the extent any

unused exclusion certain part subject to contingent GPOA

d. Delaware Tax Trap...trigger in those states that allow it

Of the four, preferred way...for Howard...he first says all flawed...preferred way...combination of having formula GPOA but having it exclude certain factors from formula and give trust protector ability to grant power...get part automatically and if trust protector good at job get it all or nearly all...

Independent trustee take property and distribute to ss; no brainer..but find the person who will do it--good luck...trust companies that won't do it...many won't jump at that to get a step up in basis...be sure they act and do before person dies...no assets protection issues with respect to ss-- those are the pros and cons...difficult to get old people to give you the information to figure out size of estate...to determine unused exemption and get accurate information about their health...they'll talk to you about their health but it won't be accurate. Trustee sweating bullets over getting sued, not reduction of fee (Hah). Will spouse will leave to someone other than remainder beneficiaries?...perfect solution in theory but works poorly in practice...what if assets take a run up in value and create an estate tax? Another problem.

Last year's program has forms...formula...what assets do you pick? Assets with lower basis? Likely to

be sold? Trigger most amount of gain? When? What time? When drafting give trustee authority what to pick and what will give the best tax benefit. If can get there need to be sure works in state where located or isn't in conflict with other savings clauses in document...and explain to client...add to credit shelter trust...to do basis basis adjustment...benefit is it is automatic...and works without later effort but when draft needs to be right. If going to do...Coors case...should not apply but lack of law is scary...adjustment, means won't get as big a benefit... but have this provision...its an inaccurate clause since can only be inaccurate in not giving enough but it is better than nothing as a base and add ability of someone to make it work right.

Independent trust protector. Relatively easy to do...build in...try to catch up on any lost exemption...risks same...must act and must understand to act and done on a timely basis so don't over include assets...doing at time closer to death.

Delaware tax trap...basically create non-general POS to continue...violate the RAP rule...Congress says if you do this, the power holder will cause inclusion with no assets. Very complicated to understand and spot...In the state where you are in may be provisions to prevent violation...be sure document not internally inconsistent with savings clauses. Very hard to explain...may not be a better result. Does put burden on client rather than drafter...so on them not

you...

No matter what system is used, still could miss it...don't expect perfection...when client came in...they had the best deal with full step ups so whatever you do then won't be as good as that.

These are mechanisms and thoughts about how to get the step up...

Portability...if thinking portability first, need not get into these basis mechanisms...these are fixes...

When in process of doing the math...bigger issue is states haven't gotten there yet to catch up...may want to use traditional credit shelter trust in those states to do state estate tax planning and then use the above to solve.

Subject: JESTs

Zaritsky basically believes these work after all to achieve full step upon basis. It's nice when a learned professor such as himself gets on board (can be an expert witness later in a malpractice trial--HAH!).

Subject: Community Property Trusts--full basis step up

And, Zaritsky says these work. AK and TN has this as we know from Richard Foley and Larry Bray/Katina Gaines.

He can't understand why more people

aren't taking advantage of these...let's get busy!!!

Subject: Tax Basis in life insurance

basis in life insurance policies...IRS takes position basis is reduced by value of present insurance coverage you have already used...basis is not just payments made...term policy basis usually zero or close to it...immensely complicated...

Subject: Taxation of payments pursuant to a pre-marital agreement

Transfers pursuant to a pre-marital agreement...say you provide a fixed amount if living together as a minimum...or alternative bequest...one or the other

...question recent IRS ruling focused on is whether marital deduction allowed in that case...MD in the first place...is this a contingent marital deduction?...Service said MD allowed as it is a mere procedural formality and won't defeat...this raised thought that not all payments under pre-marital agreements so easily resolved...if couple divorced...and payments are made under pre-marital agreement the beneficial tax provisions otherwise applicable may not be apply... if made under a pre-marital agreement

...planning: include a provision that says the parties are required to incorporate terms of pre-marital agreement into a

marital settlement agreement or a divorce decree to get same benefits

Subject: Sales to IDGTs

Recent case filed petition in Tax Court--not yet litigated

promissory note with defined sale to grantor trust that goes wrong
...lip balm family...carmex--I've use that--...sold a \$69 Million interest for a note...trust had excess of 10% of assets--current rule of thumb...beneficiaries guaranteed 10% of purchase price...elected to split gifts...disaster and bad idea...note outstanding...got a gift tax deficiency notices...taxpayer died two days after getting \$32 M gift tax bill from IRS who said...value of shares a whole lot more...said transfer not a sale but a transfer to a trust with a retained interest... 2702...zero value...gift of all transferred shares...service then argued difference of value since didn't like defined value provisions...penalty...2702 and 2036...all of this terrible...things got worse...transfer tax paid twice...gift split

...attorneys who represent optimistic about 2702 issue...agent trying to raise as many issues as could to put on pressure...

unsettling for those who like to use this technique. What do? Tell client...IRS may attack and win... running a risk of gift tax on 100% of note amount...need to know this is a position some in service

taking...consider structuring note so meets GRAT terms...or use GRATs until this issue is resolved

...Dennis doesn't necessarily agree. Question of degree...Dennis thinks it's a valuation case...be aware of case and possibility if risk adverse go GRAT route... Closely held business too many appraisals with a GRAT though and inability to use GST

...area will get resolved not in Tax Court...by agreement likely...will likely work it out... GRATs clearly safer...but sales to a grantor trust can be much more effective...saddle up and go forward says Dennis.

Subject: Contingent GPOA

...non-GST exempt trust...trigger GST...give GPOA to that child so no GST but rather estate tax inclusion...if GST applies by the way, there is a basis step up..state estate tax and exemptions must be taken into account too

...if in estate of GPOA power holder (child)...child can allocate own GST to it and apply own exemptions...but maybe state estate tax could come into play...complicated

...as mentioned, basis step up may not be an issue...taxable termination creates basis step up...anyway...so that may not be an issue...then issue of domicile and state estate tax come into play and all of that can change

...we all know the above...but...

...speaker (Kirkland & Ellis attorney) defaults to grant GPOA but gives trustee power to remove it and only exercise that removal power at the request of the beneficiary...how does trustee know whether to do that or not?...

...takes trustee off the hook...puts in beneficiary...control [*Clever solution to this an to put the burden back on the beneficiaries to make the decision...not the advisors...always a good idea*]

Subject: Trust Information

...Right to information... just because I create a trust for kids...trustee may say "why tell you?...you are just the creator"

...hard wire in ability to get information...and same for anyone with power to appoint or ability to remove trustees otherwise how will they know anything?

Subject: Trust Merger, Decanting

Transfers to other trusts that are similar...can come in handy...could be a form of built in decanting...substantially similar? Can be a way of decanting without relying on decanting statute.

Subject: Power to invest in closely held businesses

Limitations on trustees power to acquire interests or invest in closely held

businesses...may want to limit
this...often too much latitude...trustee
might invest in his own business

...can invest in these but only if trustee is
a family member...or if beneficiary or
any of descendants own a business or
beneficiary consents...make it only "our"
family business.

**Subject: Avoiding Foreign Trust
Status**

Avoiding inadvertent foreign trust status

...put in language...all substantial
decisions shall be made by US Persons
to avoid this...net is expansive...so
speaker has language in trust to avoid
this...

Subject: HEMS.

...Definition in materials page 16...more
thoroughly define...in document ...see
definitions...expand to include, for
example, investing in trade or
business...education defined...[We have
good definitions for education, maybe
health but may not define what
constitutes maintenance all that well. I'll
post his language later when I get home.]

Subject: Portability Election

Portability.

Direct executor/trustee to make the
election...they may not know to do...or
might say we don't need to do...costs
money...and we don't think we'll need

it...

...Consider directing here [and in a pre-
nuptial...if have one...

**Subject: Definition of
children/descendants**

Children and descendants...defining
them

...grantor's children or grantor's
spouse's children...clients may move
assets around...speaker used to say only
grantor's children...but...say split gift

...future children not those of client
could benefit from deceased spouse's
exemption...so...be careful

*[Solution may be to define as children
and descendants born of that
marriage? Need to come back to this]*

Subject: Portability (50 minute
session)--this had so much it is hard to
just highlight so here are my raw
notes...lots of alternative planning and
thoughts...

Portability

Don't give up on tradition. Don't think
all traditional planning out the window...

For wealthier clients what doing for last
couple of decades not really out the
window...

Relying on portability might be the
wrong decision...

If not all low basis and you have sufficient assets to do planning may want to try to avoid estate taxes...clients may not have all such low basis assets

Portability is not easy...yet another option that makes our jobs tougher...now have a another "descendable" asset...can leave to ss...if we want to...basis step up and use of exemption...sounds great...great...except not really permanent...doesn't cover all...like gst or state estate tax...etc.

...planning part...on same continuum as treating spouses as one economic unit...like gift splitting ...gst exemption can be split...now portability...treats spouses as a unit...but state estate tax not part of it...gst exemption not portable

Pure portability plan will lose out on a tax benefit. GST exempt status really gets lost...quite a delta in some cases

...when is it applicable?...first spouse to die doesn't have enough to use exemption...DSUE amount that can be left to ss... but only if file a return...have to say something about making election including in premarital agreements

\$5.43 Million...a lot of money...can be lost...sort of just mean if spouse's representatives won't agree to it...

Concern can be the minute you communicate with the IRS...with and estate tax return...maybe some risk there

...we were hoping for and easy 706...but IRS can't deal with you without a return

IRS needs more detail to figure out just how much exemption you are porting...can't make as simple as you like...value estimates to nearest \$250k etc...if qualify for MD or CD not as involved in valuation...but IRS needs information so sympathetic to that...

...suppose larger estate but could elect portability...since all going to ss...or all to QTIP trust...what then? Game of portability...\$5 M estate no need to file return but have to to get portability...no box to check...just file a complete and properly prepared return...if don't want that cause I am mean...must elect out.

Simplicity? No

Basis adjustment

...solution to IRD...

Doctor with homestead and retirement plan and this does not serve well to traditional planning so this is a good solution there...

Can lose exemption with family trust if goes down in value...here...stays the same amount...clients could be worse off...with family trust

... with well balanced portfolio that shouldn't be your concern

...State shelter may not be used

Heckerling Institute--Sky's Notes 2015
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well...but immediately make gift to grantor trust after death to solve... don't know how this will go...

Potential if plan into portability...if inherit DSUE and then transfer property to grantor trust then can compound!

...paying income tax not a gift...so this is powerful...incredible wealth mover...using DSUE to accomplish credit shelter trust as a grantor trust...lose benefit of having spouse as protected beneficiary...unless can use in DAPT state...lose out on that, maybe...need a wealthier client to be on board with this...

...Loss of gst exemption...portability

... QTIP trust...if can't get past losing a tax benefit...don't lose it..so be on board with QTIP trust at a minimum...

Once there, no exposure to creditors...protecting spouse, etc...elderly spouse can be preyed upon...doesn't require a bad spouse just elderly. QTIP trust likely the vehicle used with portability planning...

...Potential loss of tax credits...if all assest to ss...ptp credit...

...Lose DSUE cause remarry and survive another spouse...this hangs us up intellectually...Could lose this by something we cant control which is surviving a second spouse...advocate for a change in law...abusive? Based on census men 70 and older 22.6%

widowed 17.4 currently widowed. Could mean 78% remain single.. 51.2% widowed doubled...48.3% currently widowed..94% cremain single...so, not everyone remarries

...Why is Congress worried about stacking DSUEs when very wealthy client can do it by making and immediate gift...could accumulate shelters by making gift after gift (spouse after spouse) but only for super rich...poorer people have to worry about losing it...why consider losing that...law should be changed..

...because now have we have options...now we say...think about all this now? Say no...what do we want?

We want flexibility...of course...want time...and flexibility...plan to delay decision...use disclaimer planning...start with QTIP and disclaim back into Family Trust...for spouse better to disclaim from one with greater benefits to one with lesser benefits--didn't catch why--- and get rid of POA in trust to be disclaimed to...

Partial elections and Clayton QTIP...ex 6 under QTIP rules...Clayton disposition is shifting somewhere else for another beneficiary...still a good QTIP as to portion which make election...need to have independent fiduciary to make the election...she promotes independent anyway...be careful here if fiduciary election creates tax issues.

...Takes out of QTIP and puts somewhere else

...Problems with QTIP-- ss remarries and gifts splits with new spouse or survives another spouse...tax benefits being used automatically and then DSUE no longer there to shelter that...hard to cover this in marital agreements...difficult to keep promises in such agreements from being a gift

Suggestion...2519...possible solution..to loss of DSUE by surviving ss...QTIP and DSUE be sure goes to right place. Give transfer of sliver of income to trigger 2519 and trigger application to that trust...don't give other part away except for asset appreciation... capture DSUE and inclusion on the rest when that happens have a restoration of credit and reapply ...middle ground to not worry so much about DUSE being diverted elsewhere or worrying about a big gift going somewhere else

...Better solution..."Super charged credit shelter trust"...has taken some heat...Blattmacher...dreamed this up...at end of the day and debate concluded...key elements that make this work really in the regs.

Trying to have credit shelter trust be a grantor trust and preserve taxable benefits with out having the spouse lose access to trust...creating inter vivos QTIPS...what happens...create...navigate reciprocal trust doctrine...not as dangerous...since each QTIP will be includable in each

others estate...not a ruse...not like ones where they try to get out of estate...starting with QTIP that will be includable...so, not same level of high alert...but navigate reciproat trust document...old probate and pretty article on this--reciprocity

Only one credit shelter trust here...what is the opportunity...create one for spouse and vice versa...what happens to QTIP for spouse-- can make reverse qtip...leaking income? Yes...what happens...spouse dies...spouse estate tax shelter allocate to that qtip trust and comes back as credit shelter trust for survivor...state tax inclusion problem for survivor? No

...can come back-- no 2036 2038...but 2041 creditors rights? I put property in trust and could be a self settled trust...since included in spouse estate they are now in their estate

...FL great shape specific legislation that says if QTIP for fed purposes then not self-seltleed trust...don't need to self self settled trust in FL which won't pass in the legislature...instead get this in the law... you are putting property in trust for spouse for life...creditor avoidance strategy? no, it's estate planning...so argue for this kind of statute in your state

Opportunity..when becomes credit shelter trust for my benefit...still a grantor trust with respect to me...and for my benefit..not same as taking DSUE and I am creator after death and create trust after death of first spouse...

could sue state to try to avoid creditor problem

..Pause button as this was in spouses estate-- how can that not shift who the grantor is?...troubles people... but 641 regs say unless have ...gratuitous transfers other than fmv...so grantor trust rules signal this treatment---not just following transfer rules...separate set of rules 1.671-2 e 5..if person with gpoa then the person will be treated...as grantor...no gpoa waiver over QTIP trust from and created from my spouse...turns out very powerful.....this can't be?

Opponents quizzed person who drafted the regulations...says what it says but maybe it was a mistake..its there and says what it says...this is a solution to portability... much easier to sell...to put property in trust for other and...leverage gst exemption...and will grow...and have access and be a grantor trust to ss...great strategy...of all the things you can do this is easiest

Basis issues...give away \$5M 0 basis asset...suppose appreciates to \$6m what is benefit on \$1M?... equals \$x00k but costs more in capital gains tax...if goes to 10% estate tax savings \$2 Mi capital gains tax still behind...what if \$5 M goes to \$15 now estate tax saving...finally ahead when asset triples in value...

Low basis asset to engage in lifetime planning appropriate caution but maybe don't have typical assets...client knows something about their low basis

asset...they want to keep...say it will go way up...if answer is if wealthy enough use a grantor trust and substitution strategy...might still be able to get there...grantor trust is optimal lifetime flexible technique...allows you to rethink what should be in there and what shouldn't...substitute later...to get low basis assets out...

...book for JP Morgan...get a flavor...who has an estate tax problem...?

...3% spending...even \$10 M couple 27% chance of estate tax issue. If spend 5% then down to 3%...30 to 100 Million..estate tax issues...so \$10 Million client is most trouble to plan for...the wealthier... estate tax will be an issue.

...use a grantor trust to have options open whatever you do...

More charts...avg overlife is 10 years...so opportunity to do some planning...but if spending ...90% of time won't owe any estate tax...enlightening...income tax planning more critical...

In gst land...just do a QTIP and no gst tax...even if leaks income...

\$30 M couple...estate tax a real problem...lifetime planning for this couple...Even credit shelter trust significant savings...

Page 61 charts conclusion...pure

portability, credit shelter, etc...all in one place...

Use exemption today always best plan if time horizon...big ahah is gst...lifetime planning

Page 62...stress testing low basis stock on avg...and making a lifetime gift...shows how much appreciation you need for that stock to be better off transfer during stock...if 5 years 19% return...what is chance get that...9%...so what chart gives you is sensitivity...time horizon going to matter...unless you have a client that knows something particular about low basis asset...

Subject: Installment sales to IDGTs

John Porter reiterated that installment sales to IDGTs are on the IRS audit radar screen...

...Installment sales to defective grantor trust...gift and estate tax perspective...what's fmV of interest sold? Is note worth same as property sold?

...Seed gift of LLC interests...then sale on same day...sold 9.5% interest and gave away some...IRS argued should be aggregated...Pierre case...Taxpayer won argument...but...IRS looking at it...John Porter says ...put a little time..between funding of trust with units of LP to seed...wait until next year...or a following tax year, even better...

...Porter knows of IRS case with agent

where IRS argued about value of note in exchange even interest on note at AFR...what type of security? IRS asks...balloon payment?...defraze case...once to appeals Porter thinks this falls out.

Woebling case...2702 case...IRS may not be successful but on radar...

Estate tax side...sale of partnership units to grantor trust...note received...2036 and "little 2036" argued... IRS argued partnership interest transfer should be brought back in since decedent got right to payments for note payments...how avoid? If paper trail of payments is such that amount of distributions from LLC equals the amount of note payments...looks like 2036...preference there is if use distributions from LLC make amount of distributions from LLC different in amount and timing..

...Another way to avoid argument is bona-fied sale for full and adequate consideration...put some time between seed gift and sale to avoid part sale and part gift..consider seed gift with cash...on radar

Subject: 2036(a)(2)

Richard Foley and I gave a joint talk about IRC Section 2036(a)(2) and the Turner case a couple years back

...John Porter thinks creator of FLP can be a general partner of the entity without causing inclusion just as a result of serving as such...under 2036(a)(2)

Subject: QTIP trust investing in FLP

...2036(a)(2)... can senior be a partner and managing member?...John says yes

a. Strangi...court found...fiduciary concepts constrain authority to keep from making arbitrary decisions ...but practicalities there... only Strangi really owned...99.9%... what is incentive of others to enforce?...court did say (a)(2) inclusion...

b. Turner...sole discretion to make distribution decisions...(a)(2) applies

c. Cohen case...good case here...1982 full tax court (a)(2) does not apply to senior family members decision to make distribution decisions...court said if trust agreement gave trustees discretion to make arbitrary but if limited by law...if trustee has limits on ability on exercise then (a)(2) should not apply ...Byrum too...so...planning ... put in agreements...business judgement ascertainable standard... available cash be distributed but definition of what that is...exercise of fiduciary duty and reasonable judgement to be unnecessary for future operations...give you type of language that keeps from exercising unlimited discretion..

Can be sole general partner according to John...but...have others involved to help satisfy bona fide business sale..."alone or in conduction with" still within purview of that but if have bona fide sale then never get to that component...John believes can be Senior can be a general partner...

...say you have a \$10 Million QTIP with marketable securities...put in LP or LLC?

... trustee can do and structure so others are members of these...upon death of ss may get discounts in 20% to 40% range...depending on appraiser...contribute to old and cold or form new...with family as members

...trustee of QTIP won't be GP , no ability to liquidate, etc

...Sam Donaldson would ask about fiduciary duties...can fiduciary do this?...He'd start by looking at trust instrument or state statute that would allow...review trust to be sure can do...then, why are we doing this? Primarily to take a discount? No, find a non-tax reason

...duties to beneficiaries of QTIP trust and breaching any of those duties? If taking \$10 M and turning into \$6M with no withdrawals or liquidation are we really destroying value? Real restrictions...breaching a duty to them? No easy answer...

...if advising a trustee who is asked to do this..secure agreements from beneficiaries who might consent

...but what don't want in file is letter to beneficiary saying only reason doing this so can transfer assets to get discount...there goes discount

...IRC Section 2519 application comes to mind...when gifts made during lifetime of even a small portion of remainder interest...problem if \$4 Million loss in value...gift?

...we may not have a problem... FSA 9920016... for 2519 to apply must be a transfer of ss' interest in income...no transfer of any portion of her income interest as she continued to have an income interest in the new entity

...will continue to have that right...to further shore this up consider putting something in partnership agreement that says annual distribution of cash...sam says he agrees...no disposition of income interest

...any risk or harm if QTIP funds 100% of consideration?...but in hypo had others coming in...need to be sure have proportionate contributions and capital interests

...see kite case...tax court memo 2013-43... QTIP trust created FLP with 34% discount and transferred asset to ss...IRS did not raise 2519... Steve Akers... Bessemer website discusses this...Service did not need to argue 2519 for other reasons...worry about kite and FSA...feel more comfortable with real valid business reason such as real estate where valid business purpose and document that...

Subject: Wait and See QTIP Election

...say \$500k to credit shelter...no 706...now, 2012 to 2015 doubled in value...wife dies with \$250k estate...file late 706 to QTIP his trust? Thereby include in wife's estate to get step up in basis...okay to sit on that trust...to see what happens?...

...QTIP would have been helpful...looks like a great deal...too good to be true... but see -7 (b)(4)-- if didn't timely file...regs say if not timely filed...has to be on first estate tax return filed after the due date...regulation deadline would apply...can go ahead and make the QTIP election...then yes...can make step up in basis...if facts changed if really exploded in value...taking no action may be way to go...suggests planning strategy with "QTIPable" trust and wait to make election upon death of ss

...this is a WOW...but credit shelter trust has to be QTIPable...

Subject: 645 Election

Keebler says it is rare when they don't make the 645 election as it has many advantages...more favorable estate income tax rules apply...fiscal year...no estimated payments for 2 years...charitable set aside...one return...applies during administrative period...

Subject: Eliminating tax in Complex Trusts

Suggestion to buy life insurance on lives of beneficiaries...invest in those policies using life insurance tax exemption...

Subject: Deduction to estates and trusts for distributions to charity

[This is an area very few get right...here's the final word...]

There is no income distribution deduction (DNI deduction) for a distribution to charity...no K-1 either...

the only way to get a charitable deduction is to take it under IRC Section 642(c)...

[the K-1 is the way the IRS will find it]...if you screw up no deduction...some think...well I'll take an income distribution deduction...does not apply to a charitable deduction...if no 642 (c) no claim to deduction...either 642 c or out of luck...period...

[So, what this means is you have to comply with IRC Section 642 c... you have to make the distribution from "gross income"--that's a tax term...not a trust accounting definition for this purpose...and, it has to be pursuant to the governing instrument...so, there needs to be special drafting in the trust instrument or will to get the charitable deduction...now, if a distribution is made to the charitable residuary beneficiary

and that's the only remaining beneficiary, then good argument you get the charitable deduction if from gross income...speaker thought that was pursuant to the governing instrument but its not real clear...this happens all the time...and the accountants just run DNI deduction through when that isn't the correct way to get the charitable deduction...the idea of "gross income" is a tracing concept...you can't distribute a painting and say that is from gross income...]

Subject: Powers of Appointment

...new uniform act on powers of appointment...just adopted in July 2014 by uniform commissioners...

...CO adopted...introduced in other states...why need this? For the most part...state law doesn't have much about this...state law very thin...purpose of act is to give us "normal" law...some changes that we wont be happy with...
...First thing to realized, talking about non-fiduciary powers...not trustee-like powers to direct assets...in decanting...fiduciary power...uniform decanting act coming out soon too

...What if trustee has power to appoint assets...just a trustee power...

...What if say non-trustee has power to appoint but can only be exercised in fiduciary way...most courts would say not a power of appointment in that case

... "Power holder" new term...traditional

term was donor...donee

...Change the name...to "power holder"...but, "special powers of appointment" are called "non-general poa"

...uniform act presumes it's a general power and not limited unless you do limit it...general...appoint to one of the big four...self, creditors of self...

...GST tax...give someone the power to give someone else the general power? Issue arose...if someone has the power to give to me then am I already considered having it? 2041 b 1 c...power exercisable alone or in conjunction still going to be a general power

...Federal tax consequences...can't change by uniform act but...Tried to nudge the law here...to say...power to create is not a power itself...says the act...if someone can switch a power from general to special...respect this says the act...mere power to give something is not that directly, says the Act

...Choice of law...traditional rule has been...law where power was created regardless of where going to be exercised...why care? Say client power to appointment among spouse and descendants? Say same sex relationships and in state that allows or doesn't allow? What law applies?

...Definition of descendants re artificial

technology... all over the place...

...If exercise, don't usually go back to state where created...uniform law...creation of power domicile of party that created power but in all respects to exercise domicile of power holder...unless something else specific on this..in grant of power

say...mother's instrument gives power to appoint assets among her descendants and I am one of her descendants...she has given me general power and didn't mean to...inadvertent...in uniform act...fixed the problem and said inadvertent unless you specifically say there is going to be a general then not a general power in this case...[does this mean can't appoint to self?]

...recognized lots of people don't have wills just trusts...traditional way was to exercise by will by specific reference...attempted to deal with this...said fine, can exercise in a revocable trust...

...discussion of "substantial compliance"... mom created and gave specific reference to the power...people get close but not quite...I exercise but not quite do it right...does that count? At common law no doctrine of substantial compliance...so they have clarified this up a bit...appointment by a revocable trust is substantial compliance even if will says must be by will unless some material purpose mom had in mind;

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If execute a will that says I exercise all my powers of appointment...or residuary clause that says I leave all property to heirs, won't do it...need to at least refer to who created it...

If have substantial compliance piece and want to be sure its exercised, need to put it in the will...need to say I am not exercising powers if don't intent to do so...

...who can be appointee and fraud on the power...

Say going out there as attorneys and and sprinkling general powers out there everywher...I don't want them to exercise I just want them to have it...

...narrowest power is power to appoint to creditors of estate...narrowest power we think of \$\$\$

...question: who are creditors of estate? Any idea? "ive got lunch on Thursday" So lets say I do codicil over night and I appoint assets out of mom's trust to jon who paid for lunch today....a creditor of my estate but it has \$1M in it..what does Jon get?

...As a creditor permissible appointee? Get only \$20.00 or \$1M? different answers...or once paid no longer a creditor? One answer is Jon gets \$1Million...\$\$\$

...Another professor says \$20...any authority for that? No authority cause it is so obvious...most of us...don't like to

have things in documents that we don't know what they mean...want to be able to explain it...other practical consequences to this? Maybe...giving mother a general power very narrow...to appoint to creditors of her estate...and there are creditors she could gin up..could borrow money and spend...could create pledges to charity...could appoint to brother Fred...could borrow money from Fred buy car and then give him the car...she may start exercising the power...question...it seems...how will power holder exercise this sort of power...

...Fraud on power...can't contract to exercise in a certain way unless it is currently exercisable...can't bind myself in the future...such as a testamentary power...can't bind ahead...this has been policy for 150 years...

...Say \$10 Million trust and have non-general power to appoint among descnedats...but really want to give \$1 M to opera...way I can do that? Cant' say I'll appoint \$1m to Fred and then say Fred son you have to give to opera...he would agreed

...but lets suppose that Fred has \$1M today...and he enters into binding pledge with opera...when my father dies I will come into some money and then give you \$1 M... now exercise power \$1M off the top... Fred gets a \$1 M off the top... does that work a fraud on the power?

...examples from restatement 3rd talking about this...not many cases dealing with this...more use of these powers lately so more case law coming

...Law tends to turn on what power holders' intent was...if to limit class...then drafters of restatement think courts will say cant get away with above...but if incidental and Fred going about his business...ok...through clever planning can deviate a bit and get around...

...Standard solution is make it exercisable conditional on someone else's permission...\$\$\$

...Creditor issues...power holder trying to divert...what about third party creditors and any rights they have?

---when can a creditor reach property just because someone has the power?...general rule is if general power created by power holder...creditors can get to those assets...but what about gpoa created by someone else?...

Grandma died created trust for mom...now elderly...I inherit...low basis...I go in and give mom a GPOA...get new basis...question is...any risk to that?...what about mom's creditors getting to the assets of that trust just because she has general power?...\$\$\$

...law in flux...not what we think it is...old common law rule was if you have a gen power at death creditors

could not get unless you exercise...1879 case...some states said even if you exercise...they still can't get it...some states have changed...and minority of cases...uniform act goes the other way...if you have an estate not sufficient to pay creditors then creditors can go after that...think about that...happy with that result? Think of real world consequences...what liability does my mother have? Health care...one unmanageable liability...she could drive...driving the most dangerous...mom almost drove through the plate glass last weekend...very significant...can you fix it? ...Page 49 materials...make it subject to approval by someone else? Way to fix it? Will that keep creditors at bay?...think about this...mom runs school bus off road...all would-be neurosurgeons...won't be able to point to trust with these nuances in court of law...judge will say I've written my last sentence of my opinion now clerk go get law to fill in...Mississippi mom created trust...Sly case let creditors get assets...from irrevocable trust for benefit of bad guy (sex offender?)...biggest change in uniform act...but even with common law out there...judges are influenced by restatement and uniform laws...so be careful when sprinkling gpoas

...Crummey powers...general protection for these in uniform law...present right...creditor can reach...but act tries to except those out...states and now uniform act have changed the idea these are self-settled trusts...right to withdraw and let lapse then not settlor of the

trust...KY Uniform Trust Code...did this...\$\$\$ what does MO and KS say?

...Entities doing things...aspect of entities and power of appointment...persons can be power holders...individual is human...person is human and entities...so entities can have powers of appointment in uniform act...so says uniform act.

...Farm want to be available to great grandchildren...rest of family wealth may disappear...conservation easement...no...doesn't want intervening generations to act...deal with that by putting that farm in trust...law is very likely to impose fiduciary obligations most of the time on most of those people...worry over long period of time...court will impose duties on people in trust...what if instead create a normal trust with board of directors or LLC and give them a power of appointment...say trustee under pressure to sell...board could say no not going to do that..do something to help...shifting decision from one group to another but can limit and eliminate any sort of fiduciary duty by doing through POA...could give right to withdraw too.\$\$\$

...Various uses of poa...

...Attack on perpetual trusts...can't be changed...notion of what's the matter with these...there are evergreen clauses they as they include poa in them...point for us to make when taking about perpetual trusts

Subject: Trust Protectors

1. Trust Protector or Trust Advisor...
2. Body of law about Trust Advisors...found to be fiduciaries...page 9...what name should this have?
3. Speaker went back to calling a Trust Protector in most cases...use Trust Advisor in others...they have different functions.
4. Are they a fiduciary? Not right question to ask...
5. Refer to trust advisor when powers subsumed in powers of trustee...fiduciary..when talking about other powers, use term Trust Protector \$\$\$
6. Other powers...Trust Protector...
7. Powers differ...greater or broader? Not sure...but different...
8. Shouldn't use the names interchangeably...
9. Name a person as a Trustee...you know what they are supposed to do...but with a Trust Protector virtually no law...we must define what to do..
10. Tendency to see if can fit into one single mold...could be different based on what can and can't do...
11. Trust protector is not for every

trust...use when important to use and not just because cool to do if don't need it..

12. Function here in my trust... served better with a trust protector? Only then should you name.

13. Trust protector is a third party given power in the instrument to make decisions to carry out the settlor's intent...doesn't tell a lot about what trust protector will do...all those powers need to be in the trust instrument...

14. State statutes...

15. Early statutes...DE dealt with Trust Advisors...not Trust Protectors...not the same...Several categories of statutes...Section 808 of UTC...person who holds a power to direct...is presumptively a fiduciary...act in good faith for purposes of trusts and interest of beneficiaries...this deals with Trust Advisors more so...doesn't define anything with respect to a trust protector...so not much help here...comments state intent or purpose is to ratify use of Trust Protectors...not to create but to ratify...

16. UTC 808 is default provision...does not control if trust changes it...

17. Can change the presumptively fiduciary standards...

18. 11 states have no statute at all on trust protectors...

19. 26 states that don't really deal with

this issue...

20. No cross-reference between 808 and Trust Protector statutes...almost all are default statutes...no powers created...provides a list that are non-exclusive and not powers being granted...only has powers granted to trust protector in the trust instrument...need to grant powers...or have none...

21. State statutes dealing with ...is trust protector a fiduciary? Default provision and can be varied in instrument...some default to no fiduciary...

22. If trust advisor with trustee function then fiduciary...some states say...

23. Confusion..only one state says trust protector is a fiduciary...VA says this.

24. Trust protector and Trust Advisor not the same \$\$\$

25. Case law...three cases...in US...one around the longest time Mclean case...

26. Speaker was an expert witness in that case...discussion surrounds around things trust protector did but all where just allegations...Trust protector was summary judgement issue...got out...only thing first case stands for...lots of allegations...petition, answer and trust instrument in front of court...court said okay plaintiff gets opportunity to prove up case...after discovery, court set out order applying law to be applied...trust protector had no

duty to monitor the trustee...only had powers granted in trust instrument...power only power to remove, replace and resign...after 3 day trial court granted a directed verdict...took verdict away from jury..plaintiff didn't prove all the allegations in the petition...people got this wrong...court of appeals applied the same law to determined there was no liability...nothing bad happened after Trust Protector got request to remove the trustee...no obligation to monitor the trustee so anything prior to that notice was irrelevant \$\$\$

..Fist round of Swartz case page 21...Trust protector was not allowed to bring an action in court...trust protector was going to turn off grantor trust powers...settlor didn't want gain on his tax return... shift to trust...kids decided they were going to terminate the trust prior to it ceasing being a grantor trust...trust protector stepped up to stop termination of trust...did trust protector have that power and did they exercise properly was the question...trust said could amend the trust to contract powers but not expand the powers...no action against the kids mentioned so no power to do so...exercise of trust amendment exceeded the powers granted...dismissed the case...opportunity to deal with real party in interest...later removed trust protector and then removed trustee...legal research google the case Swartz v wellan case to see for yourself...kids said you cant appoint trust protector so trustee removal couldn't appoint...looking for real party

in interest.

..Monansian case...FL case and all have is Section 808 of UTC...not clear and default provision...court said acted within scope of powers given by settlor...to validly exercise...TP Tried to eliminate action against second spouse...

Daniel Coleberg and Wiley case...be careful who appointed as TP if related or subordinated...

30. Drafting...

31. Types of powers that you can give...page 23...whatever settlor wants them to be...defines role of TP...no implied powers...

32. Three kinds of powers

33. Called Advisor...those otherwise subsumed and exercised by trustee...distributions, direct sales, veto purchases...investment...if use these powers then fiduciary if you want trustee to follow TA...cant have exoneration and TA...someone has to have fiduciary duty otherwise no trust...if not a fiduciary then Trustee can reject TA...if okay having a fiducairay then be sure Truess is exonerated in following TA\$\$\$

34. Other power is one can give without any adverse consequences...page 25 examples...ability to remove and replace a trustee...not one that is onerous...may be more prudent to have TP exercise but not necessary...beneficiary might have power but could run risk of having

beneficiary too much power so time to have TP to avoid inadvertent control...approve trustee compensation...or choose situs

35. Third power...if gave to settler or beneficiary they would not be able to be exercised...by fiduciary...duty of loyalty or impartiality...add a beneficiary? Turn off grantor trust power could be adverse to beneficiary interest...reason we want TP who do not have fiduciary powers...powers that are otherwise given or exercised by a court...like powers...impartial person...

36. Some things can do...power to mediate disputes...interpret terms of trust to construe...so don't have to go to court...page 26 examples..\$\$\$

37. Drafting top 10 tips

38. First question to ask: Is TP necessary or desirable...if not, won't use...don't use in every trust...use for purposes

39. Number 2...never rely on state law...spell out in great detail...never adopt list of powers in state statute not needed or wanted in cases

40. Number 3 if give powers of those others then a trust...be in state where TP can act as non-fiduciary...address in trust instrument...court can see in document that I am saying acting non-fiduciary capacity...in McLean case said acting in fiduciary capacity...in order...if TP learned of something bad

trustee doing then TP had duty...have to explain in document what mean by fiduciary...clear it up and say what you mean

41. Number 4 be very specific in trust terms as to what you mean they are to do

42. Fiduciary or not

43. Exonerate trustee or TP...or TA exonerate Trustee...absent bad faith TP is not liable

44. Stand by job or intend to monitor actions of trustee?...if monitor pretty close to trustee...if that is intention then provide TP shall receive all information

45. If intention is stand by then put in document not duty to monitor...no duty to keep informed...need to deal with compensation of trust protector...if stand by...only when step forward

46. Hourly basis depending on time spend reasonable

47. If supposed to monitor the trust...

48. Based on time spend monitor the trust...similar to that as trustee

49. How TP is removed and replaced and can resign at any point in time...deal with this

50. List whatever powers intend them to exercise...without no power to do so...

51. Need to give TP direction as to how

to exercise their power...such as if benef comes to them and requests that they remove the trustee. Then ability to determine whether or not to do...not automatic...removal not just because asked by beneficiary but want TP to look at it...

52. Standng to enforce the trust or the powers given them?...court might not otherwise allow to proceed

53. Be careful of words you use...give interpretation in body of trust...

54. Number 5 use appropriate name..call TA if giving that...if not call them TP

55. Be sure not mandating exercise power...exercise or non-exercise to be exercised in sole and absolute discretion...unless intend to do an act at a particular time

56. Number 7..set out duty of care...say TP not liable absent bad faith or willful misconduct...

57. Number 8 make sure instrument clear TP protected...standard of care...who will pay attorney for TP if they are sued by anyone?...say in document...settlor could enter into indemnification agreement with settlor...

58. If information needed be sure readily available upon request...so TP can exercise powers given

59. Nuber 10 despite name used...be sure not appointed to protect the trust...

60. Finally, role TP and Trustee...when appointed as TP first thing do read trust instrument...review...see if enough protections there...dicuss with lawyer and settlor what job doing...make sure that you as trust protector are protected and roles clear...need to underatnd in all respects and be sure comfortable in doing...ask for indemnification and atty fees...insurance cover? How hanle?

61. Trstee needs to understand what being asked to administer...Trustees ask whether need to give TP information on a regular basis...

62. Trustee does not need to and should not provide financial or other statements to TP as that could expand on liability of TP...

63. Make sure understand jobs TP to do...just because appointment doesn't mean can tell trustee to do this or that...make clear..

64. Make very clear in the document all that needs to be there.