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Future of Estate Planning and Fiduciary Services

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The 2014 Estate Planning Teleconference Series

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By

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Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, pre-nuptial agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects each involving assets valued at several hundred million dollars and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

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A. The Impact of ATRA

After the enactment of the "permanent" and higher applicable exclusion amount and GST exemption, adjusted for inflation, as well as portability, by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312 (December 17, 2010) and the American Taxpayer Relief Act of 2012, P.L. 112-240 (January 2, 2013) ("ATRA"), most estate planning clients do not possess the level of wealth necessary to be concerned about transfer taxes. Even those clients who are still concerned about transfer taxes are potentially subject to a 40% transfer tax rate as opposed to the higher transfer tax rates that applied in previous years. However, at the state level, currently 17 jurisdictions retain a generally applicable estate or inheritance tax. Lee, "Paradigm Shift: The ATRA-Math (Planning After the American Taxpayer Relief Act of 2012)," Bernstein Global Wealth Management, November 2013.

In contrast, federal and state income taxes now have an even greater potential to dilute wealth transferred to estate and trust beneficiaries. ATRA increased federal income tax rates for ordinary income, long-term capital gains and dividends, and some states, such as California, have increased their income tax rates. Lee, *supra*.

Due to these changes, a major part of the estate planning process going forward will involve measuring transfer tax consequences against the income tax savings resulting from allowing assets to be subject to federal and state transfer taxes and acquiring a step-up in basis at death.

1. Issues and Techniques Related to Portability

Many estate planning professionals now design estate plans that rely on portability to avoid federal estate taxes. The most straight-forward form of a portability-based estate plan directs the assets of the predeceased spouse to the surviving spouse free of trust, rather than split between a marital disposition and a credit shelter disposition. Since fewer assets are held in trust, if the surviving spouse is in a lower income tax bracket than a trust would have been, the assets that would have been held in the credit shelter trust may be subject to less income tax.

a. Combined Wealth Under Applicable Exclusion Amount. For spouses whose combined wealth is less in value than one applicable exclusion amount, an estate plan based on portability and without a credit shelter trust is a compelling option. The couple will still avoid federal estate tax at the surviving spouse's death (even if the value of the surviving spouse's estate grows during the period following the predeceased spouse's death to a size at which the deceased spousal unused exclusion ("DSUE") amount is fully deployed at the surviving spouse's death), all the assets that pass through the predeceased spouse's estate will receive a step-up in basis at the surviving spouse's death and trust-level income tax will be avoided. A portability-based plan also has the benefit of simplicity. These tax benefits may be offset (perhaps substantially) if the surviving spouse's estate is subject to state estate or inheritance taxes.

However, the non-tax benefits of a credit shelter trust will be lost. These benefits include creditor protection, fiduciary management of trust property and control over the ultimate disposition of property, which may be very important in second-marriage situations in which the predeceased spouse would like to have his or her descendants not related to the surviving spouse receive the remaining property after the surviving spouse's death. Causing assets to pass in trust upon the predeceased spouse's death may not alleviate this problem, however, if the surviving spouse is the trustee of these trusts. In this situation, the trustee may make large discretionary distributions to him or herself and either consume the distributed funds or convey them to or for the benefit of his or her preferred beneficiaries, leaving less for the intended remainder beneficiaries of the predeceased spouse's trust(s).

Sometimes the advantages of a credit shelter trust are not entirely relevant to a family, making the portability-based estate plan more attractive. The surviving spouse who is the outright recipient of significant wealth may be knowledgeable about asset management (or at least may know how to use and rely on competent advisors), and there may be no asset protection issues and no conflicts of interests or disputes among beneficiaries. Sloan & Abendroth, "Planning With Portability, When it Isn't Portable," FALL MEETING OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (2013).

b. <u>Combined Wealth Above Applicable Exclusion Amount</u>. For spouses whose combined wealth is greater in value than one applicable exclusion amount, utilizing a credit shelter trust in the estate plan of the surviving spouse may be appropriate, even with the availability of portability. The post-predeceased spouse's death growth in the assets held in the credit shelter trust will be excluded from the surviving spouse's gross estate, whereas the post-predeceased spouse's death growth of the assets bequeathed by the predeceased spouse to the surviving spouse and held by the surviving spouse pursuant to a portability–based estate plan is includable in the surviving spouse's gross estate and will erode or even use up the surviving spouse's applicable exclusion amount, including the DSUE amount. This potential problem may be exacerbated by the fact that the DSUE amount is not adjusted for inflation. Of course, the portability-based alternative approach will give rise to a step-up in basis at the surviving spouse's death with respect to all assets of both spouses, and that result may be preferable in some cases.

c. <u>Retirement Assets and Portability</u>. An estate a substantial portion of which consists of retirement assets may obtain maximum deferral of income taxes through the use of a portability-based plan wherein the surviving spouse would be named as the designated beneficiary. When retirement assets are held in or payable to a credit shelter trust, the income taxes that arise in connection with minimum required distributions dilute the transfer tax-free appreciation of the credit shelter trust assets. However, retirement assets, even if they are included in the predeceased spouse's gross estate pursuant to a portability-based estate plan, will not receive a step-up in basis inasmuch as such assets consist of income in respect of a decedent. IRC § 1014(c). An outright distribution to a surviving spouse of retirement assets, of course, may be inappropriate in a second-marriage situation or where the surviving spouse may have creditor issues.

d. **<u>The Age Factor</u>.** A portability-based estate plan may be less beneficial for younger clients primarily because there may be decades of growth in their wealth before both spouses are deceased. When utilizing a credit shelter trust, at the death of the predeceased spouse, a portion of the estate equal to the applicable exclusion amount can be permanently removed from estate tax exposure (at least as long as such assets are not distributed), no matter how many more years the surviving spouse is alive and no matter the growth in value of the credit shelter trust assets. Under a portability-based plan, all the assets in the predeceased spouse's estate are potentially subject to estate tax exposure, and, with a younger surviving spouse, it is more likely that the surviving spouse's receipt of a portion of the predeceased spouse's estate that would otherwise have been transferred to a credit shelter trust will contribute to the surviving spouse's estate's increasing in value beyond the applicable exclusion amount and the "DSUE" amount before the surviving spouse dies. Sloan & Abendroth, *supra*.

e. **<u>Portability-Based Plan With QTIP Trust</u>.** One way to maximize the benefit of a portability-based estate plan and obtain some of the benefits of using a credit shelter trust-based plan is to mandate distribution of all the predeceased spouse's property to a QTIP trust. Redd, "Death of Formula-Based Estate Planning," TRUSTS & ESTATES (September 2014). Not only are the predeceased spouse's assets included in the surviving spouse's gross estate and may receive a step-up in basis, but also a reverse QTIP election can be made and GST exemption can be allocated to the trust. IRC § 2652(a)(3).

Rev. Proc. 2001-38, 2001-1 C.B. 1335, provides that the IRS will ignore a QTIP election if such election was not necessary to reduce estate tax liability to zero. If the predeceased spouse's portability-based estate plan provides for the transfer of all property to a QTIP trust, and the predeceased spouse's executor makes a QTIP election, and if the estate has a value below the applicable exclusion amount, the QTIP election would not be necessary to reduce estate tax liability to zero; there would not have been an estate tax anyway. If the QTIP election is ignored, the predeceased spouse's applicable exclusion amount will then have to be utilized, decreasing, if not eliminating, a DSUE amount for the surviving spouse. Thus, it appears that Rev. Proc. 2001-38 could effectively prohibit use of portability in this situation. Redd, "The Ascendancy of Income Tax Planning," ANNUAL MEETING OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (2014). *But see* Bramwell, Dillon & Mullen, "Relax, Rev. Proc. 2001-38 Cannot Be Used Against Taxpayers, Or Why QTIP Planning is Safer Than Some Might Think," LISI Estate Planning Newsletter #2100 (May 20, 2013) at http://www.leimbergservices.com.

The IRS, implicitly acknowledging this issue, has added to its Priority Guidance Plan a project to provide guidance regarding the validity of the QTIP election on an estate tax return filed only to elect portability. Office of Tax Policy and Internal Revenue Service, 2013-2014 Priority Guidance Plan (November 20, 2013). One alternative that would avoid the risk under Rev. Proc. 2001-38 is to structure the estate plan with an outright residuary distribution to the surviving spouse coupled with a contingent disclaimer trust option. The primary drawback of this approach is that the surviving spouse cannot hold a power of appointment to redirect trust property.

f. Post-Death Transfer to Irrevocable Grantor Trust. The predeceased spouse's estate plan may leave all property to the surviving spouse outright as in a typical portability-based estate plan. The surviving spouse can then immediately transfer property received from the predeceased spouse with a value equal to the DSUE amount to an irrevocable grantor trust. Redd, "Ascendancy," *supra*.

Some of the benefits of a credit shelter trust can then be realized through the irrevocable grantor trust, with the added benefit that the surviving spouse becomes the grantor of the trust, avoiding trust level income tax and allowing the trust property to grow income tax free. IRC § 677(a). In addition, the surviving spouse maintains his or her own applicable exclusion amount, which is adjusted for inflation, and can use the predeceased spouse's DSUE amount, which is not adjusted for inflation, to offset the taxable gift resulting from creation and funding the trust. Treas. Reg. § 25.2505-2T(d). Since the assets in the irrevocable grantor trust are removed from the surviving spouse's gross estate, the fact that the DSUE amount is not adjusted for inflation becomes irrelevant.

This technique can make a portability-based estate plan more attractive for even very large estates. It could be utilized even if the predeceased spouse's assets are bequeathed to a QTIP trust if the trustee can make substantial principal distributions to the surviving spouse that will allow the surviving spouse fully to fund the irrevocable grantor trust. Sloan & Abendroth, *supra*.

One drawback of this technique is that, for the spouse to be a beneficiary of the irrevocable grantor trust, it must be established in a self-settled trust jurisdiction and the funding of such trust must avoid being characterized as a fraudulent conveyance. Thus, a surviving spouse with creditor problems likely could not use this strategy. Also, the extent of powers and beneficial interests the surviving spouse could have in such an irrevocable grantor trust are narrower than would be the case with a traditional credit shelter trust. This technique also depends on the surviving spouse's carrying out the creation and funding of the irrevocable grantor trust. The surviving spouse may decide to keep all the assets available to the surviving spouse despite the tax benefits of implementing the irrevocable grantor trust. Furthermore, the assets in the irrevocable grantor trust will not receive a basis step-up at the surviving spouse's death. This problem may be alleviated somewhat if the surviving spouse has the ability, in a nonfiduciary capacity, to exchange with the irrevocable grantor trust assets that have an equivalent value. *See* IRC § 675(4)(C). The surviving spouse could then transfer high basis assets to the irrevocable grantor trust in exchange for low basis assets for which a basis step-up will provide significant income tax savings, and such power will not cause inclusion of the irrevocable trust assets in the surviving spouse's gross estate or the realization of income. Rev. Rul. 2008-22, 2008-1 C.B. 796; Rev. Rul. 85-13, 1985-1 C.B. 184.

Planning for basis step-up involves retaining property in the gross estate so that it receives a basis step-up at death. IRC § 1014(b). Taking steps to ensure basis step-up may result in a greater benefit to the transferor's beneficiaries than making a lifetime gift if the applicable exclusion amount and GST exemption would eliminate transfer taxes in any event and substantial income taxes would be avoided because of the basis step-up when the beneficiary sells the asset. Basis step-up is one of the primary benefits of a portability-based estate plan.

As saving income taxes becomes more beneficial to a particular client, the less likely that the client will need to engage in making lifetime gifts. Such gifts will decrease the amount of the estate that can obtain a basis step-up and may achieve little or no transfer tax benefit. In addition, estate planning professionals may be less likely to advise clients to engage in transactions that create valuation discounts for assets included in the gross estate, since the basis step-up will be greater if the fair market value of the assets is not discounted on the date of death.

1. Planning Options. Techniques that an estate planning professional may utilize to include assets in the client's gross estate and receive a basis step-up include the following:

- If certain property has been transferred into a trust, partnership or another vehicle that is not included (in whole or in part) in the transferor's gross estate, the transferor may be able to reacquire such property (by purchase or by receiving distributions) so that such property ends up included in the gross estate. Alternatively, the property could remain in the trust or other vehicle, but perhaps the governing instrument could be modified so that the client has an interest in or power over the trust or other vehicle sufficient to cause inclusion of the value of such property in the client's gross estate under IRC § 2036(a).
- If the client is currently the grantor of an irrevocable trust to which the client has the power to convey assets in exchange for trust assets of an equivalent value, the client can exercise such power to remove low basis assets from the trust in exchange for the client's high basis assets.
- The client may own an interest in an entity such as a family limited partnership by which the client has removed appreciating assets from the client's gross estate in exchange for equity interests that can be discounted for estate tax purposes. It may be possible to "unwind" that entity and bring the underlying assets back into the client's gross estate. Of course, this technique is probably not advisable if the value of the assets brought back into the gross estate will cause the client to have some transfer tax

exposure after taking into consideration the applicable exclusion amount including any DSUE amount.

- The client's estate plan can be designed to step-up the basis of assets in the estates of beneficiaries if the transfer tax exposure of bringing assets into a given beneficiary's gross estate may be avoided or minimized. The estate plan could grant a contingent general power of appointment exercisable by a beneficiary, thereby causing inclusion in the gross estate and a step-up in basis. Redd, "Ascendancy," *supra*.

The power would be exercisable only if it would not give rise to adverse transfer tax consequences. One way to implement this is through the use a formula clause conditioning the power of appointment on no adverse transfer tax consequences. The formula would provide direction regarding how to calculate the potential transfer tax exposure. The assets over which the power may be exercised could be limited to assets with an aggregate value equal to the beneficiary's unused applicable exclusion amount (including any DSUE amount), or limited to a smaller aggregate value based on the exemption amount for state inheritance or estate taxes. The trust terms could then provide that assets that would benefit the most from basis step-up would be subject to the power before other trust assets.

Clients may be hesitant to grant a general power of appointment to a beneficiary because of the large amount of dispositive control ending up in the beneficiary's hands. One way to deal with this concern is to specify that the power is only exercisable in favor of the beneficiary's creditors or the creditors of the beneficiary's estate. In addition, the trust provision may specify that the power is exercisable only in favor of a bona fide creditor from whom the beneficiary received full and adequate consideration and the amount transferred to a creditor is limited to the amount actually owed to the creditor. If the trustee is independent, then the trust terms may provide that the exercise of the power is subject to the trustee's consent.

Another way to generate basis step-up with a power of appointment is to allow for the springing of the so-called Delaware tax trap over certain appointive assets held in trust. IRC §§ 2041(a)(3); 2515(d). A trust instrument may allow a holder of a limited power of appointment to exercise the power to grant another power of appointment which under state law can be validly exercised to postpone the vesting of any interest in the subject property for a period ascertainable without regard to the date of creation of the first power. If the holder so exercises the limited power, the "trap" is sprung, causing inclusion in the holder's gross estate of all assets subject to the power.

g. **<u>Designing and Using Trust Provisions to Minimize Trust-Level Income Taxes</u>.** Trust provisions can be designed to avoid trust-level income taxes. Provisions can be included in a trust document to trigger grantor trust status. For non-grantor trusts, a trust document could provide for the mandatory distribution of trust income to a beneficiary. Alternatively, a trustee could make distributions judiciously carrying out DNI with sufficiently broad dispositive discretion. The trustee may want to ensure that the potential beneficiary of such distributions is in a lower income tax bracket than the trust. To reduce income taxes further, the trustee may shift trust property into tax-exempt investments and may increase charitable contributions (assuming the trust instrument allows this). *See* Pennell, Belcher & Engelhardt, "Future of Estate Planning: Changing Landscape Across Familiar Terrain," ALI-CLE (July 22, 2014) (hereinafter, Pennell, Belcher & Engelhardt).

Increasing the ability to make distributions from the trust, however, must be balanced against the loss of creditor protection for any property subject to distribution. A power of withdrawal may be inappropriate, for example, if the beneficiary is financially irresponsible and the trust property should instead be preserved in trust. For trusts administered under documents drafted before ATRA, the trustee may decide to change prior distributions practices to reduce income tax. However, the trustee must ensure such distributions are still in accordance with the trust terms and, if not, whether a trust modification is possible and appropriate. Redd, "Ascendancy," *supra*.

B. Client Demographics

1. The Aging Population

About 35 million Americans were over the age of 65 in 2000. By 2020, this number will reach 54.6 million. Older Americans, baby boomers in particular, may be spending more years in retirement given that the life expectancy for women is now 80.9 years and the life expectancy for men is 76.3 years. Note, however, that many general statistics about lifespans can be misleading because other studies show that wealthy individuals, who are more likely to be our clients, may have an even longer life expectancy.

This becomes important in many situations, including the determination of the income needed by a surviving spouse for the expected remainder of her or his life and ensuring that a client will not outlive his or her resources. Estate planning professionals will need to closely monitor issues such as projected income distributions from trusts and investment returns. In addition, long term care insurance is a critical part of an elderly client's financial stability, and estate planning professionals should seek to ensure that the client has the best plan available that the client can reasonably afford. Estate planning lawyers should work closer with wealth transfer advisors to address these types of issues.

A client's longevity may diminish his or her descendants' inheritance, which may lead disgruntled beneficiaries to assert breaches of fiduciary duties against the personal representative, trustee, attorney-in-fact and/or the drafting attorney. Estate planning professionals may have more opportunities to counsel such fiduciaries regarding the proper preservation of property under their control and steps that should be taken to avoid litigation, such as by thorough recordkeeping. Shenkman, "Wrap Up Session: Thriving in the Brave New World," 48TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING (2014).

Older Americans may spend many years dealing with capacity issues. Durable powers of attorney and health care directives should become an even more important part of consultations with clients. These ongoing capacity issues may lead to more beneficiaries asserting that estate planning documents are invalid. Estate planning professionals will need to become adept at spotting signs of incapacity and undue influence as well as dealing with the ethical issues that may arise when trying to serve a client who may be incapacitated or close to being incapacitated. Scroggin, "Where is the Estate Planning Profession Going?" LISI Estate Planning Newsletter #2081 (March 25, 2013) at http://www.leimberservices.com/.

2. Blended Families

The traditional family of a married couple which has produced one or more children is becoming less common in the United States. Less than half of all families consist of a married couple. Only 20% consist of married couples with children. Scroggin, *supra*. Forty percent of married couples include at least one spouse with a child from a previous relationship. In addition, more than a third of all U.S. children are born outside of wedlock. Shenkman, *supra*.

Divorce is a significant cause of blended families. The divorce rate for likely estate planning clients is significantly different from the divorce rate for the population as a whole. The divorce rate for high-income families is 23% while the divorce rate for the general U.S. population is approximately twice that amount. Shenkman, *supra*. This can be an important consideration in drafting estate plans. For example, a wealthy client may wish to direct a trustee to distribute to one or more of the client's children all net income after the client's death in order to reduce the likelihood that such income would be subject to high fiduciary income tax rates and, perhaps, net investment income tax. The disadvantage of such mandatory distributions, however is that such income, to the extent not consumed, may become subject to division upon dissolution of marriage. This risk, however, may outweighed by the desire to minimize income taxes once the more specific statistics regarding divorce rates are considered.

3. The "Sandwich" Generation

More contemporary clients will be responsible not only for the raising and support of their children, but also the support of their aging parents. About 40% of baby boomers are supporting an elderly parent and a dependent child.

These clients will want to ensure their parents have financial security in the event of the client's incapacity or untimely death. Thus, in addition to a surviving spouse and children, in some cases, the client's parents should also be named as potential beneficiaries under the client's estate plan, perhaps under separate trust terms. Furthermore, durable powers of attorney should also include provisions allowing the attorney-in-fact to continue support for parents in addition to children. Shenkman, *supra*.

It may be more appropriate to include adult children as beneficiaries of a credit shelter trust rather than naming the surviving spouse as sole beneficiary, with an independent trustee designated to weigh the competing interests of these beneficiaries. Clients may be more likely to direct that assets remain in trust longer rather than distributing assets outright to a child who has been unable to become financially responsible or independent. Scroggin, *supra*.

4. Mobility

Estate planning professionals will more often need to consider the laws of multiple states in analyzing a client's property interests as well as draft trust documents flexible enough to allow for changes in the governing law and situs of the trust due to changes in the domicile of the client or a beneficiary. These issues involve not only Wills and trusts but also durable powers of attorney. Scroggin, *supra*. Anticipating these issues, the American Bar Association, on February 11, 2013, approved a revision of the Model Rule of Professional Conduct 5.5, allowing attorneys to practice across state lines in limited circumstances without being considered to engage in the unauthorized practice of law. Pennell, "A Look at the Future of Everyday Estate Planning," ALI-CLE (July 22, 2014) (hereinafter, Pennell).

For example, clients may live in a separate property state but own real estate located in their former state of residence that is subject to community property laws. Furthermore, clients may live in a state with no estate or inheritance tax but own property in a state that is decoupled for estate tax purposes. In addition, due to their connections to multiple jurisdictions, clients may be able to establish trusts subject to the law of a jurisdiction with advantageous creditor protection or estate and income tax laws.

Asset protection planning is further complicated due to increased mobility. Estate planners should keep in mind that creditor's rights and, in particular, the rights of a divorcing spouse to reach trust property held for the benefit of the other spouse, can vary from state to state. These factors weigh in favor of granting a trustee more discretion and authority over whether or not to make distributions. Pennell, Belcher & Engelhardt, *supra*.

C. Re-Defining the Scope of Estate Planning

1. Sources of Work

For the very large segment of potential estate planning clients with wealth below the applicable exclusion amount, all the complexity and planning to minimize federal estate tax has become unnecessary. It is estimated that only 196,000 households have more $10 million of investable assets. Because of clients' retirement spending and the inflation-adjustments to the applicable exclusion amounts, the number of clients with a significant risk of estate tax exposure may further decrease each year. Shenkman, *supra*.

ATRA will have a dramatic effect on the number of estate tax returns filed. The number of returns has already decreased from approximately 33,000 returns in 2009 to approximately 9,400 returns in 2012. Approximately 99.86% of estates are nontaxable. Pennell, *supra*; Scroggin, *supra*. The number of returns filed may increase in subsequent years but only because of estate tax return filings to secure the DSUE amount for the surviving spouse. Pennell, Belcher & Engelhardt, *supra*. For those estate tax returns that are filed, however, the IRS is expected to increase the percentage of such returns examined. Scroggin, *supra*; Belcher, Donaldson & Kaufman, "Recent Developments - 2012," 47TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING (2013).

Estate planning professionals may seek to grow their work from existing clients by informing them that their estate plans could be made significantly simpler by, for example, converting to a portability-based estate plan. Blattmachr, "Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve," 45TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING (2011). As discussed above in the context of basis step-up, these clients may also be interested in unwinding more sophisticated estate planning techniques that were used to decrease exposure to estate tax, such as family limited partnerships and irrevocable life insurance trusts. Clients also may be interested in using their applicable exclusion amounts, which increase each year post-ATRA, by making additional gifts. Scroggin, *supra*. In addition, although federal estate tax concerns have subsided for many, estate tax planning and the filing of estate tax returns will be more common in decoupled states. Shenkman, *supra*.

In addition, estate planning professionals must keep abreast of developments regarding the marital rights of same-sex couples. As the trend of recognizing same-sex marriages continues, these potential clients may be a tremendous source of business. For example, many potential clients may still need to have their estate plans revised after the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and changes in applicable state law regarding marital rights of same-sex couples.

More work may arise from many other non-estate tax related issues on which estate planning professionals may advise clients, including asset protection, marital planning, spendthrift trusts, probate avoidance and deterring or resolving family disputes. Most estate planning professionals will also need to expand their expertise and services offered to clients in elder law, trusts and estates controversy matters and business succession planning, discussed in more detail below.

2. Trusts and Estates Controversy Matters

The number and intensity of disputes involving trusts and estates are on the rise. Dysfunctional families and family members who are disinherited or receive less than they expected will generate litigation requiring a lawyer with expertise in trusts and estates law. Beneficiaries will continue to assert breaches of fiduciary duty by trustees and executors, whether individual or corporate, involving the beneficiary's share of trust or estate property.

Trusts and estates disputes may increase in the future due to more people attempting to employ self-help in preparing their own estate plans. Pennell, Belcher & Engelhardt, *supra*. Do-it-yourself estate plans may increase because of document preparation software for non-lawyers and the elimination of any need for estate tax planning for many people. More people may come to believe that the services of an estate planning professional are unnecessary. In addition, even if people seek out an attorney to prepare an estate plan, they may think that the service of a specialist in estate planning is unnecessary and therefore employ a general practitioner or an attorney who specializes in another area of law. The inevitable mistakes and ambiguities created in these situations will lead to further disputes that will require trusts and estates specialists to resolve.

Due to account size minimums at financial institutions and many clients' not needing (or believing they don't need) tax planning, clients may more often designate individuals as trustees over corporate fiduciaries. Individuals will typically not have the expertise needed properly to discharge fiduciary responsibilities. Their mistakes in estate and trust administration will likely give rise to more fiduciary litigation. Even before disputes break out, trusts and estates lawyers may be involved in assisting individual trustees by auditing their activities, rectifying mistakes and dealing with beneficiary demands before they turn into lawsuits. Scroggin, *supra*.

D. More Complex Trusts to Draft and Administer

Changes in state law and complicated family situations will require trusts and estates lawyers to draft more intricate estate plans and then advise fiduciaries regarding the implementation of such plans. This complexity, along with the expanded beneficiary rights under the Uniform Trust Code ("UTC"), will lead to additional scrutiny of trustees, both individual and corporate. Pennell, Belcher & Engelhardt, *supra*.

1. Family Dynamics

The increasing number of blended or non-traditional families creates numerous issues that will often need to be addressed in the estate planning process. Definitional issues alone may present significant challenges for clients and their advisors. In the new millennium and perhaps beyond, taking into account changing social norms and laws, what should the terms "spouse," "child" and "descendant" be considered to mean? What does the client intend? What public policy issues may stand in the way of a client's carefully considered definition of such terms? Are posthumously conceived children and/or grandchildren to be included?

Additionally, a client may wish to treat one or more of his or her children differently from others or may wish to include his or her stepchildren in the estate plan but under separate and different provisions. Other beneficiaries may include surviving spouses of the client's children, especially if the client foresees that the post-death trusts established for the child's benefit will be the primary source of income for the child and his or her spouse. Pennell, Belcher & Engelhardt, *supra*. These sorts of issues may encourage clients to grant beneficiaries powers of appointment to redirect trust assets so circumstances after the client's death can be appropriately responded to. Belcher, *supra*.

2. Trustee Designations

Estate planning professionals should not accept a client's trustee designations without counseling them on a trustee's duties and liability risks as well as the characteristics of an effective trustee. Redd, "The Most Disrespected Decision in Estate Planning," TRUSTS & ESTATES (July 2014). The estate planning professional must ensure that, for example, the trustee designations will not result in the surviving spouse having to deal directly, whether as a trustee or a beneficiary, with children from a prior marriage. Estate planning attorneys will need to discuss with clients whether the desired trustees will be able to effectively exercise discretion over distributions.

The division of a trustee's duties through a directed trust will become more common. A directed trust is one in which the trust instrument provides that a third party will direct one or more of a trustee's responsibilities. The third party has the power to direct the trustee as to the matter under the third party's control, and usually the trustee has no discretion over that particular area of administration. This arrangement is quite different from a delegated trust – *i.e.*, one in which the trustee contracts with a third party to perform certain fiduciary acts on behalf of the trustee. In the latter arrangement, the third party acts as an agent of the trustee, subject to the terms of the contractual relationship. In the directed trust, however, the third party has specified control over the trustee. The trust may have multiple directed trustees, such as one to handle investments, one to handle distributions and another to change the succession of trustees. The directed trustees must be able to effectively communicate with one another and with the beneficiaries. Pennell, Belcher & Engelhardt, *supra*.

3. Trust Modifications and Terminations

Trying to project a client's family's future needs and circumstances, as well as evolving laws and estate planning standards, has been proven to be very difficult and in some contexts downright impossible. Accordingly, now more than ever, flexible drafting of estate planning documents is important. This means conferring broad powers of appointment on those who can be expected to have the maturity and responsibility to exercise such powers wisely in the then prevailing situation. It also means giving serious consideration to the use of trust protectors or trust advisors who are vested with appropriate powers to amend an estate plan that has become hopelessly out of touch with evolved facts that the client did not anticipate and could not have anticipated.

In states that have enacted the UTC and in those which have not, estate planning professionals should strive to gain expertise in the judicial and nonjudicial options available to modify, decant or terminate rigid or inappropriate irrevocable trusts. Many older irrevocable trusts are no longer appropriate given current circumstances. Factors to consider include: (a) the evaporation of estate tax concerns for many individuals and married couples (which will cause many clients to terminate their irrevocable life insurance trusts); (b) beneficiaries who, it turns out, should not receive outright distributions of principal or income; (c) trust ambiguities due to drafting errors or otherwise; and (d) desirability of taking advantage of beneficial trust laws of other jurisdictions. Trust modifications, decanting and terminations may increase litigation over, among other issues, whether the trustee breached the trustee's fiduciary duties in carrying out the modification, decanting or termination or whether a parent or other beneficiary properly consented on another interested party's behalf. Pennell, *supra*.

4. Consultation and Collaboration

Given this complexity, estate planning attorneys will need to spend more time consulting with clients to understand family dynamics. This will put more pressure on the attorney to draft estate planning documents efficiently to keep fees within expectations. Pennell, Belcher & Engelhardt, *supra*. Estate planning attorneys may need to work more with accounting firms and wealth management firms in structuring estate plans. These firms may be able to provide important information, such as the basis of assets, forecasts of future income and investment returns, for the estate planning attorney to consider while advising clients and drafting documents. Shenkman, *supra*. Also, estate planning attorneys may need to work with such advisors in estate and trust administration matters, to extent other advisors are not already handling all aspects of such matters.

E. Family Offices and Private Trust Companies

The future of family offices and private trust companies is uncertain. Part of this uncertainty exists because the IRS has never finalized guidance regarding the income, estate, gift and generation-skipping transfer tax consequences of establishing a private trust company. Notice 2008-63, 2008-2 C.B. 261 (August 4, 2008). In addition, by providing a wide variety of wealth management resources and services, financial institutions seem to have obtained some business that otherwise would have been handled by family offices and private trust companies. For some very wealthy families, however, family offices and private trust companies may be attractive due to the personal attention such entities can provide on a day-to-day basis. Pennell, Belcher & Engelhardt, *supra.*

F. Technology

Technology will increasingly affect an estate planning professional's day-to-day practice. The use of document preparation software will become an essential part of most estate planning practices, if it hasn't already. This software allows documents to be prepared more quickly and reliably and at lower cost. This will be especially important for the greater number of clients who do not have estate tax concerns and have accordingly become more fee sensitive. For more routine situations, estate planning attorneys may further decrease costs by having paralegals prepare drafts of estate planning documents (and some lawyers already do this).

Document preparation software is a significant step towards the "commoditization" of estate planning documents. Because of the pressure on efficiency, attorneys will need to work towards presenting final documents to the clients that look very similar to the initial drafts prepared by the document assembly software. There will be less time for lawyers to conduct a detailed review of estate planning documents to insert relatively minor customizations. Shenkman, *supra*. However, the estate planning attorney must avoid falling into the role of a "mere scrivener" and look for ways to provide advice and otherwise add value to the engagement beyond the drafting of documents. Pennell, Belcher & Engelhardt, *supra*.

If the estate planning attorney is successful, however, in efficiently preparing estate plans within the client's fee expectations, that may lead to more profitable work from the client or from others referred to the attorney by the client. The attorney may reduce costs further through the electronic storage of documents rather than expanding hardcopy storage space. The decrease in time spent drafting documents may allow the estate planning attorney to spend more time meeting with clients and their advisors to address complications like the issues discussed in the previous section. Shenkman, *supra*.

As discussed above, technology may cause some estate planning attorneys to lose business because some individuals may wish to employ document preparation software designed for non-attorneys. This loss may be only temporary, however, because it is likely that disputes involving trusts and estates will increase as the testators or grantors under documents prepared with these do-it-yourself software packages become incapacitated or die and family members find mistakes and ambiguities in the documents. In addition, probate administration work may increase because individuals who employ self-help may never heed the advice of estate planning attorneys to fund revocable trusts or otherwise change the titling of assets to avoid probate. Similarly, post-mortem matters, such as disclaimers, and trust modifications and decanting, may increase. Pennell, *supra*.

G. Fees and Profitability for Law Firms

Given that estate planning engagements may be fee sensitive, flat fee arrangements may become more common so that the clients will know exactly what they will be spending over the entire project. Blattmachr, *supra*. Flat fee arrangements may be most common with relatively straightforward estate planning projects and small probate estate matters. Flat fee arrangements will put more pressure on estate planning attorneys to be more efficient so that the flat fee will be commensurate with the fee that would have been charged with normal hourly billing rates. Pennell, Belcher & Engelhardt, *supra*.

The increasing fee sensitivity of clients may also lead to the greater use of paralegals who can handle at least routine drafting projects and handle trust and estate administration tasks such as funding revocable trusts, preparing and filing probate documents and preparing beneficiary notices and designations.

Uncertainty exists regarding the future of trusts and estates practices in large law firms, which typically have higher hourly billing rate structures than smaller firms. If these practices are able to maintain a client base that is dominated by affluent families having wealth far above the applicable exclusion amount, these practices may continue to be profitable enough to be maintained in large law firms. For other practices, the economics of large law firms may force estate planning attorneys in these firms to join smaller or boutique firms. *See* Shenkman, *supra*; Pennell, *supra*.

Virginia MCLE Board

CERTIFICATION OF ATTENDANCE (FORM 2D)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

INSTRUCTIONS

Certify Your Attendance Online at www.vsb.org see Member Login

Complete this Certification. Retain for two years.
MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.
A $100 fee will be assessed for failure to comply with either deadline.

Member Name: ______________________________ **VSB Member Number:** ____________________

Address: ______________________________ **Daytime Phone:** ____________________

______________________________ **E-mail Address:** ____________________

____

City **State** **Zip**

Course ID Number: **NCC0002**

Sponsor: **Cannon Financial Institute**

Course/Program Title: **Future of Estate Planning and Ficuciary Services**

Live Interactive *Approved CLE Credits (Ethics Credits): **1.5** **(0.0)**

Date of telephone/webcast:______________________ **Location(s):** ______________________

By my signature below I certify

___ I attended a total of ____________ (hrs/mins) of **approved CLE**, of which (______) (hrs/mins) were in **approved Ethics**. Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)
___ The sessions I am claiming had written instructional materials to cover the subject.
___ I participated in this program in a setting physically suitable to the course.
___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.
___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.
___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

____________________ ______________________________
Date Signature

Questions? Contact the MCLE Department at (804) 775-0577 or E-mail questions to mcle@vsb.org

If not certified online, this form may be mailed to:
Virginia MCLE Board
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-3565
Web site: www.vsb.org

[Office Use Only: Teleconference]

Pennsylvania Continuing Legal Education Board

601 Commonwealth Avenue, Suite 3400 • P.O. Box 62495 • Harrisburg, PA 17106-2495
(800)497-2253, (717)231-3250 • FAX (717)231-3251
www.pacle.org
E-mail: pacleb@pacle.org

CREDIT REQUEST FORM

BA_____

This form is to be used when you have attended a course that is not sponsored by an AccreditedProvider. Lawyers seeking Pennsylvania CLE credits must complete Section B of this form and return it to PACLE, along with a Uniform Certificate of Attendance, if available, and a check made payable to PACLE for the $1.50, per credit hour attendance fee payment. Please refer to Section C to calculate the correct attendance fee payment.

SECTION A : Course Information

Provider: **1854** Cannon Financial Institute

Course: **189178** Future of Estate Planning and Fiduciary Services (413356)

Date: 12/09/2014 13:00 **Location:** Alternate Delivery

Total CLE Credit Hours: Maximum: 1.50 = 1.50S

SECTION B : Lawyer Information

Lawyer Name ______________________________ PA Lawyer ID __________

Address ____

City ___________________________________ State __________ Zip ____________

By signing below, I certify that I attended the activity described above and am entitled to claim:
_____ Substantive

______________________________ ____________________
Signature Date

I am enclosing check #_________________ for $__________

NOTE: If you attended the maximum 1.50 credit hours for this course, please enclose $3.00 attendance fee payment. See Section C below for calculation.

SECTION C : Attendance Fee Calculation

Pennsylvania grants one (1) CLE credit for each 60 minutes of attendance at an approved course. Pennsylvania requires a $1.50 per credit hour attendance fee payment. This $1.50 fee is also required for any portion of a credit hour. We accredit only programs that are at least one hour long; in addition, we accredit only in half hour increments. Please refer to the example below when calculating your attendance fees.

1 hour = 1.50	1.5 to 2 hours = $3.00	2.5 to 3 hours = $4.50	3.5 to 4 hours = $6.00
4.5 to 5 hours = $7.50	5.5 to 6 hours = $9.00	6.5 to 7 hours = $10.50	7.5 to 8 hours = $12.00

etc...

CANNON
FINANCIAL INSTITUTE

Certificate of Attendance

____

(Participant Name)

____

(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Future of Estate Planning and Fiduciary Services

(739717)

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

December 9, 2014

Laurie Frye
Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

Colorado – 2 hours General Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CANNON
FINANCIAL INSTITUTE

Certificate of Attendance

____
(Participant Name)

____
(Attorney Bar # or Social Security #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Future of Estate Planning and Fiduciary Services
December 9, 2014

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Frye
Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:
The following states have been approved for 1.5 hours of General Credit: (Course number is indicated in parenthesis): Alabama, Arkansas (TWE44908), California, Delaware, Georgia, Idaho, Illinois, Iowa (119980), Kentucky (143320), Louisiana, Maine (033132), Minnesota (185986), Mississippi, Montana (20641), Nebraska(85658), Nevada (543L14-VD), New Mexico, New York, North Carolina, North Dakota, Oregon (1048* 202), Pennsylvania, South Carolina, Tennessee (Distance Ed), Texas (901281627), Utah, Vermont, Virginia, Washington, Wisconsin & Wyoming.

These states have been approved for the following General Credit:
Colorado – 2 hours, Florida-2.0 (1309267N), Missouri –1.8 hours, Oklahoma – 2 hours, West Virginia – 1.8 hours

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Hawaii, Maryland, Massachusetts, Michigan & South Dakota

For the following states have special circumstances:
Alaska-Attorneys can use this certificate to submit to Alaska State Bar
Arizona-On honor system
Indiana & Ohio-Site Coordinators must apply for credit as the sponsor in order for participants to receive credit
Kansas–Attorney or Site may apply 30 days prior to program
New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit, and self-report their attendance.*
New Jersey-Attorneys can use this certificate to submit to New Jersey State Bar for 1.5 General credits (Reciprocity Rule)
New York–Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, CO, DE, GA, KY, LA, MS, NM, NC, ND, OK,. Type of credit: Areas of Professional Practice 1.5 General Credits
Rhode Island-Attorneys must apply for credit themselves

* In order for PA attorneys to receive credit they must listen to the teleconference in a live classroom setting. The teleconference site must also be listed on the PACLE website and the site must be open to any PA attorney who desires to listen to the program. Call PACLE at 1-800-497-2253 with questions on website listing.
****As required by the following State Bars, and in order to obtain CLE in these states, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, West Virginia and Washington. ****

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CANNON FINANCIAL INSTITUTE

Certificate of Attendance

____

(Participant Name)

Has successfully completed the Cannon Financial Institute, Inc. course:

Future of Estate Planning and Fiduciary Services

December 9, 2014

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Frye

Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** **1.5 total credit hours**
  In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour. For information regarding available CPE credits please visithttp://cpemarket.nasbatools.com/index".
  Instructional delivery method: Group-Live
  NASBA #103655; Field of Study – Specialized Knowledge & Application
- **Enrolled Agent (IRS)** **2.0 total credit hours**
  Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS' Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.
- **Certified Financial Planner (CFP™)** **1.5 total credit hours**
- **Accredited Fiduciary Investment Manager (AFIM™)** **1.5 total credit hours**
- **Certified Wealth Strategists (CWS®)** **2.0 total credit hours**
- **Certified Investment Management Analyst (CIMA®)** **1.5 total credit hours**
  Course #13CFI029
  If you hold the CIMA®, CIMC® or CPWA® certification, you may report this pre-accepted CE program online by logging into your My IMCA account at www.imca.org/user
- **Certified Trust Financial Advisor (CTFA™)** **2.0 total credit hours**

Fiduciary Law	2
Taxes	0
Investments	0
Financial Planning	0
Ethics	0

- **Certified Retirement Services Professional (CRSP™)** **2.0 total credit hours**
- **Fiduciary Investment Risk Management Association (FIRMA®)** **2.0 total credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant** **1.5 total credit hours**
  (**No Individual State Insurance Credit Available)

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute

Subject Matter/Title: Future of Estate Planning and Fiduciary Services

Date and Time of Activity: December 9, 2014 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT,

10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics: 0

Elimination of Bias in the Legal Profession:

Prevention, Detection and Treatment of Substance Abuse:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: ________________________

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics:________________________________

Elimination of Bias in the Legal Profession:________________________________

Prevention, Detection and Treatment of Substance Abuse: ________________________________

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.

Thank you for attending this event.

Today's event features an online, post-event evaluation form. To send us your feedback, please click on the link below, or type the URL into your web browser's address bar.

http://eval.krm.com/eval.asp?id=20909

Your feedback and comments are very important to us. Thank you in advance for taking the time to complete this evaluation!