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Participant Guide

Delivering the Best Possible Results for Estate Planning and Trust Administration Clients

Cannon Financial Institute, Inc.

Presents

The 2020 Estate Planning Teleconference Series

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Charles A. Redd is a partner in the St. Louis, Missouri, office of the law firm of STINSON LLP. Mr. Redd concentrates his practice in estate planning, estate and trust administration and estate and trust-related litigation. Prior to joining Stinson, Mr. Redd was a partner in and Vice Chairman of the Trusts & Estates Practice Group at the law firm of SNR Denton US LLP (now Dentons US LLP). Mr. Redd was also previously a partner in the law firm of Armstrong, Teasdale, Schlafly & Davis (now Armstrong Teasdale LLP) and was Chairman of that firm's Trusts & Estates Department. He was previously employed as a Trust Administrator by First Wisconsin Trust Company (now U.S. Bank, N.A.), Milwaukee, Wisconsin, and as an Assistant Counsel by Centerre Trust Company of St. Louis (now Bank of America Private Bank).

Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital 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, some involving assets valued at over a billion 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.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar, the Illinois State Bar Association, The Bar Association of Metropolitan St. Louis and the Estate Planning Council of St. Louis.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award. Mr. Redd was the principal draftsman of the recently enacted Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent; Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He serves as Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. In 2018, he was inducted into the Estate Planning Hall of Fame® by the National Association of Estate Planners and Councils. Mr. Redd is listed in The Best Lawyers in America and is "Band 1" ranked by Chambers and Partners in their High Net Worth guide. He frequently writes and lectures nationally on topics in the trusts and estates field.

* * * * * * * * *

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

Delivering the Best Possible Results for Estate Planning and Trust Administration Clients

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I. EDUCATING CLIENTS AND PROSPECTIVE CLIENTS ON THE NEED FOR SOPHISTICATED ESTATE PLANNING AND TRUST SERVICES

A. Introduction

In general, consumers and prospective consumers of estate planning and fiduciary services don't know much about what they are seeking or should be seeking. Often, they are motivated largely by desires to pursue simplicity and low cost. They may be blind to the importance of having an estate plan that is designed to fulfill their unique needs and desires. It is the responsibility of industry professionals to create and utilize opportunities to educate the public concerning the importance of sophisticated estate planning and the need to engage and consult those with experience and expertise in planning estates and fiduciary administration.

B. Estate Planning

The process of estate planning should no more be undertaken by untrained individuals for themselves and their families than the diagnosis and treatment of disease and illness should be handled by patients for themselves. Lawyers and others who have professional credentials should engage in honest self-reflection concerning the level and type of estate planning with which they are genuinely qualified to assist.

1. Document Drafting Challenges

Unfortunately, there are many ways in which the design and drafting of the provisions of Wills, trust instruments and durable powers of attorney can be mishandled. Provisions designating initial and successor fiduciaries should be comprehensive in scope. Administrative provisions may need to include intricate directions regarding retention of the equity in and the operations of a family business. Dispositive provisions that accurately reflect the client's desires need to be assembled using understandable but technically correct language and must address all contingencies. No family is the same as any other, and special situations present design and drafting challenges. Problems involving the disposition of tangible personal property, even tangibles of modest monetary value, if not anticipated and skillfully addressed, can sometimes be monumental. Crafting dispositive plans for families whose members may include unmarried partners, step-children, adopted children, children born out of wedlock, non-biological children, special needs children, children having lifestyles of which the client disapproves, spouses of children (whose degree of acceptance by the client may vary) and dependent parents requires heightened sensitivity, attention to detail and drafting ability.

2. Planning for Incapacity

Ever more impressive advances in medical science continue to increase life expectancies and accident survival rates. Many people alive today realistically anticipate living beyond age 100 and can expect to survive calamities that just a couple of decades ago would have meant certain death. This evolving reality is a double-edged sword. With prolonged life comes an increasing likelihood of becoming incapacitated. Accordingly, there should be a greater emphasis on planning for a time when a client for whatever reason is no longer able to meet his or her own needs or care for him or herself. Such planning often includes establishment and funding of revocable trusts, designing a revocable trust's dispositive and Trustee succession provisions to address the individual client's comfort level that everything he or she anticipates needing or wanting while incapacitated will be made available and preparing comprehensive durable powers of attorney for both property, business and financial matters as well as health care and other personal matters.

3. Need for Expertise, Experience and Coordination

The drafting lawyer should be prepared, using his or her accumulated expertise and experience, to offer suggestions to his or her client regarding provisions that make sense in the client's particular situation. The drafting lawyer must not assume the role of a mere scrivener – dutifully transcribing into a Will, trust instrument or durable power of attorney whatever stream of consciousness directions may be expressed by a client. In such a scenario, estate planning is truly reduced to a mindless, mechanical commodity.

The numerous components of a comprehensive estate plan, even in a "simple" situation, need to be coordinated so they operate and interact seamlessly and in a manner that fulfills the intentions of the client. These components include Wills, trusts, durable powers of attorney, advance directives, life insurance beneficiary designations, employee benefit plan and IRA beneficiary designations, powers of appointment, jointly-held with rights of survivorship, tenancy in common, tenancy by the entireties and other multi-party property ownership arrangements and beneficiary deeds.

C. Fiduciary Administration

1. Corporate Fiduciaries

There are good and valid reasons to entrust the administration of estates and trusts to professional or corporate fiduciaries, including embedded experience and expertise, continuity, independence, financial substance, etc. Fiduciary administration requires a combination of several different types of knowledge, ability, experience and judgment that untrained individuals simply don't have. Trustees must be prepared to make discretionary distribution decisions and to fulfill this fundamental duty with in an impartial manner, sensitive to the competing needs and circumstances of all beneficiaries and without emotion. Additionally, a fiduciary must properly identify and collect all assets belonging to the subject estate or trust and manage any non-standard assets, make investments that are proper in a fiduciary context, prepare and file tax returns and pay taxes, make appropriate tax and other elections, correctly allocate receipts and disbursements between income and principal, prepare and render accountings to beneficiaries, effectively respond to beneficiaries' requests for information and, potentially, engage in litigation to protect the estate or trust's interests. Full-service corporate fiduciaries possess the technical abilities to carry out all these functions.

2. Individual Fiduciaries

Fiduciary administration does not necessarily have to be carried out by professional or corporate fiduciaries. However, if non-professional individuals are to be appointed in fiduciary roles, it is imperative that they obtain and follow professional advice as they interpret and implement their duties. When an untrained individual seeks to implement estate or trust administration without professional guidance and assistance (usually in a misguided attempt to minimize expenses), it rarely, if ever, ends well.

II. TYPES OF SERVICES OFFERED BY VARIOUS PROVIDERS

A. Estate Planning

1. Lawyer

The planning of an estate, depending on its size and complexity (both in terms assets to be disposed of as well as the client's dispositive intentions), may involve one service provider or could involve a team. In the most simple situations, an individual lawyer, sometimes one in general practice, is capable of gathering the client's personal and financial information, answering the client's questions and giving advice and designing and preparing the documents needed to implement what the client wants to accomplish. If a client's estate planning needs and desires are more complicated, the client will likely need to engage a lawyer who specializes in estate planning to give advice and draft the required documents. In exceptionally complicated situations, that lawyer may need to involve additional counsel with expertise in estate planning subspecialties, such as offshore asset protection strategies. Local counsel will virtually always be required where an estate planning project includes the disposition of property located in multiple jurisdictions.

2. Team

In many estate planning scenarios, a team approach works well. The team consists of the estate planning lawyer, who provides the client with legal and practical advice and drafts documents, and may also include a certified public accountant, whose detailed knowledge about the client's finances, tax posture and manner of asset ownership, and contributions of practical advice, are often invaluable. Additional members of the team may include an investment advisor and a trust professional, each of whom, respectively, may contribute ideas and insights as to how various investments may reasonably be expected to perform over time and how a given trust might be designed now and how it might be administered in the future.

B. Fiduciary Administration

1. Full-Service Corporate Fiduciaries

Full-service, traditional corporate fiduciaries, of course, offer both trust administrative services as well as investment services. The breadth of such services is outlined in part I.C. above. There are, literally, scores of small, medium-sized and large full-service corporate fiduciaries across America who provide excellent estate and trust administration. Like the choice of an estate planner, the choice of a corporate fiduciary will vary depending on the size and complexity of the matter.

2. Lawyers and CPAs

In some locales, it is not uncommon to see law firms, law firm-related entities, individual lawyers and certified public accountants directly serving in a variety of fiduciary roles. Often, such firms and entities have a highly developed model for providing top-quality services and rival sophisticated trust institutions. Individual lawyers and accountants bring their respective professional skills to the process and engage agents to assist them in performing administrative tasks for which they may not be well-suited, such as investments and tax return preparation.

3. Directed Trustees

Some bank trust departments and trust companies hold themselves out as available to act as Trustees of directed trusts. A directed trust is one as to which the trust instrument provides that a third party (the "Trust Director"), sometimes called a "trust protector" will direct one or more of a Trustee's (the "Directed Trustee") responsibilities. Depending on the design of the trust, directions to the Trustee may be forthcoming in the form of investment directions or discretionary distribution directions. The Directed Trustee, operating under specific enabling provisions in the trust instrument and applicable directed trust statutes,[1] generally receives and implements instructions received from the Trust Director. In such cases, with narrow exceptions, the Directed Trustee is required to follow the instructions received and has no liability for so doing.[2] Directed trusts are used where a client finds certain features offered by a corporate fiduciary attractive, *e.g.*, continuity and objective oversight, but not others, *e.g.*, administration of nontraditional trust assets and investment services.

4. Family Offices

For exceptionally wealthy families, family offices sometimes provide many of the services offered by corporate fiduciaries. A family office may employ a legion of professionals skilled in such areas as investments, management of specialty assets, tax planning and tax return preparation, accounting. While a family office, as such, cannot directly act in most fiduciary roles, a family office can provide, at a very high level, virtually all the administrative tools an individual, family member Trustee needs – leaving to that Trustee only the responsibilities to make discretionary

[1] *See, e.g.*, Uniform Trust Code ("UTC") § 808(b)–(d) and the Uniform Directed Trust Act.
[2] *See, e.g.*, S.D.C.L. §§ 55-1B-2, -5; 12 Del. C. § 3313.

distribution decisions and periodically to monitor and oversee the performance of the family office in the areas of administration delegated to it.

5. Private Trust Companies

An interesting and growing alternative to the family office is the family or private trust company. A private trust company is the functional equivalent to a family office with fiduciary powers. The legislative bodies in several states in recent years have enacted laws allowing the creation of private trust companies. Private trust companies operate for the sole and exclusive benefit of families and family groups. They are absolutely prohibited from offering or performing fiduciary service to the general public. In many states in which private trust companies are legal, they may be regulated or unregulated by the applicable state regulatory body. The income, estate, gift and generation-skipping transfer tax consequences of using private trust companies remains uncertain. The last Internal Revenue Service pronouncement concerning private trust companies, which was explicitly not definitive, was promulgated over ten years ago. Notice 2008-63, 2008-2 C.B. 261 (August 4, 2008).

III. ALTERNATIVE FEE ARRANGEMENTS

A. Estate Planning

1. Hourly Rates

Among estate planning lawyers and law firms, the traditional, prevailing method for charging professional fees for services rendered was and largely remains multiplying hourly rates times the number of hours spent working on the estate planning project. Over the past several years, however, a trend has emerged to alter that traditional fee charging model in favor of charging a flat fee. Some estate planning clients are particularly fee sensitive, and those clients are apprehensive about a method of computing professional fees that leaves open-ended and outside their control the aggregate amount to be charged and, at least in their minds, rewards inefficiency. The flat fee approach addresses both of those concerns.

2. Flat Fee and Hybrid Arrangements

Flat fee arrangements may be most common with relatively straightforward estate planning projects and small decedent's estate matters. In such circumstances, an estate planning lawyer can often predict the amount of time that will be expended and then propose a flat fee amount that will be attractive to the client and at the same time enable the lawyer to earn fair compensation for work performed. With more complicated estate planning projects, though, a flat fee approach is more difficult to manage because such projects invariably require unpredictable amounts of client consultation time. When working on these more complex projects, the traditional, hourly rate-based approach may be seen as more fair to both client and lawyer. Alternatively, in that context, a hybrid model may work well. The hybrid model involves charging a flat fee for document preparation and charging by the hour for consultative services.

3. Methods for Increasing Efficiency

Fee pressure on estate planning lawyers naturally forces them to increase efficiency. This pressure leads in at least a couple of directions. First, the drafting and assembly of routine estate planning documents, as well as the routine or "boilerplate" provisions of complex documents, must be super-streamlined. Computer programs that automate document assembly are very commonplace today, and it is hard to imagine a viable estate planning practice without one. Second, estate planning practitioners should embrace the greater use of paralegals in handling routine document drafting projects. Experience has shown that capable paralegals can prepare quite credible drafts of simple Wills and revocable trust instruments, "pour-over" Wills and durable powers of attorney.

4. Large Law Firms vs. Boutiques

Some question the future of estate planning 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 federal estate and gift tax basic exclusion amount, these practices may continue to be profitable enough to be maintained. The economics of large law firms have forced, and may continue to force, some estate planning lawyers in these firms to join smaller or boutique firms.

B. Fiduciary Administration

1. Fee Schedules

Beginning approximately fifty years ago, corporate fiduciaries nationwide began developing standardized, published fee schedules which they generally applied in computing fees to be charged for administering trusts, investment management accounts, custody accounts and, in some cases, decedent's estates. As applied to trusts, in particular, those schedules called for fees to be computed based on a combination of factors including the amount of income generated within a specific timeframe and the value of the trust property as of given dates. Additional fees for so-called "special services," such as tax return preparation, management of unique assets such as closely-held business interests, farm and ranch property, royalty interests, etc. were determined separately. Most of these schedules also included distribution or termination fees, which were calculated as a percentage of the amount or fair market value of principal being distributed. For several years, fee schedules that were in effect at the time the fiduciary account came to the institution governed the determination of fees throughout the life of the account.

Corporate fiduciary fee schedules today follow a similar model, but, for the most part, they have been refined and simplified. The number of "special services" for which separate fees are charged has generally been reduced. In many cases, percentage fees based on the amount of income generated have been eliminated. In virtually all cases, distribution or termination fees have been eliminated. And, today, as fee schedules are updated, those updated fee schedules are used, other than in exceptional circumstances, to calculate the fees for administering all accounts held by the corporate fiduciary.

2. Negotiated Fees

Depending on the size of an account or group of accounts within the same family, most bank trust departments and trust companies are willing to abandon application of published fee schedules in favor of using a negotiated fee arrangement. The scope of negotiated fee arrangements is limited only by the imagination of the negotiators and how badly the institutional fiduciary wants to secure the business.

3. Directed Trusts

Some corporate fiduciaries hold themselves out as ready, willing and able to serve as directed Trustees with respect to investments. In such cases, fees will be paid both to the Trustee and to the investment director. Naturally, such corporate fiduciaries charge less to serve as a directed Trustee than they would charge to serve if they were fully responsible for all Trustee functions including investments. In theory, the total fees to be paid to the directed Trustee and to the investment director should be about the same as the fees that would be paid to the corporate Trustee were it acting alone, but it does not always work out that way. Some settlors are willing to have their trusts pay a bit of a premium to have a directed Trustee arrangement.

4. Individual Trustees

When individuals serve in fiduciary roles, there are several different ways in which they usually charge for their services. First, they may simply charge by the hour. Arriving at an appropriate hourly rate may be a challenge, and different hourly rates should apply depending on the expertise and experience of the particular individual. A lawyer or a certified public accountant is justified in charging a higher hourly rate than an individual with no relevant professional credentials or experience. Second, an individual may charge based on a percentage of the value of the trust property measured at periodic intervals. The percentage should be lower for an individual with no relevant professional credentials or experience than for a lawyer or a certified public accountant. Finally, an individual may charge fees for fiduciary services rendered by using a recognized corporate fiduciary's fee schedule but discounting those fees by some percentage to account for the fact that the individual is not equivalent to a full-service corporate fiduciary and will almost certainly be required to engage and pay agents to carry out or advise with respect to various administrative functions.

IV. Utilizing Changes in the Law as Opportunities to Enhance the Quality of Services and Their Efficient Delivery to Clients

A. Many Estate Plans are in Desperate Need of Revision

The past several years have witnessed significant changes in laws relating to estate planning and trust and estate administration. At this time, and for the indefinite future, as a result of the 2017 Tax Act,[3] individuals have a greatly enhanced, historically high basic exclusion

[3] An Act To Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97.

amount.[4] During the past decade alone, we have moved from a period in which federal estate tax was eliminated altogether (the year 2010) – to a $5,000,000 federal estate and gift tax exemption, indexed for inflation from 2010 (during the years 2011 through 2017) – to a $10,000,000 exemption, indexed for inflation from 2010 (which now amounts to $11,580,000). In the meantime, in 2012, there was a credible possibility that the exemption would be reduced to $1,000,000. As if that amount of volatility in federal estate and gift tax law were not enough, we are within months of a national election, the results of which could conceivably include a substantial reduction in the exemption along with a substantial increase in the rate of tax. Even if those results do not materialize, the $10,000,000 exemption, indexed, will, under the 2017 Tax Act, vaporize on January 1, 2026, and the $5,000,000 exemption, indexed, will be restored.[5]

Many estate plans that have not been thoroughly reviewed and updated within the past few years are in desperate need of revision. Accordingly, estate planners have very legitimate, if not compelling, reasons for taking the initiative to contact many of their clients, alert them to the problematic results that could obtain if their current documents remain in place and encourage them to authorize a comprehensive review and, if necessary, revision of their plans.

A few examples of the kinds of issues that should be examined in a 2020 estate planning review include the following:

B. Replacing Obsolete Formula Provisions

Among the most serious problems with older estate plans is that they contain “formula” provisions which, at the death of the first spouse to die, would cause property having a value equal to the smallest amount necessary to reduce federal estate tax to zero (or a fractional share of such property defined by a numerator equal to such smallest amount) to pass in a marital deduction disposition with the balance of the decedent’s estate to pass in a non-marital deduction disposition. At the time these plans were constructed, they may have made sense but, if they were to be implemented today, would cause extremely distorted results.

Consider the following example: X has a Will containing a formula provision of the type summarized in the preceding paragraph. X signed his Will in 2008. X’s non-marital deduction disposition is materially different from his marital deduction disposition. (There are innumerable clients across America in this estate planning posture.) When X signed his Will, his net worth was $5,000,000. Today, X’s net worth is $8,000,000. In 2008, what we now refer to as the “basic exclusion amount” was $2,000,000. Today, it is $11,580,000. Had X died in 2008, $3,000,000 would have passed in the marital deduction disposition, and $2,000,000 would have passed in the non-marital deduction disposition, a result of which X presumably approved. The applicable figures for 2009 would have been $1,500,000 and $3,500,000. The applicable figures for 2010, based on what X and his advisors could have known in 2008, were $4,000,000 and $1,000,000. If X were to die today, his surviving spouse could receive ***nothing*** under his estate plan (whether outright or in trust).

[4] Internal Revenue Code (“IRC”) Section 2010(c)(3).
[5] IRC Section 2010(c)(3)(C).

Clients with formula-based estate plans should carefully consider whether those plans would carry out their present intentions and, if not, take steps promptly to make changes needed to conform their plans to achieve the results they want.

1. Portability

The concept estate planners know of and routinely refer to as "portability" was introduced into the law by the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, P.L. 111-312 (December 17, 2010)[6] and was extended by The American Tax Relief Act of 2012, P.L. 112-240 (January 2, 2013). Portability allows a predeceased spouse's unused estate tax exemption, formally known as the "deceased spousal unused exclusion amount"[7] ("DSUE amount"), to be available for use by a surviving spouse (or his or her estate), provided an election is made on the predeceased spouse's timely-filed estate tax return.[8]

Portability has dramatically changed the estate planning landscape for married couples. Using portability is a viable, and often preferable, alternative, when planning with a view to using both spouses' estate tax exemptions regardless of who is the first to die, to dividing ownership of assets between the spouses while both are alive and then mandating that a credit shelter trust come into existence at the death of the first to die.

The most straightforward 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.

2. Clayton QTIP Trust

Another approach made possible by portability is to direct distribution of the estate of the predeceased spouse to a so-called Clayton QTIP trust.[9] A Clayton QTIP trust is a trust for which a QTIP election at the death of the first spouse to die is eligible to be made and where, to the extent the predeceased spouse's executor does not make the QTIP election, any non-elected property, under the terms of the governing instrument, passes to a separate trust which is not required to have terms identical to the QTIP trust and is not required to meet the definition of a QTIP trust, *i.e.*, a traditional credit shelter-type trust for the concurrent benefit of the surviving spouse and descendants living from time to time. An income interest which is contingent on the election of the Executor will not fail to be a qualifying income interest for life if such an election is actually made.[10]

In a typical Clayton QTIP scenario, to the extent a QTIP election is not made with respect to a predeceased spouse's residuary estate, non-elected potential QTIP property passes to a traditional credit shelter-type trust for the concurrent benefit of the surviving spouse and

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[6] Subject to the "sunset" provision contained in Section 304 of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, P.L. 111-312 (December 17, 2010).
[7] IRC Section 2010(c)(4).
[8] IRC Section 2010(c)(5)(A).
[9] *See Estate of Clayton v. Comm'r*, 976 F.2d 1486 (5th Cir. 1992). *See, also*, Treas. Reg. § 20.2056(b)-7(d) and 7(h).
[10] Treas. Reg. § 20.2056(b)-7(d)(3).

descendants living from time to time. Income from that trust does not have to be paid to the surviving spouse. The trust may provide for wholly discretionary income and principal distributions among multiple current beneficiaries. In addition, the surviving spouse may have a non-general power of appointment over the assets of the trust. The surviving spouse must have a mandatory income interest only in the property with respect to which a QTIP election is made.

The flexibility allowed in the Clayton QTIP context provides opportunities for tax savings based on asset characteristics, the age and health of the surviving spouse and the family's goals. An executor may elect portability and may make a QTIP election with respect to 100% of potential QTIP property thereby facilitating use of the predeceased spouse's GST exemption by means of the "reverse QTIP election" under IRC § 2652(a)(3) *plus* a full basis step-up as to the QTIP property at the death of the surviving spouse. On the other hand, an executor may prefer a traditional credit shelter trust approach that will allow for use of the predeceased spouse's GST exemption without "reverse QTIP election" and will in essence trade estate tax-free appreciation of property during the life of the surviving spouse for basis step-up at the surviving spouse's death.

A broad discretionary credit shelter trust dispositive scheme allows for income tax planning through the making of judicious distributions. In addition, income tax planning options may be enhanced by providing the surviving spouse with a broad non-general lifetime power of appointment over the credit shelter trust.

C. Engrafting General Powers of Appointment Onto Existing Irrevocable Trusts

Innumerable trusts that originated as or have become irrevocable, created before enactment of the 2017 Tax Act and still in existence, were intentionally, and appropriately, designed to cause the value of the trust property not to be included in the gross estate of any beneficiary at such beneficiary's death. Today, many of these beneficiaries reasonably believe they will likely have no federal estate tax issues – regardless of whether the value of a portion or all of the trusts of which they are beneficiaries is included in their gross estate. Virtually all of these trusts hold assets having a fair market value in excess of their basis.

1. "Free" Step-Up in Basis

A "general power of appointment" is a power which is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate.[11] The value of property subject to a general power of appointment is includable in the gross estate of the powerholder.[12] Correspondingly, at the death of the holder of a testamentary general power of appointment, regardless of whether he or she exercised it, the property that was subject to the power will be deemed to have been acquired from the deceased powerholder and will, therefore, qualify for a step-up in basis,[13] thereby eliminating taxable capital gain that had accumulated in such property up to the date of the powerholder's death. That basis step-up can properly be regarded as a "free" step-up in a case in which the deceased powerholder's gross estate (plus adjusted table gifts) is insufficient in value to

[11] IRC § 2041(b)(1).
[12] IRC § 2041(a).
[13] *See* Treas. Reg. §§ 1.1014-2(a)(4), (b)(2).

generate estate tax. Under current federal tax law, the applicable threshold beneath which zero federal estate tax would be payable for a decedent dying in 2020 is $11,580,000.

The challenge, then, in cases in which a free basis step-up would be expected to result, is how to engraft a general power of appointment onto an irrevocable trust. In many jurisdictions, the law has developed to enable some types of changes to be made in certain circumstances to irrevocable trusts. The alternative methods for effectuating such changes include trust decanting, modification and nonjudicial settlement agreements.

2. Decanting, Modification or Nonjudicial Settlement Agreement

In general, decanting is the process by which a Trustee of an irrevocable trust with discretionary distribution authority may, without court approval, transfer the trust property into a new, separate trust. The governing instrument of the new trust has administrative and/or dispositive terms different from those contained in the original trust instrument. Decanting statutes vary widely. Under many such statutes, however, it would be possible (or would certainly appear to be possible) for a Trustee to decant to a new trust whose terms would confer a general power of appointment on a beneficiary, thereby generating basis step-up with respect to the assets of the trust at the beneficiary's death. A result similar to decanting may also be achieved by means of judicial or non-judicial modification or non-judicial settlement.[14] In some states and under some circumstances, whether such a modification or settlement could be used to insert a general power of appointment may turn on whether such a change would be considered to violate a material purpose of the trust and could be properly approved by the court.

There is an enormous opportunity for estate planning professionals to bring real value to clients by suggesting that existing irrevocable trusts be examined in order to determine whether it would be feasible and beneficial to use decanting or a trust modification technique to confer testamentary general powers of appointment to create a free basis step-up at the powerholder's death. To ensure that a testamentary general power would not unexpectedly cause imposition of estate tax, the power could be designed using formula language so that it would exist only to the extent holding such power would not, by itself, cause imposition of any estate tax. Such a formula could effectively be further refined in such a way so as to have effect only with respect to certain assets in a trust, or to subject to such power, first, those trust assets having a cost basis that is the smallest percentage of fair market value and then cascading to each next lowest basis asset until holding the power would no longer not cause any imposition of estate tax.

D. Terminating Irrevocable Insurance Trusts That May No Longer Be Needed

Finally, there are many irrevocable insurance trusts that were designed and implemented years ago with the objective of keeping the value of life insurance proceeds from being included in the settlor-insured's gross estate. Given the current historically high federal estate tax basic exclusion amount, some clients who created these trusts may view them now as very likely unnecessary as estate tax shelters, and these clients may wish to terminate these trusts and redeploy the insurance policies held in the trusts (perhaps, as a personal investment or, perhaps, into a

[14] *See, e.g.*, UTC §§ 111, 411, 412 and 416.

revocable trust that would give the settlor-insured dispositive flexibility). In many jurisdictions in which the Uniform Trust Code has been enacted, it may be possible for the settlor and all the beneficiaries of an irrevocable trust to join together and terminate the trust, even if such termination would violate a material purpose of the trust.[15] Estate planners have a great opportunity to present this option to clients and, in cases in which it would be appropriate, to effectuate a termination.

V. IMPORTANCE OF PERIODIC REVIEWS OR FOLLOW-UPS WITH CLIENTS CONCERNING TRUST ADMINISTRATION AND UPDATING ESTATE PLANS

A. Trust Administration

Regular reviews with trust beneficiaries of trust administration procedures, decisions and results contribute greatly to a smooth relationship between the Trustee and the beneficiaries and are commensurate with a Trustee's duties to disclose, report and keep beneficiaries informed.[16] Reviews take on heightened importance when one beneficiary dies and a new beneficiary becomes eligible to receive distributions. The new beneficiary may be much younger than the deceased beneficiary, have different financial and family situations and may qualify for discretionary distributions that were not available to the now deceased beneficiary. Similarly, a current beneficiary may reach an age or experience a change in health or other circumstances giving rise to entitlement to or eligibility for additional distributions of trust income or principal. *See* Donovan, "Beneficiaries Behaving Badly," AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (Fall 2013 Meeting). Additionally, material changes in investments, investment results or cash flow available for distribution to beneficiaries also suggests a need for communication by the Trustee.

B. Estate Planning

As resoundingly demonstrated in the preceding portions of these materials, estate planning is a dynamic, ever-changing field. Estate planning documents become obsolete much more quickly than most people realize. As a result, periodic reviews are a must. A common interval for review and, if necessary, revision of an estate plan is at least every three years. In addition, an estate plan should be reviewed and possibly revised when there has been a significant change in applicable probate law, trust law or certain federal or state tax laws, the nature and extent of the client's assets, the manner in which the client desires to dispose of those assets, the composition of the client's family or the state in which the client resides.

An estate planner, unless he or she is ready, willing and able to accept such responsibility, may wish to disclaim responsibility for alerting clients regarding changes in the law which could impact their estate plan. However, the ACTEC Commentaries on the Model Rules of Professional Conduct (5th Ed. 2016), specifically commenting on Model Rule 1.4, indicate that such a disclaimer is not necessary: "In the absence of an agreement to the contrary, a lawyer is not

[15] *See* UTC § 411(a).
[16] *See* UTC §§ 813 and 1005.

obligated to send a reminder to a client whose representation is dormant or to advise a client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs."

Participant Survey

We would love to hear your feedback for today's teleconference:

Developing and Keeping Business for Estate Planning and Trust Professionals

April 21, 2020

Please use this link to tell us what you think.

http://livewebcast.net/cannon/042120

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
649 S. Milledge Ave., Ste. 4, Athens, Georgia 30605

CANNON

FINANCIAL INSTITUTE

Certificate of Attendance

____

(Participant Name)

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

Developing and Keeping Business for Estate Planning and Trust Professionals

April 21, 2020

Laurie Frye
Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** — **1.5 credit hours**
  In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour.
  Instructional delivery method: Group-Live
  NASBA #103655; Field of Study –Business Management & Organization
- **Enrolled Agent (IRS)** — **2.0 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.
  Course # (VRUGV-T-00130-20-O)
- **Certified Financial Planner (CFP™)** — **1.5 credit hours**
  Course #268633
- **Accredited Fiduciary Investment Manager (AFIM™)** — **1.5 credit hours**
- **Certified Wealth Strategists (CWS®)** — **2.0 credit hours**
- **Certified Investment Management Analyst (CIMA®)** — **1.5 credit hours**
  Course # 20CFI016
  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 credit hours**
- **Certified Retirement Plan Professional (CRPP™)** — **2.0 credit hours**
- **Certified Trust Operations Professional (CTOP™)** — **2.0 credit hours**
- **Certified Fiduciary and Investment Risk Specialist (CFIRS™)** — **2.0 credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant (**No Individual State Insurance Credit Available)** — **1.5 credit hours**
- **Fiduciary Investment Risk Management Association (FIRMA®)** — **2.0 credit hours**

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CANNON

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Certificate of Attendance

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(Participant Name)

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(Attorney Bar # or Social Security #)

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Developing and Keeping Business for Estate Planning and Trust Professionals

April 21, 2020

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 (TWE69082), California, Delaware, Georgia, Idaho, Illinois, Iowa (335745), Kentucky(215143), Louisiana, Maine (052146), Minnesota (280043), Mississippi, Montana (26522), Nebraska(189292), Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon (60196), Rhode Island, South Carolina, Tennessee (Distance Ed), Texas(174065244), Utah, Vermont, Washington, Wisconsin, & Wyoming

These states have been approved for the following General Credit: Florida - 2 hours (1906541N), Missouri –1.8 hours, Oklahoma – 2 hours, West Virginia – 1.8 hours

The following states are not approved for credit: Colorado (pending), Pennsylvania, Virginia

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
The following states have special circumstances:
Alaska-Attorneys can use this certificate to submit to Alaska State Bar
Arizona-On honor system
Connecticut-Attorneys can use this certificate to submit to Connecticut MCLE
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 for New Jersey CLE 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, DE, GA, KY, LA, MS, NM, NC, ND, OK. Type of credit: Areas of Professional Practice 1.5 Credits
****As required by the following State Bars, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Illinois, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington and West Virginia. ****

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CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Developing and Keeping Business for Estate Planning and Trust Professionals

Date and Time of Activity: April 21, 2020 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:

Elimination of Bias in the Legal Profession:

Competence:

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:______________________________

Competence: ______________________________

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.