ACTEC 2018 Annual Meeting Musings

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The American College of Trust and Estate Counsel is a national organization of approximately 2,500 lawyers elected to membership. One of its central purposes is to study and improve trust, estate and tax laws, procedures and professional responsibility. Learn more about ACTEC and access the roster of ACTEC Fellows at www.actec.org.

This summary reflects brief highlighted individual observations of Steve Akers from some of the seminars at the 2018 Annual Meeting and does not purport to represent the views of ACTEC as to any particular issues.

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Important Information Regarding This Summary
This summary is for your general information. The discussion of any estate planning alternatives and other observations herein are not intended as legal or tax advice and do not take into account the particular estate planning objectives, financial situation or needs of individual clients. This summary is based upon information obtained from various sources that Bessemer believes to be reliable, but Bessemer makes no representation or warranty with respect to the accuracy or completeness of such information. Views expressed herein are current only as of the date indicated, and are subject to change without notice. Forecasts may not be realized due to a variety of factors, including changes in law, regulation, interest rates, and inflation.

Introduction

Some of my brief observations from the 2018 ACTEC Annual Meeting Seminars in San Antonio, Texas on March 9-11, 2018, are summarized below. (At the request of ACTEC, the summary does not include any discussions at Committee meetings.) This summary does not contain all of the excellent information from the seminars, but merely selected issues from some (but not all) of the seminars. The summary is based on the presentations at the seminars, but the specific speakers making particular comments typically are not identified.

Item 1-2 summarize comments from a panel by Turney P. Berry and Kimberly E. Cohen, Hot Topics

1. Planning Following 2017 Tax Act

a. **Review Instruments with Formula Clauses**. A client may have made gifts of most of the gift exclusion amount and has a default formula clause in the will to fully utilize any remaining exclusion available from annual indexing adjustments. As a result of the doubling of the exclusion amount in 2018, the formula clause could now have a huge impact on the overall plan. Reviewing wills to determine the impact of formula clauses based on the exclusion amount or GST exemption amount is now more important than ever.

b. **Using Nongeneral Power of Appointment for Flexibility**. Powers of appointment, which can be exercised in a nonfiduciary capacity, afford substantial flexibility to adjust to changed circumstances. A potential concern may exist if the IRS can demonstrate that the grantor controls the power holder. *See Securities Exchange Commission v. Wyly*, 56 F. Supp. 3d 394 (S.D.N.Y. 2014) (non-tax case treating effective control of trust by settlors as causing "independent trustee" exception to grantor trust rules not to apply). A preferred approach is to have beneficiaries discuss changed circumstances with the power holder rather than having the settlor contact the power holder directly about making changes.

c. **Clients Want to Avoid Complexity**. Most clients do not want to deal with complicated strategies, and prefer making direct gifts to straightforward trusts to utilize the additional gift exclusion amount. Not so coincidentally, though, clients are often excited about doing what the lawyer is excited about doing. In addition, clients may be willing to put up with more complexity in planning for grandchildren than for children.

   A client may be more willing to undertake complexity for strategies that benefit the client directly, rather than for descendants after the client's death (such as with upstream planning to take advantage of parents' or grandparents' exclusion amounts leaving assets in trust for the client's benefit).

d. **Circumscribed General Power of Appointment**. Planning to access basis adjustments for beneficiaries with excess estate exclusion amounts may incorporate a "circumscribed general power of appointment." This is a power to appoint to creditors of the beneficiary's estate with the consent of a non-adverse person with two additional constraints: (1) the maximum amount that can be appointed is capped (for example, at $1,000 less than the beneficiary's remaining applicable exclusion amount), and (2) the power extends only to assets that have a basis less than fair market value. (It is a power that the settlor intends will likely never be exercised.)

An existing irrevocable trust might conceivably be amended (for example, by a non-judicial settlement agreement) to add a circumscribed general power of appointment. Beneficiaries' consent is likely a gift by the beneficiaries of a small amount, and they may want to file gift tax returns reporting the small gift amount to begin running of the period of limitations on additional gift tax assessments.

Do not use this type of planning, though, if dissension exists among the beneficiaries (increasing the chances that a beneficiary would "misuse" the general power of appointment), or if the beneficiaries have particular creditor concerns.

Powers of appointment are discussed in detail in Items 63-68.

e. **Gifts Taking Advantage of "Window of Opportunity" With $10 Million (Indexed) Gift Exclusion**. A gift of $11.18 million, if the exclusion amount has reverted to $5 million (indexed) at the client's death, will effectively remove the excess over the estate exclusion amount from being subject to estate tax. To take advantage of this window of opportunity, the client needs to make a gift of well over $5 million. If a client makes a $5 million gift, and if the estate and gift exclusion amount later sunsets to $5 million (indexed), the client will have simply used up most of that $5 million (indexed) exclusion amount. The IRS could conceivably adopt an ordering rule in regulations that gifts would first use exclusion from the excess portion (in effect, "off the top" of the $11.18 exclusion amount), perhaps by analogy to the ordering rule that applies to gifts using the DSUE amount from a predeceased spouse under Reg. §25.2505-2(b), but until that time, the clients must assume that the only way to utilize the larger exclusion amount available until 2026 is by making gifts of $10-11 million.

For this purpose, consider not making the split gift election, so that all gifts come from one spouse, utilizing that spouse's excess exclusion amount that is available until 2026.

Another alternative is to defer making large gifts until we know whether the IRS will adopt the special ordering rule provision in regulations that the IRS will likely issue this year providing "[g]uidance on computation of estate *and gift taxes* to reflect changes in the basic exclusion amount" (added in the February 7, 2018 update to the 2017-2018 Priority Guidance Plan).

f. **Charitable Contribution Planning**. The increased standard deduction under the 2017 Tax Act means that many taxpayers will no longer obtain any income tax deduction for charitable contributions (if the client does not itemize deductions). A planning alternative is to bunch charitable gifts, making a gift to a charity in one year that covers 3-5 years of gifts that the donor intends to make over that period. The donor may want to place restrictions on the gift fund, so that it will be used over that period of years by the charity. Alternatively, the client could make a large gift to a donor advised fund, which would make the distributions to charity over that intended period.

2. Trust Amendments Not Recognized For Purpose of Permitting §642(c) Deduction for Distributions to Charity

A recent Chief Counsel Advice concluded that assets appointed to charities under a power of appointment granted in a court modification would not satisfy the "pursuant to the terms of the governing instrument" requirement. CCA 201747005 (includes extended discussion of Bosch and Rev. Rul. 73-142). CCA 201651013 reached a similar conclusion. This conclusion seems incorrect; if the governing instrument is effectively modified under state law before the transfer to charity, subsequent transfers would seem to be made pursuant to the terms of the governing instrument in the absence of guidance under §642(c) that it looks only to the governing instrument as drafted, without valid modifications.

Carol Harrington has pointed out that one case has reasoned that proposed regulations are nothing more than the position of a "frequent litigant." Turney Berry asks, "Is a CCA a temper tantrum of a frequent litigant"?

Items 3-13 are observations from the Annual Joseph Trachtman Lecture by R. Hugh Magill. Mr. Magill discusses the impact of changing family demographic trends on estate planning, It's All in the Family … What's a Family? Estate Planning and Trust Management for a Brave New World

The summary below is based on Mr. Magill's oral comments and a detailed in-depth PowerPoint document with Mr. Magill's observations. Some of the comments below are verbatim from Mr. Magill's materials.

3. Generalizations about Generations

a. **Generation Assignments**.

Lost Generation born 1883-1900

Traditionalists: G.I. Generation born in 1900-1926 and Silent Generation born 1927-1945

Boomer Generation born 1946-1964

Generation X born 1965-1981

Millennial Generation born 1982-2002

b. **Generation Attributes**.

Traditionalists - dutiful, frugal, committed (marriage and employment), respectful (authority, institutions, government), accelerated adulthood, strong work ethic, delayed gratification, command and control decision-making, and 89% religiously affiliated.

Boomers - optimistic, hard work and loyalty lead to personal gratification, competitive, rejected then embraced authority, live to work, consensus decision-making, and 83% religiously affiliated. 10,000 Boomers will turn age 65 each day until 2030. In 2001, 16.3% of the U.S. population was at least age 65, and by 2025, 24.2% of the population will be at least age 65.

Generation X - skeptical (marriage, corporations, government), private, suspicious of authority, adulthood will be less prosperous than parents, work/life balance is very important, decision-making by functional pragmatism, and 77% religiously affiliated.

Millennials - optimistic, collaborative, tolerant, technologically savvy, and multitasking, socially responsible, multicultural, work to live but seek responsibility and recognition, decision-making based on net-educated and networked background, largest and most racially diverse U.S. generation, and 65% religiously affiliated.

4. Life Expectancy

In 1900, the average life expectancy was approximately ages 48 and 50 for males and females, respectively. In 2015, the life expectancy was 76.3 and 81.2 for males and females, respectively. A 20-year-old today is more likely to have a living grandmother that a 20-year-old was to have a living mother in 1900.

5. Family Demographics

a. **Marriage Rates**. The percentage of persons in the U.S. who are married has decreased from almost 70% in 1960 to about 50% currently. The number of cohabitating adults age 50 and over has increased 75% in the last 10 years.

Persons are generally older when they marry than previously, with a strong correlation between education level and postponement of getting married.

b. **Changing Marriage Paradigm**. For Traditionalists, marriage was a "cornerstone" event (life events typically moved in this pattern - courtship, marriage, cohabitation, children, and financial security). In the new marital paradigm, marriage is a "capstone" event (with life events moving in this substantially altered pattern - courtship, cohabitation, financial security, children, and marriage). Even in this changing paradigm, a teenager is more likely to be raised by a biological parent in the U.S. than in any other country.

About 40% of Millennials believe that marriage is becoming obsolete. But marriage still has significant tax and legal effects. There are 1,138 provisions of federal law that treat married persons differently than unmarried persons.

For Boomers, earlier divorces are more common than for Traditionalists, with less social stigma attached to divorce. Forty percent of families have at least one step family member.

c. **Changing Family Structures**. The seven most common family structures in the U.S., in order, are (1) single person, (2) married couple, (3) married couple with one child, (4) married couple with two children, (5) one parent with one child, (6), two adults (friends or partners), and (7) married couple with three children. Interestingly, a married couple with three children is only the seventh most common household structure.

d. **ART**. Assisted reproductive technology (ART) is making single parent families more prevalent.

e. **Co-Parenting Relationships**. A growing number of co-parenting relationships exists, with the parents wanting to co-parent a child with no intentions of any romantic relationship between the parents.

f. **"Diblings."** "Diblings' is a new term referring to individuals who are biologically related by the donor who provided egg or sperm to their parents. It is a combination of the words "donor" and "siblings."

g. **Composition of American Families**. The composition of American families (based on a U.S. Census Bureau summary in 2013) is as follows:

Households without children – 31%;

Traditional households with children (heterosexual married couple with children) – 35%;

Modern (blended, multi-generational, same sex, or single parent) – 34%.

6. Impact of Changing Family Structures on Estate Planning

One recent study of 20,000 Americans age 50 and older observed the following trends -

- 42% have no will
- 38% of deceased respondents died intestate
- 49% had stepchildren and had no will
- 59% of respondents who are parents but have had no contact with at least one genetic child for at least a year have no will
- 62% of divorced respondents have no will.

Persons in these latter three categories have more difficulty making decisions regarding their estate planning. The answers to fundamental questions are more difficult (Who will receive bequests? How much? Outright or in trust? Equal or unequal, because amounts passing to collateral relatives often pass unequally?)

7. Estate Planning Structure for Multi-Generational Blended Family

The age span differences in multi-generational families can also lead to estate planning complexities. A multi-generational family may have a father who is 15 years older than his wife, who is 15 years older than the step children, who are 15 years older than their half siblings. The wife may be concerned about the traditional approach of deferring the father's children's inheritance until the wife has died, fearing that the step-children will view her as a hurdle to their inheritance.

In that situation, the client (perhaps in consultation with the family) may reject the traditional "life estate/remainder" construct and instead make lifetime transfers to his children and advise the children that the lifetime transfers will be their entire inheritance, so they will not be looking at the step-mother as spending their inheritance. For example, the father's plan may consist of annual exclusion gifts, rolling GRATS passing equally to children, a QPRT or other trust arrangement for a vacation home, and a trust for the wife.

The wife's plan may include trusts for her children, GST exempt transfers to her grandchildren, and a trust arrangement for the vacation home. Regardless of the details of the plan, a more complicated structure is involved.

8. Planning Process for Contemporary Families

Prior generations often had no communication with the family about the estate plan until after the parents' deaths.

Contemporary families are having more family dialogue surrounding the design and implementation of the estate plan. Spouses/partners express their expectations, expectancies, and goals. Children discuss their family views, expectations and hopes/fears. Ultimately the client will decide on and discuss the estate plan with the family, its rationale, the role of advisors, and other concerns.

Major issues that the contemporary families must face include wealth sufficiency, generational expectations about financial wealth and estate planning, lifetime vs. testamentary wealth allocation, the viability of a life estate/remainder construct in the family situation, the utility and shelf life of spray trusts (which are often unworkable in blended family situations), the rewards and risks of shared assets, issues about family reproduction and per stirpital allocation for long term trusts, and the roles of fiduciaries (who serves whom and why). The major emphasis often shifts from being transfer tax-centric to being goals-based (while still being tax efficient).

9. How Will Trusts Evolve for Modern Families?

a. **Grantor Intent**. Grantor intent becomes especially important with complex family structures. A statement of intent is especially important for perpetual (very long-term) trusts.

b. **Instructions to Trustee**. The grantor's intent may be communicated to the trustee through a letter of wishes (generally unenforceable), precatory language in trust documents, an explicit statement of intent and unambiguously stated purposes of the trust, merely limited by public policy limitations.

c. **Communication to Beneficiaries**. Wills and trusts are a form of personal communication with beneficiaries. They often represent the final communication with beneficiaries. "There are no two-way conversations at the cemetery." The communication can be in the form of an "ethical will" or family mission statement. A more meaningful communication may be a more customized statement of the client's intent or overall goals for the trust, to provide context for financial assets in the trust, to articulate goals for family wealth and beneficiaries' well-being, and to inform future generations about family values and vision. It will be most meaningful to beneficiaries if it is a brief statement authored by the client, with a focus on heritage and legacy, values, and hopes.

The following is a sample paragraph provided by Mr. Magill:

> I acquired the wealth transferred into this trust at age 60 through starting a business that grew out of a personal passion. As an immigrant to this country it is essential to me that my descendants also demonstrate a lifelong commitment to economic achievement that is not available in my birth country. Therefore, this trust was created by me to serve as a financial catalyst of the personal, cultural and professional achievement of my descendants. The human need for productive personal fulfillment never retires or ends. I intend that the funds in this trust be strategically distributed throughout the entire lifetime of the designated beneficiaries. Since I have transferred substantial funds to my children outside of this trust, I intend that this trust should not be terminated prematurely to serve any alternative material purpose.

d. **Family Growth**. The current fertility rate in the U.S. is slightly less than 2.0. A husband and wife (age 70) with two children (ages 40-45) and four grandchildren (ages 7-15) in 2018, based on the 2.0 fertility rate, would be expected to have 28 grandchildren and more remote descendants within 45-55 years. The anticipated significant family growth will be a factor in designing the trust terms.

e. **Types of Beneficial Interests and Powers**. Beneficial interests and powers that the client may consider include income, discretionary principal, unitrust or annuity interests, withdrawal rights, mandatory distributions (perhaps subject to trustee override), use of trust assets, and powers of appointment.

   Possible discretionary distribution standards may range (narrow to broad) from emergencies, to ascertainable standards, to best interest and welfare, comfort, pleasure/happiness, or to the trustee's sole discretion. Ascertainable standards are used as distribution standards more often than necessary. Trustees welcome broader standards to achieve the trust purposes for new generations of trust beneficiaries.

f. **Spray/Sprinkle Trusts**. Spray/sprinkle trusts are typically not compatible with modern family structures. Being able to make unequal distributions among multiple beneficiaries can be useful for minor beneficiaries of the same degree, but beyond that, the competing fiduciary duties of the trustee to all beneficiaries make the trust administration difficult (for example, providing information for beneficiaries while maintaining confidences, building trust portfolios suitable to each beneficiary's risk tolerance and tax rates, etc.). "If beneficiaries can't live together in the same house, they shouldn't live together in the same trust."

g. **Investment Powers**. Many Millennials are devoted to socially responsible investing concepts.

10. Longevity and Disability Issues

a. **Young vs. Old**. Life expectancy is trending upward, and our society does not have enough younger families to finance the care of older persons, either directly or through the government. From 1950-1970, almost 15% of the population was under age 5 and less than 6% was at least age 65. That is changing; the cross over point will be in 2020 when the percentage of each group will be about 8% of the population. The difference grows exponentially after that, and by 2050, 17% of the population will be at least age 65 and only 7% will be under age 5.

The percentage of the population over age 65 compared to the population age 15-64 was 12.8% in 1950, 19.5% in 2010, and is expected to be 35.5% in 2050.

China is an example of an inverted family tree society. A typical family has four surviving grandparents, two surviving parents, and one child. In China, a child can be liable if he or she does not support the child's parents.

b. **Dementia and Cognitive Decline**. The rate of dementia and cognitive decline will continue to grow (but at a much higher rate in low and middle income countries compared to high income countries, and at a lower rate for more highly educated individuals).

   The National Institutes of Health came to this surprising conclusion: "Mild drinking, as well as being overweight or obese, can lead to significant protection against dementia."

c. **Who Cares for Elderly**? The U.S. and South Korea are near the top of the list of countries in which people believe that the elderly bear the greatest responsibility of providing for their own care. In most countries (other than the U.S., South Korea, Japan, France, Germany, the U.K., and Pakistan), the general belief is that the families or the government should have primary responsibility for the elderly.

   The lower birth rates (the number of childbirths per woman has decreased from almost 4.0 in 1963 to about 2.0 or less since 1983), and the growing number of dementia cases, will lead to a perfect storm of having insufficient family caregivers to care for the elderly, severely straining families and public assistance programs.

   Boomers are currently subsidizing Millennials' housing, but in the future, Millennials will subsidize Boomers' Social Security, Boomers will consume their assets leaving small inheritances for Millennials, and Millennials will have to self-fund their retirement with less inherited financial capital (and much of the capital that is inherited will be taxable IRD).

d. **Planning for Disability and End-of-Life Issues**. The changes described above lead to an increased importance of having discussions with younger family members about disability and end-of-life issues. These issues can lead to family conflict. Research shows that 70% of families drawn together around these difficult medical and end-of-life issues will experience significant interpersonal conflicts, typically because of a lack of discussion about these issues at an earlier time.

11. Changing Wealth Dialogue

Prior generations had little dialogue among generations about wealth planning. Contemporary generations have different *philosophical concerns*: What will our legacy be and how much wealth is too much? *Practical concerns* are how to raise self-reliant resilient children in wealth, when and how to discuss wealth with children, how to develop effective family collaboration and governance, and how to incorporate philanthropy to contribute to social good and family well-being. *Tactical concerns* include how to provide for aging parents and dependent children or a disabled sibling, and how to treat different categories of family members (full blood children, half-blood children, stepchildren, ART children, in-laws, and non-marital partners).

12. How Will Families Collaborate and Make Decisions?

Family issues requiring collaboration range from easier topics, such as planning holidays, vacations, etc. to difficult topics such as family business employment and compensation, business succession, wealth allocation, and health and life care decisions.

These decisions are being made in a changing family paradigm and environment for contemporary families. Elements of the changed paradigm include diverse family structures, an expectation of networking and joint decision making rather than a hierarchical authoritarian decision making approach, an environment of open communication, and increased cultural diversity.

The book *Wealth in Families*, by Charles Collier, suggests that definitions of wealth go beyond financial wealth but include human capital, intellectual capital, social capital, and financial capital. Families need to address how their financial capital can enhance the other forms of family capital.

A possible family decision-making continuum is as follows.

Parental control – children's education and estate planning for minors

Family consensus – social and family activities, general family communication guidelines, and values discussions

Family compact – estate planning, and health and life care issues

Family council – philanthropy and management of shared lifestyle assets

Formal governance structures – business and entrepreneurial endeavors, asset management, and foundation management.

13. Heritage and Legacy

Hugh Magill's summary –

"Families may use an age old technique, the telling of stories, to understand who they are and how is it that their financial wealth will inform the well-being of their family for generations to come. While the composition of the families that we serve today is undergoing dramatic change, whatever the composition, of course, each family is a group of individuals – individual human beings drawn together by love and by financial wealth, addressing the issues we all face during our mortality.

With each of our clients, we stand at the intersection of our heritage – in other words, our distinctive place among the generations of our family – and our legacy – in other words, our yearning that there might be something permanent from our labors. As counsel and as fiduciaries, we stand beside them and we guide them at this intersection of heritage and legacy. It is what some would call a liminal space, a threshold. And what a privilege it is, and an honor as Fellows of this College, to accompany and guide these families at this intersection."

Items 14-22 are observations from a Symposium by Ronald D. Aucutt, Beth Shapiro Kaufman, and Douglas L. Siegler, 9100 Relief: Jumping Through the Hoops When You Learn You Have an "Oops!"

14. Spotting a Missed Election

Missed elections are often spotted when a change of trustee or professional advisor occurs. The advisor should ask to review gift or estate tax returns to confirm that appropriate elections have been made.

15. 9100 Relief-Overview

Regulations §§301.9100-1 through 301.9100-3 provide procedures for obtaining extensions to make certain elections and applications for relief.

"9100 relief" is not in the Internal Revenue Code. It is a creature of IRS regulations. The number 9100 was selected because it was a number so far beyond any Code provisions that it would be a safe number to use for the regulation that would not be confused with regulations for any Code section.

9100 relief has evolved from an originally relatively narrow provision, providing extensions only for certain income tax elections. Regulations were originally issued in 1959 and amended in 1970 and supplemented by Rev. Proc. 79-63 for relief for extensions of time to make elections or other relief regarding the income tax. Revised regulations that were finalized in 1991 (and augmented by Rev. Proc. 92-85) provided further relief including relief for missed deadlines in other subtitles, including Subtitle B (containing the transfer tax rules).

The current 9100 regulations were finalized in 1997, incorporating many of the positions taken in Rev. Proc. 92-85. The 1997 regulations (1) expand the class of elections qualifying for relief, (2) provide less onerous standards for relief (dropping any perceived requirement that some planner "fall on its sword" with respect to a missed election, and (3) make a limited class of elections and relief applications automatic without the necessity of filing a ruling request.

16. Automatic Relief under Reg. §301.9100-2

a. **12-Month Extensions.** Reg. §301.9100-2(a) provides an automatic 12-month extension from the extended due date of a return on which an election was required for certain specifically identified regulatory elections, including the §754 election, election for special use valuation if the examination of the estate tax return has not commenced, the election to treat a qualified payment right under §2701(c)(3)(C)(i) as not being a qualified payment right, and the election to treat any distribution right as a qualified payment under §2701(c)(3)(C)(ii).

b. **6-Month Extensions of Statutory Deadlines**. An automatic extension of 6 months from the due date of the return, *excluding* extensions, is granted for making regulatory *or statutory* elections having deadlines prescribed as the due date or the return or the due date of the return including extensions, but not including elections that by their terms must be made by the due date of the return, excluding extensions. Reg. §301.9100-2(b). To qualify for the automatic 6-month extension, the taxpayer must have timely filed the return, and taken the corrective action prescribed in the regulation within the 6-month extension period.

The 6-month extension apparently is available for a late inter vivos QTIP election, which the IRS views as having a statutory deadline. If the donor filed a timely gift tax return, the donor would have until October 15 of the year following the year in which the gift was made to file an amended Form 709 to make the corrective action for the automatic 6-month extension.

c. **Procedural Requirements.** Any return, statement of election, or other form of filing to obtain automatic extensions must contain the statement "**FILED PURSUANT TO §301.9100-2**" written across the top.

17. Non-Automatic Extensions for Relief, Reg. §301.9100-3

a. **Often Granted.** The three panelists have never had a request for 9100-3 relief denied by the IRS. Ron Aucutt summarizes: "Be a hard dog to get off the porch, with civility, and relief can be obtained." A key to obtaining relief is to be totally candid with the IRS. Approach the relief application process as one in which the IRS will work with the taxpayer in resolving a problem situation.

b. **General Standard for Granting Relief**. The taxpayer must satisfy two primary criteria—(1) that the taxpayer acted reasonably and in good faith, and (2) that granting relief will not prejudice the interests of the government. Reg. §301.9100-3(a). The relief procedures under §301.9100-3 are the exclusive method of obtaining an extension of time to make an election that does not qualify for automatic extensions under §301.9100-2.

Reasonable Action and Good Faith. The regulations list five situations in which the taxpayer is deemed to have acted reasonably and in good faith: (1) the application for relief is made prior to discovery of the missing election by the IRS; (2) the taxpayer inadvertently failed to make a timely election because of intervening events beyond the taxpayer's control (for example, kidnapping, shipwreck, hurricane); (3) after exercising reasonable diligence (considering the taxpayer's experience and the complexity of the issue) the taxpayer was unaware of the necessity of the election; (4) the taxpayer reasonably relied on written advice of the IRS (this would be very uncommon); or (5) the taxpayer reasonably relied on qualified tax professional advice (but this is not satisfied if the taxpayer knew or should have known that the professional was not competent to render advice about the election or the taxpayer knew or should have known that the professional was not aware of all relevant facts). Reg. §301.9100-3(b)(1).

The regulation lists three circumstances in which the taxpayer will not be considered to have acted reasonably and in good faith: (1) the taxpayer seeks to alter a return position for which an accuracy-related penalty has been or could have been imposed; (2) the taxpayer was fully informed of the required election and related tax consequences and chose not to file the election; and (3) the taxpayer uses "hindsight" in requesting relief, such as where specific facts have changed since the original due date that make an election advantageous. Reg. §301.9100-3(b)(3).

Prejudice to Interests of the Government. The regulations describe two circumstances under which the interests of the government are deemed to be prejudiced: (1) the election would result in the taxpayer having a lower tax lability than if the election had been made timely; and (2) if the tax year in which the regulatory election should have been made or any tax year affected by the election, had it been made timely, are closed by the statute of limitations before the ruling is issued granting 9100 relief. Reg. §301.9100-3(c)(1).

c. **Procedural Requirements.** The regulations include numerous procedural requirements.

Election Information and Documentation. The taxpayer must state when the applicable return making the election was required to be filed and when it was actually filed, and must submit a copy of any documents referring to the election. Reg. §301.9100-3(e)(4)(ii).

Required Affidavits. Affidavits must be submitted by the taxpayer (detailing the events that led to the failure to make the timely election, the discovery of the failure, and the engagement of any tax professional and the taxpayer's reliance on the professional relating to the election) and by any other individuals having information about events leading to the failure to make the timely election. Those other individuals could include by the tax return preparer, anyone who made a substantial contribution to the return, any professional who advised the taxpayer about the election (detailing, among other things, the engagement and responsibilities of the professional and the advice given to the taxpayer). The affidavits must be signed under penalties of perjury.

Checklist. Appendix C of Rev. Proc. 2018-1 is a checklist that must be used in preparing and reviewing the ruling request and that must be filed on top of the ruling request. The Checklist lists about 50 questions that must be answered. Take every question seriously. Even if a "wrong" answer is required to a question, answer the question correctly with an explanation. A single "negative" answer that has an explanation is not fatal.

d. **Preparation of Ruling Request**.

Who Should File Application? Someone other than the taxpayer and someone other than a person involved with the failure to make the election should file the application. That person can address candidly and objectively what was done (or not done and why). The panelists all practice in Washington D.C., and have filed a number of these requests on behalf of advisors for taxpayers who want to obtain an extension to make a late election to avoid a loss to the taxpayer (and grounds for a malpractice action against the professional).

Who Is the Client? The taxpayer is the client even though the attorney filing the request is requested to do so by the taxpayer's professional advisors and may be paid by those advisors. The filing attorney should have an engagement letter with the taxpayer and have a Form 2848 Power of Attorney authorizing the attorney to represent the taxpayer before the IRS.

Obtaining Cooperation. The attorney filing the application for relief should not be heavy-handed in assigning blame for the missed election, should dispel the "fall on your sword" notion, and explain that the IRS typically gives relief. While the attorney cannot guarantee that relief will be given, seeking to obtain an extension to make the election is better than continuing with the uncertainty of tax effects of the election failure. The relief application process typically results in the ability to make the late election, and is a winning result for all parties, avoiding malpractice actions. If the failed election may result in a malpractice action, the parties often enter into a tolling agreement to extend the statute of limitations on any malpractice action (avoiding the need for filing the action after the relief is obtained), together with an agreement that the affidavit from the professional will not be used for any purpose other than the relief application.

General Approach to Application. The application should tell a compelling story in a favorable light but in a candid manner. Do not leave out any relevant facts (the misstatement or omission of controlling facts can be a ground for revoking the ruling). This is not a situation in which one party wins and another loses; treat the IRS as a friend who will work with the taxpayer in resolving a problem situation. Evidence such as hearsay that would be inadmissible in a judicial proceeding can be included. Despite the statement in §6110(k)(3) that private letter rulings cannot be used or cited as precedent, IRS personnel working on the ruling request will appreciate being reminded of what the IRS has ruled in similar circumstances in the past.

Organization of Application. The typical format of a ruling request is similar to this: Statement of Facts (Background, Proposed Transaction); Relief Requested; Law and Analysis; Conclusion (make it a "punchy" conclusion); Procedural Matters (including statement required by Rev. Proc. 2018-1) and Administrative Matters (identifying enclosures, contact information, etc.).

Facilitating Privacy. People who don't mind suing others in court typically do not want to see their names in IRS rulings. While the IRS redacts names, if the IRS were to miss redacting one of many times that a taxpayer's name is used in the ruling, privacy is blown. Help avoid that result by referring to the taxpayer's name only in the title of the request. Otherwise use terms such as taxpayer, mother, father, Child 1, Child 2, Grandchild 1, Grandchild 2, etc. throughout the ruling request. (An exception might be if the attorney wants to personalize the request in a sympathetic situation by referring to a particular taxpayer by his or her first name through the request.)

18. Pre-Submission Conference

The IRS will grant pre-submission conferences, but do not request a pre-submission conference for routine rulings. They require significant IRS resources because about six IRS persons will attend the meeting. Use them when a difficult issue is involved, and the conference may inform the attorney of whether a favorable ruling may be possible and can shape how the issues should be presented in the application request. Rather than having a formal pre-submission conference, panelists suggest calling the Branch chief or an IRS attorney in the Branch who has issued similar rulings and discuss the issue informally.

19. User Fee for 9100 Ruling Request

The standard fee for a ruling request is $28,300, but the standard fee for a 9100 relief request is $10,000. A reduced user fee of $2,400 may be available if the applicant's gross annual income is less than $250,000, or of $7,600 for annual gross income of between $250,000 - $1,000,000. In addition, a reduced user fee of $2,700 might be available for substantially identical ruling requests. Rev. Proc. 2018-1 (Appendix A-Schedule of User Fees).

20. Procedure Following Submission of 9100 Request; Timing of Ruling

Within 30 days after submission, the taxpayer (or attorney) will receive a letter that the IRS has received the request, listing the number assigned to the request, and providing a phone number that can be used to get additional information. The IRS attorney may call the attorney that filed the request to discuss whether procedural requirements have been satisfied and to discuss substantive issues that may potentially arise. If so, be sure to get the phone number of the IRS person handling the ruling request (in case the taxpayer does not hear anything else within 6 months of filing the request).

Branch 4 (dealing with transfer taxes) has an internal rule of providing at least an initial response to a 9100 request within 3 months of when the application was received. If the IRS official reviewing the application has requests for additional information, the official will typically talk with the person submitting the request by telephone and send a letter describing additional information that is needed, and stating that the additional information is needed within 21 days (additional time will be provided if needed). The attorney should respond to any such request for additional information immediately, to keep the process moving as expeditiously as possible. After the IRS attorney reviewing the request has drafted a ruling, it must be reviewed by a supervisor to assure consistency in rulings issued by that Branch.

When submitting the application, the attorney should request that the ruling be sent by fax to the attorney (as well mailing the ruling to the taxpayer). (Do not request an email with the response; "Faxes are where the IRS is up to in technology.")

A ruling is typically issued within 3 - 6 months of the date of the submission.

If a ruling will be adverse, the taxpayer is entitled to a conference (which will be attended by a "table full of people form the IRS;" do not take the taxpayer to that conference).

A redacted and unredacted version of the ruling will be sent to the taxpayer. The attorney who filed the request should review the redacted version very carefully to make sure that all names are redacted.

The taxpayer typically receives a response to a request for 9100 relief within 3 - 6 months.

21. Submit Actual Election

The ruling extending the time for making an election does not make the election. The taxpayer must still submit an amended return making the actual election. The attorney should work on preparing an appropriate return which can be filed immediately after the extension request is granted. The planner does not want to fail to make the timely election and have to request another extension!

The taxpayer is permitted to decide not to make the election after receiving the requested extension.

22. Specific Types of Extension Requests

Simplified 9100 applications are available for certain S corporation elections (Rev. Proc. 2013-30) and portability elections (Rev. Proc. 2017-34) in specific situations, without any requirement of filing a 9100 request or paying a user fee.

The written materials describe substantive issues and particular rulings that have been issued in a variety of situations, including the alternative valuation date election, qualified domestic trust (QDOT) election, QTIP and reverse QTIP election, gift tax QTIP election for inter vivos trusts, portability election, special use valuation election, qualified conservation easements, election in or out of carryover basis for 2010 estates, GST exemption allocations including elections under §§2642(g)(1)-(g)(2) and Rev. Proc. 2004-46 (requests for late GST exemption allocation are the most common 9100 relief request), election out of automatic GST exemption allocation, trust severances for GST purposes, valuation elections under §7520, 65-day rule election under §663(b), §642(c)(1) election for a charitable contribution paid after the close of the taxable year, §645 election for revocable trusts treated as an estate, expatriation rulings, "check the box" election under Reg. §301.7701-3(b), and the qualified Subchapter S subsidiary ("QSub") election under §1361(b)(3)(B).

Items 23-30 are observations from a Symposium by Richard H. Greenberg, Richard W. Nenno and Margaret E.W. Sager, On the Road Again: Situs and the Resident Trust

23. Primary Factors in Determining Trust Situs and Types of Trust Situs

a. **Primary Factors**. The primary factors that may come into play in determining the situs of the trust are the trust terms, the domicile of the settlor, the location of trust assets, the place of administration, and the location of the trustees.

b. **Types of Trust Situs**. Every trust has an administrative situs, locational situs, tax situs, and jurisdictional situs. They may be related to each other but are not necessarily the same.

24. Why Change Trust Situs?

Three primary reasons for changing the situs of a trust are (1) saving state fiduciary income taxes, (2) utilizing another state's trust laws that are more favorable for a particular situation, and (3) convenience.

Examples of state law trust issues that may favor another state's laws are issues involving directed trusts, trust modification, total return/power to adjust, automatically restricting an overly broad distribution power to avoid having a general power of appointment, and silent (or "quiet") trusts.

25. Duty to Change Situs

a. **Statutory Provisions**.

Uniform Trust Code. Section 108(b) of the UTC states that a trustee "is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries."

Uniform Probate Code. Section 7-305 originally was similar. It also adds that "[i]f the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state." Article VII of the UPC is now superseded by the UTC and is incorporated into Article 2 of the UTC.

Restatement (Third) of Trusts. Comment b(2) to §76 provides that "[u]nder some circumstances the trustee may have a duty to change or to permit (e.g., by resignation) a change in the place of administration. Changes in the place of administration by a trustee, or even the relocation of beneficiaries or other developments, may result in costs or geographic inconvenience serious enough to justify removal of the trustee." The factors discussed in that comment that would justify changing the place of administration of a trust "include the nature and location (and particularly changes in the location) of assets under the trustee's management, relocation of beneficiaries or significant changes in their needs and circumstances, and opportunities to obtain more favorable tax or other treatment in another state or country."

Twenty-six jurisdictions have the UTC or UPC language. The Pennsylvania statute omitted that language, for fear that it would cause trustees to have a duty to consider "all conceivable jurisdictions," which theoretically might require knowing laws of the entire world.

b. **Case Law**. Only a handful of cases have addressed the trustee's duty to change situs. Those cases have involved reducing trust administrative costs, such as avoiding state income tax.

c. **Negating Any Duty to Consider Change of Situs**. Trust agreements may include provisions specifically negating the duty of a trustee to consider changing the trust situs.

26. Resources Regarding Situs and Governing Law Issues

For a further discussion of situs and governing law issues, see a summary of a panel discussion by Peter Gordon and Margaret Sager at the ACTEC 2012 Summer Meeting, summarized in Items 76-82 of the ACTEC 2012 Summer Meeting Musings, available **here** and at **www.bessemer.com/advisor**. In addition, governing law issues are summarized in a discussion by Jonathan Blattmachr, Henry Christiansen, Robert Goldman, and Professor Jeffrey Schoenblum at the ACTEC 2014 Annual Meeting, summarized in Items 43-56 of the ACTEC 2014 Annual Meeting Musings, available **here** and at **www.bessemer.com/advisor**.

27. Overview of State Taxation of Trusts and Estates

A complex labyrinth of separate rules for the state taxation of trusts and estates applies throughout the 50 states and the District of Columbia. Only 8 states do not tax the income of trusts (Alaska, Florida, Nevada, New Hampshire, South Dakota, Texas, Washington, and Wyoming). Tennessee will join that list in 2022 (it currently taxes only interest and dividends of trusts). The remaining 43 states (including the District of Columbia) tax trusts based on a variety of factors.

a. **Summary**. The income of grantor trusts is normally taxed to the grantor, distributed ordinary income of a nongrantor trust is generally tax to the recipient, and accumulated source income of the trust (*e.g.*, income attributable to real property, tangible personal property, or business activity) usually is taxed by the state where the property is situated or the activity occurs. Therefore, there are tax savings opportunities for accumulated non-source income of nongrantor trusts, particularly their capital gains.

b. **Source Income**. Almost all states will impose their taxes on undistributed income of nongrantor trusts that is from real estate or businesses located in the state. (That can be a difficult determination for businesses that produce income in a variety of states.) Therefore, no matter whether a trust is a "resident trust" or a "nonresident trust," undistributed trust income from real estate and businesses in the state will be taxed by that state.

c. **Distributed Income.** Income that is distributed from nongrantor trusts is taxed to the beneficiaries, based on the state income tax laws of where the beneficiaries are located**.** This can result in higher or lower state taxes, depending on how the state taxes trusts and depending on the individual tax rates in the state in which the beneficiary resides.

d. **Nonsource Undistributed Income of Nongrantor Trusts**. The remaining income of nongrantor trusts is generally taxed based on where the trust is deemed to be a resident—and a wide pattern of residency rules have developed over the years in determining whether a trust is a resident trust or nonresident trust as to a particular state. Relevant factors (that vary among the states) are the residence of the settlor, trustee, and beneficiaries, or where the trust is administered.

e. **Multi-State Taxation**. The various states define "resident trust" in different ways, leading to inconsistent income tax treatment, and sometimes resulting in double (or more) state income taxes imposed on the same income. After going through the steps described above, if two different states impose income tax on the same trust, most states allow some form of credit to the extent that other states impose an income tax on the same trust income (but the form of the credit varies dramatically).

28. Resident vs. Nonresident Trusts

All of the 43 states plus the District of Columbia that impose an income tax on trusts tax the undistributed income of a non-grantor trust as a "resident trust" based on one or more of the following five criteria: (1) if the trust was created by a resident testator (for a testamentary trust), (2) if the trust was created by a resident trustor (for an inter vivos trust), (3) if the trust is administered in the state, (4) if the trust has a resident fiduciary, and (5) if the trust has a resident beneficiary. Observe that the governing law of the trust is not one of those criteria (except in Louisiana; also in Idaho and North Dakota that is a factor considered along with other factors). A trust included in one of the first two categories is sometimes referred to as a "founder state trust" (i.e., the trust is a resident trust if the founder of the trust was a resident of the state).

Richard Nenno's written materials at the ACTEC 2018 Annual Meeting include an exhaustive Appendix listing the relevant state statutes in all states and summarizing the factors used in each state. For another complete survey of the nexus rules in the various states, see the Bloomberg BNA Special Multistate Tax Report, 2017 Trust Nexus Survey, available at **http://src.bna.com/tBG** (published October 2017).

29. Constitutionality of Taxing Founder State Trusts

A wide variety of cases have addressed the constitutionality of state tax systems that tax trusts based on the testator of a testamentary trust or settlor of an inter vivos trust residing in the state (i.e., founder state trusts). Based on those cases, most commentators believe that taxing a nonresident trust solely because the testator or settlor was a resident is probably unconstitutional. However, if that state's court system is utilized, for example, because of a probate proceeding in that state, chances are better that the state does have the authority to tax the trust.

Over the last five years, cases have held or suggested that Illinois, Minnesota, New Jersey, North Carolina, and Pennsylvania could not tax trusts merely because the settlor was a resident of those states when the trust was created.

30. Resources Regarding State Income Taxation of Trusts

For an excellent summary of the state fiduciary taxation of trusts and the cases addressing the constitutionality of taxing founder state trusts, see Items 28-32 of the ACTEC 2016 Summer Meeting Musings, available **here** and at **www.bessemer.com/advisor.**

In addition, the most recent cases addressing the constitutional cases are summarized in Item 22 of the Heckerling Musings 2018 and Estate Planning Current Developments Summary found **here** and available at **www.Bessemer.com/Advisor**, and at Item 17.c of the Current Developments and Hot Topics Summary (December 2017) found **here** and available at **www.Bessemer.com/Advisor**.

Items 31-39 are observations from a seminar by Gerry W. Beyer, Jocelyn Margolin Borowsky, and Katherine E. Ramsey, State Law Pitfalls: Don't Step in It When Your Client Steps Across State Lines

31. Importance of Planning for State Law Differences

Almost 8 million people move to a new state each year. Clients own land in other states. From a planning standpoint, the key is to avoid default state rules that cause unanticipated consequences.

Laws vary among the states as to all of the issues discussed below, and the estate plan could be altered significantly by a mere move to another state. Wills should generally address all of these issues to avoid a disruption in the plan in case the client moves or acquires property in another state. "Silent doctrines" that apply in another state and that are not apparent on the face of the documents can dramatically impact the plan.

32. Ascertaining Governing Law

The law of domicile at death generally controls personal property and the law of the situs of property generally controls as to real property. Therefore, the will may be interpreted under the laws of several states.

Property Ownership (Marital Rights)

Ownership of property is generally governed by the law of domicile of when property was acquired, and absent agreement, marital title does not change as a couple moves between community and common law property states.

Will Validity. Fortunately, many states have "savings statues" that recognize the validity of the will if it was validly executed under the law at the place of execution.

Interpretation and Construction. Interpretation and construction issues are generally governed by the law of the jurisdiction in which property passes (for personal property, domicile and for real property, situs). Some cases have applied rules of the state where the will was executed.

Use Choice of Law Provision. To avoid uncertainty, include a choice of law provision in the will.

33. Will Execution

Formal execution requirements vary among the states. Use a will ceremony that satisfies the execution requirements of almost all states.

34. Changed Circumstances – Property

a. **Ademption by Extinction**. If specifically bequeathed property is disposed of prior to the testator's death, the bequest fails ("adeems") under the laws of most states. Some states allow tracing into identifiable proceeds. Some allow an amount equal to the value of the bequest to pass to the legatee and a few allow a substantially equivalent asset that is present in the estate to pass in lieu of the specific bequest. For every specific gift, the will should expressly indicate what happens if the property is not included in the estate at the time of death.

b. **Ademption by Satisfaction**. Ademption by satisfaction arises if the testator makes a cash gift to the legatee while living. Uncertainties arise, however. How do other beneficiaries prove that the gift was in satisfaction of the bequest? Does a presumption apply, or must extrinsic evidence be used, or is a signed writing required? Wills generally include a provision that no gift after execution of the will is treated as being in satisfaction of bequests under the will.

c. **Change in Value of Corporate Securities**. For a specific gift of corporate securities, who is entitled to stock splits or stock dividends or cash dividends? In some states, the answer depends on whether the bequest is specific or general, and may depend on whether the testator owned the gifted securities at the time of the will execution.

d. **Interest on Legacies**. States vary as to when interest begins to run on pecuniary legacies and what rate of interest is applied.

e. **Exoneration**. If bequeathed property is subject to an outstanding liability, does the recipient received just the net equity in the property or does the recipient receive the property free of any liability? States have varying presumptions regarding exoneration of bequests.

f. **Abatement**. If the estate assets are not sufficient to satisfy all bequests, which bequests are deleted ("abated") first? Most states have a common law or statutory order of abatement. The residuary estate is typically used first to pay debts, but that may be the most important gift a testator is making.

g. **Express Directions**. Include express directions in the will as to all of these issues in order to avoid uncertainties in case a different state's laws may become applicable.

35. Changed Circumstances – People

a. **Marriage**. Will a subsequent marriage have an effect on the will or possibly even automatically revoke the will? The subsequent marriage may create a forced share in some states. Clients should be advised to seek legal advice regarding the estate plan upon a subsequent marriage.

b. **Divorce**. Divorce generally revokes all provisions in a will in favor of an ex-spouse (both bequest and fiduciary appointments), but the states vary regarding provisions for other ex-relatives, such as stepchildren, a mother-in-law, sister-in-law, etc. In all states, the automatic revocation upon divorce applies only when the divorce judgment is signed. Under some states' laws, the appointment of a spouse to make medical decisions and financial decisions might also be automatically revoked upon divorce. Wills should address these provisions, and could even provide that bequests or fiduciary appointments for a spouse or relatives of the spouse will be revoked if a divorce action is pending at the time of death.

c. **Pretermitted Children**. The definition of "pretermitted children" (i.e. children born after the will was signed), varies among the states. In some states it applies to all after born/adopted children, but in others it applies only if the after-born child was not provided for in the will.

d. **Anti-Lapse Statutes**. All states have some kind of anti-lapse statute providing what happens if a beneficiary predeceases, but those statues vary is significantly. If the anti-lapse statute applies, bequests to a predeceased beneficiary pass to that beneficiary's descendants. The statute applies in some states only if the predeceased beneficiary is a descendant of the testator, but in other states if the beneficiary is a descendant of a parent of the testator. Some states have an even broader definition, and in a few states the anti-lapse statute applies whether or not the beneficiary is a relative at all.

e. **Survival Period**. Most states include a 120-hour survival requirement in order for a beneficiary to receive assets under the will. Wills often override that statutory survival period to extend the required survival to 30 or 60 days. (A few states say that an instant of survival is sufficient.)

f. **Express Directions**. Include express directions in the will as to all of these issues.

36. Interpretation and Construction Issues

a. **No Apparent Ambiguity**. If no apparent ambiguity exists on the face of the will, some states imply a plain meaning rule, and other states will attempt to apply the intent of the testator.

b. **Class Gift**. Construction issues may arise regarding class gifts. For example, does a gift to children include after-born children, adopted children, nonmarital children, or children by artificial reproduction technology ("ART")? The law is still developing especially as to ART children.

c. **Incorporation by Reference**. Some states recognize incorporation by reference but a few do not.

d. **Tangible Personal Property Document**. Some states by statute (*e.g.*, § 2-513 of the Uniform Probate Code) recognize a separate document disposing of tangible personal property. The best practice is to avoid using a separate document to dispose of tangible personal property unless the client is clearly warned that it may not be effective if the client changes domicile.

e. **Election**. An election may be triggered if an individual attempts to make a gift of the entire community asset to a non-spouse. That may force the spouse to an election either to receive assets passing under the will or to retain his or her one-half community property share of that asset. Triggering such an election is often inadvertent. The best practice is to include a provision that no gift is intended to force the spouse to an election unless that intent is clearly expressed.

f. **Per Stirpes**. Most states apply the per stirpes determination starting with the children of the testator/settlor even if they are all deceased. A minority of states, begin with the highest generation that has a surviving beneficiary.

37. Estate Administration

a. **Simplified Administration**. Specific language may be required to take advantage of simplified administration methods available in the state.

b. **Bond**. In some states, a bond for the personal representative is waived if the will is silent, but in other states express language is required to waive a bond requirement.

c. **Compensation**. If the will is silent, the states vary regarding compensation for the personal representative. Some allow reasonable compensation, some allow compensation by a formula or schedule, and some allow no fee if the will is silent regarding compensation.

d. **Pay Just Debts.** Wills traditionally included a provision to "pay all just debts." That might be interpreted to included debts that would otherwise be barred by the statute of limitations. Do not include a provision saying to pay debts – the estate can't get out of paying them anyway.

38. Trustee Exculpation for Life Insurance Investments

Life insurance products are complicated products often held in trusts that do not have other significant assets to pay for advice as to the policies. They are often not easy to change as a trust investment (to change to a new policy would require a physical by the insured and an agreement to pay any increased premiums to the trust). Family members often serve as trustee as an accommodation to the insured/settlor. The settlor may not want to hold the trustee to the same investment standard as for a trustee investing in the stock market.

The Uniform Prudent Investor Act (UPIA) has language recognizing that life insurance is a special type of investment that may have a special relationship to the trust or beneficiaries. Retaining life insurance policies in an irrevocable life insurance trust is arguably permitted under UPIA notwithstanding that it is a concentrated investment, but UPIA does not negate the trustee's duty to monitor the suitability and performance of any investment (including life insurance policies).

At least 15 states have statutes specifically providing protection for a trustee with respect to life insurance policies owned by the trust. Those states are Alabama, Arizona, Colorado, Delaware, Florida, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming.

39. State Surveys

State surveys or summaries of various state laws are included in the written materials regarding the following topics:

- State fiduciary income taxation of undistributed trust income;
- Rule against perpetuities;
- Directed trusts;
- Domestic asset protection trust statutes;
- Amendments of trusts by non-judicial modification, judicial modification, decanting, or merger;
- Virtual representation of interested parties;
- Silent trusts (modifying the "duty to inform beneficiaries"); and
- No contest clauses.

Items 40-48 are observations from a seminar by Keith Braddoc Gallant, Kristin M. Lewis, Professor Mary F. Radford, Peter S. Stern, Elder Financial Abuse: The Crime of the 21st Century

40. Scope of the Problem

A recent study concludes that elder abuse affects between two and five million adults over the age 65.

The *Washington Post* estimates that one in six adults over age 65 has been the victim of a financial crime.

A higher estimate comes from a report by TrueLink Financial, which estimates that 36.9% of seniors are affected by financial abuse in a five-year period, amounting to $36.48 billion annually.

The problem is not just limited to financial losses. The TrueLink report indicates that the non-financial effects of elder financial abuse includes that 6.7% of victims postpone necessary medical care, and 4.2% have reduced nutritional intake. Elders who have experienced even modest financial abuse have a 300% higher risk of death compared to those who have not been abused.

Caregivers of elder victims also experience loss, including depression, conflict with family and friends, hopelessness, and damage to their marriages or significant relationships.

Elder financial abuse has been referred to as the "Crime of the 21st Century."

41. Most Likely Perpetrators

A 2011 study concluded that 51% of elder financial abuse comes from strangers (home repair scams, telemarketing scams, robbery, etc.), and that 34% is from family, friends, neighbors, in-home caregivers, and other known persons.

Other studies, however, reflect that about 60% of elder abuse and neglect incidents have a family member as the perpetrator (and 2/3 of them are adult children or spouses). A 2014 study concluded that the most likely perpetrators of elder abuse are family members (57.9%), friends and neighbors (16.9%), and home care aides (14.9%).

Factors that increase the likelihood of a known person becoming a perpetrator of elder financial abuse include the use of drugs or alcohol, high stress levels, low coping resources, lack of social support, high emotional or financial dependence on the elder, lack of elder training, and depression.

42. Reasons for Elder Financial Abuse

The commonly cited reasons/risk factors for elder financial abuse include (1) Alzheimer's disease and other dementias, (2) diminished financial capacity, (3) social isolation (multi-generation families are no longer common), (4) family members become dependent on an elder for financial support, (5) older persons have alterations in the anterior insula portion of the brains, which adversely impacts "gut feelings" about the trustworthiness or potential predators, (6) clinical depression, and (7) financial illiteracy.

43. Underreporting of Elder Financial Abuse

Most elder abuse cases are not reported. One study estimates that only 1 in every 14 cases is reported and another concluded that only 1 in 24 cases is reported. The most cited reason is that the victims themselves refuse to report the abuse for various reasons (embarrassment, not wanting the family member-abuser to go to jail, the victim feeling responsible, fear that admitting abuse will result in being placed in a nursing home, belief that nothing can be done or that the abuser will harm the victim even more if reported, and dementia or other impairments).

44. Responders for Reports of Elder Financial Abuse

Every state is required to have Adult Protective Service (APS) agencies for investigating reports of elder financial abuse (required by the Title XX of the Social Security Act). A database of all state contacts can be accessed by calling the Elder Care Locator service at

800-766-1116 or by visiting eldercare.acl.gov. In addition, the federal Older Americans Act mandates the establishment of a Long-Term Care Ombudsman program in all states for long-term care facilities (including nursing homes, assisted living facilities, board and care homes, intermediate care facilities for those with intellectual disabilities, and other community living arrangements).

A person reporting suspected elder financial abuse to an APS agency merely needs reasonable cause to suspect abuse and does not need to prove the abuse. APS is required to investigate reports of abuse. If the victim consents, APS will develop a service plan. Substantiated criminal activity must be reported by APS to the prosecuting attorney. Victims often refuse to understand or acknowledge that abuse has occurred. The reporting person is protected from both civil and criminal liability.

45. Mandatory Reporters

Mandatory reporters of elder financial abuse vary from state to state. For example, Georgia has an expansive statute including persons required to report child abuse, physical or occupational therapists, day care personnel, coroners and medical examiners, emergency medical services personnel, clergy members (outside of the confessional), and employees of financial institutions or investment companies. Many states, like Georgia require mandatory reporting by employees of financial institutions. A significant number of states require mandatory reporting by "any person … with reasonable cause to believe or suspect" that elder financial abuse has occurred. Attorneys are mandatory reporters under the laws of a few states, including Texas (Tex. Human Res. Code § 48.051). A significant number of states provide that "any person" with "reasonable cause to believe or suspect" that an elder has been the victim of abuse, neglect or exploitation must report to the relevant authorities (and that conceivably includes attorneys). Penalties for failures to report by mandatory reporters range from no penalty, to monetary fines, to jail time.

46. Civil and Criminal Remedies

Remedies for elder financial abuse include both civil remedies for restitution, compensatory damages, and punitive damages. Civil claims may be pursued under specific statutory causes of action for elder financial abuse, fraud or constructive fraud, breach of fiduciary duty or aiding and abetting a breach of fiduciary duty, negligence, rescission, conversion of stolen assets, and actions for an equitable accounting of actions by a trustee or agent under a power of attorney. Finding an attorney to pursue a civil law claim can be difficult because perpetrators are often judgment proof (they are financially abusing the elder person in the first place because they are impecunious). Less than 15% of cases will result in recovery of stolen property in elder financial abuse cases.

Criminal remedies include elder financial abuse or exploitation as a distinct crime (available in some states) and basic criminal laws against theft, fraud, deception, larceny, forgery, and embezzlement. Prosecutors often refuse to pursue elder financial abuse actions, however, if the victim refuses to cooperate or because of budgetary constraints if the damages are less than the expenses of pursuing the action.

47. Attorney Ethical Responsibilities

a. **Resources**. Good resources include: ABA Opinions interpreting the Model Rules; ACTEC Commentaries on the Model Rules; state bar ethical opinions; state court opinions; NAELA *Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries*; ACTEC *Engagement Letters: A Guide for Practitioners*; ABA/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*; and Flowers & Morgan, *Ethics in the Practice of Elder Law* (ABA 2013).

b. **Clients with Diminished Capacity – Model Rule 1.14**. Model Rule 1.14(a) provides that if a client has diminished capacity, the attorney should, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. The ACTEC *Commentaries on the Model Rules* explain that even if the person does not have capacity to enter into a contract or other legal relationship, the attorney "may appropriately continue to meet with and counsel him or her." ABA Opinion 96-404 reiterates that the attorney should continue to communicate and discuss relevant matters with the client.

Model Rule 1.14(a) does not explain how the attorney determines if the client has diminished capacity, but comments state that merely thinking that the client's actions are foolish does not mean necessarily mean the client has diminished capacity. The ACTEC *Commentaries on the Model Rules* list various factors including the client's ability to express the reasons leading to a decision or to understand the consequences of a decision, and the extent to which a decision is consistent with the client's values, long-term goals, and commitments. While mental tests are available, attorneys are encouraged not to use them; while they are easy to administer, they are not easy to evaluate. The best approach is to use a forensic geriatrician.

Protective actions by an attorney are permitted under Model Rule 1.14(b) if the attorney reasonably believes (i) the client has diminished capacity, (ii) is at risk of substantial physical, financial or other harm unless action is taken, and (iii) cannot adequately act in the client's own interest. Some states (such as Texas) provide that an attorney "shall" take protective action in those situations if the attorney believes "action should be taken to protect the client." If the attorney takes protective action on behalf of a client with diminished capacity, ABA Legal Formal Ethics Opinion 96-404 require the attorney to take "the least restrictive action under the circumstances" (*i.e.*, do not immediately call the district attorney).

California has not adopted Model Rule 1.14. Instead, under Rule 6068(e) of the California Business Professions Code, the attorney has a duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Because of that rule, California attorneys have limited ability to contact family members, APS, bankers, etc. to report actions requested by the client that the attorney suspects are the result of elder financial abuse. (While attorneys cannot report such actions, a new law in California permits bank officers who suspect abuse of a power of attorney to block action under the power of attorney after notifying the APS or law enforcement.)

c. **Confidentiality – Model Rule 1.6**. Model Rule 1.6 allows disclosing confidences in certain situations for clients with diminished capacity, and also in some cases even if the client does not have diminished capacity. Rule 1.6(b) provides: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; … [or] (6) to comply with other law or a court order." That provision does not cover financial abuse, but some states have expanded that exception. The Georgia statute refers to avoiding or preventing "harm or substantial financial loss to another as a result of client criminal conduct or *third party criminal conduc*t clearly in violation of the law." That would allow disclosure of elder financial abuse arising from criminal conduct to the APS.

   The "other law" exception may also be applicable, for example if the attorney is a mandatory reporter of elder financial abuse under state law. Some states (Illinois is an example) specifically extend protection to attorneys for reporting elder financial abuse even if disclosure would otherwise warrant disciplinary action for disclosing confidential information.

d. **Attorney for Client-Perpetrator – Model Rules 1.2(d) and 1.6(b)**. If the attorney suspect that a client is perpetrator of elder financial abuse on another (for example, the client requests the attorney to prepare a deed for another person to convey the other person's home to the client under suspicious circumstances), Model Rule 1.2(d) provides that a lawyer shall not "assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with the client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." In addition, Rule 1.6(b) allows an attorney to disclose confidences "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

e. **Common Attorney for Client and Perpetrator – Model Rule 1.9** If the attorney represents both the elder person and a family member who the attorney suspects of abusing the elder person, Model Rules 1.2(d) and 1.6(b) above would apply. In addition, Model Rule 1.9 provides that an attorney cannot represent a client with a matter that is materially adverse to the interests of a former client unless the former client gives informed consent, confirmed in writing.

48. Steps That Can be Taken to Minimize or to Counter Elder Financial Abuse

- Children that live distant from an elderly parent should keep in close contact with the parent.
- Encourage elderly persons to remain socially active and not become isolated.
- Hold assets of elderly persons in funded revocable trusts, with multiple third party co-trustees or preferably with a professional trustee as a co-trustee.

- Assemble a team of allied professional advisors for the elderly person. A dream team might include some of the following: an estate planning attorney, elder law attorney, geriatric care manager, nurse life care planner, investment advisor, government benefits specialist, accessibility specialist, accountant, household manager, professional bookkeeper, daily money manager, and elder mediator. Team members would see the elderly person much more often than the estate planning attorney, and may become aware of suspicious circumstances that would be red flags of possible abuse.
- Make very careful and defensive use of a general durable power of attorney (that has been referred to as "the most effective burglary tool since the crowbar").
- Use prepaid debit cards, available through TrueLink Financial, that are programmed to be accepted only at certain vendors.
- Report suspected abuse to APS or the Long-Term Ombudsman (an attorney may be a mandatory reporter in some states).
- If APS fails to take action, be persistent and report recurring suspicious circumstances, and insist on an investigation.
- Many banks have internal protocols for dealing with suspected elder financial abuse and may freeze accounts to prevent further abuse.
- Investment accounts may be placed on a temporary hold for up to 25 days under the Financial Industry Regulatory Authority ("FINRA") Rule 2165 on the account of a "Specified Adult" where the member has a "reasonable belief" that the Specified Adult has been, is being, or will be the victim of financial exploitation.
- File a civil action to recover transferred assets, including filing a lis pendens in the deed records with respect to fraudulently transferred real estate. Civil actions may include recovery under specific elder abuse statutes, fraud or constructive fraud, rescission, conversion, or a demand for an equitable accounting.
- For suspected fraud with credit account, contact any of the three national credit reporting agencies (Equifax, Experian, and TransUnion) to attach a fraud alert to the credit file, which will require companies to verify the consumer's identity before extending new credit.
- For suspected fraud with credit cards, contact each of the three national credit agencies to place a "credit freeze" on the credit file, which will limit access of all persons (including the consumer) to that information until it is lifted using a PIN assigned to the consumer when the freeze is implemented. In addition, a "credit lock" may be requested with each of the three national credit agencies so that no person (including the consumer) can open new accounts until the credit file is unlocked in accordance with a lock agreement.
- Contact banks, investment managers, and credit card companies to report fraudulent activity.

Items 49-55 are observations form a seminar by Jim Calzaretta (Deloitte Tax, Chicago, Illinois), Steven B. Gorin, and T. James Lee, New Partnership Audit Rules: Why They Are so Important for Estate Planners

49. Overview of New Partnership Audit Rules

The Bipartisan Budget Act of 2015 replaced the existing partnership audit regimes, including provisions under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), with new partnership audit rules that apply to partnership taxable years beginning after 2017. The audit rate for partnership has been very low, in part of the complexity of an audit at the partnership level, resulting in assessment at the individual partner level and audits of each of the individual partners. TEFRA centralized the audit procedures, but significant complexities have remained from the IRS's point of view. The new rules will encourage more partnership audits by just requiring an audit at the partnership level. The new rules are meant to assist the IRS in auditing partnerships, and are not designed to increase fairness. They will likely result in more partnership tax audits and more tax revenues collected from partnerships and partners. The general approach is that the audit will occur at, and any adjustment will apply at, the partnership level (particularly for large partnerships). Taxes will be paid by the partnership, not the partners, which will avoid the necessity of a multitude of individual tax audits of the individual partners. The rules include two important exceptions form this general approach, described below.

WARNING: This summary does not incorporate additions made by the Consolidated Appropriations Act, 2018 enacted on March 23, 2018, which included technical corrections to the partnership audit rules enacted in the Bipartisan Budget Act of 2015. The IRS is reviewing existing regulations in light of the technical corrections.

50. Partnership Representative

For partnership tax years prior to 2018, partnerships have been required to designate a "tax matters partner," which had to be a partner of the partnership. Under the new rules (effective for post-2017 tax-years), every partnership must designate a "partnership representative" on its federal income tax return for each tax year beginning after 2017. The partnership representative must be a person having a "substantial presence" in the U.S., but does not have to be a partner. The partnership representative has sole authority to make elections and represent and bind the partnership (and the partners) in all administrative and court proceedings involving adjustments to the partnership's federal income tax return. All notices and communications will be sent only to the partnership representative. The individual partners have no right to participate in the audit.

The partnership agreement may (and should) address obligations of the partnership representative to the partners, but such contractual commitments do not impact the ability of the IRS to rely solely on elections made by the partnership representative.

51. Amendments to Partnership Return

Under the new rules, partnerships cannot merely file an amended partnership income tax return, but instead must file an "administrative adjustment request." It is not a "request" in the sense of necessitating a grant of authority to file an amended return by the IRS, but initiates a formal process for requiring that individual partners report their respective shares of the adjustments requested in the administrative adjustment request.

52. Partnership Level Determination and Payment of Income Tax; Exceptions

The general rule is that partnership income tax audits are conducted at the partnership level and any resulting income tax will be paid by the partnership and not by the individual partners. The rate that is applied at the partnership level generally is the highest rate of tax for individuals or corporations in effect for the reviewed year under §1 or §11. The partnership level income tax liability resulting from an audit (the "imputed underpayment") including penalties and interest will be assessed and collected from the partnership for the "adjustment year" in which the adjustments become final, not the "reviewed year" that was audited. This can result in a **huge economic distortion** if the reviewed year partners are not the same as the adjustment year partners.

Several important exceptions from the general rule are: (i) one or more partners may choose to amend their returns, in which event the adjustments included on the partners' separate amended returns will be deleted from the adjustment to the partnership, and (ii) the partnership representative may make a "push-out election," which requires each partner to report its share of any audit adjustments on the partner's return and to pay any resulting income tax liability.

Another exception is that an "eligible partnership" can "elect out" of the new partnership audit regime so that audits and tax liability will be conducted at the partner level (discussed below).

In addition, beyond the scope of what was discussed at the seminar, the technical corrections added by the Consolidated Appropriations Act, 2018 enacted on March 23, 2018, add a "pull-in" procedure, which is a simplified means for modifying the imputed underpayment based on individual partner attributes, but that does not require partners to file amended returns.

53. Overview of Audit Process under Revised Audit Procedures

a. **Notice of Proposed Adjustment**. The IRS begins the audit process by sending a notice of proposed adjustment, which includes a proposed imputed understatement, netting all adjustments at the partnership level, and applying the highest tax rate in the reviewed year under §1 or §11.

b. **270-Day Period for Modification of Imputed Underpayment**. The filing of the notice of proposed adjustments starts the running of a 270-day period in which the partners may decide how to respond to the proposed adjustment.

c. **Some Partners May Amend Their Returns**. Some partners may choose to amend their separate income tax returns to report their respective portions of the adjustments. (This could be advantageous, for example, if the partner is not in the highest rate bracket, or qualifies for the §199A deduction for partnership income that is qualified business income.) If the amended returns takes into account all adjustment properly allocable to the amending partners, and if they pay any additional tax due, then the underpayment amount for the partnership is determined without regard to the portion of the adjustments that were reported by the partners on their amended returns.

If some partners choose not to amend their returns, the partnership will pay the additional tax attributable to their proportionate share of the proposed adjustment. The tax payment by the partnership should be charged against the capital accounts of the remaining partners who did not amend their returns.

d. **Reporting Partner Attributes Impacting the Proposed Adjustment**. The partnership representative will report to the IRS any portion of the adjustment that is not reported on amended returns of the partners, and can report individual partner attributes that would reduce the imputed underpayment. For example, an adjustment in the amount of the imputed underpayment may be appropriate if a partner is tax-exempt entity, or is a C corporation [with a lower tax rate than the highest individual rate], or for capital gains or qualified dividends allocable to an individual partner; however, no adjustment is allowed because individual partners would be allowed deductions under §199A for adjusted income that is qualified business income under §199A. (Regulations might be revised to allow an adjustment for the effect of the §199A deduction.)

   These adjustments must be reported to the IRS within the 270-day window after issuance of the notice of proposed adjustment. Partners who are in the highest rate bracket may prefer simply to have the tax paid at the partnership level, and charged against their capital accounts, rather than going to the expense of filing amended returns (and incurring the risk of possible audits of the amended returns that might increase the likelihood of IRS review of other unrelated items). Another advantage of paying tax at the partnership level is that a 2% reduction of tax applies, as a motivation to use the simplified approach of merely paying tax at the partnership level.

e. **Issuance of Final Proposed Partnership Adjustments**. Following the end of the 270-day period, after the IRS makes adjustments in light of the amounts reported on individual returns and after considering individual partners' attributes affecting the tax attributable to the balance of the adjustment, the IRS will issue a final proposed partnership adjustment.

f. **"Push-Out" Election**. Within 45 days of the date of the final proposed partnership adjustments, the partnership representative may make an election to "push-out" the proposed adjustment to the partners, by furnishing a statement to the IRS and each partner making the election and showing each partner's share of any adjustment to income, gain, loss, deduction, or credit as reported in the final proposed partnership adjustments for the reviewed year. The election made by the partnership representative is binding on the partnership and the partners. (The partnership agreement may contain provisions about whether the push-out election should be made or the process for making the decision of whether to make the election, but those internal processes do not change the IRS's ability to rely on any election made by the partnership representative.)

g. **Filing of Tax Court Petition**. Within 90 days of the date of the final proposed partnership adjustments, the partnership may file a petition for readjustment with the Tax Court, federal district court having venue, or the Court of Federal Claims.

h. **Payment by Partnership**. Unless the adjustments are reflected on individual partners' amended returns, or are "pushed out" to the partners under the "push-out" election, after appeals are finalized any remaining imputed underpayment is payable by the partnership. The partners at that time are not legally responsible for the additional tax, but the partnership is, and the partners at that time therefore bear the tax (unless the partnership agreement provides that they should be reimbursed by prior partners).

54. Eligibility for Election Out; Partnerships with Trusts as Partners Not Eligible

a. **Eligible Partnerships**. Only eligible partnerships may make the election out of the new audit rule regime. Requirements of eligible partnerships include: (1) not more than 100 partners; and (2) the partnership can only consist of eligible partners, including individuals, C corporations, foreign entities that would be treated as C corporations if they were domestic entities, S corporations, and estates of deceased partners (but not including partnerships, trusts, or disregarded entities).

The exclusion of trusts (including revocable trusts, grantor trusts, nongrantor trusts, and charitable remainder trusts) from this list is of vital importance in the estate planning community. As a general rule, the new audit rules apply to large partnerships, and small partnerships can opt out of the new rules. However, family partnerships with trusts or disregarded entities as partners do not have that option available.

The preamble to the regulations implementing the new audit rules explains that the IRS rejected numerous suggestions to exercise its regulatory authority to expand the types of entities that can qualify as eligible partners because that would "unduly burden the IRS" by increasing the number of partnerships subject to the deficiency procedures that the IRS must follow for partnerships that elect out of the centralized audit regime. ACTEC filed comments with the IRS pointing out that no additional burden would be placed on the IRS with respect to revocable trusts or grantor trusts. The IRS responded that, at this point, it just wants to have the new partnership audit rules apply as broadly as possible.

b. **Irrevocable Trust Using S Corporation Exception**. If a partnership includes an irrevocable trust, and if electing out of the new partnership audit rules is important, the trust might contribute its partnership interest to an S corporation. Partnerships with an S corporation as a partner are treated as eligible partnerships. (For purposes of this rule, S corporations qualify despite the types of shareholders, but all shareholders of the S corporation are counted toward the 100 partner limit.)

c. **Annual Election; Pre-TEFRA Rules Apply**. An annual election is required to electing out of the new partnership audit regime. If the election out is made, the pre-TEFRA audit rules will apply.

d. **Electing Out May Not Be Critical**. Electing out may not be particularly important. Dealing with the revised procedures may be fairly straightforward (for example, by just having the partners file amended returns if some partners are in lower brackets or by paying at the partnership level if all partners are in the highest individual tax brackets [assuming that regulations are revised to allow the IRS to allow an adjustment to account for the effect of the §199A deduction if partnership income is qualified business income]). Indeed, the tax is 2% less if the tax is paid at the partnership level under the new procedures.

55. Amendments Needed

A variety of issues should be covered in amendments to partnership and LLC agreements, including rules governing the partnership representative, the election out decision, imputed underpayments and modifications, the push-out election, economic distortion provisions, and administrative adjustment requests. Amendments should not be made, however, until final regulations are issued. Partners will have hard decisions to make with respect to the issues, and planners must keep in mind that many partnership agreements will ultimately need to be revised so that the partners can agree among themselves how these various issues will be handled. The written materials include various samples of provisions that could be included in partnership agreement amendments.

Items 56-62 are observations from a seminar by Tina Wüstemann (Switzerland), Clare Maurice (England), Christian von Oertzen (Germany), and Michelle B. Graham (Rancho Santa Fe, California), One Will to Rule Them All (or Not), which addressed planning considerations for U.S. persons with assets abroad.

56. Consultation Required

In representing a client with international contacts (such as owning offshore assets), coordinating with counsel in the jurisdiction where the other contacts exist (such as property ownership) is essential.

57. Fundamental Differences of Common Law v. Civil Law System Regarding Successon Matters

a. **Common Law Countries**. Common law countries' laws are generally consistent with the U.S. as to the main principles of testamentary freedom, spousal protection (elective share rights or community property), and common use of trusts. (These countries include Australia, Belize, Barbados, British Virgin Islands, Canada [other than the province of Quebec, which is a mixed law jurisdiction], Hong Kong, India, Ireland, New Zealand, Singapore, the U.K., and the U.S.)

b. **Civil Law Countries**. Example civil law countries are Austria, Brazil, People's Republic of China, Chile, Colombia, Denmark, Ecuador, France, Germany, Greece, Italy, Japan, Luxembourg, Mexico, Netherlands, Peru, Portugal, Russia, Spain, Sweden, and Switzerland.

c. **Lack of Testamentary Freedom**. Civil law countries have forced heirship. There are considerable variances among the countries' forced heirship laws. (For example, in Switzerland, an inheritance agreement can waive forced heirship rights.) Estate planning is less commonplace in civil law countries compared to common law countries in part because of the lack of testamentary freedom as to a substantial part of the estate.

d. **No Trusts**. Trusts are an English invention. Civil law countries use other arrangements.

e. **Community Property.** Civil law countries typically recognize community property. Many allow persons about to marry (or even allow spouses after married) to choose their matrimonial regime. For example, they could choose that all assets would be community property, or that all assets would be separate property, or could designate the regime for particular assets. While most states in the U.S. do not recognize community property, the non-community property states in the U.S. have moved toward protecting spouses' rights by adopting elective shares systems.

f. **Mixed Jurisdictions**. Some jurisdictions have elements of both civil and common law. These jurisdictions include Scotland, South Africa, Quebec, Puerto Rico, and the Philippines. In addition, the state of Louisiana has elements of both.

g. **Religious Law Countries.** Islamic countries apply very rigid succession principles, based on Sharia law. Detailed rules broadly mandate how property passes (*e.g.*, daughters receive half-shares compared to sons). Examples of countries with religious legal systems include Iran, Libya, Oman, Saudi Arabia, Sudan, and Yemen.

h. **Domicile vs. Habitual Abode or Nationality**. Common law states traditionally use the concept of domicile (one's permanent home) to determine what jurisdiction's law of succession controls, whereas civil law countries typically use the concept of habitual residence (*i.e.*, where one is residing) or nationality. The 1989 Hague Convention on Succession (discussed below) generally rejects the concepts of domicile and situs but uses the concepts of habitual residence and nationality as the keys to govern conflict rules for succession issues.

i. **Trusts**. Many civil law states do not recognize trusts, although some recognize concepts that are similar to trusts (such as the fideicommissum, referred to in some countries is as a "fideicomiso"). Some civil law countries that do not recognize the trust concept nevertheless recognize trusts that were validly created under another country's laws if the trust complies with mandatory rules of the civil law country.

j. **General Choice of Law Approaches – Law of Unity vs. Movables/Immovables**. Many civil law countries apply a single or unitary law to all assets (whether real or personal property) of a decedent. Depending on the jurisdiction, this unitary law may either be the law of the decedent's nationality (citizenship) or of the decedent's last domicile (now trending toward habitual residence rather than domicile). In contrast, common law countries differentiate the law that is applied based on whether assets are characterized as real or personal property (*i.e.*, immovables vs. movables).

k. **Avoiding Forced Heirship**. Actions that may help in avoiding the forced heirship laws of a country where property is located include (1) removing the assets from that country with forced heirship laws, (2) holding title to the property through an intermediate entity, such as a corporation or company, and establish a trust in the U.S. to own the shares or interests in the corporation or company, or (3) plan so that the choice of law rules would not apply forced heirship principles (such as electing in a will to apply the law of the testator's nationality as authorized in the E.U. Succession Regulation, described below).

58. General Approach of U.S. Courts Regarding Succession Issues Impacting Multiple Countries

a. **Jurisdiction**. First, the court will determine that it has jurisdiction (which can be either in rem or in personam jurisdiction). This was an issue in the initial *Renard* case in New York.

b. **Choice of Law**. Next, the court will determine under conflict of laws rules which law will apply for a given issue (such as the construction, validity, or interpretation of a will or trust). Procedural issues are typically governed by the law of the forum. As to substantive issues, the traditional rule has been to apply the law of the situs for real property and to apply the law of the domicile for personal property. The courts look to the law of the jurisdiction having the most significant relationship to the dispute or particular issue. (For real estate, this would typically mean applying the law of the situs of the real estate.) An emerging trend deviates from the doctrinal rules and balances the relevant policies of the different jurisdictions and determines the choice of law matters to reflect the relative interests and policies of the interested jurisdictions as well as the presumed intent of the testator.

c. ***Renvoi***. Once a court is directed under its own choice of law rules to apply the law of another jurisdiction, the court will apply the substantive local law of the other jurisdiction as to that issue, and if *renvoi* applies it will also apply the "whole" law of the other jurisdiction including both its substantive law and choice of law rules. For example (using the facts of *In re Schneider's Estate*, 96 N.Y.S.2d 652 (Sur. Ct.)), a New York court determined the validity of a testamentary disposition of real property in Switzerland by a New York domiciliary. Under the New York choice of law rules, the law of the situs applied, so New York applied Swiss law (which had forced heirship). Under the Swiss unity-of-succession principle, the Swiss courts would apply the law of the testator's domicile to all of his property (real or personal). Therefore, the court applied New York law to uphold the disposition of the real property even though it did not comply with the forced heirship rules of Switzerland.

   Three approaches to *renvoi* exist. (1) Some countries do not apply *renvoi* at all. If a court applies the law of another jurisdiction, it applies only the substantive law of that jurisdiction, not its choice of law rules. (2) Most countries that accept *renvoi* use "single reference" *renvoi*. If another jurisdiction's law applies, the court applies the substantive law and choice of law of the other jurisdiction. (See the example above regarding the *Schneider's Estate* facts.) (3) A few jurisdictions apply "double-reference" *renvoi*. In the example above from the *Schneider's Estate* facts, when Switzerland applies the New York law under its unity-of succession principles, it would apply New York's substantive law *and* New York's choice of law rules, which would mean that Switzerland law would apply to the real estate. (In effect, double reference *renvoi* can sometimes have the effect of canceling out single reference *renvoi*.)

59. EU Regulation on Successions

The European Succession Regulation No. 650/2012 of July 4, 2012 (also known as Brussels IV) creates a new set of private international law rules governing cross-border successions for persons who die on or after August 7, 2015. It creates a single law of succession that governs both movable and immovable property, adopting a unity-of-succession approach. The applicable law will be the country of habitual residence at the time of the decedent's death unless the deceased was "manifestly more closely connected" with another state or unless a Brussels IV state determines that applying the law of another state would be "manifestly incompatible with the public policy of the Brussels IV state." Under the E.U. Regulation, the E.U. member state will accept *renvoi* and apply its local law to succession matters related to property located in that member state that is owned by a decedent with his or her habitual residence in another jurisdiction. Very importantly, the testator can instead choose in his will to apply the law of his nationality (regardless of whether that state of nationality is a member state). The law applies universally, and will apply to assets of decedents dying on or after August 7, 2015 that are in one of the EU member states (except that UK, Denmark, and Ireland have opted out).

This approach may avoid forced heirship that would otherwise apply. For example, if a New York domiciliary and resident owns real estate in Germany, under the general principle of the EU regulation, New York law should apply to the succession of the worldwide assets (including the German real estate). But this includes the New York conflict of law rules, and under New York law, the succession of real estate is governed by the law of the situs, leading back to the application of the French forced heirship rules. However, the regulation allows the New York resident to elect in his will to have the New York succession law apply, which would exclude the forced heirship rules.

Planning Tip: Including such an election in wills is very important for persons owning real estate in a foreign country in any of the EU member states covered by the EU regulation or who may be moving to one of those member states.

60. Estate Tax Treaties

If assets are owned in another country that imposes a death, estate, or inheritance tax, determine if an estate tax treaty exists with that country to minimize or avoid double taxation. The U.S. currently has state tax treaties with 18 counties, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Sweden, Switzerland, and the U.K.

61. International Wills – Washington Convention

The Hague Conference on Private International Law in 1961 adopted a Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, which adopted rules for recognizing the validity of the execution of wills. This Convention has been adopted in about 40 countries, but not the United States.

In 1973, the International Institute for the Unification of Private Law (UNIDROIT) held the Convention Providing a Uniform Law on the Form of an International Will (the "Washington Convention") to establish uniform law on the formalities of an international will without invalidating or superseding the laws of other countries. The U.S. is a signatory to the Washington Convention. The key requirements are as follows:

(1) The will only applies to the testamentary disposition of one person;

(2) The will must be in writing;

(3) The will may be in any language, and written by hand or any other means;

(4) The testator must declare before two witnesses and of a person authorized to act in connection with international wills ("authorized person") that the document is his will and that he knows the contents of the will;

(5) The testator must sign the will in the presence of the witnesses and the authorized person;

(6) The two witnesses and the authorized person sign the will in the presence of the testator;

(7) The signatures are at the end of the will;

(8) Each sheet of the will must be numbered and signed by the testator;

(9) The date is noted at the end of the will by the authorized person; and

(10) The authorized person shall attach to the will a certificate establishing that the obligations of the law have been satisfied.

62. Having a Situs Will Is Generally Preferable to Just Having a U.S. Will

Having a single U.S. will to control the disposition of all worldwide assets is simpler and initially less expensive, but various disadvantages include (1) possible invalidity in the foreign country, (2) possible need for translation, (3) unworkability for a pourover will because trusts are not recognized in many foreign countries, and (4) a foreign court may require production of the original will and complying with that requirement would be difficult if the original will has been probated in the U.S.

Alternatively, a situs will can be used for each country in which the testator owns assets. It should clearly describe that it applies only to property in that country. The wills must be coordinated to avoid inadvertent revocation (for example, if a new will is signed revoking all prior wills) or inadvertently failing to cover assets in all jurisdictions. Having multiple wills may be more expensive at the outset, but cost savings will often be realized when the estate is administered as a result of the foreign country administering a will that has familiar provisions and covers only assets in that country.

The client may also consider using an international will that complies with the requirements under the Washington Convention, described above.

Items 63-69 are observations from a seminar by Turney P. Berry, Tami Conetta, and Neil T. Kawashima, Powers of Appointment: From Snoozy to Sexy

63. Overview of Significance

A great deal of attention over the last several years has focused on using general powers of appointment to cause estate inclusion in order to achieve a basis adjustment at a beneficiary's death (discussed in Item 68 below). State law issues regarding powers of appointment have been under review recently with the adoption of the Uniform Powers of Appointment Act (discussed in Item 67 below) and the enactment of the Uniform Act in a growing number of states.

64. Common Non-Tax Uses of Powers of Appointment

Traditional uses of powers of appointment, other than for achieving a basis adjustment at death, are numerous. In effect, the power of appointment is a mechanism for decanting, but with much more flexibility and without fiduciary responsibilities to treat all beneficiaries fairly. (The power of appointment is particularly helpful to provide flexibility for these various uses because it is exercised in a non-fiduciary capacity, giving the powerholder a great deal of authority to make appropriate changes.)

a. “**Second Look” Changes**. Powers of appointment provide a great deal of flexibility by giving other persons the ability to adjust how assets will pass from the trust, taking into account conditions that exist at that time. The powerholder can consider changes in family dynamics (including marital issues, creditor issues, substance abuse issues, the fact that some beneficiaries have substantially more wealth than others who are needier of financial assistance, or bad attitudes that are detrimental to family harmony). “A fool on the spot is better than a genius two generations ago.”

b. **Distribution Changes**. The power of appointment can be exercised to change how distributions are made, such as to remove a mandatory income interest, to prefer certain generations over others, or to make the distribution standard more or less restrictive (for example, to require that a married beneficiary must have a marital agreement or else become restricted only to very basic emergency support distributions). A power of appointment could also be “misused” to exclude some beneficiary permanently who may at that point in his life have a spendthrift, substance abuse, gambling, or other lifestyle problems, or for any other reason has alienated the powerholder.

c. **Early Termination**. The use of an inter vivos power of appointment is one way to provide for the early termination of a trust when the administration is no longer efficient or feasible. One panelist described a situation in which a powerholder terminated a trust and appointed assets outright to beneficiaries who were bickering and making trust administration very difficult.

d. **Control; Stop Meddling**. Powers of appointment give desired “arm twisting” influence to powerholders under Professor Halbach’s old rubric that the “power to appoint is the power to disappoint.” For example, powerholders can make sure that charitable beneficiaries continue to support the settlor’s desired activities and beliefs. Powerholders who are current beneficiaries can stop “meddling” by remainder beneficiaries. To make this even stronger, give the powerholder the right by an inter vivos power of appointment to exclude certain persons as beneficiaries of the trust.

e. **Eliminate Right to Information/Standing**. Exercising an inter vivos limited power of appointment to exclude certain persons as current or remainder beneficiaries would remove their right to receive information from the trustee and take away their standing in court proceedings. In addition, if the sole beneficiary holds a power of appointment, under the Uniform Trust Code the powerholder of a general or nongeneral power of appointment is the representative of those who might receive trust assets either with or without exercise of the power, and information about the trust can be provided just to that person.

f. **Facilitate Efficient Trust Administration**. Trust assets could be appointed to a new trust that allows more efficient trust administration, such as by authorizing the trustee to follow the modern portfolio theory, to hold a concentrated investment position, to add more robust retention authority, or to provide for different successor trustees or a more creative process for appointing successor trustees, or to appoint co-trustees with bifurcated powers.

g. **Adopt Directed Trust Provisions**. A trustee with fiduciary duties may have concerns about decanting to a trust that reduces the fiduciary responsibility of the trustee by creating a directed trust procedure. A powerholder does not have fiduciary duties and can appoint assets to a new trust with directed trust provisions, which new trust could include creative provisions (with committees, etc.) to provide directions regarding different types of investment assets, real estate, marketable securities, private equity, closely held businesses, etc.

65. Common Tax Uses of Powers of Appointment

a. **Prevent Completed Gifts**. A donor's retained power of appointment may keep a transfer from being a completed gift for gift tax purposes. For example, transfers to a DING or NING trust to save state income taxes typically employ retained powers of appointment to keep the contribution from being a completed gift for gift tax purposes. (Under CCA 201208026, the grantor may need to retain an inter vivos power, rather than just a testamentary power of appointment, if the trustee is authorized to make distributions to persons other than the grantor. *See* Reg. §25.2511-2(b).)

b. **Utilize Beneficiary's GST Exemption**. A power of appointment could be exercised to give a beneficiary a general power of appointment so that the assets would be in the beneficiary's estate for estate tax purposes, and the beneficiary could allocate his or her otherwise unused GST exemption to the assets.

c. **Basis Adjustment Planning**. Using general powers of appointment is one way of causing assets to be included in a beneficiary's estate for estate tax purposes in order to achieve a basis adjustment at the beneficiary's death to the extent that the beneficiary has estate exclusion that would otherwise be unused. Basis adjustment planning issues are discussed in Item 68 below.

d. **State Income Tax Avoidance**. Some states tax trusts based in part on whether a fiduciary is a resident of the state. Instead of appointing a trustee in that state, give a resident of that state a nonfiduciary power of appointment, and name trustees located in other states. Alternatively, if holding a power of appointment by a resident may potentially subject a trust to state income taxation in that state, designate an LLC (created in another state) as the powerholder, and name the resident as a manager of the LLC.

   A power of appointment could also be used to move the administration of an existing trust to a state that does not impose of fiduciary income tax or that does not base the fiduciary income tax on whether administration occurs in the state or whether a fiduciary is located in the state.

66. Common Drafting Errors in Exercise of Powers of Appointment

a. **Read the Trust Agreement**. Be careful to follow all procedures described in the trust agreement for exercising a power of appointment, In addition, read the entire trust to understand the settlor's intentions regarding the trust.

b. **Appoint to Permissible Recipients**. Be sure that the power is exercised to leave assets only to permissible recipients under the power. If the power is a nongeneral power, make sure that the power is not exercised in a way that blends with the powerholder's assets, which could subject those assets to the powerholder's creditors.

c. **Correction of Improper Exercise; Substantial Compliance**. Various uniform laws (including the Uniform Powers of Appointment Act, §304) are moving toward the acceptance of substantial compliance, but many states hate substantial compliance. First, determine if the improper exercise can be saved under state law that recognizes an exercise that is in substantial compliance with the required procedures. If not, go to court to modify the improper exercise of the power as a scrivener's error (but whether the court will allow a reformation is not certain).

d. **Blanket Exercise.** Do not use a "blanket-exercise" clause that purports to exercise any power of appointment the powerholder may have. It may not sufficiently satisfy a requirement of specific reference to a power in the instrument that creates the power. If it is effective, it may exercise powers of which the powerholder is unaware (or has forgotten), and may inadvertently create unintended effects.

67. Uniform Powers of Appointment Act

A Uniform Powers of Appointment Act (referred to in this Item as the "Uniform Act") was promulgated by the Uniform Law Commission in July 2013. Turney Berry was the Chair of the Drafting Committee. The Uniform Act has been adopted in eight states: Colorado (the first), Missouri, Montana, Nevada, New Mexico, North Carolina, Utah, and Virginia. It has been introduced in Illinois and Kentucky, and is being studied for enactment in many other states. State law regarding powers of appointment is remarkably thin.

The information in this Item generally discusses positions taken by the Uniform Act regarding powers of appointment. References to a "§" in this Item of the Summary refers to a section of the Uniform Act unless otherwise indicated.

a. **Non-Fiduciary Powers**. Powers of appointment are non-fiduciary powers. §102(13). Decanting authority is a fiduciary power. If an instrument says that a trustee holds a power of appointment, it is not really a power of appointment– it is a normal trustee power subject to fiduciary duties.

b. **Nomenclature Change**. The "donor" is the person who creates a power of appointment, §102(4), and the "powerholder" is the person who can exercise a power of appointment (the traditional term for that person was "donee"). §102(14). To satisfy some academics on the drafting committee, special powers of appointment are referred to as "non-general powers of appointment." §102(10).

c. **General Power Presumption**. The presumption is that a power of appointment is a general power of appointment unless it is limited. §203. For example, "Fred may appoint the asset as Fred determines" is a general power.

d. **Important Exception to Avoid Inadvertent General Powers**. Section 204 of the Uniform Act presumes that a power is nongeneral if it is exercisable only at the powerholder's death and permissible appointees are a defined and limited class excluding the powerholder's estate, creditors and creditors of the estate. For example, a power to appoint to descendants of the powerholder's parents would not include the power of the powerholder to appoint to himself, his estate or creditors.

e. **Permissible and Impermissible Appointees.**

Power to Appoint to Powerholder or Powerholder's Estate. A power to appoint to the powerholder or the powerholder's estate is extremely broad, allowing the appointment in favor of anyone and without restrictions (even if the power states that it is subject to restrictions). There is no need that the powerholder first appoint to himself or to his estate and then make a distribution to others or make a bequest to others. *See* Comment to §305 of the Uniform Act.

Power to Appoint to Creditors. The effect of a power to appoint to the powerholder's creditors or to creditors of his estate is unclear. For example, assume that the powerholder owes $100 to Bob. If the powerholder can appoint assets to his creditors, can he appoint all of the trust assets to Bob or only up to $100? After he distributes $100 to Bob, Bob is no longer a creditor. A power to appoint to creditors of the estate is more troubling, because Bob is clearly a creditor of the estate at Bob's death, and subsequent events (such as paying $100 to Bob) do not change the fact that as of the date of the powerholder's death, Bob was a creditor of the estate.

The issue is important because planners sometimes draft a general power of appointment as a power to appoint to creditors, thinking that this is the most limited general power possible. If the power is not limited to the extent of a creditor's debt, this type of general power is not limited at all.

What is the answer? "Everyone knows the answer—but everyone knows a different answer." For example, a BNA Portfolio takes the position there is no limit on the amount that could be appointed to a creditor, but Professor John Langbein says that the power to appoint to creditors can be exercised in favor of a creditor only up to the amount of the debt to the creditor. When asked if he has authority for his position, he responded "You might as well look for authority that the sun rises in the east. This question is so stupid that everyone knows the answer." When told that a lot of people think the answer is different, Prof. Langbein responded "There are a lot of stupid people."

Neither the Uniform Act nor the Restatement (Third) of Property: Wills and other Donative Transfers provide further guidance regarding this issue.

f. **Substantial Compliance With Donor Imposed Formal Requirements**. Traditionally, there has been no doctrine of substantial compliance recognizing substantial (but not precise) compliance with the formal execution requirements imposed by the creator of the power. Section 304 provides that substantial compliance with a formal requirement imposed by the donor, including a requirement that the instrument make specific reference to the power, is sufficient if: (1) the powerholder knows of and intends to exercise the power; and (2) the manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement. For example, a testamentary power of appointment that can be exercised by will can also be exercised by a revocable trust that is functionally equivalent to a will. However, a specific reference requirement would not be satisfied by an exercise of "any appointment that I might have" or by a residuary clause purporting to exercise any powers that the testator has—because a material purpose of the specific reference requirement was to avoid inadvertent exercises. In that situation, the exercise of the power would at least need to reference who created the power that is being exercised.

g. **Choice of Law.** The traditional rule is that the law where the power of appointment was created controls regardless where it is exercised. As an example of the importance of governing law, assume that a powerholder can appoint the assets to specified persons or their spouses. Would same-sex spouses be included? That may depend on the state law that governs. Or the term "descendants" may depend on the law of a particular state with respect to artificial reproduction technology or other state law issues (such as the recognition of adult adoptions). The Uniform Act provides that the creation, revocation, or amendment of the power is governed by the law of the donor's domicile at the relevant time (§103(1)), but the Uniform Act changes the governing law provision regarding the exercise, release, or disclaimer of the power to what the Commissioners think is the uniform practice of practitioners in exercising powers of appointment—and that is to apply the law of the domicile of the powerholder (§103(2)).

h. **Fraud on Exercise.** The Comment to §307 of the Uniform Act explains the "fraud on the power" concept as follows:

> Among the most common devices employed to commit a fraud on the power are: an appointment conditioned on the appointee conferring a benefit on an impermissible appointee; an appointment subject to a charge in favor of an impermissible appointee; an appointment upon a trust for the benefit of an impermissible appointee; an appointment in consideration of a benefit to an impermissible appointee; and an appointment primarily for the benefit of the permissible appointee's creditor if the creditor is an impermissible appointee. Each of these appointments is impermissible and ineffective.

i. **Contract to Exercise a Power.** A powerholder cannot contract to exercise a power of appointment in a certain manner unless it is currently exercisable. §405 of the Uniform Act. The policy reason for this position is that the person who created the power wanted to leave flexibility for the powerholder to change his or her mind before it is exercised taking into account current conditions. Such a contract to exercise a power of appointment in a particular manner could not be enforced.

This issue is particularly important for testamentary powers of appointment. The drafting committee struggled with whether to allow contracts to exercise a testamentary power of appointment because many lawsuits could be settled if someone who had a testamentary power of appointment could agree in the settlement to exercise the appointment in a certain manner. The committee ultimately concluded that there were too many ripple effects of allowing such contracts.

As an example, assume A has the power to appoint to his descendants. He really wants to give $1 million to the opera. He clearly cannot just appoint $1 million to the opera. Furthermore, he cannot appoint $1 million to his daughter because the daughter has agreed to give the $1 million to the opera. Difficult situations can arise regarding such indirect transfers. Suppose the daughter does not agree directly to give the appointed assets to the opera, but instead simply makes an enforceable $1 million pledge to the opera and A appoints $1 million to her. Is that a fraud on the power?

Another example illustrates how difficult this issue can be. Assume that a father appoints assets to his children "so they will take care of their mother." Few would think that is abusive. But if the father said to a child "if you will fund an irrevocable trust with $1 million for your mother today so that I know she will be taken care of, I will appoint $1 million to you," that would be inappropriate.

j. **Condition Exercise on Consent of Nonadverse Party.** A classic solution to prevent these types of potential abuses is to condition the exercise of a power on someone else's consent.

k. **When Can Creditor Reach Assets of Holder of General Power?** The mere existence of the authority of someone to create a general power of appointment does not of itself create creditor concerns for the person who might be granted a general power of appointment.

If a beneficiary is actually granted a general power of appointment (either by a third party or by formula at the beneficiary's death), the traditional rule has been that would not by itself allow creditors to reach the assets. However, the beneficiary's creditors could reach the assets if the beneficiary actually *exercised* the general power of appointment (although a 1935 Kentucky case said that creditors could not reach the assets even if the power was exercised as long as it was not exercised in favor of creditors). That traditional rule (dating back to an 1879 Massachusetts case) was the position of the Restatement (Second) of Property (Donative Transfers) (§§13.2, 13.4, 13.5). The Restatement (Third) of Property, however, takes the position that property subject to an *unexercised* general power of appointment can be reached by the power holder's creditors if his or her property or estate cannot satisfy all of the powerholder's creditors. Restatement (Third) of Property (Donative Transfers) §22.3 (2011). Some states (such as California, Michigan, and New York) have specific statutory measures adopting the position of the Third Restatement. The Uniform Trust Code applies the Restatement (Third) position to inter vivos general powers of withdrawal in §505(b)(1) (presumably that would also apply to inter vivos general powers of appointment); it does not address property subject to a testamentary general power of appointment, but refers to the Restatement Second position—suggesting that creditors could not reach property subject to an unexercised testamentary general power of appointment.

Section 502 of the Uniform Act provides that creditors of the holder of a general power may reach the assets subject to the power to the extent the powerholder's property (if the power is presently exercisable) or the powerholder's estate is insufficient. (This wording [and the Comment to §502] suggests that the creditors of a person who holds a *testamentary* general power of appointment would not be able to reach the trust assets until after the powerholder dies.) The Comment to §502 clarifies that the rationale of this position is that a presently exercisable general power of appointment is equivalent to ownership. Whether the powerholder has or has not exercised the power is not relevant to this issue. **This is the biggest change from traditional law principles under the Uniform Act, and this is the provision that states are most likely to consider changing. As discussed above, traditionally the creditors of a powerholder with a testamentary general power could not reach the property unless the powerholder exercised the power, but the Uniform Act changes that result to allow the creditors of the powerholder to reach the assets and some states may want to change that result.** There is an exception in the Uniform Act for property subject to Crummey withdrawal rights in §503; upon the lapse, release, or waiver of a withdrawal power, it is treated as a presently exercisable general power only to the extent that it exceeds the annual exclusion amount.

Creditors of a powerholder of a *nongeneral* power of appointment generally cannot reach the assets subject to the power. §504 of the Uniform Act.

A possible solution to keep from making assets subject to a general power of appointment available to the powerholder's creditors is to require the consent of a third person (who would need to be a nonadverse party in order for the power of appointment to cause estate inclusion under §2041). *See* Bove, *Using the Power of Appointment to Protect Assets—More Power Than You Ever Imagined,* 36 ACTEC L.J. 333, 337-38 (Fall 2010).

Greg Gadarian (Tucson, Arizona) has suggested a very interesting planning strategy that exists for lapsed withdrawal powers in two states (Arizona and Michigan) that treat the lapsed powerholder as not being the settlor of the trust for creditor purposes. *See* ARIZ. REV. STAT. §14-10505(B). A number of states have similar provisions that limit creditors' access to assets over which a power of withdrawal has lapsed to amounts described in §§2041(b)(2), 2514(e), or 2503(b), but Arizona and Michigan apply this protection to the entire amount of the lapsed withdrawal. For example, the trust might give a Trust Protector the authority to grant a withdrawal power over the entire trust assets to a beneficiary; the withdrawal power would lapse 30 days after it is granted. The assets would be included in the powerholder's gross estate (to the extent the lapsed power exceeds the "5 or 5" amount in §2041(b)(2)), and the powerholder would (according to various IRS letter rulings) be treated as the owner of the trust for income tax purposes under §678, but the entire trust would continue to have spendthrift protection. This could be used to cause estate inclusion for a surviving spouse to allow a basis adjustment at his or her death and to cause the trust to be a grantor trust as to the surviving spouse, all without subjecting the trust assets to the spouse's creditors following the lapse of the withdrawal power.

The *possibility* that creditors of the powerholder of a general power of appointment can reach the appointment assets (in light of the uncertainty of the development of state law regarding this issue) is an important factor that planners should consider before creating general powers of appointment. Even if an individual has no creditor concerns, the individual is just one auto accident away from a financial disaster.

I. **Ability to Grant General Power; General Power Does Not Exist Until Actually Created**. Section 2041(b)(1)(C) provides that a power exercisable "in conjunction with" another person will be a general power unless the other person is the creator of the power or is an adverse party (for example, another beneficiary). Some planners have raised the question of whether there is a real difference between a power that is conferred by a third party vs. a power exercisable in conjunction with a third party. *See* Ronald Aucutt, *When is a Trust a Trust?,* at 17, printed as part of *It Slices, It Dices, It Makes Julienne Fries: Cutting Edge Estate Planning Tools,* STATE BAR OF TX. 20th ANN. ADV. ESTATE PLANNING STRATEGIES COURSE (2014). This raises the possible IRS argument that the beneficiary may be deemed to hold a general power of appointment even if it is never formally granted by the third party. A possible counterargument is the provision in Reg. §20.2041-3(b) that if a power is exercisable only on the occurrence of an event or contingency that did not in fact take place, it is not a general power of appointment. If the independent party never grants the general power of appointment, arguably that is a contingency that never took place within the meaning of that regulation. Stated differently, if the power is never granted to the beneficiary, is it treated as a power exercisable upon the occurrence of an event which never happened and thus not a general power of appointment under Reg. §20.2041-3(b), or is it a power exercisable "in conjunction with another person," making it a general power under §2041(b)(1)(C) even though never granted?

The Uniform Act cannot change tax consequences but attempts to "nudge the law;" a Comment to §102 of the Uniform Act supports the view that the ability to create a general power of appointment ought not to be viewed as the equivalent of the ability to exercise the power with another. The Comment to §102 notes that if a person can change a general power into a nongeneral power or vice versa, the power is either general or nongeneral depending on the scope of the power at any particular time. For state law purposes, the power is what it is at the time it is being looked at, not what it has been or could be.

68. Basis Adjustment Planning

Planning to leave open the flexibility to cause trust assets to be included in the gross estate of a trust beneficiary if the beneficiary has excess estate exclusion will continue to be important to permit a basis adjustment at the beneficiary's death without generating any added estate tax. Indeed, incorporating planning for the flexibility to cause estate inclusion is more important than estate tax planning for most clients because most clients will not owe estate tax. The following summary lists a few ideas for basis adjustment planning. For a more detailed discussion of these and various other ideas, see Item 5 of Heckerling Musings 2018 and Estate Planning Current Developments Summary (March 2018), found **here** and available at **www.Bessemer.com/Advisor**.

a. **Basis Adjustment for Settlor**.

(1) **Independent Party With Power to Confer on Settlor a Limited Power of Appointment.** A very flexible alternative to cause estate inclusion for the trust settlor would be to give an independent party the authority to grant a power to the settlor that would cause estate inclusion, such as a testamentary limited power of appointment, which would cause estate inclusion under §2038 and result in a basis adjustment under §1014(b)(9).

The IRS might conceivably argue, however, that the settlor is deemed to hold the power under a §2036 regulation even if the limited power is not actually granted to the settlor. The key issue is whether the decedent would be treated as having retained a §2036(a)(2) power to designate persons who could enjoy the property. No prearranged understanding should exist for the grant of such a power to defend against an argument that the decedent indirectly retained the power so that §2036(a)(2) could apply (because that section requires that the power be retained by the decedent at the time of the transfer). Reg. §20.2036-1(b)(3) provides that §2036 applies even if a power is merely exercisable in conjunction with other persons (whether or not adverse) and regardless of whether the exercise of the power was subject to a contingency beyond the decedent's control that did not occur before his death. That arguably would apply to the permitted grant to the settlor of a limited power of appointment even if it was never actually granted. *See* Rev. Rul. 73-21, 1073-1 C.B. 405 (decedent's reserved power to name a successor trustee including himself upon the death, resignation or removal of the trustee triggered inclusion under §2036(a)(2) even though a vacancy had not occurred by the time of the decedent's death); *Estate of Farrel v. U.S.*, 553 F.2d 637 (Ct. Cl. 1977); *but see Estate of Kasch v. Commissioner,* 30 T.C. 102 (1958) (contingent power to determine who enjoys property or the income from property is not subject to §2036(a)(2), based on an interpretation of the predecessor statute in the 1939 Code). That same provision is not included in the regulations under §2038. *See* Reg. §20.2038-1(b).

In summary, whether this alternative works is unclear. The regulation under §2036 is very broad and potentially applies to the authority of a third person to grant a limited power of appointment to the settlor, and a case often cited to support the workability of this approach, *Estate of Skifter v. Commissioner*, 468 F.2d 699 (2d Cir. 1972), is dicta (because the court addressed a §2042 issue and merely discussed §§2036 & 2038 by analogy and did not cite the problematic §2036 regulation).

(2) **Settlor Purchase of Assets from Trust**. The settlor might purchase assets from a grantor trust or exercise a substitution power to reacquire low basis assets that would receive a basis adjustment at the settlor's death.

b. **Basis Adjustment for Beneficiary.** Possible strategies to allow a basis adjustment at a trust beneficiary's death include planning for the flexibility:

- to make distributions to the beneficiary (either pursuant to a wide discretionary distribution standard or under the exercise of a non-fiduciary nontaxable power of appointment);
- to have someone grant a general power of appointment to the beneficiary that possibly could be exercisable only with the consent of some other non-adverse party (but not the grantor); however, the IRS might conceivably argue that it is a power exercisable "in conjunction with another person," making it a general power under §2041(b)(1)(C) even though never granted (see Item 67.I above).
- to use a formula general power of appointment;
- to the extent that general powers of appointment are used for basis adjustment purposes, bear in mind that the existence of the general power may have creditor effects, but the actual exercise of a testamentary general power of appointment may be more likely to subject the assets to the decedent-beneficiary's creditors than if the general power is not exercised; or
- to trigger the Delaware tax trap by the exercise of a nontaxable power of appointment to appoint the assets into a trust of which a beneficiary has a presently exercisable general power of appointment.

If a general power is used for this purpose, its application might be limited to appreciated assets (*i.e.*, assets with fair market value exceeding basis) other than IRD items (those are the only assets that could benefit from a basis adjustment).

With respect to giving someone the ability to grant a general power of appointment to a beneficiary, if concerns exist as to how the powerholder might exercise a general power of appointment, it might be limited to an appointment in favor of the power holder's creditors, or it might be exercisable only with the consent of a non-adverse party (that is still a general power of appointment, §2041(b)(1)(C)(ii)). To protect the third party from an argument that the party must continually monitor whether to grant or change powers of appointment, the trust could provide that the third party has no authority to grant a general power of appointment until requested by one of various specified family members to do so. In addition, in light of the fiduciary issues that could arise in granting such a general power of appointment, consider using an extremely broad exculpatory clause for the third party. ("Why didn't you realize that giving a $5 million general power of appointment to my dad increased the value of the estate for purposes of determining the elective share? You actually caused $1.6 million to pass to the step-monster.")

c. **Upstream Gifts.** Many parents of clients (or other individuals) will have no federal estate tax concerns, even if the parents live past 2025 when the exclusion amount returns to $5 million (indexed)**.** Gifts may be made to individuals who have no estate tax concerns in hopes of getting a basis increase at the individual's death, and taking steps to avoid §1014(e) in case the donor should die within one year of the gift. A GRAT may be used to make upstream transfers without requiring a significant taxable gift by the client. For a detailed discussion of what Melissa Willms has referred to as the "accidentally perfect grantor trust," see Item 7.2 of the Current Developments and Hot Topics Summary (December 2015) found **here** and available at **www.Bessemer.com/Advisor**. *See* Mickey Davis & Melissa Willms, *All About That Basis: How Income Taxes Have Reshaped Estate Planning,* ALI-CLE Planning Techniques for Large Estates (April 2017).

69. Practical Problem

If a trust agreement grants a testamentary power of appointment without specifying a procedure for the trustee to rely on the presumed absence of exercise of the power of appointment if the will is not submitted for probate within a certain time frame, the powerholder's will may need to be probated to establish that the testamentary power of appointment was not exercised. If a power of appointment can be exercised by a written instrument, how does the trustee know that the power was not exercised or that its exercise was the last exercise of the power (unless the powerholder has irrevocably released the power)?

Items 70-79 are observations from a seminar by Frederick R. Franke, Jr. and Vivian Lee Thoreen, Pre-Contest Planning

70. Engagement Letter

The *ACTEC Engagement Letters: A Guide for Practitioners* and the ACTEC *Commentaries* have very helpful information about engagement letters. Among other things, they should carefully identify the client and the scope of the representation.

The engagement letter might provide that the client authorizes the payment of the attorney's fees and expenses for acting as a fact witness in any subsequent litigation. It might acknowledge that the contract is a necessary prerequisite for the estate planning attorney to proceed with the estate planning. The contract might explicitly provide that it is binding on the client's agents and on the client's estate. Before including such a provision, however, the attorney should determine whether such a provision is appropriate under the state's ethics rules. The Model Rules of Professional Conduct prohibit any "inducement to a witness that is prohibited by law." Payment may be made for trial testimony only pursuant to a statute in most states.

71. Attorney as Trial Attorney and Witness

In some states, the attorney cannot act as advocate (as trial attorney) and witness unless the client provides informed written consent. Some states draw a distinction between jury trials and bench trials. In any event, being an advocate and stating facts objectively as a witness can be difficult; at a minimum, the attorney's credibility as an objective witness may be impacted. One speaker was involved in a proceeding in which the trial attorney was listed as a witness, and the opponent invoked "the rule" requiring that the attorney could not attend any of the trial other than during his testimony. (The attorney's colleague could then be the trial attorney.)

72. General Evidentiary Issues about Scrivener's Notes/Testimony

a. **Attorney Client Privilege**. As a general rule, the attorney client privilege survives the client's death. The privilege belongs to the client, not the attorney, and the client may waive the privilege. A well-recognized exception to the general rule is the "testamentary exception," which permits disclosures from the drafting attorney. The testamentary exception is viewed as an implicit waiver by the client of the privilege to assist in upholding the testamentary instrument.

b. **Dead Man's Statute**. About 1/3 of states retain the dead man's statute in some form. It precludes an interested party (who has a direct stake in the outcome) from testifying about a transaction with a decedent, because the decedent is unavailable to dispute the testimony from the interested party. The drafting attorney generally is not precluded from testifying under the dead man's statute because the attorney does not have a direct interest in the outcome of the litigation.

c. **Hearsay**. Most states have adopted a version of Federal Rule of Evidence §803(3), which allows hearsay evidence of statements of the declarant's "then-existing state of mind" (forward looking testimony). That general rule does not also include "a statement of memory or belief" (backward looking testimony), but that is permitted if it "relates to the validity or terms of the declarant's will." For example, if a will made a $100,000 bequest to a library, and the testator later gave $100,000 to the library, an issue arose as to whether the bequest was adeemed. A friend was allowed to testify that when the client was asked whether he should change his will, the friend said "Oh, the charity will never claim the $100,000 under the will."

d. **Drafting Attorney as Key Witness**. The drafting attorney will be a key witness in most post-mortem will or trust litigation.

73. Warning Flags

Warning flags of potential contest proceedings include the following.

- Skipping over close family members in favor of non-family members
- Providing differing amounts, or adding restrictions to similarly situated beneficiaries
- Significant changes to long-established estate plans
- Unusual, or at least not generally accepted, beliefs motivating the bequest
- Unusual behavior by the testator
- Disabled or dependent testators
- Testators reclusive or withdrawn from other people.

74. Best Practices; Consistency

The drafting attorney will be a key witness in contest proceedings. The attorney must have notes to remember what happened years later.

Use the best practices consistently with all clients, but perhaps use more care and detailed documentation in situations where warning flags exist. For example, one speaker takes notes at meetings and dictates a summary of the notes in the meeting, while looking at the client, as a way of confirming that the attorney correctly heard and interprets the client's intent. (If someone brings the client to the office, the notes should reflect that the attorney asked the friend to leave the meeting so the attorney could talk with the client alone, and reflect when the friend returned to the meeting.)

75. Testamentary Capacity; Mental Exams

a. **Elements**. Elements of testamentary capacity required by the testator in many states are (1) knowing and understanding in a general way the nature and extent of his or her property, (2) the natural objects of his or her bounty, and (3) the disposition he or she is making of that property, and (4) being capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property. RESTATEMENT (THIRD) OF PROPERTY, § 8.1.

b. **Purpose**. Before engaging a medical specialist to conduct a mental evaluation, consider the purpose of the evaluation – (1) the client's mental capacity, (2) susceptibility to undue influence, (3) or both. The evaluation can be different depending on the purpose.

c. **Formal Evaluation**. If litigation is anticipated, a formal examination with a written report should be obtained rather than just having an informal evaluation.

d. **Timing**. Timing of the examination is key. The expert's opinion is most relevant, and evidentiary support will be the strongest if the evaluation occurs on the day the client signs the document, and ideally immediately before signing the document.

   If the examiner has some question about the client being able to understand the elements on that day, do not proceed but repeat the process again when the client may be having a better day. However, one expert on Alzheimer's disease has stated that "lucid moments" do not occur with Alzheimer's disease. While times may occur when the patient is better adept at masking problems, it is a progressive disease that generally does not include moments of recovery. "Lucid moments" may occur, however, in the early stages of the disease.

e. **What Type of Expert**? The best type of expert testimony in cognitive decline situations is generally a geriatric psychiatrist or psychologist. That is not always needed, however and in some situations, the client's neurologist or primary care physician testimony, who has a long-term relationship with the patient, may be sufficient. Another possibility is to have testimony from both a geriatric psychiatrist and the primary care physician.

f. **Tell Client About Examination**. The mental examination will be stressful to the client. The examination typically lasts 60-90 minutes; it can be overwhelming and the possibility exists that the client will just "shut down," feeling that the examiner is being too intrusive. The attorney should tell the client upfront about what will happen in the examination, and why it is important. Tell the client about the types of things the examiner will explore.

g. **Talk With Examiner After Examination**. The attorney should talk with the examiner afterward about the results of the examination (especially if the documents will be signed later that day) and discuss the result before the written report is prepared to reflect what issues will be helpful to be covered in the report.

76. Undue Influence

a. **Elements**. Most states look for certain common elements: (1) a confidential relationship existed between the testator and the person alleged to have exercised the influence; (2) the confidant played some role, however indirect, in the formulation, preparation or execution of the will; (3) the testator was susceptible to undue influence; and (4) the testator made a testamentary gift to the confidant which was unnatural.

b. **Diminished Capacity.** A very low threshold exists for testamentary capacity, but diminished capacity can cause a person to be more susceptible to undue influence.

c. **Confidential Relationship**. The "linchpin" of most successful undue influence attacks is the existence of someone with a confidential relationship who benefits by receiving a gift that was unnatural. A confidential relationship can be one of three types: fiduciary; reliant; or dominant-subservient. A person wishing to show a dominant-subservient relationship must present evidence that the donor was subservient to the alleged wrongdoer's dominant influence.

   State law defines the evidentiary impact of a confidential relationship. For example, in Maryland a dominant-subservient relationship will shift the burden of proof for lifetime gifts to the donee to prove that the gift was not the product of undue influence, but does not shift the burden of proof for testamentary dispositions.

   Because of the importance of confidential relationships, the drafting attorney should insist on talking with the client alone, and not in the presence of someone who brings the client to the office who later might be alleged to be in a confidential relationship with the client.

77. Drafting Pointers

a. **Serial Documents**. Consider having the client sign similar documents, over a number of years, so that an attack on the will would require setting aside a number of documents. (One speaker was involved in a contest in which 38 documents had to be set aside in order for the client to receive benefits from the contest.)

b. **Amendments v. Restatements**. Restatements of documents are generally preferable. Keeping track of a document with a number of amendments is difficult, both for the planner and the client. Situations can exist, however, in which amendments would be preferable. For example, if the client is having some cognitive decline, being able to understand a simple change in an amendment may be easier to uphold than demonstrating an ability to understand everything being done in a restatement of the entire comprehensive plan.

c. **Prior Documents**. Keep copies of all prior documents that have been superseded.

d. **Attorney Notes**. Consider whether more detailed or less detailed notes are preferable, but be consistent with the attorney's own practice and firm policies. Be aware, however, that almost every sentence in the notes will be reviewed and addressed in great detail in depositions as to its meaning and potential implications.

78. No-Contest Clause

No-contest clauses were permitted at common law, but many statutes (including the Uniform Probate Code) now provide that no-contest clauses are unenforceable if probable cause exists to challenge the document. The Restatement (Third) of Property defines probable cause as consistency of the following three elements (§8.5 cmt. c). (i) At the time of instituting the proceeding, (ii) evidence existed that would lead a reasonable person, properly informed and advised, (iii) to conclude that a substantial likelihood existed that the challenge would be successful.

Providing evidence to possible contestants that supports the validity of the document may help to establish a lack of probable cause at the time the contest proceeding is instituted.

Whether probable cause exists in many cases depends on the showing of a confidential relationship. If a confidential relationship existed, that is typically sufficient to establish probable cause.

The no-contest clause should be tailored to the specific situation. For example, it can apply to a particular bequest to a particular beneficiary, and can apply to specific types of attacks by that individual.

The no-contest clause should not overly broad. For example, the clause generally should not apply to absolutely any attack on anything that the executor or trustee does in administering the estate. Once the no-contest clause goes beyond the validity of the document, be very careful that the clause does not prevent actions that the client ultimately would have wanted to protect the favored beneficiaries' interest in the estate.

79. Execution Ceremony

The execution ceremony should be thorough and consistent.

Witnesses can include secretaries (but be concerned with being able to locate secretaries who may be short-term employees) or other attorneys in the office. Friends can be good witnesses, but older friends, who may no longer be alive or competent at the time of a contest, should be avoided as witnesses.

The signing ceremony should be at a time of the day that is generally the best time of day for the client in terms of cognitive understanding, energy, and awareness.

Videotaping can be awesome evidence if done properly, but can also be devastating evidence. One issue to consider is that if an execution ceremony is taped, will all subsequent signings also be videotaped. (If not, does that suggest that some concern may exist that refusing to tape subsequent signings hints that some questions might exist about those subsequent signings?)

One speaker was told about an actual situation in which a client's signing was videotaped in a nursing home. All went well in the ceremony and the client looked excellent, but at the very end, just before the recorder was turned off, the client asked, "do I get my doughnut now?"

Items 80-89 are observations of a seminar by Robert B. Fleming, Susan D. Snyder, Bruce Stone, and Suzanne Brown Walsh, iWills 2.0 (about electronic wills)

80. What is an Electronic Will?

An electronic will contains the same information that is contained in a traditional paper will, but the information is contained and stored in some form of electronic medium that can be retrieved in perceivable form. The electronic record itself need not exist in written language but it must be retrievable in written form that can be read by anyone who is literate in the language (*i.e.*, it could exist in a form of computer programming code).

81. Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act of 1999 ("UETA") has been adopted in 47 states, and the other three states have similar versions. It applies to a wide range of transactions, but not wills, codicils, or testamentary trusts. It does apply to inter vivos documents, including inter vivos trusts, powers of attorney, and healthcare documents.

Congress passed the Electronic Signatures in Global and National Commerce Act in 2000 ("E-sign Act") to allow the use of electronic records and signatures in interstate commerce. UETA and the E-sign Act provide that electronic contracts and signatures shall not be denied legal effect or enforceability merely because they are electronic.

82. Uniform Electronic Wills Act

The Uniform Law Commission appointed a drafting committee for Electronic Wills In 2017. The second reading will be in July, 2019, ready for adoption by states in the fall of 2019. It will address the formation, validity and recognition of electronic wills. It will also address end-of-life planning documents such as enhanced medical directives or powers of attorney for healthcare. It will not cover inter vivos trusts.

83. Single Case Addressing Electronic Wills

Only one reported case had considered the validity of an electronic will. *In re Estate Castro*, Case No. 2013ES00140 (Probate Div., Court of Common Pleas, Lorain County, Ohio 2013). It upheld the validity of a will written by stylus on a computer tablet, and that was signed by the testator and two witnesses by stylus on the tablet. The court ruled that the computer document and signatures constituted a writing, and because execution requirements had otherwise been met, the electronic document was a valid last will and testament. The order was uncontested.

84. Existing or Pending State Statutes

a. **Nevada**. Nevada enacted legislation in 2001 authorizing and establishing procedures for the creation of electronic wills. The statute was used very little, and it was significantly revised and overhauled in 2017.

A few highlights are summarized. An electronic will can be signed by a testator without the presence of the witnesses if it contains an "authentication characteristic of the testator" (such as a fingerprint, a retinal eye scan, voice-recognition, facial recognition, digital recording, a digital signature, or other commercially reasonable authentication). Alternatively, the electronic will can be executed by a testator in the "presence" of an electronic notary public or in the "presence" of two attesting witnesses. A person is deemed to be in the "presence" or to have appeared before a person if they are in the same physical location (*i.e.*, actual presence) or in a different physical location if the persons can communicate with each other by means of audio-video communication, by which they are able to see, hear, and communicate with each other in real time (such as by a Skype webcam connection).

The Nevada 2017 legislation provides that an electronic will executed by a testator who is not physically present is nevertheless deemed to have been executed in Nevada if the witnesses or the notary public are in Nevada at the time of online execution, and the will is deemed to have been executed in Nevada. This is very significant because most states have laws recognizing wills executed in another state if the execution complied with the law at the time of execution of the place where the will was executed. *See* Uniform Probate Code §2-506. Accordingly, residents of a great number of states (that have never considered electronic wills statutes) may be able to create valid electronic wills under Nevada law without physically leaving their states of residence.

b. **Florida**. Florida passed legislation in 2017 that authorized electronic wills, including remotely witnessed and notarized wills, but the legislation was vetoed by the governor. An electronic wills statute was considered again 2018, but it did not pass (primarily because of political issues not substantive issues).

c. **Indiana**. An electronic wills proposal is being considered in Indiana. The execution requirements for an electronic will are the same as for traditional paper wills, but the signatures of the testator and witnesses can a digital or electronic. The proposed legislation will not authorize remote witnessing, as is allowed in the Nevada legislation. Furthermore, the comity rule for wills (including electronic wills) is revised to recognize wills that were validly executed outside Indiana only if the testator was actually present in the jurisdiction at the time of execution.

d. **Other States**. Electronic wills proposals were introduced in six states in 2017, but only the Nevada bill was enacted. In 2018 so far, bills have been introduced in Arizona, Indiana, in Virginia. Arizona will almost certainly pass a law this year. LegalZoom is focusing its efforts this year to pass electronic wills legislation in Arizona, Indiana, and New Hampshire.

85. Qualified Custodians

Many of the electronic wills proposals require the existence of a Qualified Custodian in order for an electronic will to be self-proving or remotely executed. They also contain various detailed procedural requirements regarding cessation of the Qualified Custodian's service, appointment of successor Qualified Custodians, and required retention periods before electronic wills and records can be destroyed.

The Uniform Electronic Wills Act draft currently requires a Qualified Supervisor to be present in order for a remotely executed electronic will to be self-proving.

86. Chain of Custody

Under the Nevada legislation, the Qualified Custodian must prove uninterrupted chain of custody in order to protect electronic wills from destruction, alteration or unauthorized access and to detect changes to the document. The Qualified Custodian must store evidence of execution and be ready to prove its qualifications if requested by a court.

The current draft of the Uniform Electronic Wills Act does not include any specific custody definition or special requirements for custody of electronic wills.

87. Revocation

The drafting committee has experienced lengthy discussions about how electronic wills can be revoked. Multiple copies can exist of an electronic will, but the committee is considering recognizing that one true original or authenticated version will constitute a "single authoritative copy," but multiple versions obviously can exist in computer code. The committee is considering providing that revocation can occur by executing a substitute will in whole or in part, or by any other act that is established by clear and convincing evidence as an intended revocation of the electronic will.

88. Recognition of Wills Executed in Other States

The Nevada law creates a situation in which residents of other states could create valid wills under the laws of Nevada without physically leaving their own state even though their own state does not have an electronic wills statute.

The current draft of the Uniform Act provides that an electronic will is valid if it is executed in compliance with the Act or in compliance with the law of the place where at the time of execution the testator is physically located, or other place where at the time of execution or at the time of death the testator is domiciled, resides, or is a citizen.

89. This Is Happening

While the concept of electronic wills may seem foreign to estate planning attorneys currently, the formal recognition of electronic wills is going to become commonplace throughout the country. Many legal documents and transactions happen electronically currently, which coincidentally control the disposition at death of most persons' assets (bank account openings, retirement plan or IRA beneficiary designations, insurance and annuity contracts, etc.)

LegalZoom has been anxious to encourage electronic wills statutes because it found that after people had paid to prepare wills, about 60% did not sign them. This is an effort to get effective wills for people who have already paid for their forms.

Electronic wills may be viewed as "uber for estate planning." If electronic wills are coming, estate planners might as well embrace them as something that younger generations are wanting. Market research may show that people between ages 20-55 want electronic wills also; this is not just a desire of Millennials.

The panel predicts that ACTEC Fellows will become frequent users of electronic wills. Clients are often reluctant to be required to come back to attorney offices to execute estate planning documents that had been prepared after their extensive in-person meeting. If the law allows wills to be remotely executed, why should attorneys refuse to offer clients that convenience? Why should attorneys insist that clients execute their estate planning documents "the old-fashioned" way as original paper documents? Supervising the remote execution of electronic wills will be cheaper than sending notaries out to clients to supervise the execution of wills.

Items 90-97 are observations about a seminar by Robert W. Goldman, Susan M. Holzman, and Prof. Tanya Marsh, Nothing is Certain but Death and Taxes – Well, Maybe Just Death (discussing issues about funeral arrangements and the disposition of human remains)

90. Human Bodily Remains are not "Property"

Traditional common rules are that (1) human remains are not property, and (2) the next of kin has the right to possession of bodily remains for the purposes of burying them. Statutes now supplant the common law rules in terms of the priority of who has the right to designate what happens with human remains.

91. Statutory Provisions Regarding Right to Designate Disposition of Human Remains

The vast majority of states have statutes that determine who shall take custody and control of human remains. The right to take possession of remains and make disposition decisions is often referred to as the "right of sepulture." Top priority is typically given to the surviving spouse, followed by children, parents, siblings, etc.

A second group of statues, referred to as the "designated agent" statutes, allow a decedent to designate a person other than the one with statutory priority to take custody and control of remains after the person's death. Forty-eight states plus the District of Columbia have these types of statutes. Only Mississippi and South Dakota have no statutory language permitting one to circumvent the priority list.

The statutes vary significantly as to the mechanics that are required to designate such person. Seven states and the District of Columbia allow any kind of writing, seven states allow a designated agent to be appointed in a durable power of attorney for health care, and 34 states permit documents that meet certain formalities such as witnesses, signature of the agent, or notarization.

Twenty states expressly include "funded funeral service contracts" in their personal preference statute. In three states (Idaho, Rhode Island and South Carolina [cremation only]), a decedent's wishes are respected only if they purchased a preneed funeral contract. The statutes in these twenty states are clearly for the convenience of the funeral industry.

These statutes are often located in the statutory provisions addressing the licensing of funeral homes. Funeral homes have pushed for the passage of these laws so they will have certainty in knowing who has the ability to control the disposition of a body.

All of the state statutes are included in an Appendix to the written materials for the seminar.

92. Conflict of Laws

If an individual dies in a state other than the state of domicile, no cases directly address the conflict of laws rules as to what state's laws govern the ability to dispose of bodily remains that are located in the other state. In particular, what if the individual signed a statement designating who can dispose of his or her remains that is valid in the state in which the individual lives, but does not satisfy the mechanical requirements of the state in which the individual dies? No common law or statutory law provides that the law of a state other than the state where the body is located can control the disposition of the body. If the instrument designating an agent is not valid in the state of death, the priority statute in the state of death will presumably control.

93. Disinterment

No universal rule applies regarding the removal of a body from its final resting place. Each case is considered in equity on its own merits. A recent Pennsylvania Supreme Court lists factors that are considered:

> Among the factors to be considered in determining whether reasonable cause for reinterment has been shown are: (1) the degree of relationship to the decedent of the persons in favor of and opposed to reinterment, (2) desire of the decedent, the general presumption being that the decedent would not wish her remains to be disturbed, (3) the conduct of the persons seeking and opposed to reinterment, (4) the length of time that had elapsed since the original interment and (5) the strength of the reasons offered both in favor of and in opposition to reinterment. *Estate of Marsh*, 175 A.3d 993 (Pa. Nov. 22, 2017).

See also In re West, 801 S.E. 2d 237 (W. Va. 2017).

94. Protection of Funeral Homes

Many states have statutes protecting funeral homes from liability if the funeral home relies in good faith on statements from individuals who claim to have priority under the priority statute as to who can direct the disposition of human remains. A key corollary in the personal preference statutes is the absolution of liability for those who rely on documents that comply with the statutory requirements for memorializing preference. Some statutes forgive "all persons," but most of the statutes relieve only funeral professionals from liability. The combination of the relief of liability for funeral professionals and the preference in some state statutes for preneed funeral contracts reflects that the personal preference statutes were heavily influenced by the funeral industry.

95. Cremation

A great deal of written documentation is required to authorize cremation of a body—because cremation is irreversible once it has occurred.

96. Personal Liability for Funeral Expenses

No common law imposes a duty on anyone to be responsible for burial expenses. Only five states impose lability for burial expenses on designated persons.

97. Practical Suggestions

- Tell the designated agent where written instructions are located.
- Instructions in a will may not be discovered until after the body has been disposed. But the instructions could be placed in a will and also in a separate document.
- Written instructions in a separate document should have two witnesses and should be notarized. Those requirements are included in the laws of many states for designating who can dispose of remains.
- The various documents obviously should be consistent.
- A great deal of legal uncertainty exists regarding when and how an individual can provide direction and designate a funeral agent.
- The worst time to realize that uncertainty exists as to who controls how a body is disposed is after the individual has died.

Items 98-102 are observations from a seminar by Prof. Karen E. Boxx, Mary Alice Jackson, P.C. (Austin, Texas), and Karin Prangley, The GoFundMe Revolution: What Happens Once the Money Has Been Raised?

98. Background

In the late 2000s, a movement began to establish crowdfunding platforms. The primary purpose was to raise venture capital for new businesses. Most crowdfunding platforms are still used for that purpose. Under these platforms, an "organizer" (or "creator") creates an account for a "recipient" who can withdraw the funds, but the recipient may or may not be the beneficiary for whom the money is intended.

GoFundMe and Indiegogo are the two most popular. They are merely mechanisms for crowdfunding. The platform companies do not care why the money is being raised, who gets the money, or the purpose. They just care that the solicitation effort is not fraudulent. The platforms typically use PayPal or WePay for accepting contributions. They generally do not require that the ultimate beneficiary of the fund be notified that a campaign has started. GoFundMe charges a 4% administrative fee.

99. Income Tax Consequences

a. **Beneficiary**. IRS Information Letter 2016-0036 (June 24, 2016) addresses a microfinance campaign to raise money for a business. The IRS said that under §61, the receipt of funds under this mechanism is taxable income unless it is (i) a loan that must be repaid, (ii) a capital contribution of equity, or (iii) a gift "made out of detached generosity without any 'quid pro quo.'" The Letter added that a transfer without a quid pro quo is not necessarily a gift for gift tax purposes.

The key for income tax purposes is that the position in the Letter is that the amounts raised by the crowdfunding measure could be taxable income *if* the contributor receives something in return for the transfer. What if the contributor receives some insignificant trinket as a token of gratitude for the transfer? In the charitable contribution context, de minimis rules apply in connection with determining whether a donor received something in exchange for the contribution, but these crowdfunding transfers are to private individuals and are not charitable contributions.

Even though the funds should not be taxable income under the position of the IRS, third party transfer services must be licensed under FinCEN (the Financial Crimes Enforcement Network), and the IRS requires that third party payment networks send recipients a Form 1099-K ("Payment Card and Third Party Network Transactions") if more than $20,000 is collected or if more than 200 transactions have occurred with the account. The beneficiary who receives the Form 1099-K should not ignore it. An anecdote describes a family that received $50,000 from crowdfunding and did not report it. The family received a deficiency notice from the IRS for about $19,000 of back taxes. The amount reported on a Form 1099-K could be reported on the income tax return as "other income" and a negative adjustment could be included on the return with the description that the amount was the result of crowdfunding with no quid pro quo and is therefore not taxable income.

b. **Donor**. A charitable income tax deduction is not allowed for inurement of specific individuals; accordingly, the crowdfunding contributors receive no charitable deduction.

c. **"Entity" Taxation**. As funds are collected and before they are disbursed, what kind of "entity" is the fund for income tax reporting purposes? A trust, proprietorship, deemed partnership, etc.? When the account is created, the creator typically provides his or her own Social Security number. The Canadian crowdfunding legislation provides that the default treatment is that the account is treated as a trust and the organizer is the trustee, but while the campaign is ongoing, no investment obligations exist. Funds are often kept in a no interest bearing account so no income exists to be reported to anyone.

100. Transfer Tax Consequences

No guidance from the IRS addresses transfer tax issues for crowdfunding arrangements.

a. **Who is the Beneficiary?** If the organizer and beneficiary are the same person, the transfer would be to that named person, but what if the organizer is different than the beneficiary? The beneficiary might not even know of the existence of the fund. Depending on how account is created, the organizer will have the right to withdraw funds and transfer them to the beneficiary, so is any gift made initially to the organizer?

b. **Is the Contribution a Completed Gift?** Crowdfunding platforms often offer a refund if the beneficiary refuses the funds or under other conditions. GoFundMe offers a refund if campaign funds are misused.

In the context of the gift of a personal check, the gift is not complete until (i) the check is paid by the bank when first presented for payment, (ii) the donor intended to make a gift, (iii) the donor is alive when the check is paid, (iv) delivery of the check was unconditional, and (v) the check was deposited/cashed/presented in the calendar year for which completed gift treatment is sought. Rev. Rul. 96-56. In light of this analogous analysis, it seems that a gift to a crowdfunding campaign should not be complete until payment is paid to the campaign beneficiary and the opportunity for the donor to obtain a refund is extinguished.

c. **Is the Gift a Present Interest Qualifying for The Annual Exclusion?** If the crowdfunding campaign benefits a single individual, and if the organizer and beneficiary are the same person, the donee presumably has the right to possession. If the campaign owner and beneficiary are different individuals but the beneficiary has the practical immediate right to possession, the present interest requirement may be met. If the campaign seeks to benefit a class of individuals, the present interest requirement would typically not be met.

   If the annual exclusion is not available, the donor technically should file a gift tax return, claiming use of some of his lifetime gift exclusion amount. Despite this technical requirement, does the IRS want tens or hundreds of thousands of gift tax returns filed reporting $5-50 gifts?

d. **What is the GST Effect?** Is the beneficiary is more than 37 1/2 years younger than the donor and if the gift does not qualify as a present interest (and therefore does not qualify for the GST exception under §2642), technically the donor should file a gift tax return allocating a part of both the donor's gift exclusion amount and GST exemption to the transfer. That seems rather preposterous, but appears to be the technical result.

101. Issues regarding Special Needs Beneficiaries

If funds are being raised for a beneficiary with special needs, pre-planning with a special needs attorney is very important. Crowdfunding is often used for severely injured individuals or persons that otherwise have special health needs. Problems can result. As an example, a young boy with severe facial deformities used flip cards to communicate that his mother needed another $4,000 to pay for him to have another surgery. He ended up raising $42,000. Medicaid discovered the account and removed both the young boy and his mother from Medicaid, because individuals cannot have income or resources above a certain amount and still qualify for SSI eligibility and Medicaid benefits. (For this purpose, crowdfunding income is treated as unearned income.)

Planning alternatives include the following.

a. **Spend Down**. Where possible, the beneficiary could quickly use the funds for permitted purposes, subsequently leaving the beneficiary owning assets under the allowed limit, so that hopefully only several months of coverage would be lost.

b. **First Party Special Needs Trust**. The beneficiary, after receiving the funds, could transfer the assets to a "first party special needs trust" (under 42 U.S.C. §1396p(d)(4)(A)). A first party trust can be created by the individual with a disability, a parent, a grandparent, a guardian, or a court. The assets in such trust are not counted as resources for purposes of qualification of benefits, but at the beneficiary's death, Medicaid can be repaid from the trust for its disbursements on behalf of the beneficiary. A primary advantage of this approach is that certain important benefits and programs are available, as a practical matter, only to Medicaid recipients.

An ABLE account might be used in a similar fashion, but a number of technical issues would be presented. Also, only up to the annual exclusion amount ($15,000 in 2018) can pass into an ABLE account in any single year.

c. **Third Party Special Needs Trust**. A preferable approach, with pre-planning, is to have some third party create a special needs trust for the beneficiary, and have the crowdfunding contributions paid directly to that third party trust. A third party trust does not count as resources for purposes of Medicaid qualification and also does not have to be made available to Medicaid after the beneficiary's death.

Funds contributed for a third party special needs trust likely would not qualify for the gift tax annual exclusion. A possible planning alternative might be to give other minor descendants or remote remainder beneficiaries Crummey withdrawal powers. (If the disabled person who needs Medicaid benefits has a withdrawal power, that would cause the amount of assets that could be withdrawn to be treated as a resource for coverage qualification purposes.)

If some funds have been collected before realizing the implications to a special needs beneficiary, both a first party and third party trust could be used. The contributions already collected could be transferred by the beneficiary to a first party trust, and the account could be revised so that future contributions would pass directly to a third party trust. Distributions for the beneficiary would subsequently be made first from the first party trust.

102. Development of Uniform Law Regarding Crowdfunding

a. **Drafting Committee**. The Uniform Law Commission has created a drafting committee to address crowdfunding issues. The drafting committee will have its first meeting in April 2018.

b. **Scope**. The drafting committee will address "compassionate" crowdfunding, not commercial crowdfunding.

The committee will address to what extent it covers fundraising campaigns by an individual for that same individual. Some protections would not be necessary in that situation (such as the need for a trust), but other provisions of the Act might be applicable, such as specifying how any surplus funds would be used.

The committee will address whether the Act will only apply to web-based crowdfunding or to other public appeal campaigns as well.

The committee will also address whether limits on the type of purpose or intended beneficiaries will be imposed.

c. **Control**. A critical issue (perhaps the most critical) is who controls funds that are raised until they are distributed, and what limits if any are placed on the use of funds. A Canadian Uniform Act treats all funds raised in crowdfunding as trusts, with the organizer as the trustee unless specified otherwise. The Act may establish a default trust arrangement that could be used for convenience, but a trust may not be necessary in all situations. For example, a trust may not be appropriate for funds that are raised for a particular purpose rather than for particular beneficiaries. The Act will likely at least have a default trust arrangement for intended beneficiaries in a vulnerable situation.

d. **Mandatory Terms of Trust.** For situations in which a trust must be used, the Act will specific what trust terms are mandated. The Act will likely incorporate existing trust law except as provided otherwise in the Act. The Canadian Act relaxes the standard of duty for trustees to being liable only for dishonest or willful misconduct.

e. **Enforcement**. States' attorney generals will be consulted regarding their preferred role as to enforcement of the designated purpose funds.

f. **Surplus Funds**. A primary purpose of the Canadian Act was to address how surplus funds would be used. The Act will likely deal with that issue.

g. **Conflict of Laws**. A very thorny issue is the conflict of laws issue as to whose state law governs, in light of the fact that contributors may come from many states.