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ACTEC 2019 Fall Meeting Musings

October 2019

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This summary reflects the individual observations of Steve Akers from the seminars at the 2019 Fall Meeting and does not purport to represent the views of ACTEC as to any particular issues.

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December 11, 2019

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 observations from the 2019 ACTEC Fall Meeting Seminars in Philadelphia, Pennsylvania on October 18-19, 2019 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. The summary is based on the presentations at the seminars, but the specific speakers making particular comments often are not identified.

Items 1-18 summarize observations from panels comprising a half-day seminar titled "Estate Planning in the 21st Century: Using Positive Strategies to Foster Client Happiness and Well-Being." "Estate planning can and should be focused on encouraging and reinforcing well-being. After all, what is wealth and tax savings for it not for flourishing? This program explores the use of positive strategies ACTEC Fellows can implement in their estate planning practices." The seminar addressed a number of eye-opening and novel concepts for estate planning practices. These ideas and concepts will be an epiphany for some planners. Panelists were Richard S. Franklin, Marjorie J. Stephens, Raymond C. Odom, John A. Warnick, and Dr. David Gage.

Items 2-7 and Item 16 are highlights of comments by Richard Franklin and excerpts from his outstanding outline, "Well-Being Supported by Family Wealth – A Foundation to Flourish." With Richard's permission, much of the materials in these items are excerpts verbatim from his outstanding article, including suggested form provisions for a trust designed to encourage flourishing by trust beneficiaries (Item 16). Richard's article is heavily footnoted with research and studies supporting his conclusions, and those authorities typically are not cited in this brief summary of his article.

1. Introduction and Background About Applying Postitive Psychology Concepts in the Estate Planning Context

a. **Observations From An Estate Planning Attorney/Psychologist About Satisfied, Productive, Happy Estate Planning Clients and Families**. Marjorie Stephens practiced law, stopped practicing law and went to school in psychology, and later returned to practicing law in her estate planning practice. She was very sensitive to observing what motivates individuals and learning from clients who "all knew more about life and living that I did." Over the years, she has observed common threads in clients whose lives had been satisfying and successful on their terms and whose children lead satisfying, productive, and happy lives. Some of those common threads were (i) living within their means (whether they had low income or extremely high incomes), (ii) mastery of something (perhaps unrelated to their area of employment), (iii) a life pattern framework in the family that was a guide but not restrictive (for example, get a college degree, get a job, get married, have children, etc.), (iv) the presence of a key adult who knew, understood, and emotionally supported the person, and (v) the ability to moderate moods and get themselves back on track.

None of the satisfied productive clients reported money as a key factor. Marjorie's educational background in psychology had made her aware of many research studies showing that external rewards (such as money) are not good motivators and in fact decrease intrinsic motivation.

These observations have led Marjorie to explore psychology research for guidance about what motivates individuals and what things parents could do to motivate children so that the child leads a satisfied, productive, meaningful life, and to incorporate those concepts into estate planning designs for her clients who want to leave meaningful legacies for their children.

b. **Shift in Client Expectations for Estate Planning**. John Warnick observes that until the second half of the twentieth century, general views on inheritance and estate planning were unchanged for centuries; the goal was passing on skills, trades or land. A fundamental shift began with the Baby Boomers and has continued with Gen X, Gen Y, and Millennial clients. Estate planning is not just about the money, but an important element of the design of an estate plan is making a positive impact on the lives of children and grandchildren.

Estate plans can include tax planning, asset protection planning, and other essential elements of transition or succession plans but can also include features to encourage the flourishing of beneficiaries and the sustainability of relationships in the family. Planners can assist clients in creating "purposeful plans" that focus on the family and individuals in addition to taxes, asset protection, etc. The estate plan is the client's plan, not the lawyer's plan. The legal documents provide the form and structure of the plan, but what is most important is the client's spirit and vision.

c. **Important Strengths Estate Planners Should Cultivate**. John Warnick posits that planners should embrace two important strengths in light of this changing landscape. (1) Professional Humility – we should always remember why we are serving clients and we should regard our clients as our teachers. (2) Beginner's Mind – we should ask questions and become a better observer of individual feelings and the dynamics within families. Planners should have the courage to consider one or more of these new concepts in structuring estate plans.

d. **Changed Perspective for Client**. Ray Odom asks, what does the client do to enjoy the benefits of going through the estate planning process? Just die? Go beyond that. Get death and taxes out of the way. Get control of behavior out of the way. Provide a positive psychology goal tied to every day wealth transfer, and consider wealth transfer as an investment in well-being. Ray encourages clients to view estate planning and all wealth transfer as family "benevolence" ("bene" means good, so the "good volition," voluntarily wishing someone something good, virtuous and valuable) that is "defined benefit planning." The planning is "defined" (not just left to chance) and it is "benefit planning," measured not by how much taxes are saved but by how much good is accomplished by the planning. Transmitting wealth for good involves funding transformative life experiences. See Item 17 below in particular about the importance of funding experiences.

2. Overview of Estate Planning Approach to Fostering Well-Being/Flourishing

As mentioned above, the summaries in Item 2-7 and Item 15 are excerpts typically quoted verbatim (with permission) from Richard Franklin's outstanding outline.

a. **Flourishing Focus**. The seminar is a call to action to engage families in a collaborative, inclusive journey towards "flourishing," with each member of the family maximizing his or her potential and living a purposeful life. Flourishing has been described as a person becoming more and more his or her authentic self, finding true meaning and purpose, and becoming more and more what one is and everything that one is capable of becoming. The focus is on helping families reasonably using and preserving family wealth as a positive tool and resource to allow family members to be both motivated and challenged to reach their full potential. Many of these concepts are founded on the growing field of "positive psychology."

The family's first focus would be on well-being and flourishing (described in more detail below), with maintenance and enhancement of the family wealth taking on a secondary and supporting role.

b. **Application of Family Wealth**. Family wealth, as well as other resources, are for increasing well-being, including (1) ensuring that the basics of well-being are satisfied (e.g., food, shelter, clothing, housing, healthcare), (2) providing that life expectancy is not jeopardized by being low on the income spectrum, and (3) supporting elements of well-being associated with flourishing.

c. **Moving Away from an Economic Equality Focus**. Ideally the family will refocus away from economic equality and towards thinking in terms of equality of well-being and flourishing in every member.

d. **Non-Traditional Approach**. The thoughts and discussion are offered in the spirit of food for thought – i.e., ideas to consider in designing a wealth and inheritance approach to which the family can gravitate. Some of these ideas run counter to the usual advice that appears in the financial press and numerous books. For example, the "limited inheritance" approach most frequently attributed to Warren Buffett is, and always was, an unfortunate idea. Families may thoughtfully consider and incorporate some of these concepts in their planning, even if the plan is not focused entirely around these concepts.

e. **Overarching Ideas**.

- Use a positive approach in wealth and inheritance planning by moving the focus away from economics to increasing the family members' well-being and ability to flourish.
- Specifically require trustees to assess beneficiary well-being and improve it over time.
- In families of substantial wealth, estate planning should be primarily about lifetime transfers.
- Use equality of well-being and flourishing as the desired target for family members when designing the wealth and inheritance plan. – e.g., is every family member flourishing and what can the planning do to enable and support flourishing?
- Recognize the fundamental human need for self-determination and autonomy.
- Families, advisors and trustees should all be more focused on engaging at the meaning and purpose level.

f. **Summary of Goals of this Approach**. A conclusion in Richard Franklin's article is an excellent summary of the goals of this approach.

Individuals and families can deliberately and intentionally increase their happiness – i.e., create more positive emotion, improve their relationships, find more meaning and accomplish more. There is no point at which more money and wealth does not increase well-being and life expectancy. Families can intentionally use family wealth to support well-being and flourishing. ACTEC Fellows can help families incorporate well-being theory into their estate planning. One major conclusion is that wealth and inheritance planning should be much more about lifetime transfers of wealth than transfers upon death. This will better support each family member's well-being including life expectancy results, and avoid the Prince Charles Effect. A transition over the arc of the wealth holder's life expectancy, along with educating the inheritor about the financial, social and psychological implications of inherited wealth, should help mitigate the risks associated with inherited wealth and minimize cliff events. Transitioning wealth during the wealth holder's life expectancy is also more efficient for wealth transfer tax purposes.

3. Positive Psychology

a. **Historical Precursors**. Positive psychology's foundation rests on Aristotelian principles that associate happiness with virtue.

In 1943, Abraham Maslow published *A Theory of Human Motivation* identifying a hierarchy of human needs and motivations, illustrating certain markers in a person's ascent to self-actualization—i.e., attaining one's full potential.

Carl Rogers, another of the most influential humanistic psychologists of the 20th century, echoed Dr. Maslow's idea, believing that all individuals have one basic and positive motive, which is the tendency to self-actualize. He believed that one of the most important factors is the individual's feeling of genuine acceptance (especially by the parents) for who she truly is. An individual receiving unconditional positive regard, especially from parents, is more likely to self-actualize.

By the late 1960s, Dr. Maslow found self-actualization insufficient to describe "a full picture of the optimally functioning human being." Dr. Maslow created an additional level for his chart of needs that he called "self-transcendence." The level is described as "a motivational state in which the person seeks something beyond personal benefit, for example, the furtherance of some greater cause, union with a power beyond the self, and/or service to others as an expression of identification beyond the personal ego."

b. **Creation of Positive Psychology Field**. Dr. Martin Seligman launched the field of positive psychology with a speech in 1998. He is the Director of the University of Pennsylvania's Positive Psychology Center and is generally considered the world's foremost authority on positive psychology. His idea was to move beyond the prior history of psychological study that had focused solely on alleviating psychological problems, and instead focus on helping healthy people achieve richer lives with more positive emotion, more meaning, more achievement and better relationships.

c. **Happiness vs. Flourishing**. Although the terms well-being, happiness and flourishing are often used for the same purpose, their meaning is not exactly the same. Moreover, the focus of positive psychology is well-being and not happiness. For Dr.

Seligman, happiness is a one-dimensional aspect of life that is measured by life satisfaction. Well-being, though, is a construct of multiple elements beyond and including happiness. Flourishing has been described as "the product of the pursuit and engagement of an authentic life that brings inner joy and happiness through meeting goals, being connected with life passions, and relishing in accomplishments through the peaks and valleys of life." Ackerman, *Flourishing in Positive Psychology: Definition + 8 Practical Tips*, Positive Psychology.com (June 27, 2019).

d. **Humans are Positive at their Core.** Positive psychology is founded in the belief that human beings are essentially positive at their core. Each human being carries a positive potential that when unfolded, reveals happiness and well-being for self as well as for others. The focus in positive psychology is not on fixing shortcomings but on diminishing them by expanding the positive aspects of people. Hence, the focus is on what works rather than on what does not.

e. **Evolving Generations**. A century ago, life was about surviving world wars and the Great Depression.

The succeeding generations – the Baby Boomers – rebelled against their parents' beliefs and were not afraid to question authority and voice their opinions if they felt their personal values were violated. Their strong work ethics motivated them to learn as much as possible and do their very best. Boomers searched for meaningful work and moved easily between jobs with no attachment to a particular job or employer.

The succeeding generations – Generations X and Y (Generation Y is more popularly referred to as the "Millennials") have a strong desire to make an impact. They are confident in themselves and their future, self-expressive, liberal, upbeat and receptive to new ideas and ways of living.

f. **Core Features of Flourishing**. There is no single, unified idea or theory that underlies all of positive psychology, but under Dr. Seligman's model central notions are well-being theory and flourishing. "The goal of positive psychology in well-being theory … is to increase the amount flourishing in your own life and on the planet." The core features of flourishing are defined by reference to five elements (using the mnemonic **PERMA**):

- **P**ositive Emotions (pleasant life, including happiness and life satisfaction)(subjective);
- **E**ngagement (flow and being absorbed)(subjective);
- **R**elationships (we are social beings);
- **M**eaning (serving something bigger than self)(subjective and objective); and
- **A**ccomplishment (mastery and winning for the sake of it)

Seligman, FLOURISH, p. 26 (Atria 2011). Seligman summarizes that well-being theory is "essentially a theory of uncoerced choice, and its five elements comprise what free people will choose for their own sake." The emphasis is that the individual must be in control in making the choices for these elements to contribute to the individual's well-being.

g. **Focus on Positive Strengths**. Key to positive psychology is determining what works, what a person does well, and then act to support and strengthen those existing positive attributes rather than focus on the person's weaknesses.

4. Signature Character Strengths

a. **Foundational Concept**. One foundational idea in positive psychology is that using signature character strengths in daily life activities will increase well-being. A signature strength is one that is essential, energizing and easy for the person to deploy, and that the person is intrinsically motivated to pursue. Using signature strengths more will reduce stress, result in a healthier lifestyle, increase life satisfaction, increase self-esteem and confidence, and promote creativity, flexibility, and work engagement.

b. **Six Virtues and 24 Strengths**. The Values in Action (VIA) Classification of Strengths model identifies 24 character strengths in six groups of virtues. The six virtues are wisdom, courage, humanity, justice, temperance, and transcendence. Seligman & Peterson, *The Values in Action (VIA) Classification of Character Strengths*, Ricerche di Psicologia, 27(1), 63-78 (2004).

The Virtues and Strengths under the VIA model are as follows.

Wisdom—curiosity, love of learning, judgment, creativity, and perspective

Courage—honesty, bravery, perseverance, and zest

Humanity—love, kindness, and social intelligence

Justice—fairness, leadership, and teamwork

Transcendence—appreciation of beauty and excellence, gratitude, hope, humor, and spirituality

Temperance—forgiveness, humility, prudence, and self-regulation

The research shows that an individual simply being aware of her signature character strengths adds to her well-being. One study shows that workers who used their signature character strengths frequently at work are 18 times more likely to be flourishing. Thus, while awareness is good, the actual use of such signature character strengths is better.

According to research, the use of at least four of one's character strengths mitigates difficulties, leads to more positive experiences at work, and most importantly, results in a feeling that one's work is a calling.

c. **Signature Strengths Survey**. Take the VIA Survey of Character Strengths at www.authentichappiness.com. It has 240 questions and produces an assessment of the individual's five signature strengths. The VIA Institute on Character offers many resources for exploring strengths and how to use them in everyday life.

d. **Signature Strengths in Estate Planning Context**. Families could focus on identifying signature character strengths and building upon these strengths, both individually and as a group. There is no suggestion that ACTEC Fellows should become signature strength coaches, but ACTEC Fellows should know about this important positive psychology intervention and perhaps suggest that families actually seek a facilitator to work with them. Signature strengths can also be built into trust design and into philanthropic activities.

Identifying each individual's signature character strength should feed the wealth transfer planning process with important information throughout its many stages:

- In succession planning for a family business: identifying individual's strengths helps match resources and needs and better determine who will perform best and flourish in what position of the business.
- Supporting each family member's well-being: parents can plan to allocate their wealth in areas that best support each member in developing their strengths and increasing well-being. This will mean different things at different ages but includes supporting specific education and skills training, hobbies, entrepreneurial initiatives of their children, or even investing in their business.
- Family charity: in deciding and designing their charitable gifts and other involvements, families can better align their core strengths to their charity activities. In this way,family members can flourish while giving back to society.
- Family wealth discussions: understanding what makes everybody happy will help strengthen relationships, understanding and empathy. All of this helps communication and successful discussion around the family wealth.

5. Family Wealth's Supporting Role in Well-Being and Flourishing

a. **Overview.** Families should thoughtfully use accumulated wealth to support well-being and flourishing. A two-part model could be used. First, the wealth could create a baseline of support. Second, moving beyond the baseline, the wealth could support growth, development, and ultimately flourishing.

b. **Using Wealth to Create Baseline of Support for Well-Being**. The "Well-Being Baseline" in a family should start with the basics, such as the following, applied to each family member:

- Have reasonable housing in a community that is inclusive, empowered, resilient, safe, and with low government corruption (i.e., a wealthy democracy);
- Be healthy and active, and have access to quality healthcare;
- Be well educated, skilled and able to contribute to society; and
- Enjoy a clean environment and live sustainably.

Some of the ideas set forth in this baseline section are complicated and likely not currently part of the thinking of most families. Families could consider this information and settle upon a baseline for well-being of all family members and a financial plan to assure that particular baseline is met. This should be written, revisited and refined as time passes, and should include backup and emergency planning to cover the waterfront of foreseeable contingencies.

Some of the ramifications of using wealth to establish this baseline for well-being are explored.

(1) **Increasing Life Expectancy**. Statistics demonstrate that income and wealth have direct consequences on the life expectancy of the inheritor. In other words, the quantity and timing of the inheritance matters. Average life expectancy presently stands at 81.1 years for females and 76.1 years for males, but is substantially longer for the wealthy: 91.9 years for females and 88.8 years for males. Some reports show a current 13 to 15 year life expectancy edge for the affluent. When estate planners consult with a younger couple, they should advise that one of them will reach age 100. For the affluent, life expectancy today is nearing age 100.

A particularly important study of this issue is *The Association Between Income and Life Expectancy in the United States, 2001-2014*, published online on April 26, 2016 in the Journal of the American Medical Association ("JAMA Article"). The article indicates that being in the poorest 1% in the United States means a life expectancy on par with Sudan and Pakistan. Moreover, in the United States, location is also a factor in life expectancy. For example, from the moment of birth, in Arlington County, Virginia (just across the Potomac River from Washington, D.C.), the average life expectancy is 84.6 years, but in McDowell County, West Virginia (360 miles away from Arlington County), the life expectancy is 69 years – a whopping 15.6 years lower.

(2) **Prince Charles Effect**. Based on actuarial data, children are often in their 70s before inheriting wealth from parents at their passing. This is analogous to Prince Charles, age 70, waiting to inherit the throne from his mother, Queen Elizabeth II, age 93 (her husband, Prince Phillip, is a young age 98)! Hence the "Prince Charles Effect!" Thoughtful family wealth planning should take account of this increasing life expectancy.

(3) **Female Life Expectancy Advantage Narrows for Wealthy**. Estate planners have long noted the female advantage in life expectancy. The common understanding has been that females live on average approximately 7 years longer than males of the same age. However, the JAMA Article clarifies that the female advantage narrows as income increases. At the bottom 1% of income, women on average live 6 years longer than men, but at the top 1% of income women only live 1.5 years longer than men.

Knowing this data should force a realignment of thinking. For instance, frequently, SLATs and QPRTs are established based on the idea that the female in a heterosexual couple of the same age will enjoy the longer life expectancy. With this new life expectancy data, planners should approach that assumption more cautiously, especially when dealing with a very wealthy couple.

(4) **Education and Life Expectancy Correlation**. Higher education levels correlate with longer life expectancy. During the 1990s and early 2000s, life expectancy declined by 5.3 years for women and 3.4 years for men among white people with fewer than 12 years of schooling.

(5) **Wealth Planning Implications of Longer Life Expectancy**. Because of longer life expectancies, particularly for the wealthy, wealth holders must plan for their own financial security with a longer time horizon.

From the perspective of the inheritor, the quantity and timing of the inheritance matters. For example, suppose that the potential inheritor is a daughter, age 40, with a life expectancy of about 85 years at the median income level, which is almost 4 years less than the 88.9 years in the top 1% of income. If the daughter was born when her parents were age 30, if one of her parents lives to age 100, the daughter would be age 70 (*a la* Prince Charles) at that time. If the daughter inherits wealth at the death of the last to die of her parents, she will have already lived at the median income with its median life expectancy results for over 30 years (i.e., from her age 40 to age 70). Alternatively, suppose that the parents supplement the daughter's income such that over this 30-year period her income is at the 95th percentile of $224,000 (giving her approximately $160,000 per year, which would be a moving target with inflation), after which she inherits the balance at the surviving parent's death. At the 95th percentile for income, the daughter's life expectancy is 88.3 years, within 0.57 years of the top 1%. The parents' approach to the financial inheritance may directly impact the longevity of this inheritor.

(6) **van Gogh Example**. An example of providing financial support for the baseline of support is Vincent van Gogh, who was supported financially during most of his "artist" years by his younger brother, Theo, who provided Vincent with a regular allowance for his support. Vincent acknowledged that Theo's support was critical to his being able to develop as an artist. He wrote to Theo in August 1882: "It stands to reason that many people are unable to carry on because of expenses, and I cannot express how grateful I am that I can work regularly….I would have to stop if I did not have you." Richard Franklin and Ray Odom summarize how much Theo's support of Vincent has meant to the world.

> [I]t is hard to overstate the value of Theo's gift of emotional and financial support to Vincent, personally. Also consider that Theo's support allowed Vincent to actualize in his potential, and in terms of Vincent's art for posterity, it is hard to overstate the gift that Theo has made to the world. Without Theo, the art of Vincent is unlikely to exist.

c. **Transferred Wealth Can Foster Well-Being and Flourishing**.

(1) **Resources to Pursue Activities With More Purpose**. Many 50-somethings reach a reflective point at the modern "middle-age" and start to reconsider existing career choices. Frequently, they desire more meaning from their work and want to know that their contributions are having an impact (i.e., they want to flourish and be more self-transcendent). However, people are frequently stymied by the high costs associated with a mid-life career change. Inheriting in their 70s is still helpful, of course. It may help with life in retirement, but the additional resources may be too late, at that age, to support pursuing the path they thought would provide more purpose and meaning as identified in their 50s.

(2) **Effect of Increasing Income on Well-Being**. Some researchers who have studied the relationship between money and well-being have concluded that while higher income continues to improve people's life evaluations, it does not improve emotional

well-being beyond $75,000 per year per household (this number is not adjusted by household size). However, other research supports the idea that there is no satiation point at which more income does not provide greater well-being, concluding that "[w]ell-being rises with income at all levels of income; satiation does not occur in our data. But of course, [...] each extra dollar raises well-being by less than the previous." Another study similarly concluded that "the curve does not fully flatten out: greater wealth does predict greater happiness."

(3) **Estate Planning Implications**. Academics debate whether there is a threshold dollar amount of income beyond which there is no significant improvement in well-being.

Reality Check. In any event, families of wealth should consider the overall context of this information and the circumstances they desire for their members (i.e., before limiting the inheritance based on these satiation thresholds). In many areas of the U.S., an income of $100,000 means that single family housing is not possible and obtaining quality health care will be stressful. Sending children to private school for K-12 is impossible, and it is unlikely that the better public schools are accessible because the neighborhoods in which they are zoned are frequently too expensive. Many of the better colleges will be out of reach or result in unsustainable student loan debt. Beyond such basics, the list of what the individual cannot afford is long. Moreover, the individual's life expectancy will be shorter. Therefore, realistically, in the U.S., a wealthy family seizing on a satiation threshold as being sufficient to secure happiness is questionable from the start.

Cost/Benefit Analysis. A significant driver of the diminishing return of a higher income in the research seems to be related to the cost of time and stress of procuring that income. In a family of wealth, however, earned income can be supplemented with investment income. The individual has both the increase in well-being from the income and the time to pursue other activities that add to well-being. That is, with inherited money, the "costs" part of the equation are typically low and the benefits of greater income can be fully savored.

Adaptation to Avoid Negative Effects. The family can educate their family members on the social and psychological impacts of inherited wealth. Hedonic adaptation can be understood by intelligent families and interventions can be introduced to keep family members grounded in a life that is about more than materialism.

Summary. (1) No saturation point exists at which a greater well-being or life expectancy may no longer result. (2) Wealth and inheritance planning should be much more about moving wealth during life than at death (as discussed in more detail in Item 5.e below.

d. **Ways to Positively Support Flourishing**. Suggestions for moving beyond the baseline and actively supporting well-being and flourishing at the next level might include taking steps to ensure that each family member has the opportunity to:

- Grow up loved, safe and respected so that they realize their full potential;
- Be creative and experience vibrant and diverse cultures;
- Be globally competitive and entrepreneurial;
- Value, enjoy, protect and enhance their environment;
- Have a thriving and innovative career at businesses that provide quality jobs and fair work for everyone;
- Respect, protect and fulfill human rights and live free from discrimination; and
- Be open, connected and engaged in giving back.

Furthering these higher-level elements requires consideration and thought. They are not as easily satisfied as ensuring each family member has good health care coverage and good housing in a safe community. Moreover, helping and supporting a family member discover and develop their true potential – i.e., to flourish -- is less tangible than paying for education. The following are some ideas.

(1) **Positive Psychology Interventions**. Positive psychology interventions (PPIs) are intentional activities that cultivate positive emotions and behaviors to enhance well-being. ACTEC Fellows need at least a basic knowledge of PPIs because trusts should be designed to permit and encourage investing funds into human development by teaching and coaching beneficiaries on using PPIs. Therefore, having some exposure to PPIs is helpful in being able to properly design the supporting trust infrastructure.

(2) **Coaching**. Families should consider retaining a positive psychologist, Master of Applied Positive Psychology graduate ("MAPP"), coach or facilitator to assist them (and their other advisors) in developing a plan of interventions designed to increase well-being and flourishing, which plan could be supported by the overall wealth and inheritance plan.

(3) **Prioritize Meaning in Daily Life**. Recent research now shows that focusing on meaning and prioritizing it on a daily basis can lead to more meaning with all the attendant well-being benefits. Through actively organizing daily routines to include meaningful activities, individuals can become aware of what is personally meaningful and of value to them, consciously focus their intention and energies to invest in them, and eventually contribute to their well-being.

Consider using the Best Possible Self exercise. Niemiec, *What is Your Best Possible Self?*, Psychology Today (March 29, 2013). It is considered one of the strongest PPIs. The exercise involves the individual visualizing herself at a future moment in time having accomplished her goals and committing this visualization to writing. By imagining her best self and the steps to get there, she may start to see that she is actually beginning to increase prioritizing meaning on a daily basis. This Best Possible Self exercise could be shared with the family, and the family group might brainstorm on how the family could "positively" support the visualization becoming a reality.

Parents ought to thoughtfully sharpen their future prospection into a positive framework, one in which their children and grandchildren are not burdened by past mistakes or missteps. This involves truly believing and trusting in their ability to create a new reality in which they are becoming more and more their authentic selves and actualizing in their full potential. Think "future positive." At a minimum, this is one way that families could support each family member's visualization of his or her best possible self.

(4) **Savoring**. The idea of savoring is transforming positive experiences into joy. The savoring PPIs might cover past, present and future experiences, and address savoring the experience, the process, response or beliefs. There is a growing body of research that these interventions provide significant well-being benefits. One of the savoring exercises is for the individual to take a daily 20 minute walk and try to notice as many positive things around her as possible. Just becoming more fully aware of the positivity around her should increase her happiness.

(5) **Art**. Art and creativity increase a person's tolerance to ambiguity and uncertainty, foster a flexible and open mind, help build autonomy and self-confidence, strengthen the capacity of expression, refine perception, stimulate imaginative thinking and playfulness, facilitate connection to others and the environment, and foster empathy.

The focus here is on the power of art and creativity on well-being. For those who have creativity and appreciation of beauty as signature strengths, art and creativity are readily available means of flourishing. For others, art and creativity interventions carry the potential to support flourishing through enhancing positive emotions, strengthening relational skills, experiencing engagement and even accomplishment.

(6) **Other Ways for Parents to Support Children's Well-Being**. See Item 13 for other ways that parents can motivate and assist development of well-being in their children.

e. **Preparation for Using Wealth**. Take steps to increase each family member's financial and estate planning acumen, and for each member to be aware of the social and psychological implications of living with wealth.

(1) **Challenges of Delaying Wealth Transfer Until Death of Parents**. Traditionally, the death of a parent or other relative was the event that triggered a wealth transfer to the next generation. The timing of death is, of course, beyond a person's knowing. Therefore, in large measure, the traditional approach makes the entire process of wealth transfer subject to the vagaries of circumstances beyond the family's control. In families of substantial wealth, consider abandoning this outdated approach and taking more control of the wealth transfer process. The discussion above about the Well-Being Baseline outlines some reasons why lifetime transfers of wealth may support greater life expectancy and well-being benefits.

Without planning, the infusion of a substantial inheritance upon an ancestor's death can be disruptive. It is by analogy a "cliff event." How will the wealth be invested and managed? Who can be trusted to assist the inheritor? How should the inheritor use the wealth (i.e., for new cars, houses, art, jobs, education, travel, gifts, investments)? How will the wealth affect the inheritor's relationships with other family members and friends? Moreover, these questions frequently come at a heartbreaking and emotionally charged time following a family member's death.

(2) **Gradual Transfer During Parents' Lives**. Consider a model in which wealth is largely transferred during the ancestor's lifetime. Having a gradual transition over a long period of time avoids many of the "cliff event" trauma issues. The ancestor could simultaneously work with the inheritor to impart both her knowledge of wealth management and her philosophy relating to wealth. The inheritor could acquire a greater understanding of what it means to live with wealth and to prepare the inheritor for financial, social and psychological ramifications.

It does not make any sense to expect the inheritor to handle her inheritance responsibly unless she is prepared adequately in advance. If not the ancestor, whose job is it to prepare the inheritor? Others can assist the ancestor in the training. The training should be focused on preparing the inheritor to use wealth as a resource for supporting his or her well-being and flourishing. Keeping the wealth protected for future generations to benefit from it in the same way might also be part of the approach.

It is critical to gain the perspective and self-awareness that the inheritor is an individual – separate and distinct from the wealth (with unique strengths, virtues, and talents). As an individual, the inheritor is no better or worse than any other individual. The inheritor, like any other individual, is empowered by the basic freedoms to love and be loved, to be respected as a fully sentient being, and to be entitled to his or her space on the planet. Inheriting wealth does not change these universal rights. Likewise, inheriting wealth does not provide justification for ignoring these universal rights in non-inheritors.

Thoughtful education and a deliberate and ongoing transition should help avoid cliff events and prepare the inheritor for what lies ahead.

6. Transitioning Control

Attempts by parents to control a child's pursuits is counterproductive towards achieving his or her highest potential. In positive psychology, the need for self-determination cannot be overstated. Families should carefully consider how to gratify that need through control changes in the family. Aligning needs with signature family strengths and talents is one way to approach control changes.

The parent cannot be the "decider" of the child's strengths, talents or highest potential. The child must have the freedom to pursue his or her own expression. Parents need to carefully distinguish between communicating thoughtfully in a supportive role and communicating in order to manipulate.

For some parents the power to determine the disposition of wealth may be the final opportunity to exhibit their control. Conditional inheritances and incentive trusts are other devices used to continue wielding that power after the death of the parent. Care must be exercised, however, or these devices may be viewed as a means of manipulation and control that cultivates guilt, confusion and anger for the inheritor. Moreover, the actual evidenced-based studies are clear that one cannot be motivated by money.

7. Limited Inheritance Approach

The image of a ne'er-do-well rich kid, idle and without purpose, is disturbing and contrary to much of what parents and grandparents believe is wise or appropriate. To remedy this concern, much focus has been given to one "sink or swim" strategy that limits the descendants' inheritance (often referred to as the "limited inheritance" approach). The idea is that the children should struggle, and that this will build character and instill proper values.

Those who can afford to leave their children considerably more, frequently and purposely leave them less. Their hope is to better motivate their beneficiaries. Warren Buffett asserts that the perfect amount to leave children is "enough money so that they would feel they could do anything, but not so much that they could do nothing." One commentator wrote: "Many of our clients and prospective clients reference this famous quote. They are concerned about how much wealth to pass along to their children. While they like the idea of giving them enough financial security to choose meaningful work, they worry whether a substantial inheritance would still let their children be productive members of society."

Following the model attributed to Mr. Buffett and others, parents adopting the "limited inheritance" approach are giving the bulk of their wealth to charity. It is not just billionaires that are using this approach. Many baby boomers of far less wealth are following this path.

Interestingly, the amounts that Warren Buffet left to his children, under this rationale, would be staggering to most clients. He is reported to have given each of his three children $100 million, and because he was happy with how they handled that amount, he is giving (or by now has given) each of them $1.5 billion for their separate foundations.

The limited inheritance approach to encourage children to become productive and engaged is questionable for numerous reasons. A few are described below.

(1) **Reaching Full Potential**. Productive and engaged are subjective terms. As a starting place, consider shifting the goal to increasing each family member's well-being and flourishing. Imagine Shakespeare's father, attempting to produce the productive and engaged child, encouraging Will to be a solicitor, doctor or wool merchant (anything other than a playwright and poet) and what a waste that would have been. With this shift of thinking, simply being productive and engaged takes on a role of secondary importance. Family wealth can help with both the Well-Being Baseline and Beyond the Well-Being Baseline. Why would parents not wish to give children a leg up in the hierarchy, enabling them to spend less of their time on the basic levels?

Struggling to satisfy basic needs is not necessarily helpful or instructive in striving to achieve higher aspirations and flourishing. Moreover, the time and energy involved with the former may, in some cases, detract from the time and energy that could be devoted to the latter.

(2) **Presumptively Negative Act**. To motivate children to be productive and engaged, the limited inheritance approach leaves the parent taking a negative action of limiting resources for the children. Where is the parent's positive, supportive action to achieve the desired result? Moreover, there is no empirical data to support the efficacy of this approach.

Many times, the parent who created the wealth did so at the expense of not spending time with the children. Imagine a child who already felt the parent's absence during his or her formative years, harboring the suspicion that mom or dad did not really care about them. Discovering that they would receive little inheritance might solidify the belief.

Consider how Warren Buffett frames his stated approach for giving children "enough money so that they would feel they could do anything, but not so much that they could do nothing." These words could be interpreted as "I don't trust you" to make reasonable and appropriate decisions and "I will therefore paternalistically make decisions for you." Is that the message the parents really want to convey?

Those who gravitate to the "limited inheritance" approach do so based on a few bad examples, rather than realistically considering the broader landscape that reflects positively on the behavior of inheritors. One recent study found, for example, that 91% of inheritors understood that they had an obligation to preserve the wealth for future generations.

Moreover, the "limited inheritance" offers parents a seductively simple solution. Compared to engaging with the children, helping them discover and support their strengths, supporting their well-being, and preparing them financially, socially and psychologically to live with wealth, the "limited inheritance" approach can be implemented unilaterally and in secret.

(3) **Entrepreneurs May Overemphasize the Creation Phase Compared to the Management Phase**. Many of those who created the wealth overemphasize the value of the wealth creation phase. Within families, consider whether it is misguided (dare say arrogant) to value the creation process more than the management process. Wealth creators valuing their contributions as being the most important to favorable family circumstances is analogous to a sales force valuing its contributions to a company as being more important than manufacturing, finance, etc. Compared to a competitive business setting, however, it may be more corrosive in a family setting for the wealth creator to value his or her contributions as superior and thereby denigrate those family members that may take on a management and preservation role. In the long-run, to the fifth, sixth and future generations, it is a seamless line of ancestors, responsible for their circumstance.

8. Predictors of Success

a. **Predictors of Success in Schools**. Years ago, the Perry Preschool Project provided enriched preschool programs for children, increasing their cognitive skills, but the cognitive advantage of those students lasted until only about the third grade. The project was considered a failure. James Heckman, a winner of the 2000 Nobel Prize in economics, followed up on the students in the program decades later and discovered that students in the program were more likely to graduate from high school, to be employed by age 27, to have incomes over $25,000, less likely to be arrested, and less likely to be on welfare. Heckman reviewed previously unexamined data about the children's noncognitive skills and found that the success in these children was correlated with noncognitive skills such as curiosity, self-control, and social fluidity.

Paul Tough, in his book *How Children Succeed* (2012), concluded that what matters is not how much information can be stuffed in a child's brain at an early age but "whether we are able to help her develop a very different set of qualities, a list that includes persistence, self-control, curiosity, conscientiousness, grist, and self-confidence."

b. **Predictors of Life Success**. A primary predictor of life success is the individual's self-efficacy, i.e., the individual's perception of his ability to control outcomes in his life–the belief that he can "get things done." Some researchers conclude that a high sense of self-efficacy is a better predictor of career selection and success than actual ability, prior preparation, achievement, and level of interest. A high sense of self-efficacy leads to academic achievement, career advancement, re-employment after a job loss, tenacity, creativity, and management of job stresses. Albert Bandura, in his book *Self-Efficacy: The Exercise of Control* (1977), concludes that four principal sources of information that lead to the development of self-efficacy are (i) mastery of some area, (ii) modeling, (iii) verbal persuasion, and (iv) ability to control one's perception of his or her physical capabilities and moods.

c. **Grit**. Researchers studying the characteristics of West Point students who stayed in the academy vs. those who dropped out after basic training concluded that the best predictor of success was not physical strength, athleticism, intellect, leadership ability, or well-roundedness, but was a noncognitive, non-physical trait known as "grit" – defined as "perseverance and passion for long-term goals." *See* Angela Duckworth, GRIT, THE POWER OF PASSION AND PERSEVERANCE.

9. Ineffective Motivation Sources: Money and External Rewards

Various psychological studies have concluded that money rewards (i) decrease motivation to engage in a task/job (preschoolers paid to draw drew less after being given the reward than they did before the study), (ii) decrease the level of performance, (an extremely high paid group performed worse than other groups), (iii) decrease creativity (pay tended to narrow focus, opposite of what is needed for a creative task), and (iv) increase undesirable behavior (decrease good behavior, such a giving blood, increase unethical behavior such as cheating, increase addictive behavior such as requiring more rewards in the future to elicit the behavior, and encourage short-term thinking such as focusing on profits over the next six months rather than long-term).

"Enough" money is required, however, in an employment situation so that basic survival needs are not at stake.

10. Motivation Drivers

Several researches (including Daniel Pink in his book *Drive: The Surprising Truth About What Motivates Us* (2009)) have concluded that major sources of motivation are autonomy, mastery, purpose, and relatedness.

a. **Autonomy**. Some researchers cite autonomy, i.e., persons' perception of their ability to control the outcomes in their lives, as the most important of these factors. This is critical in the estate planning context because parents may seek to motivate their children through rewards both during their lifetimes and through the structure of trusts on their deaths. But control is the antithesis to being intrinsically motivated. Everyone wants control over their own lives and will resist every effort to control them.

b. **Mastery**. Mastery of some activity is a source of motivation and is also a source of self-efficacy, one of the big predictors of life success. David Pink's *Drive* book notes that control leads to compliance, but autonomy leads to engagement with life, and only through engagement in an activity can we master something. Mastery of an area can result in activities in that area, even though challenging, being deeply rewarding, result in a state of what some researchers call "flow" (described further in Item 11 below).

One of the factors affecting mastery is the individual's gut-belief that he or she will be able to become accomplished in the particular activity. Individuals that believe intelligence and talent are acquired, not innate, have a higher sense of self-efficacy and greater likelihood of having the persistence to master the activity.

Pink describes three "laws" of mastery: (1) mastery is a mindset that intelligence in an area can increase with effort and that each task leads to further growth; (2) mastery is a pain requiring hard work (Malcolm Gladwell's *Outliers* maintains that 10,000 hours of practice is needed to achieve mastery in a field, emphasizing the importance of the mindset of "waking up early and getting to practice" everyday); and (3) mastery is a process that is never fully achieved but continues forever, leading to a further level of mastery, a process that reflects perseverance and grit.

c. **Purpose and Relatedness**. These two factors are different but are related. Purpose relates to one's broader goals than just acquiring wealth and is interwoven with our relationship with individuals and humanity. For example, a study of a call center for a university fundraiser showed that callers who were aware of personal stories of scholarship individuals raised twice as much as other groups of callers.

11. Flow—An Aspect of Well-Being and Flourishing

a. **Description of Flow**. One researcher attempted to dig deeper into the sources of life's enjoyment for people. He had people carry a beeper that rang at random intervals. When the beeper sounded, the individual recorded what he was doing and his emotional state. He concluded that individuals were most happy and most satisfied with their lives when they were totally engrossed in an activity that was within the individual's competence but near the edge of the competence. He described these experiences as "flow." It was a "self-contained activity, one that is done not with the expectation of some future benefit, but simply because the doing itself is the reward," and the effect is to lift "the course of life to a different level." He described these "flow" experiences as having eight components.

> First, the experience usually occurs when we confront tasks we have a chance of completing. Second, we must be able to concentrate on what we are doing. Third and fourth, the concentration is usually possible because the task undertaken has clear goals and provides immediate feedback. Fifth, one acts with a deep but effortless involvement that removes from awareness the worries and frustrations of everyday life. Sixth, enjoyable experiences allow people to exercise a sense of control over their actions. Seventh, concern for the self disappears, yet paradoxically the sense of self emerges stronger after the flow experience is over. Finally, the sense of the duration of time is altered; hours pass by in minutes, and minutes can stretch out to seem like hours.

Mihaly Csikszentmihalyi. FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE, P. 49 (1990).

b. **Work and Flow**. The primary voluntary activity of most people is their work. In *The Happiness Hypothesis*, Jonathan Haidt notes that "most people approach their work in one of three ways: as a job, a career, or a calling." People in every profession from janitors to professionals fall into each of these categories. The way the individual approaches and views work is critical to the fulfillment derived from work activities. Marjorie Stephens observes that "[i]ndividuals with a calling have frequent experiences of flow during their day. They do not watch the clock nor live for the weekends. They may continue to do the same work even if they were not paid. Volunteer work can be a calling." One study of janitors in a hospital who saw themselves as part of a team to promote the health of patients and saw their work as a calling, acting on their signature character strengths of kindness, loving, emotional intelligence, or citizenship.

12. A Fresh Look at One's Legacy

In light of these concepts illustrating how parents can assist their children in flourishing and being able to engage purposefully in flow activities, parents must open their minds to what their children can and may achieve. Stephen Covey noted that in the business world, "If you want to make great gains in human performance – and I'm talking here about 500 percent, not 5 percent – you have to change fundamentally the way you think about people You have to believe that people are the most valuable organizational assets, and that they are capable of immense achievement. And you have to help them believe it, too. In other words, you have to see the oak tree in the acorn, and you have to understand the process of helping that acorn become the giant oak tree."

Marjorie Stephens observes that "[i]t is ironic that businesses may embrace this idea before families. Yet in families, we are not looking to gain any personal or economic benefit, but rather are more likely looking to facilitate our children's realization of their own talents.... Many families operate under the myth that some people have talents to be realized and other do not. This myth must be dispelled as a part of the process of developing a structure to facilitate individuals in becoming productive…. Money rarely is effective and almost always is not effective in achieving what we want our legacy to be.... Our legacy is inextricably wrapped up with who we are as individuals, in how we live our lives."

13. Ways Parents Can Motiviate and Assist Development of Well-Being in Children

Parents play a vital role in developing motivation in their children, using the four major drivers of motivation described above – autonomy, mastery, purpose, and relatedness.

a. **Autonomy**. Autonomy, or a sense of self-efficacy, may be the most important motivation driver. The key is the sense of the individual's control over his life. "[O]verbearing parents and teachers erode intrinsic motivation. Kids whose parents let them make their own choices about what they like are more likely to develop interests later identified as a passion." Angela Duckworth. GRIT; THE POWER OF PASSION AND PERSEVERANCE, p. 107 (2016).

The act of shifting control to an individual requires providing the individual with information (such as training and practicing driving under training before turning over total control of the car).

Similarly, a child needs training in managing money, and working with someone in managing money before control is turned over to the individual. It is surprising how little training any of us receive in managing money or in parenting, two of the most important skills we need in our lives.

If a child has financial problems, providing the child with money may be the easiest way to address the problem, but the parent should address how to assist the child in a way that will build the child's sense of autonomy. Providing money is an easy solution, but using money to bail out the individual may mean avoiding an opportunity to assist the individual in learning the process of solving a problem without gifted money. Individuals need to experience consequences; that's how we become resilient. Parents should provide emotional support in problem solving more than financial support. Always keep in mind that the overall goal is developing a high sense of self-efficacy.

Marjorie Stephens suggests that "[f]inding the balance of helping a child and providing the positive discussion is a difficult one. Even more difficult can be refusing any financial assistance but remaining emotionally open and supportive. The latter situation takes a clarity in one's feeling around money that is rare in our society. Money is an external solution to a problem that almost always has other aspects. The money is not the solution, but it may feel like it."

Modeling is one of the most important things that parents can provide their children. Researchers have found that one way that a child's sense of self-efficacy increases is through watching a model, and the more the model is like the child, the more effective it is. Marjorie Stephens observes: "If you model perseverance in solving a problem and model continuing something that presents a challenge, then you are providing a model for that behavior. Modeling the process of persevering, modeling continuing to struggle, acknowledging that solving the problem or completing the task is not easy provides a much more effective model than having everything come easily to you."

b. **Mastery**. Mastery is a mindset (that the individual can learn an activity) and a process. Parents cannot master anything for children; their role is limited. Parents can expose children to multiple experiences when they are young and allow the children to select the experiences they want to take further, without judging their selections. Parents should provide feedback rather than advice, reflect on strengths, and reflect on the parent's own successes and failures. Parents can encourage or even require commitment to an experience that the child selects.

Again, parents can model the process of mastery and commitment and perseverance required to continue to improve, and that this process provides satisfaction and joy.

Verbal persuasion does not work outside a trusted genuine relationship. Verbal persuasion is helpful if the persons understands the strengths and challenges the individual has, and parents should be in a position to provide that encouragement.

Verbal persuasion becomes a process of the individual realizing what skills he has and is using, rather than an attempt to entice with an external reward.

c. **Relationship**. The individual is part of a community that provides multiple models and life paths.

One researcher observed that learning-disabled children who knew a lot about their families did better when they faced challenges. She and a colleague developed a measure called the "Do You Know?" scale that asked children to answer twenty questions, including:

- Do you know where your grandparents grew up?
- Do you know where your mom and dad went to high school?
- Do you know where your parents met?
- Do you know of an illness or something really terrible that happened in your family?
- Do you know what went on when you were being born?

The researchers discovered that the more children about their family's history, the stronger the sense of control over their lives, the higher their self-esteem, and the more successfully they believed their families functioned. The "Do You Know?" scale turned out to be the best single predictor of children's emotional health and happiness. Bruce Feiler. THE SECRETS OF HAPPY FAMILIES: IMPROVE YOUR MORNINGS, RETHINK FAMILY DINNER, FIGHT SMARTER, GO OUT AND PLAY, AND MUCH MORE, p. 40-41 (2013) (describing the work of Marshall Duke and Robyn Fivush).

d. **Purpose**. The family can model living with a purpose by developing a Family Mission/Purpose. Stephen Covey, in First Things First, suggests that in determining what you want for your life, visualize how you'd like your life to be described at your funeral in areas of work, family, and community. He suggests generally to begin an activity with the end in mind.

Bruce Feiler, in *The Secrets of Happy Families*, describes that he was skeptical about developing a mission statement and considered the idea corny, but he developed one for his own family as part of his research. He suggests using seven habits as a guide and using a list of words to describe certain values as a springboard. He used the following four questions in his family meeting to begin developing a mission statement:

- What words best describe our family?
- What is most important to our family?
- What are our strengths as a family?
- What sayings best capture our family?

Id. at 67.

e. **Positive Actions Parents or Others Can Take That Are Helpful and Not Controlling**. Marjorie Stephens lists the following actions that are positive for a parent or other person to take in assisting in the development of an individual.

1. Always Consider the Objective of Shifting Control to the Individual.

In considering the effects of one's actions or any action that is being included in a document such as a Will or Trust ask the question: Does this facilitate the individual taking control of his life?

2. Consider Steps of Control.

If the individual is not (perceived as) ready to take full control begin with information, add involvement, consider training if helpful and then shift to full control.

3. Model Desired Behavior.

Model the kind of behavior (perseverance, compassion, etc.) that you would like to see in your child.

4. Input and Process, not Solutions.

Do not solve the problems that your child or other mentee/legatee face; work with them on methods to be used and let them use these methods to solve the problems then note and reflect on the problem-solving process they used.

5. Recognize and Reflect on Successful Techniques.

When a skill is used to solve a problem, or cope with stress, or address an issue, reflect on how the action was used to address the problem, stress or issue.

6. Keep a Growth Mindset.

Affirm that ability and intelligence are acquired. Note, affirm and reflect the improvements that are made.

7. Open Opportunities and Let Go.

Provide multiple experiences, let the individual select what to master, let go of judgment, reflect on their improvement and model mastery in your own life.

Marjorie offers that the primary role of the parent is building a close trusting relationship with the child (i) to provide modeling and (ii) to know, understand, and reflect the child's strengths. Providing the relationship will facilitate the child's pursuit of mastery, purpose and meaning and in doing so provides the environment for the child to flourish.

f. **Summary**. Marjorie Stephens provides a succinct summary of the parent's role incorporating the concepts of the major drivers of motivation, as discussed above.

> Happiness is mastery, flow, purpose, autonomy all flowing in the soup of relationships. Our children pursue mastery, flow, purpose and autonomy. The role of the parent? Get out of the way or, at best, support and facilitate. But parents are far from irrelevant. The soup of knowing, understanding, and reflecting on our children's strengths and efforts provides the environment for mastery, purpose and autonomy to flourish. In leaving a legacy, the legacy primarily comes from the "relationship soup" parents provide for their children and those close to them.

See Item 5.d-e above for other ideas from Richard Franklin about how parents can positively support the flourishing of their children.

14. Estate Planning Implications of These Concepts; Role of the Advisor

Marjorie Stephens offers her views about how these concepts come into play in the estate planning context.

As advisors, our clients are best served by involving their children in their estate plan. Some important parts of developing and considering this process are:

- Determine what legacies they want to leave:
- Define their own legacies
- Write their obituaries
- Identify their values
- Consider which aspects of their legacy impact their children

Involve their children:

- Discuss their estate plan
- Discuss their financial situation
- Develop a family mission/purpose statement

Discuss the components of motivation, success and well-being with the clients and have them identify, for each of their children, the current status of each child in each of the following areas:

- Autonomy
- Mastery
- Purpose

Discuss the importance of the relationship on the children in the following two areas:

- Modeling
- Knowing the children and reflecting their strengths
    - Consider having everyone take the character strengths test
    - Gains are made in identifying and reflecting their use of their strengths

The primary concern of clients in the estate planning process is what they should include in their estate planning documents. The first step in identifying what should be included is to have discussed and considered and even begun implementation of the above process.

If a trust is created, the objective of the trust should be to turn over control of the trust to the individual beneficiary at some point in time. Control should be kept at the lowest level to accomplish the client's objective. Generally, during any time when there is another person serving as Trustee, full information should be required. The individual should be brought into the process with at least annual and, preferably quarterly, meetings scheduled. The investments should be discussed and the objective outlined. The process should be to educate the beneficiary so that the beneficiary can assess any person who is retained in the future to manage the investments.

Distributions that are to be made for the beneficiary's health, education, support and maintenance according to his/her standard of living keep the beneficiary focused on the trust and providing the need for distributions rather than on the beneficiary's own development. These trusts and fully discretionary trusts keep control outside the beneficiary. If it is a trust with discretionary distributions, whether based on an ascertainable standard or on full discretion, then involving the beneficiary as much as possible is imperative to keeping some control within the individual. Mandatory distributions provide more control in the individual. Distributions of a percentage of the value of the trust each year provide the beneficiary with information and more reliability in planning his life. To facilitate planning and certainty, the amount can be set at a dollar amount with the additional amount necessary to make up the percentage distribution made at the end of the year. The percentage distribution can be coupled with a right to withdraw a percentage of the principal each year with the percentage increasing at older ages. The individual has most reliability and control if the process is always aimed at the transition toward the individual being in full control at a certain age.

15. Planners Can Be Scalable in Applying These Concepts

These concepts may seem like an overwhelming shift in the approach to structuring estate plans, but the application of these concepts is scalable. Applying these concepts is not an all-or-nothing proposition. For example, the planner can prepare traditional plans but at least can discuss the importance of the plan in light of protecting family relationships and developing the growth of beneficiaries and give clients a different perception of their plans. Clients universally want their children to be motivated and happy and want their children to be productive, successful individuals (however the client may define that). Planners can start with that universal desire of clients and shift clients' focus from "what I do when I die" to embracing a living process that has an impact every day. The discussions can include talking about the clients' children, shifting control, focusing on ways to motivate children effectively, and encouraging clients' positive feelings about their children and grandchildren. See also Item 2.d above.

16. Trust Design to Encourage Flourishing of Beneficiaries

The following is a sample form provision by Richard Franklin for creating a positive trust designed to promote well-being and flourishing.

1.1 OBJECTIVES

This Agreement shall be construed, and each trust established by this Agreement shall be administered, to accomplish the following objectives. Any provision of this Agreement that may appear to conflict with or in any way defeat such objectives shall be construed or applied to accomplish them.

(a) <u>Trust Primarily for Support of Descendants and Promote Well-Being and Human Development</u>.

(1) My primary objective in establishing the trust is to provide a source of funds for the support of my current and future descendants. The trust is a gift of love, a legacy to enhance the lives of my family and promote the growth and freedom of each beneficiary for years to come.

(2) I believe and trust in the ability of my descendants to create a reality in which they are becoming more and more their authentic selves and actualizing in their full potential. It is my hope and intention for this trust to positively support their strengths and virtues, and, by providing financial assistance for their basic support and needs, allow them to devote more of their time and talents to those endeavors that enable my descendants to flourish and achieve self-transcendence to the benefit of humanity. In making discretionary distributions, my overarching intention is for the trust to support the beneficiary's positive human development.

(3) A core desire and goal for the trust is to improve my family's well-being and flourishing over time. From an equality point of view, my intention is for the trust to promote equality of well-being and flourishing for each beneficiary. Whether the beneficiaries economically receive equal benefits from the trust is not a primary concern.

(4) My intention is for the Trustee and PFC (defined below) to work together to define a Well-Being Baseline for each beneficiary of this trust and then for the Trustee to ensure that this baseline is achieved for each beneficiary, even to the point of exhausting the trust. Generally, I intend that the Well-Being Baseline would include these elements as applied to each family member:

- Have reasonable housing in a community that is inclusive, empowered, resilient, safe, and with low government corruption (i.e., a wealthy democracy);
- Be healthy and active, and have access to quality healthcare;
- Be well educated, skilled and able to contribute to society; and
- Enjoy a clean environment and live sustainably.

(5) It is my intention that each of my descendants will be able to exercise wide-ranging autonomy over his or her share of the trusts to be created under this Agreement. He or she is vested with authority to become a Trustee and sole Trustee of his or her share of the trusts to be created under this Agreement, subject to attaining the ages specified in ____. He or she is vested with authority as the beneficiary to dispose of his or her share of the trusts to be created under this Agreement by Will through the exercise of a Special Power of Appointment. I believe that each descendant must be granted freedom of self-determination to experience true growth and security. Therefore, the intention for this Agreement is to grant such freedom of self-determination and thereby be a means to unleash the true potential of the beneficiaries. The Agreement has been designed to achieve certain tax planning objectives mentioned below, but these goals are secondary to the beneficiaries' flourishing, the circumstances of which can only occur with freedom and self-determination.

(6) This Paragraph (a) and Section 1.2 below contains statements reflective of my intent, which are to guide the Trustee in administering the trusts under this Agreement. The statements of intent in this Paragraph (a) and Section 1.2 below are not intended to restrict or eliminate the Trustee's discretion or be considered a retention of power over beneficial enjoyment of the trusts under this Agreement.

(b) Generation-Skipping Transfer Tax. I intend to allocate my GST exemption to the trust with each contribution and thereafter for the trust to be exempt from the federal generation-skipping transfer tax as a result of the trust having a zero inclusion ratio.

(c) Exclusion of Trust Estate from My Gross Estate. I intend for the principal to be excluded from my gross estate for purposes of federal and state estate, succession, or other death taxes.

(d) Creditor Protection. I intend for the income and principal to be protected from each beneficiary's creditors to the maximum extent that applicable law allows.

(e) Income Tax Status of Trust. Unless the Trust Advisor exercises the authority granted pursuant to _____________ hereof to terminate the status of the trust as a grantor trust, I intend that the gross income of the trust shall be included in my gross income for federal income tax purposes and that I shall be considered the owner of trust income and corpus within the meaning of sections 671 through 678 of the Code.

1.2 POSITIVITY TO FLOURISHING COMMITTEE

(a) Committee Purpose. It is my belief that a positive approach best mediates flourishing, that behavior is often guided by future anticipated emotions and that actions are chosen that likely bring positive emotions. It is also my belief that through actual engagement and searching for purpose and meaning that the realization of finding purpose and meaning is more likely, that prioritizing meaning on a daily basis is more likely to bring about experiencing meaning and increasing well-being. Therefore, the Trustee shall form a Positivity to Flourishing Committee (PFC) of beneficiaries and advisors. The PFC's goal will be to support each beneficiary developing his or her resilience, gratitude, strengths, meaning, flow, positive relationship and positive emotions. The idea is for the PFC and the trust to support well-being and flourishing in each beneficiary's life.

(b) Well-Being Baseline and Beyond the Well-Being Baseline. As stated in section 1.1(a)(4), the PFC should help the Trustee establish a Well-Being Baseline for the beneficiaries. Thereafter, the PFC's goals will be primarily focused on those elements of well-being beyond the Well-Being Baseline. I intend that the Trustee and PFC would set goals for moving beyond the baseline and actively supporting well-being and flourishing at the next level. The goals might include each family member having the opportunity to:

- Grow up loved, safe and respected so that they realize their full potential;
- Be creative and experience vibrant and diverse cultures;
- Be globally competitive and entrepreneurial;
- Value, enjoy, protect and enhance their environment;
- Have a thriving and innovative career and businesses that provide quality jobs and fair work for everyone;
- Respect, protect and fulfill human rights and live free from discrimination; and
- Be open, connected and engaged in giving back.

(c) Strengths. I believe that deploying a person's highest strengths leads to more positive emotion, to more meaning, to more accomplishment and to better relationships ("PERMA"). Therefore, the PFC should work to have each beneficiary identify his or her signature strengths and then work to discover ways to support the beneficiary utilizing these strengths. For example, each beneficiary should be encouraged to take the VIA Survey of Character Strengths (**www.authentichappiness.com**). The PFC should keep a family tree of strengths and work to develop new and creative ways to use and deploy these strengths individually and as groups, including in service of the trusts created under this Agreement.

(d) Resources; Exploration. I believe in the application of the principles of positive psychology because of it resting on a foundation of empirical study. The PFC should develop a library of tools and resources to assist the beneficiaries, particularly materials related to positive psychology. The beneficiaries attending retreats, workshops and other education programs to aid in exploring and discovery of their unique gifts and passions are all useful ways that the PFC should promote to bring forth and support transformation.

(e) Creativity and Innovation. I believe that creativity and innovation can be learned and that a creative person may have more capacity to find and discover purpose and meaning. I also believe that creativity can increase with age. The PFC should seek out ways to promote creativity (not limited to visual arts) and innovation in the beneficiaries, old and young alike.\

(f) Arts and Aesthetics. I believe that having an appreciation for arts and aesthetics, including the beauty in nature, improves well-being. For example, studies show that an appreciation of aesthetics may be associated with reduced risks for dementia. The PFC should seek out ways to promote an appreciation for art and aesthetics of all kinds.\

g) Investing Well-Being. I believe there are positive ways to make investments in well-being. For example, I believe in spending on travel that uses the beneficiaries' strengths of love of learning, art and aesthetics, and curiosity and interest in the world. I believe the impact of this is especially powerful for a family sharing the experience together. The PFC should become expert at this type of investing (spending) that is positive and particularly supportive of the beneficiaries' strengths and virtues.

(h) Assessments. I believe that the Trustee and the PFC should periodically evaluate each beneficiary's well-being and flourishing. Both subjective (e.g., the Flourishing Scale (Diener 2009)) and objective evaluations should be used to track and improve the services to the beneficiaries. These evaluations should also be considered in determining the performance of the Trustee and PFC in actually improving the well-being and flourishing of the beneficiaries.

(i) No Limits. It is my hope that my family will take this beginning and further develop the idea for the PFC and mold it over time, as circumstances and knowledge develops, to improve the ideas and approaches of this committee and the trust in its entirety. My family is not limited to what is written here. This Agreement is the beginning chapter of what I hope is a long story of our family flourishing. I encourage my family to create and innovate something meaningful beyond my imagination for the future. I trust that they will do just that. The Trust Protector may amend these provisions to accomplish these results.

(j) Funding, Compensation and Reimbursement. The Trustee is authorized to use income and principal of the trust to support the PFC's efforts, research, programs, and activities. The Trustee is authorized to pay reasonable compensation to non-beneficiary members of the PFC. Members of the PFC who are beneficiaries of the trust shall serve without compensation. Each member of the PFC shall be entitled to reimbursement for any and all costs, charges and expenses reasonably incurred and necessary or proper for service on the PFC. Any compensation and reimbursements may be paid without court approval and always in the Trustee's reasonable discretion. The Trustee may retain and rely on the advice of professional advisers who shall be compensated from the trust as recommended by the PFC.

(k) The PFC is intended to be an advisory committee to the Trustee and a mechanism for the beneficiaries and other advisors to participate and enhance the purposes of the trust. The advice and activities of the PFC are not intended to restrict or eliminate the Trustee's discretion or be considered a retention of power over beneficial enjoyment of the trusts under this Agreement.

1.3 DISTRIBUTIONS

(a) Income and Principal. The Trustee may make payments from the net income and principal to my descendants, as the Trustee deems appropriate for their well-being and flourishing, including satisfying their Well-Being Baseline and elements Beyond the Well-Being Baseline, as determined in and through the process described in Sections 1.2 and 1.3 of this Agreement. Any undistributed income shall be added to principal at least annually.

(b) Limitations. Notwithstanding any other provision herein, no Trustee has the right to exercise any powers granted hereunder that would give such Trustee or any person to whom the Trustee's powers may be imputed a general power of appointment described in section 2041 or 2514 of the Code or an incident of ownership described in section 2042 of the Code with respect to any insurance policy held by the Trustee insuring the life of such Trustee or any person to whom the Trustee's powers may be imputed. Any Trustee who is a beneficiary of a trust hereunder shall make payments from the net income and principal of such trust only as may be appropriate for the health, education, maintenance and support of a beneficiary of such trust in a manner consistent with the ascertainable standard as defined in section 2041 of the Code and applicable regulations, but no Trustee shall participate in the exercise or decision not to exercise any discretion concerning distributions to any beneficiary to whom such Trustee owes a legal obligation of support. In each case where a Trustee's exercise of discretion is prohibited as provided above and another Trustee is serving, the determination of the remaining Trustee or Trustees shall be final and binding upon the beneficiaries of such trust. For clarification purposes, an Independent Trustee's discretion shall not be limited to the ascertainable standard as defined in section 2041 of the Code and applicable regulations.

1.4 DIVISION

(a) Upon my death, the principal shall be divided into per stirpital shares representing my descendants and each share representing a then-living descendant of mine shall be held in a separate trust for such descendant (who shall be the "Primary Beneficiary" of such trust) pursuant to the Descendants Trust Provisions hereof.

17. Funding Experiences Is Especially Meaningful

How can clients spend money in a way that increases someone else's (as well as their own) well-being and sense of flourishing? Clients should particularly focus on funding **experiences** in their wealth transfer plans. Ray Odom comes to this conclusion with an analysis of the advantages that experiences offer in Dr. Seligman's PERMA analysis (discussed in Item 3.f above) regarding flourishing. The following conclusions are all based on various psychological research studies.

- **P**ositive Emotions. Various research studies conclude that purchased experiences produce more positive emotion than purchased material possessions; one of the studies, for example, concluded that people in the study had far more regrets for inaction of experiences than for possessions on almost a 2-to-1 basis. Despite a common belief that possessions are longer lasting, research studies demonstrate that material purchases may provide more frequent bouts of momentary happiness in the weeks after acquisition, but the enjoyment of experiences lasts longer. The studies conclude that much greater regret arises over the failure to purchase a desirable experience than the failure to purchase a desirable material item; benefactors may have more regret over not purchasing an experience than not purchasing material possessions for their beneficiaries.

- **E**ngagement. "Wealth transfers that create 'flow' (as described by Dr. Seligman) … are more likely to come from buying an experience that can be verbally recalled and shared than a possession that can be shown and discussed." Ray concludes that the research studies bear "out the hunger of human beings to be a part of experiences that they can add to their 'life story' … and then share with others. It is this sharing that often makes the purchase of experiences transformative."
- **R**elationships. Experiments examining actual gift exchanges in real-life relationships reveal that experiential gifts produce greater improvements in relationship strength than material gifts, regardless of whether the gift giver and recipient consume the gift together. If an individual buys an experience for someone, that person will feel closer to the individual consistently and over time, even if the individual did not join the person during the experience.
- **M**eaning. Experiential purchase decisions help develop meaning better than purchases of material possessions.
- **A**ccomplishment. Accomplishments are more about life story experiences than life possessions. "[W]ealth-owning benefactors and beneficiaries are infinitely more than the sum of their possessions. The sum of an individual's experiences is more important in calculating and transmitting the good life. Although accumulated money is indeed a relevant marker of one's 'accomplishments, it may not be the best indicator of a good life." Ray describes research studies indicating that when people write the story of their lives, they typically will focus more on acquired experiences than acquired possessions.

Ray concludes – "Positive psychology research shows that wealth transfers that provide experiences may be vastly superior to wealth transfers that provide material possessions. Of course, there is the issue of autonomy and the tax effects of the gifts to fund experiences. The core goal of all estate planning and all wealth transfers must be to create, share and transmit the benefits of well-being, happiness and the good life to family and to humanity."

18. Family Businesses – More Opportunities for Control and Well-Being

a. **Large Percentage of Businesses**. About 90% of businesses in the United States are family businesses.

b. **Family Businesses Can Be Damaging to Family Well-Being**. Issues that arise include a perceived lack of fairness, disgruntled siblings choosing to compete against the family business, secrets in the family (e.g., compensation levels), and business issues that can cause unhealthy family relationships (for example, leading to some children feeling a lack of self-worth). Family businesses, in particular, present a fertile ground for unhealthy control issues.

c. **Accidental Partnerships in Family Businesses**. Family businesses may eventually come to have siblings as "accidental partners." Parents may transfer interests in the business to their children prematurely, thinking that they need to make equal transfers in the business to all children. Parents may make those equal transfers before they know who wants to be involved in the business. *See generally* D. Gage, J. Gromala, & E. Kopf, *Successor Partners: Gifting or Transferring a Business or Real Property to the Next Generation*, 30 ACTEC J. No. 3, 193-197 (2004).

These may result in parent defined partnerships rather than sibling defined partnerships. Partnership planning can only be successful when led by the partners themselves. Siblings who feel a lack of control will find a way to fight back, which complicates estate planning.

d. **Developing "Non-Accidental" Sibling Partnerships in Family Businesses**.

- Siblings decide who's in and who's out.
- Parents should insist that siblings plan before transferring their business to the children.
- Parents can enhance well-being by nurturing their children's sense of autonomy.
- Remind siblings that the other siblings will be the most important individuals in their lives; developing good sibling relationships develops a greater sense of well-being.
- Planning should focus on sibling strengths rather can siblings conflicts and dysfunction.

Items 19-27 summarize comments from a panel by David C. Blickenstaff, Mark R. Parthemer, and Robert M. Weylandt titled "Alternative Investments: An Investment Dream – A Planning Nightmare." Items 20-23 are based on materials in the written outline by Robert Weylandt. Items 24-27 are based on presentations by Mark R. Parthemer and David Blickenstaff.

19. Significance of Alternative Investments

Alternative investments are generally investments other than cash, bonds, stocks, and cash equivalents – such as commodities, financial derivatives and cryptocurrencies, but the most common types are hedge funds and private equity.

Alternative investments are important parts of clients' investment portfolios because they assist in providing (1) diversification, (2) enhanced returns, and (3) moderation of volatility. Appropriate diversification of trust investment portfolios under modern portfolio theory is likely to include hedge funds and private equity, but special fiduciary concerns arise when trusts own alternative investments.

The prevalence of alternative investments in clients' portfolios raises the important question of whether estate planning structures that planners create for clients are eligible to acquire alternative investments. Restrictions that may come into play include corporate restrictions, investment institution restrictions, and securities law restrictions, as well as other miscellaneous statutory restrictions mentioned below.

20. Relevant Securities Statutes

a. **Securities Act of 1933**. The purpose of the Securities Act of 1933 (the 1933 Act) is to protect investors by requiring disclosure about securities being offered to the public and prohibiting fraud in the sale of securities so that investors can make educated decisions. Information disclosure is initiated by the registration of securities offered to public sale. Various exceptions apply, including for private offerings to a limited number of persons or institutions. It also prohibits sale of unregistered securities unless an exemption from registration applies (Rule 144 imposes conditions on the sale of unregistered stock).

   "Non-public offerings" (which is not defined) are exempt from registration. Under a safe harbor, a non-public offering includes a sale to an unlimited number of "**accredited investors**" and no more than 35 non-accredited investors if certain other conditions apply.

b. **Securities Exchange Act of 1934**. The Securities Exchange Act of 1934 (the "1934 Act") created the Securities and Exchange Commission, requires disclosure of information in connection with proxy solicitations or tender offers, and requires certain insiders to disclose information about their activities, and provides for the recovery of the short-swing profits of insiders.

c. **Investment Company Act of 1940**. The Investment Company Act of 1940 (the "1940 Act") regulates the activities of companies that engage in investing in securities and whose own securities are offered to the public (such as mutual funds).

   Under a safe harbor, an entity that sells its interests only to "**qualified purchasers**" is not deemed to be an investment company for purposes of the 1940 Act registration requirements. (Funds that limit investors to less than 100 investors do not have to limit investors to qualified purchasers.)

d. **Hart-Scott-Rodino Antitrust Improvements Act**. The Hart-Scott-Rodino Antitrust Improvements Act (the "Hart-Scott-Rodino Act") requires certain parties to file a notification prior to a merger, acquisition, or other consolidation. The filing fee ranges from $45,000 to $280,000 in 2019, based on the size of the transaction, and a hefty daily civil penalty applies if the required notification is not given.

21. Rule 144

a. **Overview**. Rule 144 imposes conditions on the sale of unregistered stock (stock not purchased through a stock exchange on an open market) by anyone and also imposes restrictions on the sale of any stock (whether or not registered) by an "affiliate."

For purposes of Rule 144, an affiliate is any person that controls management of the issuer, directly or indirectly, including senior management, directors, and shareholders owning more than 10% of the outstanding stock of the company.

Stock that is subject to sale restrictions under Rule 144 is commonly referred to as restricted stock or Rule 144 stock.

b. **Sale Restrictions for Affiliates**. If the seller is an affiliate, the seller must meet (1) holding period conditions (generally at least six months) prior to the sale, (2) volume limitations (the seller cannot sell more than the greater of 1% of the outstanding shares or the average reported trading volume during the preceding four weeks), and (3) a notice requirement (filed on Form 144 if the seller intends to sell greater than 5,000 shares or greater than $50,000 worth of stock during any three-month period).

c. **Sales Restrictions for Others**. If the seller has not been an affiliate for at least three months, the shareholder can freely sell shares subject only to the six-month holding period requirement.

d. **Company Counsel**. Company counsel typically advises whether a shareholder who wishes to sell shares may sell the shares without violating Rule 144.

c. **Application to Irrevocable Trusts.**

Holding Period. The donor's holding period tacks for gifts to a trust, but not for sales to a trust.

Affiliate. A trust may be treated as an affiliate if it is a greater than 10% shareholder (which would trigger the volume limitations and notice requirement in addition to the holding period requirement).

Aggregation. A trust may be aggregated (for volume limitation purposes) with the grantor under certain circumstances if the grantor is an affiliate, including (1) if the trustee is an affiliate or (2) if the beneficiaries include the spouse or any relative of the affiliate grantor who shares the same household as the affiliate grantor.

22. Section 16 of 1934 Act

a. **Overview**. Under Section 16(a) of the 1934 Act, "insiders" must file reports upon becoming an insider, upon a change of beneficial ownership, and for certain exempt or unreported transactions. For purposes of Section 16, insiders include senior management, directors, and greater than 10% shareholders (after applying certain attribution rules).

Section 16(b) provides that an issuer may recover "short-swing" profits from any purchase and sale or sale and purchase by an insider of the company's equity securities within a six-month period. Bona fide gift transfers are exempted from the short-swing profits rule of §16(b), but not from the reporting requirements under § 16(a) (the gift transfer would be reflect on a Form 5).

For an excellent discussion of the estate planning implications of Section 16 of the 1934 Act, see Arlene Osterhoudt & Ivan Taback, *Securities Law Considerations for Trusts and Estates Advisors: Part II*, TRUSTS & ESTATES 24 (March 2017).

b. **Application to GRATs**.

Funding. Funding of the GRAT will not be reportable as a change of ownership if the grantor is the trustee because the insider is still treated as the indirect owner, but the transfer to the GRAT is reportable on Form 4 as a change in the form of ownership (from direct to indirect).

Making Annuity Payments. The distribution of insider stock back to the grantor to make the annuity payments should not be treated as a sale but is reportable on Form 5 as an "other acquisition or disposition." (The exercise of a substitution power by the grantor to re-acquire the insider stock may, however, be subject to reporting under Section 16(a) and to the short-swing profits rules of Section 16(b) if the grantor has matching transactions within six month before or after the substitution.)

Sales of Shares Held by GRAT. A sale of insider securities by the GRAT should be reported, and sales by the GRAT will be aggregated with personal sales by the grantor-insider for Section 16 purposes.

Disposition of Shares at GRAT Termination. If insider shares are distributed to the remainder beneficiary at the termination of the GRAT, the grantor/insider will no longer have an interest in or control of the shares, so the grantor will be treated as having disposed of the shares by gift, to be reported on Form 5 as a gift.

c. Application to Other Irrevocable Trusts. Issues include (1) whether a purchase or sale by the trust of company stock is reportable (i.e., if the trust is an insider), and (2) whether purchases or sales by the grantor/insider will be matched with purchases or sale by the trust for purposes of the short-swing profits rule.

The trust is an insider if it is a greater than 10% shareholder or if an insider has investment control of shares held in the trust and the insider has a pecuniary interest in the trust (including if members of the grantor's immediate family, which includes children who share the same household, are beneficiaries of the trust).

23. Accredited Investors and Qualfied Purchasers

For an excellent summary of the Accredited Investors and Qualified Purchasers rules, see Arlene Osterhoudt & Ivan Taback, *Securities Law Considerations for Trusts and Estates Advisors: Part I*, TRUSTS & ESTATES 19 (July 2016).

The registration requirements under the 1933 Act generally apply only to transfers of securities in exchange for value, and not to gifts. Therefore, a trust receiving a bona fide gift of an interest in a fund generally will not need to qualify as an Accredited Investor (assuming no elements of consideration are connected with the transfer, such as an obligation to satisfy future capital calls).

a. **Accredited Investors (Referenced in 1934 Act)**. The term "Accredited Investor" is defined in Rule 501 of Regulation D and includes eight categories, several of which are especially important in the family estate planning context:

(1) individuals having (i) a net worth (along with his or her spouse) that exceeds $1 million (excluding the value of his or her primary residence, but including assets in a revocable trust for the individual), or (ii) income in excess of $200,000 (or joint income with a spouse in excess of $300,000) in each of the two most recent years with a reasonable expectation of reaching the same income level in the current year);

(2) banks or similar institutions serving in a fiduciary capacity;

(3) a charity, corporation, partnership, or business trust with assets exceeding $5 million and not formed for the specific purposes of acquiring securities being offered;

(4) trusts with over $5 million that were not formed for the specific purpose of acquiring the security and whose purchase is directed by a "sophisticated person"; and

(5) entities in which all equity owners are Accredited Investors under the other categories (this includes a revocable trust if each grantor is an Accredited Investor and includes an FLP owned entirely by Accredited Investors).

b. **Qualified Purchasers (Referenced in 1940 Act)**. There are only four categories of Qualified Purchasers (and the requirements for being a Qualified Purchaser are stricter than for being an Accredited Investor):

(1) Natural persons owning at least $5 million of investments;

(2) Certain family-owned companies (including trusts) owning at least $5 million in investments, that are owned by two or more related persons (including siblings, spouses (including former spouses), descendants by birth or adoption, spouses or estates of such persons and charitable organizations and trusts established by or for the benefit of such persons) and not formed for the specific purpose of acquiring the securities being offered;

(3) Other trusts if all the trustees (or major decision makers) and all grantors (or other contributors) are Qualified Purchasers and the trust is not formed for the specific purpose of acquiring the securities being offered; and

(4) Any person, acting for its own account or the accounts of other Qualified Purchasers, who in the aggregate owns and invests on a discretionary basis, not less than $25 million in investments that is not formed for the specific purpose of acquiring the securities being offered (this has been described generally as an investment manager with not less than $25 million under management or a company with not less than $25 million of investments).

These categories are listed in the Investment Company Act, 5 U.S. Code § 80a-2(a)(51).

Transferees from a Qualified Purchaser will be treated as Qualified Purchasers if the transfer is by gift or bequest (but not sales). If the transferee provides any form of consideration (such as agreeing to satisfy future capital calls), this exception does not apply. A transfer from a Qualified Purchaser to an FLP in exchange for a partnership interest is a transfer for consideration and the FLP does not qualify for this exception.

Interesting distinctions arise between the definitions of Accredited Investors and Qualified Purchasers. For example, a charitable foundation trust with less than $5 million of investments, which is therefore not an Accredited Investor, may nevertheless be a Qualified Purchaser if it is established and managed by a Qualified Purchaser. Also, a parent exercising investment discretion over a trust for his child or children could qualify the trust as a company under the second exception to be a Qualified Purchaser even though the child could not qualify as an Accredited Investor.

c. **Important Terms**.

Investments. Investments do not include personal use property such as a residence.

Not Formed For Specific Purpose. Whether a person or entity was formed for the specific purpose of acquiring the offered securities is a facts and circumstances consideration, particularly in the entity context, and is intended to prevent unaccredited investors from pooling their assets to qualify as Accredit Investors. An SEC no-action letter indicates that relevant factors include (1) centralized management and decision making (the individual owners do not just manage their own assets), (2) proposed activities of the entity (i.e., that the only activity will not just be to acquire the investment), (3) the relative percentage of the overall portfolio represented by the investment, and (4) the extent to which all equity holders participate in entity investments on their own behalf.

Sophisticated Person. A Sophisticated Person is one who has the knowledge and experience in financial and business matters so that he or she is capable of evaluating the merits of the prospective investment. The Sophisticated Person need only control investment decisions at the time the security is acquired.

Institutional Trustee. The definition in the statute does not explicitly include trust companies, but a no-action letter from the SEC that was requested by a state-chartered trust company did not raise the an issue as to whether the trust company was an institutional trustee.

d. **Trusts as Qualified Purchasers**. The following are examples of trusts that qualify as Qualified Purchasers:

(1) A trust that owns at least $5 million of investments that was established for two or more related persons (as described in Item 23.b.(2) above);

(2) A trust with a Qualified Purchaser as grantor and trustee if it was not formed for the purpose of acquiring the offered securities; and

(3) A trust acting for itself or others that has investment assets of at least $25 million that was not formed for the purpose of acquiring the offered securities.

24. Hart-Scott-Rodino Act

a. **Overview**. Pre-merger notifications are required for transactions in which either the acquiring or acquired party are engaged in U.S. commerce and either (1) the acquiring person acquires voting securities of the acquired person valued over $359.9 million (in 2019), or (2) the acquiring person acquires voting securities of the acquired person of between $90 million and $359.9 million (in 2019) AND one of the parties has assets or revenue of at least $180 million and the other has at least $18 million (2019 values, indexed).

The filing fee is substantial, ranging from $45,000 to $280,000 based on the size of the transaction.

The civil penalty for failing to make required pre-merger notification filings is $41,484 PER DAY.

Certain exemptions apply.

b. **Sample Estate Planning Exceptions**. Sample estate planning exceptions include (1) funding of a revocable trust, (2) funding of a GRAT, (3) a testamentary transfer, (4) an outright gift to family or charity, and (5) a transfer into a trust for family or charity.

c. **Sample Transfers Subject to Hart-Scott-Rodino**. Sample estate planning transactions that might be subject to Hart-Scott-Rodino (if the size of transaction/size of parties tests are met) include (1) a distribution from a trust or entity (such as an FLP), (2) a sale to a trust or unincorporated entity, (3) the formation of a wholly owned entity, and (4) a contribution to a newly formed entity.

25. Control Share Statutes

About half of the states have statutes designed to discourage hostile takeovers. These statutes vary widely but generally provide that if a transfer of shares is made so that the acquiring person has a certain level (typically 10%) of voting rights after the transfer (taking into consideration the acquiring person's own shares before the transfer), the acquiring person will lose the right to vote the acquired "control shares" (at least without approval of a supermajority of the stockholders), and the company will have a right to redeem the transferred control shares at the price under an existing buy-sell agreement (which may be substantially less than full fair market value). A gift of control shares may trigger this result. Statutes sometime provide an exception for intestate transfers but not for general gratuitous transfers.

26. Regulation U

Regulation U is a federal rule applying to loans secured by margin stock (including publicly-traded securities and most mutual funds) that is designed generally to limit the amount of leverage that can be extended for loans secured by securities for the purpose of buying more securities. The maximum loan value that can be offered is 50% of the collateral securities' market value. Reg U applies if the lender is (1) a commercial bank or (2) a non-bank lender who has extended credit (secured by stock) above certain limits ($200,000 in the most recent quarter or had outstanding in such quarter $500,000 or more of such loans).

If Reg U applies to a margin loan, the lender must register with the Federal Reserve Bank, and the reporting must include a thorough financial disclosure and disclosure of certain personal information.

An example of how Reg U can apply in the estate planning context is a family loan or sale to a grantor trust for a note if the loan or note is secured by publicly-traded securities.

27. Fiduciary Considerations

Alternative investments can provide helpful diversification for the trust investment portfolio and can help to maximize returns while minimizing risk. Holding such funds, however, can also increase fiduciary risks.

a. **Fiduciary Risks**. Fiduciary risks of alternative investments include potential violations of the duty of loyalty (because of insider/outsider tension and other conflicts), the duty of care (factors include having the appropriate expertise regarding such investments, cost, liquidity, taxes, safeguarding the assets, and having "strange bedfellows"), and the duty to keep beneficiaries informed (concerns include valuation/reporting and the availability of information about the investments).

Delegation of investment responsibility regarding such investments is one way of managing the additional fiduciary risk, but the manager must be selected and monitored appropriately.

Directed trusts are often used with a trust advisor responsible for all investments or for "special investments."

b. **Drafting Considerations**. Drafting considerations for trusts that will hold alternative investments include the following: clearly authorize investing in alternatives, excuse conflicts of interest, consider waiving the duty of diversification if desired by the settlor, limit the fiduciary's liability in light of the additional challenges of administering these assets, consider giving someone the power to direct decisions regarding alternative investments, consider whether the alternative investments should be housed in a separate entity (LP or LLC) that is owned by the trust, and address how alternatives will be valued for various trust purposes. To the extent that such issues are not addressed in the original trust agreement, decanting may permit adding some of these provisions in a decanted trust with revised administrative provisions.

The following are some samples of provisions authorizing trusts to hold alternative investments.

- "Notwithstanding any rule of law with respect to the suitability of investments by a fiduciary or requirements of diversification of investments, the trustee is expressly authorized to retain [X] investments."
- "The Trustee is directed to pursue opportunities to invest in X, even to the extent of diminishing trust principal from time to time."
- "The Trustee is authorized to retain any such assets herein defined as a "Special Asset" [and then define Special Asset to include the classes of alternative investments that are desired]."

c. **Beneficiary Consent**. Before acquiring alternative investments, consider whether beneficiary consents should be obtained or whether to involve beneficiaries in the process of planning why such investments should be acquired or retained even if risky. If beneficiaries are given information up front and involved in the decision-making process, they are less likely to complain later or to sue. Similarly, consider obtaining beneficiary consents periodically with respect to the retention of alternative investments.

d. **Administering Alternative Investments**. Administration considerations are summarized as follows—

- Process, process, process
- Confirm acquisition authority/check for restrictions
- Evaluate the investment (fit within the portfolio, conflicts of interest, limitations that will exist on control, liquidity, and information)
- Assess liquidity needs (present and future) and future contribution obligations

- Consider delegation or moving to a directed trust
- Consider tax aspects (tax reporting will be more complicated) and valuation (for determining trustee fee or unitrust amount and for reporting to beneficiaries)
- Will distributions be treated as income or principal (see UPIA § 401)?
- Consider obtaining beneficiary consent
- Disclose, disclose, disclose.

Items 28-29 summarize comments from Mark Pacella (Pennsylvania Office of Attorney General), Alan F. Rothschild, Jr., and Karen M. Stockmal at a panel titled "Negotiating and Drafting Charitable Gift Agreements to Avoid the Courts and the Attorney General's Office"

28. Charitable Gift Agreements

a. **General Components**. Well-drafted charitable gift agreements should address the following: (1) parties to the agreement, (2) intended purposes or outcomes, (3) any restrictions or conditions on use of the funds, (4) changes in circumstances, and (5) preventative legal language (including standard contract terms, modification, and enforcement provisions).

b. **Parties**. Carefully identify the donee because many charities have similar names. In identifying the donor, consider that a binding commitment by an individual cannot be satisfied by a private foundation. If a donor advised fund is the donor, planners struggle with whether a donor advised fund pledge can be made.

c. **Charitable Purpose/Restrictions**. Thoughtfully describe the purpose of the gift so that the purpose can be fulfilled by the charity, but provide sufficient flexibility so that intended benefits can be achieved.

   Any restrictions or conditions on use of the funds should be listed in detail (for example, access may be restricted so that an ongoing endowment is created), but carefully consider if restrictions would eliminate the ability to take an income tax charitable deduction. Detailed restrictions and conditions can become problematic. Alan Rothschild observes –

   > Where do you draw the line between donor participation, donor influence, and donor control …?
   >
   > …
   >
   > Where the top 1% of donors count for nearly 80% of a typical capital campaign, this issue will likely not go away. This new generation of entrepreneurs who have achieved mega-wealth status is no longer satisfied with endowed chairs or even buildings bearing their names. They want input into hiring, to dictate subjects to be studied, and even a political bent on the research to be funded.

d. **Changed Circumstances**. Anticipating the effects of future changes in circumstances is a key element in crafting a charitable propose statement.

e. **Pledge**. If the gift agreement involves a pledge with respect to future contributions, carefully address whether the pledge is legally binding or merely a statement of an intent to give. The charity will typically want a legally binding pledge; otherwise it cannot count the future commitment as part of its capital campaign reporting numbers. Payment terms should be clearly identified.

The agreement should also address what happens if the donor is unable to fulfill the pledge, such as due to death or changes in circumstances. For example, what if the minimum contribution for naming an endowed chair is not achieved, can a lesser position or opportunity be achieved, and who makes these decisions?

f. **Naming Opportunities**. An agreement that involves a naming obligation should address (1) possible obsolescence of the project funded (e.g., the building is demolished so that a modern facility can be erected), and (2) what happens if the honoree's subsequent actions tarnish the reputation of the charitable institution. Several highly publicized cases have addresses attempts to "un-name" a building. For example, a $30,000 contribution in the 1930s to Vanderbilt University was made in return for naming a building "Confederate Memorial Hall." A court determined that Vanderbilt could not remove the name "Confederate" without refunding the present fair market value of the original contribution, which was about $1.2 million. Vanderbilt initially balked ("it does not bother us **that** much"), but anonymous donors eventually provided the funds to allow dropping "Confederate" from the name of the building.

   Separate policies and procedures regarding naming and un-naming rights can be incorporated by reference in the gift agreement. That approach may be less offensive to a prospective donor. For example, the Columbia University Gift Policies Manual (included in the seminar written materials) has an 8-page detailed discussion of "Naming Opportunity Guidelines."

g. **Standard Contract Terms**. Include a governing law provision and a standard "merger clause" (providing that the agreement contains the entire understanding of the parties).

h. **Modification**. Address whether and how the gift agreement could be modified in the future. Absent consent of the parties, a court order may be necessary to modify the agreement (for example, if a restriction or condition becomes "unlawful, impractical, impossible to achieve, or wasteful").

i. **Enforcement**. Address how the agreement may be enforced, particularly, whether the donor will have standing to enforce the agreement. Historically, donors have not had standing to enforce charitable agreements, but a few relatively recent cases have recognized a donor's standing to sue to enforce a charitable agreement. Therefore, the donor should consider whether reserving standing to enforce the charitable gift is prudent, and if so, the agreement should give the donor, the donor's estate, or some other identifiable person or entity the power to enforce the gift. Some commentators, however, take the position that standing is a legal procedural issue and not an issue that can be governed by contract.

29. Role of Attorneys General Regarding Charities and Charitable Assets

State laws typically give the state Office of the Attorney General broad supervisory authority over all property committed to charitable purposes. The Office of the Attorney General is charged with representing the public's interest by enforcing laws that apply to a given set of facts.

The polestar rule is that donor intent is paramount. Although the Office of the Attorney General is not a neutral party, in light of the fact that it represents the public's interest, it does not necessarily advocate the position that results in the greatest amount of money passing to the charity. The goal is to benefit the public at large, staying within the parameters of legal rules. The Office of the Attorney General does not substitute its judgment for a trustee's judgment if the trustee is complying with legal requirements.

Items 30-35 summarize comments from F. Peter Conaty, Raymond J. Koenig, III, and Rebecca Wallenfelsz at a panel titled "Lending as a Creative Planning Solution: Understanding the Bad and Avoiding the Ugly, So All is Good"

30. Various Factors For Consideration in Structuring Loan Transactions

Various factors come into play in structuring loan transactions, such as – the credit worthiness of the borrower, credit history of the borrower (but what if it is a newly formed trust?), cash flow for making payments, and the collateral (form of the collateral, how liquid it is, who holds it, etc.). Co-borrowers may be required if the initial borrower does not have sufficient credit worthiness; the co-borrowers will have joint and several liability. Other parties may be involved as guarantors.

31. Guarantee Must Have Consideration to Be Enforceable

A guarantee may be limited to only a specified portion of the debt or unlimited. Under common law principles, some consideration or benefit must be received by the guarantor for a guarantee to be enforceable. The benefit can arise from an economic or familial relationship between the borrower and the guarantor.

32. Graegin Loans

a. **"Avoid Forced Sale of Assets."** The IRS recognizes that interest is deductible on amounts borrowed to pay federal estate tax if the borrowing is necessary in order to avoid a forced sale of assets. Rev. Rul. 84-75, 1984-1 C.B. 193.

b. ***Graegin v. Commissioner***. In *Estate of Graegin v. Commissioner*, T.C. Memo, 1988-477, the Tax Court in a memorandum decision allowed an estate to deduct projected interest on a loan that was obtained to avoid the sale of stock in a closely-held corporation. The court reasoned that the amount of the interest was sufficiently ascertainable to be currently deductible because of the fixed term of the note and because of the substantial prepayment penalty provisions in the note. The court observed that it was "disturbed by the fact that the note requires only a single payment of principal and interest," but determined that such a repayment term was not unreasonable given the decedent's post-mortem asset arrangement. The court observed that it was "mindful of the potential for abuse presented by the facts in this case," but found the executor's testimony credible regarding his intention with respect to repayment of the note. The court specifically pointed to the fact an outside shareholder existed who would complain if the loan was not timely paid.

c. **Significance: Reducing Cash Outlay Required Nine Months After Date of Death**. For estates facing a liquidity crunch, obtaining an up-front deduction and dramatically reducing the dollars that the estate must come up with to pay the IRS nine months after date of death is critical.

d. **Regulation Project**. The Treasury/IRS Priority Guidance Plan includes a project that will address whether to apply present value concepts to administration expenses, which could eliminate the viability of Graegin loans to receive a deduction for the amount of interest payments.

e. **Example of Extremely Favorable Results of Up-Front Deduction**. The economics of this up-front deduction can be staggering. For example, assume a $10 million taxable estate. If sufficient lifetime gifts have been made so that the estate is in a 40% bracket, the estate would owe $4.0 million in estate taxes. However, assume the estate borrows $1.434 million [this amount is calculated in an interrelated calculation] from a closely-held company under a 15-year note, at 12.0% interest, with a balloon payment at the end of the 15-year period. The accumulated interest payment due at the end of the 15 years would be $6.415 million. Under the *Graegin* analysis, the interest expense would be currently deductible, yielding a taxable estate of $10 - $6.415 or $3.585 million, which would result in a federal estate tax (at a 40% rate) of $1.434 million. The $6.415 million of interest would be paid to the company (which in turn, is owned primarily by family members.) The overall result is a very considerable estate tax savings. **The estate tax that is due 9 months after the date of death is reduced from $4.0 million to a little under $1.5 million.**

The interest income would be subject to income tax over the 15-year period, and the IRS will take the position that the interest on loans to pay taxes is nondeductible personal interest. However, many families are willing to pay income taxes over the payment period if they can reduce the estate taxes that are due nine months after the date of death. Be aware that if a QTIP trust or funded revocable trust is the borrower rather than a probate estate, the IRS may argue that under § 2503(b) only interest actually paid within the estate tax statute of limitations period may be deducted.

f. **Possibility of Income Tax Recognition with No Offsetting Deduction If Estate Tax Interest Deduction Is Denied For Some or All of Graegin Loan**. The IRS often tries to settle cases involving Graegin loans by allowing an estate tax interest deduction for some but not all of the years of the loan. This can create a potential income tax issue where the amount is borrowed from a family entity rather than borrowing it from a bank. For the remaining years, the interest payments to the lender will still be taxable income, and there may be no offsetting income tax deduction for the estate's payment of the interest. Some planners indicate that they have been able to negotiate the estate tax settlement to provide that there will be no income recognition of the interest income in years for which an estate tax interest deduction is not allowed.

g. **IRS Will Review Commercial Reasonableness of Loan and Necessity of Loan**. The loan should be a bona fide loan that is documented with terms that would be considered in an arm's length transaction. The IRS will review closely the reasonableness of the necessity for the loan for avoiding a "forced sale of assets" before allowing an estate tax deduction under § 2053 for the interest.

If the estate illiquidity is self-inflicted, the IRS is especially suspect. In *Estate of Koons,* T.C. Memo. 2013-94, the court disallowed a $71 million interest deduction on a $10.75 million note. The note was very long (payments under the note were paid over 8 years (2024-2031) beginning **18 years** after the loan was made). The loan was from an LLC owned 71% by the estate, and the court reasoned that the estate could have forced a distribution from the LLC to pay the estate tax and that the loan merely delayed the time for such a distribution because the estate's only ability to repay the loan was from eventual distributions from the LLC.

h. **Lender's Perspective**. From a lender perspective, this is a problematic type of loan situation. The loan is to a brand new entity with no credit history. The estate has illiquid assets with little or no cash flow for making payments. No prepayment is allowed, and the loan may provide for interest-only payments for a long period of time. These bad facts will impact the interest rate and the collateral required. Other guarantors may be required. (Would any such guarantors benefit by making the guarantee so that they would be receiving consideration?)

   Even if the loan is from a family entity, planners may request a bank to "price out" the loan to determine their required terms in case the IRS should question the commercial reasonableness of the loan.

33. Loans Involving GRATs and Grantor Trusts

a. **Examples of Loans with GRATs**. The grantor may need to borrow funds to exercise a substitution power to lock in the success of a successful GRAT, or to repurchase the depreciated assets so that the depreciated assets can be contributed to another GRAT so that appreciation from that time forward could be shifted. If the grantor is concerned that the GRAT has been "too successful" and wants to freeze the future growth, a loan to the grantor may permit the grantor to re-acquire the assets under a substitution power or the grantor may give a note directly to the GRAT in the exercise of the substitution power.

b. **Examples of Loans with Sale to Grantor Trust Transactions**. The initial sale to the grantor trust typically involves a note from the trust to the grantor to purchase assets from the grantor. At the due date of the note, the trust may borrow funds to pay the grantor's note in whole or in part (if the trust wants to avoid selling trust assets to pay the grantor's note). Another use of a note is if the grantor wishes to repurchase appreciated assets from the grantor trust prior to the grantor's death so that the appreciated assets would receive a basis adjustment at the grantor's death.

c. **Lender's Perspective**. The lender will want to know how the loan will be repaid, and whether the borrower has sufficient cash flow to repay the loan. If a loan is extended following the termination of a GRAT, the lender will want to be comfortable with the remainder beneficiary and his or her ability to repay the loan from the trust.

34. Guarantee Fee

If a third party provides a guarantee (for example to support the value of the note given by a newly-formed grantor trust in a sale to grantor trust transaction), the guarantor should be paid a fair price for providing the guarantee in order to avoid becoming a partial grantor of the trust. The amount of the fee would depend on a variety of factors, including the total amount being guaranteed, the likelihood of having to make any payments on the guarantee, the credit worthiness of the borrower, the availability of collateral to support payment of the loan, etc. The pricing analysis should be documented. An appraisal firm can be retained to provide an appropriate guarantee fee based on the structure of the loan and guarantee. Panelists have used appraisal firms for that purpose, in which event the firm provides an appraisal report with a detailed analysis of the pricing analysis.

35. Life Insurance Premium Financing

If a loan is used for making premium payments, the policy itself will typically serve as collateral for the loan, but the lender will typically lend up to only 95% of the cash surrender value (and some lenders will loan up to only some lower percentage). Unless the policy has been in place for some time, the policy will not have sufficient cash surrender value to serve as the sole collateral, and additional collateral will be required. Lenders often want liquid assets as the additional collateral.