

# Heckerling 2010: A Sole Practitioner's Perspective



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WealthCounsel IL Forum

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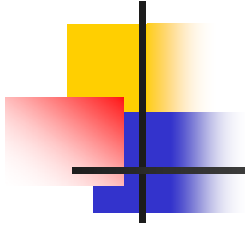
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# Caveat & Caution!

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- What follows is not a comprehensive review of a week long conference.
- It is my interpretation of the highlights, based on my particular practice & my particular focus.
- But, first, a general comment about the conference.



Estate Tax Repeal, 2010 and 2011:

**GOING BLINDLY WHERE NO  
ONE ELSE HAS GONE BEFORE**



# Carryover Basis Affects.....

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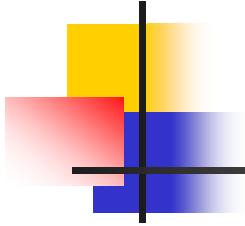
- 70,000 decedents.
- Therefore, not on Congress' Top Ten List compared to
  - Getting Re-elected
  - Health Care
  - Foreign Policy
  - Oil Slick
  - Times Square
  - Supreme Court Nominee



# Grantor's Intent and Repeal

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- My Trustee shall allocate to the Non-Marital Share a pecuniary amount equal to the largest amount that can pass free of all death taxes imposed by reason of my death, by federal, state or local authorities, taking into account the applicable credit amount (unified credit) and the state death tax credit provided use of any estate death tax credit does not require an increase in the state death taxes paid, and after taking into account any property passing outside of this trust agreement that is includable in my gross estate.
- **What does your file say about grantor's intent?**  
Does formula clause accomplish what client really wants?
- What would have happened had grantor died in 2009? 2010? 2011?
- What would happen in Va, IN and others?



*In the absence of any tax law whatsoever,*

**WHAT IS  
THE CLIENT'S INTENT?**



# Retroactive Estate Tax?

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- Most authorities believed (in January!) that retroactive estate tax will be held to be constitutional.
- If imposed mid to late 2010?!
- Death of billionaire Dan Duncan makes retroactive estate tax perhaps less likely.



# Is There A Legal and/or Ethical Duty to Contact Clients?

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- What does your engagement letter say?
- What does your disengagement letter say? Is there a “maintenance” agreement?
- There are **CLIENTS** and there are clients. What about former clients?
- What to do?!



# “Gap Period”

## Client Contact Triage Plan

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- Clients with largest estates, who are
- Oldest or most infirm with
- Highest chance of dying during the gap period. (It's May already!)
- Then, contact clients with largest estates by age
- Many sample letters (WC, ACTEC, etc.)



# Marketing Opportunity

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- Not just for larger estates
- The volatility in the tax law has given us the opportunity to be in front of our clients more, not less.



# Client Contact Options

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- Do nothing.
- Web Site article.
- Firm newsletter
- “General” Client Letter to affected clients (“contact us”)
- Custom letter to selected clients: “John, you have a problem, please call to make an appointment as soon as possible.”



# Now, Need to Think About 2011 Contact Plan

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- What if AEA goes back to \$1,000,000?
- What if AEA goes back to \$3,500,000?
- What if AEA is \$5,000,000?
- Is that what the client really wants?
  - An unpredictable, floating allocation to the non-marital trust?
- It's plain that the environment is going to *continue* to be volatile...



# Solutions to Unpredictability

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- Simple amendment/codicil for clarification of intention
- Design alternatives (WC has covered these well earlier in the year)
  - Single Fund QTIP
  - All to Marital with Disclaimer Trust
  - All to Marital with Clayton QTIP



## Moving Forward...

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- Dow Jones Newswire
- 4/27/2010 ran a story that
- Steny Hoyer stated House W&M Committee will hold hearings on Bush tax cuts, *including the estate tax* in June.
- Right.



## AALU – Early April report...

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- The cost of extending the AEA at \$3.5 million with a 45% rate is an exception from the PAYGO rules for two years.
- So, watch for a 2011 reconciliation bill.
  - If they can get this in reconciliation, it would take 51 votes to get 2009 law for two years.
  - If not, we're back in the unknown territory again.

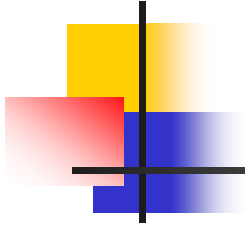


## Senator Baucus:

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- We're going to take up estate tax "any time now".
- Want to get agreement before going to the Senate floor.
- Again, right.





# RECENT DEVELOPMENTS



# 2010 Estate & Trust Administration

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- Even if no estate tax & if carryover basis applies:
  - Delay filings, get gift & income tax extensions (if necessary)
  - *Get the appraisals anyway*
- Don't sell assets in 2010.
  - Try to get liquidity other ways – to avoid carryover basis.



## Price: Annual Exclusion Gifts

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- Gift of interests in restricted FLP constitute gifts of future interest;
- Therefore, do not qualify as annual exclusion gifts.
- See also Fisher, same basic conclusion. (Appeal would be to 7<sup>th</sup> Circuit).
- *How do you fix it?*



## Gifts in 2010: 35% Rate

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- For larger estate, this is an opportunity to move assets out of the estate at a historically low rate.
- Why do clients jump on the opportunity to pay taxes on a Roth IRA conversion but rarely see any opportunity to pay gift tax?
  - Benefit in calculation and tax is out of the estate as well. No state death tax, either.
  - Think about net gift. At 45% really amounts to 31%. 3 Year risk.



# Disclaimers

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- Petter: Approves formula disclaimer.
- Note, however, that a condition subsequent invalidates it. (Proctor)
- Generally:
  - A surviving spouse can disclaim  $\frac{1}{2}$ .
  - Non citizen spouse can disclaim includible portion under §2040.
  - Surviving joint tenant can only disclaim portion contributed by other joint tenant.
  - Different results, different states, uniform acts.



# ILIT Rescue

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- Grantor not happy with terms of ILIT.
- Creates two wholly owned grantor trusts.
- Transfer from GT1 to GT2 for cash.
- Not transfer for value as transfer to grantor insured is exception to transfer for value rule.
- Yes, the “three year” rule of §2035 will apply, but grantor will get new ILIT terms.
- The “last transfer” rule – a cure all.



# Reminder: Reciprocal Trust Doctrine

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- Supreme Court
  - Grace: Interrelated with same economic position.
- Tax Court
  - Estate of Levy 1983: No reciprocal trust doctrine if economic differences in the trusts. (Difference was a Power to appoint).
- IRS
  - PLR 200426008: Substantive differences in the trusts – no reciprocal trust doctrine.

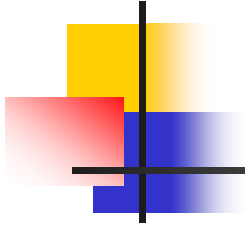


# Crummey Letters

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- Expert panel does not believe that written notice to guardian of a minor Crummey beneficiary is required when the parent is the trustee.
- Actual notice is required.
- Docket when the child becomes an adult.
- What are you going to tell the agent on audit?





# **IDEAS FROM HECKERLING TO IMPROVE YOUR PRACTICE**



# Hindsight Bias

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- Powerful, pervasive & insidious.
- Tendency to view a known outcome as more foreseeable than it actually was prior to its occurrence.
- Makes past decisions look either brilliant or foolish.
- **What would an expert with 20/20 hindsight do in these circumstances?**



## Anticipate that the Heirs Will Complain About Paying Taxes

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- Document that you talked to the client's about potential tax issues
  - Estate tax, gift tax, income tax related issues.
  - Courts will want to see that documentary evidence that you discussed these issues with client (and that they rejected lifetime gifts and other strategies).



# Importance of Database

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- Not just basic client information
- Sort by type of plan
  - Marital formula
    - Pecuniary credit shelter
    - Clayton QTIP
    - Disclaimer
  - ILIT, QPRT, GRAT, FLP
  - Jurisdiction, domicile, if applicable



# Extrinsic Evidence of Intent

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- One page, color diagram of the estate plan.
- We have started having the client sign the diagram.
  - This may be controversial.
- My “notes” in our client management system are now much more extensive after each client visit.



# Wrap up Letter

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- Some analysis paralysis for me.
- Needs to be presented with delivery of final estate planning documents.
- Summarizes all issues discussed
  - Includes open items and recommendations not followed to be followed up.
  - Leads into update meeting next year.