HIGHLIGHTS OF THE 55th ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING

**Virtual Conference**

**May 3, 2021 – May 6, 2021**

**Waukesha Estate Planning Council**

**Thursday, June 17, 2021**

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1. Heckerling Overview
   1. Reduced program 33 🡪 20 hours; 28 alternative sessions vs 8
   2. Participants: Unknown
   3. Elephant in the room – Biden tax proposal
      1. “There is no certainty – there are only bold proposals with no chance of passage in current form.” Steve Akers
      2. Will likely be debated throughout summer and into the fall.
      3. Note Trump tax bill – 2017 Tax Cuts and Jobs Act – enacted 12/22/2017
   4. Heckerling Agenda
      1. Recent Developments – Akers, Donaldson and Moore Johnson
      2. Inherited IRA and CRTs - Hoyt
      3. Revisions and Reversals of Irrevocable Trusts – Harrington
      4. Asset Protection – Rothschild, Langa and Rubin
      5. Strategic Planning in a Year of Change – Zeydell and Angkatavanich
      6. Fiduciary Litigation Cases - Fitzsimmons
      7. Ethics – Singer, Lodise and Suzuki
      8. ESG Investing – Sitkoff
      9. GST Tax - Kwon
      10. Diminished Capacity – Krooks, Fleming and Pleat
      11. International Tax and Estate Planning – Graham and Rosen-Prinz
      12. Estate Planning for Retirement Benefits – Choate
      13. Wrap and Review – Berry and Redd
      14. Fiduciary Tax Planning – DNI – Jerry Doyle
   5. Case Studies – Heckerling focuses on UHNW
      1. Single Individual – incapacitated – children from prior marriage - $24M – estate splits between children and friend – 1/3 each - $14M investments; $10M real estate
      2. Recent widow - $12M; $8M prior gifts (split) – all to children and grandchildren - $6M Roth IRA + $6M house and investments
      3. Married couple – each with children from prior marriage - $20M QTIP + $30M mutual assets
2. Recent Developments – Steve Akers, Sam Donaldson, Sarah Moore Johnson (275 pg outline)
   1. Proposed Legislation
      1. Bernie Sanders – proposal for 99.5% - old Obama Greenbook proposals
         1. Modify estate and gift tax rates and exemptions
            1. Estate and GST exemption reduced from $11.7M to $3.5M
            2. Gift tax exemption reduced from $11.7M to $1M
            3. Rates increased from 40% to graduated scale of 45% to 65% (above $1B)
            4. Portability retained
            5. Prospective - effective 1/1/2022
         2. No step-up in basis in grantor trusts
         3. Limitation on minority interest discounts
         4. GRATs – minimum term 10 years
         5. Grantor trusts included in taxable estate of deceased owner
         6. Eliminate GST exemption for trusts that last for more than 50 years
         7. Per donor limit of $30,000 on annual exclusion gifts other than outright gifts of cash and marketable securities
            1. Severely limit ILITs
            2. Limits SLATs
      2. STEP ACT (Rep Pascrell and Sen Van Hollen)
         1. Tax unrealized appreciation upon transfers by gift, in trust at death and upon changes in status of deemed owned trusts
         2. Proposal has a 1/1/2021 effective date
         3. Exceptions for transfers of tangible personal property, to spouses, and to charity
         4. For assets held in trust, taxable step up to occur every 30 years
         5. $1M lifetime gift exclusion
         6. $100,000 lifetime gain exclusion + exclusion for gain on personal residence
      3. Made in America Tax Plan - Biden
         1. Infrastructure improvement plan
         2. Tax changes focused on corporate tax increases
            1. Increases corporate tax rate from 21% to 28%
            2. Establish minimum tax on large corporations with book income
      4. American Families Plan - Biden
         1. Focus on individuals – universal pre-school, free community college, education spending, child care support, enhanced paid leave, nutrition
         2. Individual income tax changes
            1. Increase top rate from 37% to 39.6%
            2. Increase tax rate for capital gains and qualified dividends to 39.6% for households making over $1M
            3. End step-up of basis at death for gains in excess of $1M ($2.5M for couples including $500,000 home step-up). Gains to be taxed unless given to charity or related to family owned business or farms
            4. Close “carried interest” loophole
            5. End 1031 like-kind tax deferral for gains greater than $500,000
            6. Apply 3.8% Medicare tax consistently to those making more than $400,000
            7. Provide additional resources to IRS for enforcement on those with highest income 🡪 allocate $80B to collect $700B
         3. More details expected in Treasury Greenbook to be released in June
      5. Death Tax Repeal Act of 2021
         1. On 3/10/21, 24 Republican Senators sponsored a bill to repeal the estate tax
         2. Fewer than 2000 households had to pay federal estate tax in 2020
      6. SECURE Act #2 – passed House Ways and Means Committee on May 5
         1. Expand Roth accounts to include SIMPLE IRA, SEP IRA, catch-up contributions, employer matching contributions
         2. Increase RMD age from 72 to 75
         3. Index $1000 IRA catch up contribution
         4. Increase 401k catch up at age 62-64
         5. Reduce failure to take RMD penalty to 25% from 50%
         6. Expand self-correction program to include IRAs
         7. Index $100,000 QCD and allow a one-time QCD to a split interest charitable trust (CLT or CRT)

* + 1. Key Takeaways
       1. Timing and extent of potential changes to federal and gift tax laws are unknown
       2. Changes will be debated throughout the summer and fall
       3. Retroactive changes effective 1/1/2021 are very unlikely; any change most likely effective prospectively
       4. Increased capital gains tax at maximum income tax bracket might be very impactful on future trust administration
       5. Uncertainty does not preclude planning
       6. 2021 remains a good time to consider making large gifts to lock in the $11.7M exemption – if you can afford this. Anti-clawback regulations will protect gifts.
       7. Large gifts to irrevocable trusts will also lock in GST exemptions
          1. Spousal Lifetime Access Trusts (SLATs) remain a popular gifting tool
          2. DAPT may be an option for a single individual
       8. Take advantage of low interest rates to employ other tax advantaged gifts
          1. GRATs
          2. Installment sales to intentionally defective grantor trusts
          3. Family Loans
          4. Charitable Lead Trusts
       9. Solutions in unlikely event legislation is retroactive
          1. Defined formula gift
          2. QTIPable gifts
          3. Disclaimers
          4. Gift of notes
          5. Rescission
  1. New Legislation
     1. SECURE ACT – effective 1/1/2020
        1. Change retirement plan RMD to age 72
        2. Allow IRA contributions after age 70 ½ if earned income
        3. Expanded use of 529 plans
        4. Changed “kiddie tax” to apply tax rates applicable to parents
        5. Mandate Inherited IRA RMD to be paid over 10 years
     2. CARES ACT (3/27/2020)
        1. Rebate checks – initial checks $1,200
        2. Expand unemployment benefits to $600/week
        3. Waived RMD for 2020 and 10% early withdrawal penalty
        4. Expanded access to HSA accounts – non-prescription medicine or drugs
        5. Encourage charitable giving - $300 above the line deduction
        6. PPP loans and other business tax relief
     3. Consolidated Appropriations Act (12/21/2020)
        1. Another $600 rebate check
        2. Extend $300 charitable deduction for non-itemizers for 2021 and increase to $600 for joint filers
  2. New IRS Regulations
     1. Much activity focused on COVID legislation. Lots of relief extending 2019 and 2020 tax return filings
     2. Deductibility of estate and trust administration expenses – 67(e) and 642(h)
        1. Miscellaneous deductions are still permitted for trust and estates
        2. Carryovers and excess deductions carryover to beneficiaries who can claim the deduction on their personal return
     3. SALT ($10,000) limitations
        1. States cannot re-characterize state payments as charitable contributions
        2. Pass-through entities however can choose to pay state income tax at the entity level and deduct the tax paid as a business expense (WI, CT, LA, OK, RI)
     4. Estate Tax Closing Letters
        1. Closing letters issued by IRS before 6/1/2015
        2. Replaced by informal estate tax account transcript with transaction code #421
        3. Proposed regulations will reinstate estate tax closing letters with a $67 user fee
           1. Effective 30 days after final regulations issued
           2. Will be a one-step online process
     5. Updated actuarial tables are expected in 2021 to be based on 2010 census data
  3. Tax Case Law Updates – supplemented with materials from Dana Fitzsimmons
     1. Estate of Moore – TCM 2020-40 (April 7, 2020)
        1. Assets in FLP should be taxed in decedent’s estate at fair market value
        2. Howard Moose born into poverty, school ended at 8th grade, yet acquired more than 1,000 acres near Yuma, AZ where he operated a large and desirable agribusiness
        3. Late in 2004, he began to negotiate the sale of Moore Farms to Mellon Farms. His health also began to fail and he was hospitalized in December for congestive heart failure. He was discharged to hospice and implemented an estate plan, which he executed on 12/20/2004
           1. Private Foundation
           2. Revocable Living Trust
           3. CLAT
           4. Children’s Irrevocable Trust
           5. Management Trust – held 1% FLP
           6. Children’s Irrevocable Lifetime Trust
           7. FLP
        4. On 2/4/2005, sold Moore Farms for $16,500,000. 80% went to FLP, 20% to Living Trust, FLP distributed about $5,000,000. On 3/7/2005, FLP was sold by Living Trust to Children’s Irrevocable Trust for $5,300,000, claiming a 53% valuation discount. Howard died at end of March 2005.
        5. Howard’s 2005 gift tax return showed $1M in gifts, with $1.5M exemption – no tax due. His 706 showed Management Trust and promissory notes worth about $5.4M. Deduction included debt owed to FLP ($2M), charitable deduction of $4.8M and $475,000 estate administration expenses for attorney fees. This produced a $0 taxable estate.
        6. IRS audited. Invoked 2036 to include FLP at full value in estate. Denied all deductions and assessed $1.3M gift tax liability and $6.4M estate tax deficiency.
        7. Tax Court found that 2036(a)(1) applied to Howard’s transfer of assets. There was not a bona fide sale of the FLP to the Irrevocable Trust for full and adequate consideration. Tax Court also found $2M in loans to children were gifts because children had no resources to repay loans. $2M loan to FLP was not deductible because no documentation to support loan. Attorney fees not deductible because it was a flat fee and no evidence submitted to substantiate administration work on the estate. Charitable deduction was limited because much of value could not be ascertained at date of death due to financial clause.
        8. Conclusion: Tax Court decision assessed gift tax deficiency of $1,329,751 and estate tax deficiency of $6,384,073. Estate has appealed to the Ninth Circuit Court of Appeals.
     2. Grieve v. Commissioner, TCM 2020-28 (3/2/2020)
        1. Pierson Grieve was former CEO of Ecolab. He used a FLP, established in the late 80s as part of his estate planning. FLP held $70M in closely held assets.
        2. In 2013 he transferred certain assets to a 2 year GRAT and Family Irrevocable Trust. IRS challenged the value of the gift and assessed additional gift tax based on underreporting of $8M.
        3. Tax Court accepted donor’s valuation of LLC interests transferred to GRAT and Irrevocable Trust
     3. Nelson v. Commissioner, TCM 2020-81
        1. Nelson transferred FLP interests to an Irrevocable Trust for an “amount to be determined by a qualified appraiser.” Taxpayer tried to argue that such amount should be based on the “value as finally determined for federal gift and estate tax purposes.”
        2. Tax Court respected the formula for gift and sale based on appraisal within a limited time but did not extend it to values as determined for tax purposes. The taxpayer was bound by what was written.
        3. Tax Court continues to respect formula clauses. They will be respected based on language used not what parties intended.
     4. Estate of Streightoff, 953 F3d 713 (5th Circuit – 3/31/2020)
        1. Under a Financial POA, Frank Streightoff’s daughter, Elizabeth, created his estate plan on 10/1/2008. In addition to a revocable trust, she created a FLP funded with investment assets. Frank assigned 89% of the FLP to his revocable trust; 11% went to his children and a management company.
        2. Frank died 5/6/2011. His estate claimed a 37% discount in the FLP for a value of $4,588,000. Discounts claimed for lack of marketability, lack of control, and lack of liquidity.
        3. IRS permitted a discount of 18% for lack of marketability, and increased the FLP value by $1,405,000. Tax Court agreed with IRS valuation discount.
        4. Fifth Circuit upheld decision of Tax Court valuing an interest as a FLP, not just an assignee interest, for estate tax purposes. Speakers thought the 18% discount allowed by the IRS was generous, especially since assets were entirely marketable securities and Frank had unilateral control (through his POA) up to moment of death. Note in Estate of Powell, the court included the entire value of a FLP in an estate under 2036(a)(2) because the decedent could have joined with other partners to dissolve the FLP and controlled FLP distributions.
     5. Estate of Bolles, TCM 2020-71
        1. The Tax Court addressed whether and to what extent a family’s advances to children were loans rather than gifts
        2. Mary died 11/19/2010. She frequently made advances to children and treated them as loans; she made a record and recorded repayments or reductions by the applicable annual gift tax exclusion.
        3. She advanced a lot more to son Peter, almost $2M including a guarantee on a defaulted bank loan. Peter made no repayments after 1988.
        4. Mary amended her estate plan in 1989 removing Peter as a beneficiary. Later she amended the trust to include Peter but to reduce his share for the amount of his unpaid loan.
        5. Tax Court applied 9 factor test to determine if loans were legitimate.
           1. Written promissory note, interest charged, security/collateral, fixed maturity date, demand for repayment, actual repayment, ability to repay, records maintained, and tax reporting consistent with a loan
           2. Tax Court held advances paid before 1989 were loans to Peter and advances paid after estate plan was created in 1989 were gifts because no reasonable expectation of repayment
        6. Note numerous PLRs allowing late elections of portability if estate is under estate tax filing threshold. Extension may be granted under Reg §301.9100-3.
     6. Charitable Contributions
        1. Deduction denied for “deconstructed” homes Mann v US, 984 F3d 317 (4th Circuit Court 1/6/2021); Loube v. Commissioner, TCM 2020-3 (1/8/2020)
        2. Deduction denied for contribution of designer eyeglasses. Purchased package for $50,000, hold for one year, donate for $225,000 Campbell v Commissioner, TCM 2020-41 (4/7/2020)
        3. Qualified appraisal of a water rights easement is not obtained based on the opinion letter of a litigation attorney Brannan Sand & Gravel Co TCM 2020-76 (6/4/2020)
        4. Conservation Easements
           1. Oakbrook Land Holdings 156 TC 180 (5/12/2020) appealed to Sixth Circuit (10/16/2020 and 11/16/2020)
           2. Oakbrook bought 143 acres of vacant land for $1.7M. One year later, it gave a conservation easement on 106 of the acres and claimed a $9.5M charitable contribution for the easement. IRS and Tax Court disallowed the deduction because if the easement were extinguished, the proceeds would revert to the donor and donee.
     7. State Estate Taxes
        1. 13 states and DC have a state estate tax.
           1. CT, DC, HI, IL, ME, MD, MA, MN, NY, OR, RI, VT, WA
        2. Area of controversy is whether a QTIP Trust established in one state is taxable in a state where taxpayer died. See Shaffer v Commissioner of Revenue 148 NE 3d 1127 (Mass 2020)
  4. State case law update
     1. Ron v Ron affirmed 83 6 Fed Appx 192 (Fifth Cir 2020)
        1. Deals with alleged dissipation of assets with a divorce and role of trust protector.
        2. Suzanne and Avi married in 1994. Suzanne created trust in 2012, with children as trust protector. Gary was named as trust protector and had power to name additional beneficiaries. He added Avi as a beneficiary.
        3. In 2017 Suzanne and Avi divorced. Subsequently, Avi transferred property to himself. Suzanne sued Gary for breach of fiduciary duty.
        4. Texas court found no liability. There is no fiduciary relationship to the trustor, only to the trust or trustee.
     2. Barefoot v. Jennings 456 P3d 447 (Cal 220)
        1. Trust beneficiary disinherited by amendment has standing to challenge the validity of the amendment in probate court.
        2. Jean and husband signed a joint revocable trust in 1986. After husband’s death, Jean amended trust several times to disinherit daughter, Joan, and increase inheritance of daughter, Shana.
        3. Jean died in 2013 and daughter Joan sued to declare amendment invalid due to undue influence.
        4. Trial Court dismissed for lack of standing. CA Supreme Court reversed and said a beneficiary under a prior trust may petition to determine whether the amended trust is valid.
     3. Hodges v Johnson 2020 NH Lexis 157 (2020 NH Sp Ct)
        1. David created irrevocable trusts for spouse, children, stepchildren, and descendants. Trust was funded with FLP interests. Trustees were employee and the company lawyer. The trust included a no contest provision.
        2. Trustees had discretion to distribute income and principal to the group of beneficiaries.
        3. Over the course of two decantings, the trustee decanted existing trusts into new trusts that removed the two stepchildren and one child who was fired from the family business.
        4. In 2014, the removed beneficiaries petitioned to set aside the decantings and remove the trustees. The trial court set aside the decantings and removed the trustees. The NH Supreme Court upheld the decision and said that while the decanting statute permits the trustees to remove beneficiaries, the trustee still has a duty of impartiality in considering the interests of all beneficiaries. The court ignored the no contest provision where there is a trustee breach.
        5. The removed trustees sued for reimbursement of attorney fees. The new trustees countered by requesting reimbursement of $90,000 of attorney fees paid by the trust. The court denied the request for attorney fees and ordered the removed trustees to repay $90,000 because they breached a fiduciary duty.
     4. Gowdy v. Cook 455 P3d 1201 (104 2020)
        1. Marian created trust for Gerald for life, then to Marian’s heirs. The drafting attorney was named as trustee. Any successor corporate trustee was required to have $100M in capital. The trust had a no contest provision.
        2. Marian died in 2015. Subsequently, Gerald took issue with attorney fees. He petitioned for removal of trustees, requested a trust accounting, requested a decanted trust to remove the corporate trustee capital surplus requirement and requested damages for excessive fees.
        3. Trial Court held for trustees and NY Supreme Court affirmed because Gerald did not show he was damaged. Sp Ct also affirmed decision to enforce the no contest provision and disqualified Gerald as a beneficiary. The attempt to decant was an action that would set aside a trust provision in violation of the no contest language.
     5. In re: Potter Exempt Trust S93 SW3d 556 (MO Ct App 2019)
        1. Potter created GST exempt trust for child and grandchild. After child’s death, grandchild received no distributions. Grandchild then requested $200,000 for real estate business. Corporate trustee paid the request and individual trustee objected to payment on grounds that grandchild had sufficient outside resources.
        2. Corporate trustee petitioned court for instructions on whether it must consider a beneficiary’s other resources.
        3. Trial Court ruled the request to consider other resources was inappropriate because the document did not require this. Ct. Appeals reversed, saying that a discretionary trust includes an exercise of discretion that should consider other resources (see Restatement (Third), §50, comment e.)
        4. Drafting point: be explicit on consideration of outside resources.
     6. In re: Raggio Family Trust 2020 Nev Lexis 21 (NV Sp Ct 2020)
        1. Surviving spouse was beneficiary of a marital trust and credit shelter trust. Trust permitted discretionary distributions as the trustee “shall deem necessary for the beneficiary’s proper support, care and maintenance.”
        2. Nevada law includes a statute that says a trustee shall not consider other resources unless otherwise provided in the statute.
        3. Supreme Court ruled that trustee is not required to consider other resources because trust instrument did not specifically require this.
     7. In re: Estate of Oaks, 944 NW2d 611 (WI Ct App 2020)
        1. Wisconsin does not recognize holographic wills
        2. Vietnam Vet with PTSD committed suicide. He left note saying “I want all worldly belongings to be assigned to Lynne” (domestic partner).
        3. CT App gave effect to the writing as a “gift causa mortis.” Donor had intent to make gift, gift was made in peril, donor died of peril, gift was delivered (because Lynne lived with decedent).
     8. Estate of Michael Jackson (died 2009)
        1. Involved valuation of three assets – “image and likeness;” copyright to Beatles music; copyright to Jackson’s music.
        2. Image and likeness right of publicity has a 70 year term. Estate said $2,105; IRS $434M. Value determined $4.15M due to Jackson’s disfavorable reputation at death.
        3. Beatles copyright owned 50% by Jackson, 50% by SONY. Estate said $0, IRS $206M. Value determined to be $0 because SONY advanced Jackson over $300M during his life.
        4. Jackson music copyright – Estate said $2.2M, IRS $114M. Value determined to be $107M but no undervaluation penalty due to very difficult valuation.
     9. JoAnn Howard v. Cassity 2020 US District Lexis 29932 (2020)
        1. Represents last stage of fiduciary litigation:
           1. Parties try to reach settlement
           2. Mediation
           3. Discovery and motions
           4. Trial
           5. Who pays legal fees
        2. Dispute involves fraud over preneed funeral contracts. Under MO law, a person can buy a preneed funeral contract. Upon sale, seller keeps 20% and 80% goes into trust with corporate trustee. Trust invested in life insurance contracts. At death, trust paid funeral home contract amount plus a growth premium.
        3. Terms of trust permitted investment by outside investment adviser. Seller hired CPA firm as investment adviser. CPA worked fraud with seller where insurance contracts loaned funds to seller and payment amounts were manipulated so that seller kept 90% of contract proceeds.
        4. In 1998 corporate trustee was Allegiant Bank. Allegiant was bought by Nat City in 2004. Nat City resigned in 2004 and Bremer Bank succeeded. Several other banks succeeded Bremer until 2007 when insurance regulators discovered the fraud. In 2004 Allegiant supposedly held $122.9M in preneed deposits and $159.8M in life insurance coverage.
        5. In 2009 litigation commenced against the various banks who acted as corporate trustee. Settlements were reached with all banks except PNC who purchased Nat City in 2009.
        6. Federal district court allowed case to proceed with a jury trial and jury awarded plaintiffs (funeral homes and state guaranty insurance associations) $355.5M in damages and $35.5M in punitive damages.
        7. On appeal 8th Circuit, the court remanded the damage award to the district court, which reduced the judgement to $99.5M.
        8. The trust that held the life insurance contracts was a directed trust – the corporate trustee was directed to follow instruction of outside investment adviser and was absolved of liability for doing so. PNC tried to argue that it should be relieved of investment responsibility for acts of outside investment adviser. Court ruled trustee has a duty to ensure prudent investing and only relieved of investment duty if assets were invested in a prudent manner.
        9. In final phase of litigation, plaintiffs asked for $13.2M in fees and $3.1M in costs. Courted awarded $139,000 in costs and $7M in fees on theory that award not applicable under UTC but rather under federal law that limits fees and costs.
     10. Litigation Trends – Dana Fitzsimmons, Bessemer Trust
         1. Number of cases are booming 🡪 perhaps because of aging of baby boomers with significant wealth.
         2. Financial elder abuse increasingly noticeable.
         3. Expansion of lawsuits to third party service providers – attorney, CPA, insurance adviser, bank.
         4. Statutory innovations are driving new cases. Speed of development of new uniform laws is increasing uncertainty.
         5. Technology – from reproduction to digital assets to financial services – is increasingly impactful.
         6. Litigation generalists (non-fiduciary specialists) often do not consider the impact on families and litigation divides families.

1. Other Issues of Note
   1. Using a CRT to stretch an Inherited IRA (Chris Hoyt, UMKC School of Law) Generally better off to use 10 year RMD deferral but consider CRUT to replace IRA if:
      1. Long term CRUT – 30+ years but charity must be expected to get 10% at termination.
      2. Beneficiary in high income tax bracket.
      3. Family has charitable intention – do not foist on people with no charitable intent.
      4. Use with life insurance to mitigate risk of early death.
      5. Don’t invest CRUT in municipal bonds.
      6. Don’t use with Roth IRA.
      7. Don’t use if IRA owner’s estate is subject to federal estate tax – lose section 691(c) deduction.
   2. Estate Planning for Retirement Benefits (Natalie Choate)
      1. Rumor that IRS regulations on SECURE Act written but release time is unknown (new rules are 17 months old).
      2. Publication 590 includes errors – IRS has informally indicated no RMD owed until 10th year following IRA owner’s death – not annual RMD with remaining lump sum in year 10.
   3. Retroactive correction of Irrevocable Trust (Carol Harrington)
      1. Discussed reformations, disclaimers, and rescission.
      2. Rescission works best of done within same taxable year; problems occur if split tax years.
   4. Fundamentals Program on Distributable Net Income (Jerry Doyle, BNY Mellon)
      1. Best discussion on how to calculate DNI from Simple Trusts and Complex Trusts.
      2. Complex trusts are any trusts that may accumulate income, distribute principal, or make distributions to charity.
      3. Six concepts apply to determine who is taxed on DNI from Complex trusts
         1. General rule – allocate pro rata
         2. Understand tier system of distributions
         3. Separate share rule
         4. 65 day rule – 663(b) election
         5. Specific bequests
         6. Distributions in kind – 643(e) election
      4. Allocating capital gains to DNI will take on increased importance if capital gains maximum tax rate increases to 39.6% at $13,000 of trust income.
         1. Wisconsin law gives trustees discretion to treat capital gains as part of distribution under 701.1108.
         2. Recommend such discretion be drafted as a standard provision in all trust instruments.
2. Case Studies
   1. Single Individual – incapacitated – children from prior marriage - $24M – estate splits between children and friend – 1/3 each - $14M investments; $10M real estate
      1. Financial power of attorney agent may be able to act
      2. Be careful of overly aggressive death bed FLP/valuation discount planning
      3. May be able to use lifetime exclusion gift; will need to engage the estate plan beneficiaries in the planning
      4. Be prepared to act in 2021
      5. Annual exclusion gifting is also an option
      6. Roth IRA conversion is an option if estate includes Traditional IRA
      7. Charitable planning is not an option
   2. Recent widow - $12M; $8M prior gifts (split) – all to children and grandchildren - $6M Roth IRA + $6M house and investments
      1. Stretch IRA by converting to a CRUT not an option because Roth IRA
      2. Using up lifetime exclusion will cause Roth IRA to be terminated and will significantly deplete estate
      3. Annual gifting remains an option
      4. Charitable planning including use of a CLT is an option
   3. Married couple – each with children from prior marriage - $20M QTIP + $30M mutual assets
      1. Using lifetime exclusion gift is an option – unless concern about gifting too much money to children
      2. SLATs may be a good option to utilize lifetime exclusion amount
      3. Roth IRA conversions
      4. Use annual gift exclusion
      5. Consider charitable planning if charitably inclined
      6. Could consider valuation discount planning (FLP), GRATS, intrafamily loans, QPRT