PRESENTED AT

2015 Stanley M. Johanson
Estate Planning Workshop

December 4, 2015
Austin, Texas

Estate Planning Workshop

Panelists:
Stephen R. Akers, Dallas
Mickey Davis, Houston
Amy P. Jetel, Austin
Stephanie Loomis-Price, Houston
Jeffrey Myers, Fort Worth
R. Eric Viehman, Houston
Melissa J. Willms, Houston

Moderator:
Stanley Johanson, Austin

University of Texas School of Law
63rd Annual Taxation Conference
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A. **Transfer on Death Deeds.** The Recent Developments outline (p. 2) notes that Texas has enacted the Real Property Transfer on Death Act (new Estates Code Chapter 114), which allows the owner of real property to designate a beneficiary to receive title to the property on the owner's death without the necessity of probate.

1. Have any clients asked you about TOD deeds? If so, what have you told them as to the advisability of utilizing this procedure? (Or if they haven't asked yet, what *would* you tell them?) Do you have any observations on this procedure?

2. If the client owns real property in another state and the state has enacted this Uniform Act, might this be a useful way to avoid ancillary administration problems?

   a. In addition to Texas, the Uniform RPTOD Act has been enacted in Alaska, Hawaii, Illinois, Nevada, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Virginia and West Virginia, and bills seeking enactment are pending in Maryland and Tennessee. Most of the statutes include an optional form for a TOD deed for use in that state.

   b. While on the subject… What techniques do you sometimes employ to avoid an ancillary administration when the client owns (*e.g.*,) a condo in Santa Fe, or a farm or ranch in Oklahoma?

      Yes, it's easy if the client has established a revocable trust; the property can be conveyed to the trustee. But what if there is no RIVT in existence?

B. **Are you comfortable with the use of an *in terrorem* clause in a trust that grants Crummey withdrawal provisions?** The Recent Developments outline (p. 16) discusses <u>Mikel v. Commissioner</u>, T.C. Memo. 2015-64, in which the Tax Court rejected the Service's position that Crummey withdrawal provisions in the trusts did not qualify for annual exclusions because the trusts contained *in terrorem* (no-contest) clauses. The contention was that the beneficiaries were not given present interests because a right of withdrawal would be legally enforceable only if the beneficiary could go before a state court to enforce that right. That is something a beneficiary would be reluctant to do because of the *in terrorem* provision. Therefore, said the government, the withdrawal rights were "illusory, as any attempt to seek legal enforcement of that right would result in adverse consequences to its holder.

1. In rejecting the Service's position, the court noted that the *in terrorem* clause was narrowly drafted. It would trigger a forfeiture if a beneficiary were to "take part in or aid in any proceeding to oppose the distribution of the Trust Estate, … or challenges any distribution set forth in this Trust." The purpose, said the court, was to deter challenges to the trustee's discretionary power to make distributions, and did not speak to challenges to the exercise or non-exercise of the withdrawal right

2. However, the typical *in terrorem* provision is much broader in scope, and provides carte blanche for a forfeiture if a beneficiary challenges any of the trusts provisions. And so I ask: In light of Mikel v. Commissioner, Are you comfortable with the inclusion of an *in terrorem* clause in a trust that is intended to secure annual exclusions through the use of Crummey withdrawal provisions?

3. The Mikel trusts also contained arbitration provisions: If a dispute were to arise concerning the trust, the dispute "shall be submitted to a panel consisting of three persons of the Orthodox Jewish faith" (a beth din). The Service contended that the beneficiaries were not given present interests because a right of withdrawal would be legally enforceable only if he or she could go before a state court to enforce that right. Not so, said the Tax Court. "It is not obvious why the beneficiary must be able to 'go before a state court to enforce that right.' Here, if the trustees were to breach their fiduciary duties by refusing a timely withdrawal demand, the beneficiary could seek justice from a beth din… A beneficiary would suffer no adverse consequences from submitting his claim to a beth din, and respondent has not explained why this is not enforcement enough."

4. Speaking of arbitration provisions… In Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013), a unanimous Supreme Court ruled that an arbitration provision contained in an inter vivos trust was enforceable against the trust beneficiaries. "[T]he arbitration provision contained in the trust at issue is enforceable against the beneficiary for two reasons. First, the settlor determines the conditions attached to her gifts, and we enforce trust restrictions on the basis of the settlor's intent. The settlor's intent here was to arbitrate any disputes over the trust. Second, the [Texas Arbitration Act] requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which we have previously concluded may be manifested through the doctrine of direct benefits estoppel…. [A] beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause. For example, a beneficiary who brings a claim for breach of fiduciary duty seeks to hold the trustee to her obligations under the instrument and thus has acquiesced to its other provisions, including its arbitration clause. In such circumstances, it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms."

5. Still speaking of arbitration provisions… what do you think of them? In drafting wills or trusts, do you employ them (at least in some cases)? Why or why not?

C. **What do you think of HEETs?** One of the proposals in the Obama administration's Fiscal Year 2016 Budget Proposal ("the Greenbook") was that Health and Education Exclusion Trusts (HEETs) should be made subject to the generation-skipping transfer tax. Under a HEET trust authorizes distributions from the trust for medical expenses and tuition to multiple generations of descendants,

Title search: Estate Planning Workshop

Also available as part of the eCourse
Recent Developments Affecting Estate Planning

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