

# Heckerling Highlights

## Samantha L. Heaton

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# Highlights from Heckerling 2018

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- 2017 Tax Changes
- Strategies for addressing 2017 tax law
- Uniform Directed Trust Act



# 2017 Tax Act

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- Signed into law December 22, 2017.
- Effective Date:
  - Most individual (and estate) provisions effective 2018 – 2025 (sunset 2026)
  - Business related provisions effective permanently



# Gift, Estate and GST Tax Changes

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- Basic exclusion amount increased to \$10 million (indexed for inflation \$11.18 in 2018)
- Clawback: The act directs the Treasury to create regulations to address differences in the basic exclusion amount at the time of a gift and at death (§ 2001(g)(2)). Analysts anticipate no clawback.



# Individual Tax Changes 2018

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- New rate brackets
- Indexing using “chained CPI”
- Standard deduction increased (\$24,000)
- Personal exemptions eliminated
- Elimination and limitation on deductions: Miscellaneous itemized deductions, state and local taxes, home mortgage interest, charitable deduction.



# Individual Tax Changes 2018

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- Alimony: Alimony payments not deductible and not income to recipient. Effective for instruments executed *after* December 31, 2018. Does NOT sunset.
- 529 Plans – Can now be used for elementary and secondary schools (limit \$10,000/student)



# Business Tax Changes 2018

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- Corporate Tax Rate decreased to 21%
- Qualified business income from pass-through entities (New § 199A): 20% deduction
  - **Income limits**
    - Below \$315,000 married jointly: deduction available
    - Between \$315,000 and \$415,000: specified service companies may reduce deduction; phase-in of limit by wages and qualified property test
    - Above \$415,000: no deduction if specified service company; limited by wages and qualified property test

# Business Tax Changes 2018 – 199A

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- Disqualifying activities: Mostly service industries (accounting, health, law, etc.) – apply to higher income limits
- Wage limitation: Higher income filers limited by the amount of W-2 wages for the business, though can also use qualified property used in the business to minimize limitation on deduction; this limitation is phased-in for those between \$315,000 and \$415,000.

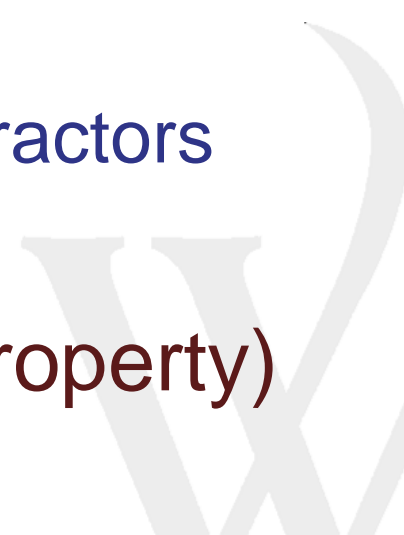




# Business Tax Changes 2018 – 199A

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- Actions to Increase Deduction
  - Separate specified service businesses from non-specified ones
  - Increase W-2 wages
    - Consider moving independent contractors to employees
  - Buy new equipment (qualifying property)



# Planning Opportunities and Challenges in Light of 2017 Tax Act

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- Increased basic exclusion
  - Reconsider importance of:
    - Qualifying trusts for annual exclusion gifts
  - Re-evaluate formula clauses: could be tying up assets unnecessarily in trust
  - Portability more important. It can preserve the increased DSUE caused by the increased exclusion.
  - Flexibility, as always, will be important.



# Planning Opportunities and Challenges in Light of 2017 Tax Act

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- GST: Opportunity to allocate increased exemption
  - Late allocations may not be possible because increased GST exemption amount applies to “estates of decedents dying and gifts made after December 31, 2017.”
  - May not want automatic allocation to apply if Settlor will die before sunset and have sufficient exclusion. This would allow for an additional basis step-up.



# Planning Opportunities and Challenges in Light of 2017 Tax Act

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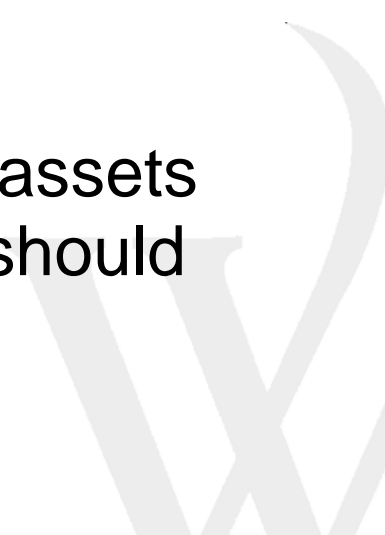
- Basis adjustment planning
  - Increasingly important to plan for *inclusion* in Settlor's estate so as to get a step-up in basis.
    - Grant independent party authority to grant testamentary limited power of appointment to Settlor
  - Basis adjustment opportunities at beneficiary's death
    - Include ability to distribute all or most assets to beneficiary (broad Trustee discretion)
    - Power of someone to grant a general power of appointment



# Planning Opportunities and Challenges in Light of 2017 Tax Act

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- Use increased exclusion
  - Clawback unlikely
  - New gifts through irrevocable trusts
  - Forgive old intra-family loans
  - Importance for some clients of continuing benefit for grantor or grantor's spouse
- Cushion - risky transactions not as risky in increased exclusion environment
- Caution against making gifts with low basis assets
- Reevaluate trust with substitution powers - should assets be swapped.



# Planning Opportunities and Challenges in Light of 2017 Tax Act

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- Charitable Giving
  - Bunching giving
  - Use donor advised funds with large gifts in years when standard deduction will be used
  - Qualified Charitable Distributions from IRAs still exist for those over 70 ½, even in years when itemization not used
  - Remember that clients do have reasons for giving outside of taxes - the tax changes may not impact client giving as much as anticipated



# Uniform Directed Trust Act

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- Uniform Law Commission completed work on and approved the UDTA in 2017
- Four areas of improvement from current law
  - Key exclusions from applicability
  - Fiduciary duties
  - Address non-fiduciary matters in trust administration
  - Reconcile law of co-trusteeship with Settlor authority and autonomy demonstrated in directed trusts



# Uniform Directed Trust Act: Exclusions

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- The UDTA recognizes a “power of direction” granted to a “trust director” in a “directed trust.”
- “Power over a trust” granted to person by trust terms and exercisable while person not serving as Trustee.
  - Includes: Power to amend, terminate, veto, consent
  - Excludes:
    - Power held while a Trustee
    - Non-fiduciary powers of appointment
    - Power to appoint or remove a Trustee or Trust Director
    - Power of Settlor over Revocable Trust
    - Power of a beneficiary
    - Settlor’s tax objectives (e.g., power of substitution)

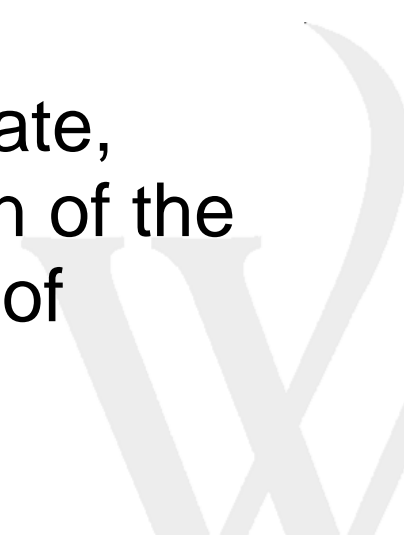




# UDTA - Detour on Scope of Statute

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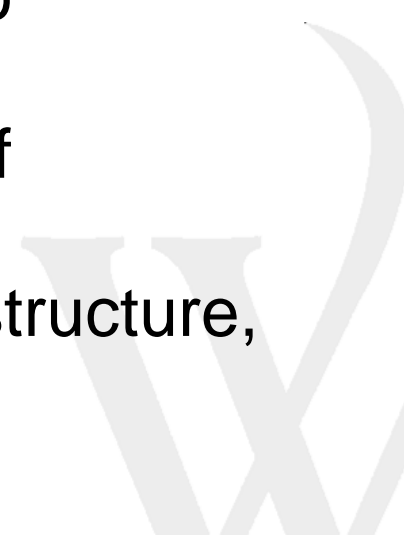
- Enabling statute rather than off-the-rack
- One default power: Unless the trust provides otherwise, the trust director may exercise any *further power appropriate* to powers of direction granted to trust director.
- Act applies to all trusts in an enacting state, even those effective prior to the adoption of the act, but only as to actions after the date of adoption



# UDTA - Allocating Fiduciary Duties

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- Primary fiduciary responsibility placed on person holding the power
- Directed trustee's duty reduced to avoiding "willful misconduct" in determining whether to comply with director's directions
- Directed trustee also has affirmative duty to reasonably comply with direction
- Generally applies traditional fiduciary law of trusteeship to trust director
- Adaptable standard - not central to UDTA structure, so states can adopt alternatives



# UDTA - Allocating Fiduciary Duties

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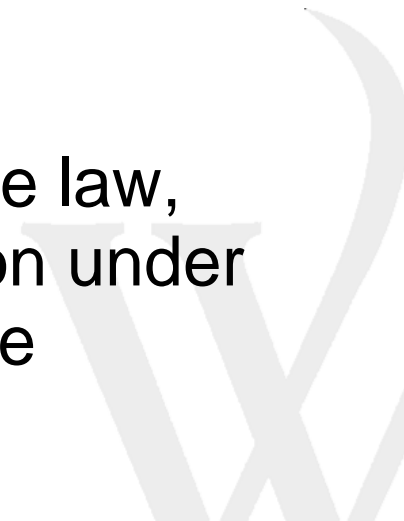
- Information sharing: must provide to extent related to
  - the powers or duties of the director, AND
  - the powers or duties of the trustee or other director.
- No duties to monitor, inform or advise
- No assumption of duty if a trustee or trust director chooses to monitor, inform or advise



# UDTA - Subsidiary Rules of Trusteeship

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- Current laws do not address issues of vacancy, compensation, acceptance and limitation periods.
- Jointly held powers of direction must be exercised by a majority.
- Traditional law of trusteeship applies to 7 subjects:
  - Acceptances, bond, reasonable compensation, resignation, removal and vacancy
  - Applies current state law on the matter
- Litigation matters - applies traditional trustee law, although trust director can receive protection under report or accounting even if not made by the director.



# UDTA - Reconciling Co-Trusteeship

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- Traditionally, co-trusteeship has been viewed as a safeguard for beneficiaries imposed by the Settlor
- A co-trustee with power to direct co-trustee is NOT a trust director
- However, UDTA allows trust to opt out of default law of co-trusteeship and apply lower directed trustee rules



# UDTA - Minnesota

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- Minnesota Trust Code does currently provide for directed trusts
- However, the Legislative Committee of the Probate and Trust Section has begun a subcommittee to review the Act and consider whether legislation should be supported by the section



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