

ASSET PROTECTION FOR BUSINESS OWNERS AND THEIR ENTITIES

ESTATE PLANNING COUNCIL OF GREATER MIAMI
6TH ANNUAL ESTATE PLANNING SYMPOSIUM
TUESDAY, FEBRUARY 6, 2018
CORAL GABLES, FLORIDA



Presented By:
Alan S. Gassman, Esquire

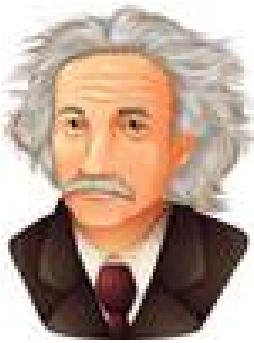
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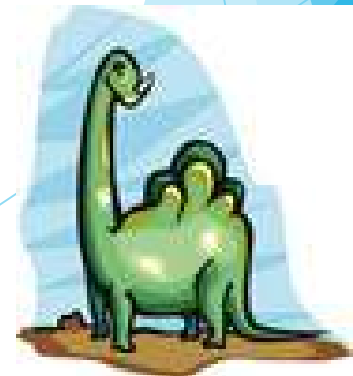
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HABITS

- ▶ Achieve success in any area of life by identifying the optimum strategies and repeating them until they become habits. - Charles J. Givens
Read more at: <https://www.brainyquote.com/topics/habits>
- ▶ Habits like blogging often and regularly, writing down the way you think, being clear about what you think are effective tactics, ignoring the burbling crowd and not eating bacon. All of these are useful habits. - Seth Godin
Read more at: <https://www.brainyquote.com/topics/habits>
- ▶ Changing habits acquired over many years is often extremely difficult. - Marie Kondo
Read more at: <https://www.brainyquote.com/topics/habits>



“It wasn’t raining when Noah built the ark.”



We owe our clients the right to know what their risks, rewards, and alternatives are with respect to Creditor Protection Planning for Business – the majority of arrangements we see do not do this.

ASSET PROTECTION CHECKLIST – Page 1

PROTECTED OWNERSHIP CATEGORIES		NOTES		LIABILITY INSULATION	NOTES
1	Assets exempt by Florida Constitution, Statute, Common Law or Federal Law. <i>(Note: The above exceptions do not apply to the IRS, FTC, SEC, or other "Super Creditors", such as the Department of Justice when pursuing RICO perpetrators.)</i>		1	Make sure housekeeper, in-laws, and all others are covered if they drive your cars or reside in your residence.	
1(a)	Homestead.		2	Car ownership, and which parent signed to be responsible for the driving of a minor.	
1(b)	Tenancy by the entireties.		3	Car driving by children, spouses, employees and others.	
1(c)	Pension and IRA.		4	Firewall protection provided by LLC's, companies and various partnerships (LLP's, LP's and LLLP's).	
1(d)	Life insurance policies.		5	Triple Net Lease language to protect landlord - must give tenant total control of property.	
1(e)	Annuities		6	Managers may get sued.	
1(f)	529 Plans		7	Delegate to management company.	
1(g)	Disability and Social Security Benefits		8	Guests may sign releases.	
1(h)	Others		9	Independent contractor arrangements.	
2	Charging Order Protection.		10	Bartenders for personal parties.	
3	Property owned by others.		11	No guests on wave runners.	
4	Property sold for Note or annuity payment rights.		12	No alcohol served to anyone under the age of 21.	
5	Third Party Settled Trusts.		13	Appropriate underlying and umbrella liability insurance - for each property, car, 4-wheeler, etc. But beware of exceptions and illegal situations that will not be covered.	
6	Self-Settled Trusts in Asset Protection Trust jurisdiction.				
7	Foreign assets, entities and accounts in jurisdictions that do not recognize U.S. judgments.				
BUSINESS AND INVESTMENT CONSIDERATIONS				OTHER CONSIDERATIONS	
1	Liability and casualty insurance review, with personal use interaction and business umbrella to be considered.		1	Income and estate tax avoidance - buy a felony to avoid paying IRS taxes or to conspire to help someone avoid such payment - same applies as to debt owed directly to the FDIC and certain other governmental creditors.	
2	Friendly lenders.		2	Marriage and divorce - ex-spouse cannot invade TBE assets held with new spouse or invade new spouse's interest in a homestead or TBE homestead.	

ASSET PROTECTION CHECKLIST – Page 2

	BUSINESS AND INVESTMENT CONSIDERATIONS	NOTES		OTHER CONSIDERATIONS	NOTES
3	Separate activities and exposures.		3	Impact on an estate plan.	
4	Leasing arrangements with landlord rent right secured by UCC-1 on tenant's property.		4	Federal and state criminal law.	
5	Car use.		5	Exposure of the advisor.	
6	Car ownership.		6	Exemptions that apply on death - do not make life insurance or annuities payable to an estate or to a trust that provides that estate obligations must be paid.	
7	Delegate to offshore employees.		7	Client guarantee.	
8	Employee causes of action - make sure they have Workers' Compensation.		8	Confidentiality - use an anonymously owned LLC from Wyoming, Delaware or Colorado to serve as manager of operational LLC's and Trustee of Homestead Land Trust, and file Certificates of Authority in each county where real estate is located.	
9	Separate intellectual property rights.		9	Equity Stripping - debt secured by a mortgage or lien on valuable assets at risk may be payable to arm's-length lenders or related party lenders under a number of various arrangements.	
10	Alcohol at events.		10	Make your children self-supporting.	
11	Using independent contractors.		11	Get divorced soon, or not at all.	
12	Client/Patient/Supplier Arbitration Agreements.				
13	Consider New Parent F Reorganization to separate assets within a company without triggering capital gains.				
14	Consider factoring accounts receivable to a related company that may be held for descendants.				
15	Trusteed or Partnership/LLC based Buy/Sell Life Insurance Arrangement.				
16	Consider leasing use of equipment on a triple net basis - be sure all activities are insured.				
17	Pension contributions.				

THE CPA'S CHECKLIST FOR FLORIDA CREDITOR PROTECTION PLANNING AND MAINTENANCE

1. Do the clients know about tenancy by the entireties protection?	
2. Are the clients' assets held as tenants by the entireties? <ul style="list-style-type: none"> a. Were the right boxes checked when they opened an account? b. Do they have out of state real estate that needs to be placed under a Florida LLC? c. How will the client's fund a bypass trust on the 1st death if everything is owned jointly? - Disclaimer planning. d. Are K-1's being issued to both spouses or to the correct spouse or entity? If a husband and wife own S-Corporation stock or a partnership interest as tenants by the entireties is it proper to be issuing separate K-1's to them for 50% each of the interest? Often the CPA's file is the only place to find documentation on how stock and LLC interests are owned. e. How do stock certificates read? f. What names are on contracts? g. Is property held in a state that allows for tenancy by the entireties? h. Have the clients considered a TBE owned LLC or family limited partnership. i. Do their LLC's have proper operative language? 	
3. Is the homestead more than ½ an acre within the city limits or more than 160 acres in the county? Homestead is owned as tenants by the entireties as well?	
4. Do they understand that the cash value of a life insurance policy is only protected when it is owned by the insured individual?	
5. Is life insurance payable to protective trusts that can benefit the surviving spouse and descendants without being subject to their creditor claims? Does the client own life insurance policies on any other person - if so, it will not be creditor protected.	
6. Is there an inherited IRA - inherited IRAs are not protected from creditors under recent Florida case law.	

THE CPA'S CHECKLIST FOR FLORIDA CREDITOR PROTECTION PLANNING AND MAINTENANCE

<p>7. Who is responsible for making sure that LLCs are properly established and maintained? An improperly drafted LLC will not provide a Florida client with charging order protection or tenancy by the entireties status, even if intended to do so. Many lawyer do not know how to do this properly, so how can accountants and clients themselves even attempt this?</p> <p>Single member LLC's do not have charging order protection.</p> <p>WARNING - It violates the unauthorized practice of law rules to set up LLC's and to provide legal documents for LLC's. This puts the CPA firm at risk for malpractice and licensing purposes.</p>	
<p>8. Do the clients own assets that may cause liability, such as investment real estate, a business or even a charitable activity? Should these be placed in separate LLCs for liability insurance insulation purposes?</p> <p>a. Some clients think that a flow-through tax entity allows creditor claims to flow through, which is not of the case.</p> <p>b. Many clients think that revocable trusts will shield them from creditor claims. There is a big difference between avoiding probate and avoiding creditors.</p> <p>c. Who is the manager? Exposure of the manager?</p> <p>d. Do insurance carriers on agencies know how assets are owned?</p>	
<p>9. Are proper formalities being followed so that one company or person is not considered an alter ego of the other for liability insurance insulation purposes.</p> <p>Are financial statements being prepared? For example, many CPA firms prepare a form 1065 for an entity taxes as disregarded simply to help confirm appropriate fiscal conduct and accountability.</p>	
<p>10. Is the client being realistic about what their risks and exposures are with respect to potential upside down loan situations, guaranties, and real estate debt that may not be renewed. Why do some clients wait until it is too late? A nudge here and there can save significant problems.</p>	
<p>11. How much should the CPA know? Will communications with the CPA and other parties become discoverable?</p> <p>Understand CPA client Florida litigation privilege - copies of letters or information given to third parties will be discoverable.</p>	

THE CPA'S CHECKLIST FOR FLORIDA CREDITOR PROTECTION PLANNING AND MAINTENANCE

<p>13. Is the client being accurate and truthful on financial statements provided to lending institutions? How specific do these statements need to be on issues such as joint assets and changes thereto.</p> <p>Proper footnoting is crucial.</p>	
<p>14. Are insurance agencies and carriers aware of exactly what is being insured? Is the client telling the insurance carrier that the car is personal and not for business, while telling the IRS that the car is 90% business and is owned by a company?</p> <p>Can someone working for the CPA firm call the applicable insurance agencies to make sure that everything is coordinated?</p> <p>Make sure client understands exclusions, such as animals, pools, civic activities, church or synagogue activities, etc.</p>	
<p>15. What is the client's cash-burn rate? Are they waiting for the economy to turn around, and what if it does not and when do they run out of cash?</p>	
<p>16. Schedule an annual review?</p>	
<p>17. Consider new entities and trusts, including protective trust systems and limited liability entities. Segregate voting from non-voting under entities.</p>	
<p>18. Annual input from and participation with qualified lawyer.</p>	
<p>19. Debt at the Debtor's Best Friend</p> <ul style="list-style-type: none"> a. Is there one creditor who should be ahead of the others? b. Are all loans documented by promissory notes and secured by mortgages and/or security agreements? c. Review various debt-associated strategies, such as cross-collateralization and sale lease backs. 	

PRIMARY CAUSES OF LIABILITY

Catastrophes in the Making

1. Debt: General creditors, medical creditors, guarantees, provider agreements, etc.
2. Tort Liability (civil breaches of contract, rather than criminal):
 - (a) Auto owners and drivers (boats and other vehicles)
 - (b) Errors and omissions - professional malpractice.
 - (c) Aiding and abetting others who commit wrongdoings.
 - (d) Premises liability- building owners. Think of that child on the tricycle going up the wheelchair ramp and flipping down the stairs. Also consider the following:
 - (i) Hazardous waste.
 - (ii) Asbestos and other harmful building materials.
 - (iii) People hurt by construction defects.
 - (iv) People tripping and hurting themselves in the parking lot.
 - (v) Tenants with rowdy customers who shoot people.
 - (vi) Inappropriate acts by lease management.
 - (vii) Children eating lead paint.

PRIMARY CAUSES OF LIABILITY

3. Relationship Liability:
 - (a) Joint and several liability.
 - (b) Partnerships.
 - (c) Co-signors or co-guarantors on notes.
 - (d) Joint tort feasons (those who commit civil faults) can be jointly and severally liable for economic damages.
 - (e) Co-conspirators.
 - (f) Vicarious liability: An employer is generally liable for the activities of employees in the scope of the business. What if the receptionist runs over a child while running an errand?
 - (g) Spoiled romances and accusations by a forlorn ex-girlfriend or boyfriend, especially if you employed him or her.
4. Tax Liabilities:
 - (a) Income taxes.
 - (b) Trust fund - employee withholding – money stolen that should have gone to the government - paying employees as independent contractors.
 - (c) Penalties, interest, and criminal implications.

PRIMARY CAUSES OF LIABILITY

5. Others:
 - (a) Divorce: Alimony and property settlement.
 - (b) Child support.
 - (c) Hazardous waste liability and related issues.
 - (d) Student loans.
 - (e) Business participation: Sexual discrimination, etc.
 - (f) Involvement as trustee with relationship to pension plans.
 - (g) Medicare and other payors.
 - (h) Real estate liability:
 - (i) Hazardous waste.
 - (ii) Lead paint.
 - (iii) Asbestos.
 - (iv) Tort liability.
 - (v) Vicarious liability for building activities.
 - (vi) Civil rights or other violations.

Especially Treacherous Liabilities

Liabilities generally not cancelable in bankruptcy include the following:

Liabilities generally not covered by insurance include the following:

(i) Government student loans

(i) Civil rights violations committed by employees or others

(ii) Trust fund tax liability

(ii) Environmental liabilities, including sick building syndrome and lead paint issues

(iii) Hazardous waste liability

(iii) Criminal acts

(iv) Breach of fiduciary duty liabilities

(iv) Charitable and religious board activities

(v) Child support and alimony

(v) Jet skis normally cannot be insured for over \$250,000 per occurrence

(vi) Medicare, Medicaid, and sometimes private pay refund liabilities of physicians: Carriers have been suing doctors for not following referral laws for significant refunds

(vi) Acts of terrorism: Most casualty insurance clauses exempt acts of terrorism. The industry has been paying claims on goodwill up until now






Have Plenty of Insurance Coverages –

1. **Liability and casualty insurances.**
2. **Unowned vehicle insurance.**
***(No motor vehicles owned by valuable business or asset holding entities.)**
3. **Business interruption insurance.**
4. **Employee practices insurance.**
5. **Cyber leaks and privacy invasion coverage.**
6. **Product liability insurance**

**Have your insurance carrier come and see your situation from an
OSHA and safety point of view.**

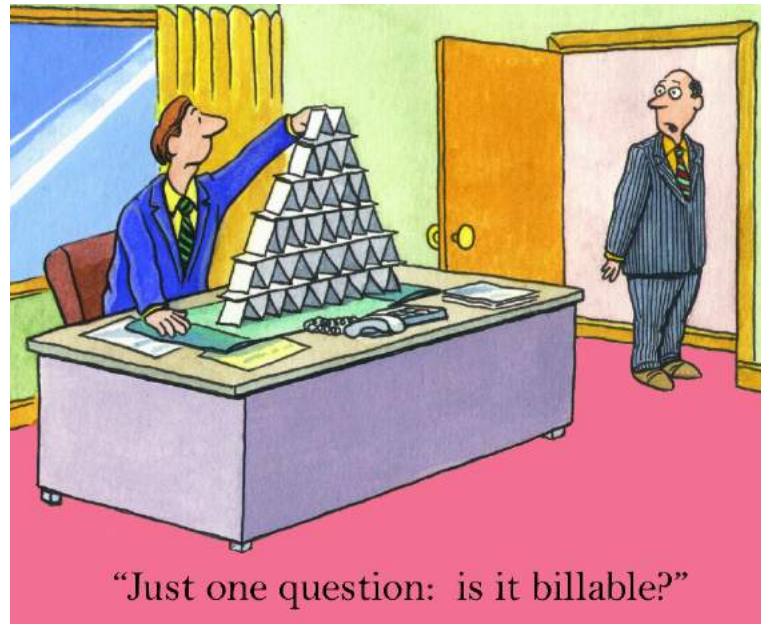
Understanding Your Liability Insurance Coverage

The vast majority of carriers will only issue a \$250,000 policy on your home, a \$250,000 policy on your driving, and a \$250,000 policy on your vacation home. A separate “umbrella carrier” or “carriers” will then issue separate policies for above \$250,000, as shown in the example below. Sometimes one carrier will write two or more of the below described policies, but often there will be 3 or more carriers involved and coordination can be a challenge:

<p>\$5,000,000</p>  <p>\$251,000</p>	<p>Umbrella Policy #1</p> <p>Covers claims for home at \$300,000 and for cars at \$250,000.</p> <p>Must be “drop-down” umbrella if home policy is issued by Citizens or a comparable state agency that does not cover liabilities from pools, pets, or other notable exceptions.</p>		<p>\$5,000,000</p>  <p>\$301,000</p>	<p>Umbrella Policy #2</p> <p>May need a separate umbrella for out-of-state vacation home, large boats or other items.</p> 	
<p>\$250,000</p>  <p>\$0</p>	<p>Policy #1 – Homeowners</p>	<p>Policy #2 – Vacation Home</p>	<p>\$300,000</p>  <p>\$0</p>	<p>Policy #3 – Car Driver and Owner Policy</p>	<p>Policy #4 - Big Boat at Vacation Home</p>

Have a team of advisors that includes a good accountant, lawyers of the specialties you need who are honest enough to tell you who you need and when you need them, a good personality and casualty carrier, and a competent, caring and ethical financial planner.

RUN YOUR BUSINESS RESPONSIBLY!



Seal off liability wherever you can:

- a. Use limited liability entities.
- a. Use multiple entities if you can have multiple separate operations.
- a. Export or otherwise avoid activities or functions which invite liability.

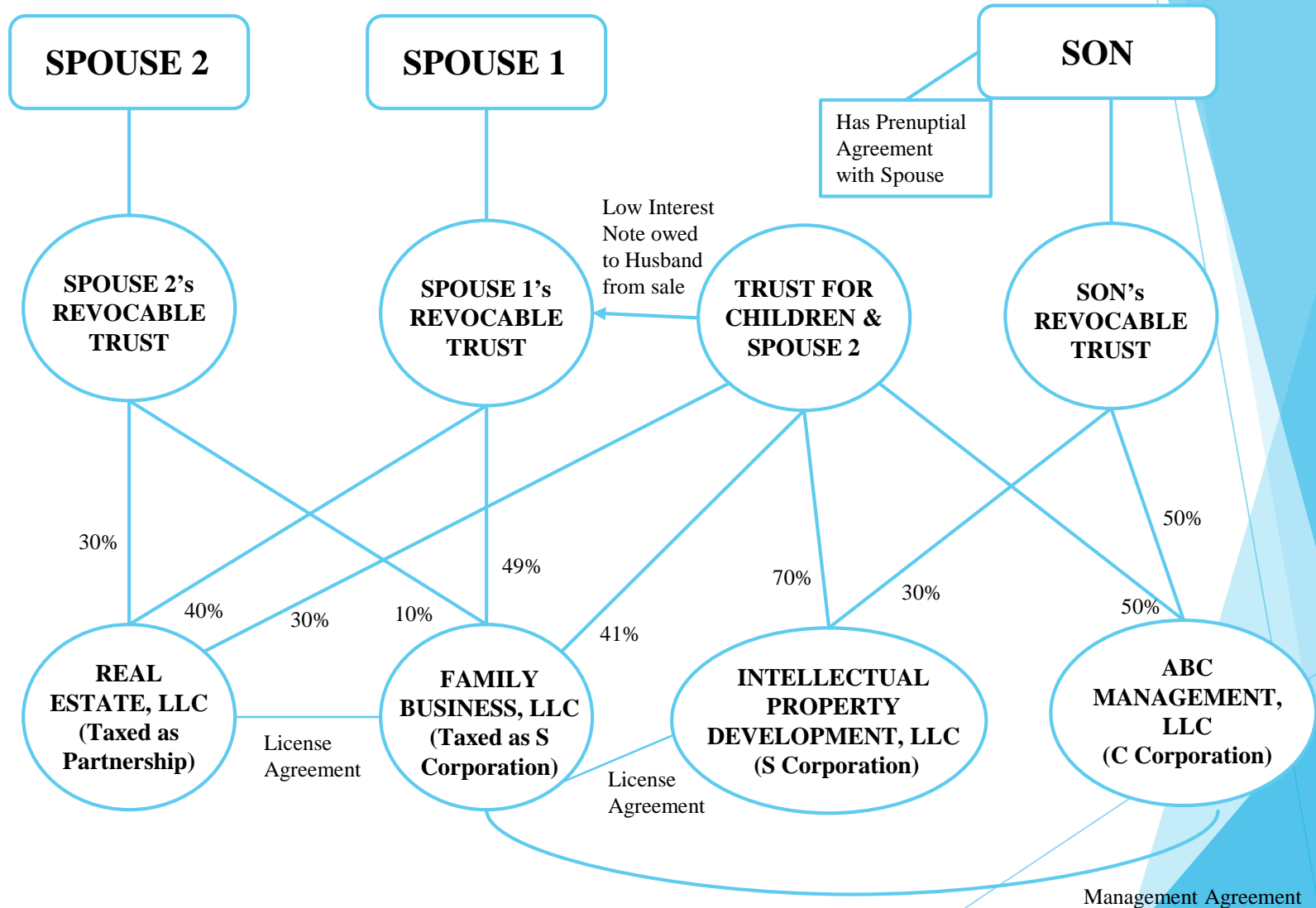


Firewall Protection

Use Firewall Protection and Multiple Entities Where Possible:

- A. Two cabs in each LLC.
- B. Rental properties under separate LLC's managed by your judgment-proof nephew who needs to earn money.
- C. Put the business that may be sued under a company that is separate from a large portion of the assets and intellectual property associated therewith.
- D. Maintain proper corporate formalities.

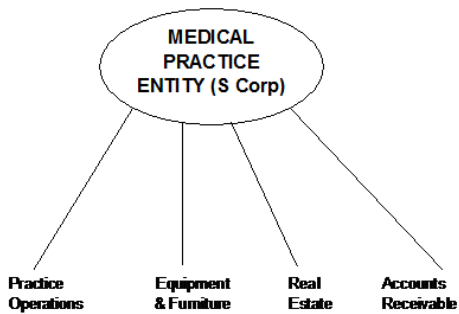
Possible Family Logistics for a Successful Business and Estate Plan



New Parent F Reorganization (Showing Accounts Receivable Factoring Arrangement)

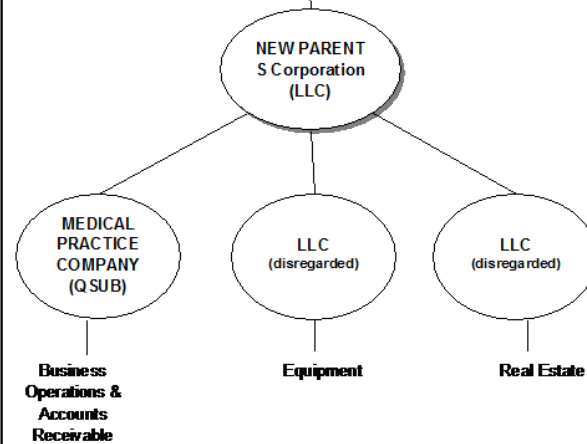
1. Physician or Physicians Owns Medical Practice Entity

Shareholder or Shareholders



Initially we have a medical practice entity where valuable assets are exposed to potential malpractice and other entity liabilities.

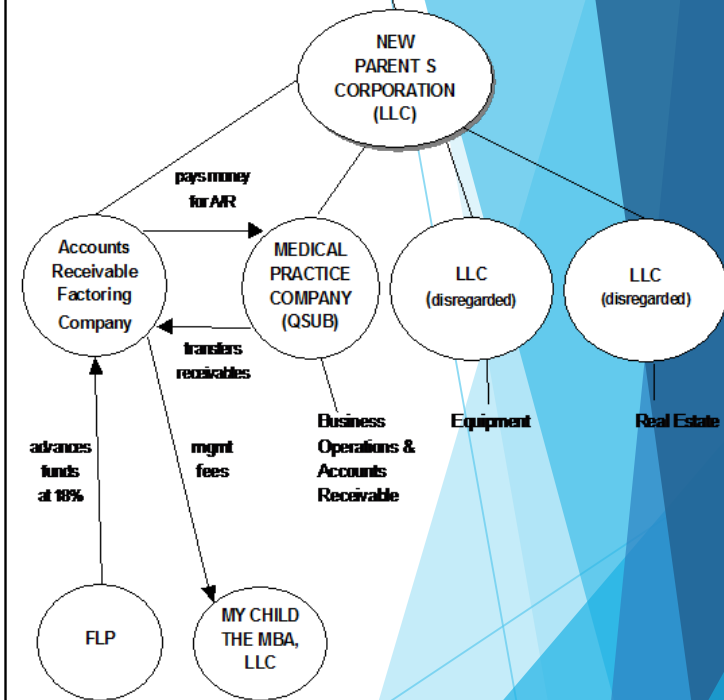
2. Shareholder (S) (and spouses?)



[Retains initial tax identification number and billing identity]

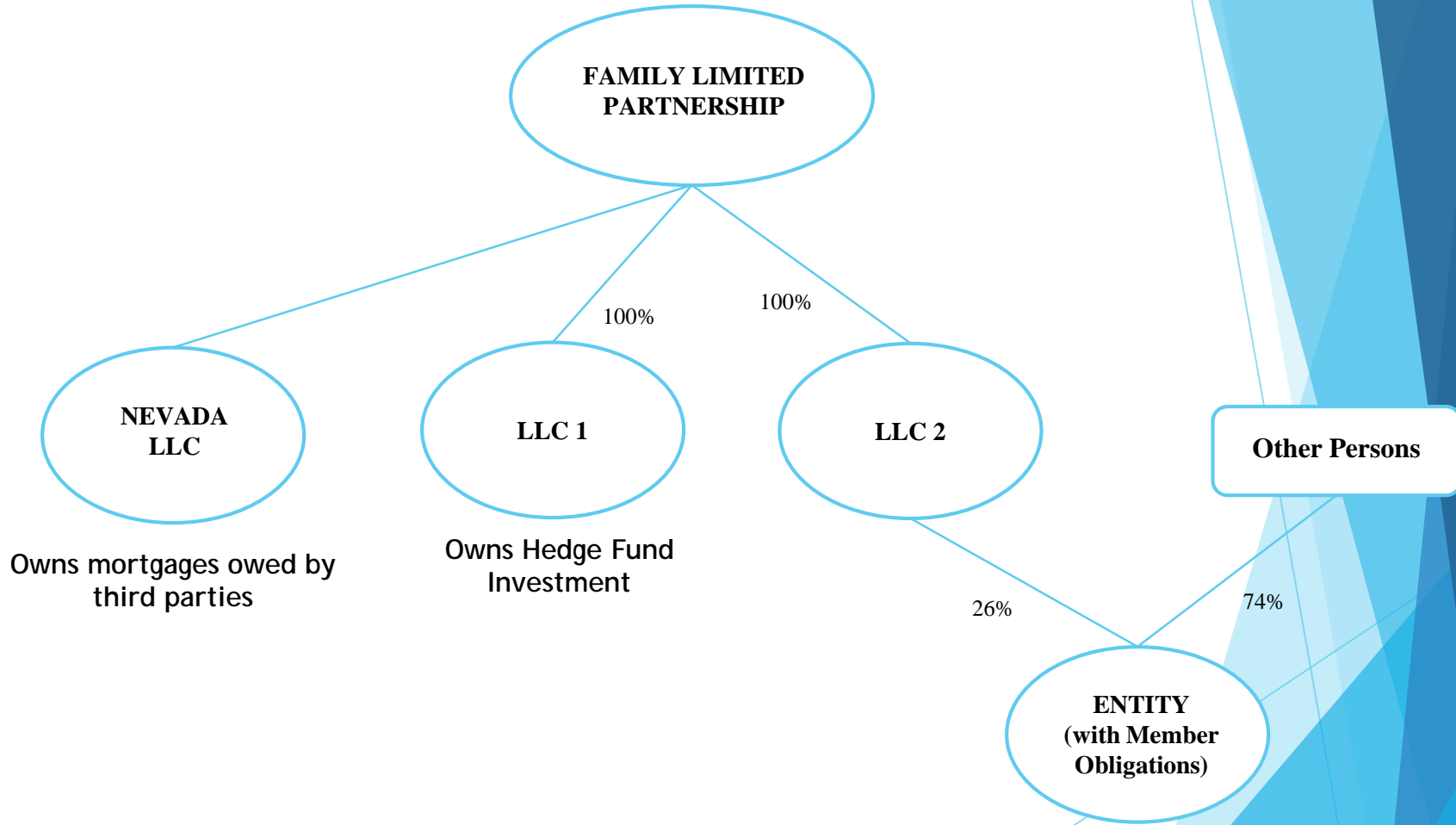
A new S corporation can be established to own the stock of the medical practice entity, which becomes a qualified subchapter S subsidiary. It can then transfer valuable assets income tax free to other LLCs owned by the same new parent company to protect assets from future creditors of the medical practice entity.

3. Shareholder (S) (and spouses?)

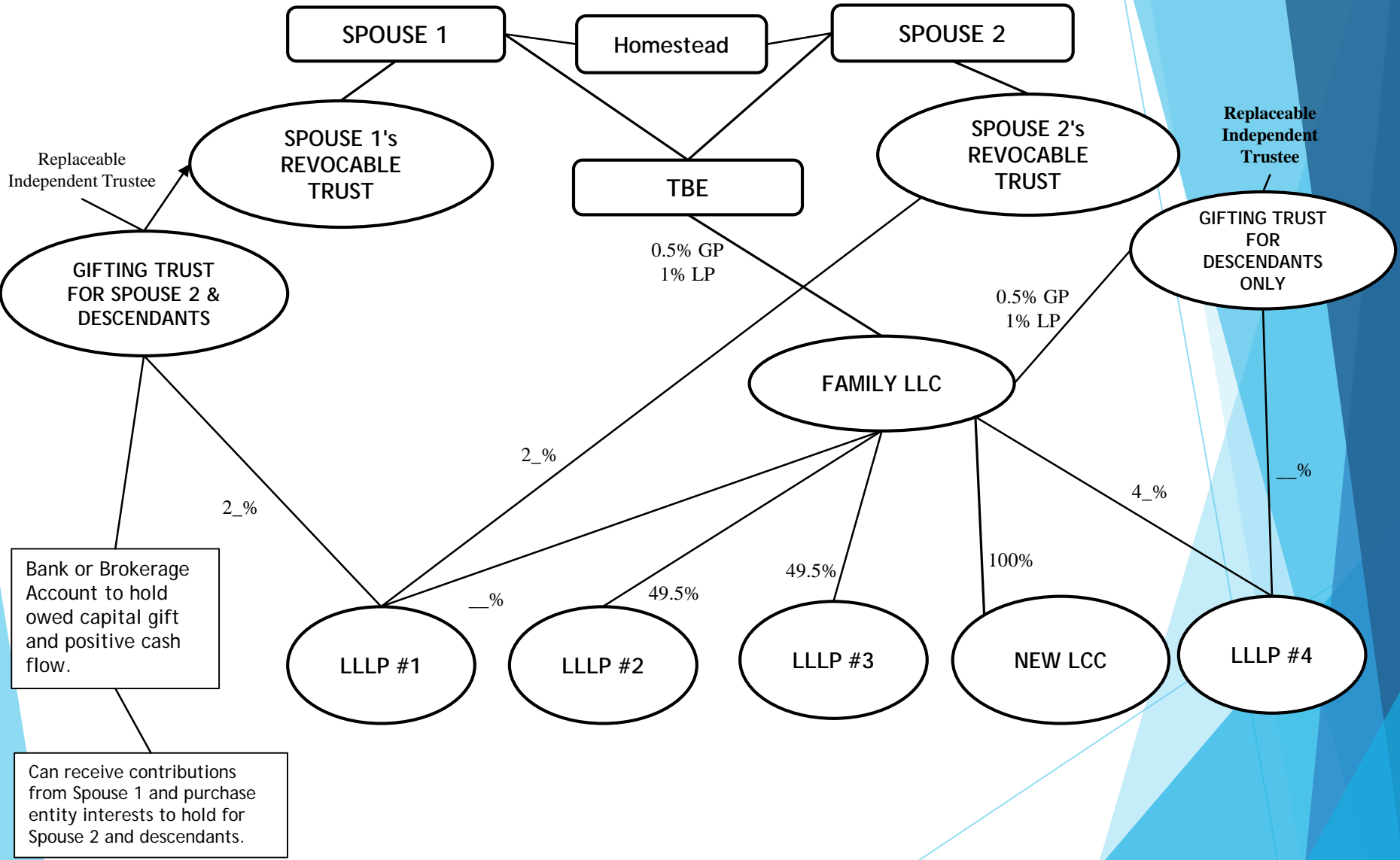


To obtain income tax planning advantages for affiliated family members and entities, a separate accounts receivable factoring company can be established to work along the lines of the Extended Letter of Protection (ELOPE) System shown in other materials.

Using Intermediary Entities to Protect Family Limited Partnership From Potential Liability



Using an Intermediary Entity to Not Inconvenience Fellow Investors



Managers and officers of a company can be held personally responsible for their personal acts if someone is injured or harmed.

Often a “management company” will be the manager, but who manages the management company?

Under the Doctrine of Respondeat Superior the employer is responsible for what an employee does.

- ▶ **Normally there is an exception to this for independent contractors – but how can you be sure that a person is an independent contractor versus being an employee.**
- ▶ **A carefully tailored agreement may be essential as is the proper design and implementation of functions and responsibilities.**

(continued)

- ▶ **You may call someone an independent contractor, but if a jury or state agency decides that they are an employee, then you may have:**
 - a) Liability for their actions and inactions.**
 - b) Liability to support them for the rest of their lives if they become incapacitated, and you should have had Worker's Compensation insurance.**
 - c) Risk of disqualification of your pension plan. Special language in the plan documents may help protect against this.**
 - d) Whistleblowers may make a fortune reporting you.**

For an employee, Worker's Compensation Law requires the payment of insurance, and limits the liability of the employer if the insurance is in place.

- ▶ **Example: An employee is killed when another employee negligently operates equipment. The deceased employee's estate receives a payment from the Worker's Compensation carrier, and the employer has no liability.**
- ▶ **If the person killed had been an independent contractor, then the liability of the employer could be unlimited.**

Applicant Statement

APPLICANT'S STATEMENT:

I certify that answers given herein are true and complete to the best of my knowledge.

I authorize investigation of all statements contained in this Application for Employment as may be necessary in arriving at an employment decision.

I further authorize Gassman, Crotty & Denicolo, P.A. access to reports prepared by any credit reporting bureau or agency, and direct such agencies to provide a copy of my report at the request of Gassman, Crotty & Denicolo, P.A.

This application for employment shall be considered active for a period of time not to exceed 45 days. Any applicant wishing to be considered for employment beyond this time period should inquire as to whether or not applications are being accepted at that time.

I hereby understand and acknowledge that, unless otherwise defined by applicable law, any employment relationship with this organization is of an "at will" nature, which means that the Employee may resign at any time and that the Employer may discharge Employee at any time with or without cause. It is further understood that this "at will" employment relationship may not be changed by any written document or by conduct unless such a change is specifically acknowledged in writing by an authorized executive of this organization.

In the event of employment, I understand that false or misleading information given in my application or interview(s) may result in discharge. I understand, also, that I am required to abide by all rules and regulations of the Employer.

Signature of Applicant: _____

Date: _____

Authorization for Release:

AUTHORIZATION FOR RELEASE OF INFORMATION FOR BACKGROUND INVESTIGATION

In consideration of my application for employment (including contract for services) with GASSMAN, BATES & ASSOCIATES, P.A. I authorize GASSMAN, BATES & ASSOCIATES, P.A., acting on its own or as an agent of any other company or organization and their respective agents, to conduct and report research and share with each other, information about my background including, but not limited to, information about my prior employment, education, driving record, consumer credit history, criminal record, workers compensation claims and general public records history.

Further, I understand that an investigative consumer report may be requested from various Federal, State, Local and other agencies. I understand that such an investigative report may contain information about my background, mode of living, character and personal reputation; and that I am entitled to be advised of the nature and scope of the investigation requested within a reasonable time after I ask for this information in writing.

I HEREBY AUTHORIZE, WITHOUT RESERVATION, ANY PERSONS, AGENCY OR OTHER ENTITY CONTACTED BY GASSMAN, BATES & ASSOCIATES, P.A. TO FURNISH THE ABOVE MENTIONED INFORMATION.

I understand that any investigative consumer report requested will be used strictly for employment purposes as defined under the Fair Credit Reporting Act §603(h), as a report to be used for the purpose of evaluation for employment, promotion reassignment or retention as an employee. I release GASSMAN, BATES & ASSOCIATES, P.A., their respective officers, directors, employees and agents, and all persons, agencies, and entities providing information or reports about me from any and all liability arising out of the release of any such information or reports.

The information requested below is needed for the purpose of positive identification and to complete verification procedures (Please print clearly).

Name:	
Other Names Used (maiden, alias):	
Social Security Number:	Date of Birth:
Race:	
Driver's License Number:	
Present Address:	
City/State/Zip:	From (mo/yr): _____ to _____
Present Phone:	
Cell Phone:	
Prior Address #1:	
City/State/Zip:	From (mo/yr): _____ to _____
Prior Address #2:	
City/State/Zip:	From (mo/yr): _____ to _____
Signature:	Date:

Probationary Period Acknowledgment

Employee 90 Day Letter

EMPLOYEE NAME _____

PLEASE PRINT

As you become an employee we wish to inform you that all employees are governed by a 90 day probationary period.

The Florida Unemployment Compensation Law provides that any claimant who has voluntarily left work without good cause or has been discharged by the employing unit for unsatisfactory job performance within the 90 day probationary period, shall be disqualified from receiving benefits.

Please sign below that the 90 day probationary period has been explained to you.

EMPLOYEE SIGNATURE _____

DATE- _____

Company Policy on Sexual Harassment

GASSMAN, CROTTY & DENICOLO, P.A. will not tolerate harassment of any kind toward any of its employees. We have taken steps to protect you from harassment in the workplace.

Your cooperation is vital for your protection and well-being. Please observe the following procedures and know your rights as stated below:

1. It is against our policy for any worker, whether male or female, to harass another worker in words or actions. Each of the following is against our policy.
 - a) Making unwelcome sexual advances or requesting sexual favors;
 - b) Making comments on a worker's physical appearance or body, or making comments on a worker's presumed sexual habits, preferences, desires, etc.;
 - c) Touching or caressing a worker without the worker's prior, express permission;
 - d) Displaying obscene or sexually-oriented or suggested photographs, drawings or other visual or oral material;
 - e) Engaging in obscene or sexually-oriented gestures, activities or comments;
 - f) Creating an intimidating, hostile or offensive work environment to any employee or any class or group of employees.
2. It is against our policy for any worker to use a worker's submission to or rejection of the above conduct by another worker as a factor in any employment decision affecting the worker submitting to or rejecting the conduct.
3. We will not condone any harassment of employees. All workers, including, but not limited to, supervisors and management personnel, will be subject to severe discipline, including discharge for any harassing behavior.
4. Any employee who feels victimized by harassment should immediately report it to Alan Gassman or their appropriate supervisor. We will undertake a careful investigation, which may include interviewing other employees who have knowledge of the alleged incident or similar situations. Your complaint, along with the investigative steps and findings, will be documented as thoroughly as possible. Any appeals from this decision will be handled in accordance with our dispute resolution procedures.
5. No employee will be subject to any form of retaliation or discipline for pursuing a harassment complaint.

Computer Usage Acknowledgment:

ACKNOWLEDGMENT

THE UNDERSIGNED, an Employee of GASSMAN, CROTTY & DENICOLO, P.A., does hereby acknowledge that with respect to e-mail and Internet access in the office on the computers that I operate, that GASSMAN, CROTTY & DENICOLO, P.A. does periodically monitor the use, and may do so without notice. I understand that the computer system is for business use only, and that my activities on the computer for personal use when I am “off the clock” may be monitored. The above includes AOL Instant Messenger, MSN Messenger and any other instant messenger service. Employee agrees not to download any programs from the Internet without approval.

“Employee”

▶ **Evaluate all relationships for possible issues.**

Written agreements with exculpation clauses, arbitration clauses, and lawyer fee clauses can be essential - or horrendous – depending on whose side you are on.

Have customers, suppliers, contractors and other third parties sign waiver, hold harmless and releases:

- ▶ **I waive any rights I would have unless you do something really, really bad.**
- ▶ **I agree to hold you harmless, and thus pay for any expenses or liabilities you might incur if I pursue you nevertheless.**
- ▶ **I release you from any such liabilities that may occur in the future, unless you are really, really bad (clearly willful misconduct or gross neglect).**

Consider arbitration provisions to apply to key employees for the following reasons:

- ▶ **Privacy**
- ▶ **Avoidance of runaway juries.**
- ▶ **High arbitration filing fees.**
- ▶ **Disarms many employment rights' lawyers.**

Practice and Business Entities and How They Can be Taxed



1. Taxed as S corporation or C corporation.
2. S corporations pay no tax unless they used to be a C corporation and certain circumstances exist.
The income and deductions of an S corporation flow through to the shareholders pro rata to ownership.
3. A C corporation is taxed as a separate entity and if it is a professional service company, all net income is taxed at the highest bracket (39.6%).
4. No charging order protection.

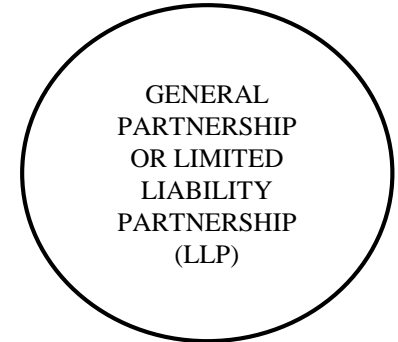
\$35 filing fee
\$150 annual report fee



1. Only 1 member- disregarded for federal income tax purposes.
But may have a Taxpayer Identification Number.
2. If 2 or more members – taxed as a partnership. A partnership is taxed in a manner similar to an S corporation, but with major differences.
3. Can elect to be taxed as an S corporation or a C corporation for federal income tax purposes.
To have corporate tax treatment a Form 8832 must be filed with the IRS.

\$125 LLC filing fee
\$138.75 LLC annual report fee

\$1,000 LP/LLLP filing fee
\$500 LP/LLLP annual report fee
(other state filing fees are much lower for L.L.L.P.'s)

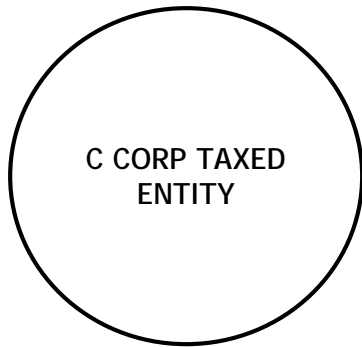


1. Can be disregarded if considered to have one member (such as if an individual owns 50% and his or her revocable trust owns 50%)
 2. Taxed as a partnership if 2 or more members.
 3. No charging order protection.
- No filing required for general partnership.

\$50 LLP filing fee
\$25 LLP annual report fee

BASIC INCOME TAX OPERATION OF EACH TYPE OF ENTITY

Shareholder
(Dividends are taxed)



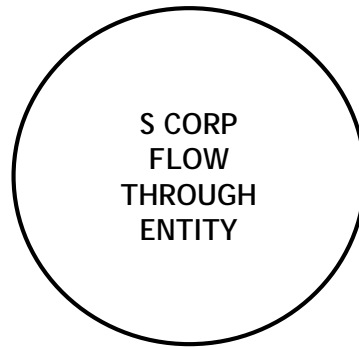
Corporate level tax - revenues minus deductible expenses.

Dividends are not deductible expenses.

May deduct healthcare and disability insurance expenses under certain circumstances.

In the highest individual tax bracket on the first dollar of income if this is a personal service company.

Shareholder
(Dividends are not taxed)



Income and deductions are computed and then go on income tax returns of owners by K-1 reporting.

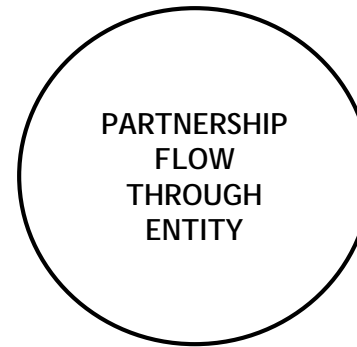
There can only be one class of stock, but voting/non-voting is permitted.

Contribution of appreciated assets can trigger tax unless the 80% rule is followed under IRC Section 351

Income is triggered if an appreciated asset or accounts receivable are transferred from the S corporation to shareholders unless it is deductible compensation.

Special rules apply if an S corporation used to be a C corporation. This can cause double tax.

Partners
(Individuals, S corporations or otherwise) (Distributions are not taxed)



Income and deductions are computed and then go on income tax returns of owners by K-1 reporting - no entity level tax.

Distributions to partners are usually subject to employment taxes

Compensation paid to partners is often called "guaranteed payments" and reduces partnership income

Typically no income tax is triggered when appreciated assets are contributed to the partnership in exchange for a partnership interest

Typically no gain is triggered when the partnership transfers appreciated assets to its partners to redeem their ownership interests.

PROPRIETORSHIP

All income and deductions are shown on individual's Form 1040 Schedule C - subject to employment taxes of 12.5% on the first \$128,700 of income, plus the 2.9% Medicare tax, making for a 15.3% tax thereon, plus the 2.9% Medicare tax on income and an additional 0.9% Medicare tax to the extent of self-employment income that exceeds \$200,000 for a single taxpayer and \$250,000 for a married taxpayer.

Choices and Factors with Respect to Allocation & Payment of Medical Practice Income for the Practitioner

	PAYEE	CREDITOR PROTECTED IN FLORIDA?	Current Taxes/Expenses	Tax Cuts and Jobs Act
<p>Owned by Physician or as Tenants by the Entireties</p> <p>S CORPORATION PRACTICE ENTITY</p>	Pension Plans	Yes	Costs for staff and to maintain plan – spouse on payroll to justify additional contribution. Highest tax - 39.6%. Nonqualified plans subject to 3.8% Medicare tax	Highest tax bracket is 37%.
	Children on the Payroll	Yes – If goes to Roth IRA in the name of the child.	Child in lower rate (Lowest bracket – 10%) but 15.3% employment taxes apply.	Lowest bracket will be 10%. Standard Deduction = \$12,000 Single or \$24,000 MFJ
	Wages paid to Doctor	If Head of Household, Florida Statute 222 may apply – deposit directly into protected account.	15.3% employment taxes on first \$127,200, and then 2.9% over \$127,200 plus .9% tax on wages exceeding \$200,000 for single person and \$250,000 for married joint filers.	Repeal of additional 0.9% tax not mentioned in new Act
	Dividends to owner of entity.	Only if owner is protected – such as tenants by the entireties or a family limited partnership owning the entity.	Not subject to payroll taxes – but could be recharacterized by IRS, and not subject to the 3.8% Medicare tax unless distributions represent income from passive sources.	Business Income Deduction of 20% of Qualified Income Repeal of 3.8% Medicare tax not mentioned in new Act
	Spouse on payroll.	Yes, if spouse is safe.	15.3% employment taxes on first \$127,200, and then 2.9% over \$127,200 plus .9% tax on wages exceeding \$200,000 for single person and \$250,000 for married joint filers.	Repeal of additional 0.9% tax not mentioned in new Act
	Rent	Yes, if renting entity is protected. They protect PA assets if landlord has lien to enforce rent on long-term lease.	6.8% sales tax Subject to the 3.8% Medicare tax for single taxpayers with MAGI over \$200,000 and MFJ taxpayers with MAGI over \$250,000.	Repeal of 3.8% Medicare tax not mentioned in new Act State sales tax is reduced to 5.8% on commercial real property rentals
	Interest owed to related parties.	If related party is protected.	Deductible as interest – receiving party pays interest income.	Interest expense not eliminated.

Partnership v. S Corporation- Which is Better to Hold Real Estate?

PARTNERSHIP	S CORPORATION
<i>Advantages</i> 😊	<i>and Disadvantages</i> ☹️
Partners receive basis for indebtedness incurred by the partnership 😊	DOI income insolvency exclusion is determined at the corporate level. 😊
On the death of a partner, the partnership's (inside) tax basis of its assets can receive a step-up in income tax basis, if a Section 754 election is in place for the partnership 😊	No similar basis adjustment mechanism applies to S corporations. ☹️
When a new partner buys into a partnership corporation, their depreciation write-off and underlying basis in their partnership interest will be based upon the price that they pay. 😊	When a new shareholder buys into an S corporation, their depreciation write-off and underlying basis if and when the real estate is ever sold has to be based upon the historic basis and depreciation taken, versus being based upon the price they pay. ☹️
Appreciated real property can generally be distributed from the partnership tax-free to the partners. 😊	Distributions of appreciated real property to the shareholders are treated as if the property was sold at its fair market value to the shareholders. ☹️
No restrictions apply as to who can own partnership interests. 😊	S corporations can only be owned by certain individuals and trusts, and cannot be owned non-resident aliens, corporations or partnerships ☹️
Partnerships can have more than one class of stock, and income and distribution preferences can be drafted in virtually any manner, so long as they have substantial economic effect 😊	S corporations cannot have a "second class of stock," and income allocation and distribution rights must be pro rata to ownership ☹️
DOI income insolvency exclusion is determined at each partner's level. ☹️	Shareholders do not receive basis for indebtedness incurred by the corporate, unless the loan is made by such shareholder. ☹️

Rental House Ownership Strategies

***Rental houses - limiting liability while also qualifying for appropriate insurances.**

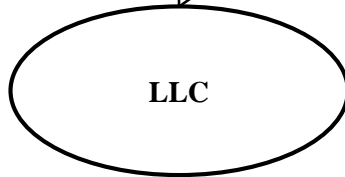
SPOUSE 1
(or Revocable Trust of Spouse 1)



(rental house)

- * Spouse 1 or Revocable Trust of Spouse 1 owns rental house.
- * House can cause creditor problems.

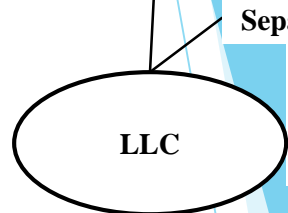
SPOUSE 1
(or Revocable Trust of Spouse 1)



(rental house)

- * Should limit liability but good luck getting insurance.

SPOUSE 1
(or Revocable Trust of Spouse 1)



(rental house)

- * Some insurance carriers will like this better.

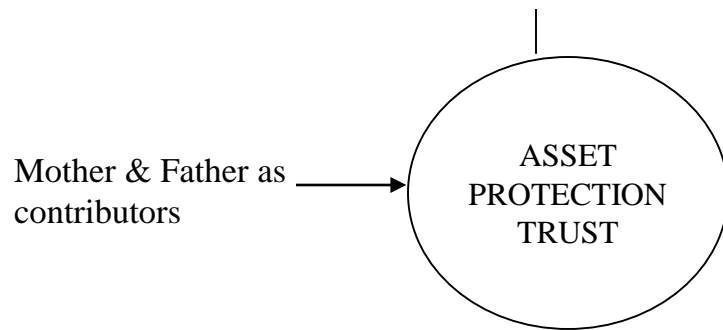
Trustee's Creditors May Not Invade a Trust Held for Third Parties

- ▶ Florida Statute Section 736.0507 codifies the concept that a trustee's interest in trust assets will not be subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt. This, of course, does not apply to the extent that the trustee is the settlor and the beneficiary.
- ▶ Under Florida Statute Sections 736.1013 and 736.1015, the trustee of a trust is not personally liable on contracts entered into on behalf of the trust unless the contract so provides or the trustee fails to reveal its fiduciary capacity. Pursuant to Florida Statute Section 736.1013(2), a trustee is personally responsible for torts committed in the course of administration of a trust where the trustee is personally at fault. As provided in Florida Statute Section 736.1015, the trustee has no personal liability for obligations of a general partnership where the general partner interest is held solely in his or her capacity as a trustee, unless the trust is a revocable trust and the trustee is the settlor.

Limited Liability Trust – Asset Protection Trust

Better than an LLC to hold investment property if liability insurance coverage and rates will be beneficial; Such a trust may also qualify under an individual umbrella policy, whereas an LLC may not

Trust Company in proper jurisdiction = Trustee or Co-Trustee



- Benefits mother, father and children.
- May be disregarded for income tax purposes.
- No tax filing requirements if a domestic asset protection trust jurisdiction is used.
- May need to have subsidiary management trust owned 100% by asset protection trust to hold title, to allow parents to have management powers (preferably one parent who does not have other exposed assets).

Rental Home(s)

Note: An alternative may be to have a revocable land trust owned by an LLC – some carriers will insure property this way, but not under an irrevocable trust or an LLC.

Consider the “Beneficiary Defective Trust” (678 Trust)

- If a beneficiary of a trust is given the power to withdraw all contributions made to the trust, then the beneficiary is treated as the owner of the trust for federal income purposes under IRC Section 678(a)(1).
- Further, if the beneficiary's power lapses or if the beneficiary releases such power, and if the beneficiary otherwise has a grantor trust power (i.e., a power described in IRC Sections 671 through 677), then the beneficiary will nevertheless be treated as the owner of the trust for federal income purposes under IRC Section 678(a)(2).
- The beneficiary's withdrawal power can lapse or the beneficiary can release his or her withdrawal power each year to the extent of the greater of \$5,000 or 5% of the value of the trust's assets without the beneficiary being considered to have made a gift to the trust for federal gift tax purposes.
- Therefore, the beneficiary's withdrawal power could be expected to lapse or be completely released prior to the beneficiary's death, which would cause the trust assets to not be included in the gross estate of the beneficiary upon his or her death, notwithstanding that the beneficiary is treated as the owner of the trust for federal income tax purposes (and could therefore enter into an installment sale with the trust without recognizing income taxes related to the sale).

678 Trust

(a)General rule A [person](#) other than the grantor shall be treated as the owner of any [portion](#) of a trust with respect to which:**(1)**such [person](#) has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or

(2)such [person](#) has previously partially released or otherwise modified such a power and after the release or [modification](#) retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

(b)Exception where grantor is taxable Subsection (a) shall not apply with respect to a power over income, as originally granted or thereafter modified, if the grantor of the [trust](#) or a transferor (to whom section 679 applies) is otherwise treated as the owner under the provisions of this subpart other than this section.

(c)Obligations of support Subsection (a) shall not apply to a power which enables such [person](#), in the capacity of [trustee](#) or co-trustee, merely to apply the income of the trust to the support or maintenance of a person whom the holder of the power is obligated to support or maintain except to the extent that such income is so applied. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income of the [taxable year](#), such amounts shall be considered to be an amount paid or credited within the meaning of paragraph (2) of section 661(a) and shall be taxed to the holder of the power under section 662.

(d)Effect of renunciation or disclaimer Subsection (a) shall not apply with respect to a power which has been renounced or disclaimed within a reasonable time after the holder of the power first became aware of its existence.

(e)Cross reference For provision under which [beneficiary](#) of trust is treated as owner of the portion of the trust which consists of stock in an S corporation, see section 1361(d).

678 TRUST EXAMPLE

Father places \$100,000 of S corp stock into a Trust.

Son has 60 days to withdraw all of the contribution, and the Trust is then held for son's health, education and maintenance in an Asset Protection Trust ("APT") jurisdiction.

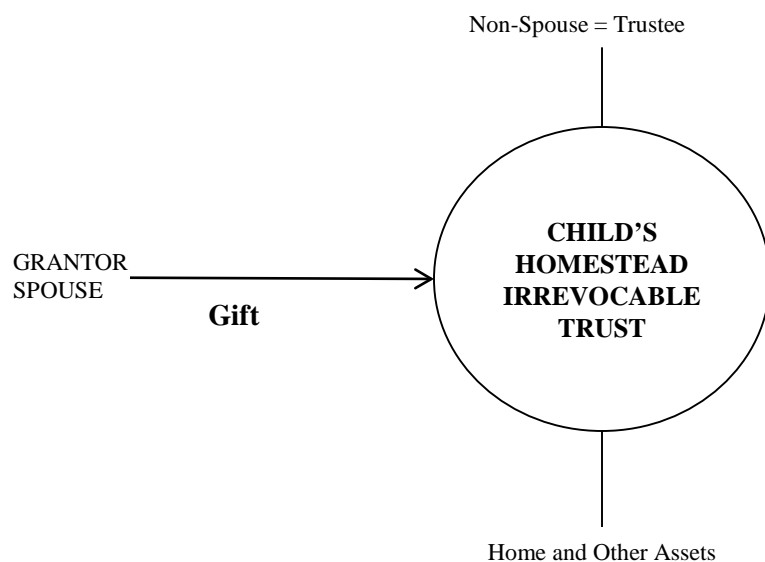
Trust income will be taxed to son, and the son will be considered to be the owner of the trust for federal estate tax purposes on the son's death.

Son may later release/disclaim all rights, assuming that this is not prevented by a spendthrift clause, but will still be considered to be the owner of the Trust for income tax purposes during his lifetime.

Child's 678 Homestead Irrevocable Trust

A trust that can own a home used by a child to benefit the spouse and descendants;

- can qualify for the State Homestead Exemption and 3% cap
- can be considered as owned by the Child for income tax purposes to qualify for the \$250,000 income tax exemption on sale
- can be controlled by the Trustee and used for the benefit of various family members
- will insulate family members from liabilities associated with ownership of the home



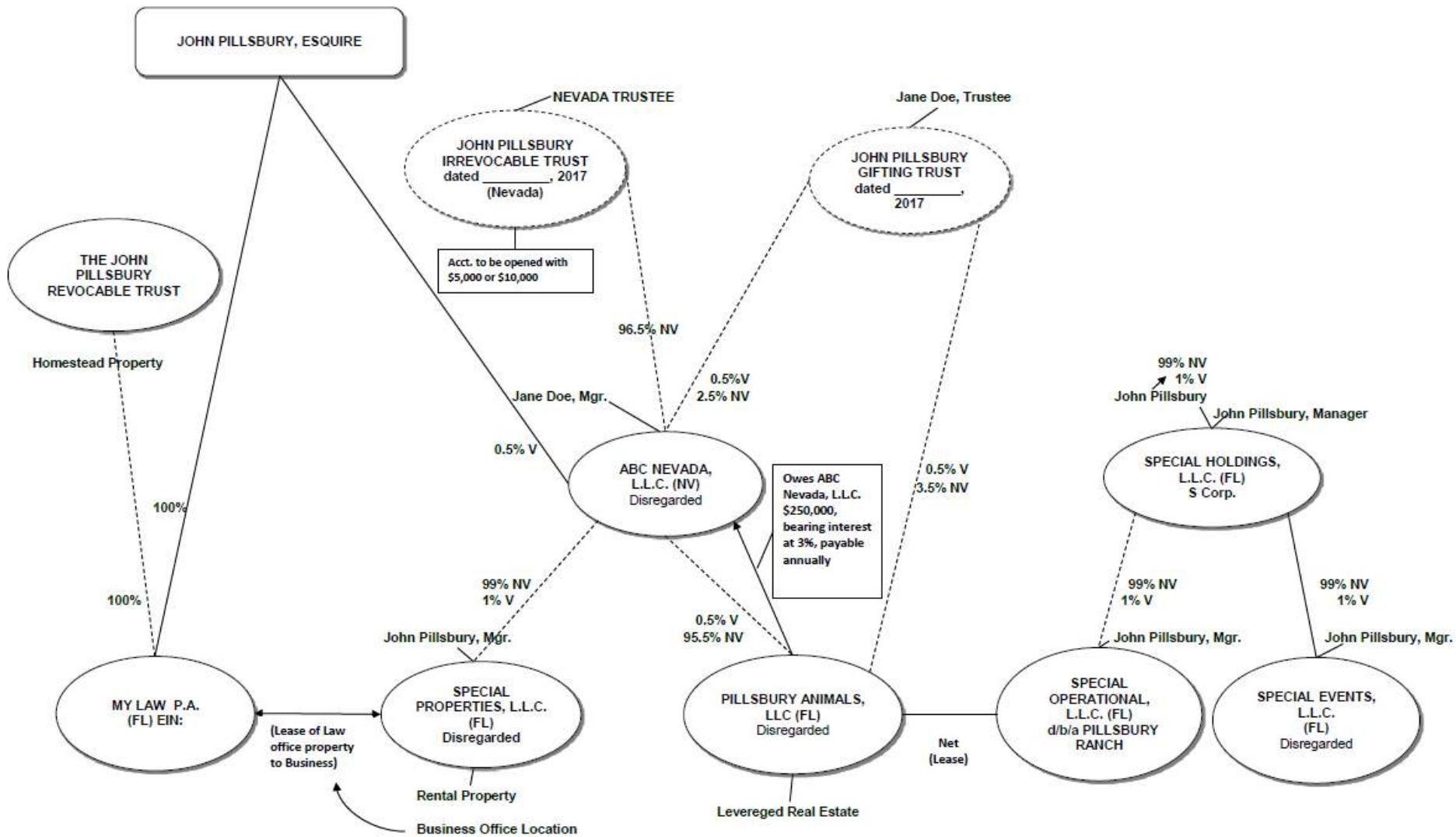
Trust assets can be applied for the health, education, maintenance and support of the spouse and children.

One or more children may reside in the house to qualify for the Florida Tax Homestead Exemption.

For income tax purposes, the Trust can be considered as owned by the child who lives in the house so that the house can be sold income tax free to the extent of up to \$250,000 in appreciation.

The Trust will not be subject to creditor claims of any family member unless (1) the transfer to the Trust by the Grantor Spouse is a "fraudulent transfer," or (2) the child has a right to withdraw more than the gift tax exclusion amount in any calendar year.

NOTE – The Trust must be appropriately drafted, funded, and administered to achieve the above results.



Equity Stripping

Definition:

Reducing the amount of value of an asset that a creditor or divorcing spouse may have available to them by reason of having debt secured by the property that might otherwise be subject to forfeiture or sharing.

Advantages of Equity Stripping

1. Avoids the expense associated with transferring assets
2. Avoids transfer taxes and taxes that would be imposed upon the sale of an asset
3. Allows equity amount to be protected in jurisdiction separate from where the asset exists
4. Oftentimes, the indebtedness amount can be kept confidential but must be disclosed on financial statements, tax returns, and as otherwise required by law.

Disadvantages of Equity Stripping

1. The equity in the asset remains exposed.
2. Expenses associated therewith.
3. Substance over form arguments where there is no tax or business purpose for the arrangement.
4. The doctrine of Marshaling of Assets or “the over secured creditor” in bankruptcy.

Marshaling of Assets

- In general terms, the equitable doctrine of “Marshaling of Assets” means that a creditor, with two funds available to satisfy his debt, cannot “by his application of them to his demand, defeat another creditor who may resort to only one of the funds.” *In re Talmo*, 192 B.R. 272 (Bankr. S.D. Fla. 1996).
- The rule of marshaling assets sets forth the order in which senior creditors can proceed against other collateral properties. Importantly, it does not bar the senior creditor from proceeding against a subsequent purchaser or a junior creditor if the value of the first collateral is insufficient.
- Courts are reluctant to allow a claim for marshaling when it would be unjust or unfair to allow the junior creditor to do so.
- To invoke the doctrine, there must be:
 1. Two creditors asserting claims against a common debtor;
 2. Two funds that belong to the debtor (“common debtor requirement”); and
 3. One creditor with legal rights to satisfy its debt from either of the funds, while another creditor has rights in only one of the funds

Equity Stripping – Preferred Debtors:

- ▶ Recapitalize companies with debt
- ▶ Cross-collateralize loans and pledge assets
- ▶ Let a friendly creditor get a judgment
- ▶ Long term leases with acceleration clauses
- ▶ The ELOPE System

What Can Be Pledged?

- a. Real estate can be mortgaged.
 - b. Furniture, equipment, and other non-real estate physical items can be liened by UCC-1 financing statements and legitimate debt.
 - c. Intangible assets such as software, logos, 11 secret herbs and spices, stock certificates, ownership in an LLC, and other assets that are not physical in nature can be pledged and/or liened by UCC-1 filing, depending upon state law.
 - d. CDs, brokerage accounts, life insurance policies, and annuities can be liened by contractual arrangements based upon forms that most financial institutions and insurance companies have readily available
 - e. Vehicles can be liened by filing the proper paperwork with the Department of Revenue. The Coast Guard handles liens on boats in international waters.
 - f. Your dog
- ▶ It is not enough to “say” or provide in a contract that an asset will be “secured” by debt. There has to be “perfection of a security interest” under state law - usually two years before another creditor arrives on the scene.

Is a Line of Credit with a Secured Interest Against Assets Enough to Protect Against Creditors?

- ▶ Not if nothing is owed – only to the extent that monies are owed before the problem occurs
- ▶ The creditors will not know how much is owed by looking in the public records – they will just know that the lender has a lien, which can deter litigation.

CHART #1

PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS

Practice Entity borrows money and distributes to Shareholder professionals.

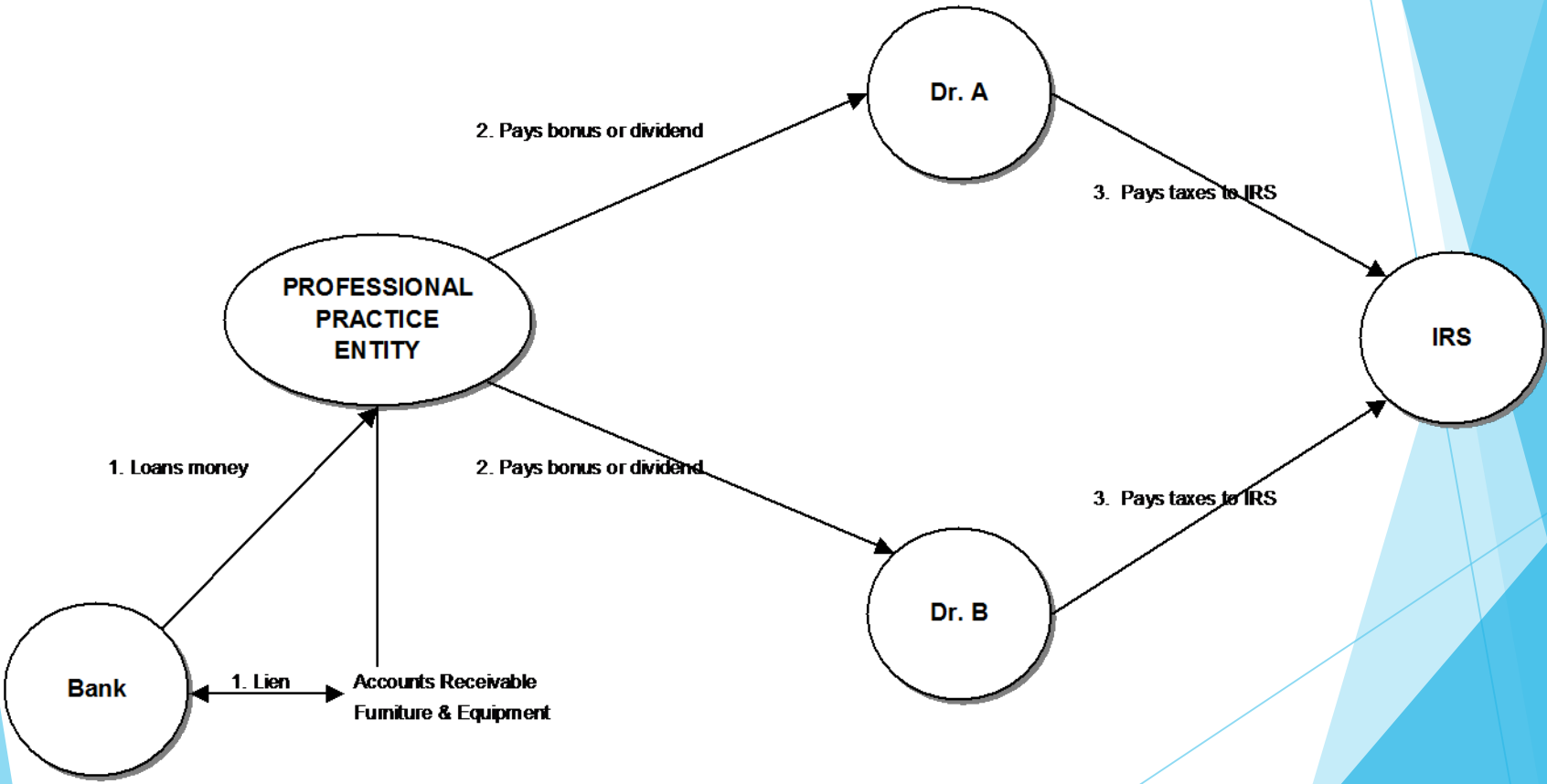


CHART #2

PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS

Shareholders borrow money - Professional Entity provides credit enhancement by collateralizing assets and guaranteeing debt.

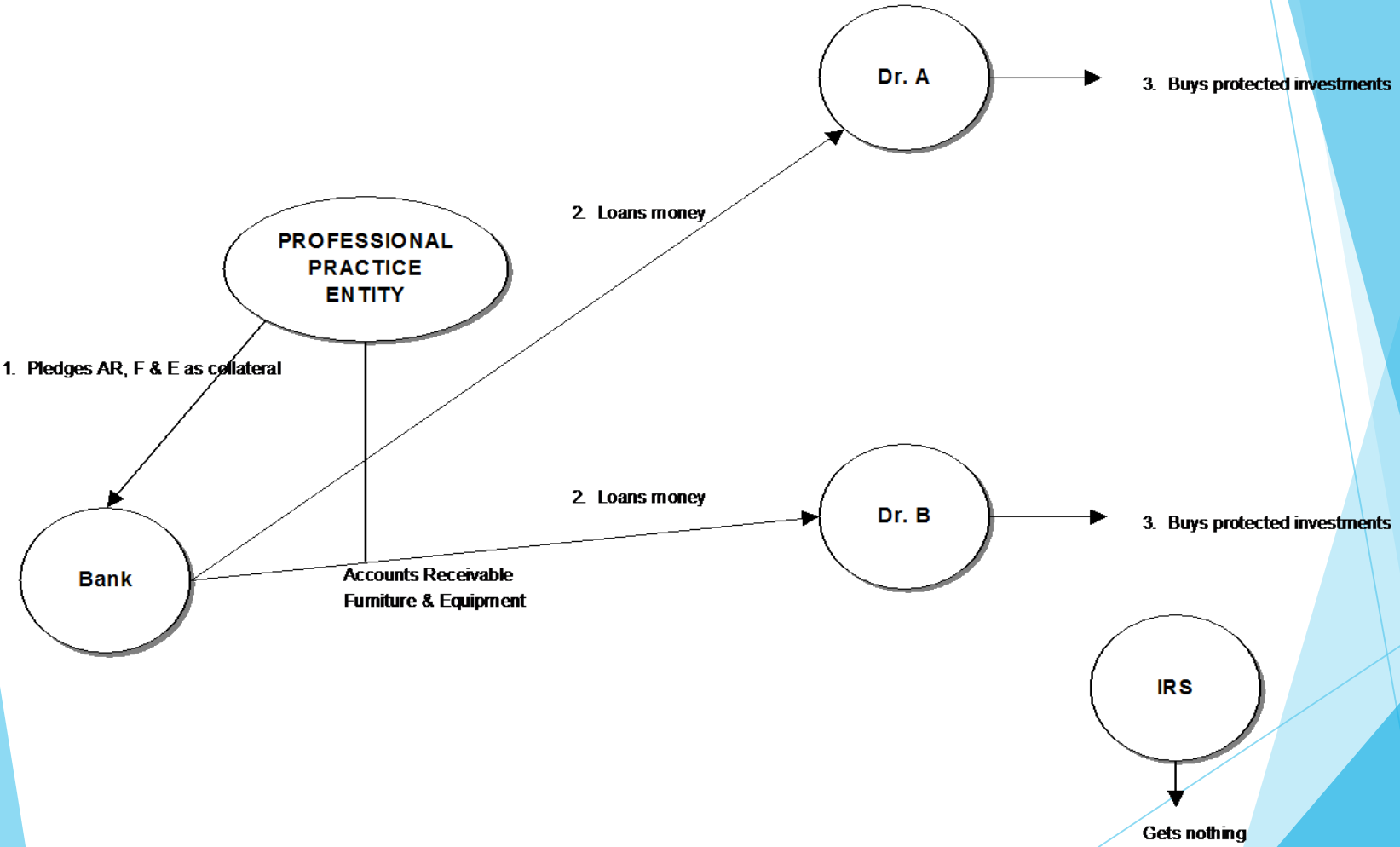


CHART #3

PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS

Practice Entity assets and guarantee provided under loan to separate Building Entity - Practice and Entity enter into long term lease.

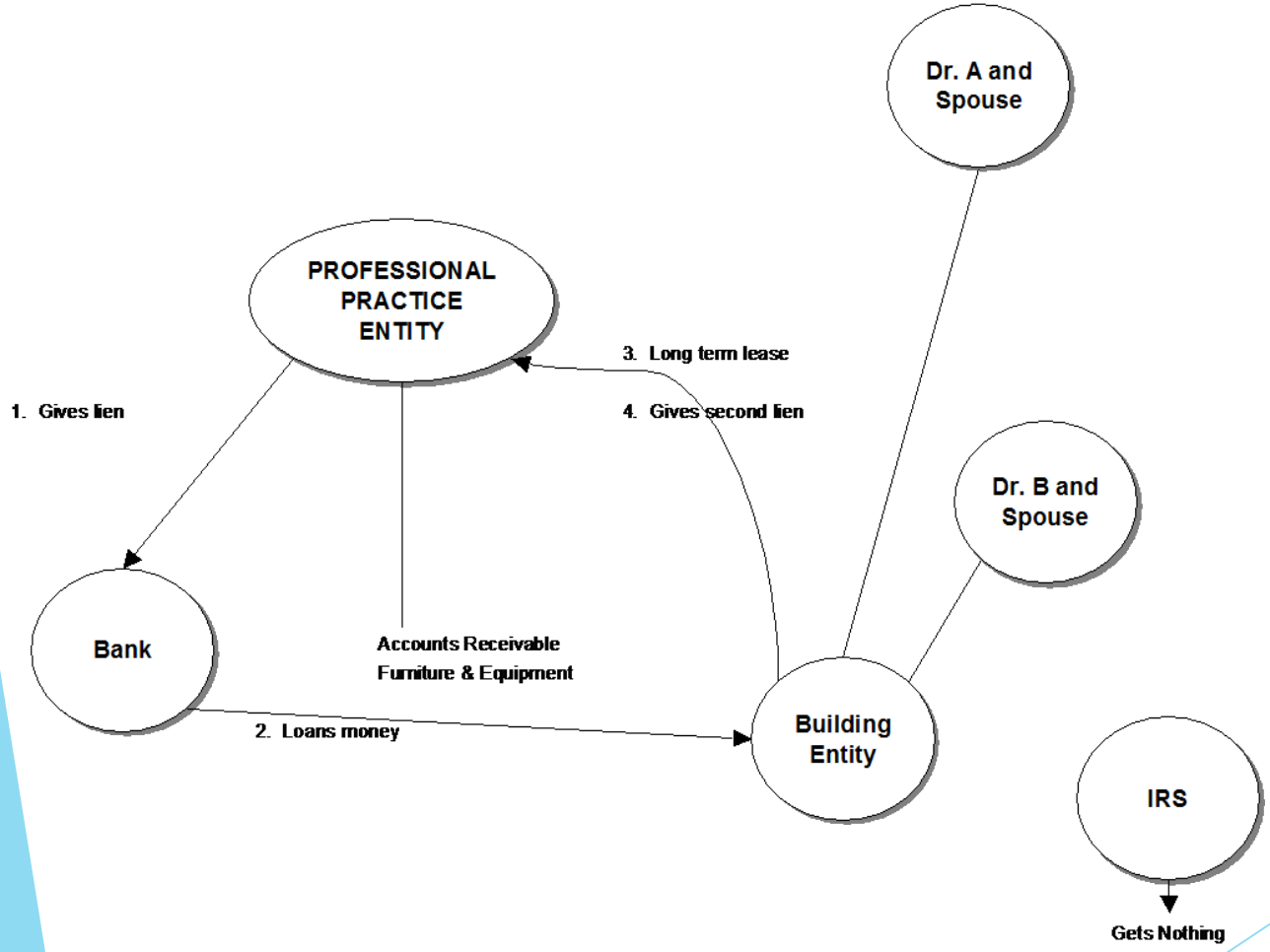
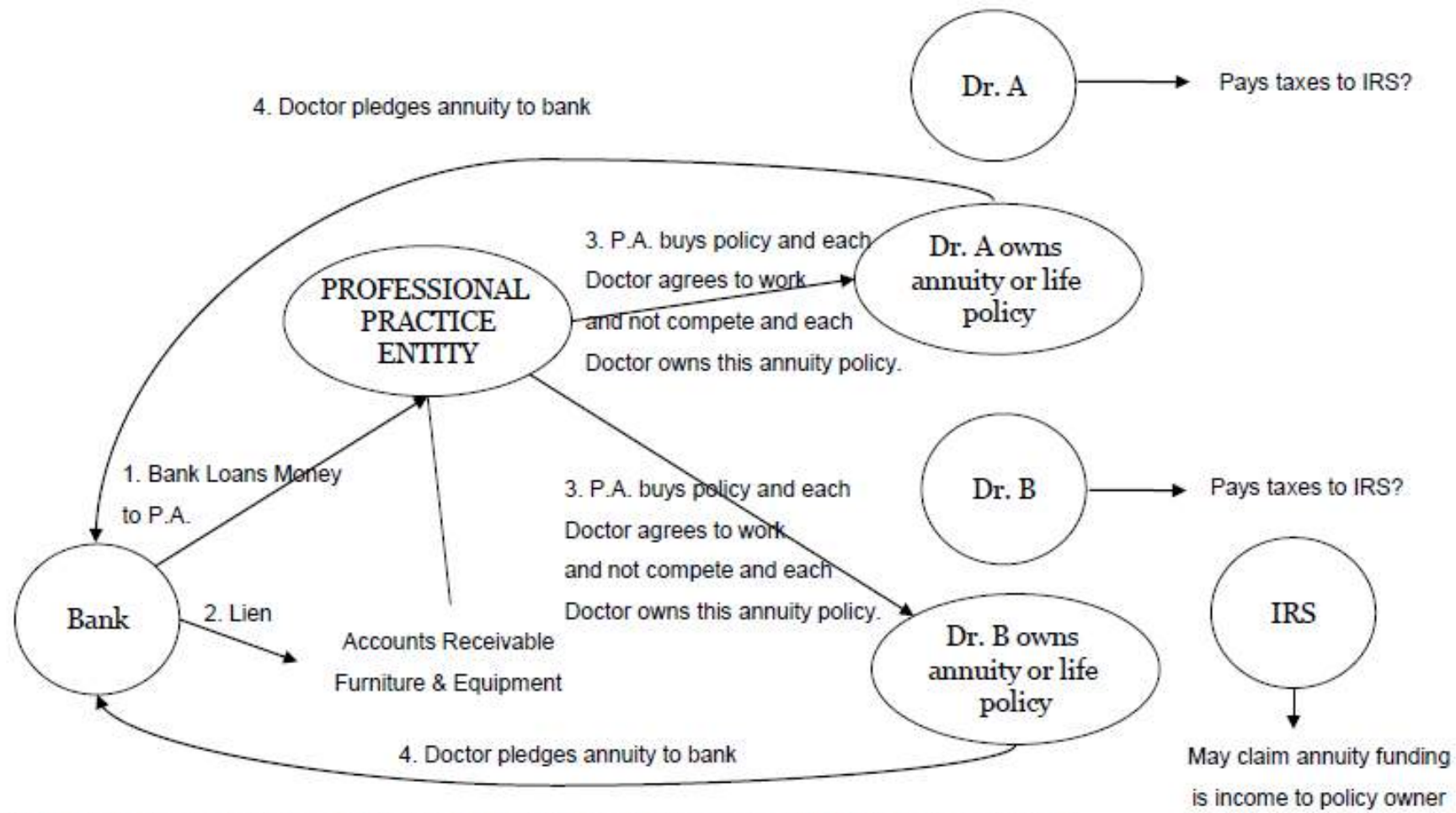


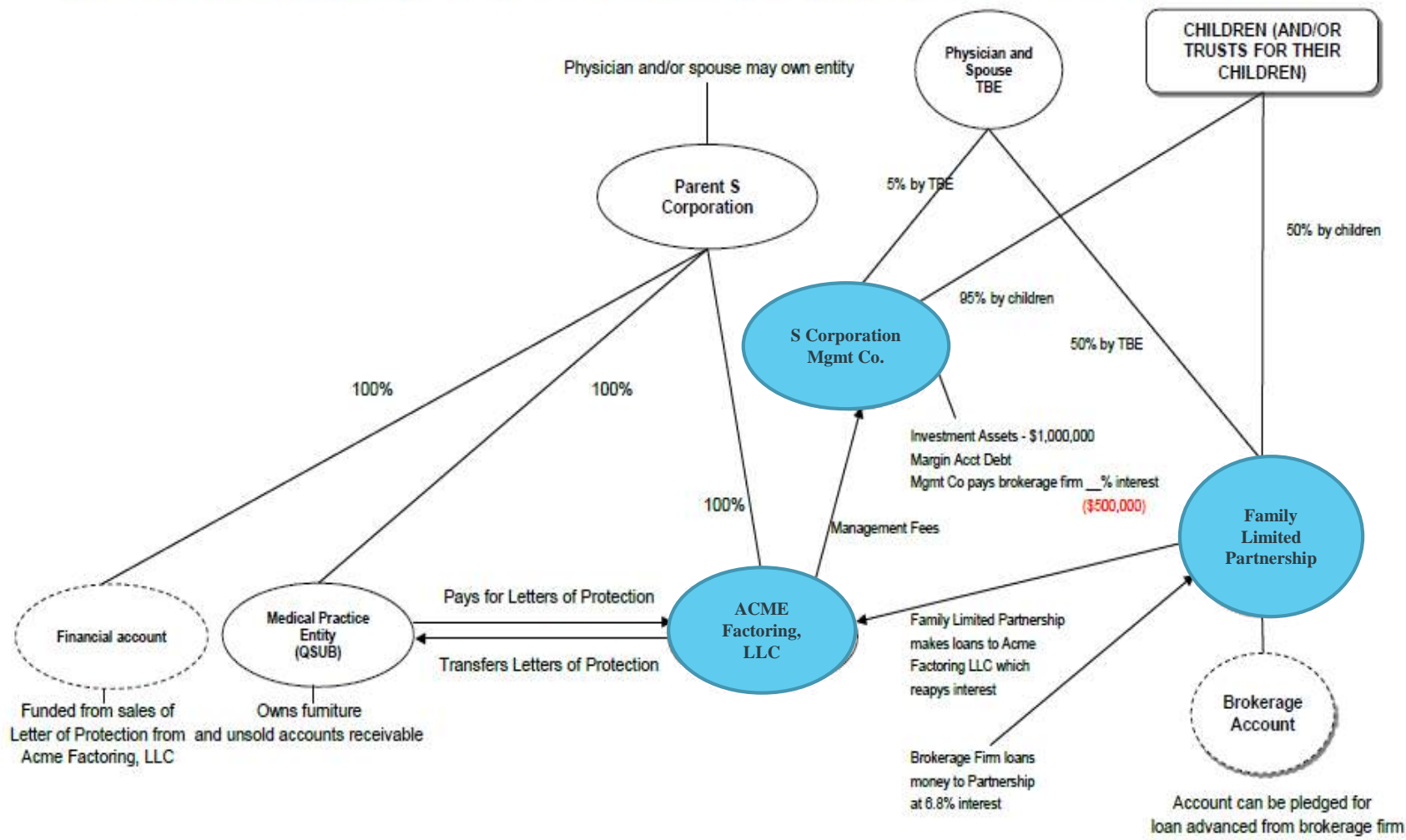
Chart #4 PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS



Why not have the doctors personally borrow the money to buy variable annuity or life products that will have a 4% expected rate of return by borrowing money from the bank directly to avoid the income tax issues shown in Chart #4? The bank, being concerned that the market could plummet, may require additional collateral, which would be in the form of medical practice assets so that the medical practice becomes a guarantor on each loan and pledges its furniture, equipment, and accounts receivable as additional collateral thereon. Thus, this becomes Chart #2, which perhaps works better from a logistical standpoint.

Extended Letter of Protection Enhancement (ELOPE System)

To enable a Family Limited Partnership and child-owned management entity to derive reasonable profits for the purchase and administration of letters of protection



Equity Stripping

Example 1 Results:

- ▶ The neighbor sues John and gets a \$600,000 verdict.
- ▶ The neighbor levies on John's rental house by forcing a sale on the Courthouse steps.
- ▶ The house sells for \$275,000. \$5,000 from the sale goes to the neighbor/creditor, and the bank is paid in full.
- ▶ John keeps his variable annuity contract and files a Chapter 7 bankruptcy. He no longer owes money to the neighbor.

Using LLCs and Trusts to Protect Otherwise Exposed Assets, Part 1

CLIENT

**SPOUSE OF
CLIENT**



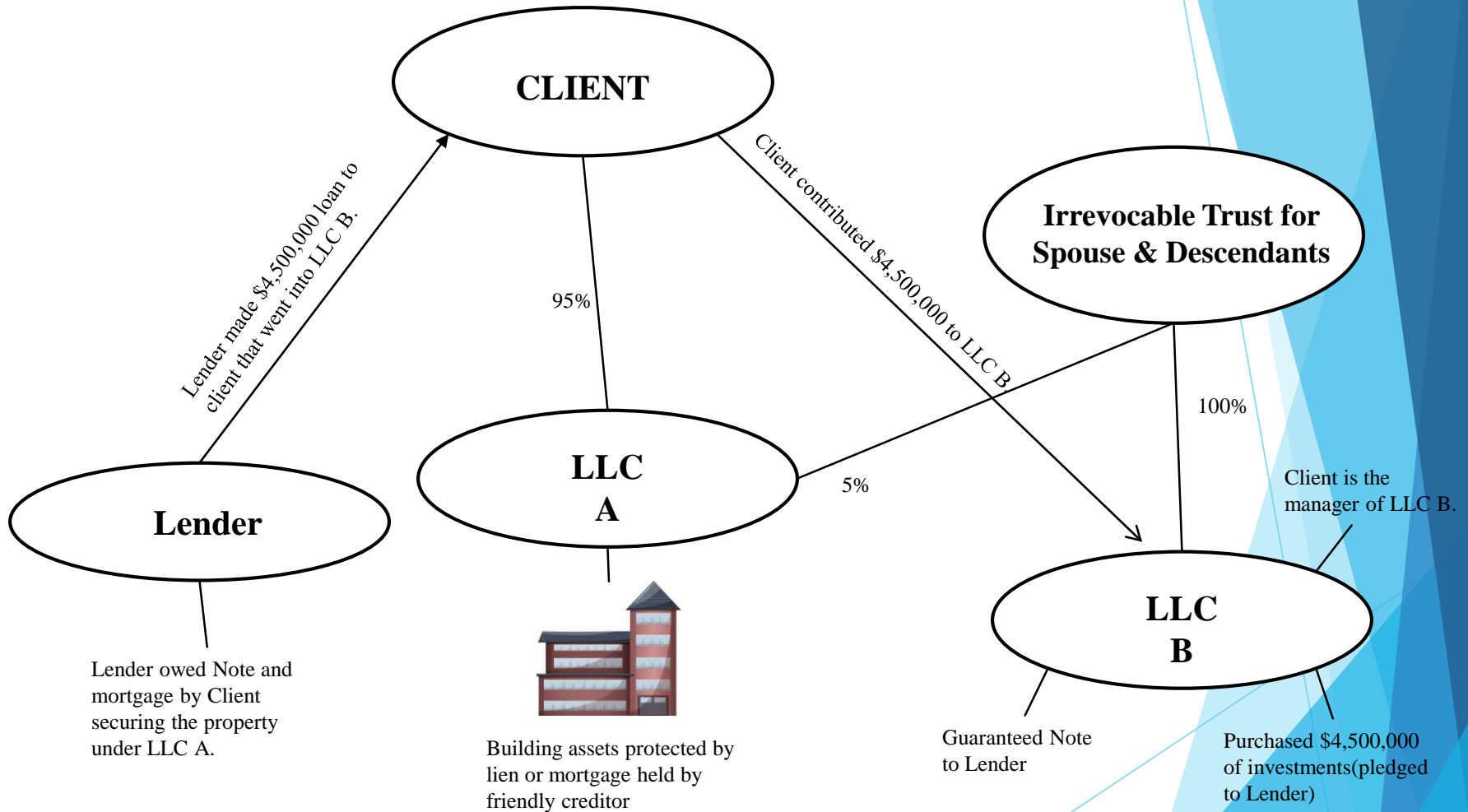
\$5,000,000

Client owns \$5,000,000 building.

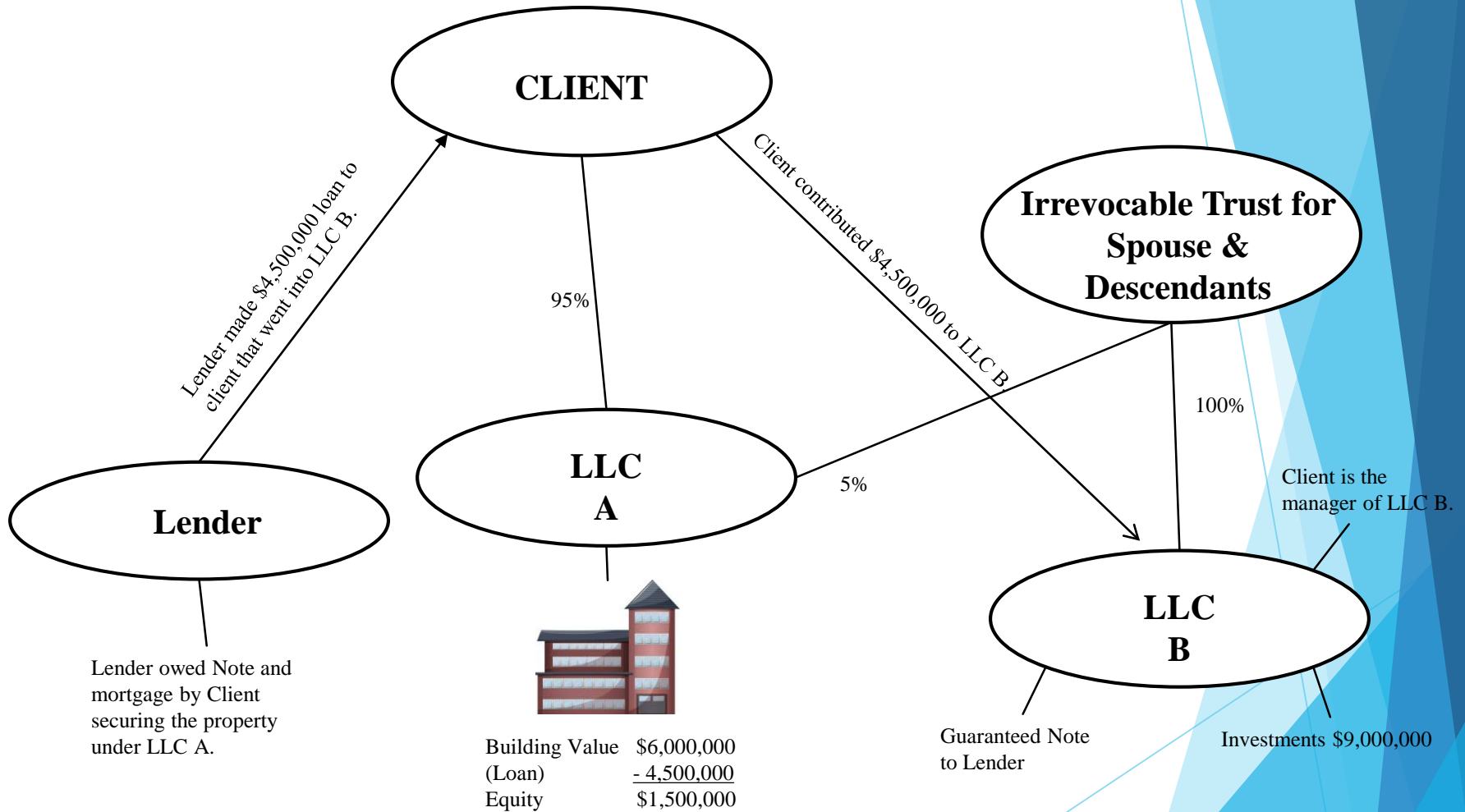
Lender is willing to loan \$4,500,000 on building.

Using LLCs and Trusts to Protect Otherwise Exposed Assets, Part 2

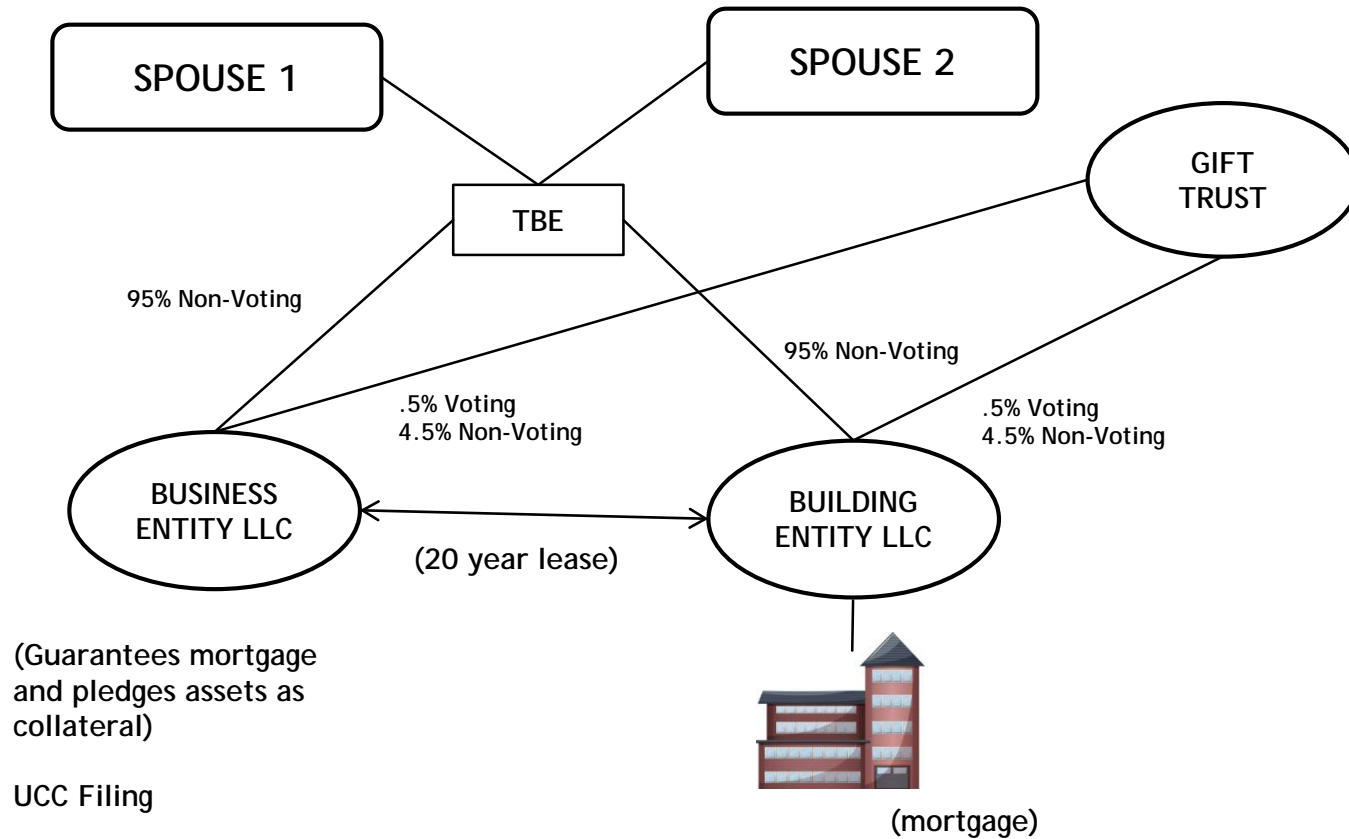
Debt Planning for the Solvent Family that Wants to Stay that Way



Using LLCs and Trusts to Protect Otherwise Exposed Assets, Part 3 (in 10 years)



COORDINATION OF BUILDINGS AND BUSINESSES for Charging Order and Other Protection



TBE and charging order protection, along with cross-collateralization to protect a married couple's business and investment assets, and reduce federal estate tax.

Friendly Judgments

Definition:

Court orders declaring amounts owed by reason of a trial or forfeiture; the judgment “attaches” to all real estate and certain other assets upon filing in the public records by the plaintiff. Once other creditors see a large judgment, they are typically reluctant to spend money to be in “second place.”

20 years is a long time!

When you owe money to multiple creditors – have a friend buy the position of the first creditor, and record the Judgment to be in front of the second creditor who does not yet have a judgment

Judgments

If a debtor with a reasonable income and \$200,000 of exposed assets has three separate creditors with potential judgments of \$800,000 each, a friend of the debtor can approach each creditor and offer to buy the judgment. The creditor willing to sell their rights to pursue a judgment for the least amount (perhaps \$125,000) can sell it to a company that the debtor invests in.

The company obtains the judgment, files it of public record against the debtor in the amount of \$800,000, and the debtor can pledge the debtor's assets as additional collateral for a work out that allows the debtor to pay \$50,000 a year for four years. Upon default, whatever is left of the \$800,000 becomes due and payable.

Are the other two creditors now going to pursue this debtor? Would there be anything for them to get if they do?

Charging Order Entities and Other Porcupines

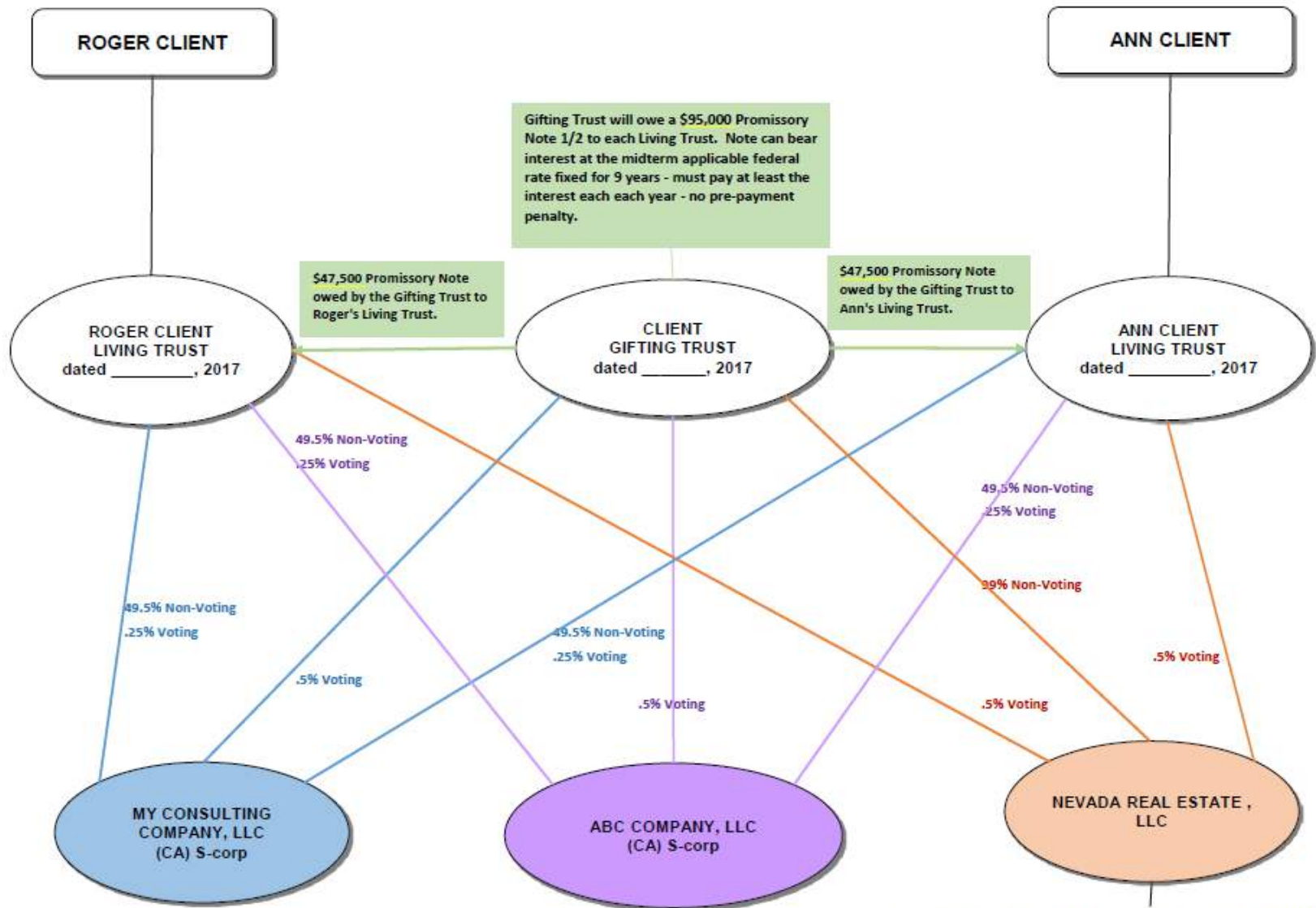
Use charging order protection by having multiple owner LLCs with segregated voting rights or limited partnership arrangements.

Also consider using voting and non-voting stock, in case charging order protection is not available.

Do not assume that charging order protection will work with out-of-state entities, if the debtor's state of residence does not recognize charging order protection.



CREDITORS MAY GET A CHARGE OUT OF THIS



Gifting Trust will owe a \$95,000 Promissory Note 1/2 to each Living Trust. Note can bear interest at the midterm applicable federal rate fixed for 9 years - must pay at least the interest each each year - no pre-payment penalty.

\$47,500 Promissory Note owed by the Gifting Trust to Roger's Living Trust.

\$47,500 Promissory Note owed by the Gifting Trust to Ann's Living Trust.

Real Estate, LLC will be purchasing 5 duplexes for \$1,040,000 that may be worth \$1,240,000 because of bargain purchase agreements.

Other Porcupines:

- ▶ Buy property with hazardous waste issues – no bank will want it!
- ▶ Other assets that a creditor does not want to touch
Get an orphanage involved...The story of an island on a river!

8 Common LLC Planning Errors

Limited Liability companies are quite often the entity of choice for investment and business holdings. Problems can arise, however, where structuring does not take important risks and federal and state law requirements into account. Some of the most common problems we encounter in reviewing LLC arrangements for clients are:

1.) Tenancy by the Entireties Designation that Will Not Qualify as TBE

Many married couples in states that protect tenancy by the entireties assets from the creditor of one spouse or the other have their LLC interests titled jointly as tenants by the entireties, but they don't realize that there are provisions in the operative documents which are inconsistent and would, thus, annul tenancy by the entireties characterization and protection. Common examples of this are:

(a) By the rules of tenancy by the entireties, the joint interest must pass outright solely by the surviving spouse in the event of the death of the surviving spouse. Oftentimes, an operational document will provide that, on the death of a member, the interest of that member must be sold. Agreements are commonly not drafted to explicitly provide that on the death of a spouse, the other spouse will be the owner of the joint interests, without any inconsistent member agreement provisions.

(b) Similarly, provisions under an operative document which restrict transfers may actually be read to prevent one spouse from owning the entire member interest on the death of another spouse.

(c) While the certificate of ownership may be issued to both spouses as tenants by the entireties, oftentimes, the Operating Agreements or Articles of Organization will provide for only one spouse or the other to be an owner.

8 Common LLC Planning Errors

2.) Entity Documents Can Disqualify S Election

Limited liability companies may be treated as S Corporations under the federal income tax law if certain very strict requirements are met and an S election is made. If the S election is made but the S Corporation requirements are not met, then the company will be taxed as a “C Corporation,” therefore exposing properties and income to double tax.

Common causes of this catastrophic treatment are as follows:

(a) An operating agreement does not provide for all income to be distributed pro rata to ownership. Commonly, “partnership style” clauses assure members that they will recapture their original investment or have some sort of an income sharing that would reflect a “second class of stock,” which is not permitted under the S Corporation Rules.

(b) Although state law permits a limited liability company to have non-citizens, corporations, and other entities own LLC interests, these and certain other entities are not permitted owners of S Corporation stock and will, thus, cause disqualification.

(c) Too high of a debt equity ration could cause disqualification from S Corporation status.

8 Common LLC Planning Errors

3.) Failure to Plan for Cash or Other Distributions/Failure to Use an Intermediary Entity

Oftentimes, a client will invest in a multiple member LLC, expecting to have charging order creditor protection, but not thinking through that positive cash flow that other members will want to assure is distributed will become accessible to a judgment creditor who has a charging order against the LLC. Many clients are well advised to establish a “Family Holding LLC” or a family limited partnership to hold the multiple member LLC interests so that positive cash flow would pass to the family LLC to be held and reinvested in a protected manner.

Clients who take ownerships in a multiple member LLC as tenants by the entireties may wish to do so under a limited liability company or limited partnership owned by the spouses and another family member in order to assure that upon the death of one spouse tenancy by the entireties status would continue, and positive cash flow from the multiple member LLC will, thus, be protected.

4.) Forced Sale Provisions

Often, well-drafted Operating Agreements will have provisions that would allow any member to force a sale of their member interests at any time or under certain circumstances, such as where another member is selling their interest (“tag along rights”). One advantage of a limited liability company under the laws of most states is that the sole remedy of a judgment creditor is a charging order – meaning that the credit cannot actually force the sale of the limited liability company interest, become a forced owner, or reach into the limited liability company. A bankruptcy or state court judge may override charging order protection where a debtor member would have the right to simply “cash out” at the time when the judgment creditor has a charging order against the debtor.

8 Common LLC Planning Errors

5.) We “Formed it Ourselves” or “My Accountant Took Care of This.”

While it is possible for any third grader to file a charter to establish the existence of an LLC with state authorities, in the author’s experience, the vast majority of LLCs that have been established by non-lawyer personnel have been implemented incorrectly. In most states, it’s the unauthorized practice of law for a non-lawyer to establish and implement a limited liability company for another party. Therefore, the types of non-legal firms that are willing to establish and implement limited liability companies tend to be unconcerned and ignorant, willfully or inadvertently, of the formalities, paperwork, and coordination needed to properly establish, document, implement, and operate a limited liability company. Clients who buy \$99 “Total Service Incorporation Kits” run the same risks. The slogan “Pay us now or pay us later” comes to mind, but along with that comes “Pay us later and watch your assets looted by creditors and/or the Internal Revenue Service.”

6.) Assuming that Limited Liability Companies are as Well Protected as Limited Partnerships in All States

Some states provide charging order protection for limited partnerships but not limited liability companies. Clients who have or will have children or other members residing in a state or jurisdiction that may not protect them may want to consider using limited partnerships or other entities in lieu of limited liability companies.

8 Common LLC Planning Errors

7.) Failure to Properly Respect Formalities and the Existence of the LLC

It is generally very difficult to “break the corporate veil,” but a debtor relying upon a limited liability company arrangement needs to be able to show that the company was the actual owner and operator of the property/business, that a charter was properly filed and maintained consistent with operational documents, accounting and tax treatment, and that the arrangement was not in reality a general partnership, a joint venture, or a proprietorship.

8.) Personal Activities May Not be Insulated by Use of an LLC

Some clients believe that they can carry on consulting, management, or related activities under the name of their LLC and not have potential personal liability.

Under general tort law, the officer of a company and the manager of an LLC will be responsible to third parties for personal negligence. Many clients are well advised to keep a low profile with respect to LLC activities and to hire third parties to handle management decision making and day-to-day activities.

Foreign Companies and LLCs

Foreign and Delaware Accounts –

**(May be immune from garnishment –
but will not be protected in bankruptcy
or if a U.S. court uses a contempt of
court order)**

Excerpt from Leimberg LISI Newsletter # 287, thanks to Steve Leimberg. Full copy available upon request.

The *Barber* of Seville Replaces No Time for *Sargeant* by Travis Arango and Alan Gassman

It is shocking that the difference between a Limited Liability Company's membership interest and stock in a corporation could cause such a different result. In *Sargeant v. Al-Saleh*, the stock in a foreign corporation could not be reached by the court while *Well Fargo Bank v. Barber* sent the creditor offshore to get a foreign court to allow seizure. In *Barber*, sole ownership of a Nevis LLC was considered to be like any other intangible personal property that a Florida judgment could be applied against.

Fans of *Gomer Pyle, U.S.M.C.* might remember Andy Griffith's movie *No Time for Sergeants*, where he starred as Private Will Stockdale. The *Sargeant* case caught the attention of a great many planners last year when the Fourth District Court of Appeal determined that stock held in a foreign country could only be seized by a creditor when permitted by a court sitting in that foreign country.

One would think that ownership in a limited liability company would be equivalent to owning stock in a foreign corporation, and that may be the case (not to be confused with a case of beer, which is what many planners are going to drink this weekend as they think about this case) because Judge Paul G. Byron, who sits at the United States District Court for the Middle District of Florida, determined that because an LLC membership interest is not "certificated," it is "intangible personal property" that attaches to the debtor.

In *No Time for Sergeants*, the character played by Andy Griffith could never get his arms around the situation. Wells Fargo (which has been around since 1852, long before anyone had heard of Andy Griffith,) thought they were going to get their arms around stock but failed. *The Barber of Seville* was an opera that was written by Gioachino Rossini and Cesare Sterbini and first performed in 1861 at the Teatro Argentina in Rome, Italy. When someone gets a cut out of Will Stockdale, it is a heir-cut as opposed to a judicial haircut, which is what Ms. Barber got from Wells Fargo, when she expected that her Nevis LLC interest would not be seizeable^[17] without getting a judgment in Nevis. Nevis does not recognize foreign judgments, let alone question the judgment of foreign countries.

The issue of this case will definitely be appealed by Ms. Barber or some subsequent debtor or creditor as this issue is litigated in the future.

Lawyers who have encouraged clients to use out-of-state and/or offshore limited partnerships, LLCs, or other entities need to realize that judges have the ability to apply Florida law in these situations under the Conflict of Law Rules, and that charging order protection will not be available for many Florida based situations where the debtor is the 100% owner of a foreign LLC, thus calling into question whether planners need to get back to clients and suggest additional members.

Another question is whether LLCs should be certificated (required to have stock certificates issued) and whether that would have changed the result for Ms. Barber, who will now have to trade her Rolls Royce in for a Cadillac Seville.

- ^[1]2015 WL 470589
- ^[2] *Id.*
- ^[3] *Barber*, 2015 WL 470589.
- ^[4] *Id.*
- ^[5] *Id.*
- ^[6] *Id.*
- ^[7] 137 So.3d432 (Fla. Dist. Ct. App.2014).
- ^[8] *Id.* At 433.
- ^[9] *Barber*, 2015 WL 470589.
- ^[10] *Id.*
- ^[11] *Barber*, 2015 WL 470589.
- ^[12] *Barber*, 2015 WL 470589.
- ^[13] *Id.*
- ^[14] *Id.*
- ^[15] *Id.*
- ^[16] *Id.*
- ^[17] “Seizeable” is not a word, but what the heck?

Life Insurance and Annuity Contracts

A Logical Guide to Selecting Buy/Sell Agreement Arrangements-Traditional Choices are Not Always the Best

By Alan S. Gassman, J.D., LL.M.

A. Entity Redemption Arrangements. The company owns the life insurance policy and is the beneficiary thereof. Upon receipt of the life insurance proceeds, the company is to use such proceeds to buy out the deceased owner.

Will there be enough money to (A) buy out the deceased owner and (B) have the deceased owner released from any and all guarantees and obligations associated with the business?

1. If it is not practical to have the deceased owner released for contractual or other reasons, should the part of the life insurance proceeds that would otherwise be kept by the company as key man insurance be escrowed pending satisfaction of all releases that the deceased owner may have responsibility for.
2. How can the deceased owner's family be sure that the monies received from the life insurance policy will actually be used to satisfy contractual buy-out agreements?
3. What if the company claims that for some reason the agreement is not enforceable or that there are claims against the deceased owner that offset what would be paid to him or her.
4. What if the company has a major creditor claim against it (what if the deceased owner died in a car accident that he or she caused while driving a company vehicle and the company is now being sued by others who died in the accident?)
5. What if the company goes into bankruptcy and the family of the deceased owner becomes just another creditor in a bankruptcy proceeding?
6. For income tax purposes the remaining shareholders do not get a stepped up basis for the stock purchased.. The stock simply becomes treasury stock.

A Logical Guide to Selecting Buy/Sell Agreement Arrangements-Traditional Choices are Not Always the Best

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B. To avoid the above potential problems consider a cross-purchase agreement?

Each owner may own the policy or policies on the other owners. Thus the policy proceeds should be protected from creditors of the company.

Also, each purchasing shareholder will get a tax basis in the purchased stock equal to the purchase price thereof.

1. However, policy proceeds will not be protected from creditors of the surviving owner who would receive policy proceeds.
2. Also, contractual disputes could result in the surviving owner using the funds for other purposes while litigating over the obligation to pay and becoming insolvent.
3. Further if there are more than 2 shareholders, then on the death of one the policies owned on the others would need to be transferred to rebalance between them, thus causing issues under the transfer for value rules. For example, if there are 4 equal shareholders there have to be 4 policies each owned 1/3rd each by each 3 shareholders on the fourth, and if one leaves the company the remaining 3 policies have to be readjusted as to ownership.

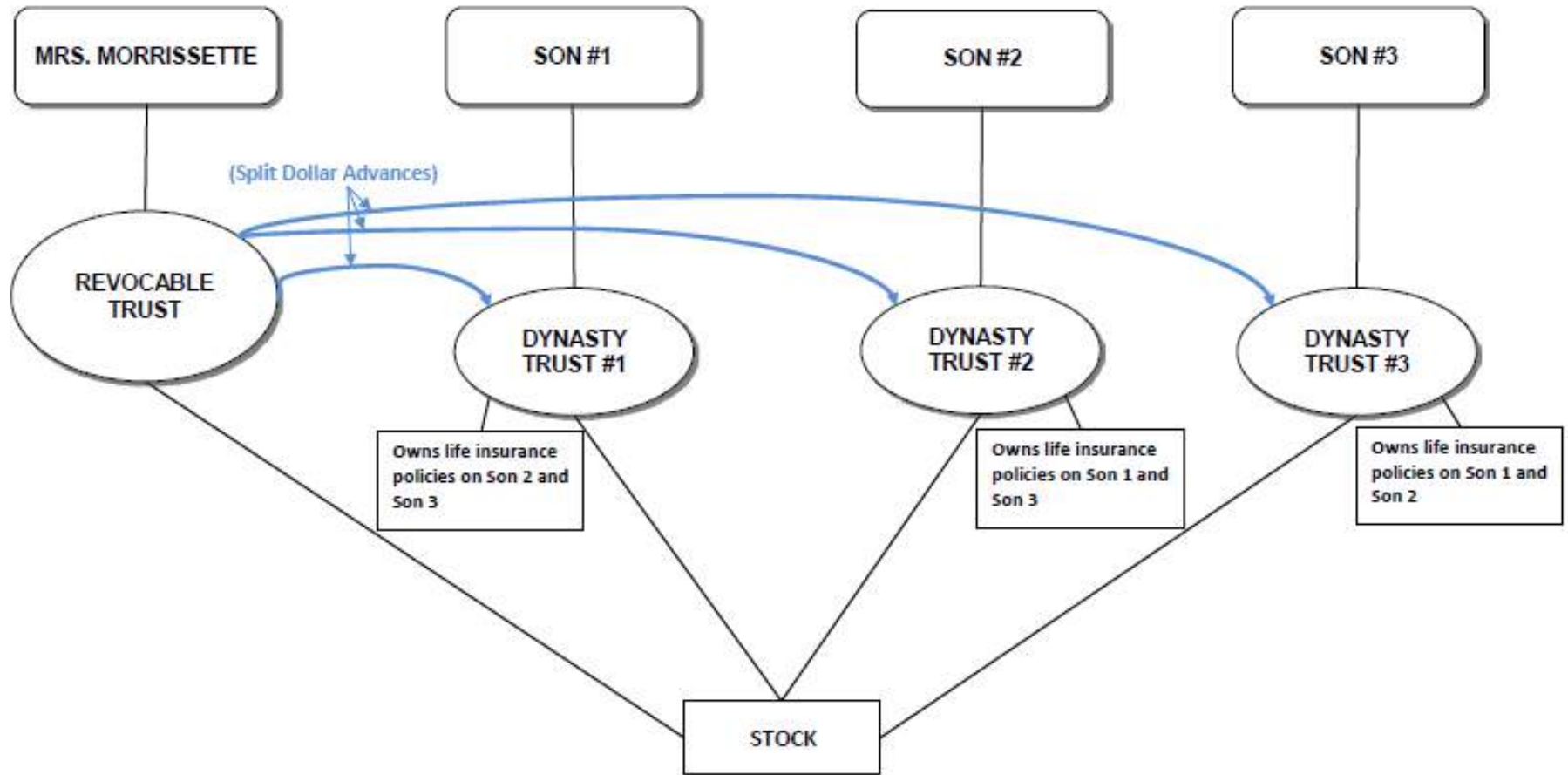
A Logical Guide to Selecting Buy/Sell Agreement Arrangements-Traditional Choices are Not Always the Best

By Alan S. Gassman, J.D., LL.M.

C. Hybrids of the Above:

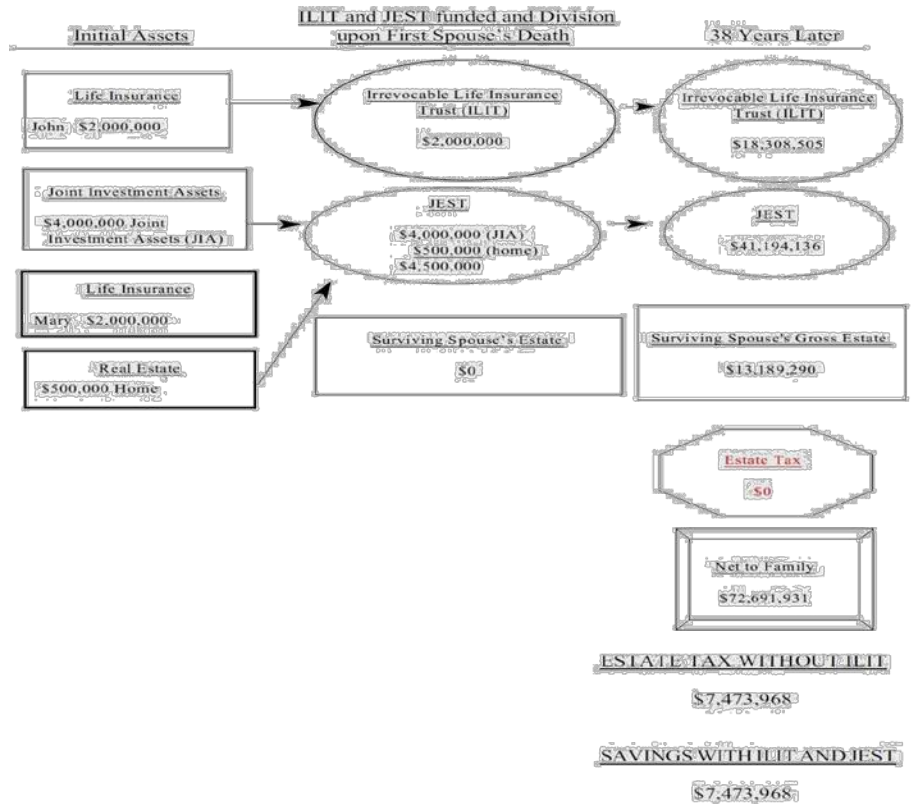
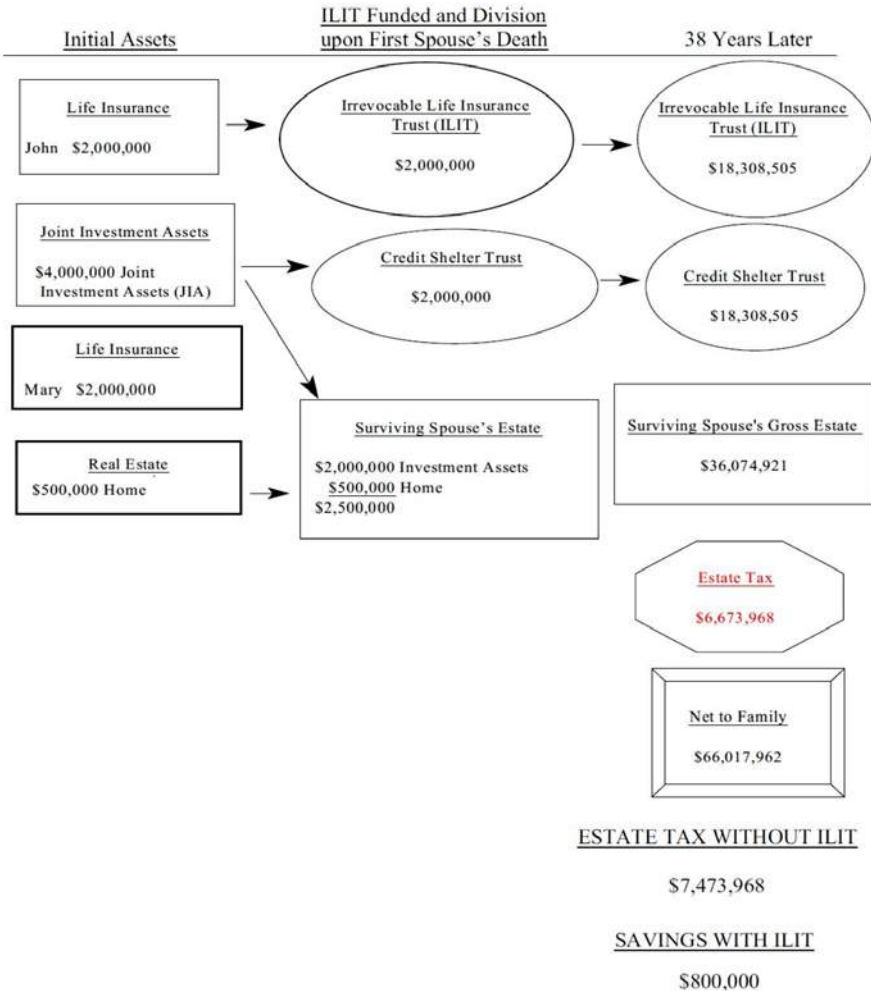
1. Consider a Trusteed Corporate or Cross-Purchase Agreement. Under these arrangements the owner and beneficiary of the policy can be a trust company, a law firm, or another trusted institution as trustee for the benefit of the company in a Trusteed Redemption arrangement, or for the benefit of the other shareholder or shareholders in a Trusteed Cross Purchase arrangement. . The trust agreement can require that the policy proceeds be held safely until sale and used solely for redemption or cross-purchase purposes.
2. This at least assures the surviving family that the life insurance proceeds will not be absconded with.
3. Generally for tax purposes the policy needs to be considered as owned and payable to the company in a redemption arrangement or the surviving owner or owners in a cross-purchase agreement. Could a state court or a bankruptcy court override the trust agreement where there are creditors of the entity in a redemption arrangement or creditors of the remaining shareholders in a cross-purchase arrangement?
4. There would be a purchase price tax basis for the other shareholders if the Trustee appropriately characterized as an agent for the other shareholders.

MORRISSETTE V. COMMISSIONER - PAGE 48

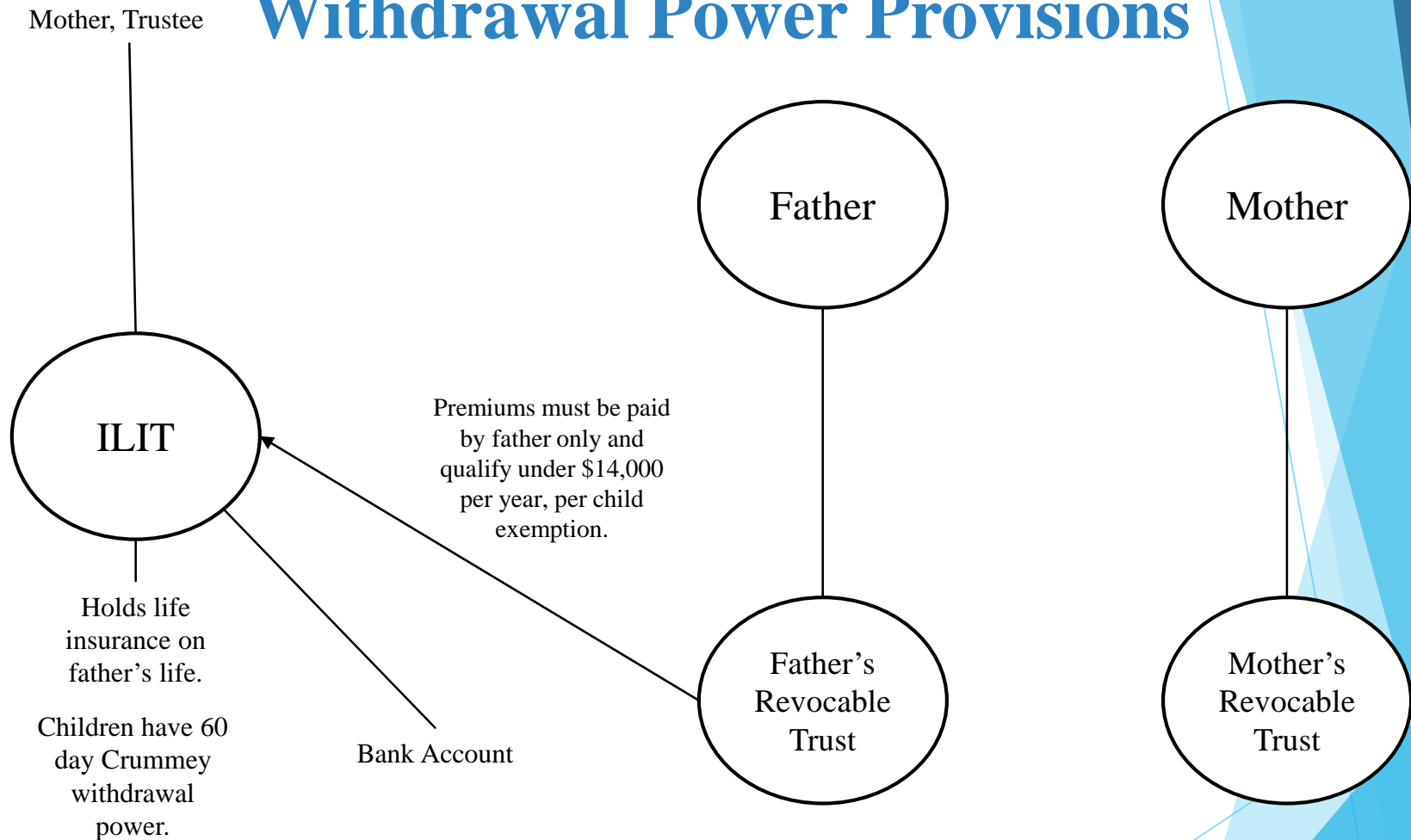


On death of Son #1, life insurance proceeds received from Dynasty Trust 2 and Dynasty Trust 3 are used to buy Son #1's stock and Dynasty Trust 1 stock.

The \$800,000 Mistake

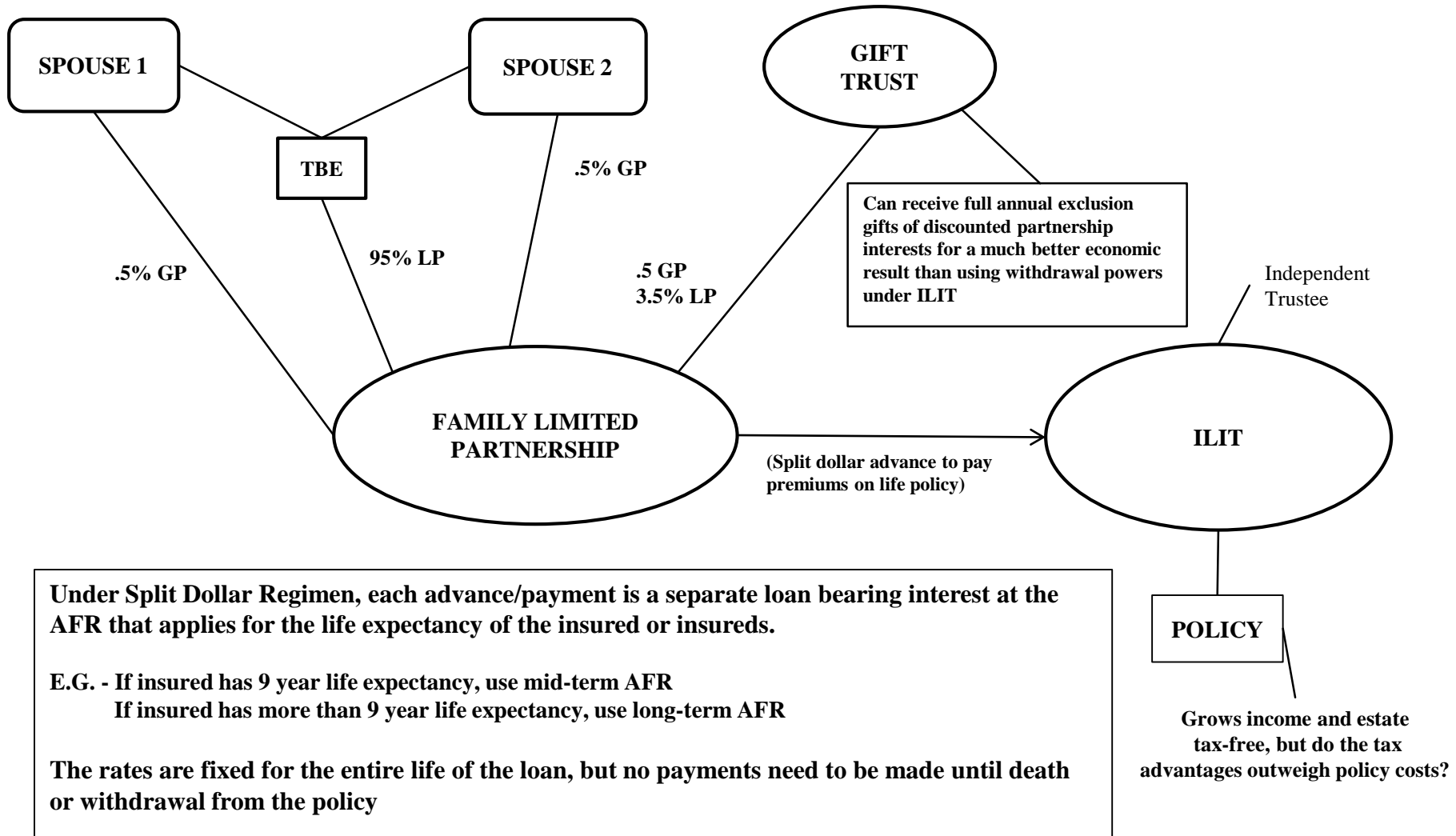


Where Premiums Can Be Paid Via Withdrawal Power Provisions



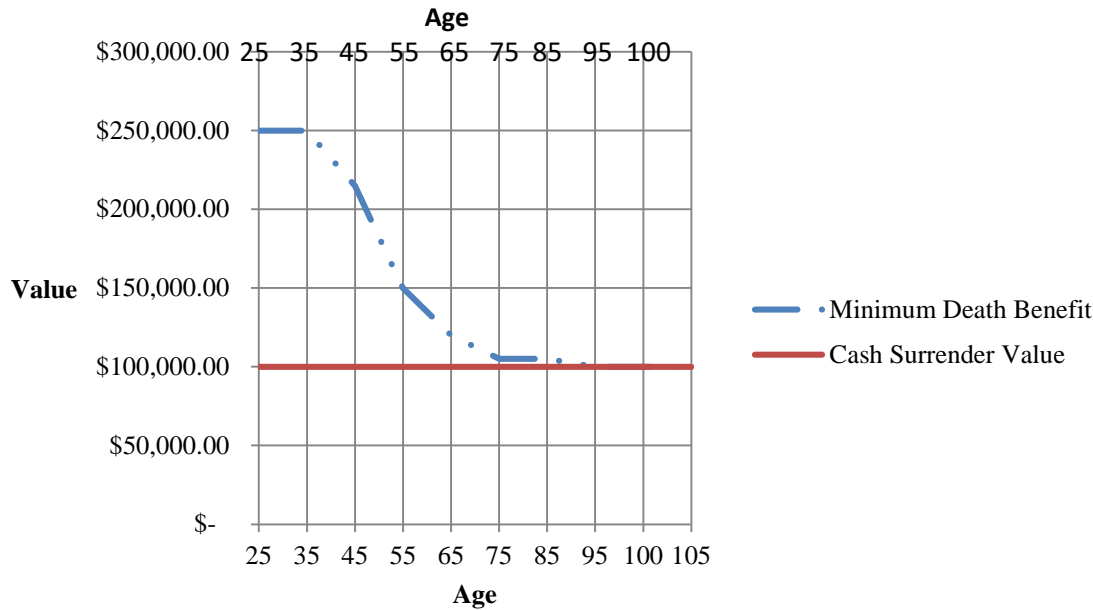
Split Dollar Loan Regimen

**Ability to loan money at fixed applicable federal rate, in effect as of the day of each premium made
- no interest or principal payments required until policy matures or is borrowed upon or cashed in.**



Tax Talk

Minimum Corridor Test Illustration \$100,000 Cash Surrender Value Minimum Death Benefit



Insured's Age	Percentage
40 or less	250%
45	215%
50	185%
55	150%
60	130%
65	120%
70	115%
75	105%
80	105%
85	105%
90	105%
95 or more	100%

Determining Basis (“Investment in the Contract”) for Life Insurance Policies

- Investment in the contract or basis is:
 - > (1) the aggregate amount of premiums or other consideration paid for the contract LESS
 - > (2) the aggregate amount received or credited under the contract that is excludable from gross income
- Payments not included in calculating the amount paid for the contract:
 - > Premium payments for (1) disability income, (2) double indemnity provisions, and (3) disability waiver provisions.
 - > Interest payments on policy loans
- What else reduces basis?
 - > Policy Dividends received in cash
 - > Dividends used to purchase policy riders not integral to the insurance policy (e.g. disability income, disability waiver provisions, accidental death insurance, term insurance riders)
 - > **Dividends used to pay policy premiums**
 - > **Dividends used to pay interest on policy loans**
 - > **The Tax Cuts and Jobs Act reversed the IRS’s position in Revenue Ruling 2009-13 and provides that basis is not reduced by “cost of insurance” charges incurred under the contract. .**

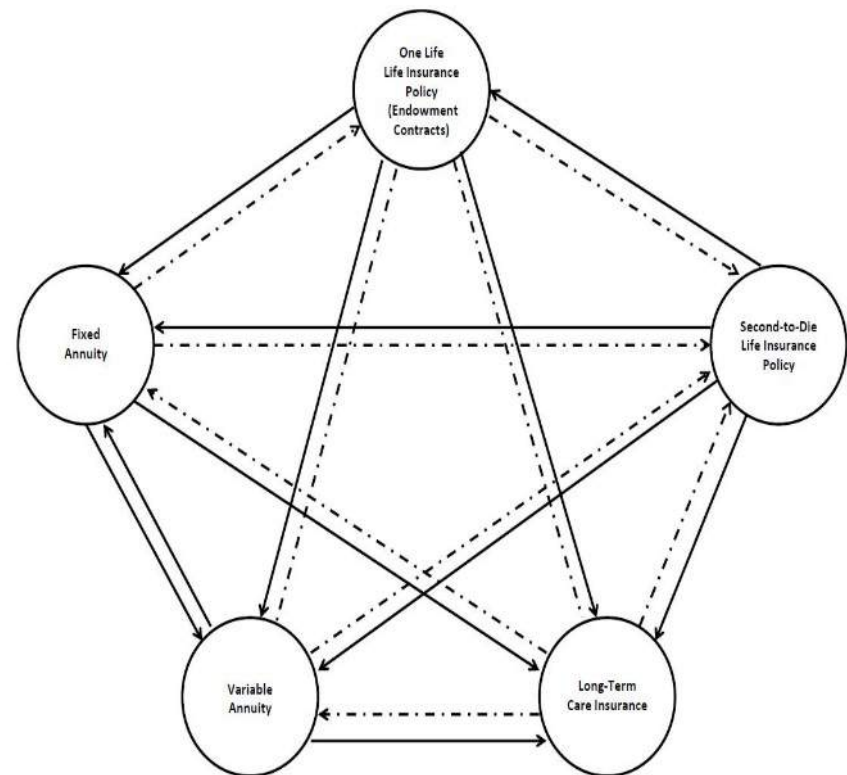
1035 Exchanges

The chart pictured provides a graphic representation of which financial products can be exchanged on a tax-free or tax-deferred basis under Section 1035. As indicated by the chart, Section 1035 allows for a life insurance contract to be exchanged into any of the other listed contracts (i.e. other life insurance policies, endowment contracts, annuity contracts, or long-term care insurance contracts). However, a life insurance policy on one life cannot be exchanged for a life insurance policy that pays on the death of the survivor of two individuals (a second-to-die life insurance policy). Furthermore, endowment contracts may only be exchanged for other endowment contracts, annuities, or long-term care insurance contracts. Long-term care contracts are the most restricted, in that they can only be exchanged for other long-term care contracts. Some variable annuity products provide that minimum annual payments may be doubled if the annuitant would qualify for long-term care benefits. These annuities presumably can be exchanged for other annuities under Section 1035, and the benefit is very limited if all payments under the contract reduce the actual cash value of the contract.

The straight lines in the chart indicate that tax-free exchange treatment under Section 1035 is permitted, while the dotted lines indicate that tax-free exchanges are not available under Section 1035.

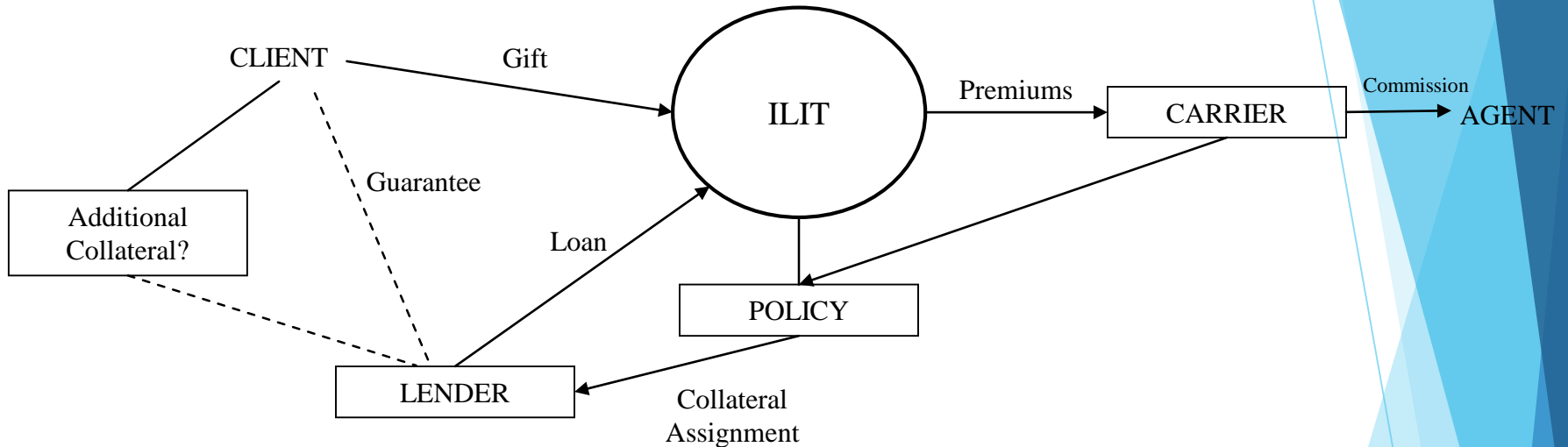
Treasury Regulation 1.1035-1 provides that Section 1035 will not apply in situations where the contract or policies that are exchanged do not involve the same insured or obligee. However, Section 1035 allows for the exchange of multiple contracts, meaning that two life insurance policies may be exchanged for one annuity contract, or one annuity contract may be exchanged for two annuity contracts.

Finally, the IRS released Rev. Proc. 2011-38, which provided that, so long as withdrawals are not received from either contract for 180 days following a partial exchange, then the partial exchange will qualify as a tax free 1035 exchange. It reduced the 12-month period that was espoused by the IRS in Rev. Proc. 2008-24 to 180 days, and eliminated the requirement that an exception under Section 72(q)(2) must be met to obtain Section 1035 tax-free treatment. The Rev. Proc. established that a partial exchange of annuity contracts will be tax-free under Section 1035 or “the Service will apply general tax principles to determine the substance of the transfer and, therefore, its tax treatment.” Further, the original contract and the new contract are not aggregated after the 180 day period, notwithstanding whether they are issued by the same carrier.



	Term Life	Whole Life	Universal Life	Variable Universal Life	Guaranteed Universal Life	Equity Index Life Distinguishing Feature
Distinguishing Feature	Provides protection for a specific period	Lifetime protection for as long as premiums are paid	Guaranteed minimum interest rate on investments accumulated in the accounts – interest rates are based on bonds only and can be higher than the minimum guaranteed	Combines premium and death benefit flexibility of universal life with investment choice of variable life	Death benefit is guaranteed if specified premiums are made timely for a given period of years	No loss of cash value in negative stock market years – rate of return will be a portion of index performance
Premium	Fixed, but will increase at each renewal	Fixed	Flexible since they are set by the policyholder	Flexible, like universal life	Fixed	Flexible, like universal life
Cash Value	None	Guaranteed	Account value minus the surrender charges	Not guaranteed; depends on performance of stocks	Can generate significant cash value (albeit at a higher premium)	See above
Death Benefit	Face amount of policy if death occurs within the term	Face amount of policy if in force when death occurs	<u>Option A:</u> maintain level death benefit <u>Option B:</u> face amount increases as cash value grows <u>Option C:</u> death benefit increases to facilitate a return of all premiums on death	Same options as universal life	Guaranteed if premiums paid timely; accelerated death benefit rider for chronic and terminal illness	Same options as universal life
Can Borrow Against Cash Value	N/A	Yes	Yes	50%; Subject to Regulation U	May lose “no-lapse” guarantee	Depends upon policy
Cash Value at Risk if Carrier Fails	N/A	Yes	Yes	No	Yes	Yes
Can be Sold without Series 6 License	Yes	Maybe	Yes	No	Yes	Yes
Life Settlement	Yes	Maybe	Yes	Maybe	Yes	Yes
Regulated By	State	State	State	FINRA and State	State	State

Premium Financing as Simple as it Looks



The policy may be cashed in with amounts of value exceeding the loan owned by the ILIT or will pay loan and provide remaining death benefit to ILIT on death of client.

Confer with a Good Actuary

- ▶ Quite often clients are underserved with respect to retirement planning. This is often the result of product or general brokerage houses and banks that sponsor simple retirement plans without extensively trained planned design and maintenance personnel.
- ▶ One example is the possible use of a 401(k) plan that uses the 3% safe harbor. Such a plan can be set up so that the 3% contribution is not required. The client can decide before the end of each year whether the safe harbor contribution will be made for the year, and must give notice to all participants by the end of November stating whether or not the 3% contribution will be made. This is often known as the “flexible safe harbor” or “maybe safe harbor” or “wait and see safe harbor plan.” Many physician groups should be checking with their pension advisors to see if their plan has the flexible safe harbor feature. A plan with a required safe harbor match cannot be managed on a flexible basis.
- ▶ Appropriate pension planning can also include cross-testing and defined benefit planning.

Employee Census

Name of Employer:

Provide complete information for all employees employed during the year, even if they have terminated.

<u>Employee Name</u>	<u>Date of Birth</u>	<u>Date of Hire</u>	<u>Date of Termination</u>	<u>Annualized W-2 Compensation</u>	<u>Hours per Week</u>	<u>Ownership %</u>

Optimize Qualified Plan Contributions

(courtesy of Jim Feutz, Suncoast Pension & Benefits Group, Inc.)

- ▶ On the following page, we have an example of an allocation of benefits as between a physician, his spouse who is the office manager for the practice, and 4 employees, using a flexible 401(k) plan.
- ▶ This client had been told that “all that they could do economically” was a SIMPLE IRA Plan because the client has four other full time employees.
- ▶ As shown on the following page, the physician and his wife would benefit from 89% of the plan contributions, with the four other employees sharing 11%, part of which is subject to vesting requirements of 20% per year over 5 years. Most physician groups would not be aware of this type of opportunity.

Optimize Qualified Plan Contributions

(courtesy of Jim Feutz, Suncoast Pension & Benefits Group, Inc.)

Flexible 401(k) Plan for Charles Allen, M.D., P.A.

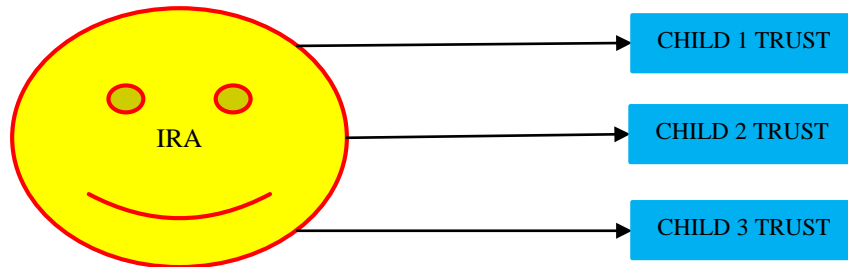
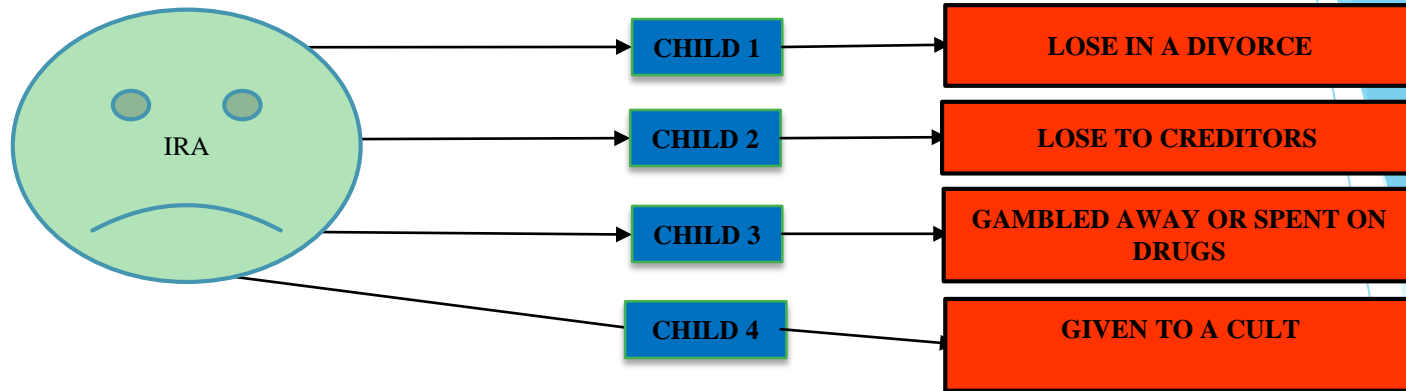
Name	Position	Earnings	Age	Employee Deferrals	Profit Sharing	Total to Employee	Employer Cost	% of Total
Charles Allen	Owner	250,000	46	17,000	33,000	50,000	50,000	62.7
Ann Allen	Mgr	82,000	46	17,000	4,100	21,100	21,100	26.5
Sub-Total		332,000		34,000	37,100	71,100	71,100	89.2
Jan Brown	Staff	76,267	47	763	3,813	4,576	3,813	4.8
Mindy Garcia	Staff	24,980	43	250	1,249	1,499	1,249	1.6
Alice Jenkins	Staff	39,503	29	395	1,975	2,370	1,975	2.5
Sue Mayfair	Staff	18,960	40	190	1,555	1,745	1,555	1.9
Sub-Total		159,710		1,598	8,592	10,190	8,592	10.8
Total		491,710		35,598	45,692	81,290	79,692	100.0

Three Choices for Retirement Plan Benefits

May be Best to Have This Spread Among Two of the Choices – Client Age 75, Oldest Child Age 50

<u>CHOICE #1</u>	<u>CHOICE #2</u>	<u>CHOICE #3</u>
<p><u>Mrs. Client as Beneficiary Advantages:</u></p> <p>1) Ability to roll over Dr. Client’s retirement plan accounts income tax-free into her own retirement plan account and to take required minimum distributions based upon her life expectancy, recalculated annually, based upon the below percentages of the retirement plan account for the next ten years.</p> <p>The above referenced distribution percentages are less than what would occur if the retirement plan account was payable to Dr. Client’s Revocable Trust.</p> <p>2) Mrs. Client has the ability to direct the disposition of the retirement plan funds upon her death, and after Mrs. Client’s death, the required minimum distributions from the retirement plan funds would be based upon the life expectancies of her chosen beneficiaries. The retirement plan funds would be protected from the creditors of these beneficiaries if the funds are paid to trusts for the benefit of such beneficiaries after Mrs. Client’s death.</p> <p><u>Disadvantages:</u></p> <p>1) The future value of the retirement plan would be includable in Mrs. Client’s estate for federal estate tax purposes upon her death.</p> <p>2) The above referenced distribution percentages are greater than what would occur if the retirement plan accounts were disclaimed so that they are payable to the Clients Irrevocable Trust.</p>	<p><u>Restated and Amended Trust Agreement of Deceased Client’s Revocable Trust Advantages:</u></p> <p>1) The retirement plan accounts can benefit Mrs. Client without being subject to federal estate tax in her estate.</p> <p>2) Mrs. Client cannot access the retirement plan accounts above the annual required minimum distribution without the consent of the other Co-Trustees, which protects Mrs. Client from any undue influence.</p> <p>3) The retirement plan benefits would be protected from the creditors of Mrs. Client’s children after her death, except to the extent of any distributions actually made from the Trust to the children.</p> <p><u>Disadvantages:</u></p> <p>1) Annual required minimum distributions would be based upon Mrs. Client’s life expectancy and a special distribution table that is not recalculated annually, which would be as described below for the next ten years.</p> <p>The below referenced distribution percentages are greater than what would occur if either of the two other alternatives were chosen. Thus, by using Mrs. Client’s life expectancy to determine the annual required minimum distributions, the retirement plan benefit distributions cannot be “stretched” out over life expectancies of Mrs. Client’s children after her death.</p> <p>2) Mrs. Client will have to forfeit her ability to direct the disposition of the retirement plan funds after her death. The retirement plan funds will instead pass in separate trusts for the benefit of Mrs. Client’s children upon her death.</p>	<p><u>Irrevocable Trust for Children Only Advantages:</u></p> <p>1) The value of the retirement plan accounts would not be includable in Mrs. Client’s estate for federal estate tax purposes upon her death.</p> <p>2) Annual required minimum distributions of retirement plan benefits would be based upon the life expectancy of the oldest of Mrs. Client’s children and a special distribution table that is not recalculated annually, which would be as described below for the next ten years.</p> <p>The above referenced distribution percentages are optimal from an income tax planning standpoint, as they are more favorable than the other alternatives because they result in the lowest annual required minimum distributions.</p> <p>3) The retirement plan benefits would be protected from the creditors of Mrs. Client’s children after her death, except to the extent of any distributions actually made from the Trust to the children.</p> <p><u>Disadvantages:</u></p> <p>1) Mrs. Client cannot benefit from the retirement plan accounts.</p> <p>2) Mrs. Client cannot control the disposition of the retirement plan funds upon her death. The retirement plan funds will continue to be held pursuant to the terms of the Trust.</p>
<p>2014: 4.5455%</p> <p>2015: 4.7170%</p> <p>2016: 4.9261%</p> <p>2017: 5.1282%</p> <p>2018: 5.3476%</p> <p>2019: 5.5866%</p> <p>2020: 5.8480%</p> <p>2021: 6.1350%</p> <p>2022: 6.4516%</p>	<p>2014: 8.0645%</p> <p>2015: 8.7719%</p> <p>2016: 9.6154%</p> <p>2017: 10.6383%</p> <p>2018: 11.9048%</p> <p>2019: 13.5135%</p> <p>2020: 15.6250%</p> <p>2021: 18.5185%</p> <p>2022: 22.7273%</p>	<p>2014: 3.0120%</p> <p>2015: 3.1056%</p> <p>2016: 3.2051%</p> <p>2017: 3.3113%</p> <p>2018: 3.4247%</p> <p>2019: 3.5461%</p> <p>2020: 3.6765%</p> <p>2021: 3.8168%</p> <p>2022: 3.9683%</p>

The Mathematics of Pension and IRA Minimum Distribution Rules



If the trusts for the children are Conduit or Accumulation Trusts, then payments will come out over the life expectancy of each child.

What Else Can You Have On Your Creditor Protected Florida Homestead Besides Your Home?

▶ Outside City Limits:

- ▶ Property located outside of the city limits can qualify for homestead exemption even where the property (up to 160 acres) for residency of the debtor is used for substantial and independent business activities. This was confirmed in the case of *Davis v. Davis*, 864 So.2d 458 (Fla. 1st Dist. App. 2003), where the homestead property included the home and an independently operated mobile home park.
- ▶ In *In re Earnest*, the Middle District of Florida held that 4.82 acres in unincorporated Marion County was exempt homestead property. There was a warehouse that the debtors used in their business on the property, and a building rented to a third party.
- ▶ In *In re Oulette*, 2009, WL 1936896 (Bankr. M.D. Fla. 2009), the Middle District of Florida held that property located outside a municipality with two mobile home located on it was exempt homestead property even though the debtors rented to second mobile home to a third party. But not all cases have had this result.

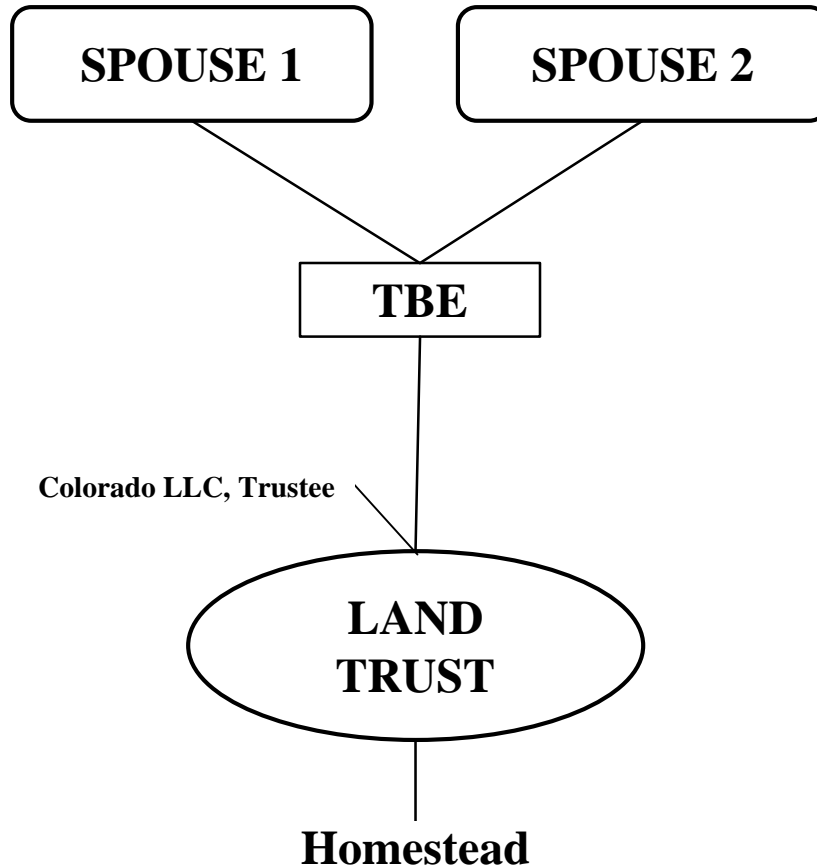
▶ Inside City Limits:

- ▶ The law is not as flexible for debtors with dual purpose homestead properties that are within city limits, and can be very fact specific.
- ▶ A 2007 Bankruptcy Court opinion issued by Judge Isicoff found that while the constitution protects homestead, it limits the protection to the “residence of the owner or his family” and this protection would only apply to structures in which a member of the family resides.

Buying The House Or Condo Next Door?

- ▶ An adjoining vacant lot may not be considered homestead where it has not been used or considered by logistics and fencing, etc., to be part of the homestead estate. This was the result in *In re: Estate of Ritter*, 407, So. 2d 386 (Fla. Dist. Ct. App. 3d Dist. 1981) where the property in question was never jointly fenced with the residents and was merely a separate, empty lot which served, at best, as an excess side yard to the residence.
- ▶ When clients buy adjoining homes, they will be well-advised to make sure that there are no fences between the homes and to build pathways, integrated use, and coordinated appearance from the road and otherwise to promote the concept that the two separate houses are a single homestead. The second house may be referred to as a storage/exercise/guest house.

Homestead



Homestead Planning



**Driveway
Easement**



**Creditors Lost In
Mountains**



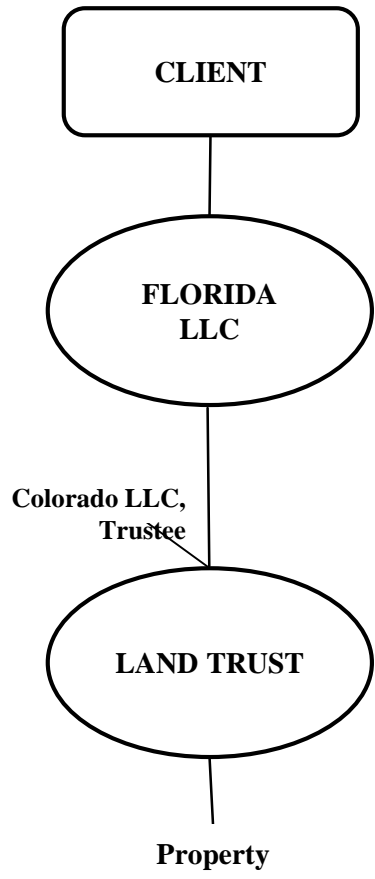
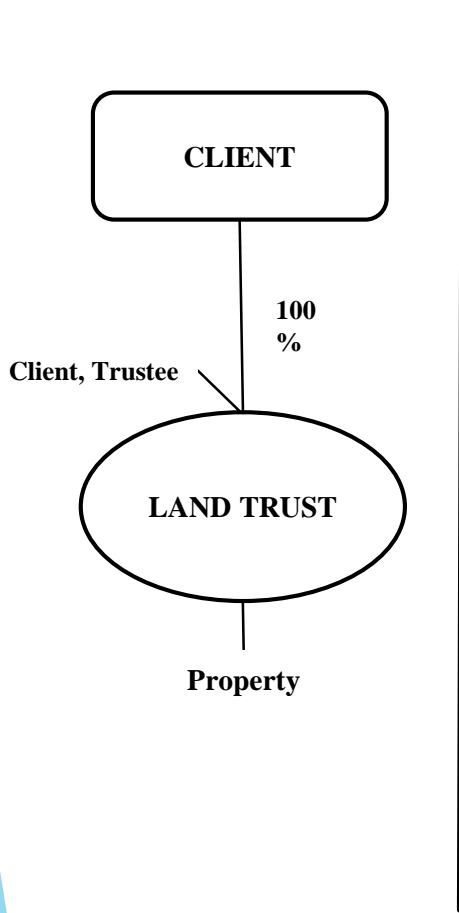
Excess Property



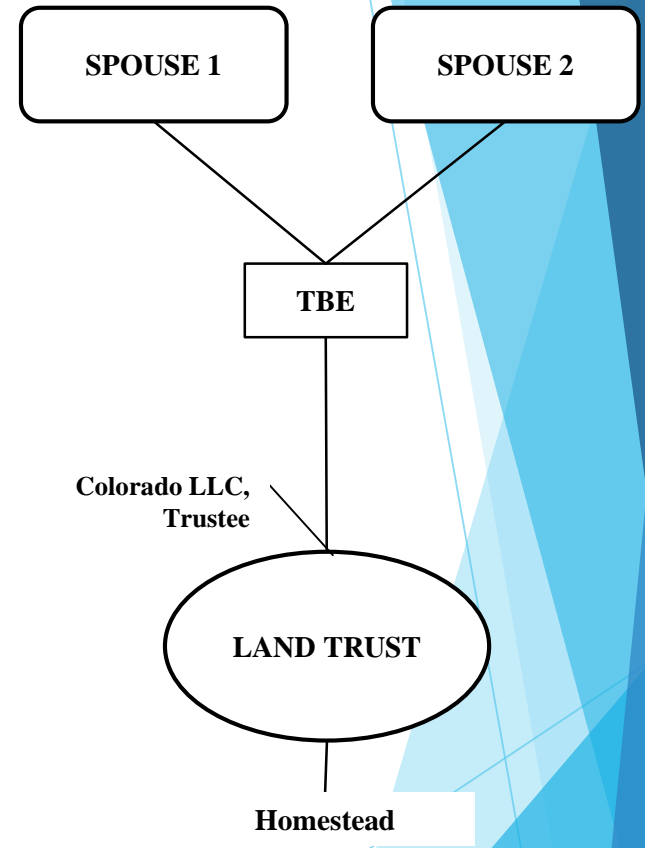
1/2 Acre Waterfront Home



LAND TRUSTS



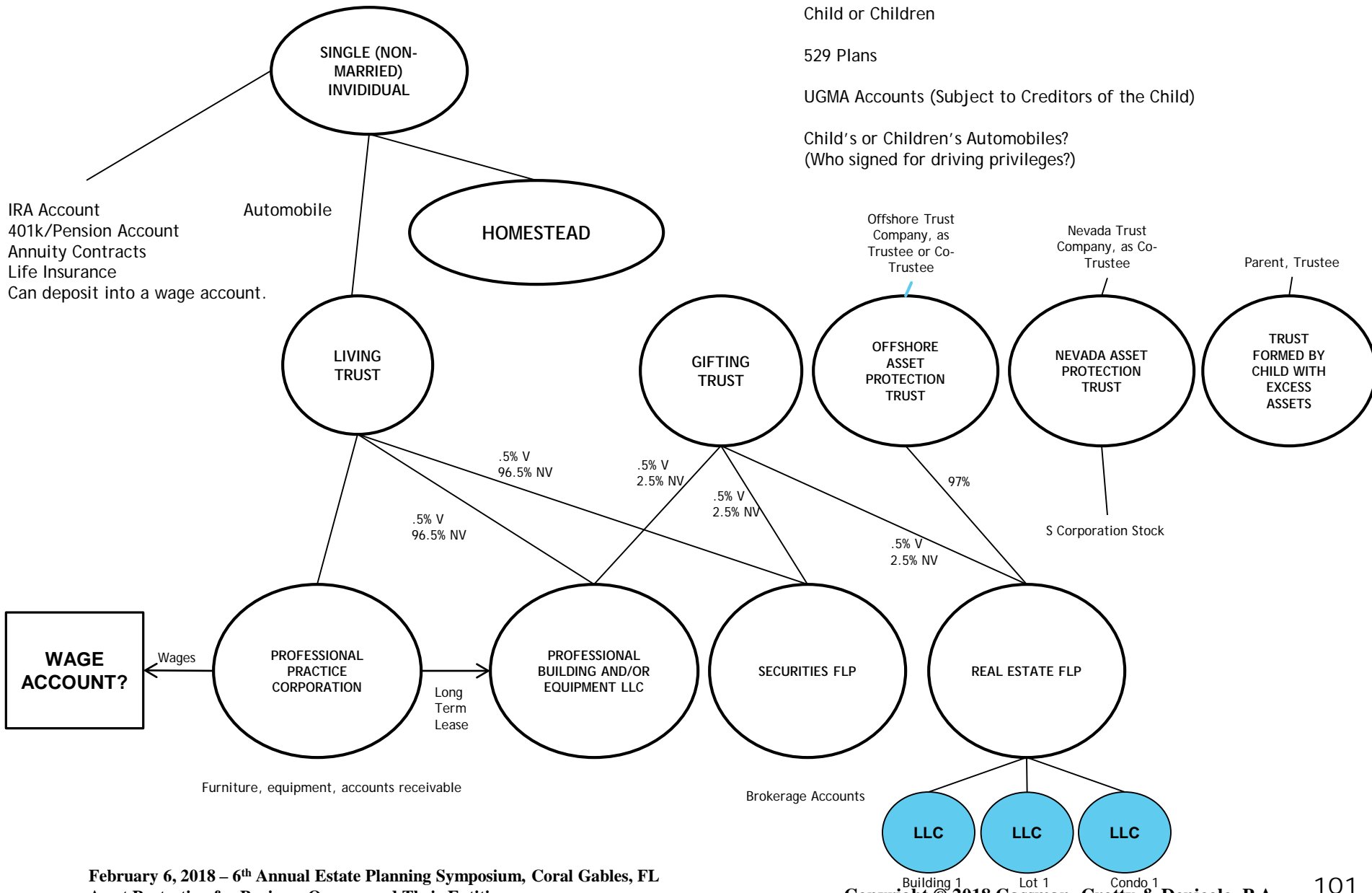
HOMESTEAD



Florida Laws – The Most Generous In The United States

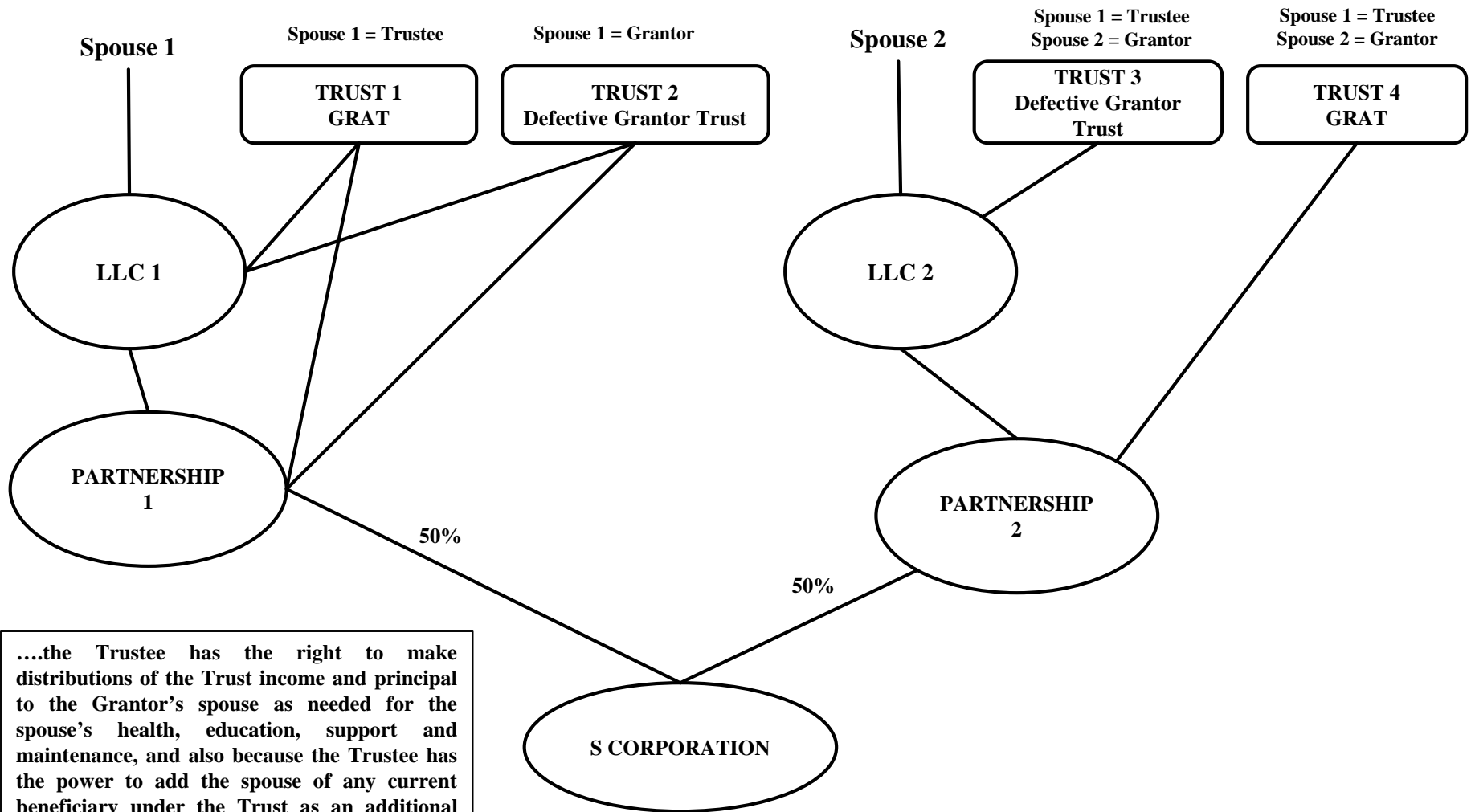
CREDITOR EXEMPT ASSETS	ASSETS THAT ARE DIFFICULT FOR A CREDITOR TO OBTAIN	ASSETS EXPOSED TO CREDITORS
Homestead <i>-Up to half acre if within city limits. -May be immune from fraudulent transfer statute.</i>	Limited partnership and similar entity interests.	Individual money and brokerage accounts.
IRA <i>-Includes ROTH, Rollover, and Voluntary IRAs, but possibly not inherited IRAs.</i>	Foreign trusts and companies.	Joint assets where both spouses owe money.
Permanent Life Insurance <i>-Must be owned by insured.</i>	Note – foreign entities are very rarely recommended and must be reported to IRS -	Personal physical assets, including car, except for \$4,000 exemption (\$1,000 if homestead exemption is claimed in bankruptcy).
401(k) <i>-Maximize these!</i>	Foreign bank accounts.	One-half of any joint assets not TBE where one spouse owes money.
Tenancy by the Entireties (joint where only one spouse is obligated) <i>- Must be properly and specially titled – joint with right of survivorship may not qualify.</i>	<p><u>Vocabulary:</u> EXEMPT ASSET – An asset that a creditor cannot reach by reason of Florida law – protects Florida residents. CHARGING ORDER PROTECTION – The creditor of a partner in a limited partnership, limited liability limited partnership, or properly drafted LLC can only receive distributions as and when they would be paid to the partner. FRAUDULENT TRANSFER - Defined as a transfer made for the purpose of avoiding a creditor. Florida has a 4 year reach back statute on fraudulent transfers. A fraudulent transfer into the homestead may not be set aside unless the debtor is in bankruptcy. It takes 3 creditors of a debtor who has 12 or more creditors to force a bankruptcy. Upon filing a Chapter 7 Bankruptcy, an individual debtor may be able to cancel all debts owed and keep exempt assets, subject to certain exemptions. Annuities and life insurance policies are not always good investments, and can be subject to sales charges and administrative fees. There is a lot more to know- but this chart may be a good first step.</p>	
529 College Savings Plans		
Annuity Contracts		
Wages of Head-of-Household		
Wage Accounts (for 6 months)		
Up to \$4,000 of personal assets – or possibly less in bankruptcy.		

ESTATE AND ASSET PROTECTION PLANNING FOR THE SINGLE PROFESSIONAL



Defective Grantor Trusts & Disregarded Entities Illustrated

Flowchart Summarizing Private Letter Ruling 200439028

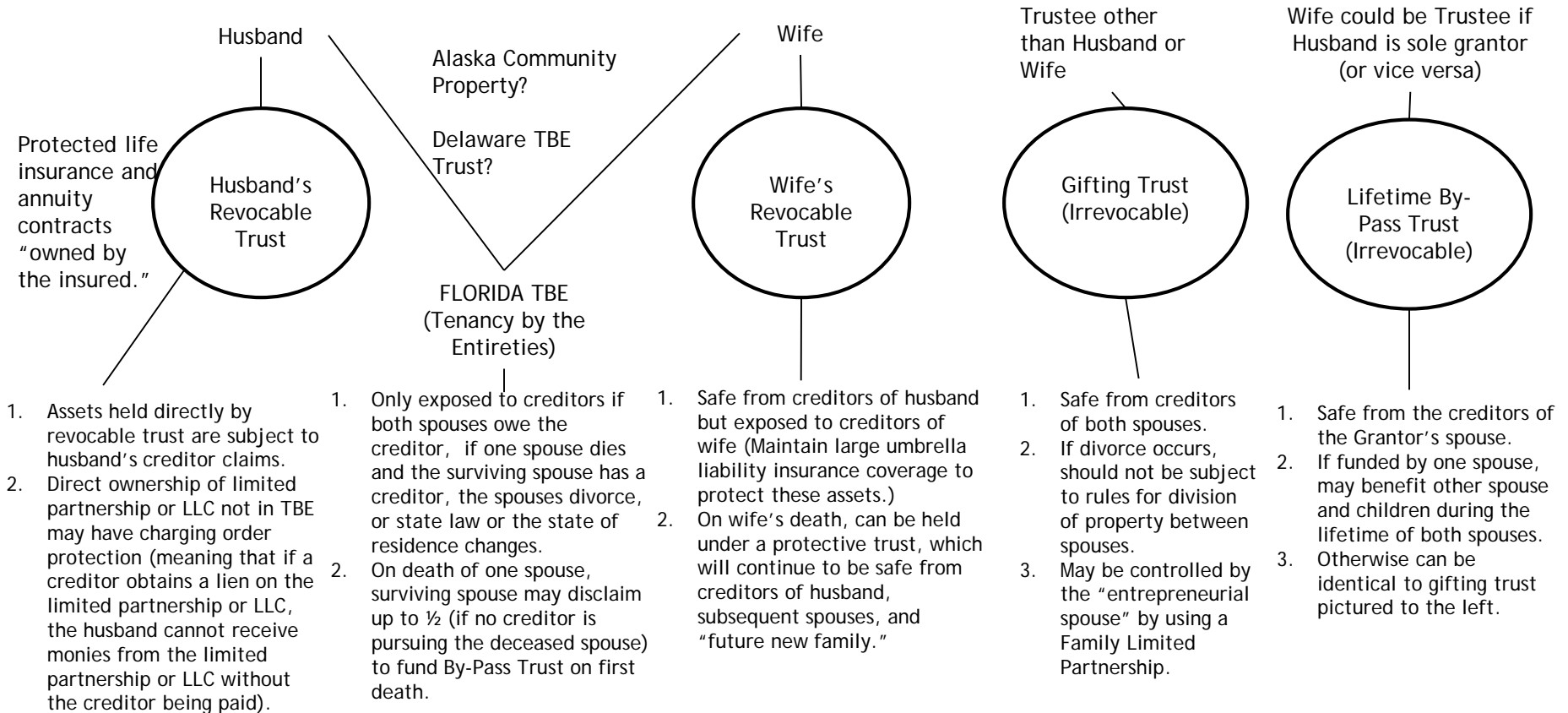


....the Trustee has the right to make distributions of the Trust income and principal to the Grantor's spouse as needed for the spouse's health, education, support and maintenance, and also because the Trustee has the power to add the spouse of any current beneficiary under the Trust as an additional beneficiary of Trust 2 or Trust 3.

DETERMINING BEST HOW TO ALLOCATE ASSETS AS BETWEEN A MARRIED COUPLE | PART I

General Rules:

- Typically want each trust funded with at least \$5,340,000 worth of assets on death for estate tax planning.
- May be funded from ½ of tenancy by the entireties assets via disclaimer and probate or by life insurance/pension/IRA assets.



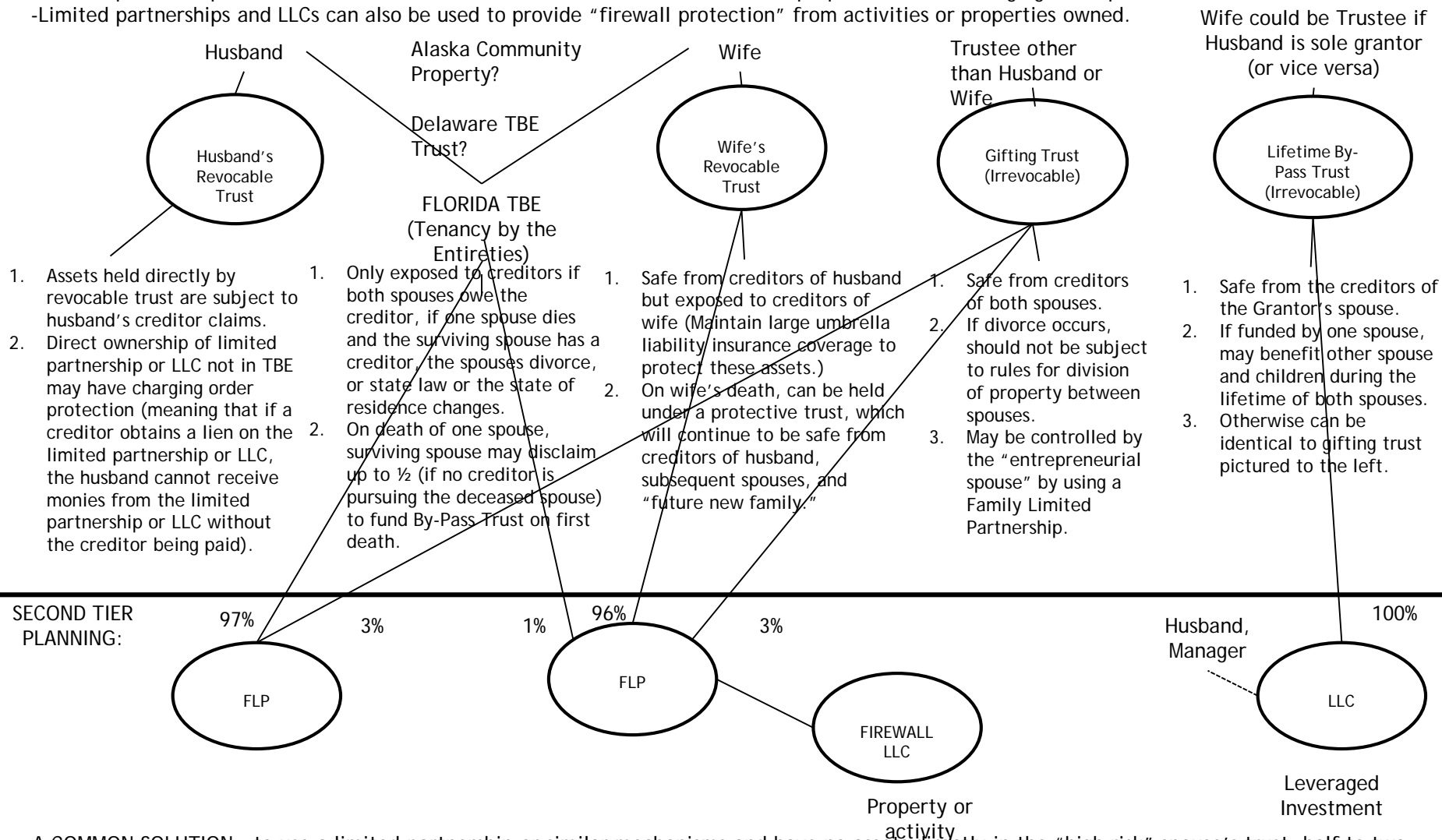
SEE NEXT PAGE FOR SECOND TIER PLANNING

A COMMON SOLUTION - to use a limited partnership or similar mechanisms and have no assets directly in the "high risk" spouse's trust, half to two-thirds of the assets held as tenants by the entireties, and half to two-thirds of the assets directly in the "low risk" spouse's trust.

DETERMINING BEST HOW TO ALLOCATE ASSETS AS BETWEEN A MARRIED COUPLE | PART II

Subsidiary Entity Techniques:

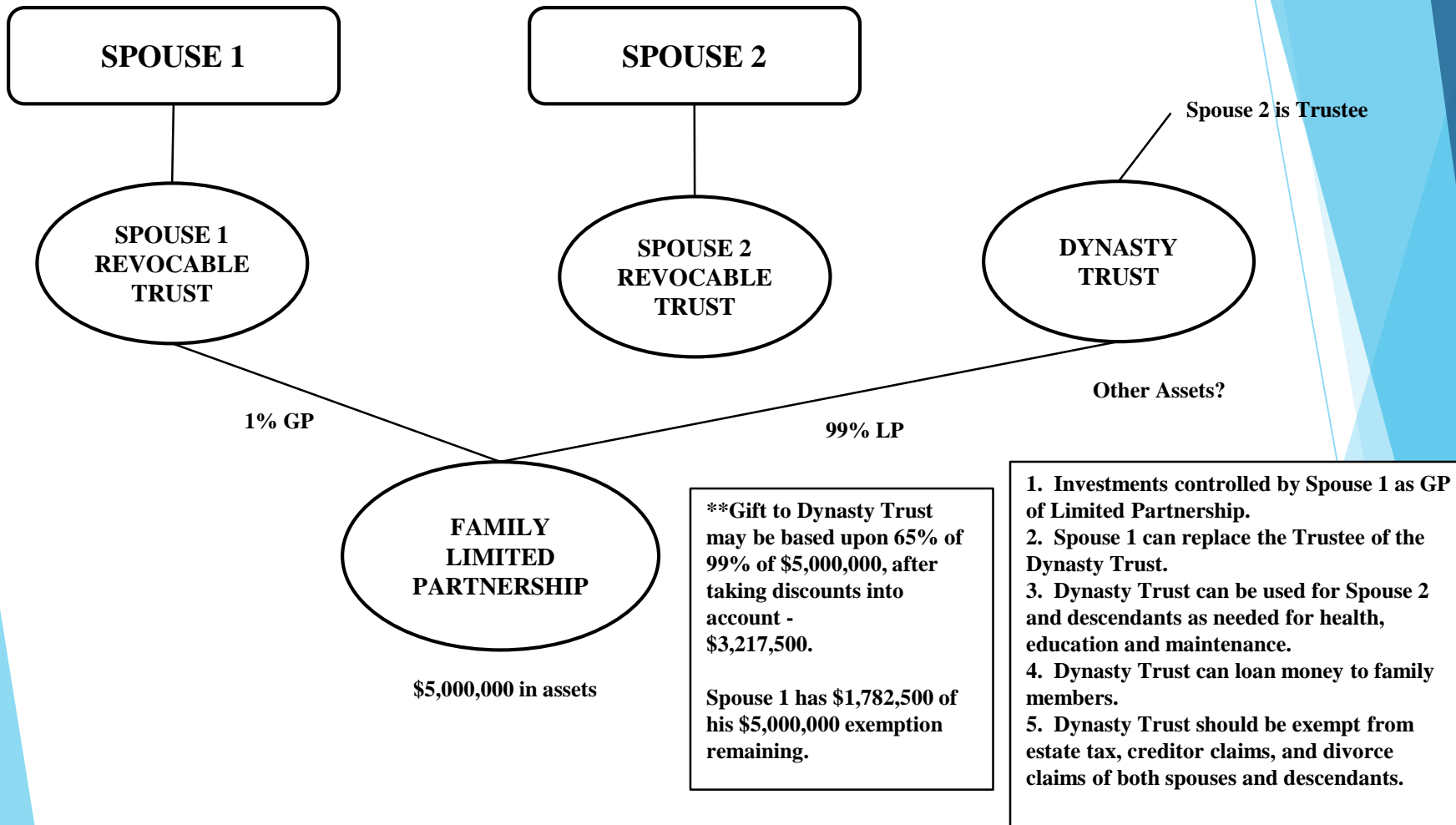
- Limited partnerships and LLCs can be used to facilitate discounts, for estate tax purposes, and for charging order protection.
- Limited partnerships and LLCs can also be used to provide "firewall protection" from activities or properties owned.



A COMMON SOLUTION - to use a limited partnership or similar mechanisms and have no assets directly in the "high risk" spouse's trust, half to two-thirds of the assets held as tenants by the entireties, and half to two-thirds of the assets directly in the "low risk" spouse's trust.

THE SLAT (Spousal Lifetime Access Trust)

Example of Spouse 1/Spouse 2 Dynasty Trust Arrangement



PLANNING FOR A DYNASTY TRUST WHERE THE SPOUSE OF THE SETTLOR/CONTRIBUTOR IS A BENEFICIARY - SPECIAL CONSIDERATIONS

1. The settlor's spouse may be a trustee of the trust. As with all irrevocable trusts, administration should be well documented and according to the trust document.
2. The settlor's spouse can have the right to receive amounts as reasonably needed for health, education, maintenance, and support. It is best to provide that any such distributions for the spouse will be made only after taking into account the spouse's other assets and resources.

Otherwise, consider whether the spouse might be considered to be gifting to the trust if he or she had the right to receive distributions and did not take them.

Alternatively, limit distributions to the spouse by requiring an independent fiduciary to approve them.

3. Marital Deduction Savings Clause - The settlor's spouse may be the beneficiary of an outright disposition or General Power of Appointment Marital Trust provision to be funded if total contributions to the trust would otherwise cause gift tax responsibility. Do not use a QTIP trust for this because of the harsh regulations requiring a marital deduction election to be filed for a lifetime QTIP trust gift.
4. Typically the trust will be disregarded for income tax purposes, so that the settlor can pay the income tax attributable to the trust's income.

In case the settlor may want to "toggle off" defective grantor trust status (such as by reserving the right to replace trust assets with assets of equal value, and then releasing that right) an adverse party (another substantive beneficiary under the trust) must have the right to approve any distributions to the spouse.

Otherwise the trust will be a defective grantor trust under Internal Revenue Code Section 677, and the settlor will not be able to toggle that off (except by getting divorced!).

5. The settlor's spouse may choose to "split the gift" on a gift tax return, which is permitted notwithstanding that the spouse is a beneficiary, so long as it is very unlikely that the spouse will need to receive benefits for health, education, maintenance and support when taking into account the spouse's other assets and resources. See Private Letter Ruling 200345038, *William H. Robertson vs. Commissioner*, 26 TC 246 (1956), and *BNA Portfolios 822-2nd: Estate, Gift and Generation-Skipping Tax Returns and Audits, Section IX.M, and 826-2nd: Life Insurance, Section II.F.*

6. What if the assets used to fund the trust had recently been owned jointly by the settlor and the spouse, or were owned by the spouse and transferred to the settlor, who then transferred them to the trust? Under the Step Transaction Doctrine, the assets and the economic risk associated therewith should be owned and held exclusively by the settlor for a reasonable period of time. In case the IRS argues that the contribution to the trust was really made by the settlor's spouse (in which event the settlor's spouse may be subject to federal estate tax under Internal Revenue Code Section 2036(a)(1) - retained life interests), it may be important to have trust language which provides that any trust assets considered as transferred to the trust by the spouse beneficiary will be considered to be held in a separate subtrust of which the spouse will not be a beneficiary.

PLANNING FOR A DYNASTY TRUST WHERE THE SPOUSE OF THE SETTLOR/CONTRIBUTOR IS A BENEFICIARY - SPECIAL CONSIDERATIONS

7. Should the surviving spouse be given a limited power of appointment to direct how trust assets will pass? The grantor cannot be given this power if a completed gift to the trust is desired, but the spouse can. However, the power should not be exercisable in favor of her personally, her creditors, her estate, or creditors of her estate.

At what point should the power of appointment exist and/or be terminated?

- (a) Immediately upon inception of the trust until the death of the surviving spouse?
- (b) Only after the death of the settlor until the death of the surviving spouse?
- (c) Only unless or until the parties are divorced or either party has a child who is not a beneficiary under the trust?

What would prevent the beneficiary spouse from exercising his or her power of appointment to fund a trust for the donor spouse to allow the ability to receive amounts as needed for health education and maintenance - assuming that there is no pre-existing agreement or obligation for this to happen.

8. Should there be a divorce clause?

Typically where the drafting lawyer is representing both spouses this can be discussed and a joint representation letter can be put into place. It is likely that the judge will consider the trust assets to be for the benefit of the beneficiary spouse, but this will vary from state to state and judge to judge.

If the settlor's spouse is not a client then consider a clause that will provide that, upon divorce, the beneficiary spouse is no longer a beneficiary, trustee or otherwise entitled under the document.

9. If the trust also provides for health, education, maintenance and support or other payments to descendants, how will the trust be protected from a descendant's support claims or other items for which state law permits penetration of a trust?

If the trust's primary beneficiary is your spouse, but your children can reach into it, do you have to worry that one of your children is going to have a nasty divorce and the ex-spouse of a child is going to be able to reach into this trust?

Consider whether there should be a Flee (Cuba) Clause in the trust, or whether the trust should name an independent trust protector or trust protectors with the ability to remove descendant beneficiaries and/or the ability to move the situs of the trust to an appropriately protective jurisdiction.

THE Q-TIP EXCEPTION

FLORIDA TRUST CODE - 736.0505 Creditors' claims against settlor.- (1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply: (a) The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor.

(b) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(c) Notwithstanding the provisions of paragraph (b), the assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.

(2) For purposes of this section: (a) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power.

(b) Upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in: 1. Section 2041(b)(2) or s. 2514(e); or

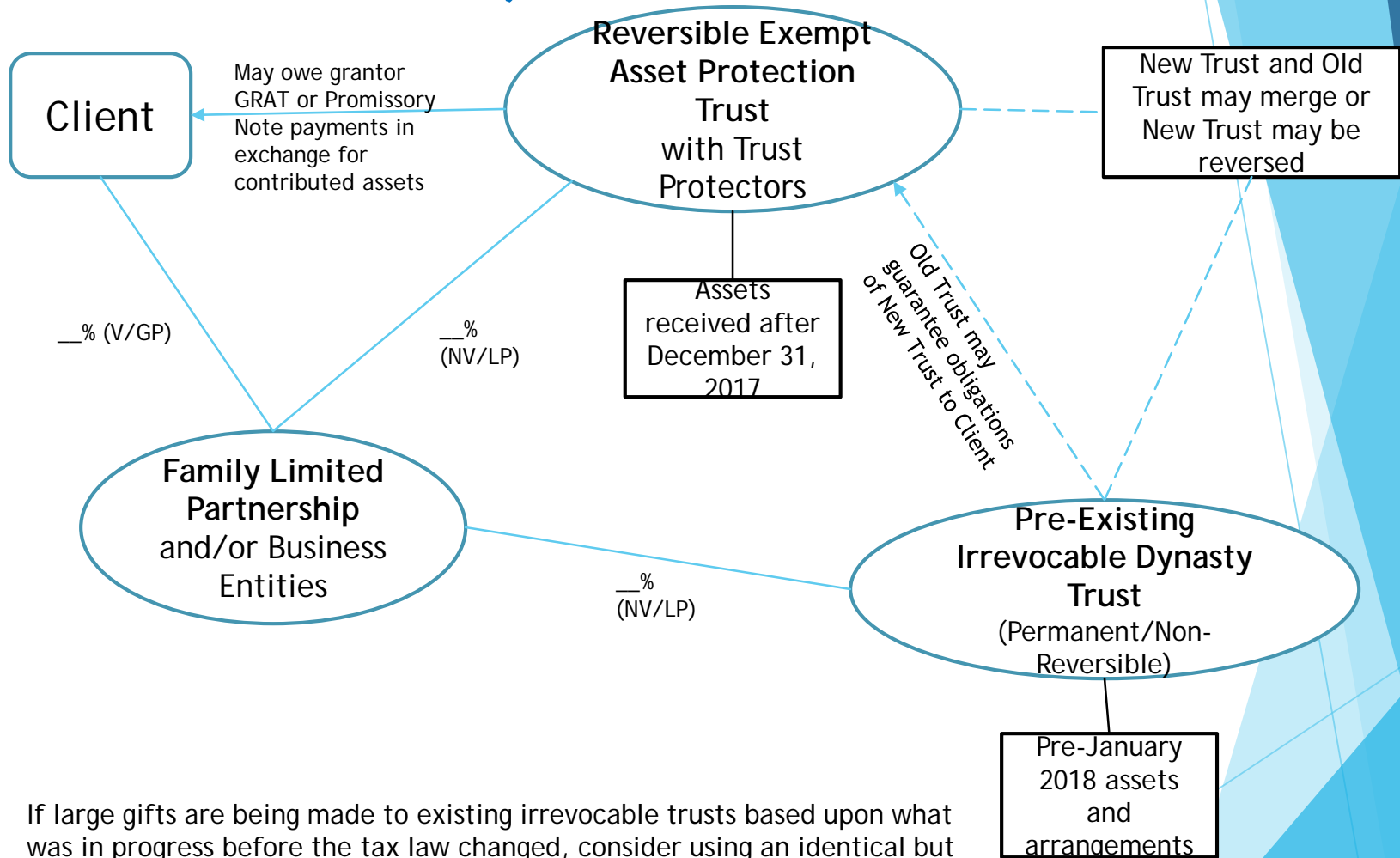
2. Section 2503(b) and, if the donor was married at the time of the transfer to which the power of withdrawal applies, twice the amount specified in s. 2503(b), of the Internal Revenue Code of 1986, as amended.

(3) **Subject to the provisions of s. 726.105, for purposes of this section, the assets in: (a) A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended, or a trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; and**

(b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a), shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.

See The Florida Bar Journal December, 2010 article – *New §Assures Tax/Asset Protection of Inter Vivos QTIP Trusts*

The Reversible EXEMPT ASSET PROTECTION TRUST (THE "REAP TRUST")



If large gifts are being made to existing irrevocable trusts based upon what was in progress before the tax law changed, consider using an identical but reversible irrevocable trust to gift to, which can either be merged into the pre-existing trust, held in parallel, or reversed back by Trust Protectors if and when the estate tax is not a concern for the client.

Steve Leimberg's Estate Planning Newsletter: Excerpts from "The Reversible Exempt Asset Protection ("REAP") Trust for 2017 Planning" by Alan Gassman, Christopher Denicolo, Kenneth Crotty & Brandon Ketron

The 'Reversible Exempt Asset Protection Trust,' also known as the Reversible Mirror Trust, allows clients to take advantage of presently available and effective estate tax planning opportunities, while providing the flexibility needed to address to the possible uncertainties that might exist the horizon, while also providing asset protection that may greatly exceed what is now otherwise in place."

EXECUTIVE SUMMARY:

When we look back in a year on the unexpected results of the 2016 Presidential Election, and the tendency for clients and advisors to "wait and see" what happens with estate and gift taxes, we may find that the majority of planners and decision makers erred on the side of doing nothing, costing families significant portions of their assets upon the death of loved ones in the future.

Alternatively, when we look back in five years we may find that the estate tax "went away" but came back in harsher form, after a period of time during which those who planned ahead came out much better than those who did not. While some commentators believe that repeal of the estate tax is a strong possibility, others have pointed out the several likely alternatives that must be considered to stay two or more move moves ahead on the chess board of family wealth planning in this dynamic environment.

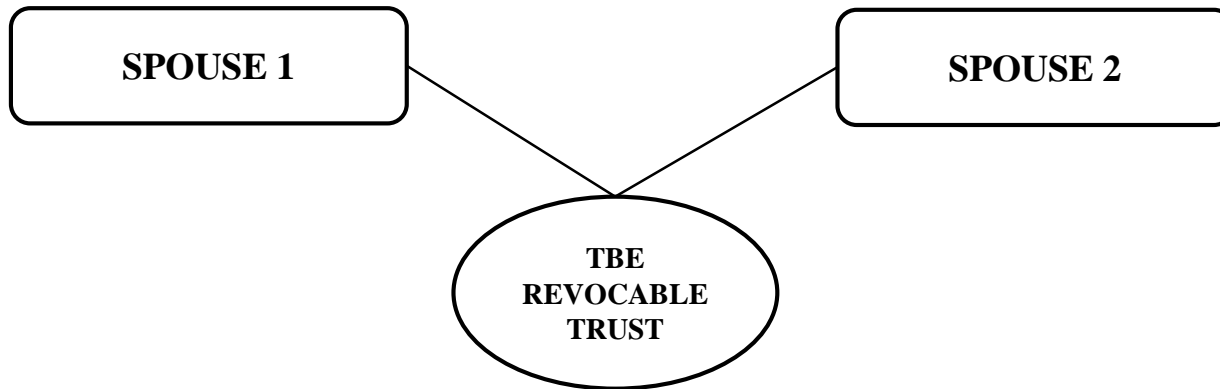
By our view it is crucial to give clients options that include flexible methods of taking advantage of present opportunities, while being able to change or reverse what is done, or assure that it would be wanted in a no estate tax world, while also being ahead in the non basis step up environment that may be coming.

The "Reversible Exempt Asset Protection Trust," also known as the Reversible Mirror Trust, allows clients to take advantage of presently available and effective estate tax planning opportunities, while providing the flexibility needed to address to the possible uncertainties that might exist the horizon, while also providing asset protection that may greatly exceed what is now otherwise in place.

In other words, while some believe that the estate tax is facing the ghoulish prospect of the grim REAPER, we think that knowledgeable advisors should be embracing the REAP Trust.

**FULL ARTICLE IS INCLUDED WITH SUPPLEMENTAL MATERIALS OR MAY BE VIEWED AT:
http://leimbergservices.com/all/LISIGassmanDenicoloCrottyKetron1_11_2017.pdf**

TBE Revocable Trust



Carefully drafted Trust provides that all beneficial interests are owned as tenants by the entireties, and solely owned by surviving spouse after first death -

Then acts as a simple Revocable Trust for the surviving spouse.

Surviving spouse must have total control over the Trust after the first death to qualify under tenancy by the entireties.

?

Question

?

Why not have Credit Shelter/QTIP Trust provisions that would be activated to the extent that the surviving spouse disclaims TBE Trust assets? - To be a true TBE Trust, the beneficial interest disclaimed would need to flow through the probate estate of the first dying spouse.

Definition Of Tenancy by the Entireties

Joint tenancy with right of survivorship is not enough because the law requires that “the 6 unities” exist. The 6 unities may be summarized as follows:

1. Unity of possession - Both spouses have joint ownership and control - it may be acceptable that a deposit agreement allows either spouse to withdraw independently of the other on the theory that the power to withdraw is an expression of an authority of agency given by each spouse to the other.
2. Unity of interest - Each spouse has the same interest in the account - it is not a problem if one spouse deposits all or most of the funds into the account as long as each spouse has the same interest immediately after the deposit.
3. Unity of time - The interests of both spouses in the asset must originate simultaneously in the same instrument, such as on the signature card. **Do not try to convert an individual account into a tenancy by the entireties account. Instead, transfer assets from the individual account to a new tenancy by the entireties account.**

Definition of Tenancy by the Entireties

4. Unity of title - Both spouses must have ownership under the same title.
5. Survivorship - On the death of one spouse, the other spouse becomes the sole owner of the entireties property. A general power of appointment given to one spouse over joint assets may vitiate tenancy by the entireties status.
6. Unity of marriage - Of course, the owners must be legally married under Florida law.

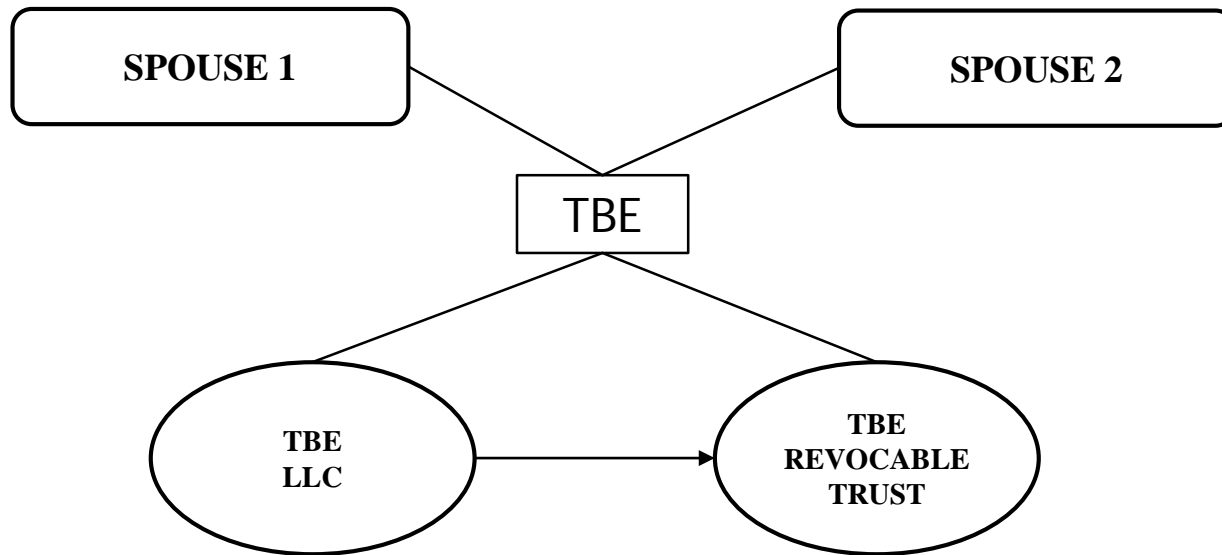
Non-residents who own property in Florida can also claim the tenancy by the entireties immunity. In *Re Cauley*, 374 B.R. 311, 316 (Bankr. M.D. Fla. 2007).

Special Tenancy by the Entireties Issues

- ▶ Joint Accounts. Not with USAA, Strong Mutual funds and many others. You must read the account agreement to be sure. Better to set up a TBE LLC to own accounts.
- ▶ Stock Certificates and Shareholder Agreements.
- ▶ Tax Reporting and Tax Refunds.
- ▶ Tangible Personal Property.
- ▶ Automobiles and Other Registered Vehicles.
- ▶ Real Estate Owned Outside of Florida.

TBE Revocable Trust/ LLC Combo – Hold the Fries!

TBE LLC ownership will pass to Revocable Trust by pay-on-death clause on death of surviving spouse.



LLC Operating Agreement provides for automatic ownership by Revocable Trust on death of surviving spouse per *Blechman v. Estate of Blechman* – Fla. 4th DCA 2015 Opinion.

LLC OPERATING AGREEMENTS CAN SERVE AS “TRANSFER ON DEATH” MECHANISM TO AVOID PROBATE AND TRUST INTERACTION (NOT TO MENTION CONFUSION & UNCERTAINTY) By Alan Gassman and Chelsea Bellew

In *Blechman v. Estate of Blechman*, 460 So. 3d 152 (Fla. 4th DCA 2015) provisions of an Operating Agreement of a limited liability company caused the Decedent’s membership interest to vest immediately upon his death.

While the Decedent made provisions for the membership interest to pass to someone outside his family in a trust before he passed away, the court found that the provisions of the Operating Agreement were controlling. The provisions of the Operating Agreement were designed to keep the company within the family and did not permit for a membership interest to pass to anyone else.

The Operating Agreement was executed in New Jersey and was, therefore, interpreted according to New Jersey case law. *Minoff v. Margetts* was a New Jersey case that permitted members of an LLC to use provisions in an Operating Agreement to control the disposition of membership interests when one member passes away. Following this rationale, the court found that the interest in this case vested in the two children upon the death of their father, according to the Operating Agreement, and that this interest was not a part of his estate. The trust had an amendment that provided for the interest in the LLC to pass to the Decedent’s girlfriend upon his death, and the court found that this instrument was subordinate to the provisions of the Operating Agreement. The provisions of the trust directly contradicted the terms and intent of the Operating Agreement. Therefore, the Decedent’s membership interest in the LLC passed upon his death outside of probate to his children and nullified the terms of the amended testamentary trust.

The specific language in the Operating Agreement that was approved by the court was as follows:

6.3 Death of Member

- (a) Unless (i) a Member shall Transfer all or a portion of his or her Membership Interest in accordance with 6.1 or 6.2 hereof, or (ii) a Member bequeaths the Membership Interest in the Member’s last will and testament to members of the Immediate Family of the respective Member, or (iii) all such Membership

Interests of a deceased Member are inherited, or succeeded to, by Members of the Immediate Family of the deceased Member, then in the event of a death of a Member during the duration of this Agreement, the Membership Interest of the deceased Member shall pass to and immediately vest in the deceased Member's then living children and the issue of any deceased child, per stirpes.

The court noted as follows:

...not every instrument which provides for performance at or after death is testamentary in character...There is nothing in the statute of wills that prevents the creation of contract of a bona fide equitable interest in property and its enforcement after the death of a contracting party, even though the date of death is agreed upon as the time for transfer.

Do we now have an obligation to review every Operating Agreement that a client has involvement with to see whether inheritance rights and disposition may be impacted thereby? Do we dare use similar language in an LLC Operating Agreement that might distort an estate plan later when the client or their advisors are not aware of the provision?

Perhaps the following provision can be considered:

Upon the death of JOHN SMITH, his membership interest shall immediately pass to and immediately vest in his spouse, MARY SMITH, or in equal shares to his children, per stirpes, if MARY SMITH does not survive him, provided that the above shall not apply to the extent of any future provision of any Will or Pour-Over Will and Revocable Trust that might be entered into by JOHN SMITH, if the legal effect thereof would be to provide for a different disposition of his LLC interest, regardless of whether such LLC interest is specifically referred to or not. The determination of whether any such subsequently signed separate Will or Revocable Trust exists to facilitate such change shall be made by the Manager or Managers of the Company, in their reasonable discretion, and the Company shall be entitled to the distributions or liquidation entitlement rights to the successor owners of the membership interest to the extent of money expended to facilitate such determination.

Should we consider using similar arrangements for our clients, and, if appropriately used, will these avoid exposure to individual creditors of the deceased LLC Member?

Planners should recommend separating community property to avoid all assets being subject to the claims of the creditors of either spouse, or possible use of Alaska or Tennessee Community Property Asset Protection Trusts

(If couple resides in a Community Property State)

Community Property Trust



- * May offer creditor protection in asset protection state.
- * Step-up basis is more well assured than with JEST - see Zaritsky/Blattmachr articles.
- * Deduct your next trip to Alaska to discuss this with Doug Blattmachr.

** See "Tax Planning with Consensual Community Property: Alaska's New Community Property Law (written by Zaritsky/Blattmachr/Ascher) at:

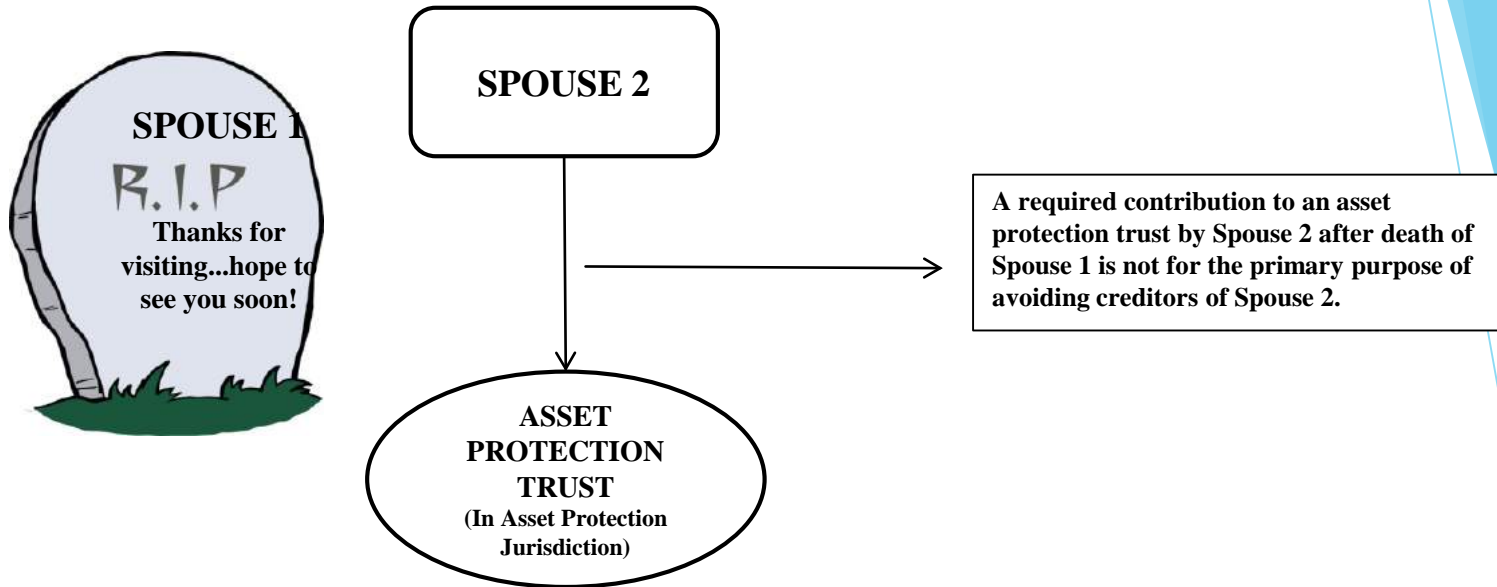
http://www.jstor.org/stable/20782170?seq=1#page_scan_tab_contents

Community Property States

- ✓ Arizona
- ✓ California
- ✓ Idaho
- ✓ Louisiana
- ✓ Nevada
- ✓ New Mexico
- ✓ Texas
- ✓ Washington
- ✓ Wisconsin

NOTE: Alaska and Tennessee are opt-in community property states that give both parties the option to make their property community property under a trust that can protect from creditors and enable all assets to receive a new fair market value date of death income tax basis if one spouse dies.

Marital Asset Preservation System (MAPS)



Spouse 1 dies. Spouse 2 is required by written agreement to establish asset protection trust in asset protection jurisdiction with all unprotected assets, and contractual obligation to preserve these for common descendants. A standby unsigned, but trust company approved, Trust Agreement can be approved by both spouses during lifetime of Spouse 1 and/or nominally funded.

Marital Asset Preservation System (MAPS)

One of the primary purposes for utilizing the Marital Asset Preservation System (“MAPS”) is to ensure that married couples keep their marital assets in the family for generations to come. In general, conscientious estate and tax planners will do their very best to meticulously plan and preserve assets for a surviving spouse, while also enabling the surviving spouse to leave assets to common descendants of the decedent, and with the minimal amount of taxes and probate expenses.

However, there is one question that is routinely left out of the discussions between married couples and estate planners during the planning process:

Would you like some assurance that your marital assets will only pass to your common descendants upon the death of the survivor of you?

The answer to this question is usually a resounding “yes”, and as such, requires the surviving spouse to protect the marital assets by not allowing them to be left to a subsequent spouse or some other future significant other.

That answer leaves the estate planner with some rather intricate issues and challenges, not to mention more work and an added layer of complexity to design and implement the various trust systems and strategies to be used.

Once the clients have decided that this is the right strategy for them, the planner must explain that upon the death of one spouse, the surviving spouse may serve as Trustee or Co-Trustee of one or more irrevocable trusts, with the power to change the trusteeship within pre-agreed parameters. These irrevocable trusts may only allow the surviving spouse to have access to assets and monies as needed for the spouse to maintain the standard of living that has been enjoyed during the marriage, and to provide support for common descendants. There are several restrictions that can be placed on a surviving spouse, one of which is to allow them to only make distributions outside of the family based upon an annual allowance that might be used for charity, religious organization dues and donations and gifts to friends based upon guidelines that can be set forth in the documents.

There can also be limitations placed on how much compensation might be paid to third parties for services like housekeeping, nursing, private lessons, personal trainers and otherwise. There can also be limited access for charity, church or synagogue donations, and other defined causes.

An Ability to Provide Limited Benefits and Compensation to a Subsequent Spouse.

While it is commonly assumed that the “next spouse” might threaten to deprive descendants of marital wealth, and might place the surviving spouse in jeopardy of losing assets that would be needed for his or her well-being, there is also the possibility that the subsequent spouse will contribute meaningfully both to the preservation and enhancement of marital assets, and with respect to providing care and support for the surviving spouse. It could be both unfair and counterproductive for the surviving spouse to not be able to allow a subsequent spouse to contribute meaningfully to marital assets, and to be compensated for providing necessary services, whether personal, nursing, or managerial, where this is clearly in the best interests of the surviving spouse, and possibly one or more of the descendants of the original marriage.

For this reason, the authors also provide that the MAPS Agreement or system may be amended by one or more of the adult descendants of the original couple, and/or an independent Trust Protectors or other advisors, to take into account appropriate circumstances and formal requests for changes.

The above normally fits well and naturally under a credit shelter/marital deduction trust arrangement that will typically be established on the death of a first dying spouse where federal estate tax is a possible concern, but quite often a good many assets will be owned outright by the surviving spouse or jointly with right of survivorship, and IRA and qualified retirement plans are typically best left to a surviving spouse to enable postponement of having to take taxable distributions.

The planner must therefore explain that those assets that are not naturally captured under a trust system on the first death of a spouse will need to be either: (1) contributed to a trust system by the surviving spouse, as encouraged or required by planning documents, and possibly a Marital Asset Preservation System (MAPS) Agreement; or (2) have the surviving spouse contractually bound by a MAPS Agreement requiring them to maintain existing marital assets, and any income derived from those assets for the surviving spouses life, and also direct that those assets be left for only common descendants upon the surviving spouse’s death.

The author commonly uses one or both of these alternatives. These techniques are often coupled with carefully drafted trust provisions, as well as an explanation in the trust document to ensure that every possible step is satisfied and that the MAPS objectives are met.

One issue for couples having more than the \$10,860,000 exemption level situation, or expectation thereof, is whether limitations placed on inherited assets would cause loss of the federal estate tax marital deduction and consequent income tax to be paid on the first death. Each individual presently only has a \$5,430,000 estate and gift tax exemption amount, which must be considered. This issue is especially important when the surviving spouse is contractually bound to preserve and leave the assets for subsequent descendants, as opposed to receiving the assets as the sole owner without any legal entanglements.

Generally, there is no marital deduction allowed for dispositions that do not at least allow the surviving spouse to have all income from marital deduction trust property and to be the sole beneficiary of a trust holding such property for his or her lifetime. A marital deduction may also not be received for assets that are paid outright to a surviving spouse who has significant contractual limitations on what he or she is able to do with the property.

Marital Asset Preservation System (MAPS)

In states that do not recognize community property, most planners will use separate revocable trusts for affluent husbands and wives for estate planning, because of established customs and the complexities associated with using joint trusts. In such situations, it is possible to have the revocable trust of the surviving spouse become irrevocable upon the death of the first surviving spouse. For purposes of federal estate and gift taxes, this event will be considered an incomplete gift because it provides the surviving spouse with the right to veto payments to any person other than the surviving spouse during their remaining lifetime, and the power to appoint trust assets to common descendants of the married couple.

Alternatively, in states that do recognize community property, we find that joint trusts are becoming more prevalent.

An objective for many estate and tax planners, regardless of the state in which they live, is to have the first dying spouse's death cause a step-up in the income tax basis to a fair market value for any and all family assets. This strategy should be utilized to the extent that the family would benefit from having an increased basis, which would essentially take any property that appreciated during the decedent's lifetime and provide the surviving spouse with the ability to not recognize any gain on such property when they come into possession.

Many planners in non-community property states are using Joint Exempt Step-Up Trusts ("JEST"), which may enable clients to receive this stepped-up basis on all joint trust assets upon the death of the first dying spouse. When the first spouse dies, assets held by the joint trust are used to fund a credit shelter trust for the benefit of the surviving spouse and descendants. These assets now held by the credit shelter trust will receive a full step-up in basis, and escape tax liability upon the surviving spouse's death.

Life insurance can also be integrated into the arrangement by having the death benefit payable to an irrevocable trust, which may be a separate trust that owns the policy so as not to be subject to federal estate tax on the death of the first dying spouse.

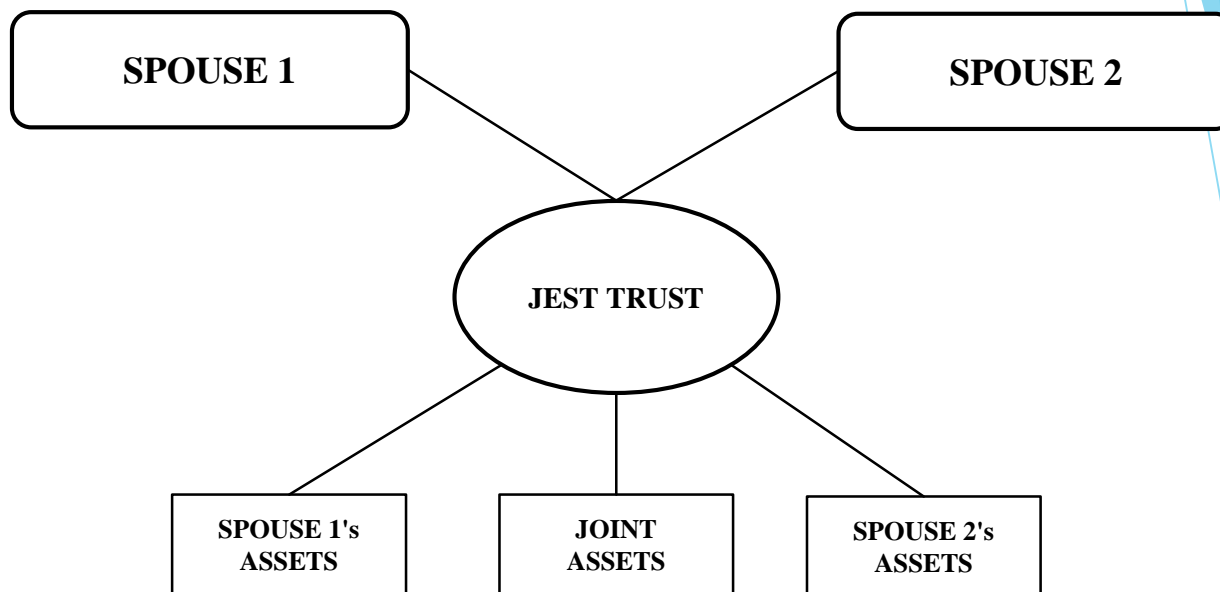
Waiver of Marital Rights.

Most states have statutes which provide a surviving spouse with a minimal outright disposition, most commonly known as the Elective Share. In addition, some states provide a surviving spouse with homestead inheritance and other rights which may be waived during the estate planning process while both spouses are living.

The estate planner will have to be very careful with respect to disclosing conflict of interest issues and evaluating whether one or both spouses should be required, or at least strongly urged, to seek independent legal counsel before being legally bound to have limited access and control to marital and inherited assets after the death of one spouse. In the event that a conflict of interest does arise, the estate planner should withdraw and require the spouses to retain separate counsel. Furthermore, because the planner represented both spouses, they are prohibited from representing either one of them against the other, even with informed consent.

ABA-Model Rule 1.7 addresses the rules for Current Client Conflicts of Interest. In essence Rule 1.7(a)(1) states that, a lawyer shall not represent a client if representing one client will be directly adverse to another client. However, this Rule is not an absolute bar to representing a client when there is a conflict. Subsection (b) provides that a lawyer may represent a conflicted client if (1) they believe they can provide competent representation; (2) it is not prohibited by law; (3) it does not involve one client asserting a claim against another client, both of whom are represented by the lawyer; and (4) each client gives informed consent. In the context of marital inheritance, subsection (b)(3) will almost always bar the attorney from representing one client over another, even with informed consent.

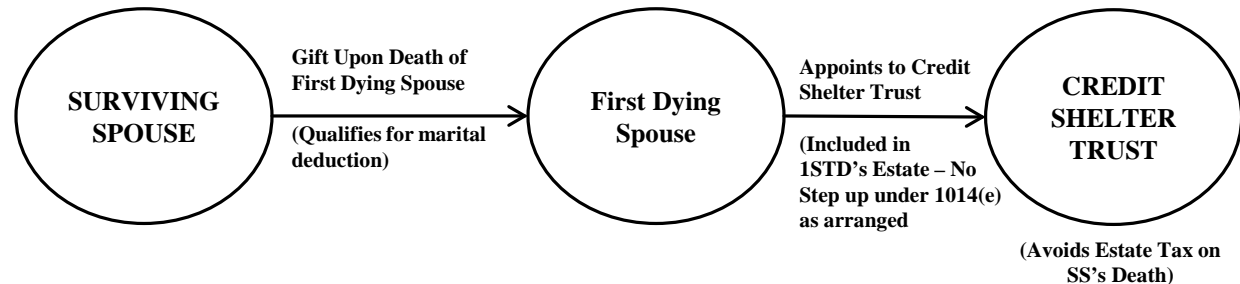
JEST Trust



On first death, up to exemption amount of first dying spouse (as much as \$11,200,000), may pass to Credit Shelter Trust or Trusts to benefit surviving spouse and descendants, with a possible full step-up of all assets - excess assets going into QTIP Trusts, which may also qualify for full step-up.

Basic JEST Anatomy

**1993 Technical Advice &
2001 and 2002 Private Letter
Rulings**



Blattmachr Article

Credit Shelter Trust could be found to be funded by surviving spouse under step transaction doctrine so creditor may invade the trust in most states.

Mulligan

If first dying spouse needs approval of surviving spouse to appoint then 2041 may not apply, could be considered as a gift of $\frac{1}{2}$ by the surviving spouse – but 1933 Johnston case held otherwise in a similar situation.

Zaritsky

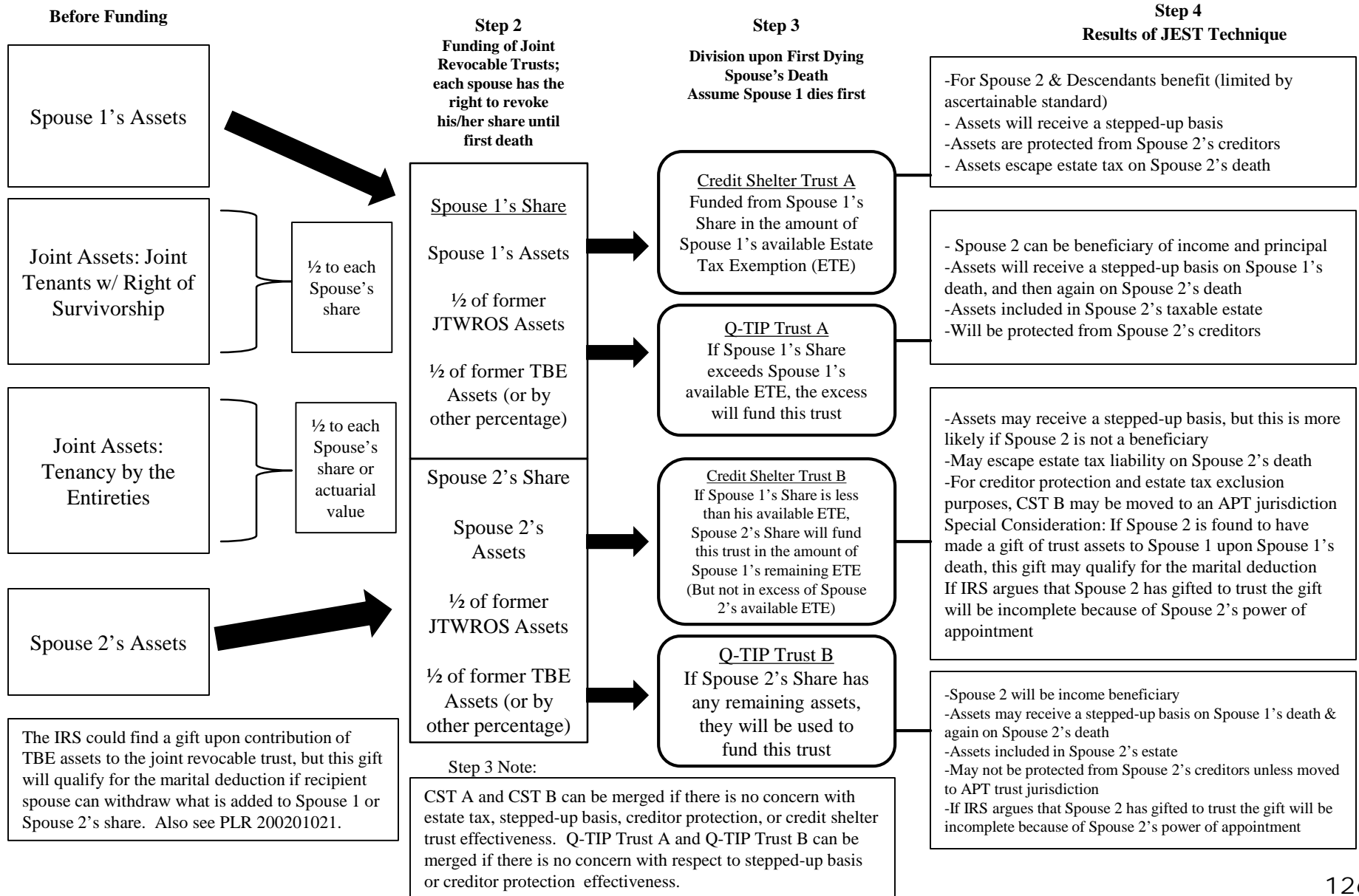
2015 Heckerling Presentation.

Will the service consider the surviving spouse to have funded the credit shelter trust or trusts by reason of the step transaction doctrine?

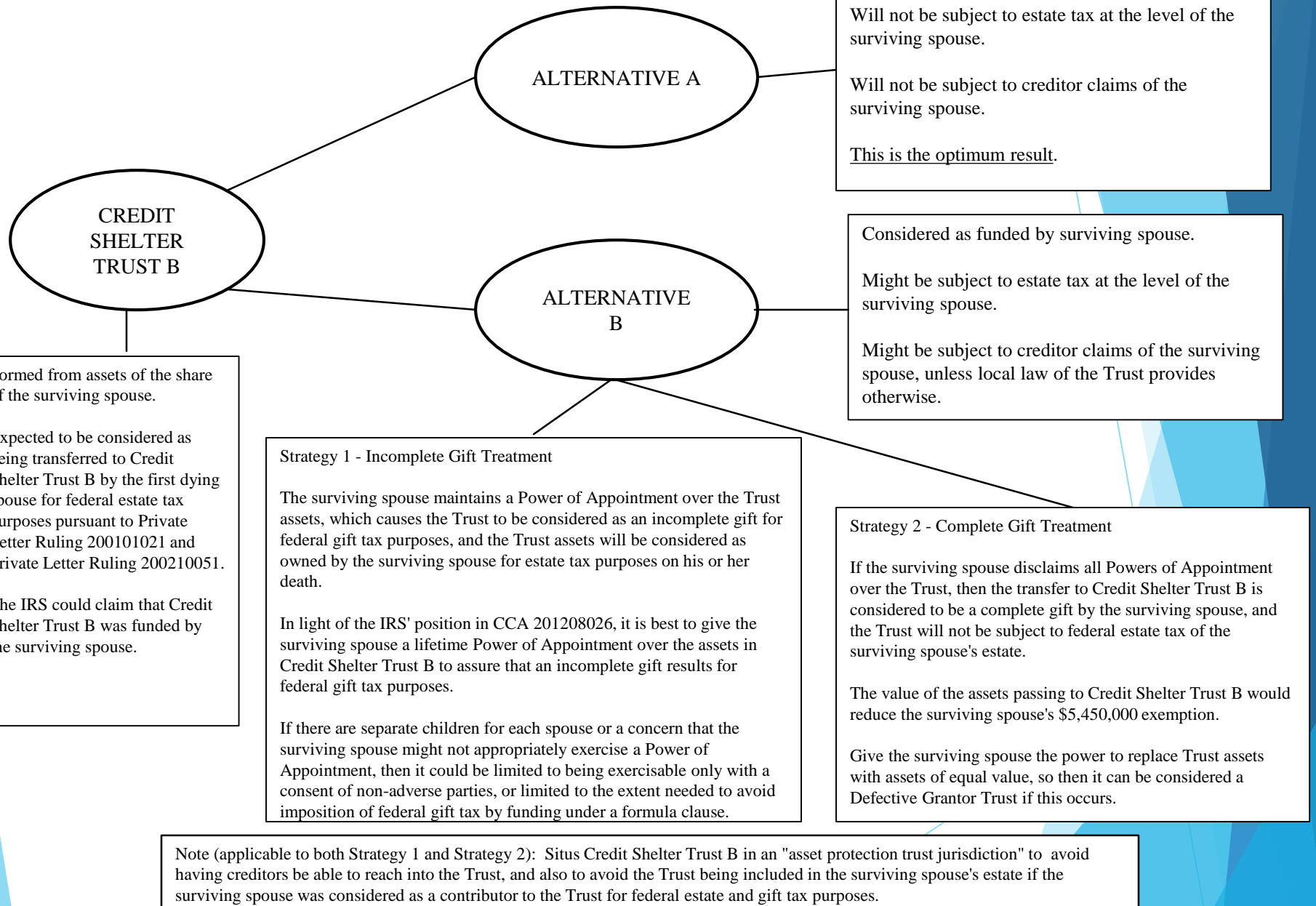
Joint Exempt Step-Up Trust (JEST) Chronology - The 4 Steps from Drafting to Implementing

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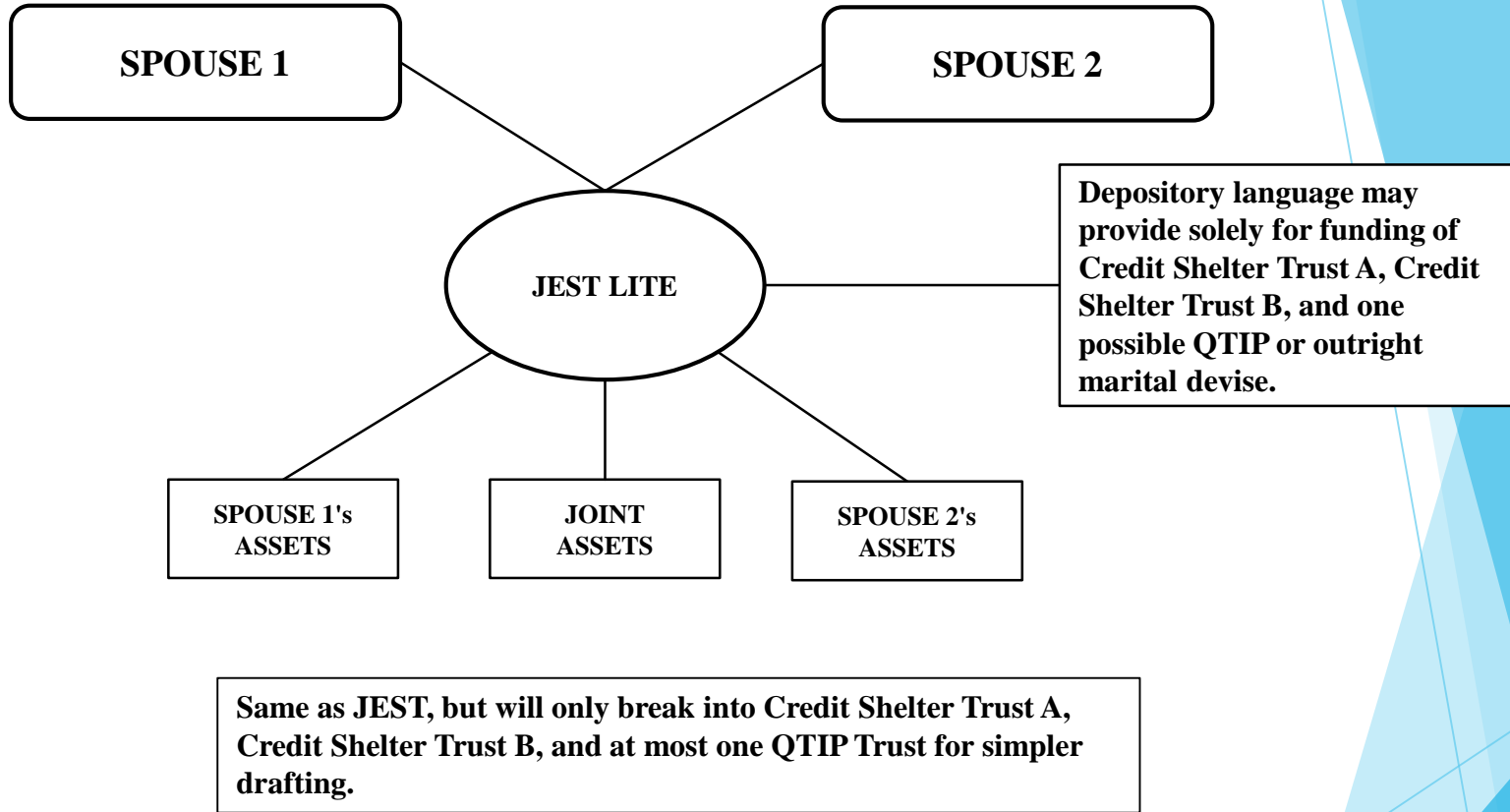
Derived from articles that can be found on Leimberg Information Services (Estate Planning Newsletter #2086) and Estate Planning Magazine October and November 2013 Editions



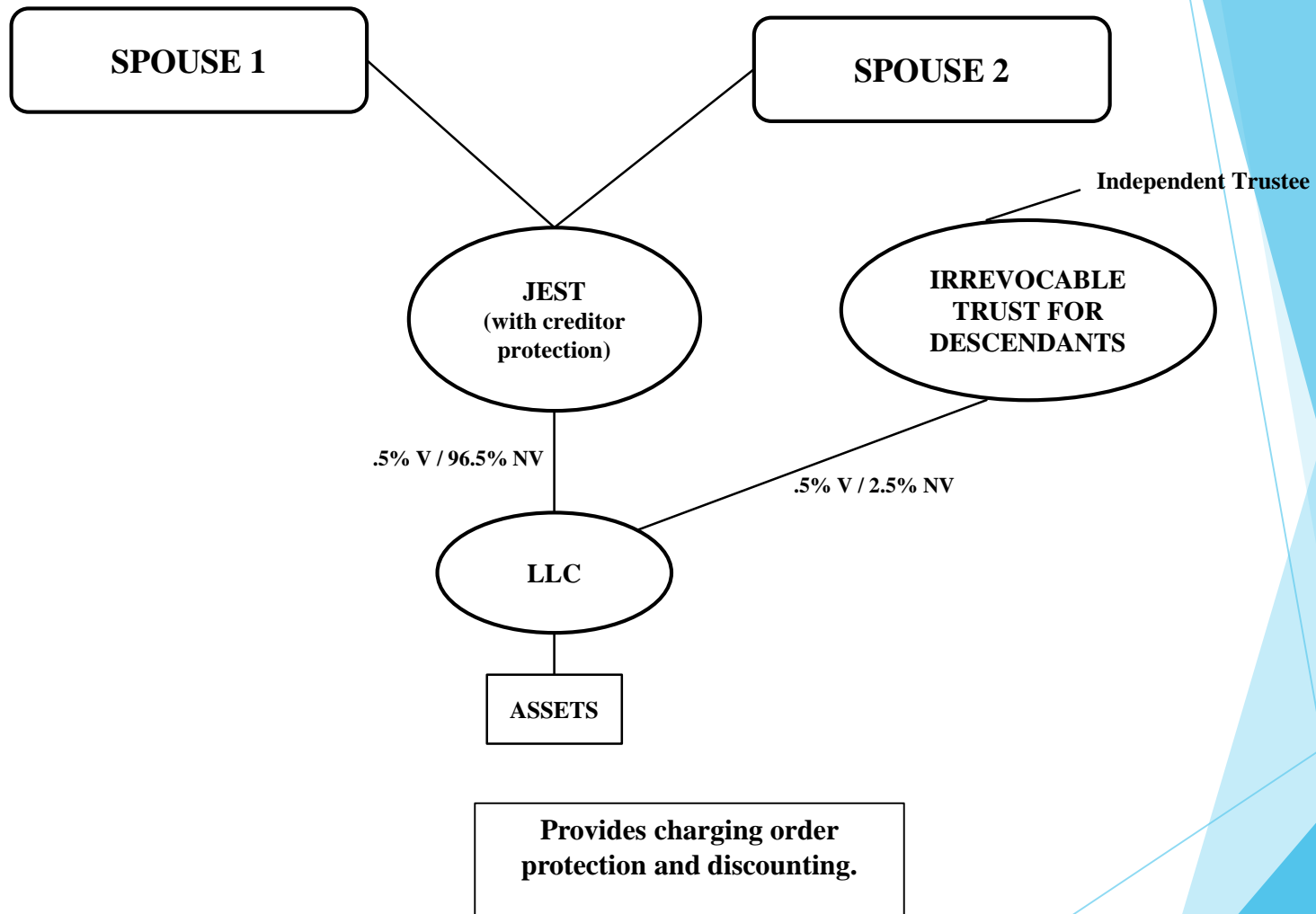
JEST Credit Shelter Trust B Planning



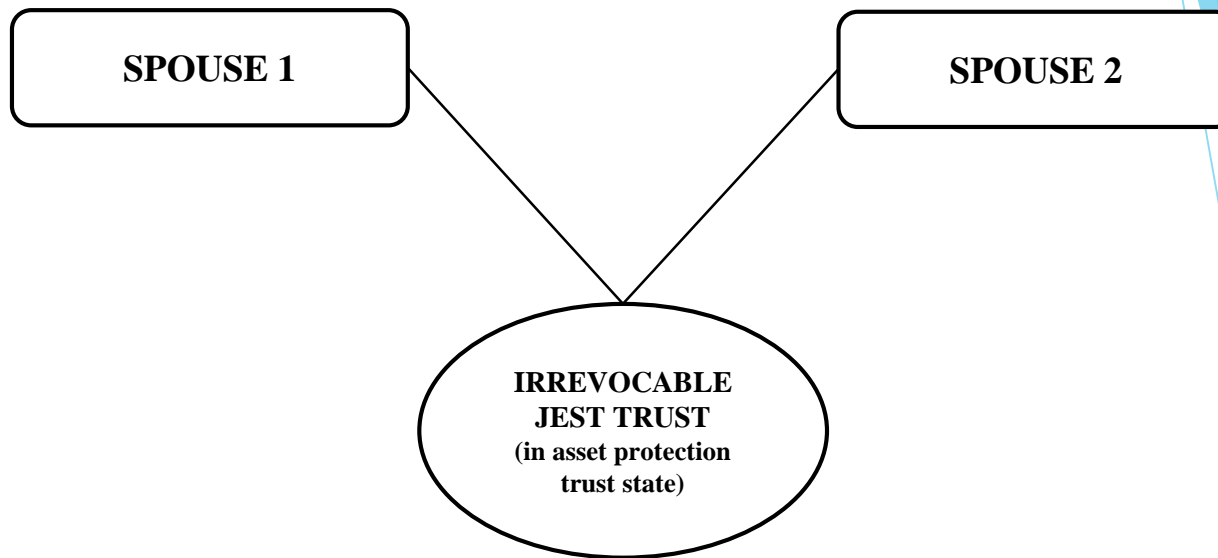
JEST Lite



JEST with Some Creditor Protection



Irrevocable JEST Trust



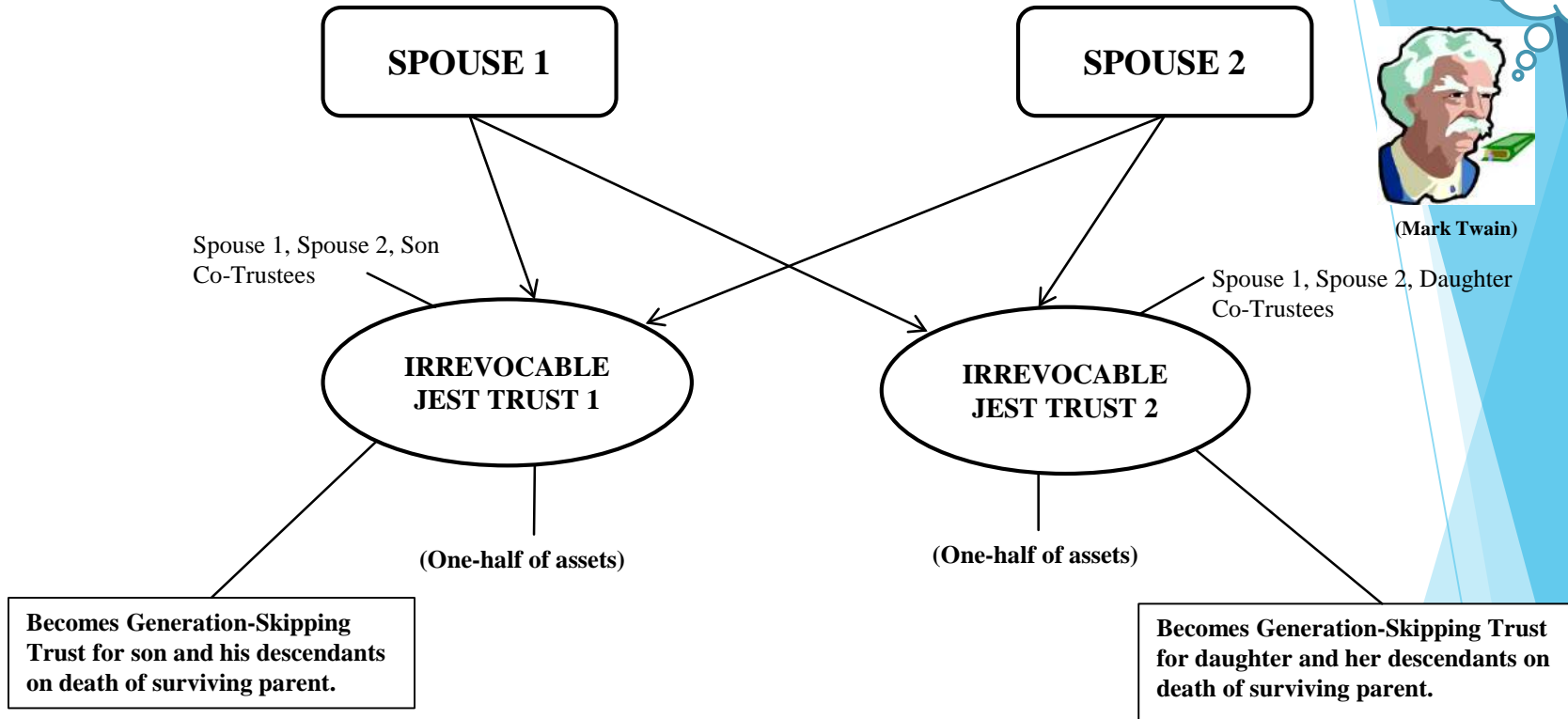
Where a couple has concerns that they may be subject to undue influence, distortion or loss of assets and direction from dementia, or otherwise, why not make the Trust irrevocable, and to also possibly provide that transfers are "incomplete gifts" by having each spouse reserve the right to veto distributions and to appoint the Trust assets (with the Power of Appointment being subject to the consent of a non-adverse party) in addition to having other JEST Trust terms to obtain a stepped-up basis on each spouse's death.

Irrevocable Multiple JESTs – Possession is 90% of the Law

And never the twain shall meet.

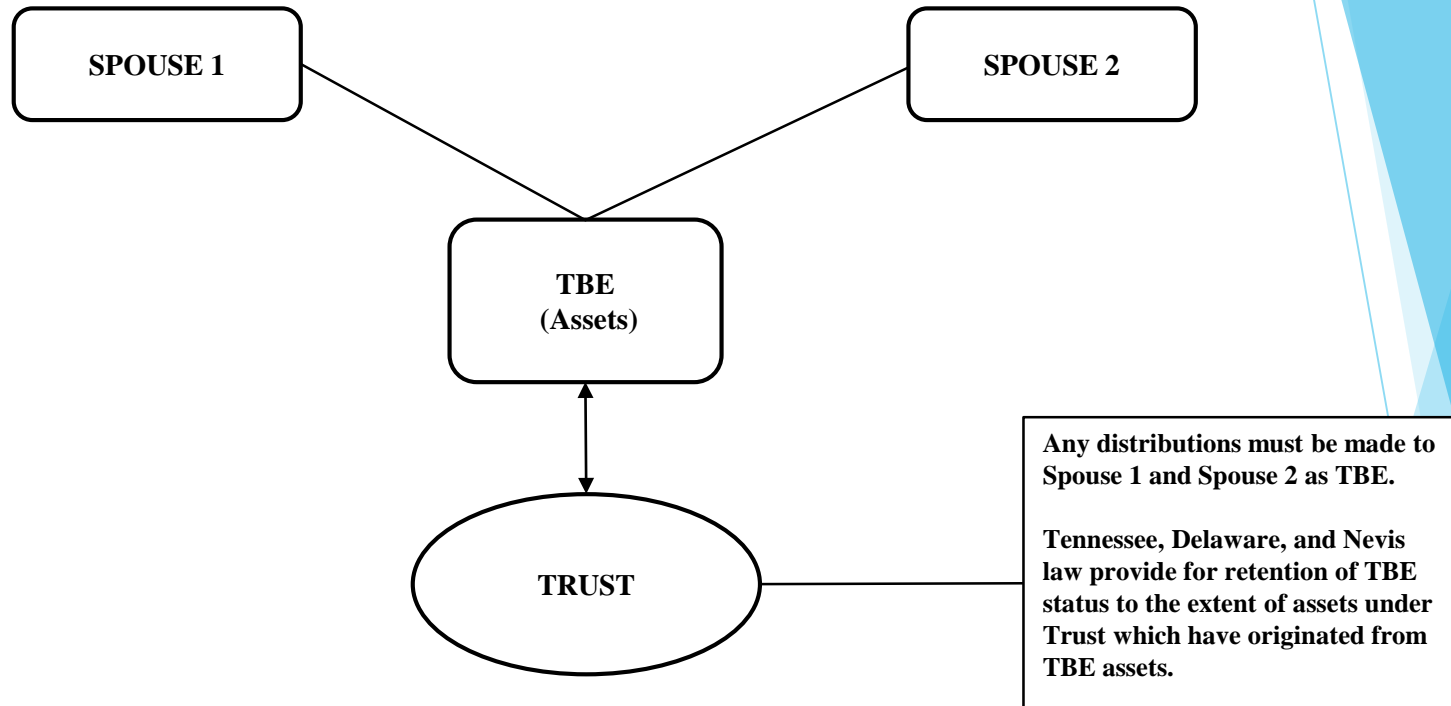


(Mark Twain)



This trust has been funded for the primary purpose of benefitting the Grantor's during our lifetime, and then having a protective trust or trusts established for our daughter, Molly Hatchett, to the extent of assets then remaining. Our son, Leonard Skin-Us is the Trustee of another trust that will be held for his benefit. Distributions to my said child and his/her descendants shall therefore reduce his/her subsequent inheritance. Either child may require that a licensed trust company serve as additional Co-Trustee of each trust, and both of our children will receive annual accountings prepared by our certified public accountant of each trust. We, as Grantors, may further exercise our power to reappoint trust assets, but only after a four hour neurological examination and verification that we are not known to be subject to undue influence, and have received approval from any two of the following five trusted non-related individuals ...

Nevis, Tennessee, or Delaware TBE APT Jurisdiction Trust



The jurisdiction law provides that TBE assets transferred to a trust will retain their TBE character, and must be distributed to the spouses only as TBE assets.

GOOD REASONS **TO** USE FLORIDA AS THE JURISDICTION OF AN IRREVOCABLE TRUST

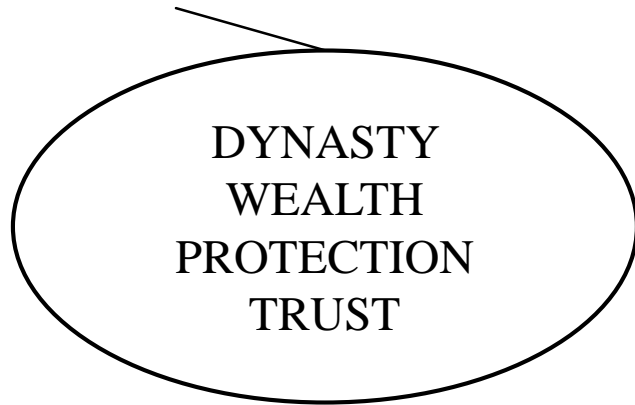
1. No income taxes on trust income.
2. No estate, inheritance or gift taxes.
3. A well-developed trust law and experienced probate court judiciary.
4. A 360-year Rule Against Perpetuities.
5. Ability to appoint a Designated Representative.
6. Grantor of lifetime Q-TIP Trust for spouse can be beneficiary after death of spouse - Florida Statute Section 736.0505 makes the trust creditor-proof for the grantor/surviving spouse.
7. We need the business!

GOOD REASONS **NOT** TO USE FLORIDA AS THE JURISDICTION OF AN IRREVOCABLE TRUST

1. The power of invasion by a beneficiary's ex-spouse or unintended or undeserving descendants.
2. Obligations of a trustee to make extensive disclosures to beneficiaries who the settlor may not want to have annual reminders and extensive expenses relating thereto.
3. Issues relating to clauses in trusts requiring beneficiaries to have certain religious orientation, sexual orientation, or to be married which may be viewed as repugnant to Florida public policy, but upheld by a foreign jurisdiction.
4. Creditor access to non-lapsed withdrawal powers, child support and alimony.
5. Concern as to "court of equity" interpretations.
6. Potential concern that federal legislation could cause domestic trusts to be subject to governmental agency liability, which would not apply to international trusts.

Dynasty Wealth Protection Trust

Trustee



Assets gifted to trust and growth thereon.

Note: Nevada gets a gold star for having a law that says there cannot be an assumed or an oral agreement between the Grantor and the Trustee of a dynasty trust; because of this, the IRS has a weaker argument that the grantor retains “secret” control.

1. Grantor can replace the Trustee at any time and for any reason.
2. Protected from creditors of Grantor and family members.
3. Can benefit spouse and descendants as needed for health, education and maintenance.
4. Per Private Letter Ruling 200944002 the Grantor may be a discretionary beneficiary of the trust and not have it subject to estate tax in his or her estate. But be very careful on this! The Trust would need to be formed in an asset protection jurisdiction and there is no Revenue Procedure on this.
5. Should be grandfathered from future legislative restrictions.
6. May loan money to Grantor.
7. May own limited partnership or LLC interests that are managed at arm’s-length by the Grantor.
8. May be subject to income tax at its own bracket, or the Grantor may be subject to income tax on the income of the trust, allowing it to grow income-tax free unless or until desired otherwise. If the Grantor is a beneficiary it must remain a disregarded Grantor Trust.

The Anatomy of an Asset Protection Trust

1. Trustee – The Trustee holds the trust assets for the benefit of the beneficiaries pursuant to the terms of the Trust Agreement.
2. Trust Settlement – This is the Trust Agreement, and should be drafted by competent legal counsel with an understanding of:
 - a) The law of the jurisdiction
 - b) United States tax law
 - c) Trust and creditor protection law in general
3. Scheduled Beneficiaries – These are the initial named beneficiaries that the trust is established for. Reputable offshore trust companies will require passports, utility bills, professional letters of reference, and sometimes affidavits from each beneficiary when the trust is established.
4. Trust Protectors – These are individuals and/or trust companies who have certain powers over the trust:
 - a) To change the Trustee or Trustees – commonly any replacement Trustee must be a reputable trust company or a lawyer practicing in an asset protection trust (“APT”) jurisdiction.
 - b) The power to add beneficiaries who are not “excluded persons.”
5. Flee Clause a/k/a Cuba Clause – A provision that requires the Trustee to move the trust and trust assets to another jurisdiction in the event of a governmental change, or if a judicial challenge to the trust makes it possible that the trust assets would be invaded within a short period of time.
6. United States Judgment – A judgment from a United States Court, which means nothing whatsoever in the jurisdiction where the trust is situated (located). In most reputable APT jurisdictions, the creditor will have to file a brand new lawsuit in the jurisdiction and obtain a new judgment against the debtor before then attempting to set aside the trust by proving that the trust is an alter ego of the settlor or a beneficiary, or that the transfer to the trust was for the primary purpose of avoiding creditors.

The Anatomy of an Asset Protection Trust

7. APT Legislation – Special laws passed in a number of offshore jurisdictions which make it extremely difficult, if not impossible, for a creditor to pierce an APT:
8. Contingency Fees Not Permitted – In most asset protection jurisdictions, lawyers must charge their clients by the hour, and not on a contingency fee basis.
 - a) Belize has no statute of limitations – unless there is a judgment against the settlor in Belize on the day the trust is formed, Belize law will protect the trust.
 - b) Court Registry deposit requirement – Nevis requires a 100,000 Nevis dollars (\$37,037.04) deposit into the Court Registry before a trust can be challenged. A 100,000 Nevis dollars (\$37,037.04) deposit is also required to challenge an LLC. A Nevis trust and LLC challenge will therefore require a 200,000 Nevis dollars (\$74,074.07) deposit.
9. Conflict of Interest Considerations – Typically, there are between two to six dozen practicing lawyers in a popular asset protection trust jurisdiction. Most or all of these lawyers have done work for the more popular trust companies, and would therefore have a conflict of interest in pursuing a trust for a creditor – lawyers from outside of the country must therefore come in as “foreigners before the court” to be admitted to practice law there to challenge the trust.
10. Judicial Bias - The asset protection trust jurisdictions derive significant income and lawyer work, not too mention governmental fees that support the local economy. The last thing an asset protection trust jurisdiction economy needs would be a judicial decision that lets creditors into a well intended asset protection trust that was structured in advance.
11. Having Your Cake and Protecting it, Too - The Trustee of the APT can own a 99% limited partnership interest or the ownership of an LLC, with the entity being managed responsibly and transparently by the general partner or manager, which may be the settlor. If and when a challenge might occur, the settlor may transfer control of the subsidiary entity to the Trustee of the trust.

Do Domestic Asset Protection Trusts Work?

- Nevada, Alaska, Delaware, South Dakota and other states have asset protection trust statutes. But the Full Faith and Credit Clause of the U.S. Constitution provides that a judgment issued by the court in one state will be respected by the court in other states.
- There are many questions regarding the effectiveness of domestic APTs. The case law is not yet fully developed on the question of whether the law of a foreign jurisdiction will apply for the determination of whether a creditor protection trust will shield trust assets from creditors of the grantor who is also a beneficiary.
 - *Hanson v. Denckla*, 357 U.S. 235 1958 – the law of the state where the trust administration occurs will be determinative.
 - *In re Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996) and *In re Brooks*, 217 B.R. 98 (Bankr. D. Conn. 1998) – assets placed in offshore APTs were not excluded from the debtor’s Bankruptcy estates.
 - *Dahl v. Dahl*, 2015 UT 23, Supreme Court of the State of Utah (January 30, 2015) – Under Utah law, wife had an enforceable interest in a NV APT that husband created because the trust was revocable regardless of stating in the trust language that the trust is irrevocable. The language that the Court based its reversal upon stated that, “Settlor reserves any power whatsoever to alter or amend any of the terms or provisions hereon.”
 - *In re Mortensen, Battley v. Mortensen*, (Adv. D.Alaska, No. A09-90036-DMD, May 26, 2011) – assets situated in Alaska were placed in an Alaska APT. The Court held that the exemptions would be determined under state law rather than federal law because the state law is applied to determine if the trust was established correctly.

Florida and APT Jurisdiction Trust Varieties



To preserve assets for marriage, management, or otherwise.

Grantor retains power to prevent distributions and testamentary power to appoint how assets pass on death - may be limited to not being exercisable in favor of creditors or creditors of estate, and exercisable only with approval of a non-adverse party not acting as a fiduciary.



Use Crummey Power for annual exclusions, or part of Grantor's exemption amount.

Held for health, education, and maintenance of individuals other than the Grantor.

Complete gift to fund - will not be included in Grantor's estate.

Grantor/Contributor cannot be a beneficiary.

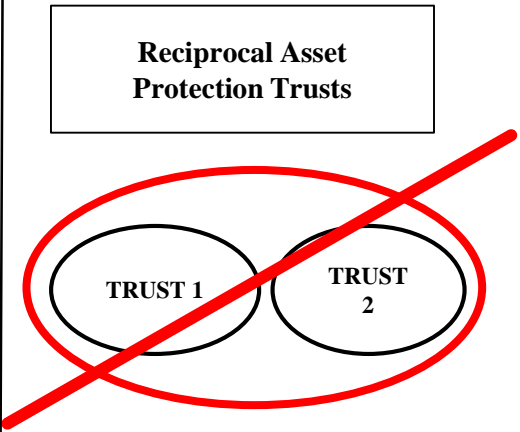


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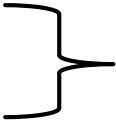
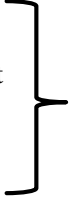
Under PLR 200944002, Grantor may be a discretionary beneficiary.



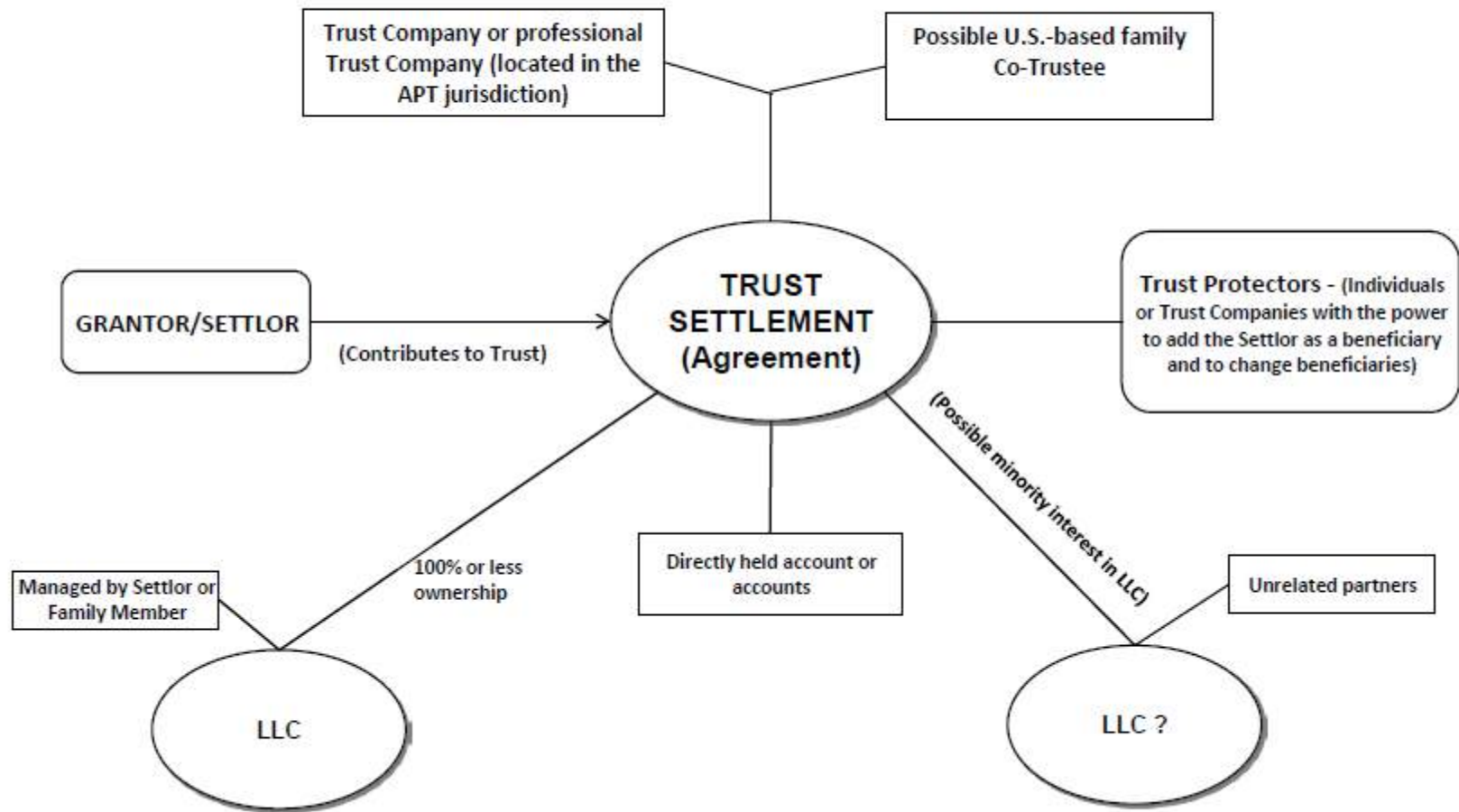
Beware the reciprocal trust doctrine, both under estate tax law and creditor protection law - see Gideon Rothschild's article entitled *Creditor Protection - - The Reciprocal Issue for Reciprocal Trusts (It's Not Just About Estate Taxes)*.

<http://www.mosessinger.com/site/files/creditorprotectionreciprocaltrusts.pdf>

Irrevocable Funded Domestic and International Wealth Accumulation Trust Categories: Where Will Your Client Best Fit?

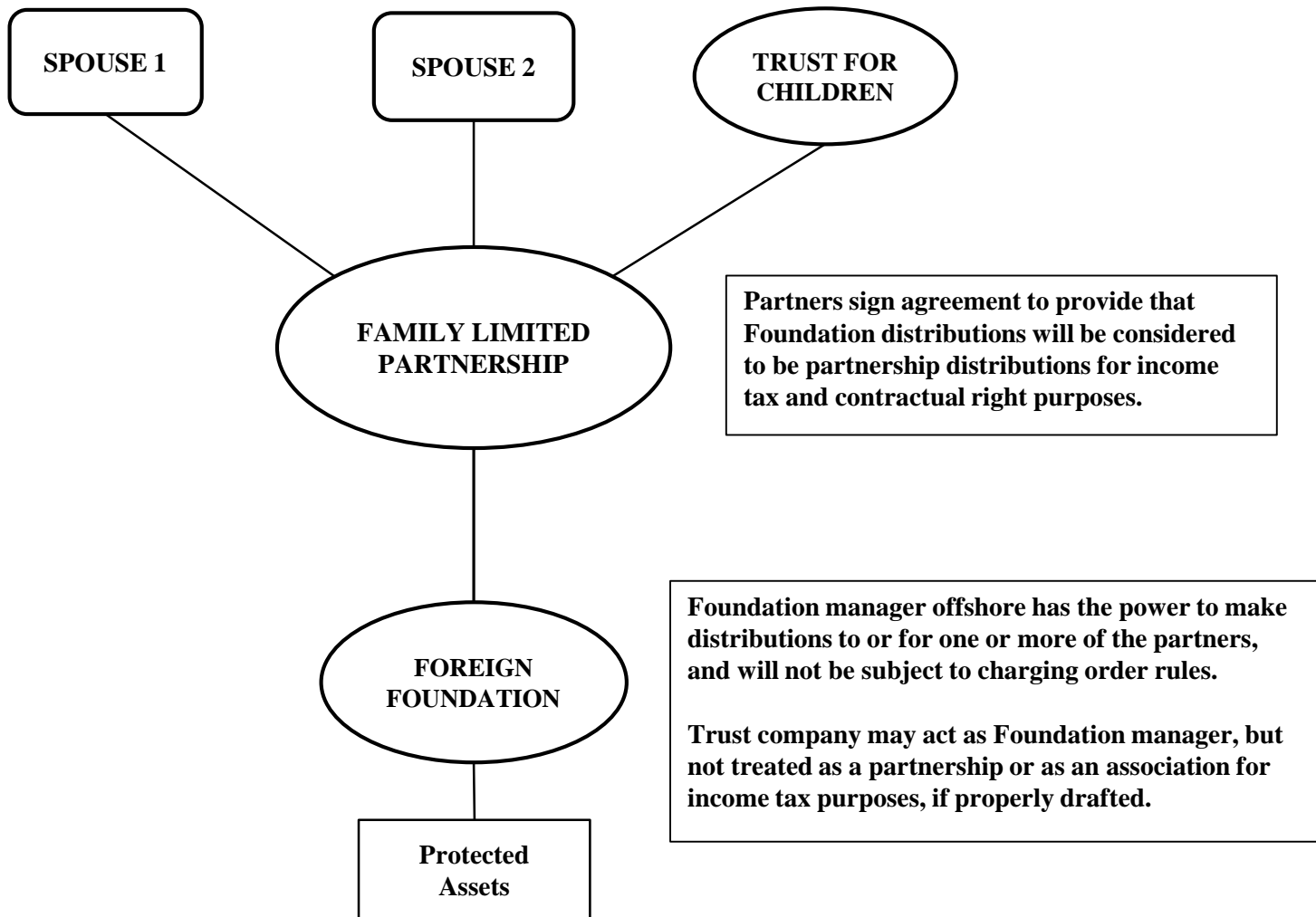
	A	B	C
	Irrevocable, Complete Gift Trust Settlor Not a Beneficiary  Shielded from future estate tax of settlor	Irrevocable, Complete Gift Trust Settlor is a Beneficiary  Shielded from future estate tax of settlor – but in case PLR 200944002 is not correct – empower a third party to deprive the settlor of distribution rights more than 3 years before the settlor dies – IRC §§ 2035 & 2036	Irrevocable Incomplete Gift Trust Treated as if no gift occurred for federal estate and gift tax purposes – business purpose is wealth preservation for family members.
1. Most Domestic States – Including Florida	A1 Protected from creditors of the settlor, and some but not all of the creditors of the beneficiary. Exception Creditors: <ul style="list-style-type: none"> • Support obligations: beneficiary’s child, spouse or former spouse (i.e., FL, CA, NY, NJ) • Person who has provided services for the protection of the beneficiary’s interest in the trust (i.e., FL) • State or U.S. claim empowered by state or federal law (i.e., public support obligations in CA) • Some states have more exceptions, (i.e., criminal restitution in CA, or punitive damages arising from manslaughter or murder in NJ) • Future legislation – What can they get you on next? NOTE – May benefit spouse but be careful under IRC 2036. If spouse is beneficiary cannot toggle off tax defective status unless an adverse party can approve all distributions to spouse.	B1 Will be subject to estate tax under IRC § 2036 because the settlor may be seen as retaining benefit by having the trust pay his/her creditors – <i>Revenue Ruling 2004-64</i>	C1 If grantor is beneficiary there will be no creditor protection – if grantor is not beneficiary then see A1 for exceptions Any creditor may be able to reach into the trust (unless the trust flees to another jurisdiction – don’t forget the flee clause)
2. Nevada	A2 Protected from all creditors – subject to 2 year Statute of Limitations (Much safer – assuming Nevada law applies)	B2 IRC § 2036 should not be an issue if PLR 200944002	C2 Same as A2: All creditors, 2 yr statute
3. Alaska, Delaware, and Wyoming (WY recently passed amendments to Uniform Trust Code)	A3 Delaware has a 4 year Statute of Limitations and exceptions for divorcing spouse, alimony and child support, as well as for preexisting torts. Alaska has a 4 year Statute of Limitations and an exception only for a divorcing spouse. Wyoming has a 4 year Statute of Limitations and exceptions for child support, property listed on an application to obtain creditor, or for fraudulent transfers.	B3 PLR 200944002 indicates that Alaska is fine – but ex-spouse creditors can get into a trust and may upset the apple cart under present Alaska law. Only single clients should use Alaska? Delaware and Wyoming have more exception creditors and may be more susceptible under PLR 200944002.	C3 Same as A3: Delaware, Alaska, Wyoming have 4 year statutes. Delaware has exceptions for support obligations and preexisting torts. Alaska has an exception only for a divorcing spouse. Wyoming has exceptions for child support, property on an application for creditor, or fraudulent transfer.
4. Offshore – Nevis, Belize, Cook Islands	A4 Completely protected depending on jurisdiction NOTE: Must remain defective for income tax purposes – cannot toggle off except by moving the trust to the United States.	B4 Should be as good as Nevada – Belize has a 1 day statute	C4 Should work fine as in A4 – no full faith and credit clause or state law jurisdiction concerns.

The Anatomy of a Typical Offshore or APT State Trust Arrangement



Foreign Foundations

Simpler than Offshore Trusts But Equally Effective According to Offshore Statutes Available in the Bahamas, Switzerland, Panama, and More



Consider the Offshore Foundation

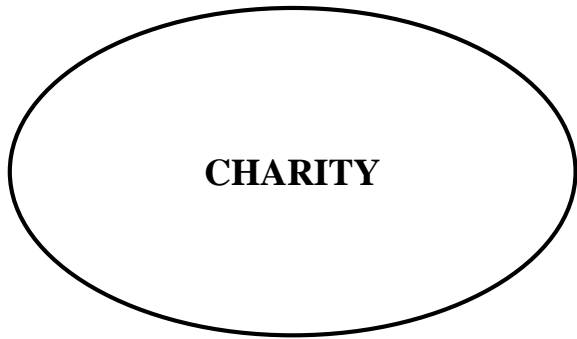
- ▶ A foundation is a special entity found in a handful of countries that include Nevis, the Bahamas, Panama, Lichtenstein, and Switzerland.
- ▶ A foundation is similar to a trust, because it is held for the benefit of one or more individuals and/or charities. It can own assets and can return those assets to any beneficiary who may have contributed them.
- ▶ A foundation has a manager, a secretary, and a registered agent. Typically, the secretary and registered agent will be a lawyer or trust company in the foreign jurisdiction. A trusted U.S. individual will typically be the manager.
- ▶ Trust reporting requirements may be eased considerably.
- ▶ Normally, a foundation will be taxed as a regular C corporation, which can be catastrophic, but it is possible for a foundation to be taxed as a trust or as a partnership, depending upon drafting and operation.
- ▶ Tax filings with a foundation will be the same as applies to an offshore trust, but red tape normally required by reputable trust companies under trust arrangements will often not apply with a foundation.
- ▶ In civil law jurisdictions, such as Lichtenstein, a judge does not have the power or authority to do anything but follow the exact written law. If the law says that creditors cannot reach a foundation, that is the judge's order, and the case is otherwise dismissed.

Foreign Charitable Foundation

- No U.S. income tax deduction for funding, but may qualify for gift tax charitable deduction.
- Formed in foreign jurisdiction that does not impose income tax.
- Non-U.S. source income not subject to tax, even though foundation is controlled by U.S. taxpayers.
- Careful and appropriate management and compliance is essential.
- Not subject to estate tax on U.S. taxpayer's death – must be held solely for charity.
- See Jonathan Moore's book – A Practical Guide to International Philanthropy.

The Very Best Creditor Protection Technique

(Give Significant Assets to a 501(c)(3) Charitable Foundation)







1. Tax deduction for contribution, which is controlled by the donors, and earmarked for eventual use for charity.
2. Creditors cannot reach it.
3. Family members can receive reasonable compensation for charitable services rendered on behalf of the Foundation.
4. Organization provisions can require that only family members will control the organization for up to 360 years.
5. The organization can be set up as a trust, with the donors as Trustees, to avoid state filings and annual filing costs that would apply for a charitable corporation.
6. The organization can be the beneficiary of a Charitable Lead Annuity Trust, but there will have to be a Chinese wall on management for a separate identical organization, so that the Grantor cannot manage what ends up going to charity from the CLAT.

AVOIDING ESTATE AND TRUST LITIGATION BEFORE IT HAPPENS – ETHICAL AND PRACTICAL CONSIDERATIONS

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INSTRUCTIONS:

- It Is Your Role as an Estate Planner or Advisor to Identify and Discuss Red Flag Situations for Litigation with Clients and Their Other Advisors, and Possibly Family Members and Friends As Well.
- Sitting Here In This Presentation You Will Think About Situations You Have Seen, and Also Situations Now in the Making That You Can Do Something About.
- Take Notes On Specific Actions You Can Take, and Specific Clients You Will Call to Implement the Strategies We Will Discuss Today. (Also Enumerate Form Changes That Can Be Facilitated to Protect Your Clients, Their Beneficiaries and Your Legal or Advisory Practice.)
- Let's Know That We Went Beyond the Normal Call of Duty to Help Our Clients and Their Families and Other Beneficiaries Avoid the Abyss of Uncertainty, Fear and Loathing, That is Our World of Estate and Trust Litigation.


THE RED FLAG	PROBLEMS ASSOCIATED THEREWITH	SOLUTIONS	NEXT ACTIONS
 <p>New spouse's children are growing closer to client.</p> <p>Client is not getting along as well with his or her own children.</p> <p>Everyone is complaining about everyone.</p>  	<ol style="list-style-type: none"> 1. Children of first marriage may be cut out of elective share situation and can be uncertain and ugly. 2. The children of the first marriage have to wait for step-parent to die to inherit. 3. Children may object to Q-TIP or trust arrangement: <ol style="list-style-type: none"> a. Loss of control over trustee. b. Objections to spending. c. Objections to trustee fees paid to the prior spouse. 4. May control funeral and grieving access. 5. Jealousy and dishonesty about, toward or by the new spouse, especially if remarried spouse is of unsound mind. 	<ol style="list-style-type: none"> 1. Did you recommend the possibility of independent counsel and notify of conflict laws and confidentiality limitations. That should be part of the first draft planning documents and conversations. Do you represent one or more of the children and is that disclosed and considered? In your deposition you will be asked by both sides why you favored the other side, etc. Make sure that your Fee Agreement covers all time spent being a witness-of-fact and complying with discovery and other requests. Remember that e-mail stands for evidence mail. 2. Recommend holding a lot of the assets in trust from the beginning – maybe start while both spouses are alive and well. 3. Consider a Marital Asset Protection System (MAPS). 4. Consider step-up on first death structures like joint exempt step-up trusts (JESTs) for non-community property states and limiting the powers of appointment as we can to reduce income taxes while also enhancing protection for the spouse and descendants. 5. Require at least a co-trustee to act with spouse, even if the spouse can replace that co-trustee with someone from a mutually agreed list or any trust company, but particularly a trust company that supports the Notre Dame Tax Institute. 6. Set expectations in writing on spending budget and new cars every 2 – 4 years and donations, etc. so that these decisions are not all "the surviving spouse's fault." 7. Consider outright devises or devises in trust to children of first marriage on the death of the first dying spouse to alleviate issues and give them less power and expectancy over surviving spouse's trust. Consider life insurance to fund this. 8. Appoint trust protectors to balance power and have flexibility and leverage. 9. Involve one or more children in the review of documents process. 10. Consider a binding Postnuptial Agreement or modification of existing Prenuptial Agreement to clarify and change to arbitration to coincide with any estate and trust arbitration. 11. Schedule follow-up every 2 to 3 years to review titling and what happens on death. Joint with survivorship and pay-on-death designations can ruin a great trust plan. 12. Request a thorough mental health evaluation before making large changes. 13. Send copies of all work with proposed and finalized changes to one or more of the children. 14. See other strategies below. 	<p>Next Actions: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Client Name: _____</p> <p>Who to delegate to: _____</p> <p>Next Actions: _____</p> <p>_____</p> <p>_____</p> <p>_____</p>
<p>Client has chosen a not-so-good trustee.</p> 	<ol style="list-style-type: none"> 1. The trustee has great leverage. 2. The trustee has the ability to be paid from the trust and to have their professionals paid from the trust. 3. The trustee may borrow from the trust and not be able or willing to pay it back. 4. The trustee may make unwise investments. 	<ol style="list-style-type: none"> 1. Require the appointment of a co-trustee by the "lead trustee" from an approved list and/or a trust company that supports the Notre Dame Tax Institute. 2. Educate the trustee the best we can and offer annual or more frequent involvement. 3. Require the trustee to meet annually with a qualified advisor approved by the Trust Protector Committee. This should not be the next door neighbor who is a lawyer unless that lawyer attends the Notre Dame Tax Institute. Require a competent CPA. 4. If there is a sole trustee preference: <ol style="list-style-type: none"> a. Allow that the beneficiaries can require an added trustee to assure proper accountings, conduct and accountability. 	<p>Next Actions: _____</p> <p>_____</p> <p>_____</p> <p>_____</p>

AVOIDING ESTATE AND TRUST LITIGATION BEFORE IT HAPPENS – ETHICAL AND PRACTICAL CONSIDERATIONS

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THE RED FLAG	PROBLEMS ASSOCIATED THEREWITH	SOLUTIONS	NEXT ACTIONS
 Client has chosen a not-so-good trustee. (Continued)	5. The trustee may not account to beneficiaries or even let them know they are beneficiaries. 6. Lack of tax planning because the "run of the mill" professionals hired by the trustee know what to recommend. 7. The beneficiaries may accuse the trustee of the above items whether they happen or not.	b. Use Trust Protectors. c. Allow for division of trusts into separate trusts with pre-designated percentages at the option of any beneficiary (i.e., can use standard tables to determine portable discounted value of future rights, and then release and take 40% of that value now). d. Allow someone to move the trust offshore for leverage. 5. Make sure that all the trustees are replaceable by someone or some entity.	<hr/> <hr/> <hr/> <hr/> Client Name: _____ Who to delegate to: _____
A child or children out-of-kilter. <i>"Don't handicap your children by making their lives easier."</i> - Robert Heinlein	1. Highly dependent on the client's money. 2. Resentful of other beneficiaries who interfere. 3. The above is exacerbated by heavy drinking and drug abuse. 4. May get poor advice from a lawyer who knows that the trust must pay fees under the exception creditor rules. 5. May move in with parents and exercise undue influence over inheritance in exchange for helping the parent get to the bathroom, etc. 6. Do not allow the out-of-kilter child to have a power of appointment unless it will be approved by a responsible party. 7. Don't have this child as a beneficiary but make him/her addable by the protectors after the client's death.	1. Make them get a job while living on a tightly agreed budget. 2. Let them know upfront that this is the way it will be – sense of entitlement. 3. Documents can require counseling certification and "AA Type" gambling and other problematic addiction compliance so that the trustee will know if they have a beneficiary who is sane to talk to. 4. Allow for elimination of beneficiary as a beneficiary and/or start the trust in an APT state of most states ala the Florida <i>Casselberry</i> case. 5. Have a safety latch provision in the trust and involve children in all decisions.	Next Actions: _____ <hr/> <hr/> <hr/> <hr/> Client Name: _____ Who to delegate to: _____
The unfair estate plan. 	1. Things changed after signing so someone does not get what they were supposed to get. 2. Not clear what the client would have wanted to do if the changes had been considered. 3. Tax apportionment and tax issues dramatically change who will get what. 4. Beneficiary designations or lack thereof change what people get.	1. Trust Protectors to the rescue, but cannot reduce or meddle with the marital deduction. 2. Write as much as you can about the client's intentions as to each contingency you can think of. 3. Warn clients and consider a blanket change thereto.	Next Actions: _____ <hr/> <hr/> <hr/> <hr/> Client Name: _____ Who to delegate to: _____

AVOIDING ESTATE AND TRUST LITIGATION BEFORE IT HAPPENS – ETHICAL AND PRACTICAL CONSIDERATIONS
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THE RED FLAG	PROBLEMS ASSOCIATED THEREWITH	SOLUTIONS	NEXT ACTIONS
<p>The incapacitated or unhealthy client.</p> 	<ol style="list-style-type: none"> 1. No one is sure if this client knows what they are doing is within reason. 2. Manipulations come out of the woodwork. 3. Bad decisions hurt the future inheritance. 4. Last minute planning changes may not be well thought through or considered. 	<ol style="list-style-type: none"> 1. Involve family members and other advisors to get the planning done ASAP and then refine as you can. Have intake form permit you to call family members without knowledge or consent of client. Put this in the Durable Power of Attorney as well. 2. Identify and strategize. This can include product sales people. 3. Document that you have warned the client and the family as best you can. 	<p>Next Actions: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Client Name: _____</p> <p>Who to delegate to: _____</p>
<p>Ambiguity or mistakes or mistakes in the documents.</p>	<ol style="list-style-type: none"> 1. The drafter makes an error in drafting that causes an ambiguity or problem that exacerbates one or more of the other problems above. 	<ol style="list-style-type: none"> 1. Allow for trust to be amended without notice to all secondary beneficiaries. 2. Allow for Trust Protectors to make changes. 3. Note in the document that specific detailed devices can be reformed by independent trustee or trustees. 4. Have someone else in the office or in the client's world proof read the documents before they are signed, and to allow for refinement after they are signed but before the client dies. 5. In terrorem clauses to the rescue? 	<p>Next Actions: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>Client Name: _____</p> <p>Who to delegate to: _____</p>

AVOIDING ESTATE AND TRUST LITIGATION BEFORE IT HAPPENS – ETHICAL AND PRACTICAL CONSIDERATIONS

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In all situations consider:

1. Waiver by jury trial.
2. Require good faith immediate mediation.
3. Consider requiring arbitration, which may be by the Trust Protectors as arbitrators.
Enable the arbitrators to bifurcate actions so that any document and interpretation issues are resolved before the more expensive to analyze and evaluate items are considered, since the interpretation questions may change or be irrelevant based on the first stage rulings.
4. Use in terrorem and/or King Solomon clauses.
5. Appoint Trust Protectors.
6. Reverse attorney fees to reduce share of unsuccessful person challenging any action or document.
7. Pre-death probate.
8. Import the laws of other states or countries by using trusts there:
 - a. can eliminate exception creditors.
 - b. can be a better forum to litigate or a formidable shield to discourage litigation.
 - c. can eliminate the need to give accountings to certain beneficiaries.
 - d. community property step-up basis or JEST trusts can avoid income taxes.
 - e. Avoid public policy interference with intent by using offshore jurisdictions that do not change things with respect to religious, marital or other requirements that clients may want to install.
9. Explain to the clients and the other side that tax planning in a structure of settlement may be very advantageous compared to what the judge or arbitrator may award.
10. Consider requiring that beneficiaries comply with good business ethics, be responsive to trustee requests, disclose personal situations and health records and sign releases to receive benefits of any kind.
11. Read Jonathan's excellent outline at Chapter 21. Give yourself an extra day to get back if you ever go to the Arctic Circle.
12. Consider an extensive videotaped interview with the client to demonstrate mental acumen and create a dramatic record of intent.

13. Consider having beneficiaries sign a legally binding agreement to not allow changes and to compensate for any changes from what the client's documents say.

Arbitration Advantages:

1. Privacy.
2. Each party can reject from a list of potential arbitrators as opposed to a possible "weak judge." Arbitrators are most often successful and knowledgeable practicing lawyers. The document can require use of a board certified trust and estate lawyer with 20 years experience practicing more than 100 miles from the residence of the decedent's place of residency.
3. Litigators are more likely to settle and cannot expect long shot or emotional issues to sway a decision.
4. Usually faster than a trial.
5. Party taking a long shot position will have to pay large arbitration fees and other costs.
6. Can bifurcate issues if allowed in document.

Arbitration Disadvantages:

1. Very expensive but can limit to one arbitrator and use state arbitration rules AAA (American Arbitration Association) or otherwise.
2. The party filing has to pay the initial filing fee. The trust can provide that this will come out of the complaining beneficiary's share.
3. Privacy enables parties to not have community peer pressure impact decisions.
4. Prevents the party who wants to delay judgment to stall effectively.
5. No appeal rights to correct bad decisions unless stated in document that AAA appeal rules and procedures will work.
6. Inability to sway a jury that might better appreciate emotional issues.
7. Arbitrators almost always find a way to "split the baby."

ASSET PROTECTION FOR BUSINESS OWNERS AND THEIR ENTITIES

ESTATE PLANNING COUNCIL OF GREATER MIAMI
6TH ANNUAL ESTATE PLANNING SYMPOSIUM
TUESDAY, FEBRUARY 6, 2018
CORAL GABLES, FLORIDA



Presented By:
Alan S. Gassman, Esquire

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Basis and Migrating Clients from Community Property States and The Power of Appointment Support Trust

6th Annual Estate Planning Symposium

Estate Planning Council of Miami

February 6th, 2018

Lester B. Law, Esq.

Lester Law



Lester is a member of Franklin Karibjanian & Law PLLC, a boutique estate planning firm with offices in Washington DC, Boca Raton, Florida and Naples, Florida.

Lester focuses on estate and trust planning, business succession planning, estate and trust administration, beneficiary and fiduciary administration and income tax matters.

Lester is a Fellow of the American College of Trusts and Estates Counsel (ACTEC), and serves on the Fiduciary Income Tax and Transfer Tax Study committees. He is also an active member of the American Bar Association's Real Property Trusts and Estate (ABA RPTE) Section, serving as co-chair of the ABA RPTE's Income and Transfer Tax Planning Group, as well as being a member of other committees. An active member of and board certified in Wills Trusts and Estates law by the Florida Bar, Lester has held many leadership roles at the Florida Bar's Real Property Probate and Trust Law Section, including chairing committees, being an editor of the Tax Notes for the Florida Bar Journal and currently co-chairing a subcommittee exploring the utility of Community Property Trusts in Florida.

Lester is a nationally recognized speaker and author. Presentations and venues include, University of Miami Heckerling Institute on Estate Planning, the Notre Dame Tax & Estate Planning Institute, ABA-RPTE meetings, Washington School of Law - Annual Estate Planning Council, Portland Estate Planning Council, Ave Maria School of Law Estate Planning Symposia, and Florida Attorney / Trust Officer Liaison Conference. He has lectured for the past decade at the Florida Banker's Trust School, was an adjunct professor at the Ave Maria School of Law and an adjunct professor at the University of Miami School of Law, Graduate Estate Planning Program. Lester has written extensively and has published in national magazines including BNA, Trusts & Estates, Estate Planning and Probate & Property, and has been quoted in national, regional and local media.

Prior to law school, Lester was a CPA in Florida with PriceWaterhouseCoopers (formerly Price Waterhouse) for several years.

Lester received his bachelor's degree with honors in business administration with a concentration in accounting from Florida International University and his master of science in taxation from the University of Miami. He also received his juris doctor from The University of North Carolina at Chapel Hill and his master of laws in taxation from The University of Florida, graduating at the top of his class.

Lester shares his time between Naples, Florida and Washington, DC.

What We Will Chat About!

1. Basis of Property at Death

- ▶ Outright transfers
- ▶ Assets in Irrevocable Grantor Trusts (IGTs)

2. Basis for Community Property

- ▶ Use of Community Property Trusts (CPTs)

3. Basis Adjustment Mechanism

- ▶ Use of Power of Appointment Support Trusts (POASTs)

Estate and Income Tax Planning

- ▶ What is clear ... is that things are not always clear in taxes ... things can be **Fuzzy!**
- ▶ What do we really know about income tax basis ... it's not always clear!

Looking Forward in the Rear View Mirror

Estates		
	Estate Tax Exclusion	Max. Estate Tax Rate
2001	\$675,000	55%
...	\$1 MM to 3.5 MM	50% to 45%
2010	Repealed	
2011	5,000,000	35%
2012	5,120,000	35%
2103	5,250,000	40%
2014	5,340,000	40%
2015	5,430,000	40%
2016	5,450,000	40%
2017	5,490,000	40%
2018	11,000,000 (ish)	40%

Max. Inc. Tax Rates		
Ordinary Income	Qual. Div. / LTCG	Medicare Surtax (NII)
39.1%	20%	N/A
38.6% to 35%	20 - 15%	N/A
35%	15%	N/A
35%	15%	N/A
35%	15%	N/A
39.6%	20%	3.8%
39.6%	20%	3.8%
39.6%	20%	3.8%
39.6%	20%	3.8%
39.6%	20%	3.8%
39.6%	20%	3.8%
37%	20%	3.8%

Basis at Death

The **Basic Basis** (not a typo --- just a tongue twister) at Death Rule - Adjust Basis

▶ § 1014(a)

- "acquired from" or "passed from" = Date of Death (DoD) Value (if not otherwise sold)

▶ § 1014(b)

- Provides ten (10) definitional sections to explaining what it means for property to be "acquired from" or "passed from" (i.e., § 1014(b)(1) to (b)(10))

Basis at Death

Code § 1014(a) ... what does it really say?

- ▶ (a) Except as otherwise provided in this section, the basis of property in the hands of a person **acquiring the property from a decedent or to whom the property passed from a decedent shall**, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be—
 - ▶ (1) the fair market value of the property at the date of the decedent's death, ...

Basis at Death

Code § 1014(b)(1) ... what does it really say?

- ▶ (b) Property acquired from the decedent - For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:
 - ▶ (1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;

Basis at Death

Code § 1014(b)(1) is a so-called “deeming” statute ...

- ▶ What do we mean by that?
 - ▶ “shall be considered” = “Deems”

Basis at Death

POP QUIZ

Question #1:

Is there a requirement that property 'acquired from' or 'passed from' the decedent be **included in the decedent's gross estate** for a basis adjustment to DOD value?

Basis at Death

Answer #1

- THERE IS ABSOLUTELY **NO** REQUIREMENT THAT THE PROPERTY BE INCLUDED IN THE DECEDENT'S GROSS ESTATE FOR ESTATE TAX PURPOSES UNDER (b)(1)
- Code § 1014... what does it really say?
 - ▶ (b) Property acquired from the decedent - For purposes of subsection (a), the following property **shall be considered** to have been acquired from or to have passed from the decedent:
 - (1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;

Basis at Death

Answer #1 ... continued

- ▶ Note ... other sections HAVE a gross estate inclusion, like
 - ▶ §1014(b)(6) (for community property),
 - ▶ §1014(b)(9) (for GPoA property, and
 - ▶ §1014(b)(10) (for QTIP property).

- ▶ **BUT ... NOT § 1014(b)(1)**

Basis for lifetime transfers / gifts

POP QUIZ

Question #2:

What could be the most important Revenue Ruling in Estate Planning today?

Basis for lifetime transfers / gifts

Answer #2:

Revenue Ruling 85-13

Basis for lifetime transfers / gifts

Revenue Ruling 85-13

- What does R.R. 85-13 do?
- What does R.R. 85.13 really say?
 1. Facts: A, the Grantor, exchanges promissory note for assets in trust.
 2. Law: IRC § 675(3) says "treated" (i.e., a "deeming rule") as owner of portion of trust where grantor has directly or indirectly borrowed the trust corpus or income, unless (the stuff about adequate interest security and making by grantor (which was not the case)).
 3. Holding: A's exchange of the promissory note for the entire corpus, was an indirect borrowing which caused A to be the "owner of the trust", because of the "deeming" rule under § 675(3) ... (Note: ever wonder why it's § 675(3) and not § 675(c) ... me too!)

Basis for lifetime transfers / gifts

Revenue Ruling 85-13

- So what happens during life?
 - Under RR 85-13, **grantor is "treated" as the "owner" of the trust property"**
 - If that is the case ...
- So, what happens when grantor dies?
 - Doesn't the legal fiction of ownership by the grantor then stop ... isn't there then another legal fiction (or a deeming rule) that would then say that **at that point in time there is a transfer FROM the grantor to the Trustee (or beneficiaries) of the IGT?**

Basis at Death

Revenue Ruling 85-13

- Doesn't it then seem that at DEATH ... it fits in Code § 1014(b)(1) ... (i.e., "property acquired by bequest, devise or inheritance ... from the decedent")?

Basis at Death

POP QUIZ

Question #3 ... again!

Is there a requirement that property 'acquired from' or 'passed from' the decedent be included in the decedent's gross estate for a basis adjustment to DOD value?

Basis at Death

Answer #3 ... AGAIN!

- REMEMBER ...
 - THERE IS ABSOLUTELY NO REQUIREMENT THAT THE PROPERTY BE INCLUDED IN THE DECEDENT'S GROSS ESTATE FOR ESTATE TAX PURPOSES UNDER § 1014(b)(1)!

Basis at Death

POP QUIZ

Question #4:

How many folks believe you can **NOT** adjust the basis of property held in an irrevocable grantor trust (IGT) when the grantor dies?

Basis at Death

Answer #4

It is **unclear** whether there is a basis adjustment at death!

Some have argued for it,
Others say no ... we leave it for you to determine!

Personal thought ... 50:50 Argument
Intent v. Actual Language of the Code

Community Property Stuff ...

Community Property Trusts (CPTs)

▶ Moving from a Community Property to Non-Community Property Regime

• Example

– *Moving from California to Florida (by example)*

– Does the property still remain community property?

– *Do you get a § 1014(a)(6) basis adjustment?*

– How to protect?

• **Keep in mind - income taxes are more relevant than estate taxes today ... for the most part!**

Community Property Trusts (CPTs)

- ▶ Code § 1014(a)
 - ▶ (a) Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be—
 - ▶ (1) the fair market value of the property at the date of the decedent's death, ...

Community Property Trusts (CPTs)

- ▶ Code § 1014(b) Except as otherwise provided in this section, the basis of property ... shall ... be—

(6) In the case of decedents dying **after December 31, 1947**, property which represents the **surviving spouse's one-half share of community property** held by the decedent and the surviving spouse **under the community property laws of any State, or possession of the United States or any foreign country**, **if** at least one-half of the whole of the community interest in such property **was includible in determining the value of the decedent's gross estate** under chapter 11 of subtitle B ...

Community Property Trusts (CPTs)

Stated Simply

- If
 - Property **is** CP (*deeming not allowed*); and
 - At least $\frac{1}{2}$ of the CP is included in the decedent's estate;
- Then
 - (b)(1) includes the decedent's $\frac{1}{2}$ interest in CP; and
 - (b)(6) includes the surviving spouse's $\frac{1}{2}$ interest in CP.
 - (Note: This is the so-called "double-basis" step up).

Community Property Trusts (CPTs)

Stated Simply

- Note:
 - As an aside ...
 - If there was no estate tax ... (as some thought might have happened ... but it did NOT!)
 - there is no basis adjustment under (b)(6) ...
 - there may still be under (b)(1)
 - as we noted ... b/c under (b)(1) there is no requirement for inclusion in the gross estate, were there is such requirement under (b)(6).

Community Property Trusts (CPTs)

Why is Code § 1014(b)(6) so favorable?

- **Historical perspective**
 - **Before 1948**
 - ▶ Socially what was happening
 - ▶ Who owned property?
 - ▶ Who died first?
 - **What happened in 1948 ... tax wise (that is)!?**
 - ▶ Joint tax returns
 - ▶ § 1014(b)(6)
 - ▶ Marital deduction
 - **So if the estate tax was repealed ... we might have be back to 1948 ... for CP states**

Community Property Trusts (CPTs)

What does the Uniform Disposition of Community Property Rights at Death Act have to do with the “double basis” step up under Code § 1014(b)(6)?

- Historical perspective

- UDoCPRaDA (pronounced “You Doc Prada”)
- Completed by Uniform Law Commission in 1971
- For adoption by non-CP states (i.e., common law states)
- Enacted in some form in 16 states
 - ▶ AK, AR, CO, CT, **FL**, HI, KY, MI, MN, MT, NY, **NC**, OR, UT, VA, WY
 - ▶ Introduced in 2017 in ND (perhaps SD soon, too).

Community Property Trusts (CPTs)

What does the Uniform Disposition of Community Property Rights at Death attempt to accomplish?

- What do most people believe?
- What does it really say ... (next slide)

Community Property Trusts (CPTs)

UDoCPRaDA

- "This Act has a *very limited scope*. If enacted by a common law state, it will only define the dispositive rights, at death, of a married person as to his interests at death in property 'subject to the Act' and is limited to real property, located in the enacting state, and personal property of a person domiciled in the enacting state. The purpose of the Act is to preserve the rights of each spouse in property *which was community property prior to change of domicile*, as well as in property substituted therefor where the spouses have not indicated an intention to sever or alter their "community" rights. It thus follows the typical pattern of community property which permits the deceased spouse to dispose of 'his half' of the community property, while confirming the title of the surviving spouse in 'her half.'"

Community Property Trusts (CPTs)

UDoCPRaDA

- There is a difference between one's **rights** and the **nature of property!**
 - The UDoCPRaDA is designed to **preserve rights**
 - The UDoCPRaDA does **NOT** determine the nature of property

Community Property Trusts (CPTs)

Code § 1014(b)(6) ... does **not deal with rights**, it deals with property that is:

" ... community property held by the decedent and the surviving spouse under the community property laws of any State, or possession of the United States or any foreign country ..."

It deals with the nature of the property ...

So basically the UDoCPRaDA has no affect on basis ... even though many think so!!!

Community Property Trusts (CPTs)

- ▶ It is highly debated, if your client leaves a CP state whether the “personal” property is still CP in the new state ...
- ▶ Some believe that the answer is yes ... citing to UDoCPRaDA (or other state law cases).
- ▶ Some believe that the answer is no ... citing to the same ...
- ▶ Some simply don't know ...
- ▶ How to get more certainty?
- ▶ ENTER ... the **Community Property Trust** ...

Community Property Trusts (CPTs)

Community Property Trust

- Why do proponents say it works?
 - *Colvclazier v. Colclazier* (89 So. 2d 261)
 - *Quintana v. Ordone* (1995 So. 2d 577)
 - *Eastabrook v. Wise* (348 So. 2d 355)
- What does the IRS think about it?
 - *Commissioner v. Harmon* (323 US 44)
- ▶ Should your client use it?
 - ▶ Need to do lots of reading ... lots of good materials out there!
 - ▶ It may be a good approach for the right client

BASIS ADJUSTMENT MECHANISMS (BAMs)

Think Emeril Legasse!



BASIS ADJUSTMENT MECHANISMS (BAMs)

Four Types for Non Grantor Trusts that Do Not Trigger Income Tax

- Independent Trustee Discretionary Distribution
- Delaware Tax Trap
- Contingent General Power of Appointment
- Trust Protector - Provide for any of the above

Goal

- Adjust basis of trust assets

When Used?

- Commonly used with Credit Shelter Trusts ... but need not limit to those trusts ... can be used with other trusts, too.

Basis Adjustment Mechanisms (BAMs)

Historically

- Contingent *GPOA* used in *GST* planning
 - Purpose to minimize tax inclusive v. tax exclusive issues with *GST* taxes (for taxable terminations v. taxable distributions v. estate tax inclusion)
 - So ... we've had it for a long time (i.e., 1986 - 30+ years)

Thought ... why not use it where the client's parents are not so wealthy ...

Introduction of the *POAST!!!*

Power of Appointment Support Trust (POAST)

Don't think TOAST ...

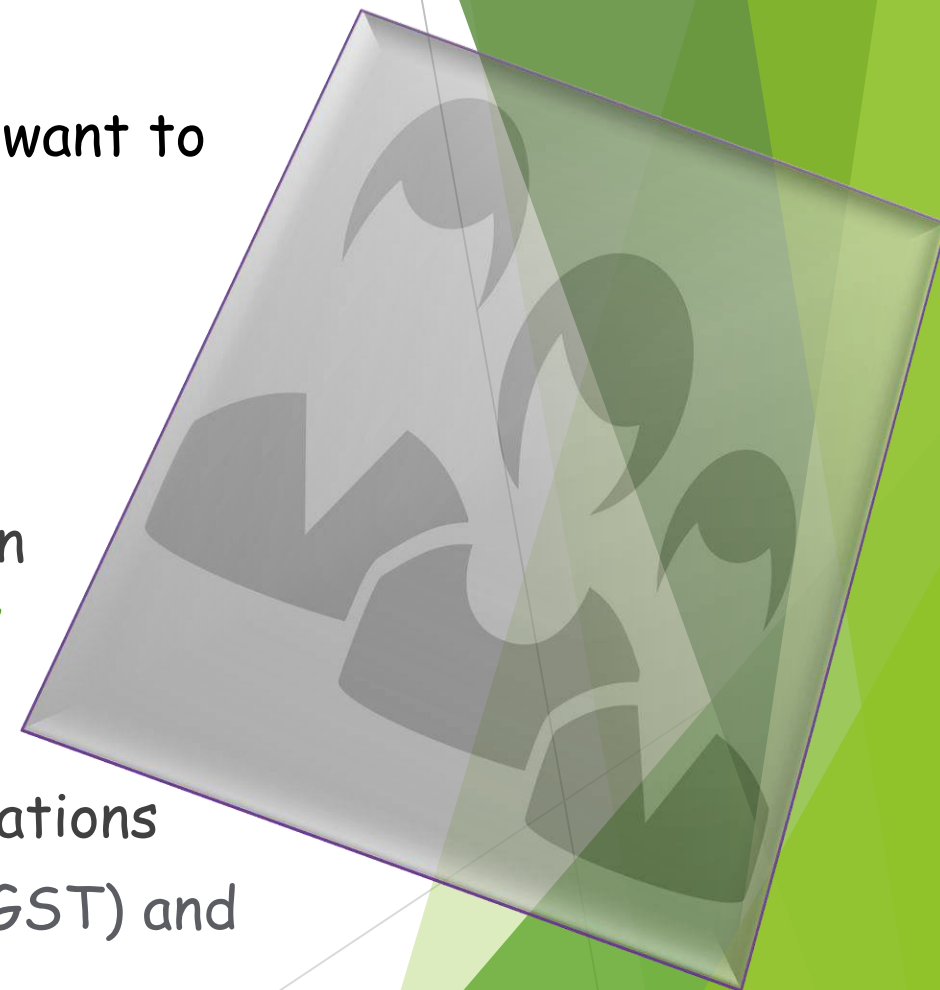
think

“POAST!”

POASTs

Introduction

- The “sandwich” generation ... I know, it makes you want to think about “toast” ... resist!
- Hypothetical Example
 - **G1 = Senior Generation Family Member**
 - Low wealth
 - Very little gifting, high remaining exclusion
 - **G2 = Current Generation “Wealth Creator”**
 - Significant wealth
 - Desire to provide for G1 and future generations
 - Minimize total transfer tax (estate/gift/GST) and income tax
 - **G3/G4 = Children/Future Generations**



POASTs

► Implementation

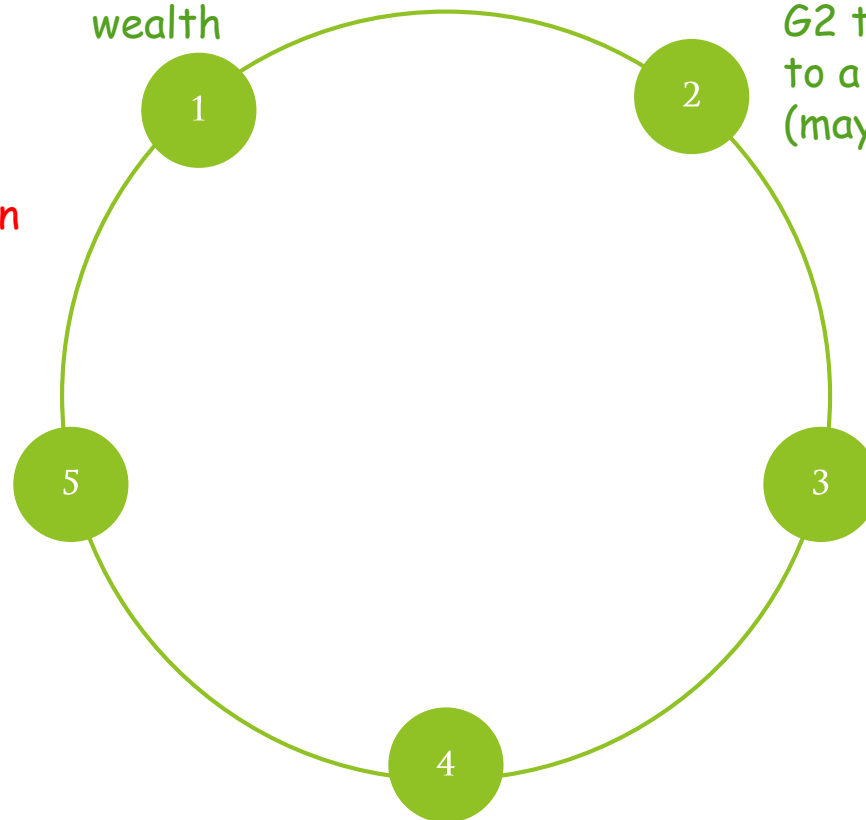
G1's unused GST exemption can be applied to included assets, allowing these assets to benefit multiple generations without additional transfer tax (trading gift tax for GST exemption)

Wealthy individual (G2) wishes to provide support for an aging family member (G1) with very modest wealth

G2 transfers assets to a POAST for G1 (may incur gift tax)

Distributions are made to G1 for his/her support, when needed

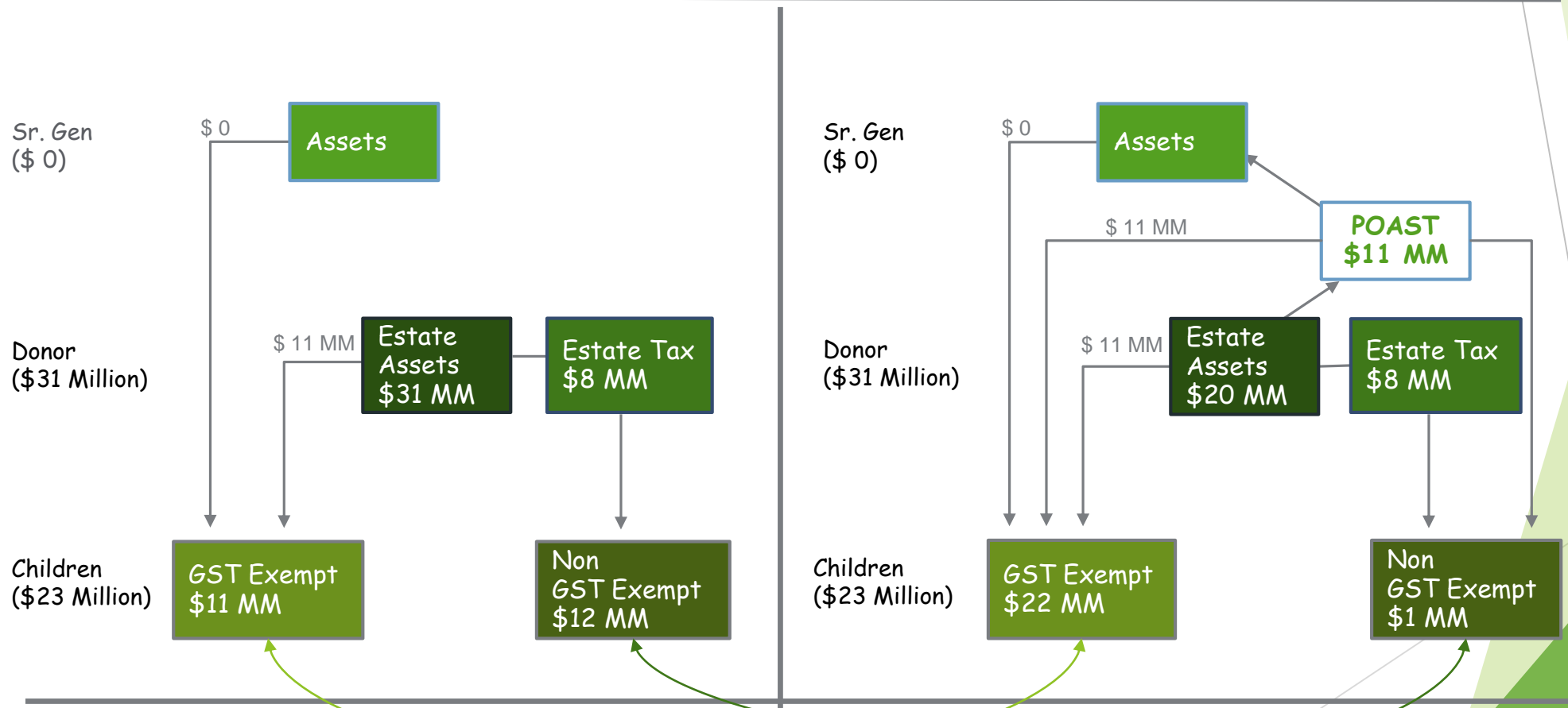
At G1's death, assets subject to GPOA are included in G1's estate and receive a **date of death basis adjustment**, potentially eliminating income tax on appreciated assets



POASTs

Traditional Planning

Traditional Planning with POAST



POASTs

▶ Structure

- The G1 beneficiary is granted a contingent testamentary GPOA, equal to lesser of (a) G1's remaining estate; or (b) unused GST exclusion at death
 - ▶ The GPOA exercise may also be contingent on third party approval
 - ▶ Caution - State, Commonwealth and D.C. creditor rights

POASTs

▶ Structure

- Assets subject to GPOA, if unappointed, fund trusts for G3/G4 (or are added to existing trusts).
- Assets not subject to GPOA remain in non-exempt trusts for G3 with typical contingent GPOA language.
 - ▶ Language should be included to split the trust for G3/G4 to preserve the GST inclusion ratio

POASTs

► Structure

- The trust can remain a grantor trust with respect to G2 (further future leverage)
 - If the GPOA is unexercised
 - If GPOA is exercised, the trust becomes a non-grantor trust

POASTs

✓ POASTs' suitability

- ✓ If several of the following factors are present, the POAST may be appropriate:
 - ✓ The G1 beneficiary will likely not have a taxable estate
 - ✓ G1 is elderly and/or has a shorter than normal life expectancy
 - ✓ G2 desires to assist G1 financially
 - ✓ G2 wishes to transfer assets dynastically for the benefit of their family
 - ✓ G2 will likely have a taxable estate
 - ✓ G2 will likely use all of their available GST tax exemption during life or at death
 - ✓ G2 has lower basis assets and would not mind parting with those assets to fund the POAST
 - ✓ Transfers to the POAST and parting with the transferred assets will not impact G2's lifestyle

POASTs

- The POAST structure can be expanded to complement additional planning strategies including:
 - Assets with significant appreciation potential
 - Grantor Retained Annuity Trust (GRAT) Residual or Intervivos CLAT - pourover
 - Life Insurance on the Donor
 - May be used to enhance tax benefits of older irrevocable trusts depending on the trust language
 - Decant
 - Court Reformation
 - Non-judicial reformation

SUMMING IT ALL UP!

- ▶ Tax law basis rules are not always crystal clear ... it is a bit

Fuzzy!

- ▶ Basis adjustment at death does not necessarily require inclusion in the gross estate
- ▶ Maybe can adjust basis of assets in IGT after death of grantor
- ▶ Should be able to adjust basis of assets for gift to IGT
- ▶ Consider the POAST where G1 has less wealthy folks who may otherwise lose the unused AEA and GST exemption
- ▶ Consider the CPT for a "double-basis" step up!

¿questions?

disclosure & disclaimer

of course, the foregoing materials for educational purposes only ...

engage your thinking cells before using this stuff ...

don't read this while driving or while multitasking ...

be thoughtful when you plan ...

FRANKLIN KARIBJANIAN & LAW PLLC