

# Creditor Protection Planning for Physicians and Medical Practices

Wednesday, August 12, 2015

12:30 p.m. and 5:00 p.m.



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# Upcoming Webinars from Gassman, Crotty & Denicolo, P.A.

## **Tuesday, August 18, 2015 | 12:30 p.m. and 5:00 p.m.**

- Medical Law Update – Federal and Florida Developments that Medical Practices and Advisors Need to Be Aware Of.
  - Speakers: Lester Perling, J.D., M.H.A. and Alan S. Gassman, J.D., LL.M.

## **Saturday, September 12, 2015 | 9:30 a.m.**

- The 10 Biggest Mistakes That Successful Parents (and Grandparents) Make with Respect to College and Related Decisions for High School Students
  - Speakers: Molly Carey Smith and Alan S. Gassman, J.D., LL.M.

## **Wednesday, September 24, 2015 | 12:30 p.m. and 5:00 p.m.**

- The 10 Biggest Legal Mistakes Most Business Owners and Investors Make (and How You Can Avoid Making Them)
  - Speaker: Alan S. Gassman, J.D., LL.M.

## **Thursday, October 1, 2015 | 12:30 p.m. and 5:00 p.m.**

- Income Tax Exit Strategies
  - Speakers: Steven B. Gorin and Alan S. Gassman, J.D., LL.M.

## **Saturday, October 3, 2015 | 9:30 a.m.**

- Failure to Launch: 20-Somethings Without a Solid Career Path – What Parents (and Others) Need to Know
  - Speakers: Molly Carey Smith and Alan S. Gassman, J.D., LL.M.

## **Wednesday, October 14, 2015 | 12:30 p.m. and 5:00 p.m.**

- Estate and Estate Tax Planning – Conventional and Advanced Planning Techniques to Minimize Taxes and Effectively Pass On Your Wealth
  - Speaker: Alan S. Gassman, J.D., LL.M.

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



# GASSMAN, CROTTY & DENICOLA, P.A. - COMPLIMENTARY WEBINARS

## ESTATE, ESTATE TAX & CREDITOR PROTECTION PLANNING

- Creditor Protection for the Single Floridian
- For Couple's Only – All About Tenancy by the Entireties – How To Use It – How To Lose It
- Cornflakes and Estate Planning Mistakes
- How to Advise Clients Under The New Estate Tax Law
- What Has Just Changed With Regard To Undisclosed Foreign Accounts
- Helter Shelter – Planning with Credit Shelter Trusts Under the New Estate Tax Law
- Major Changes in the Florida Power of Attorney Law: What You Need to Know – With A View From The Bench
- What Mary Poppins Didn't Know About Umbrellas: Ensure that your Insurances Will Insure You
- The 15 Minute Guide to the New Florida Power of Attorney Act
- Riders on the Storm: How to Make Sure Your Insurances Do Not Have Any Catastrophic Exceptions or Gaps
- Drafting Durable Powers of Attorney for the New Florida Law With Forms
- Common Mistakes in the Filing of Gift Tax Returns and How to Avoid Them, With Sample Form 709 Completed Pages

## HEALTH CARE LAW AND PHYSICIAN ISSUES

- Protecting Medical Practice Assets from Creditors – General Strategies and Common Mistakes
- Creditor Protection for the Single Physician
- Special Planning Needs for Doctors Who are Married to Doctors
- Malpractice Litigation Defense Strategies for Florida Physicians
- Unannounced Medicare Audits; What To Do If Investigators Come To Your Office
- A Medicare Practice Compliance Paperwork Checklist for Florida Physicians
- Understanding ACO's in 30 Minutes – A Physicians Guide
- Giving A Deposition – What Doctors Need To Know
- New Healthcare Price Transparency Rules
- How the New Pain Care Clinic Regulations Affect Your Medical Practice
- How Medical Practices Can Respond to the New Healthcare Law and Eminent Changes

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**CREDITOR  
PROTECTION  
FOR FLORIDA  
PHYSICIANS**

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**ALAN S. GASSMAN, J.D., LL.M.**

*A Comprehensive Guide  
for Physicians and Their Advisors*

*Gassman Law Associates, P.A.*

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**A PRACTICAL  
GUIDE TO  
KICKBACK  
AND  
SELF-REFERRAL  
LAWS FOR  
FLORIDA  
PHYSICIANS**

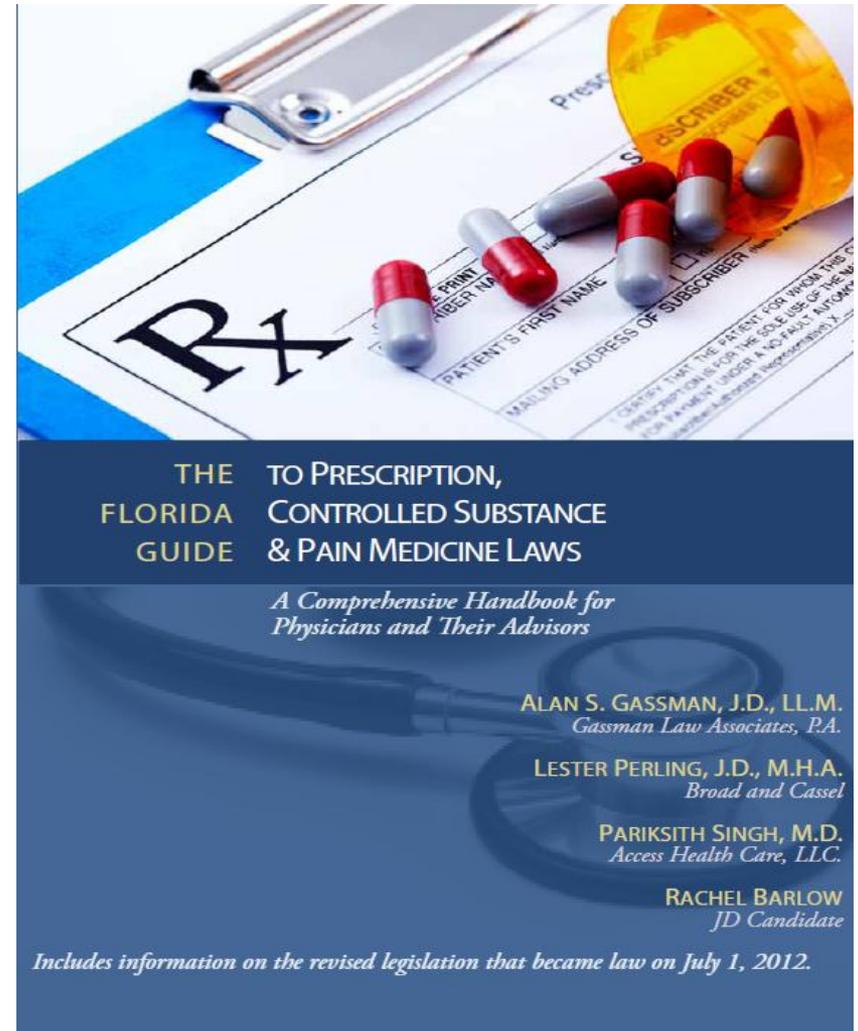
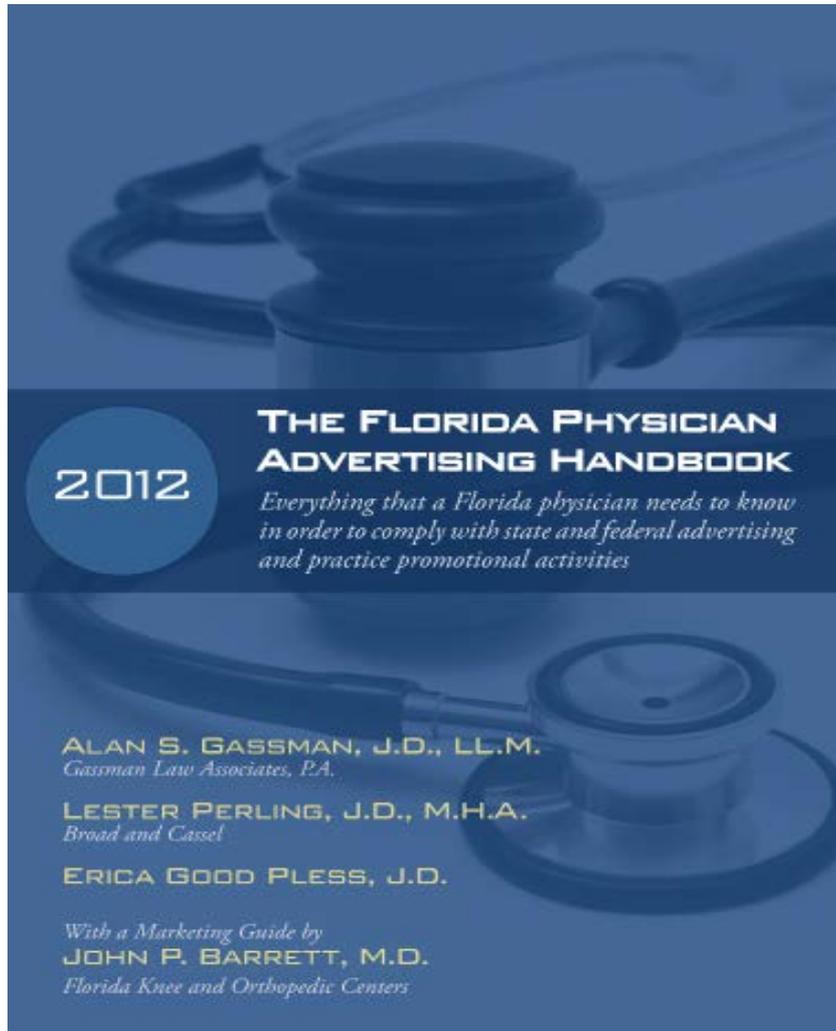
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**ALAN S. GASSMAN, J.D., LL.M.  
LESTER J. PERLING, J.D., M.H.A.**

*Gassman Law Associates, P.A.*

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# Amputee awarded \$30M

Jurors say a mom who lost her fingers and feet deserves that much.

By Justin George and Colleen Jenkins

Published May 26, 2007

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TAMPA – Sally Lucia, a mother of three who lost her fingers and feet after complications of tummy tuck surgery, deserves \$30-million, a jury in a malpractice suit said Friday.

But it will be up to Hillsborough Circuit Judge Gregory P. Holder to sort out how much of that is owed by a former Tampa doctor and a hospital.

Defense attorneys predicted that Lucia, 47, would get somewhere between \$12-million and \$16-million, while her own attorneys declined to name figures.

Holder must now make sense of the jury's parceling out of blame and the impact of Florida's "Good Samaritan" law. That is expected to begin Wednesday.

Four women on the jury wouldn't leave the courtroom without seeing Lucia privately and telling her they did everything they could to ensure justice was served. Afterward, teary-eyed, they declined to comment.

Lucia said the verdict left her "overwhelmed, but in a good way." She said she was glad the trail was finally over.

Jurors assigned Memorial Hospital 40 percent blame. Dr. George Haedicke 20 percent blame and Dr. Charles McLaughlin 40 percent blame. McLaughlin reached a settlement for an undisclosed amount and was not on trial.

While Lucia viewed the verdict as a win, so did the attorney representing Haedicke.

While finding fault, jurors said Haedicke did not act with reckless disregard, which could give him immunity under the state's "Good Samaritan" law.

The law protects emergency room doctors seeing patients in emergencies from malpractice judgments as long as a jury finds they didn't act recklessly.

An hour before jurors reached their verdict, they told Holder they were deadlocked. The trail had taken three weeks. They had deliberated 17 hours. He ordered them to keep talking.

Lucia's troubles culminated on Super Bowl Sunday 2001 when an ambulance carried her to Memorial Hospital in Tampa. She had undergone a tummy tuck 20 days earlier to repair abdominal muscle damage from three caesarean sections. Blood and fluid had collected in her wound. Her fingers were blue.

Her surgeon was out of town. Hospital staff called Haedicke, the on-call surgeon who was playing at a park with his children.

During closing arguments Wednesday, attorneys quibbled about what happened once doctor and patient met.

# \$116M is awarded in stroke suit

By TIMES STAFF WRITER

Published September 30, 2006

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TAMPA – A jury on Friday awarded a \$116-million medical malpractice verdict to the family of a Tampa man who attorneys argued became a paraplegic after an unlicensed hospital worker misdiagnosed a stroke as sinusitis.

On Aug. 9, 2000, All Navarro, now 50, of Tampa went to University Community Hospital Carrollwood campus with nausea, double vision, headaches and an unsteady gait. He was sent home with the diagnosis of sinusitis, attorney Steve Yerrid said, and went on to suffer severe brain swelling. Twenty hours after his initial diagnosis, Navarro was back in the emergency room, getting treated for a stroke.

Yerrid said the decision was the largest jury award in a malpractice suit in Florida history. Punitive damages are expected to be considered on Tuesday.

Navarro, a former pro basketball player from the Philippines, came to the United States in the 1990s. His wife Marilyn, 52, and son, Scottie, 10, are named as claimants in the jury verdict, Yerrid said.

UCH officials could not be reached for comment late Friday.

# Doctors in lawsuit now suing attorneys

By Carrie Weimar

Published March 7, 2007

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TAMPA – They got hammered with a record-breaking \$217-million verdict for misdiagnosing a patient who suffered a stroke.

Now the doctors who were the target of that high-profile lawsuit are hoping to turn the tables. They're suing their attorneys.

Among the doctors' chief complaints: The attorneys turned town settlement offers of \$1-million and \$3-million, a fraction of the final judgment.

"This case should have never gone to trial," said Dr. Frank Winkles, who is representing Franklin, Favata & Hulls physicians group and Carrollwood Emergency Physicians.

"It should have settled. Those doctors were just hung out to dry," Winkles said.

The other doctor involved in the case, Michael Austin, is represented by Tampa attorney Barry Cohen, who said the lawsuit spoke for itself.

"The allegations are pretty clear," Cohen said.

The lawyers named in the suit, filed March 2 in Hillsborough Circuit Court, did not return telephone calls seeking comment.

The lawyers are Louis J. LaCava and Victor Guzman, who work for a West Palm Beach firm that also has a Tampa branch. Also named is Brian Stokes, who is with the Unger Law Group, which is based in Orlando.

The disagreement stems from a medical malpractice case decided by a Tampa jury in October.

Allan Navarro, a former pro basketball player in the Philippines, went to the University Community Hospital Carrollwood emergency room August 9, 2000, complaining of nausea, headache, dizziness and double vision.

He was sent home five hours later with a painkiller prescription and a diagnosis of sinusitis.

No one realized Navarro was having a stroke. He returned to the hospital with more severe symptoms the next morning and underwent surgery hours later to relieve brain swelling. He ended up in a coma for three months and emerged from it permanently disabled.

Before his illness, Navarro was a machine operator earning just above minimum wage. Now he is confined to bed or must use a wheelchair.

Navarro's attorney sued. Testimony revealed that an unlicensed physician's assistant initially examined Navarro, and Austin based his diagnosis on that exam.

# Doctor kills self after malpractice verdict

Lawrence Grey, who specialized in vasectomy reversals, had been ordered to pay a former patient \$1-million.

By Bill Coats  
Published May 4, 2006

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TAMPA – On Friday afternoon, Dr. Lawrence Grey listened in a Hillsborough County courtroom as a jury announced its verdict: He should pay a former patient \$1-million.

Late Friday night, Grey's wife found him dead in the \$2-million Bayshore Boulevard home, hanging in a bedroom closet from a yellow nylon rope.

Grey's apparent suicide left lawyers in the malpractice case reeling.

Jeffery Hunter, the Tampa lawyer who represented Grey, heard about the death Saturday night after a family outing.

"I was shocked," Hunter said Wednesday "I still am."

Timothy Moran, the Jacksonville lawyer who represented the former patient, learned of Grey's death Wednesday from a *Times* reporter.

"I never intended for something like this to happen," Moran said. "I blame his insurance company for not doing the right thing."

Moran said he offered to settle the case for \$250,000, the limit of Grey's insurance coverage, and later for \$175,000 but was turned down.

If the jury's verdict of \$1,005,000 stands, Grey's business will be liable for \$755,000.

Hunter wouldn't comment on the settlement decisions. He said he intends to ask for a new trial. If denied, he plans to appeal.

Grey, a 51-year old urologist, specialized in microsurgery that reversed vasectomies, restoring his patients' abilities to father children.

Grey marketed himself online as the Vas Doctor. That's a reference to the vas deferens, the narrow tube through which sperm travels from the testicles, and which a surgeon snips in a vasectomy.

Grey used laser tools and techniques that he developed, he told the *Tampa Bay Business Journal* in a profile three years ago.

"The microbeam is strictly my own creation," Grey said in the profile. "The laser beam gives you a cleaner, more precise cut with less damage to tissue.

Hunter said Grey recently was performing 400 to 450 vasectomy reversals a year.

# 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.
3. Relationship Liability:
  - (a) Joint and several liability.
  - (b) Partnerships.

# PRIMARY CAUSES OF LIABILITY

- (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.

## 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.

# PRIMARY CAUSES OF LIABILITY

- (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.

6. Medicare, Medicaid, and private pay refund liabilities: Carriers have been suing doctors not following referral laws for significant refunds.

Liabilities generally not cancelable in bankruptcy include the following:

- (i) Government student loans.
- (ii) Trust fund tax liability.
- (iii) Hazardous waste liability.
- (iv) Breach of fiduciary duty liabilities.
- (v) Child support and alimony.

# PRIMARY CAUSES OF LIABILITY

Liabilities generally not covered by insurance include the following:

(i) Civil rights violations committed by employees or others.

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

(iii) Criminal acts.

(iv) Charitable and religious board activities.

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

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

# 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><b>Umbrella Policy #1</b></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><b>Umbrella Policy #2</b></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>

# UMBRELLA INSURANCE COVERAGE

Re: UMBRELLA LIABILITY INSURANCE COVERAGE

Dear \_\_\_\_\_:

As part of our planning I wanted to reiterate the importance of having an appropriately coordinated and "gap free" liability and casualty insurance program.

I am enclosing a sample letter that some clients use to help assure that they have coverage for common gaps or mistakes made in structuring liability insurance. If you would like assistance in completing this type of letter, please let me know.

The rest of this letter is about umbrella liability insurance coverage. We believe that it is very important to have appropriate limits of liability on automobile and homeowner insurance policies. Typically, the automobile and homeowner policies will be at \$500,000 coverage, and then there will be excess coverage under what is called a "personal umbrella policy."

The personal umbrella policy is used in combination with homeowners and auto policies to cover most clients' needs. If it is a true "umbrella" it will provide excess limits above and beyond your primary insurance coverage (such as homeowners, automobile or boat policy), and will also provide coverage for situations excluded or not addressed by underlying coverages. Each individual insurance company will have its own requirement for limits that you must have on your primary policies. You will want to be careful to assure that these policies are coordinated with your umbrella coverage.

Umbrella limits start at \$1,000,000 and can go over \$10,000,000. Pricing for these policies are based primarily on the number of houses and vehicles to be insured, with each additional \$1,000,000 of coverage being less expensive than the preceding. In your situation I would probably have \$\_\_\_\_\_ of umbrella liability insurance. Also, I would consider placing much of your brokerage account and other assets under a family limited partnership to further insulate you for creditor protection purposes.

Another coverage that is often underutilized by clients is called "uninsured motorist coverage." If you are in an automobile accident caused by someone who does not have enough coverage to pay for your damages, you can pursue your own insurance company to the extent of your "uninsured motorist" coverage. We encourage clients to see what it costs to have \$500,000 or more in uninsured motorist coverage to help compensate for catastrophic accidents that can happen.

Some carriers, including citizens and carriers who have assumed policies from citizens do not provide liability coverage for pool and pet or animal related liabilities. In this event the Umbrella liability coverage may or may not apply. This is something that should be discussed with the insurance agency or carrier that provides liability coverage.

If we can provide you with any further information or with assistance concerning your insurances, please let us know.

Very truly yours,

Alan S. Gassman

Dear Liability Insurance Agency and/or Carrier:

I recently met with my estate planning lawyer and wanted to make sure of the following:

1. Please confirm that we have Personal Liability Umbrella insurance covering our automobiles, boats, recreational vehicles, and all properties owned. I would like quotes on the following coverage limits, \$1,000,000, \$3,000,000 and \$5,000,000, with and without Uninsured Motorist coverage.
2. Please confirm that we are covered for animal liability under our primary homeowners insurance and confirm that the Liability Umbrella would also extend to animal liability. We have been told that the primary homeowners may exclude animal liability and that some Liability Umbrella policies will not provide coverage when the primary homeowners insurance excludes same.
3. Please confirm that we are covered for pool related accidents occurring on our property and also confirm that the Personal Liability Umbrella policy will also extend coverage to pool related accidents.
4. Can you please confirm that we are covered for cars being driven by \_\_\_\_\_.
5. Can you please confirm that we are covered for the investment property that we own at \_\_\_\_\_. It is titled under the name of \_\_\_\_\_?
6. Can you please confirm that we are covered for our \_\_\_\_\_ boat, which is \_\_\_\_\_ foot long and is normally stored at \_\_\_\_\_. The horsepower is \_\_\_\_\_.  
Are we also covered for trailering the boat with our trailer?  
Also, can you please confirm that we are covered for our waverunner/jet ski which is a \_\_\_\_\_ with horsepower of \_\_\_\_\_. It is stored at \_\_\_\_\_.
7. You do not handle the coverage for our vacation \_\_\_\_\_ in \_\_\_\_\_ or our vacation \_\_\_\_\_ in \_\_\_\_\_. Is our potential liability relating to the use of these properties covered under our umbrella, or do we have to obtain a separate umbrella for these properties?  
Our \_\_\_\_\_ and \_\_\_\_\_ are stored and used up in our \_\_\_\_\_.
8. \_\_\_\_\_ drives the car owned by \_\_\_\_\_ both for personal purposes and with respect to the \_\_\_\_\_ business. We assume our coverage includes business driving both by \_\_\_\_\_ and by \_\_\_\_\_ who occasionally drive the car for the business.
9. Can you please confirm that we are covered for our motorcycle being driven by \_\_\_\_\_.
10. Is there anything not mentioned above that comes to mind that we should be aware of?

Please send our lawyer, Alan S. Gassman, a copy of your response to this letter, which has been generated as a part of our estate planning. Alan's email address is AGassman@gassmanpa.com and his street address is 1245 Court Street, Suite 102, Clearwater, Florida 33746. His fax number is (727) 443-5829. Please send us a copy of your response as well.

If you have any further suggestions with respect to our coverages please let us know. Thank you very much for your assistance herewith.

Best personal regards,  
CLIENT

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## 2014 Competitive Malpractice Insurance Rates With Normal Discounts

\$250,000/\$750,000 Competitive Mature Rates 2014				\$1M/\$3M Competitive Mature Rates 2014		
	Remainder of Florida	Dade County	Broward County	Remainder of Florida	Dade County	Broward County
Internal Medicine N/S	\$8,477	\$17,400	\$16,419	\$13,576	\$24,288	\$24,288
Family Practice	\$7,460	\$15,312	\$14,448	\$11,977	\$24,288	\$24,288
Dermatology N/S	\$3,763	\$9,048	\$8,538	\$5,447	\$15,834	\$14,941
Cardiology Invasive	\$11,868	\$24,360	\$22,986	\$20,769	\$42,630	\$40,226
Cardiology Interventional	\$13,563	\$27,840	\$26,270	\$23,736	\$48,720	\$45,972
Gynecology Surgery	\$11,868	\$23,360	\$22,986	\$20,769	\$42,630	\$40,226

Compliments of:  
Charles L. Wasson, III, CPCU  
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# ASSET PROTECTION DEFINITIONS

To understand the subject of asset protection, you must speak the language. The following vocabulary and definitions will provide you with a basic understanding of the fundamental concepts which make up the “art and science” of Florida creditor protection planning.

**Debtor** - A party who owes money.

**Creditor** - A party who is owed money by the debtor.

**Judgment** - A court order establishing that a debtor owes money to a creditor. The existence of a judgment is almost always necessary before a creditor can seize a debtor’s property.

**Plaintiff** - A party suing to get a judgment against a defendant.

**Defendant** - A party being sued by a plaintiff.

**Exempt Assets** - Assets that are protected from seizure under the creditor laws. A debtor will be able to keep these assets notwithstanding that a creditor may have a judgment against the

**Non-Exempt Assets** - Assets of a debtor that are subject to creditor claims.

**Fraudulent Transfer** - As explained in Chapter 14, this is the name given to a transfer of assets from a creditor available status to a creditor non-available status if a primary purpose was to avoid known creditors. Under federal and state law, such transfers may be set aside if the assets are within the jurisdiction of an applicable court making such a finding. Outside of Bankruptcy Court, Florida has a statute of limitations on the ability of a creditor to set aside a fraudulent transfer, which in many cases runs 4 years after the applicable transfer. This does not apply under Florida law to a transfer of assets to homestead. Under bankruptcy law, however, a discharge of debt can be denied if there has been a fraudulent transfer made within one year of the bankruptcy filing. Also, the homestead exemption may be limited to \$136,875, if there has been a “fraudulent transfer” to homestead within 10 years of filing bankruptcy. There is also a 10 year set aside rule for “fraudulent transfers to asset protection trusts and similar arrangements” under the 2005 Bankruptcy Act. Oftentimes, clients will be advised to make transfers in exchange for receiving full value to avoid the fraudulent transfer rules while still making the resulting arrangement more creditor protective than it would have been.

**Preferential Transfer** - A transfer that may be set aside under state or bankruptcy law, such as a transfer made to any party within 90 days of filing a bankruptcy, or a transfer made to an “insider” within one year of filing the bankruptcy. See also Florida Statute §726 (providing a two year look back on transfers).

# ASSET PROTECTION DEFINITIONS

**Charging Order** - A creditor with a judgment cannot reach into a properly structured limited partnership or LLC arrangement, where the debtor does not own the entire entity. Instead, the creditor receives a “charging order” from the court, whereby if and when distributions are made from the entity, the pro rata share of the debtor would be paid to the creditor. There is nothing in the law that allows a court order that a distribution be made. Therefore, someone having a judgment against a debtor whose sole asset is a part ownership interest in a limited partnership or an LLC may have limited leverage to obtain cash or monies from the debtor, although the debtor will also have difficulty receiving distributions when a charging order is in place. This will often result in settlement, or the possibility of the creditor trying to force the debtor into bankruptcy.

**Firewall Protection** - The concept that the shareholder of a corporation or limited partner in a limited partnership will not be liable for liabilities incurred by the entity. This is why many companies put the more hazardous activities under a separate subsidiary.

**Limited Liability Partnerships, Limited Partnerships, Limited Liability Limited Partnerships, Limited Liability Companies, Professional Limited Liability Companies, and Partnerships of the above Entities** - The names given to various legal entities which have different effects as to firewall, tax, and charging order versus asset seizure protection. Be cautious as to which entity you choose because they do not all offer the same protection. For example, the creditor of a partner in a Florida limited liability partnership (LLP) can seize the partnership interests, and is not limited to receiving a charging order, but the creditor of a partner in a Florida limited partnership (LP) or a limited liability limited partnership (LLLP) will be limited to the charging order remedy. It is important not to confuse these entities, but this commonly occurs, even among well-meaning lawyers.

**Staying Out of Bankruptcy** - Many debtors will prefer to stay out of bankruptcy, so it is important for someone with an imminent judgment to understand how this can be achieved. Generally, it takes three creditors to force an individual into bankruptcy, if that individual has at least 12 creditors.

**Bankruptcy** - A federal process whereby every debtor has the right to file in the bankruptcy court, generally under Chapter 7, Chapter 11, or Chapter 13. Many lawyers say that this is like having the debtor “swim in a fish bowl” because there must be full disclosure of all documentation and information upon filing.

# ASSET PROTECTION DEFINITIONS

**Joint and Several Liability** - The concept that individuals who participate in a negligent or improper act will be totally liable for all damages imposed to the extent that the other “co-defendants” do not pay their fair share. There are limitations on joint and several liability pursuant to Florida Statute Section 768.81.

**Vicarious Liability**- The concept that an employer is generally responsible for liabilities incurred by an employee acting within the scope of the employee’s duties. The Greek term for this phenomenon is “respondeat superior.”

Under this concept, parents may be responsible for the driving activities of their nannies or errand runners, and doctors may be responsible for unforeseen actions by employees who might aggressively try to help people using prescription scripts, giving medical advice, and/or driving automobiles.

**Secured Interest** - The concept whereby a creditor can record a mortgage or lien on assets whereby that creditor would be entitled to repossess the assets and sell them at auction to satisfy a debt owed to the creditor. Real estate is liened by the recording of a proper mortgage, and non-real estate assets may be liened by recording UCC-1 Financing Statements based upon appropriately drafted security and/or pledge agreements. If a friendly debtor has a secured interest in a particular asset, then another debtor would have to pay the friendly secured debtor before they would be able to seize the asset secured. This is why doctors will often give the bank with a mortgage on business real estate a lien against medical practice assets, so that a malpractice claimant would have to pay the bank off or take other steps before seizing medical practice assets.

**Marshaling of Assets** - Whereby a party having a lien against assets may be forced to sacrifice their position if there are plenty of other assets that it has access to, to satisfy the obligation of the debtor. Over-secured creditor issues may also arise.

**Asset Protection Trust** - A trust arrangement whereby creditors of the grantor may not have access – which is contrary to Florida and basic common law that if the grantor could receive any benefit whatsoever, then creditors may receive all assets.

**Bad Faith** - The malpractice insurance carrier has an obligation to settle any claim within the limits of coverage of the physician, if reasonably possible. The failure of an insurance carrier to settle within policy limits can result in the carrier being responsible for an “excess verdict.” When this occurs, the plaintiff’s lawyer will often settle with the defendant by receiving an assignment of the defendant’s right to pursue the insurance carrier for the excess amount.

# ASSET PROTECTION DEFINITIONS

If the malpractice carrier believes it has a 90% chance winning at trial and a 10% chance of losing with a verdict well over policy limits, then it may make good economic sense for the carrier to take the chance, but not from the point of view of the physician. If the carrier takes the chance then if it has acted in bad faith it will be responsible for any excess verdict. Private legal counsel is commonly hired to encourage the carrier to settle within policy limits, and a physician should almost never encourage a carrier not to settle or be without private representation when the carrier or its lawyer recommends private representation! Fortunately, most verdicts exceeding coverage limits result in the physician assigning their bad faith claim to the plaintiff in exchange for a total release, particularly where the physician is otherwise judgment proof.

**Automobile Liability** – The owner of a motor vehicle in Florida is liable for operation of the vehicle by another driver, except that if the other driver has insurance then the owner’s exposure may be limited to \$300,000 per incident. If the driver has \$500,000 of liability insurance, then the owner may not have liability exposure, unless the owner was negligent in allowing the driver to use the vehicle.

**Sovereign Liability** - The concept whereby an individual working for a governmental agency and the agency itself has limited liability, presently being \$250,000 per incident. This applies to a physician working full time for public hospitals, medical schools, and the Veteran’s Administration.

**Successor Liability** - When a corporation has a liability and a “successor corporation” has identical or similar ownership, identity, customers, employees and/or general identity, a judge may find the new company responsible for the liabilities of the old company, even if there was a legitimate bankruptcy of the old company before the new company was formed and operational.

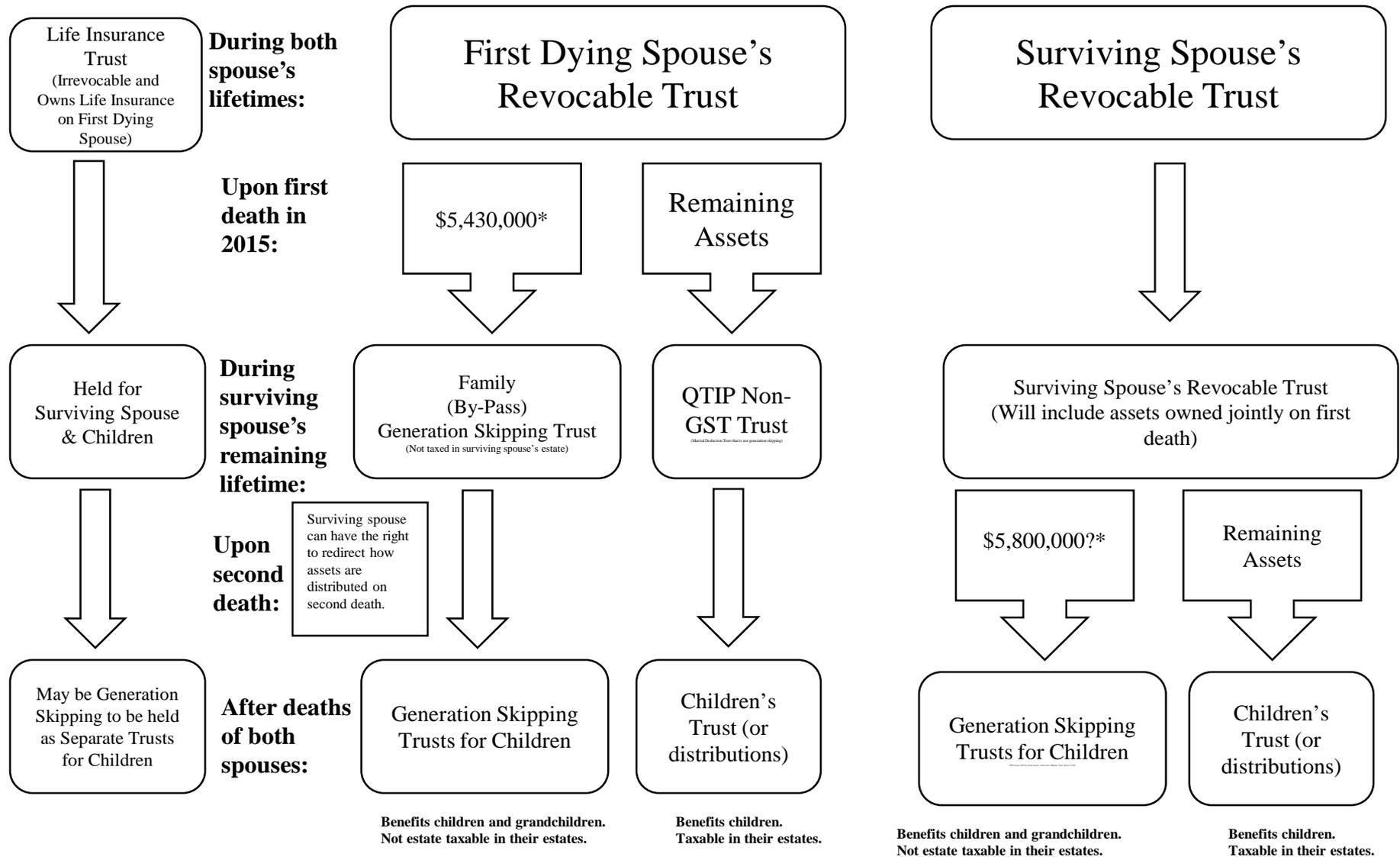
**Reverse Veil Piercing** - When a court unwinds transfers made to entities where the transferor is a debtor that had control over the entity, and used the entity to disguise personal assets to keep them beyond the reach of personal creditors.

**Concealment** - Under the doctrine of concealment an asset “given away” but actually held for the original transferor will be considered as continually owned by the original transferor, notwithstanding title. Concealing assets puts the debtor at risk for losing a bankruptcy discharge.

**How to Stop Worrying and Start Living**- A book written by the late Dale Carnegie, which includes phenomenal advice on how to counsel for and live with concerns about what may happen in the future, what can be done about these potential future problems, and how to handle oneself and others in a logical, sequential, and effective manner.

CREDITOR EXEMPT ASSETS	ASSETS THAT ARE DIFFICULT FOR A CREDITOR TO OBTAIN	ASSETS EXPOSED TO CREDITORS
<p>Homestead  <i>-Up to half acre if within city limits.</i>  <i>-May be immune from fraudulent transfer statute.</i></p>	<p>Limited partnership and similar entity interests.</p>	<p>Individual money and brokerage accounts.</p>
<p>IRA  <i>-Includes ROTH, Rollover, and Voluntary IRAs, but possibly not inherited IRAs.</i></p>	<p>Foreign trusts and companies.</p>	<p>Joint assets where both spouses owe money.</p>
<p>Permanent Life Insurance  <i>-Must be owned by insured.</i></p>	<p>Note – foreign entities are very rarely recommended and must be reported to IRS -</p>	<p>Personal physical assets, including car, except for \$4,000 exemption (\$1,000 if homestead exemption is claimed in bankruptcy).</p>
<p>401(k)  <i>-Maximize these!</i></p>	<p>Foreign bank accounts.</p>	<p>One-half of any joint assets not TBE where one spouse owes money.</p>
<p>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>	<p><b><u>Vocabulary:</u></b>  <b>EXEMPT ASSET</b> – An asset that a creditor cannot reach by reason of Florida law – protects Florida residents.  <b>CHARGING ORDER PROTECTION</b> – 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.  <b>FRAUDULENT TRANSFER</b> - 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>	
<p>529 College Savings Plans</p>		
<p>Annuity Contracts</p>		
<p>Wages of Head-of-Household</p>		
<p>Wage Accounts</p>		
<p>Up to \$4,000 of personal assets – or less in bankruptcy.</p>		

# PROTECTIVE TRUST LOGISTICAL CHART



\*Assumes first spouse dies in 2015 and that the surviving spouse dies in a later year when the estate tax exemption has gone up to \$5,800,000 (based upon 8.57% cumulative inflation). The estate tax exemption is \$5,430,000 for those that die in 2015, and increases with inflation in \$10,000 increments.  
If the first spouse does not use the entire exemption amount, what remains may be added to the surviving spouse's allowance under the "portability rules" but will not grow with inflation.

# BUYING TERM INSURANCE

## AGE 30

	<u>PREFERRED</u>		<u>STANDARD</u>		<u>STANDARD SMOKER</u>	
	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>
10 Year Term	\$378	\$328	\$658	\$518	\$1,548	\$1,218
15 Year Term	\$458	\$398	\$768	\$688	\$1,918	\$1,438
20 Year Term	\$608	\$478	\$968	\$738	\$2,278	\$1,638
30 Year Term	\$938	\$768	\$1,518	\$1,218	\$3,908	\$3,018

## AGE 40

	<u>PREFERRED</u>		<u>STANDARD</u>		<u>STANDARD SMOKER</u>	
	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>
10 Year Term	\$505	\$435	\$925	\$785	\$2,405	\$2,005
15 Year Term	\$655	\$575	\$1,215	\$1,035	\$3,125	\$2,485
20 Year Term	\$865	\$745	\$1,505	\$1,255	\$4,345	\$3,185
30 Year Term	\$1,495	\$1,135	\$2,465	\$1,985	\$7,175	\$5,275

# BUYING TERM INSURANCE

## AGE 50

	<u>PREFERRED</u>		<u>STANDARD</u>		<u>STANDARD SMOKER</u>	
	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>
10 Year Term	\$1,235	\$1,025	\$2,145	\$1,625	\$6,435	\$4,295
15 Year Term	\$1,785	\$1,235	\$2,805	\$2,065	\$7,825	\$5,725
20 Year Term	\$2,225	\$1,625	\$3,425	\$2,715	\$10,425	\$6,865
30 Year Term	\$4,025	\$2,645	\$6,245	\$4,785	\$13,719	\$10,109

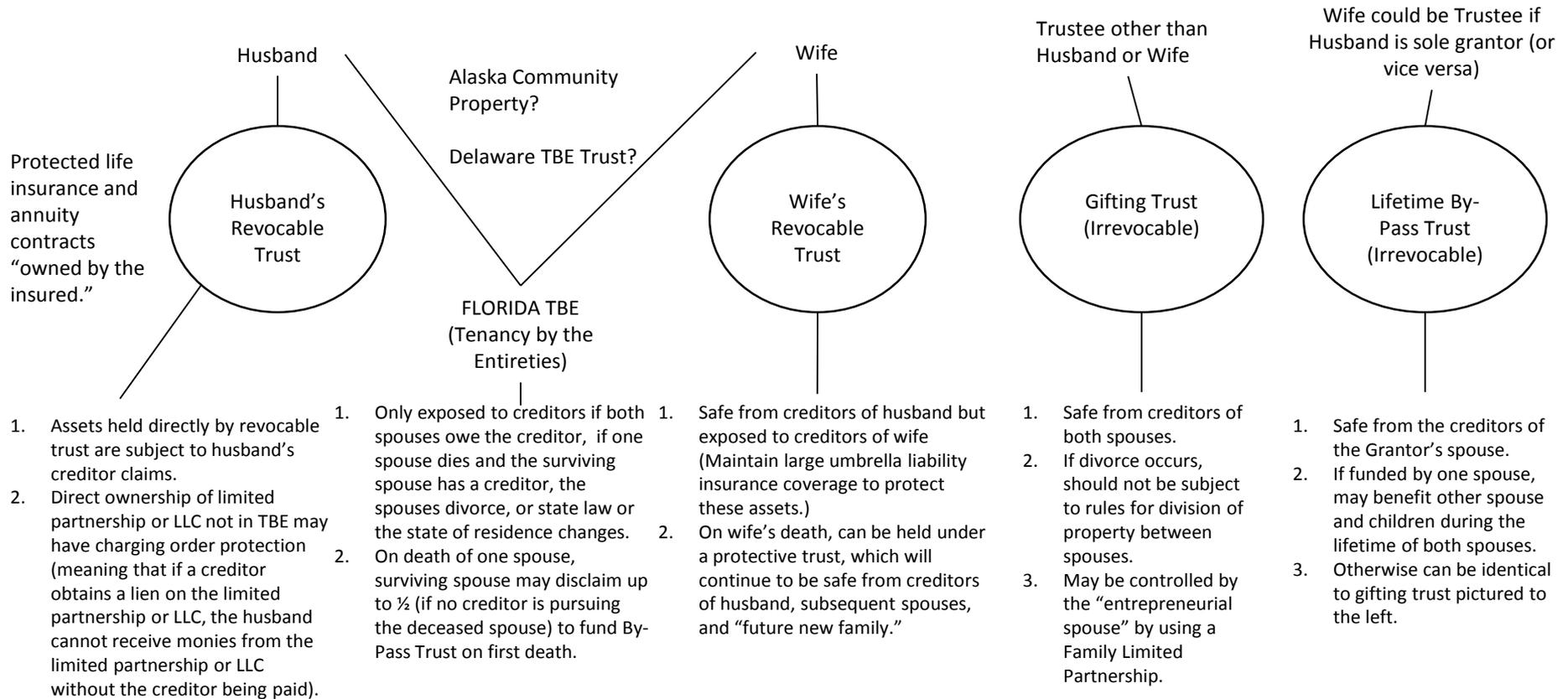
## AGE 60

	<u>PREFERRED</u>		<u>STANDARD</u>		<u>STANDARD SMOKER</u>	
	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>	<u>MALE</u>	<u>FEMALE</u>
10 Year Term	\$3,098	\$2,198	\$4,808	\$3,278	\$13,028	\$8,308
15 Year Term	\$4,488	\$3,048	\$7,088	\$5,218	\$17,658	\$12,978
20 Year Term	\$5,798	\$4,078	\$9,488	\$6,668	\$22,048	\$15,058
30 Year Term	Not Available	Not Available	Not Available	Not Available	Not Available	Not Available

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

## General Rules:

- Typically want each trust funded with at least \$5,430,000 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.



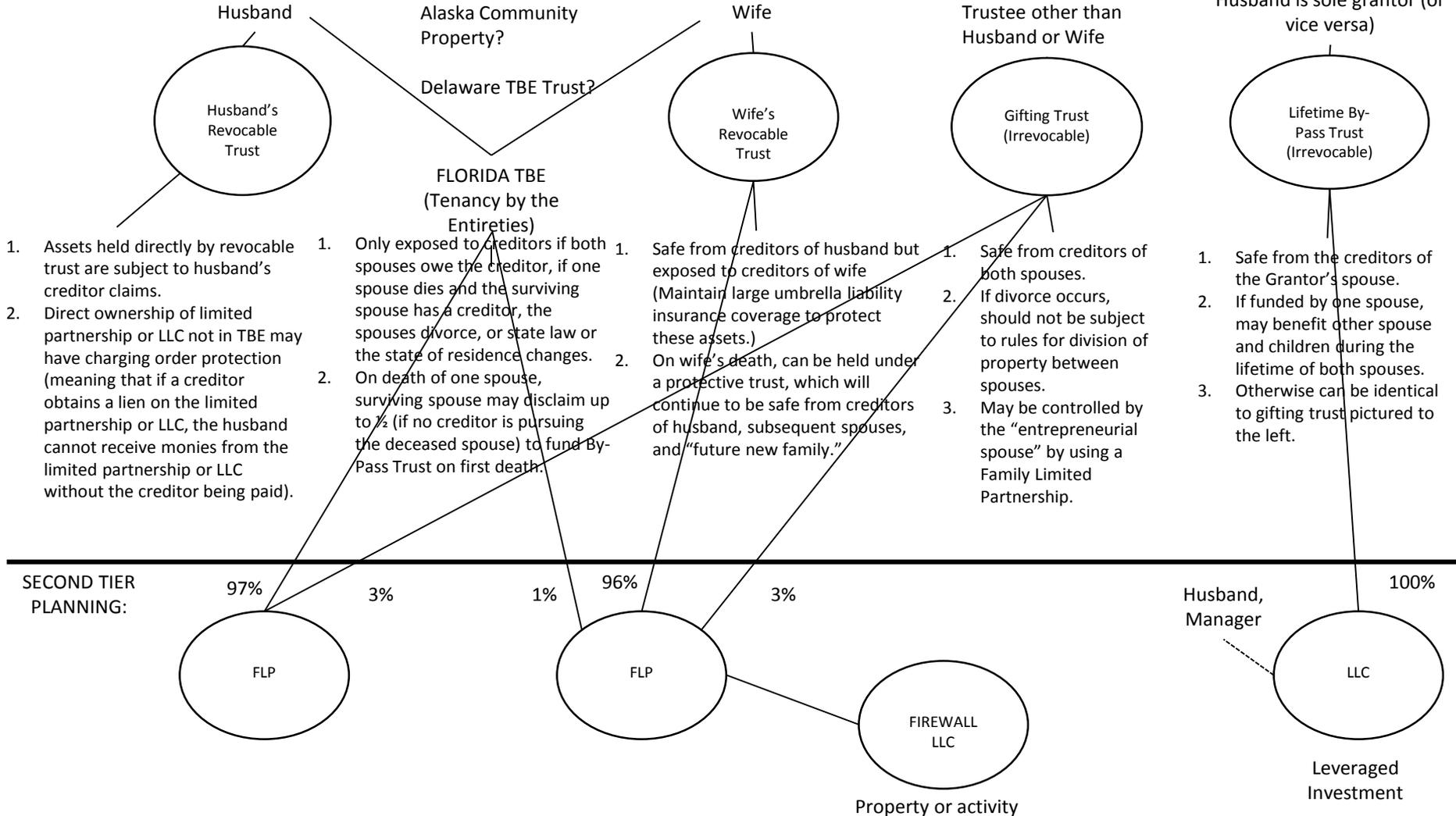
SEE NEXT PAGE FOR SECOND TIER PLANNING

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 HOW TO BEST 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.

# 10 YEAR GIFTING PERIOD – ALLOWING GROWTH THEREAFTER

## \$14,000 ANNUAL EXCLUSION ALLOWANCE

### 30% VALUATION DISCOUNT

MOVING MORE VALUE OUT OF TAXABLE ESTATES  
BY USING DISCOUNTED LIMITED PARTNERSHIP OR  
LLC ANNUAL GIFTING

Year	Reportable Gifting	Cumulative Value with 6% Growth	Giftng Equivalent Amount Applying 30% Discount	Cumulative Value with 6% Growth	Value Added By Discount Phenomenon	40% Estate Tax Savings (40% of Value Added)
1	\$14,000.00	\$14,000.00	\$20,000.00	\$20,000.00	\$6,000.00	\$2,400.00
2	\$14,000.00	\$28,840.00	\$20,000.00	\$41,200.00	\$12,360.00	\$4,944.00
3	\$14,000.00	\$44,570.40	\$20,000.00	\$63,672.00	\$19,101.60	\$7,640.64
4	\$14,000.00	\$61,244.62	\$20,000.00	\$87,492.32	\$26,247.70	\$10,499.08
5	\$14,000.00	\$78,919.30	\$20,000.00	\$112,741.86	\$33,822.56	\$13,529.02
6	\$14,000.00	\$97,654.46	\$20,000.00	\$139,506.37	\$41,851.91	\$16,740.76
7	\$14,000.00	\$117,513.73	\$20,000.00	\$167,876.75	\$50,363.03	\$20,145.21
8	\$14,000.00	\$138,564.55	\$20,000.00	\$197,949.36	\$59,384.81	\$23,753.92
9	\$14,000.00	\$160,878.42	\$20,000.00	\$229,826.32	\$68,947.90	\$27,579.16
10	\$14,000.00	\$184,531.13	\$20,000.00	\$263,615.90	\$79,084.77	\$31,633.91
11	\$0.00	\$195,603.00	\$0.00	\$279,432.85	\$83,829.86	\$33,531.94
12	\$0.00	\$207,339.18	\$0.00	\$296,198.82	\$88,859.65	\$35,543.86
13	\$0.00	\$219,779.53	\$0.00	\$313,970.75	\$94,191.23	\$37,676.49
14	\$0.00	\$232,966.30	\$0.00	\$332,809.00	\$99,842.70	\$39,937.08
15	\$0.00	\$246,944.28	\$0.00	\$352,777.54	\$105,833.26	\$42,333.30
16	\$0.00	\$261,760.93	\$0.00	\$373,944.19	\$112,183.26	\$44,873.30
17	\$0.00	\$277,466.59	\$0.00	\$396,380.84	\$118,914.25	\$47,565.70
18	\$0.00	\$294,114.58	\$0.00	\$420,163.69	\$126,049.11	\$50,419.64
19	\$0.00	\$311,761.46	\$0.00	\$445,373.51	\$133,612.05	\$53,444.82
20	\$0.00	\$330,467.15	\$0.00	\$472,095.93	\$141,628.78	\$56,651.51
21	\$0.00	\$350,295.18	\$0.00	\$500,421.68	\$150,126.50	\$60,050.60
22	\$0.00	\$371,312.89	\$0.00	\$530,446.98	\$159,134.09	\$63,653.64
23	\$0.00	\$393,591.66	\$0.00	\$562,273.80	\$168,682.14	\$67,472.86
24	\$0.00	\$417,207.16	\$0.00	\$596,010.23	\$178,803.07	\$71,521.23
25	\$0.00	\$442,239.59	\$0.00	\$631,770.84	\$189,531.25	\$75,812.50
26	\$0.00	\$468,773.96	\$0.00	\$669,677.09	\$200,903.13	\$80,361.25
27	\$0.00	\$496,900.40	\$0.00	\$709,857.72	\$212,957.32	\$85,182.93
28	\$0.00	\$526,714.43	\$0.00	\$752,449.18	\$225,734.75	\$90,293.90
29	\$0.00	\$558,317.29	\$0.00	\$797,596.13	\$239,278.84	\$95,711.54
30	\$0.00	\$591,816.33	\$0.00	\$845,451.90	\$253,635.57	\$101,454.23

# ABOUT ESTATE VIEW SOFTWARE

## For the American Bar Association Probate & Property Tech Column in the January/February 2015 Edition

Estate View Estate Tax Planning Projection Illustration Software is the result of a collaboration between tax law professor and practitioner, Jerry Hesch, practicing lawyers, Alan S. Gassman, Kenneth J. Crotty, and Christopher Denicolo, and MBA software programmer, David Archer. Although still in the Beta testing phase, and currently free to use by interested planners, we expect it to be commercially available by the beginning of 2016. Until then, interested professionals can e-mail [estateview@gassmanpa.com](mailto:estateview@gassmanpa.com) and receive a link to download the software with a free 180 day license. Practitioner and tax law student use and feedback has been very positive.

The program is built on the modern Microsoft WPF software platform for use on Windows PC's. Users can know virtually nothing about computers and software and still make full use of all features of this system. Computer savvy users can do much more. Each client scenario and results can be saved to the user's computer for future use and reference.

Estate View has a number of unique features, which distinguish it from other estate tax projection, illustration and client education systems:

### 1. Multiple Screen Capability.

The operator can use one screen, two screens or three screens, as desired, with flexible movement between input and illustration displays, which are easy to right click and move to exactly where the operator would like to show them. Novice users can use the system easily, and experienced computer operators can customize the settings and screens to provide additional displays and formats.

### 2. See Results Simultaneously With Dashboard Style Data Input and Changes.

The data input and results can be seen simultaneously, so that the planner can change amounts, growth rates, the CPI, and other assumptions while at the same time viewing the results in order to be able to quickly move numbers and rates to the best scenario for illustration.

### 3. Quick Dial for Results Feature.

The up and down arrows and other dial features permit the planner to input and change amounts and percentages with the click of a mouse, without ever having to type numbers into a keyboard if approximate amounts are acceptable. Complete data entry of the two dozen input factors can take less than 5

minutes and be easily handled by a secretary or in front of a client to review basic information and important variables and assumptions.

### 4. Immediate and Simultaneous View of Multiple Scenarios.

The planner and client can simultaneously see the results of different scenarios that can apply based upon any one set of assumptions. Any change of any number or assumption will change all scenarios for immediate use comparison. These scenarios for a married couple are as follows:

- No planning-with and without portability
2. Using a Credit Shelter Trust
3. Using a credit shelter trust and annual gifting.
4. Using a credit shelter trust and discounted annual gifting.
5. Using a credit shelter trust, discounted annual gifting, and one or more irrevocable life insurance trusts.

6. Showing installment sale to defective grantor trust using a conventional or self-cancelling note with toggling off of grantor trust status in a year chosen.

A change in any number, growth rate or other variable will automatically change the result of the above live illustrations, which can remain on screen for instant viewing and use.

### 5. Two Methods of Illustration.

The planner can choose two different types of illustrations, being logistical or by year to year graph, or can see and display both simultaneously. Also, the calculations that apply annually under each trust and person are viewable "back stage" for credibility and explanatory purposes. The graph feature is unique in the estate tax projection world, and shows a year by year progression of values and tax results that is easily manipulated as to year of death and order of death.

### 6. Customized Client Explanation Letter

Once a particular combination of inputs has been determined, a client explanation letter with color illustrations and explanation of assumptions and planning techniques will be instantly prepared as a Word document that can be saved onto the user's computer and changed in any way desired.

Afterwards, any one or more assumptions can be changed, and a new letter produced, which can then compared back to the previous letter, to show the client the differences that can be caused by changing assumptions.

### 7. Installment Sale Module.

There is a separate Installment Sale to Defective Grantor Trust module that allows quick and easy input of factors and permits dialing numbers and percentage rates up and down, using self-canceling and conventional notes, factoring in what clients spend or earn to track personal asset growth or reduction, and toggling off Grantor trust status for any particular year.

The easy to view display shows income taxes paid on behalf of the trust, values, and estate tax savings if the client dies in each year and for as many years as desired.

This feature also integrates with the primary features described above so that a client can be shown the installment sale option added on to and integrated with credit shelter trusts, annual gifting, and life insurance trust planning.

### System Requirements

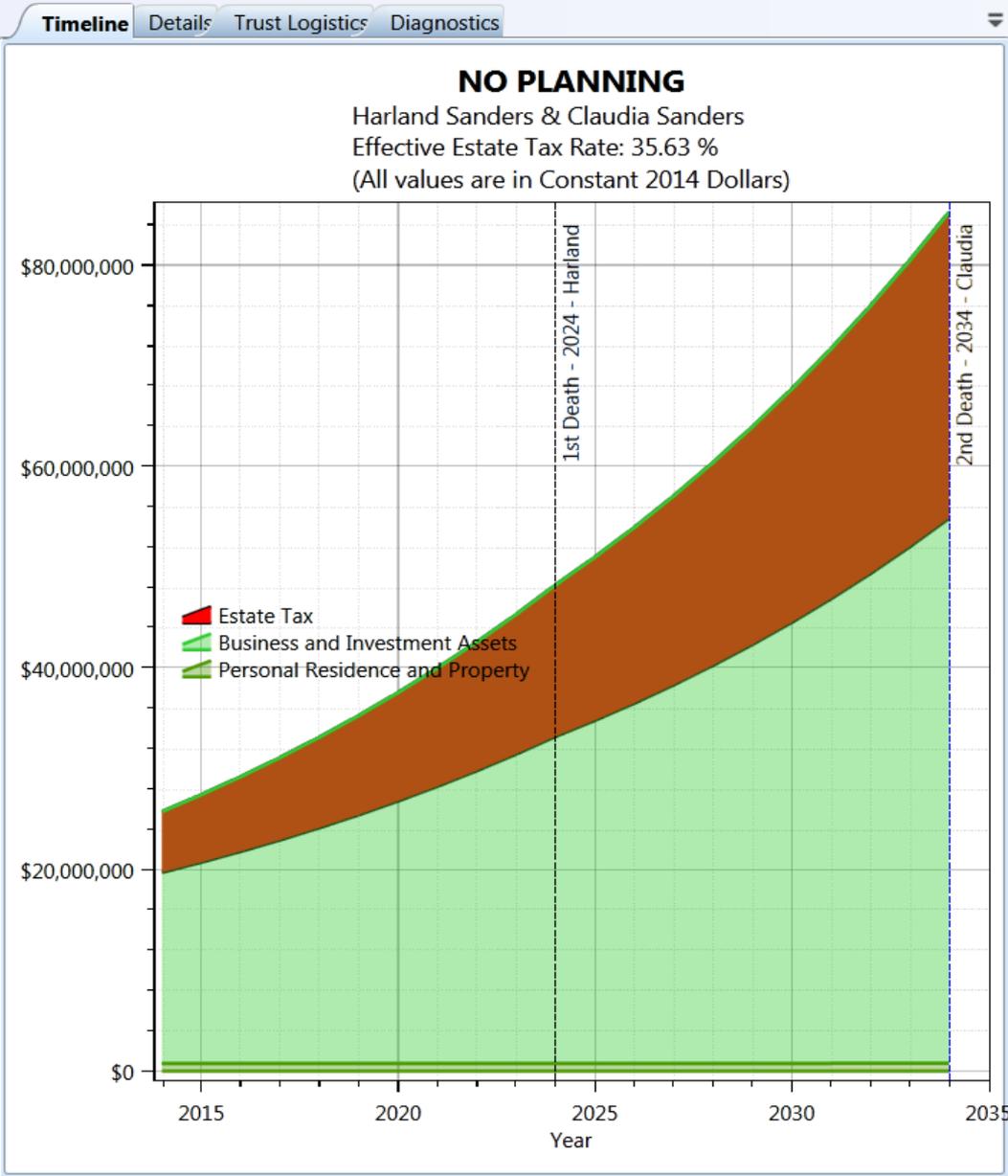
The software will run on any PC running Windows XP or later Windows program. While it takes most users under 10 minutes to learn how to use this easy to navigate system, lawyers and CPA's can earn one half hour or one full hour of CPE watching the Webinars on how to use the software and illustrate and explain estate tax planning techniques.

Planners with multiple monitors can watch the Webinar and duplicate the demonstrated functions at the same time for very effective and easy learning. The Webinar has Part one which is 25 minutes long for those wanting a half hour of credit, and Part II is another 25 minutes of more advanced discussion for those who want a full hour of credit.

Interested individuals can join our Estate View community by e-mailing to [estateview@gassmanpa.com](mailto:estateview@gassmanpa.com) to receive an instant response with a link to download the software.

Options

<b>Planner</b>	
Firm Name	GASSMAN LAW ASSC
Planner Name	ALAN S. GASSMAN, E
<b>Client</b>	
Spouse1	Harland Sanders
Spouse2	Claudia Sanders
<b>Personal Residence and Property</b>	
Annual Growth Rate	3.03 %
Current Value	\$750,000
<b>Business and Investments</b>	
Annual Fees & Tax Re...	1.50 %
Annual Growth Rate	10.98 %
Current Value	\$25,000,000
Portfolio Additions (or...	(\$250,000)
Portfolio Additions (or...	\$100,000
<b>Portability</b>	
Assume no portability...	<input type="checkbox"/>
<b>Bypass Trust</b>	
Bypass Trust Value	\$7,000,000
<b>Gifting</b>	
Discount Percentage f...	35.00 %
Initial Gifting Trust Val...	\$0
Number of \$14k gifts...	2
Percentage of \$14,000...	100.00 %
Percentage of Gifting...	100.00 %
<b>Life Insurance</b>	
Spouse 1	
Spouse 2	
Second to Die	
<b>Installment Sale</b>	
Seed Money Amount	\$600,000



Scenarios

**NO PLANNING**

**BYPASS TRUST**

**ANNUAL GIFTING**

**DISCOUNTED GIFTING**

**LIFE INSURANCE**

**INSTALLMENT SALE**

# ESTATEVIEW SOFTWARE INPUT DATA

Options	
<b>OptionsViewModel</b>	
<b>Planner</b>	
Firm Name	GASSMAN LAW ASSOCIATES, P.A.
Planner Name	ALAN S. GASSMAN, ESQ
<b>Client</b>	
<b>Spouse1</b>	
Spouse1	Harland Sanders
First Name	Harland
Last Name	Sanders
Age	55
Sex	Male
Tobacco User?	<input type="checkbox"/>
Lifetime Gift Exclusion Used	\$0
Actuarial Year of Death	2037
Projected Year of Death	2031
<b>Spouse2</b>	
Spouse2	Claudia Sanders
First Name	Claudia
Last Name	Sanders
Age	50
Sex	Female
Tobacco User?	<input type="checkbox"/>
Lifetime Gift Exclusion Used	\$0
Actuarial Year of Death	2045
Projected Year of Death	2046
<b>Personal Residence and Property</b>	
Annual Growth Rate	3.03 %
Current Value	\$750,000
<b>Business and Investments</b>	
Annual Fees & Tax Reduction Rate	1.50 %
Annual Growth Rate	8.23 %
Current Value	\$10,250,000
Portfolio Additions (or Withdrawals)...	(\$250,000)
Portfolio Additions (or Withdrawals)...	\$150,000
<b>Portability</b>	
Assume no portability available?	<input type="checkbox"/>
<b>Bypass Trust</b>	
Bypass Trust Value	\$8,760,000
<b>Gifting</b>	
Discount Percentage for Gifting	30.00 %
Initial Gifting Trust Value	\$0
Number of \$14k gifts per year	2
Percentage of \$14,000 Gifts to Gifti...	100.00 %
Percentage of Gifting Trust Gifts usi...	100.00 %

<b>Life Insurance</b>	
<b>Spouse 1</b>	
Held In Trust?	<input checked="" type="checkbox"/>
Policy Type	Level
<b>Details</b>	
Number of Years	20
Annual Premium	\$6,629
Death Benefit	\$2,000,000
<b>Spouse 2</b>	
Held In Trust?	<input checked="" type="checkbox"/>
Policy Type	Level
<b>Details</b>	
Number of Years	20
Annual Premium	\$951
Death Benefit	\$1,000,000
<b>Second to Die</b>	
Held In Trust?	<input checked="" type="checkbox"/>
Policy Type	Level
<b>Details</b>	
Number of Years	30
Annual Premium	\$12,786
Death Benefit	\$2,000,000
<b>Installment Sale</b>	
Seed Money Amount	\$600,000
Sale Value before Discount	\$10,321,429
Discount Rate	30.00 %
Sale Value after Discount	\$7,225,000
Note Amount	\$7,225,000
Note Interest Rate	7.50 %
Type of Note	Conventional
Note Term in Years	12
Year to Toggle Off Grantor Status	NA
<b>Misc</b>	
Consumer Price Index Growth Rate	2.96 %
Estate Tax Rate	40.00 %
Use Constant Dollars	<input type="checkbox"/>

Scenarios

**NO PLANNING**

**BYPASS TRUST**

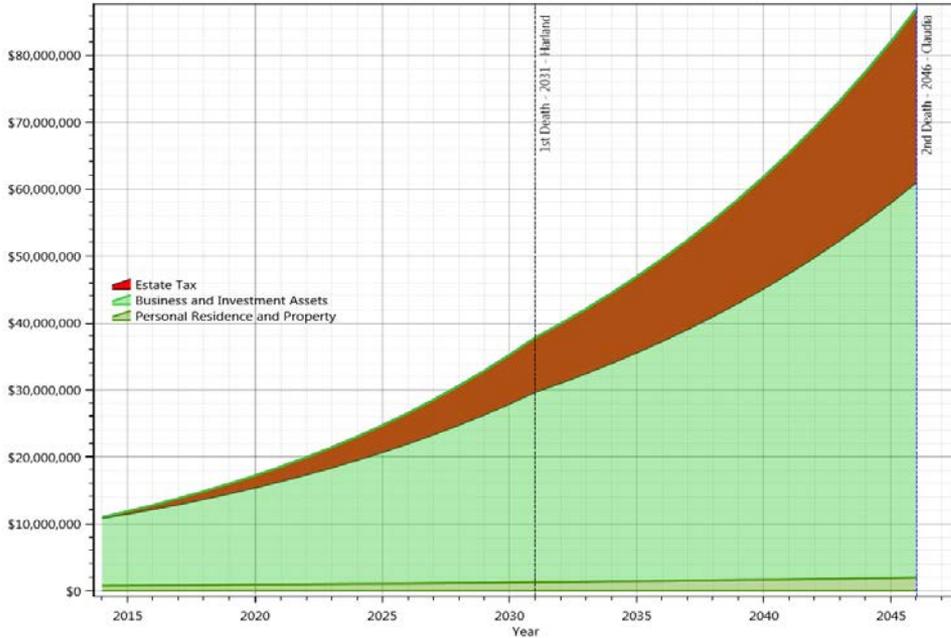
**ANNUAL GIFTING**

**DISCOUNTED GIFTING**

**LIFE INSURANCE**

### NO PLANNING WITH PORTABILITY

Harland Sanders & Claudia Sanders  
Effective Estate Tax Rate: 29.72 %



### NO PLANNING WITH PORTABILITY

Today

Harland & Claudia Sanders		
Residence	Investments	
\$750,000	\$10,250,000	
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	\$150,000	8.23 % less 1.50 % fees



Upon 1st Death  
(in Year 17)

Claudia Sanders		
Residence	Investments	
\$1,245,788	\$36,523,425	
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	(\$410,492)	8.23 % less 1.50 % fees



Upon 2nd Death  
(in Year 32)

Claudia's Estate		
Residence	Investments	Exclusion/Portability
\$1,949,394	\$84,962,766	(\$22,340,000)
<b>Net Taxable Estate: \$64,572,160</b>		



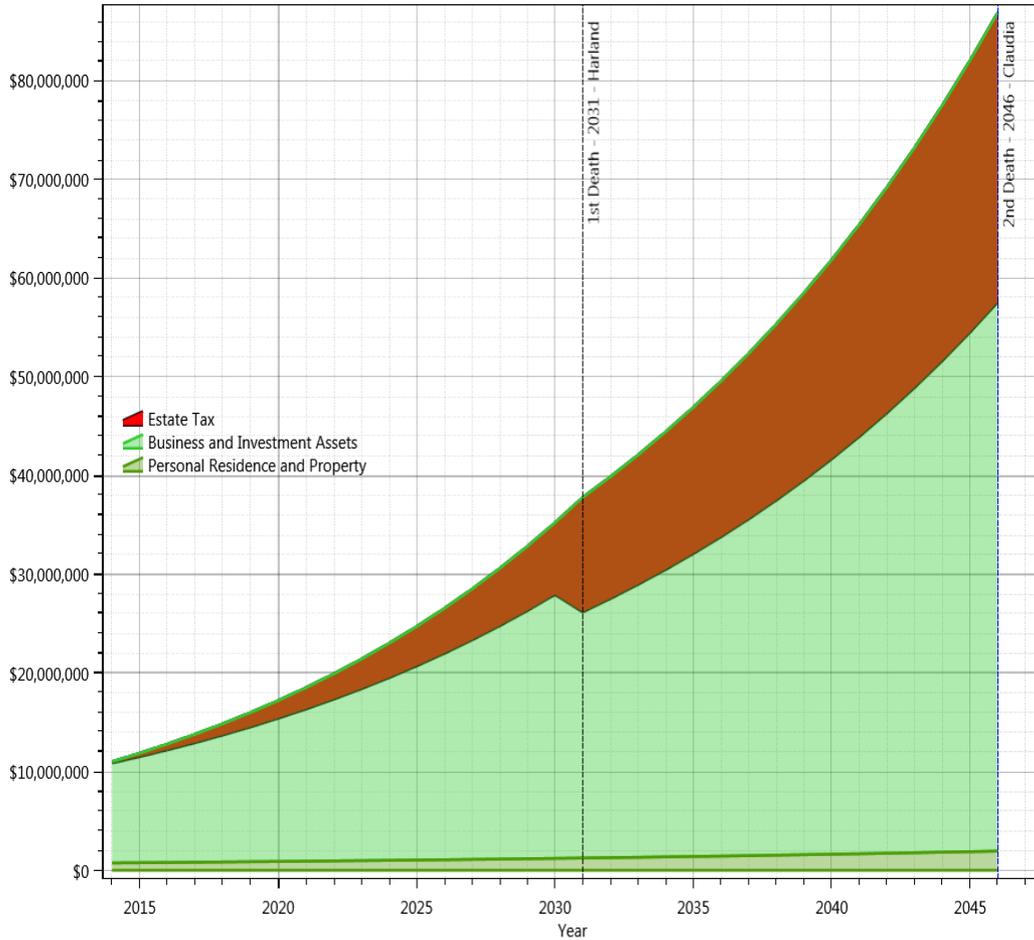
Estate Tax \$25,828,864



Total Passed  
to Beneficiaries  
**\$61,083,296**

## NO PLANNING WITHOUT PORTABILITY

Harland Sanders & Claudia Sanders  
Effective Estate Tax Rate: 33.75 %



## NO PLANNING WITHOUT PORTABILITY

Today

Harland & Claudia Sanders		
Residence	Investments	
\$750,000	\$10,250,000	
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	\$150,000	8.23 % less 1.50 % fees



Upon 1st Death  
(in Year 17)

Claudia Sanders		
Residence	Investments	
\$1,245,788	\$36,523,425	
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	(\$410,492)	8.23 % less 1.50 % fees



Upon 2nd Death  
(in Year 32)

Claudia's Estate		
Residence	Investments	Exclusion/Portability
\$1,949,394	\$84,962,766	(\$13,580,000)
<b>Net Taxable Estate: \$73,332,160</b>		



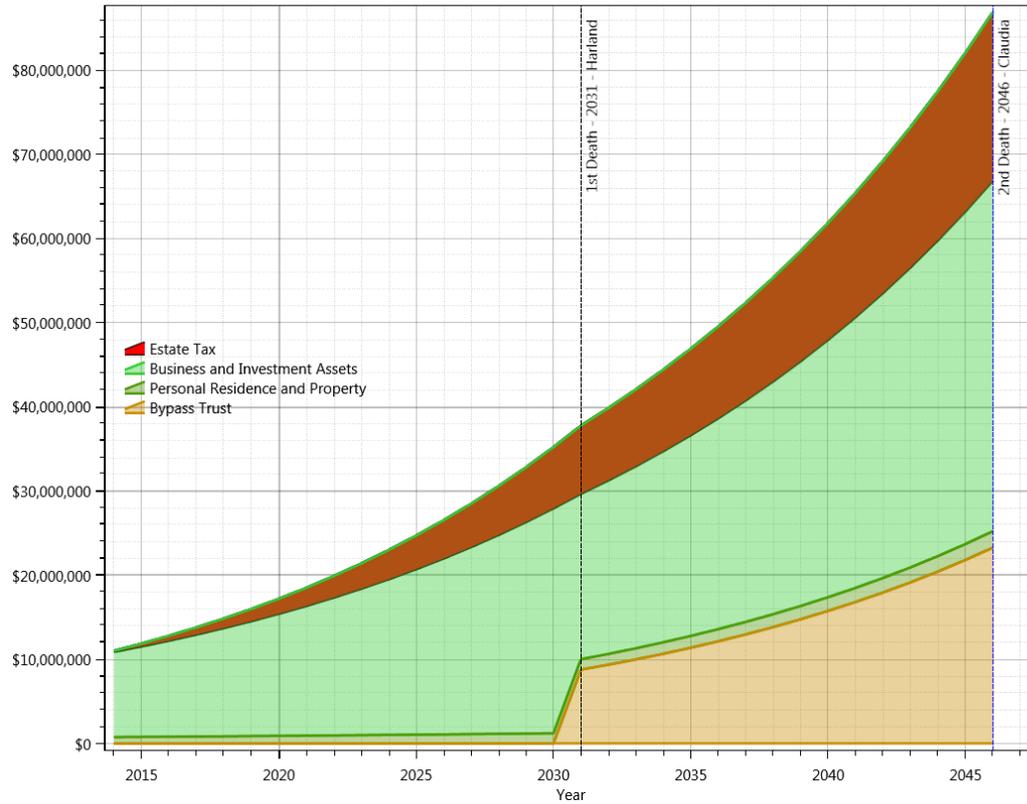
Estate Tax  
**\$29,332,864**

Total Passed  
to Beneficiaries  
**\$57,579,296**

Estate Tax \$29,332,864

### BYPASS TRUST

Harland Sanders & Claudia Sanders  
Effective Estate Tax Rate: 23.04 %



### BYPASS TRUST

Today

Harland & Claudia Sanders		
Residence	Investments	
\$750,000	\$10,250,000	
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	\$150,000	8.23 % less 1.50 % fees

Upon 1st Death  
(in Year 17)

Claudia Sanders		Bypass Trust
Residence	Investments	Initial Funding Upon 1st Death
\$1,245,788	\$27,763,425	\$8,760,000
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	(\$410,492)	8.23 % less 1.50 % fees
		8.23 % less 1.50 % fees

Upon 2nd Death  
(in Year 32)

Claudia's Estate			Bypass Trust
Residence	Investments	Exclusion/Portability	Value
\$1,949,394	\$61,692,478	(\$13,580,000)	\$23,270,287
<b>Net Taxable Estate: \$50,061,873</b>			

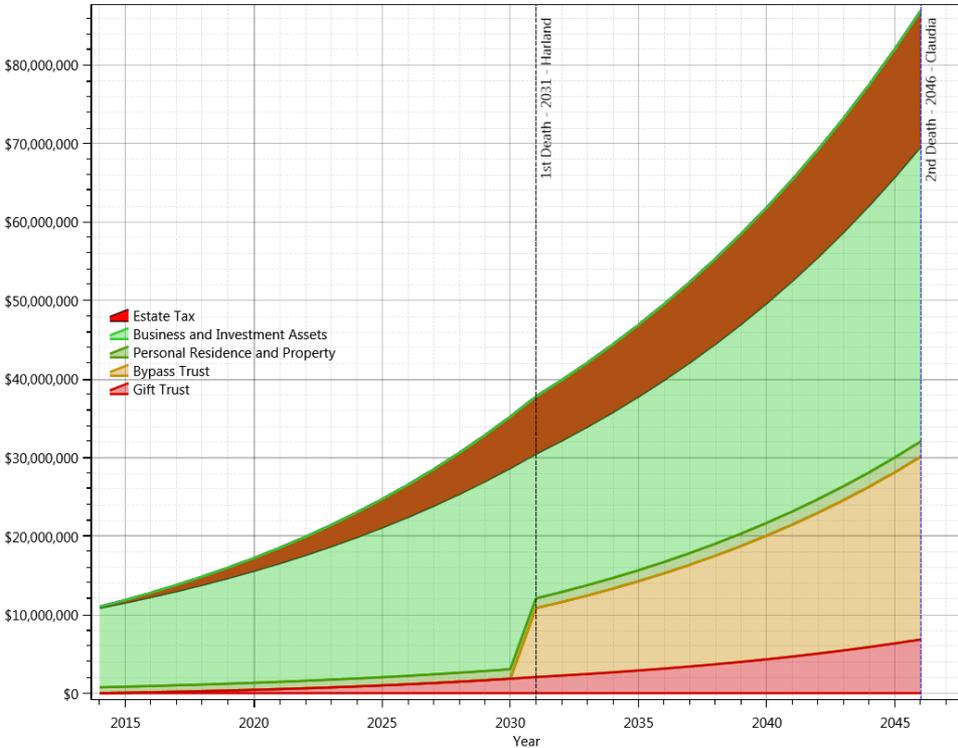
Estate Tax  
**\$20,024,749**

Total Passed  
to Beneficiaries  
**\$66,887,411**

Estate Tax \$20,024,749  
Savings \$9,308,113  
(Assuming no portability)

### ANNUAL GIFTING

Harland Sanders & Claudia Sanders  
Effective Estate Tax Rate: 19.89 %



### ANNUAL GIFTING

Today

Harland & Claudia Sanders		
Residence \$750,000	Investments \$10,250,000	
Annual Growth Rate 3.03 %	Annual Additions \$150,000	Annual Growth Rate 8.23 % less 1.50 % fees

Giftling Trust(s)
Value \$0
Annual Gifts \$56,000
Annual Growth Rate 8.23 % less 1.50 % fees

Upon 1st Death  
(in Year 17)

Claudia Sanders		
Residence \$1,245,788	Investments \$25,703,188	
Annual Growth Rate 3.03 %	Annual Additions (\$410,492)	Annual Growth Rate 8.23 % less 1.50 % fees

Bypass Trust
Initial Funding Upon 1st Death \$8,760,000
Annual Growth Rate 8.23 % less 1.50 % fees

Giftling Trust(s)
Value \$2,060,237
Annual Gifts \$46,000
Annual Growth Rate 8.23 % less 1.50 % fees

Upon 2nd Death  
(in Year 32)

Claudia's Estate		
Residence \$1,949,394	Investments \$54,851,195	Exclusion/Portability (\$13,580,000)
<b>Net Taxable Estate: \$43,220,590</b>		

Bypass Trust
Value \$23,270,287

Giftling Trust(s)
Value \$6,841,283

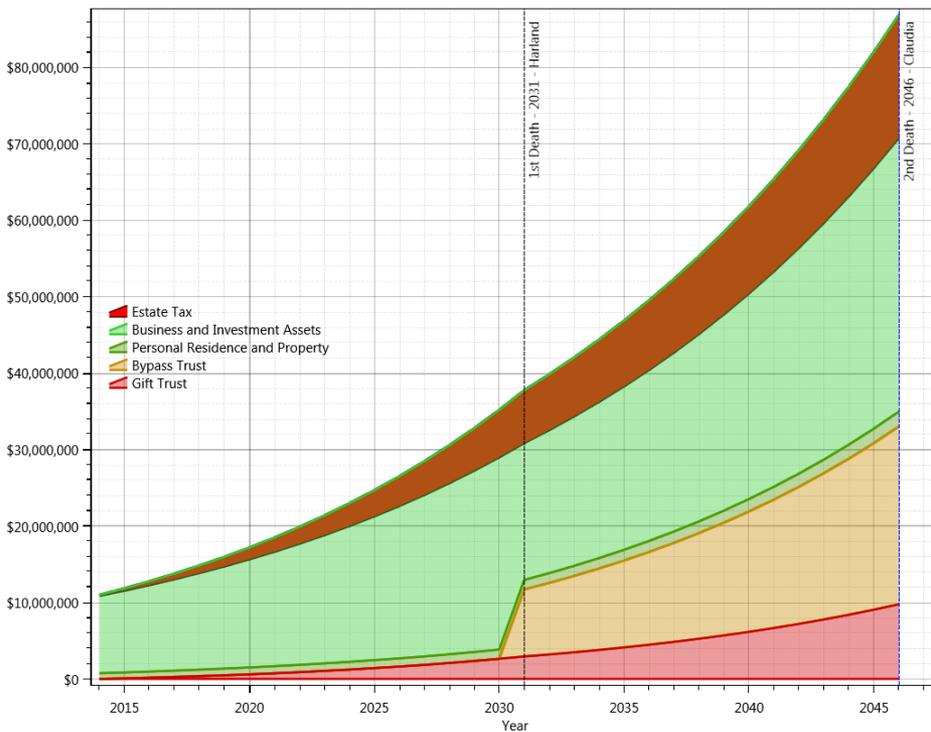
Estate Tax  
**\$17,288,236**

Total Passed  
to Beneficiaries  
**\$69,623,924**

Estate Tax \$17,288,236  
Savings \$2,736,513

### DISCOUNTED GIFTING

Harland Sanders & Claudia Sanders  
Effective Estate Tax Rate: 18.54 %



### DISCOUNTED GIFTING

Today

Harland & Claudia Sanders		
Residence	Investments	
\$750,000	\$10,250,000	
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	\$150,000	8.23 % less 1.50 % fees

Gift Trust(s)
Value
\$0
Annual Gifts
\$56,000
Annual Growth Rate
8.23 % less 1.50 % fees

Upon 1st Death  
(in Year 17)

Claudia Sanders		
Residence	Investments	
\$1,245,788	\$24,820,230	
Annual Growth Rate	Annual Additions	Annual Growth Rate
3.03 %	(\$410,492)	8.23 % less 1.50 % fees

Bypass Trust
Initial Funding Upon 1st Death
\$8,760,000
Annual Growth Rate
8.23 % less 1.50 % fees

Gift Trust(s)
Value
\$2,943,195
Annual Gifts
\$46,000
Annual Growth Rate
8.23 % less 1.50 % fees

Upon 2nd Death  
(in Year 32)

Claudia's Estate		
Residence	Investments	Exclusion/Portability
\$1,949,394	\$51,919,217	(\$13,580,000)
<b>Net Taxable Estate: \$40,288,611</b>		

Bypass Trust
Value
\$23,270,287

Gift Trust(s)
Value
\$9,773,261

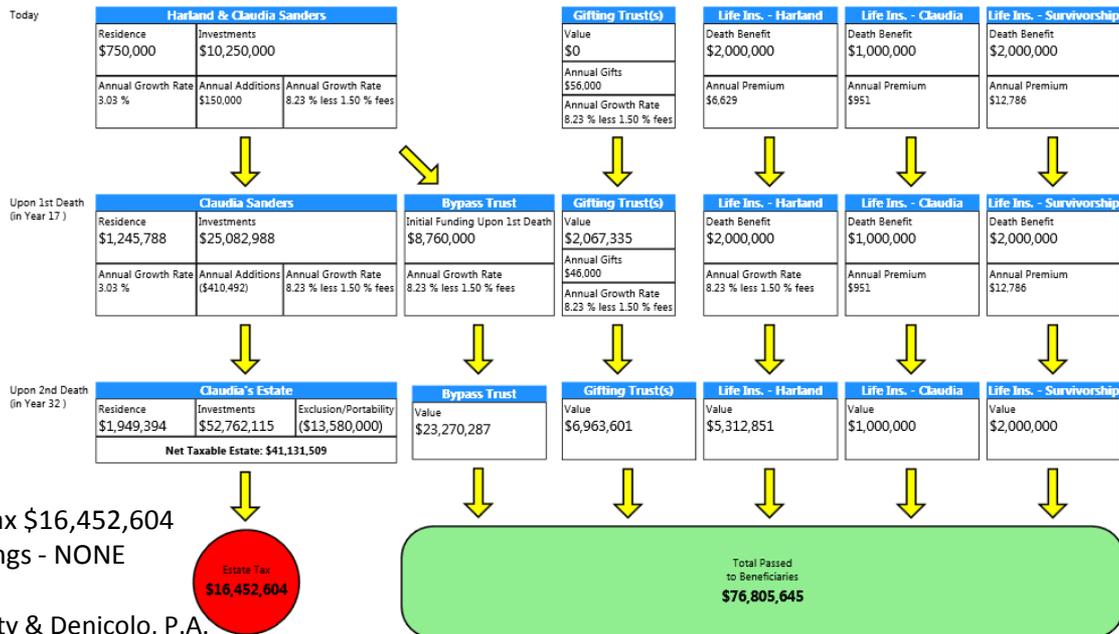
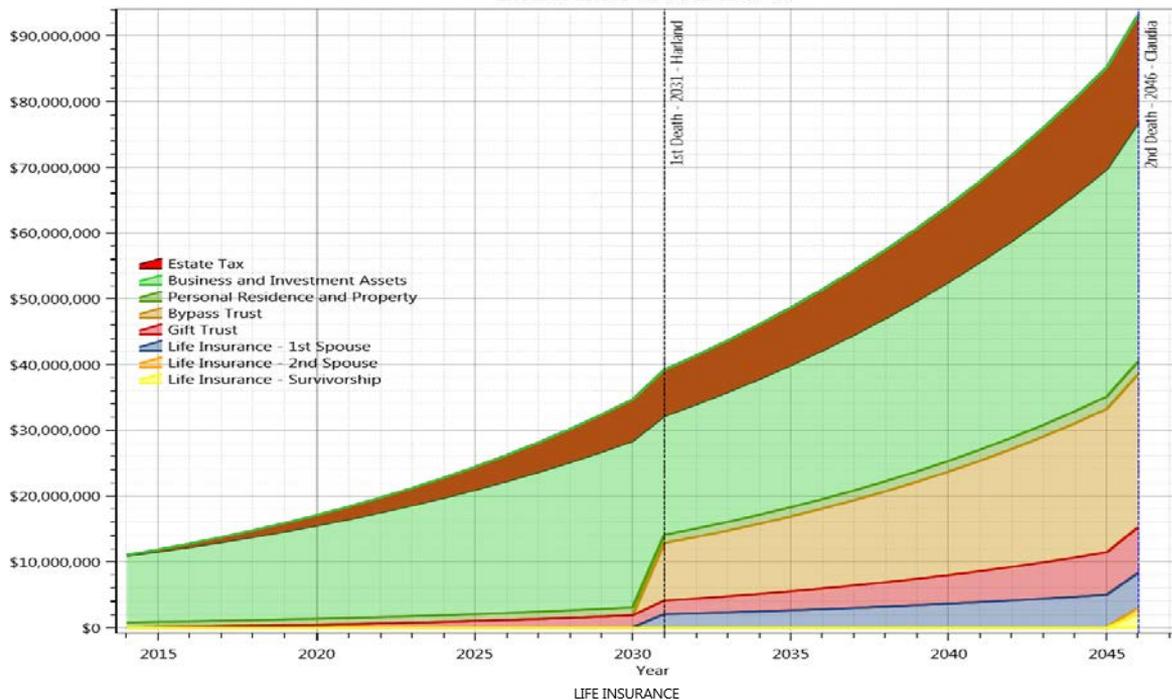
Estate Tax  
**\$16,115,444**

Total Passed to Beneficiaries  
**\$70,796,716**

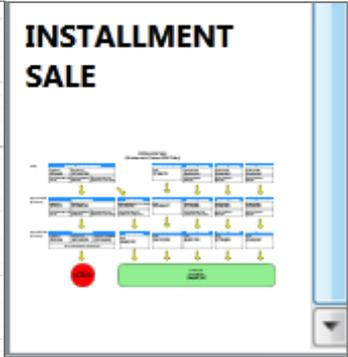
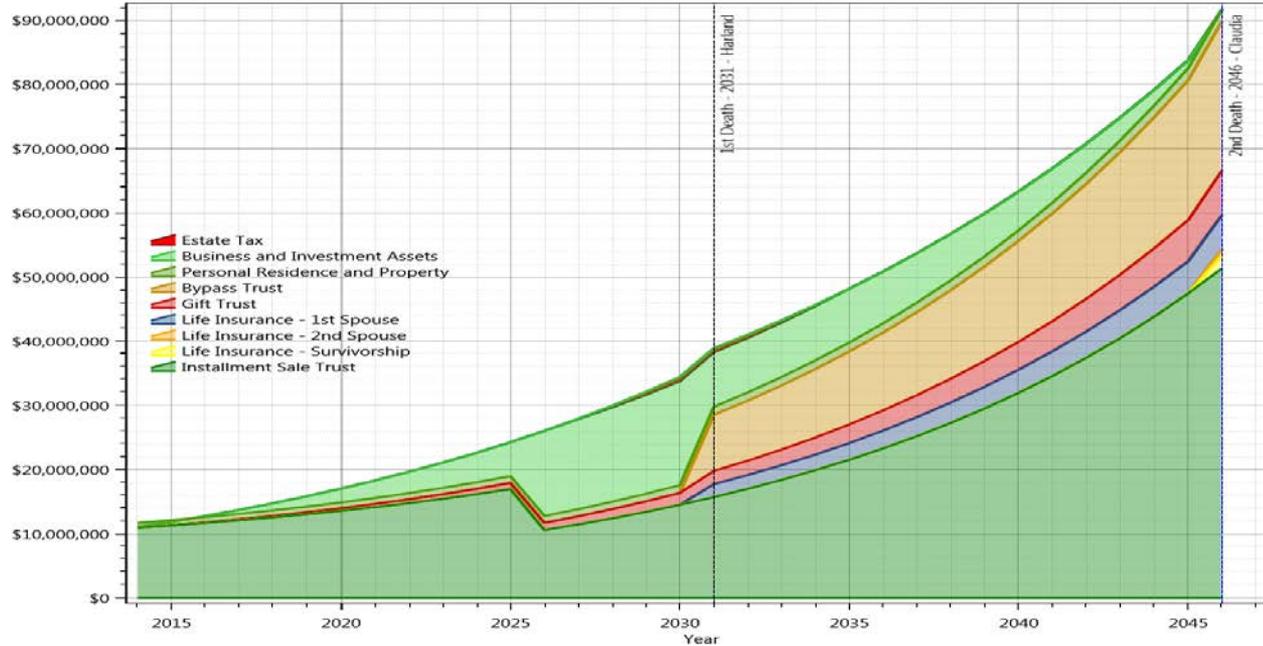
Estate Tax \$16,115,444  
Savings \$1,172,792

# LIFE INSURANCE

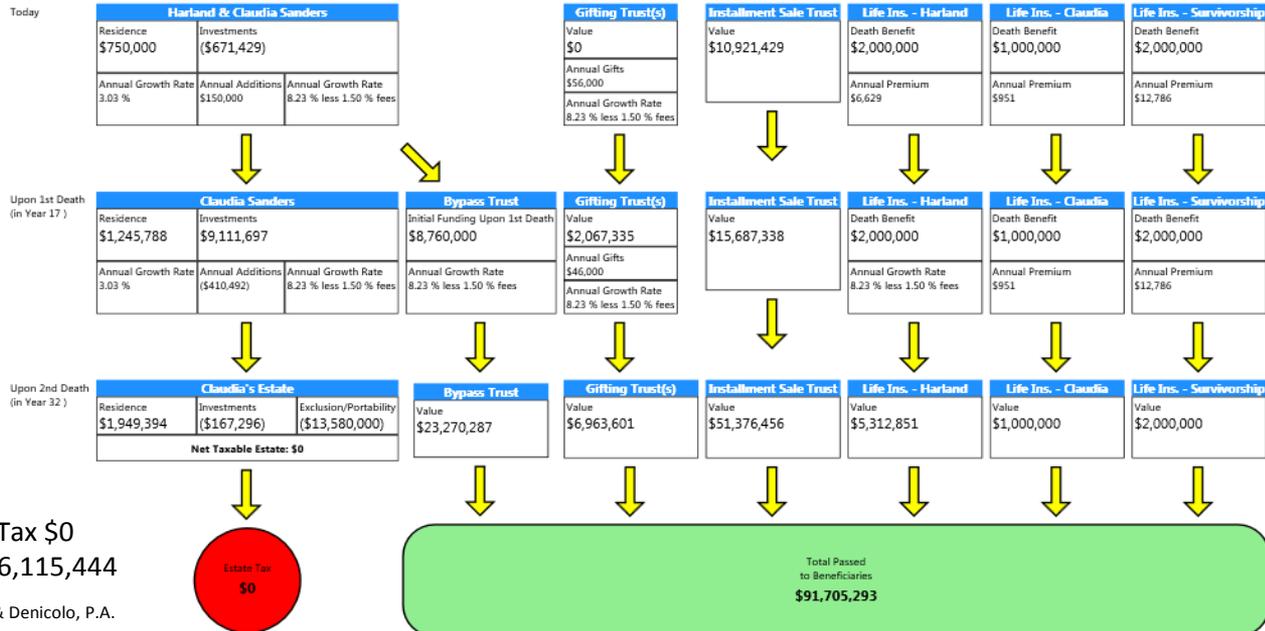
Harland Sanders & Claudia Sanders  
Effective Estate Tax Rate: 19.37 %



**INSTALLMENT SALE**  
 Harland Sanders & Claudia Sanders  
 Effective Estate Tax Rate: 0.00 %



INSTALLMENT SALE



Estate Tax \$0  
 Savings \$16,115,444

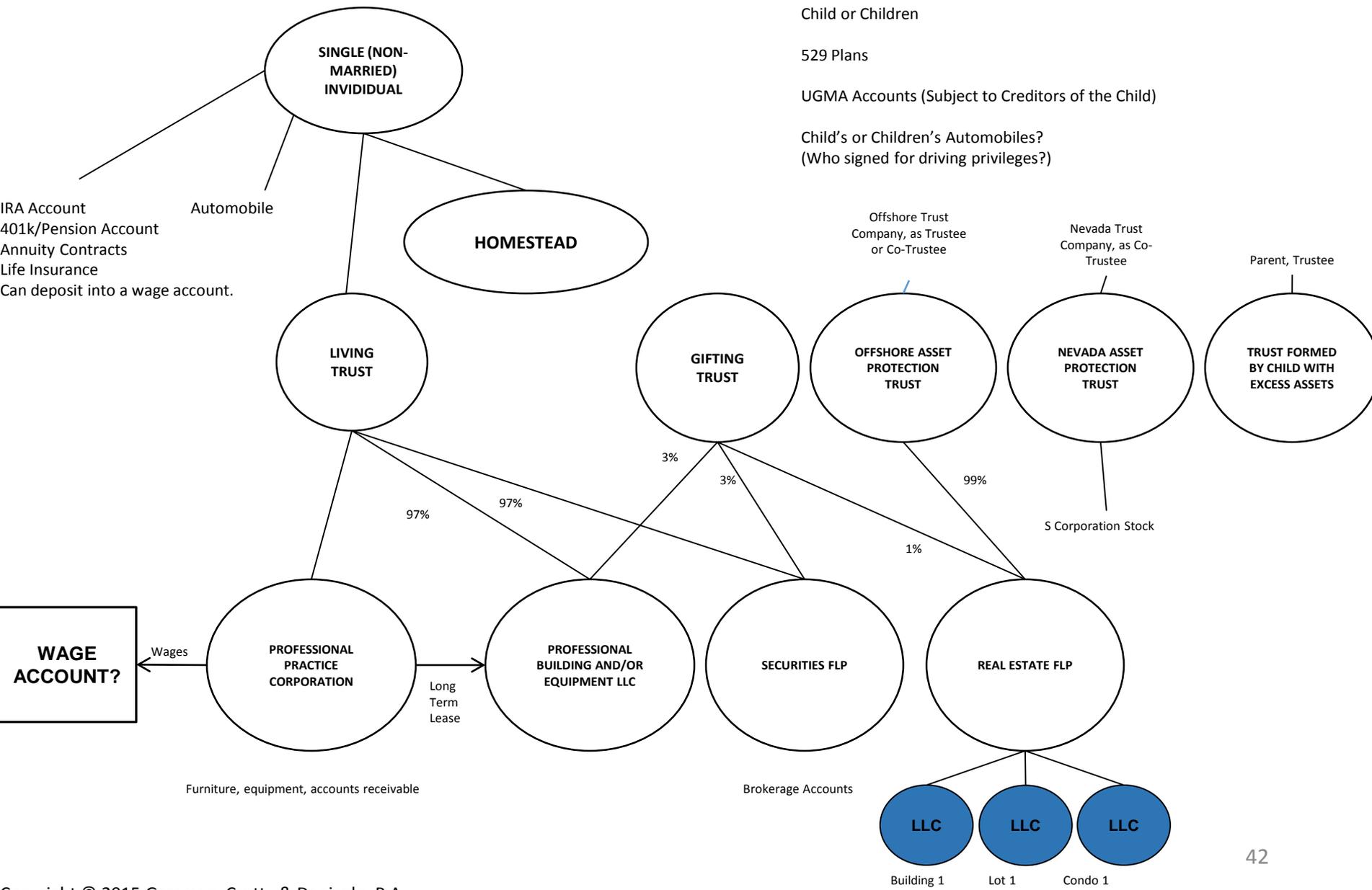


# THREE CHOICES FOR RETIREMENT PLAN BENEFITS – MAY BE BEST TO HAVE THIS SPREAD AMONG TWO OF THE CHOICES – CLIENT AGE 75 AND OLDEST CHILD AGE 50

<u>CHOICE #1</u>	<u>CHOICE #2</u>	<u>CHOICE #3</u>
<p><b><u>Mrs. Client as Beneficiary</u></b>  <b><u>Advantages:</u></b>                      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><b><u>Disadvantages:</u></b>                      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><b><u>Restated and Amended Trust Agreement of Deceased Client’s Revocable Trust</u></b>  <b><u>Advantages:</u></b>                      1) The retirement plan accounts can benefit Mrs. Client without being subject to federal estate tax in her estate.                      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.                      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><b><u>Disadvantages:</u></b>                      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.                      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.                      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><b><u>Irrevocable Trust for Children Only</u></b>  <b><u>Advantages:</u></b>                      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.                      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><b><u>Disadvantages:</u></b>                      1) Mrs. Client cannot benefit from the retirement plan accounts.                      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%                      2015: 4.7170%                      2016: 4.9261%                      2017: 5.1282%                      2018: 5.3476%                      2019: 5.5866%                      2020: 5.8480%                      2021: 6.1350%                      2022: 6.4516%</p>	<p>2014: 8.0645%                      2015: 8.7719%                      2016: 9.6154%                      2017: 10.6383%                      2018: 11.9048%                      2019: 13.5135%                      2020: 15.6250%                      2021: 18.5185%                      2022: 22.7273%</p>	<p>2014: 3.0120%                      2015: 3.1056%                      2016: 3.2051%                      2017: 3.3113%                      2018: 3.4247%                      2019: 3.5461%                      2020: 3.6765%                      2021: 3.8168%                      2022: 3.9683%</p>

# WHERE DOES THE TRUST FIT IN LOGISTICALLY?

## ESTATE AND ASSET PROTECTION PLANNING FOR THE SINGLE PROFESSIONAL



## Unconventional Uses of 529 Plans Should Not Be Ignored by Taxpayers and Their Advisors

by David L. Koche, Esq.  
Barnett, Bolt, Kirkwood, Long & McBride  
Tampa, Florida  
and Alan S. Gassman, Esq.  
and Christopher J. Denicolo, Esq.  
Gassman, Bates & Associates, P.A.  
Clearwater, Florida\*

### INTRODUCTION

Internal Revenue Code §529 enables taxpayers to establish "529 plans," which may be immune from federal and state income taxes, creditor-protected, and absorbent of losses that have been sustained within them. While most planners understand and recommend the use of 529 plans for gift tax exemption and descendant education planning, the current economic and political environment may occasion the need for a revised perspective of how to best use existing and future 529 plans to maximize personal and family educational and wealth enhancement. The occurrence of losses within 529 plans, a likely increase in future capital gains rates, and a focus on clients' now reduced economic asset base and increased personal needs require a reexamination of 529 plans.

Is it possible to use existing 529 plans to absorb otherwise taxable gains, to act as a tax shelter for the contributor himself or herself, or to use the gift tax annual exclusion to fund 529 plans for certain descendants (such as nephews and nieces) that may be converted free of transfer tax to use for other descendants (such as children) if and when it is appropriate in the future? These, and other questions, are investigated in this article.

Prior to the recent third quarter "recovery,"<sup>1</sup> the Dow had fallen over 50%, which is worse than any other bear market since the Great Depression. Unfor-

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<sup>1</sup> In the third quarter of 2009, the S&P 500 gained 15%.

tunately, educational savings plans were not immune from this broad market collapse. Indeed, recent statistics indicate that there were 11.2 million 529 plan accounts and that their value fell 12.4% in the fourth quarter of 2008, alone.<sup>2</sup> The result is that many affluent taxpayers hold 529 plans where the amounts invested exceed the present value of the plan assets. Many clients have converted from equities to cash equivalents under 529 plans, and might now reconsider this. Because a taxpayer can close down a "loss position" in a 529 plan and receive all assets tax-free (for any use or reason and without regard to use), clients holding 529 plans with significant losses should consider changing their strategy to have the 529 plan hold more income-producing assets and later withdrawing all assets upon breaking even overall. Also, clients should consider adding more monies to 529 plans with loss positions in order to maximize the ability to have past losses absorb future investment income.

Upon review of the admittedly contrarian ideas set forth below, many taxpayers may (after consulting with their financial advisors) consider abandoning the original plan to use a 529 plan to pay for college expenses when it becomes apparent that "an upside down 529 plan" is an income tax savings vehicle, without regard to where the plan assets are spent to pay for college. Stated another way, why be restricted to using bruised 529 plan assets to pay for college when the income can be withdrawn tax-free and may be better used for other purposes in this uncertain economic environment?

Also, clients may be best served by starting new 529 plans to pay for college expenses, while using existing upside down 529 plans as income savings vehicles. For example, a client who believes a child will need \$100,000 for a college education and who has a 529 plan that cost \$100,000 but is now worth only \$60,000 may fund a new 529 plan to fund college expenses, and use the existing upside down 529 plan to generate tax-free income, which can be withdrawn by the termination and liquidation of the old plan account plan when the total plan assets equal the total cumulative contributions to such plan.

This article will investigate these strategies and questions that arise therefrom after providing a basic background on 529 plan investment rules.

### BASIC BACKGROUND INFORMATION

Internal Revenue Code §529 offers generous gift tax and income tax provisions for certain accounts set

<sup>2</sup> Investment Company Institute, *529 Plan Program Statistics, December 2008* (May 22, 2009), available at [http://www.ici.org/research/stats/529s/529s\\_12-08](http://www.ici.org/research/stats/529s/529s_12-08).

# 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 cannot say that the grantor retains certain 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.

# 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.

# Considering Offshore or Domestic Creditor Protection Trusts

## SHOULD I STAY OR SHOULD I GO?

FACTOR	NEVADA	ALASKA	ISLE OF MAN/JERSEY (Channel Island)	NEVIS	BELIZE
Asset protection law – Statute of Limitations	See Page 46 Strong/2 years – BUT full faith and credit issue	Strong/4 years – BUT full faith and credit issue	No statutory limitation on fraudulent transfer – unless import law of jurisdiction of a Co-Trustee	Strong/2 years	Strong/1 day statute!
Approximate minimal cost to open trust and annual fees.	\$250 to open \$1,500 per year thereafter	\$750 to open \$3,000 per year thereafter	\$1,600 to open \$1,600 - \$3,300 per year thereafter	\$1,750 min to open \$2,500-\$5,000 per year thereafter depending on value of trust	\$700 fee to register; \$1,100 - \$2,300 per year thereafter
Risk of theft.	Very low.	Very low.	Should be very low.	Low, if you use a safe trust company.	Not sure.
Use of subsidiary entities permitted- settlor can be Manager of entity.	YES	YES	YES	YES	YES
Reputation with US courts.	Does the judge gamble?	Does the judge like cruises?	Does the judge know European history?	Does the judge like Four Seasons Hotels or Alexander Hamilton (born there).	Has the judge read <u>SEC v. Banner Fund International</u> , or like barrier reefs?
Commonality of use of Swiss or Bermuda depositories.	New concept	Not common	Common in these islands for centuries	Common	Common

# Considering Offshore or Domestic Creditor Protection Trusts

## SHOULD I STAY OR SHOULD I GO?

FACTOR	NEVADA	ALASKA	ISLE OF MAN/JERSEY (Channel Island)	NEVIS	BELIZE
Use of Trust Protectors.	New concept	New concept	Since the 1700s	Normal	Normal
Quality of service.	High	High- time zone difference	British-style/time zone difference	Small town- usually good.	Mayberry RFD
Allows importation with statute of limitations tolling from inception of trust at where it was imported from?	YES if original situs has substantially similar spendthrift laws	YES	The Statute of Elizabeth provides that fraudulent transfers should be void, not subject to any limitation period	YES	YES
Toggling off is possible?	YES	YES	NOT unless there is one or more U.S. beneficiaries	NOT unless there is one or more U.S. beneficiaries	NOT unless there is one or more U.S. beneficiaries
Provides for contingency fee payments? - Number of lawyers	YES About 10,000 attorneys	YES About 4,000 attorneys	NO, about 170 attorneys in Isle of Man, and 150 in Jersey Most lawyers are conflicted	NO, about 100 attorneys Most lawyers are conflicted	NO, about 150 attorneys Most lawyers are conflicted
Rule Against Perpetuities	365 years	1,000 years	150 years	Does not apply	Abolished

# A Matter of Opinion – Reasonable Minds Will Differ

## HOUSE OF BRICKS/HOUSE OF STICKS/SOAP ON A ROPE

<b>HOUSE OF BRICKS</b>	<b>HOUSE OF STICKS</b>	<b>HOUSE OF STRAW</b>	<b>FORGET IT</b>	<b>SOAP ON A ROPE (PRISON)</b>
Offshore trust in a top offshore jurisdiction?	Domestic in a top domestic jurisdiction?			
Trustee controlled	Most assets under an LLC or partnership controlled by client.	Client as co-trustee and/or loosely managed LLC or partnership		
Small percentage of personal assets	50% of personal assets	The majority of assets		
Business purpose besides creditor protection	Creditor protection is the sole purpose	Creditor protection is the primary purpose and last minute/domestic		
No benefits paid or derived by settlor	Occasional benefits in unexpected situations or expected future retirement benefits	Significant continuing benefits	Debit card	
Fully reported for all tax and disclosure purposes	Reasonable attempts to comply with reporting purposes	Haphazard reporting	Intentional non-reporting	Intentional failure to report income Intentional non-reporting
Disclosure on financial statements and otherwise	No one is misled over the arrangement	No one is intentionally misled over the arrangement	Has intentionally misled creditors (may be a crime)	Has intentionally misled a court or the Internal Revenue Service

# OFFSHORE TRUST – TICKING TIME BOMBS



- Not reporting the trust and trust activities on a Form 3520, upon inception, Form 3520A each year thereafter, TD F 90-22.1 (FBAR) forms annually, and compliance with FATCA (Foreign Account Tax Compliance Act) reporting requirements.
- Not reporting trust income or not reporting income that goes into the trust.
- Being dishonest with any potential creditor, the IRS or any taxing authority with respect to the trust or its underlying operations.
- Not reporting the funding of the trust as a completed gift for gift tax purposes if the grantor has not retained a power with respect to the trust that would cause its funding to be an incomplete gift (such as the testamentary power to appoint trust assets) even if the trust will be subject to estate tax by reason of such power.
- Failure to provide that upon death, any marital deduction devise must override any discretionary power of the trustee or trust protectors to deprive the grantor's spouse of sole lifetime beneficiary/QTIP trust or outright payment rights.
- Getting the trust assets stolen by the trustee.
- Being dishonest with any court with respect to the trust or its operations.

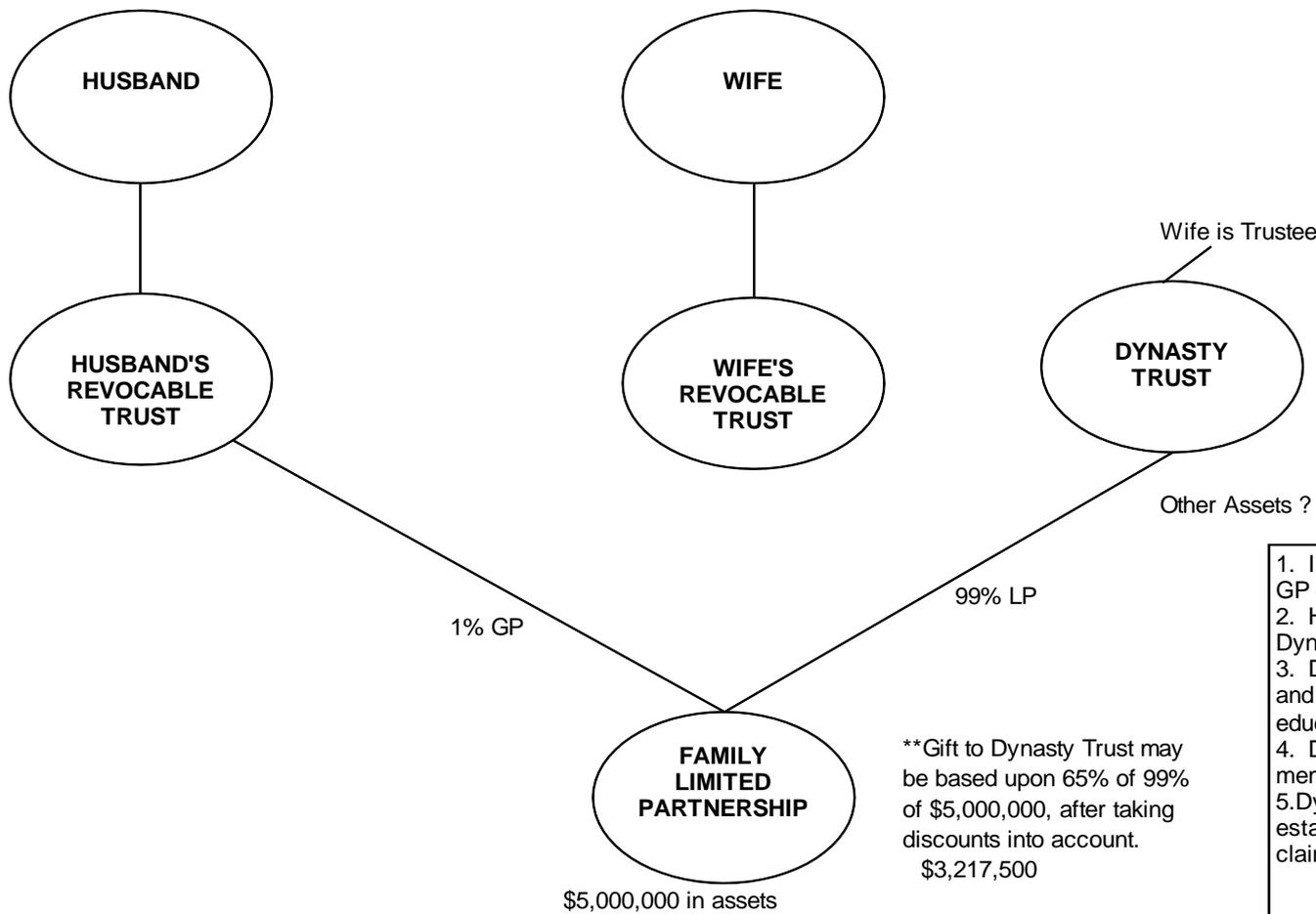
# Do Domestic Asset Protection Trusts Work?

- Nevada, Alaska and Delaware 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.

# Avoid Theft

- It is vital that clients utilize reputable trust companies and structures that assure that the assets they place under an APT will not be stolen.
- Sometimes two trust companies from different jurisdictions will serve as Co-Trustees under the trust agreement, or a lawyer or other fiduciary may serve so that two signatures and collusion would be required before monies held in an offshore account could ever be stolen.
- Some jurisdictions, like the Isle of Man and Jersey in the Channel Islands allow for the law of a co-trustee's jurisdiction to apply.
  - There are many well funded and reputable trust companies in the Isle of Man and Jersey willing to serve as managing Co-Trustee of APT formed under the laws of a more recognized APT jurisdiction.

# Example of a Husband/Wife Dynasty Trust Arrangement

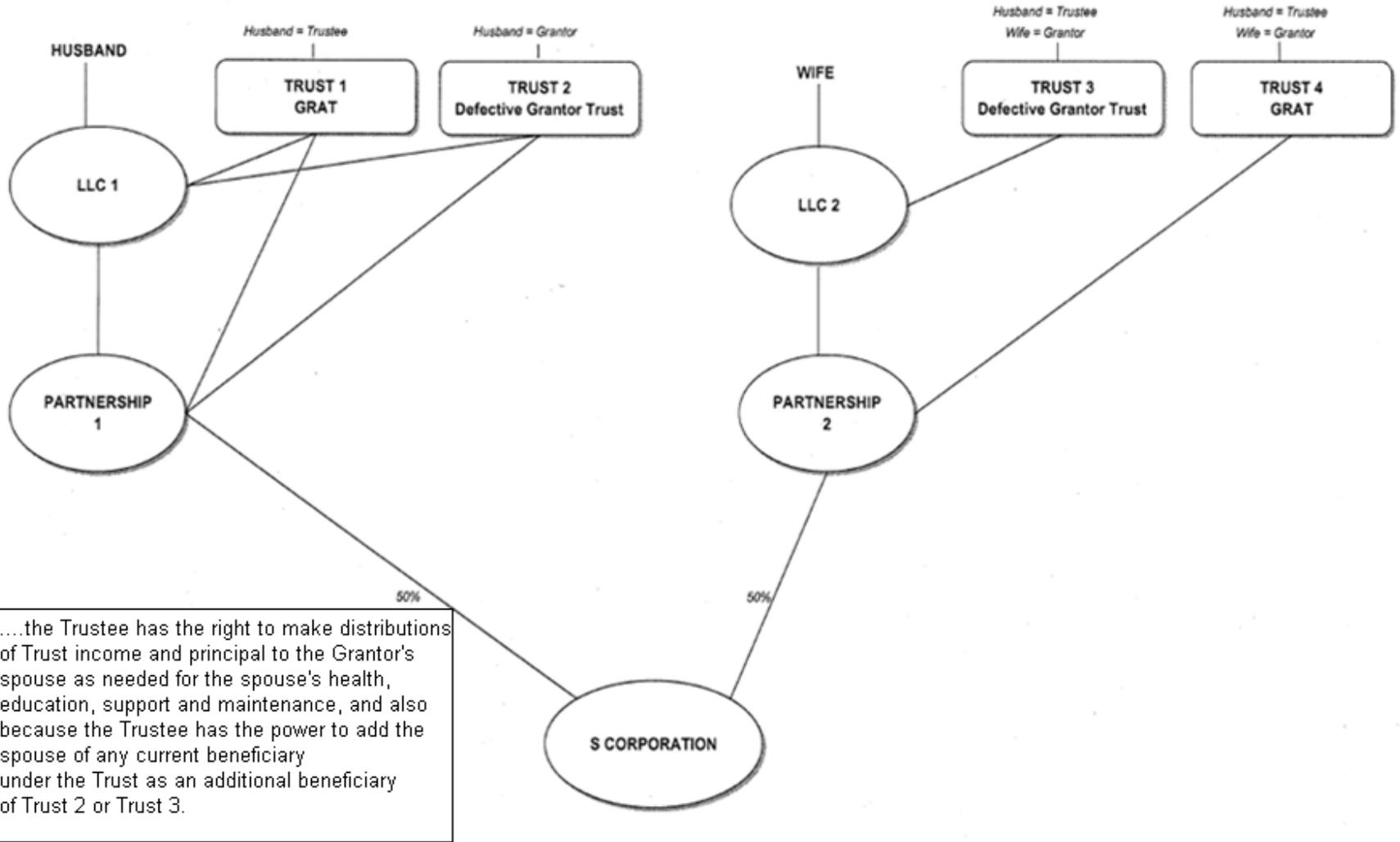


\*\*Gift to Dynasty Trust may be based upon 65% of 99% of \$5,000,000, after taking discounts into account.  
\$3,217,500

Husband has \$1,782,500 of his \$5,000,000 exemption remaining.

1. Investments controlled by Husband as GP of Limited Partnership.
2. Husband can replace the Trustee of the Dynasty Trust.
3. Dynasty Trust can be used for spouse and descendants as needed for health, education and maintenance.
4. Dynasty Trust can loan money to family members.
5. Dynasty Trust should be exempt from estate tax, creditor claims, and divorce claims of both spouses and descendants.

# Defective Grantor Trusts & Disregarded Entities Illustrated Flowchart Summarizing Private Letter Ruling 200439028

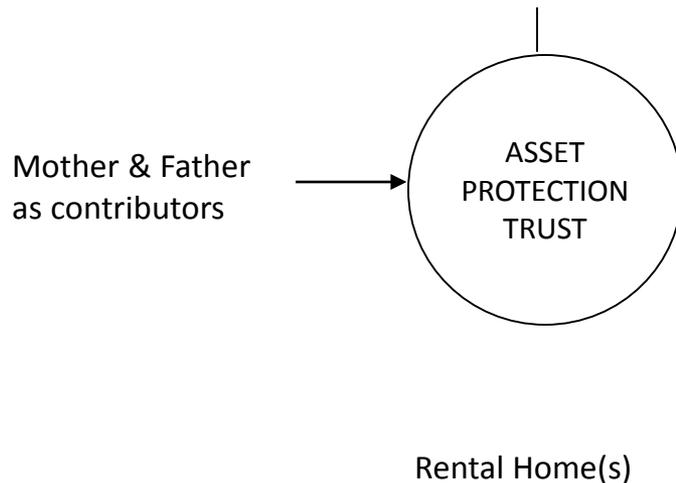


# Limited Liability Trust – Asset Protection Trust

**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

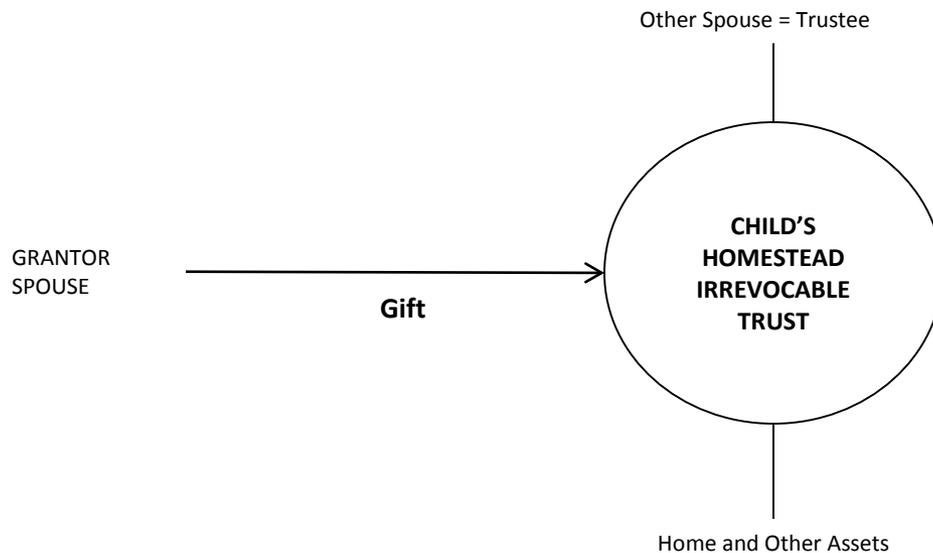


- Benefits mother, father and children.
- May be disregarded for income tax purposes.
- No tax filing requirements if a domestic asset protection trust jurisdiction is used.
- May need to have subsidiary management trust owned 100% by asset protection trust to hold title, to allow parents to have management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

# Child's 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 Trustee-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.

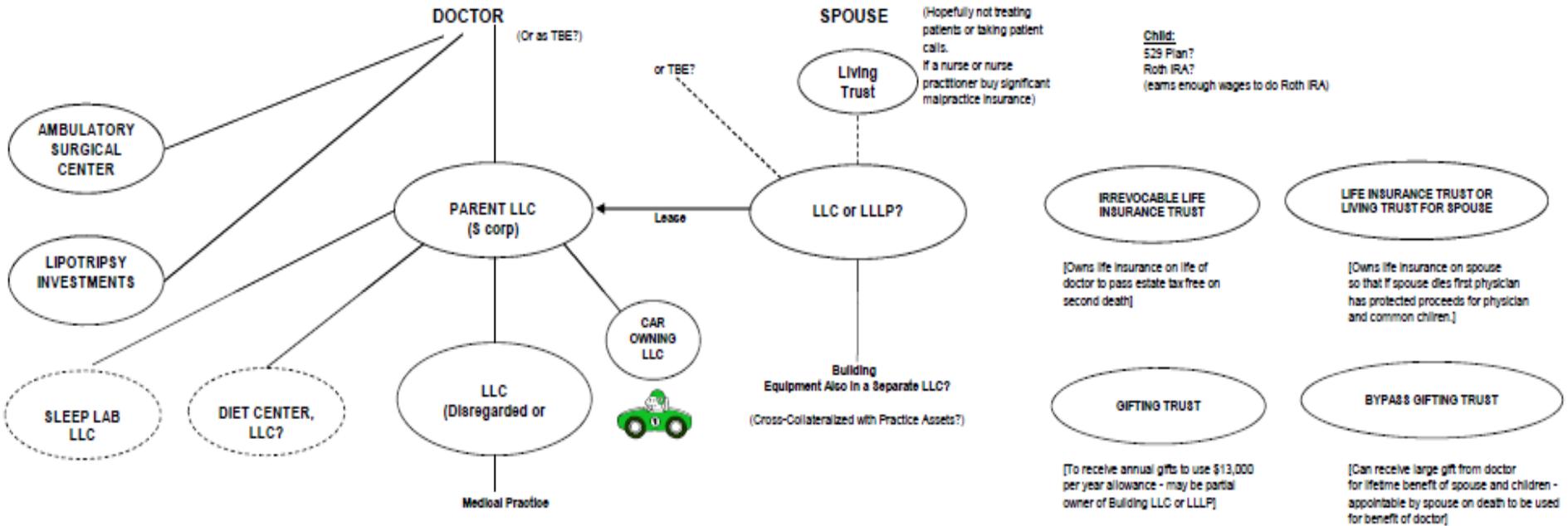
The Trust will not be subject to creditor claims of any family member unless (1) the transfer to the Trust by the Grantor Spouse is a "fraudulent transfer," or (2) the child has a right to withdraw more than the gift tax exclusion amount in any calendar year.

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

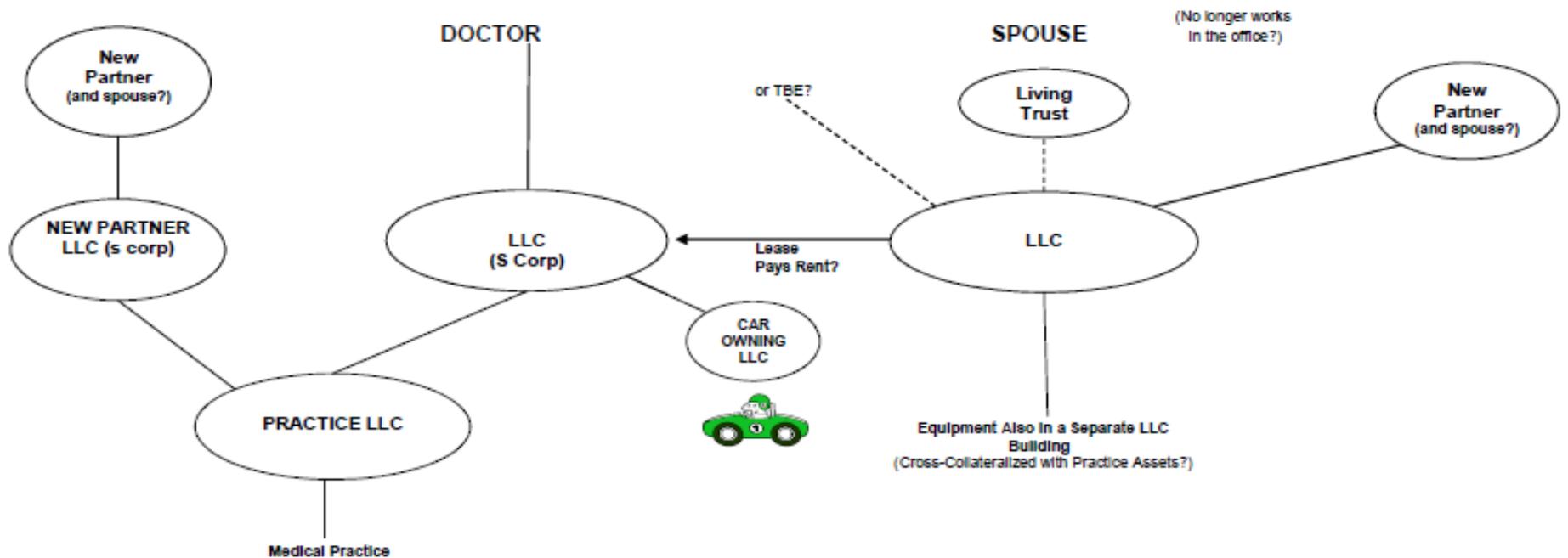
COMPARISON OF METHODS TO PURCHASE HOMES FOR THE CHILDREN

	<b>\$250,000 Exemption on Sale of Home</b>	<b>\$50,000 Homestead Exemption and 3% Per Year Cap on Valuation</b>	<b>Divorce</b>	<b>Control</b>	<b>Notes</b>
Father and Mother loan money to the child. Child purchases and owns home.	Child gets income tax exemption.	Child gets homestead exemption and cap.	Loan will be repaid to parents. Equity may be subject to claim by spouse if this is not waived by Prenuptial Agreement.	Child controls the house. However, we may be able to call the Note to force a sale.	Note: Child gets equity above Note.
Father and Mother own the home and the child lives in the house.	No.	Generally no. However, it may be possible to obtain these with a 99-year lease.	Better protected.	Father and Mother control.	
Via Child Funded Homestead Bypass Trust.	Child gets income tax exemption.	Child gets homestead exemption and cap.	Better protected.	Mother would be Trustee of the Trust and would retain control.	Note: Creditors may be able to get into the Trust. It may be possible for Mother to transfer the house to the child's individual name in the event of a Creditor issue.
Direct Client Funded Homestead Bypass Trust.	No	Child gets homestead exemption and cap.	Better protected.	Mother would be Trustee of the Trust and would retain control.	Note: The \$250,000 exemption is lost, but no creditor of the child should be able to get the assets.
One-half purchased by child and one-half owned by Father and Mother.	One-half.	One-half.	One-half, better protected.	Each controls one-half.	

# SINGLE PHYSICIAN OWNED MEDICAL PRACTICE

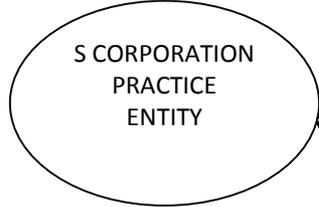


# MULTIPLE OWNED DOCTOR MEDICAL PRACTICE



# CHOICES AND FACTORS WITH RESPECT TO ALLOCATION AND PAYMENT OF MEDICAL PRACTICE INCOME FOR THE PROFESSIONAL PRACTITIONER

Owned by Physician or as Tenants by the Entireties



PAYEE	CREDITOR	2012 TAXES/EXPENSES	2013 TAX INCREASES
Pension Plans	Yes	Costs for staff and to maintain plan – spouse on payroll to justify additional contribution.	Highest tax bracket increases to 36.6%. Nonqualified plans subject to 3.8% Medicare tax.
Children on the Payroll	Yes – If goes to Roth IRA in the name of the child.	Child in lower rate but 13.3% employment taxes apply, increasing to 15.3% on 1/1/13.	10% Bracket is retained.
Wages paid to Doctor	If Head of Household, Florida Statute 222 may apply – deposit directly into protected account.	13.3% employment taxes on first \$110,100, and then 2.9% over \$110,100.	Employment taxes increase to 15.3% on 1/1/13 plus .9% Medicare tax on wages exceeding \$200,000 for single person and \$250,000 for married joint filers.
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.	S corp distributions are not subject to the 3.8% Medicare tax unless distributions represent income from passive sources.
Spouse on payroll.	Yes, if spouse is safe.	Subject to 13.3% employment taxes on first \$110,100/2.9% over \$110,100. May be worth it for protection and/or pension contribution for spouse.	Employment taxes increase to 15.3% on 1/1/13 plus .9% Medicare tax on wages exceeding \$200,000 for a single person and \$250,000 for married joint filers.
Rent	Yes, if renting entity is protected. They protect PA assets if landlord has lien to enforce rent on long-term lease.	7% sales tax – after tax cost is 4.55%	Rental income will be subject to the 3.8% Medicare tax for single taxpayers with MAGI over \$200,000 and MFJ taxpayers with MAGI over \$250,000 beginning 1/1/13
Interest owed to related parties.	If related party is protected.	Deductible as interest – receiving party pays interest income.	

# A Florida Physician's Guide to Wages and Wage Accounts

Florida law provides limitations upon the access that creditors may have to “wages” and “wage accounts” earned and funded by Florida residents.

**Florida Statute Section 222.11 provides that wages earned by a head of household will generally be immune from creditors.**

Head of household has been defined to mean that the wage earner provides most of the support for themselves and other family members. For example, where the wage earner's spouse earns more than the wage earner, the wage earner may not qualify as “head of household” for creditor exemption purposes unless it can be shown that the actual wages earned by such person provide more than half of the support for at least one other family member.

Wages do not include dividends that are paid attributable to ownership of a professional practice, as opposed to being labeled as wages. Wages are subject to employment taxes.

A family member being supported should be a relative, or maybe a non-relative, who actually resides in the household with the wage earner.

Some courts have indicated that where the wage earner is a shareholder in a closely held corporation, and can thus manipulate between what would be received as wages and what would be received as dividends, then no wages may be protected. These unfortunate bankruptcy court decisions have not been appealed, and point out the importance of taking regular paychecks and having arm's-length employment agreements in place so that wages are paid periodically in a traditional manner to enhance the probability that they will be protected.

If wages are “creditor exempt,” then it is important to maintain the creditor exempt status of the wages by depositing them into an account or other investments that will also be creditor exempt.

# A Florida Physician's Guide to Wages and Wage Accounts

Other creditor exempt assets that wages may be “converted to” can include paying down the mortgage on a protected home, investing the paycheck directly into a properly titled annuity contract or life insurance policy, funding a tenancy by the entirety account where the wage earner's spouse would not be sued by the same creditor as the wage earner, or making deposits into a **wage account**.

Physicians who have monies or investments that are not creditor exempt might be well advised to spend down the non creditor exempt savings, while accumulating wages in a wage or other protected account.

The Florida statutes do not explicitly impose any ownership, titling, naming or other specific requirement for an account to qualify as a wage account. A “wage account” can be owned by the physician earner, or may be held as tenancy by the entirety by the physician earner and the physician's spouse.

Most, if not all, married physicians whose spouses do not practice with them will be better protected by depositing their wages into a tenancy by the entirety account so that the wages may be safeguarded for two reasons: (1) the wage exemption rules as described above will apply, and (2) to “invade” a tenancy by the entirety bank account, a creditor must have a judgment against both spouses or show that the transfer into the account was Fraudulent transfer. If a wage check is a creditor exempt asset, then the deposit of the wage check directly into a protected tenancy by the entirety account should not be considered a Fraudulent transfer.

Many physicians and bankers waste a lot of time opening “wage accounts” where tenancy by the entirety accounts or other vehicles are just as, if not more, protective and would qualify as wage accounts anyway.

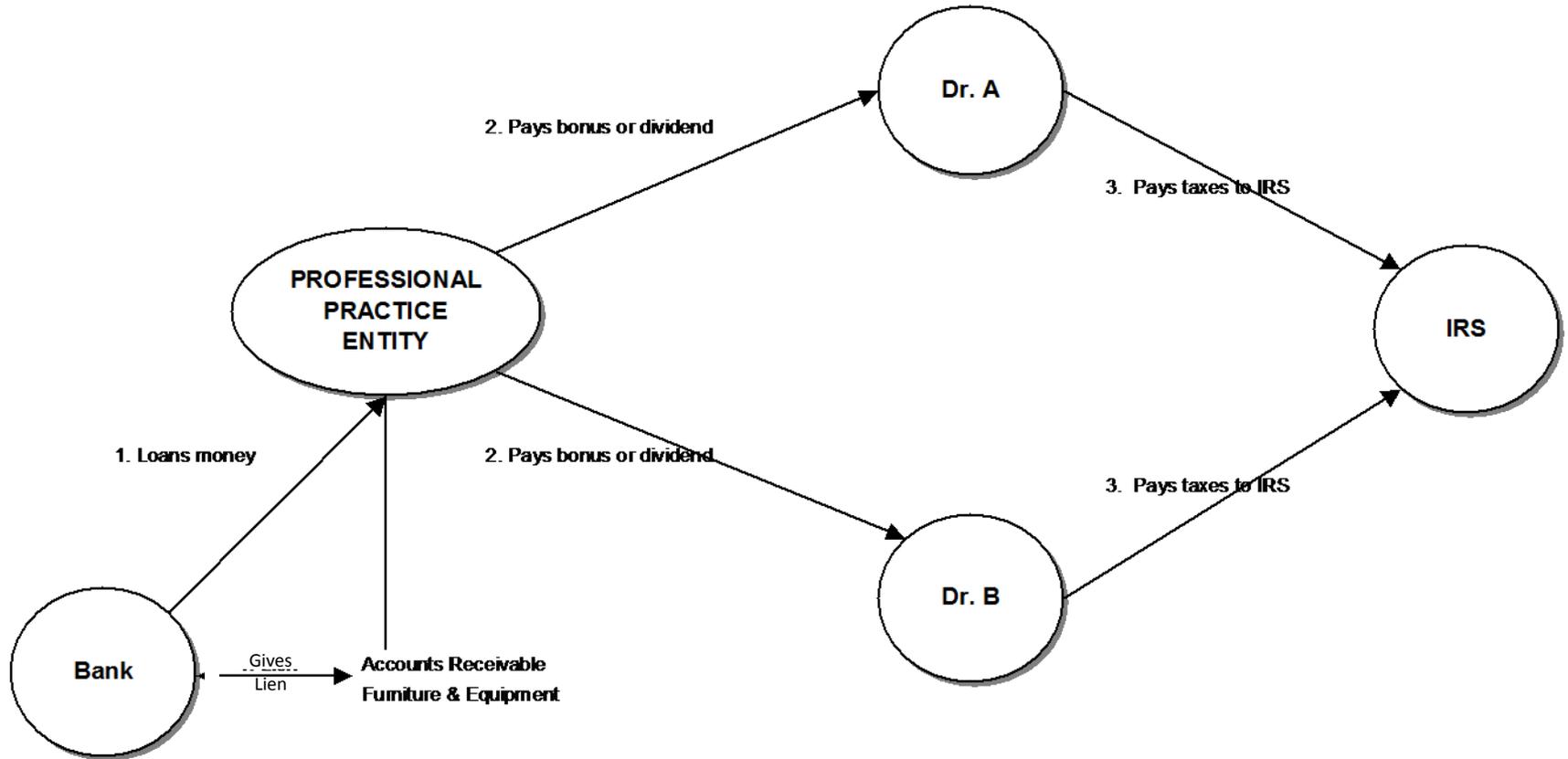
The statute simply says that wages are protected for six months in the account so long as they can be traced, and thus are not confused with non-wage or older wage deposits that would not be protected.

It makes sense to have an account funded solely by wages, and to “empty the account” into other exempt investments, at least every six months, so that there would never have to be a tracing and proof analysis as to wage money protection.

# CHART #1

## PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS

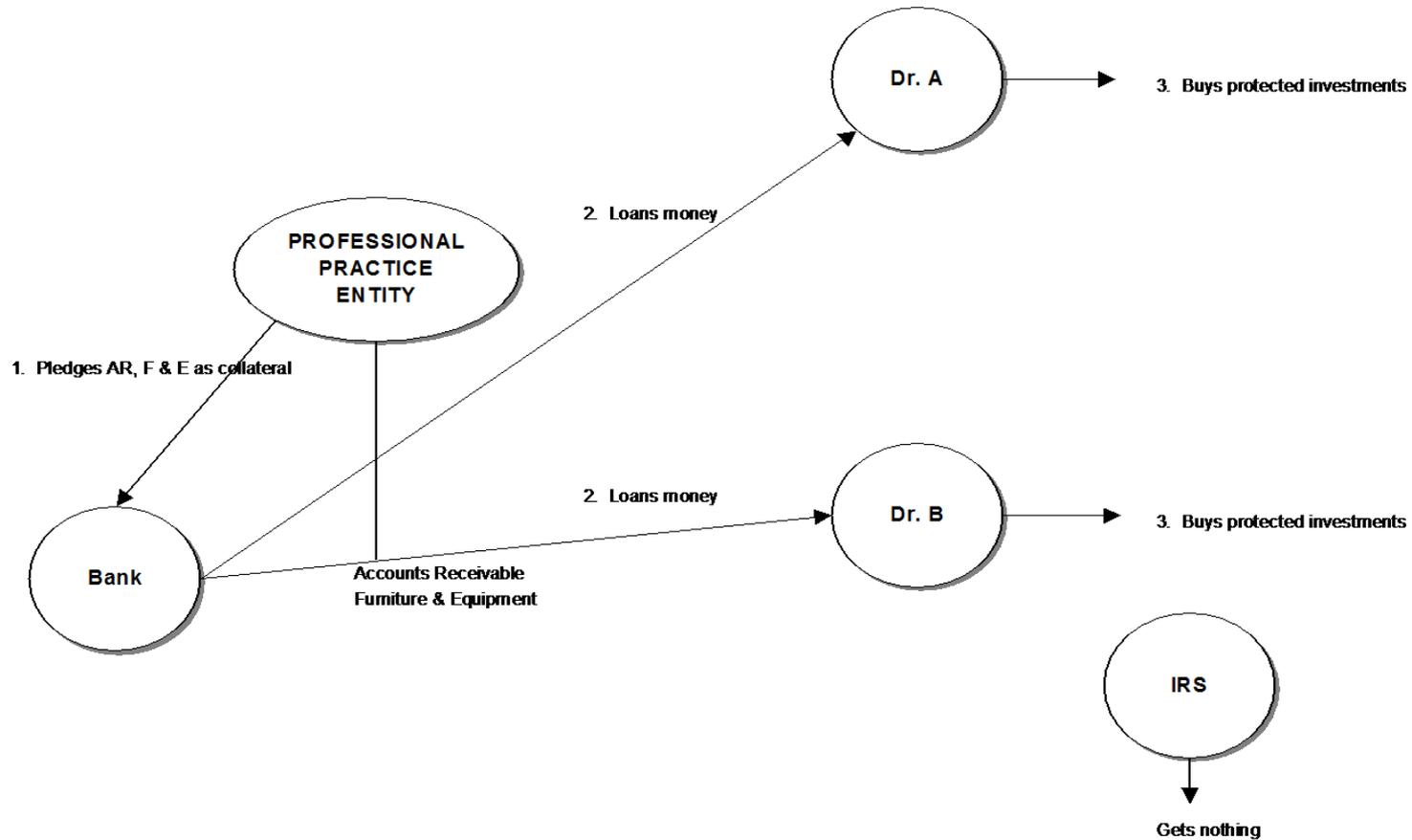
**Practice Entity borrows money and distributes to Shareholder professionals.**



# CHART #2

## PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS

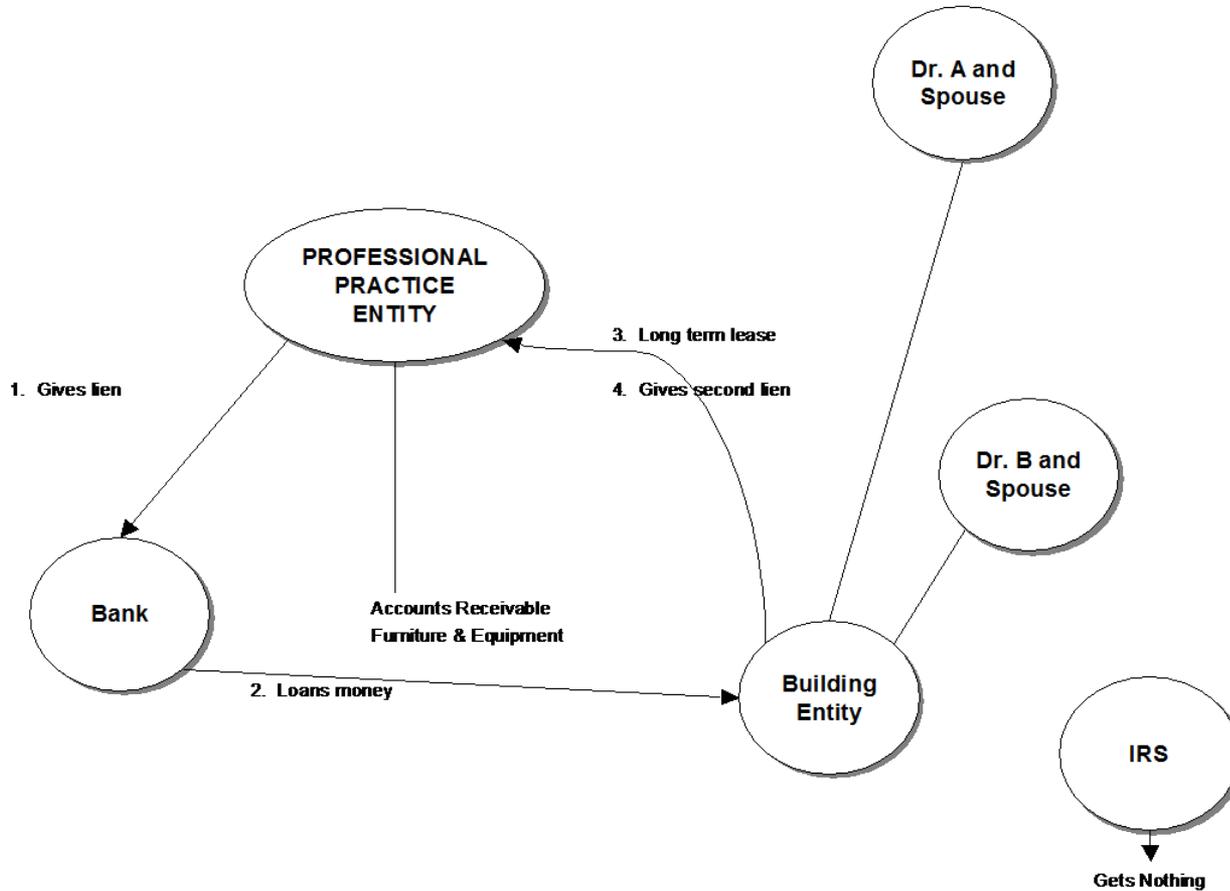
**Shareholders borrow money - Professional Entity provides credit enhancement by collateralizing assets and guaranteeing debt.**



# CHART #3

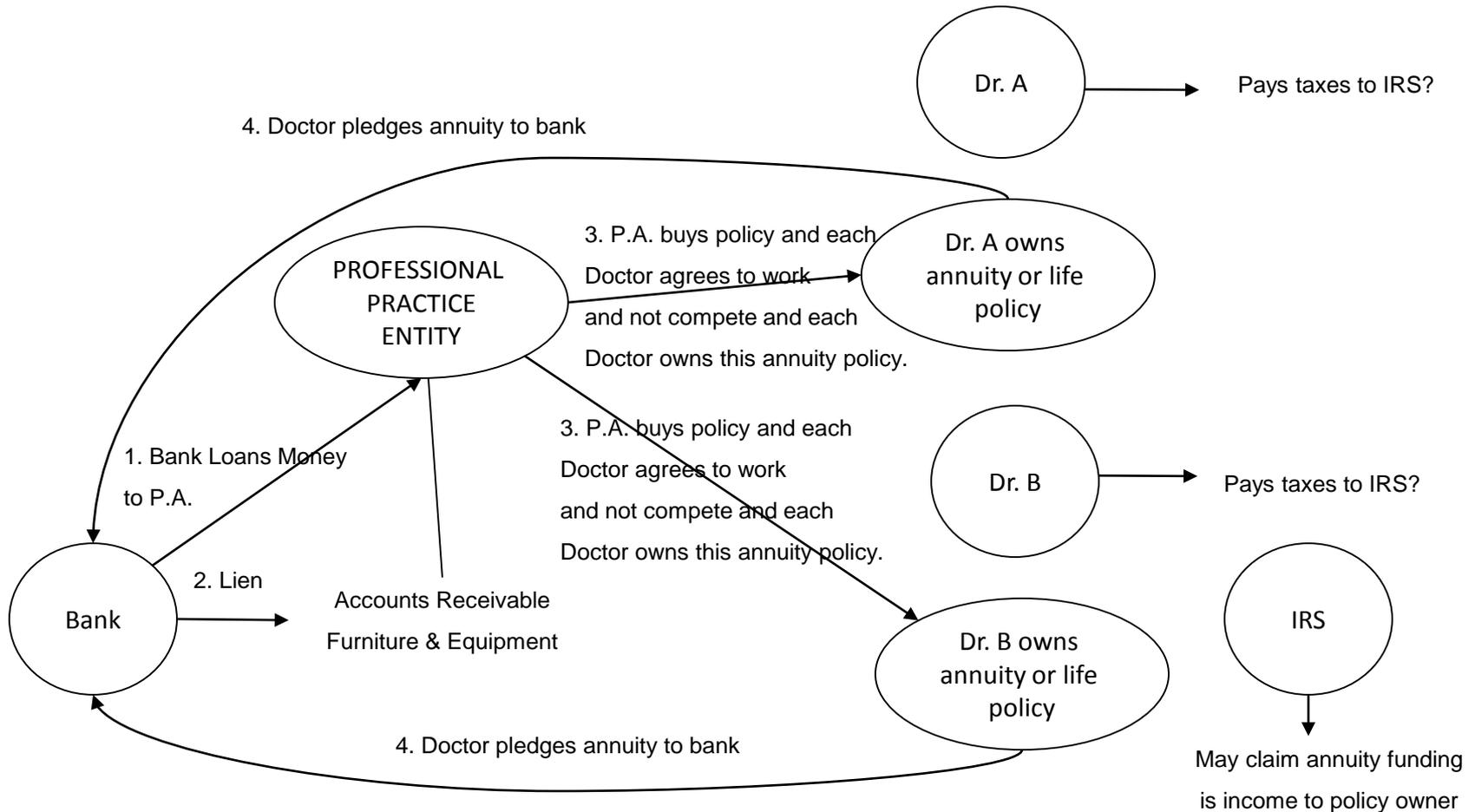
## PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS

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



# Chart #4

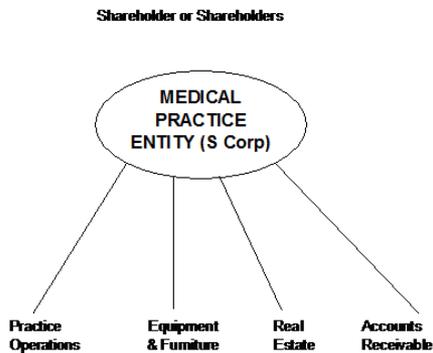
## PROFESSIONAL PRACTICE LIEN STRUCTURE LOGISTICS



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.

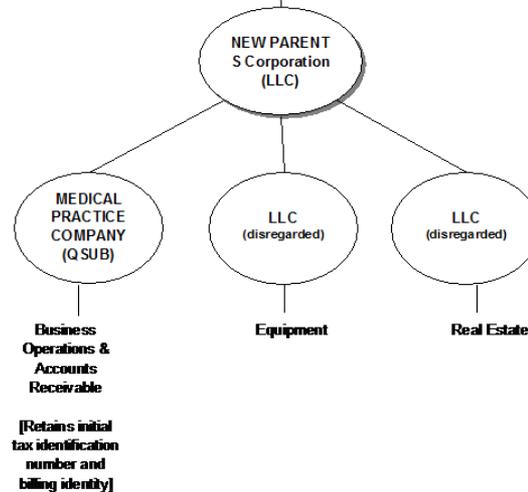
# NEW PARENT REORGANIZATION, SHOWING ACCOUNTS RECEIVABLE FACTORING ARRANGEMENT

## 1. Physician or Physicians Owns Medical Practice Entity



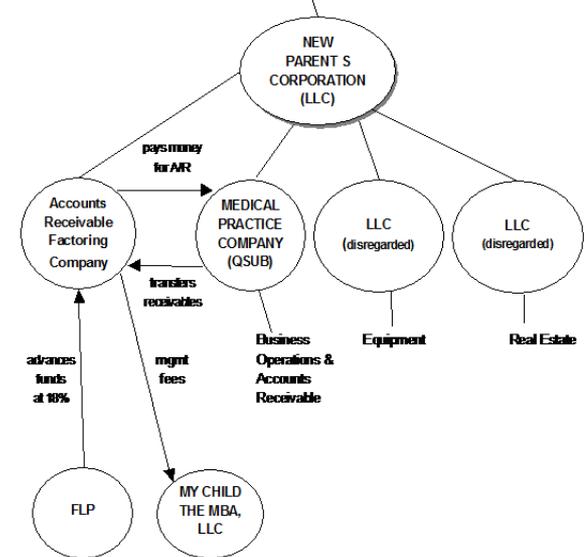
Initially we have a medical practice entity where valuable assets are exposed to potential malpractice and other entity liabilities.

## 2. Shareholder (S) (and spouses?)



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.

# Key Practice Creditor Protection Strategies

1. Keep valuable assets outside of the business entity.
2. Let creditors of the practice entity have a first lien on lienable assets.
3. Let the business entity guarantee debt owed by other entities and pledge its assets as collateral for the debt.
4. Let the business entity enter into long term leases that allow landlords to accelerate rent owed in the event of insolvency, and give landlords a lien on business assets.
5. Give shareholders a lien on business assets to secure their right to deferred compensation.
6. Consider New Parent F Reorganization.
7. Consider an ELOPE system to protect letters of protection or large accounts receivable.
8. You cannot have too much insurance.
9. See how to allocate assets among a married couple.

Follow Up Checklist for presentation entitled:  
 Protecting Medical Practice Assets from Creditors – General Strategies and Common Mistakes.  
 Presented by: Alan S. Gassman, Esq. agassman@gassmanpa.com

ITEM	DONE	NEEDS TO BE DONE	NOT SURE	DELEGATE TO
1. Malpractice insurance in place with calendaring for renewal.				
2. Corporate malpractice insurance policy in place or considered.				
3. Nurse practitioners and nurses having separate policies?				
4. Insurance for automobile liability?				
5. Employment agreements in place to document that wages paid to the doctor should be exempt from creditor claims of the doctor.				
6. Does the P.A. lease real estate from a related entity? Is there a long-term lease agreement in place to insulate the owner entity from accidents on the property?				
7. Does the long-term lease give the landlord entity a UCC-1 field lien against the assets of the medical practice?				
8. Does the medical practice owe money to “friendly creditors” like a bank?				
9. Are the medical practice assets properly pledged as collateral for the loan by filing of UCC-1 financing statements?				
10. Will the practice acquire expensive equipment or other assets that can be held by an entity for the family to not be owned by the practice, or that can be leased in the same manner?				

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ITEM	DONE	NEEDS TO BE DONE	NOT SURE	DELEGATE TO
11. Are there any loans on buildings, to family members or otherwise, that can be collateralized by medical practice assets, by proper documentation that will normally include a guaranty by the practice entity and a UCC-1 financing statement/security agreement being executed?				
12. Are there employment agreements in place which clearly delineate wages, and are wages being paid and appropriately thereafter saved in creditor protected ways? Are dividends being spent first and wages being saved?				
13. Are there separate medical practice endeavors that should be separated into separate corporations, such as a specialty practice, a weight loss center, and/or a sleep center?				
14. Assure proper ownership configuration to also comply with Florida anti-referral laws.				
15. Do the doctors have non-competition covenants and/or have they given the medical practice patient file rights that might conceivably be enforceable by a creditor?				
16. If a shareholder/physician may have personal creditor problems, is the transferability of entity ownership properly limited, and perhaps pledged as collateral to a “friendly lender?”				
17. Are there Letters of Protection or other significant receivables that should perhaps be factored or otherwise handled in order to be less exposed to potential creditors?				
18. Review materials with advisors for further possible items of follow up?				

# Upcoming Webinars from Gassman, Crotty & Denicolo, P.A.

## **Tuesday, August 18, 2015 | 12:30 p.m. and 5:00 p.m.**

- Medical Law Update – Federal and Florida Developments that Medical Practices and Advisors Need to Be Aware Of.
  - Speakers: Lester Perling, J.D., M.H.A. and Alan S. Gassman, J.D., LL.M.

## **Saturday, September 12, 2015 | 9:30 a.m.**

- The 10 Biggest Mistakes That Successful Parents (and Grandparents) Make with Respect to College and Related Decisions for High School Students
  - Speakers: Molly Carey Smith and Alan S. Gassman, J.D., LL.M.

## **Wednesday, September 24, 2015 | 12:30 p.m. and 5:00 p.m.**

- The 10 Biggest Legal Mistakes Most Business Owners and Investors Make (and How You Can Avoid Making Them)
  - Speaker: Alan S. Gassman, J.D., LL.M.

## **Thursday, October 1, 2015 | 12:30 p.m. and 5:00 p.m.**

- Income Tax Exit Strategies
  - Speakers: Steven B. Gorin and Alan S. Gassman, J.D., LL.M.

## **Saturday, October 3, 2015 | 9:30 a.m.**

- Failure to Launch: 20-Somethings Without a Solid Career Path – What Parents (and Others) Need to Know
  - Speakers: Molly Carey Smith and Alan S. Gassman, J.D., LL.M.

## **Wednesday, October 14, 2015 | 12:30 p.m. and 5:00 p.m.**

- Estate and Estate Tax Planning – Conventional and Advanced Planning Techniques to Minimize Taxes and Effectively Pass On Your Wealth
  - Speaker: Alan S. Gassman, J.D., LL.M.

# Creditor Protection Planning for Physicians and Medical Practices

Wednesday, August 12, 2015

12:30 p.m. and 5:00 p.m.



Alan S. Gassman, J.D., LL.M.  
agassman@gassmanpa.com



Christopher J. Denicolo, J.D., LL.M.  
Christopher@gassmanpa.com