The Estate Planner's Update – Tax and Florida Law

Monday, February 6, 2017

12:30 PM EST

Includes a 1 hour CLE credit upon completion

Join Alan Gassman and Brandon Ketron for this whirlwind tour of planning information, structuring, and tax and legal issues and opportunities

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Free webinar presented by Gassman, Crotty & Denicolo, P.A.

THE 19th ANNUAL
Estate, Tax, Legal &
Financial Planning Seminar
FEBRUARY 9, 2017

JOHNS HOPKINS
MEDICINE
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ALL CHILDREN'S HOSPITAL

19th Annual Estate, Tax, Legal & Financial Planning Seminar

Seminar Schedule

Sessions	Time	Topic
General Registration	7:45am to 8:30am	Breakfast and Networking at St. Petersburg Campus
	8:00 to 8:30	Breakfast and Networking at Webcast Locations
Welcome	8:30 to 8:40	**Jenine Rabin, Executive Vice President** All Children's Hospital Foundation
Session 1	8:40 to 9:30	**Recent Developments and Strategies** Presenter: Alan Gassman, J.D.
	9:30 to 9:40	**BREAK**
Session 2	9:40 to 10:30	**Charitable Giving Techniques and Avoiding Traps for the Unwary** Presenter: William R. Lane, Jr., J.D., M.P.A. and Patrick Duffey, J.D., LL.M.
	10:30 to 10:40	**BREAK**
Session 3	10:40 to 11:30	**Transferring Business Interest After the 2704 Buzzsaw (or Is It Really a Butterknife?)** Presenter: Paul Lee, J.D., LL.M. and Turney Berry, J.D.
	11:30 to 11:40	**BREAK**
Session 4	11:40 to 12:30pm	**Retaining, Obtaining and Sustaining Basis** Presenter: Paul Lee, J.D., LL.M., Turney Berry, J.D. and Jerome M. Hesch, J.D., M.B.A.
	12:30pm to 1:20pm	**Lunch**
Session 5	1:20 to 2:10	**Do People Really Do That?** Presenter: Paul Lee, J.D., LL.M., Turney Berry, J.D., and Jerome M. Hesch, J.D., M.B.A.
	2:10 to 2:20	**BREAK**

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Session 6	2:20 to 3:10	**Tales from the Dark Side** Presenter: Mark Parthemer, J.D., LL.M.
	3:10 to 3:20	**BREAK**
Session 7	3:20 to 4:10	**Recognizing and Preventing Financial Abuse of the Elderly, including the Regional FAST Program** Presenter: Robert Lang, J.D.
	4:10 to 4:15	**Closing Announcements and Reminders**
	4:15 to 4:35 pm	**Transition to Networking**
Presentation	4:35 to 6:00 pm	**Communicating Charitable Planning in an Understandable Manner presentation by Jerome M. Hesch, J.D., M.B.A.**

7:45 am - 4:20 pm	**St. Petersburg Live**
8:00 am - 4:20 pm	**Belleair Webcast**
8:00 am - 4:20 pm	**Ft. Myers Webcast**
8:00 am - 4:20 pm	**Lakeland Webcast**
8:00 am - 4:20 pm	**Lakewood Ranch Webcast**
8:00 am - 4:20 pm	**New Port Richey Webcast**
8:00 am - 4:20 pm	**Sarasota Webcast - Downtown**
8:00 am - 4:20 pm	**Sarasota Webcast - Outpatient Care Center**
8:00 am - 4:20 pm	**Tampa Webcast**

Professional Acceleration Workshop with Dr. Srikumar Rao & Alan Gassman

STETSON LAW

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FREE FOR ACTIVE LAW STUDENTS

Saturday, February 11, 2017

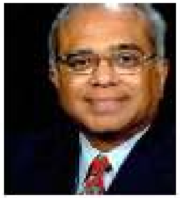
9:00 a.m. to 4:30 p.m.

Stetson Law School - Gulfport Campus
1401 61st Street South, St. Petersburg, FL

Join Dr. Rao & Alan Gassman for an interactive workshop designed to enable law students, recent graduates, and experienced professionals to reach new levels of enjoyment and achievement. Lunch is included. This presentation is based on Mr. Gassman's workshop materials which have been presented at the University of Florida, Ave Maria School of Law, and state & city Bar conferences. Net proceeds will benefit Stetson Law School.

This workshop will include the following sessions:

1.) Session 1: Goals and How to Reach Them
2.) Session 2: Eliminating Frustrations and Obstacles
3.) Session 3: Solving Problems & Developing Strategies
4.) Session 4: How to Effectively Attract, Serve, and Retain Clients
5.) Session 5: How to Develop a Great Team
6.) Session 6: Putting it All Together!
7.) <u>OPTIONAL</u> Session 7: Special hour for estate planners



Dr. Srikumar Rao is a world renowned author (*Happiness at Work* and *Are You Ready to Succeed?*), *TED speaker and McGraw-Hill Top 50 Thinker*.

Alan Gassman is a lawyer practicing in Clearwater, Florida.

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Alumni out 1 to 3 years—$75, St. Pete and Clearwater Bar Solo Practice members —$75
Charitable organization employees—$75, All others —$125
Attendees will receive 2 hours ethical <u>PLUS</u> 4 or 5 hours general CLE credit

FREE WEBINAR COURTESY OF MARTIN M. SHENKMAN, PC AND GASSMAN, CROTTY & DENICOLO, P.A.

The Asset Protection Planning Continuum – Practical Steps for Estate Planning Lawyers and Other Professionals

with Marty Shenkman and Alan Gassman

Tuesday, February 21, 2017 @ 12:30 p.m. EST

Join us for a very useful sixty minute talk that will provide you with techniques, checklists, and important knowledge to increase and improve your skills and tools for protecting clients and their business and professional entities from creditors and other threats to wealth.

Marty Shenkman

Shenkman

DON'T DELAY

REGISTER NOW AT:

shenkman@shenkmanlaw.com

Alan Gassman

GASSMAN, CROTTY, & DENICOLO, PA

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For more information email:

Marty Shenkman at shenkman@shenkmanlaw.com **OR**

Alan Gassman at agassman@gassmanpa.com

Ave Maria School of Law
ESTATE PLANNING CONFERENCE

The Ritz-Carlton Golf Resort, Naples
Friday, April 28, 2017
Join us for Ave Maria School of Law's
4th Annual Estate Planning Conference
Southwest Florida's Premier CLE Estate Planning Conference

TOP SPEAKERS TO INCLUDE:

- **Stacy Eastland – Comparing Freeze Techniques**
- **Jonathan Gopman – Asset Protection Trusts: An Update and Discussion of Planning**
- **Joan Crain – Challenges for Trustees in Dealing with Millennial Beneficiaries**
- **Jerry Hesch – Passing a Closely-Held Business on to Junior Family Members or Key Employees or Co-Owners: An Analysis of the Income Tax, Estate Tax and Financial Impact of Business Succession Planning Techniques**
- **Tae Kelley Bronner – Homestead Planning Update**
- **Lester Law – Basic Consistency for Estate and Income Tax Planning Purposes, and Multiple Implications Thereof**
- **Marve Ann Alaimo & Dixon Miller – International Estate Planning Rules and Planning Opportunities**
- **Susan Cassidy, M.D. – What You Need To Know for Your Client's Medical Issues: Competency, Great Care Versus the Mainstream, What Medicare Recipients Should Seek Outside of the Medicare System, End of Life Communications and Planning and How Will the Above be Trumped.**
- **Alan Gassman – Ethical Considerations to Avoid Estate and Trust Litigation and Family Disputes, and the 10 or so Avoidance Techniques You Should be Actively Using**
- **Jerry Hesch and Alan Gassman – Planning Strategies for Life Insurance**

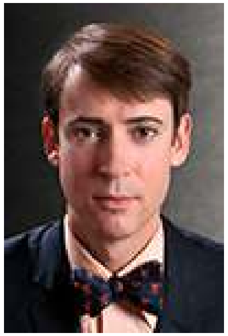
******* and more*******

UPCOMING BLOOMBERG BNA ESTATE PLANNING TALKS

Jonathan Blattmachr

GENERATION-SKIPPING TAX PLANNING-2017

Presented by Jonathan Blattmachr
February 8, 2017 // 12:30 – 1:30 PM EST



Austin Bramwell

UNIQUE AND EFFECTIVE BASIS PLANNING - - - NEW TOOLS YOU HAVEN'T SEEN AND ARE SURE TO LIKE

Presented by Austin Bramwell
March 8, 2017 // 12:30 – 1:30 PM EST
Email: agassman@gassmanpa.com for more information

Moderated by
Alan S. Gassman

Bloomberg BNA's 2017 Estate Planning Webinar Series

TOPIC	SPEAKER	DATE
Generation-Skipping Tax Planning - 2017	Jonathan Blattmachr	February 8, 2017
Unique And Effective Basis Planning - - - New Tools You Haven't Seen And Are Sure To Like	Austin Bramwell	March 8, 2017
Estate Planning Lawyers Can Provide Many Medicaid Planning Structures Without Special Knowledge, But Where Are The Boundaries?	Robert Mason	March 15, 2017
Fixing It When It's Broken	Bruce Stone	April 5, 2017
Planning With LLCs And Limited Partnerships – Interesting Uses	Steven B. Gorin Kenneth J. Crotty	May 3, 2017
Income Tax Planning With Business And Investment Entities – Little Known Opportunities For Estate Planning And Corporate Advisors	Prof. David Herzig	May 10, 2017
What Non-Elder Law Specialists Need to Know About Protecting Assets and Medicaid Planning	Letha McDowell	June 7, 2017
IRA Planning Opportunities And Pitfalls	Edwin Morrow Christopher J. Denicolo	July 12, 2017

Moderated by
Alan S. Gassman

Bloomberg BNA's 2017 Estate Planning Webinar Series

TOPIC	SPEAKER	DATE
Business Succession Planning Techniques: Passing the Business on Fairly to Family and/or Employees Using Income Tax and Investment Smart Methods.	Jerome Hesch Joy Spence	July 19, 2017
Sophisticated Asset Protection Trust, Offshore LLC And Related Planning	Jonathan Gopman	August 9, 2017
TO BE ANNOUNCED	---	September 6, 2017
A Comprehensive Checklist For Succession Planning	Turney Berry Clary Redd	September 13, 2017
The Most Common Challenges We See From The IRS, And How To Avoid Them	John Porter	October 4, 2017
Essential Non-Tax Planning Considerations For Sophisticated Estate Plan	Martin Shenkman	November 1, 2017
Tax Planning for Marriage and Divorce	Carlyn McCaffrey Nicole Pearl Jerome Hesch	November 8, 2017
Planning To Reduce Medicare And Self-Employment Taxes In Business, Investment, And Trust Structuring – 6 Structures That Can Be Used.	David Kirk	December 13, 2017

Moderated by
Alan S. Gassman

“It’s tough to make predictions, especially about the future.” --- Yogi Berra

“Those who cannot remember the past are condemned to repeat it.” --- George Santayana

“If you’re not confused, you’re not paying attention.” --- Tom Peters (from the book Thriving on Chaos)

Introduction

- Tax legislation normally occurs in September through November, to be effective the following year. Congress normally breaks in August. That may be the soonest that comprehensive tax law changes occur.

- Its is possible for tax legislation to occur earlier in the year, and to be retroactive, or only prospective.
- There are four (4) primary taxes for discussion
  - Federal Income Tax
    - Present highest rate reaches 39.6% at $415,051 for a single person and $466,951 for married filing jointly.

  - The 3.8% Net Investment Income Tax (Medicare Tax) for most income exceeding $200,000 if single and $250,000 if married filing jointly.
    - S-corporation dividends are not subject to this tax.

  - FICA Taxes
    - Social Security Taxes - 6.2% for the employer and 6.2% for the employee (12.4% total) on up to $118,500 of wages.
    - Medicare Taxes - 1.45% for the employer and 1.45% for the employee (2.9% total).
    - An additional Medicare tax of 0.9% applies on wages in excess of $200,000 for single filers and $250,000 if married filing jointly.

  - Federal estate tax on assets exceeding $5,490,000 per spouse.
    - Also applies to lifetime gifts that cumulatively exceed the above.


Introduction

- Middle class voters are not concerned with the 3.8% Net Investment Income Tax (Medicare tax) and with the federal estate tax.
- An early move to repeal federal estate tax would enable Trump's opposition to claim that he is really doing this primarily for himself and his "billionaire friends."
- All tax reduction will likely be significantly delayed by filibuster unless or until sufficient Democrats are brought onboard by some sort of compromise so that there are 60 of the 100 Senators in agreement.
- Under the Byrd Rule, unless 60 of 100 Senators agree with changes related to the budget, then such changes will "sunset" in ten years, similar to what occurred with the Bush Tax Cuts in 2010.
- If President Trump spends his political capital on building the wall, dismantling Obamacare, trade agreements, and other "hot button" items, how much capital will he have left for reducing taxes on the wealthy?

Will Changes Apply for the 2017 Tax Year?

- With the exception of a few provisions, the majority of The Tax Reform Act of 1986, which was signed by Ronald Reagan on October 22, 1986, were made effective for taxable years beginning after December 31, 1986.

- While the majority of the provisions of the Bush Tax Cuts of 2001 and 2003 were designed to be phased in over time, certain cuts took effect for year in which the bill was signed.

- It is possible that Trump's tax plan could be enacted and effective for the 2017 tax year, but time will tell what Congress can get done in 2017.


Trump on Estate and Gift Tax Reform

- Trump (along with majority of Republicans in Congress) proposes to eliminate the estate and generation skipping transfer taxes.

- Most Republican proposals on estate tax keep the gift tax intact to avoid gaming the income tax system through unlimited tax-free gifts. Trump has not made mention of the gift tax.

- However, Trump has proposed a new regime based upon the following paragraph from Trump's website:

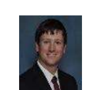
> "The Trump Plan will repeal the death tax, but capital gains held until death and valued over $10 million will be subject to tax, to exempt small businesses and family farms. To prevent abuse, contributions of appreciated assets into a private charity established by the decedent or the decedent's relatives will be disallowed." **https://www.donaldjtrump.com/policies/tax-plan/**

GOP Tax Reform Blueprint – Estate and Gift Tax Reform

- Similar to Trump's proposal, the below quoted language is all we have for the GOP Blueprint:

> **Under current law, the estate tax applies under specified circumstances to transfers of wealth when a person dies. An additional tax may apply to generation-skipping transfers, which generally involve a person making a gift that skips one or more generations - for example a gift from a grandfather to a grandchild or great grandchild.**
>
> **This Blueprint will repeal the estate and generation-skipping transfer taxes. This will eliminate the Death Tax, which can result in double, and potentially even triple, taxation on small businesses and family farms.**

Note that the above quoted language is the only discussion on Trump's website regarding the estate tax. Thus, it is unclear as to what the final form of his estate tax proposal would look like, whether such tax changes would be phased in over a period of time or come into effect as of a particular date, and whether the current estate tax regime (or a harsher system) might come back at some point in the future. It is also unclear whether assets in excess of $10,000,000 would be subject to capital gains tax at death or would be subject to carry-over basis treatment.



Trump & GOP Proposals –
Effect on Estate/Tax Planning

- If there is no estate tax, but 100% step up in basis for businesses and farms up to $10,000,000, as Trump has proposed, then estate planners will have the opportunity to shoehorn more or all of a family’s assets into the small business category that would be granted a 100% step up. It would encourage business owners and farmers to hold onto assets until death for the step up, potentially affecting business succession and delaying transition to the next generation.

- Alternatives for carryover or capital gain on death tax law.

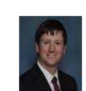
No tax on first $10,000,000 of assets. Use discount vehicles if there will be tax on step up for assets exceeding $10,000,000 to get more in value under the $10,000,000 tent.

Will family farms and small businesses also be exempt above and beyond the $10,000,000?

Will credit shelter trusts and pre-existing QTIP trusts escape the tax on death if there is one? What about pre new law dynasty trusts that have been disregarded for income tax purposes.

Any transfer over $10,000,000 under the new law may be subject to tax, including a gift, so gift now versus later?

Preferred partnership freezes may work well under the new Trump law as far as keeping down the parents' estate from a basis step-up standpoint.



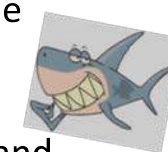
Trump & GOP Blueprint Proposals – Effect on Current Gifting Plans

- Any large substantial gifts, perhaps planned to avoid implications of the proposed 2704 regulations, should be reevaluated, but not necessarily cancelled – state tax law and non-tax reasons will also inform the decision of whether to continue or not. For many of our clients who have life expectancies that go beyond the next several years, there is always the possibility that whatever changes are made during the Trump administration could be undone, and that the estate tax could come back and be harsher than it currently is.

- Gifting is NOT, however, a "no harm, no foul" situation – using up gift tax exclusion may create a situation where it is difficult, impossible or costly to undo, but you may cause loss of an important step-up in basis benefit for no corresponding estate tax savings.

- State estate/inheritance tax avoidance (depending on the state) skews the analysis towards continuing completed gift planning, since advantages may accrue aside from any federal estate tax.

Good Reasons To Continue/Accelerate Estate Tax Planning



1. The tax may not go away – a compromise might be to increase the exemption and allow the 2704(b) regulations to be promulgated.

2. If the estate tax goes away, it may come back later with sharper teeth. What is done now and commonly acceptable may be grandfathered, such as the ability to fund an irrevocable trust in an APT jurisdiction that could later benefit the grantor. We doubt that the Bernie Sanders camp will allow this type of planning in the future, if they take power in 2021.

3. The economy seems poised to ramp forward with exploding values for many clients – are we going to leave these exposed to an unpredictable inheritance tax system?

4. Where estate tax planning is consistent with asset protection planning, this "dynamic duo" should be linked together, so that there is a solid business reason for establishing and funding APT trusts. If the client is convinced that the estate tax will be gone, why not use up what remains of the $5,490,000 exemption to fund an APT that would likely be grandfathered if the estate tax goes away and comes back with sharper teeth, and can protect assets from potential creditors.

5. Asset protection trusts for assets that would exceed the amount that can be funded without gift tax implications are typically structured now as "incomplete gifts", which requires the grantor to retain the right to prevent distributions to those other than the grantor, and to direct how the trust assets pass by limited power of appointment according to CCA 201208026. Being able to place unlimited assets into creditor protection trusts that will not have these requirements will be of great benefit to clients who wish to establish these trusts where there are truly independent fiduciaries. The debate will continue as to whether it is best to establish these trusts in domestic versus foreign jurisdictions.

Good Reasons To Continue/Accelerate Estate Tax Planning

6. Repurposing “discount entities” to become creditor protected family wealth preservation entities may be useful as discounting becomes less important and family unity and creditor protection become more important.

7. The APT GRAT is probably today’s gold standard mechanism for estate tax planning with large estates. It may be “reversible” by Trust Protectors and there is “zero risk” of gift tax exposure. See Shenkman & Blattmachr *Estate Tax Repeal is Not a Temporary or Permanent Certainity: How to Plan Now,* Interactive Legal presentation 12-12-16.

8. Looking ahead towards basis planning. Under the Canadian system, only assets passing directly to a surviving spouse are immune from capital gains tax on death. It is possible that QTIP and general power of appointment marital deduction devices will qualify to delay capital gains on death if we end up with this regime.

9. Second marriage situations that have favored QTIP trusts for deferral/avoidance of federal estate tax will be retooled significantly if the estate tax is eliminated or exemptions are dramatically increased.

10. 2016 marked the 100 Year Anniversary of the modern estate tax, and planners should not overreact to one paragraph in a proposed tax plan on a President-Elect’s campaign website.

The Choices of an Affluent Client Who is in the Middle of a Large Discounted Gift, Installment Sale or GRAT Planning Matter

	DO NOTHING	GO WITH PLAN	A HYBRID APT GRAT
1	Risk – pay more estate tax and GST tax in future if law does not change.	Risk – will not have been needed, and will not be reversible (unless reversible APT trust with Trust Protectors is used).	Little or no risk of gift treatment.
2	Risk of paying capital gains tax on death if client is considered owner of assets.	Grandfather loopholes to estate tax that may be lost as part of new legislation.	Reversible by Trust Protectors.
3	Worse creditor protection if client keeps assets.	Better creditor protection and better business purpose for making transfers that could be challenged later by creditors.	Could be grandfathered if loopholes are eliminated.
4	Time and investment of expenses towards planning will be lost.	Relatively small investment of additional time and money for the above advantages.	Can reduce or eliminate capital gains on death – defective grantor trust advantage of possible step-up basis on death of grantor may be solidified under Republican-based legislation as a continuing loophole to reward those who did this in the past.
5			Business purpose for creditor protection advantages.
6			Time and investment factor.

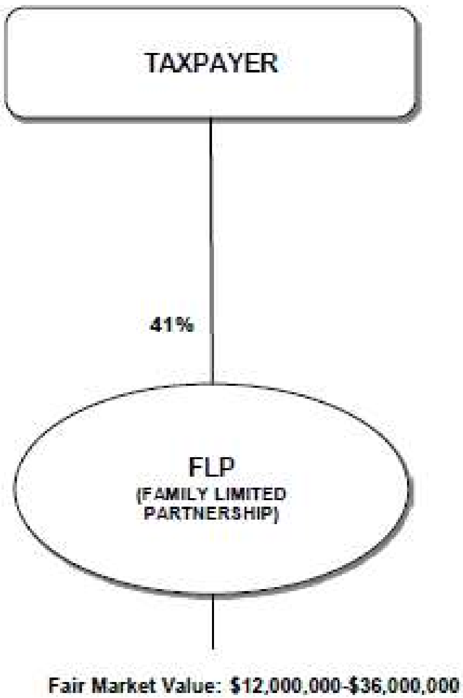
WHY TO USE A GRAT

In *Estate of Giustina v. Commissioner*, Tax Court Memorandum 2016-14, June 13, 2016 a 41% limited partnership interest was reported by the taxpayer to be worth $12,678,117 after taking into account a 35% discount.

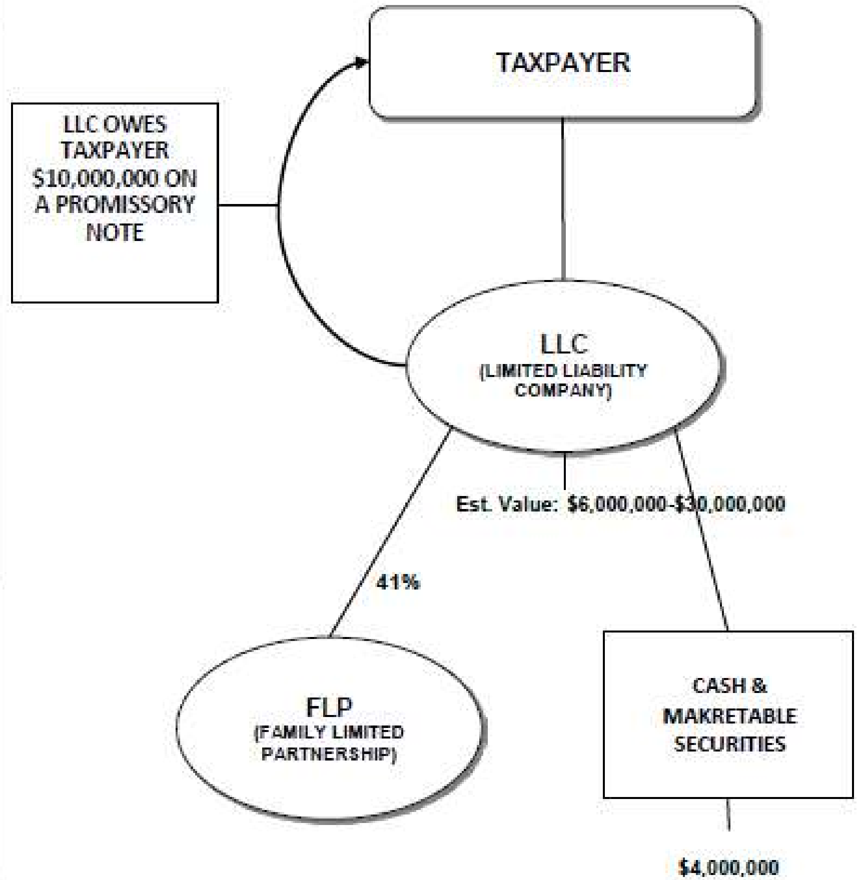
The IRS claimed a $35,710,000 value based on estimated cash flow received by the partnership and a 25% valuation discount.

The Tax Court determined that a $24,000,000 value applied, but was overturned in favor of the Taxpayer by the 9th Circuit Court of Appeals. After reconsideration the Tax Court decided upon a $13,954,730 value based upon a number of factors that are worth reading.

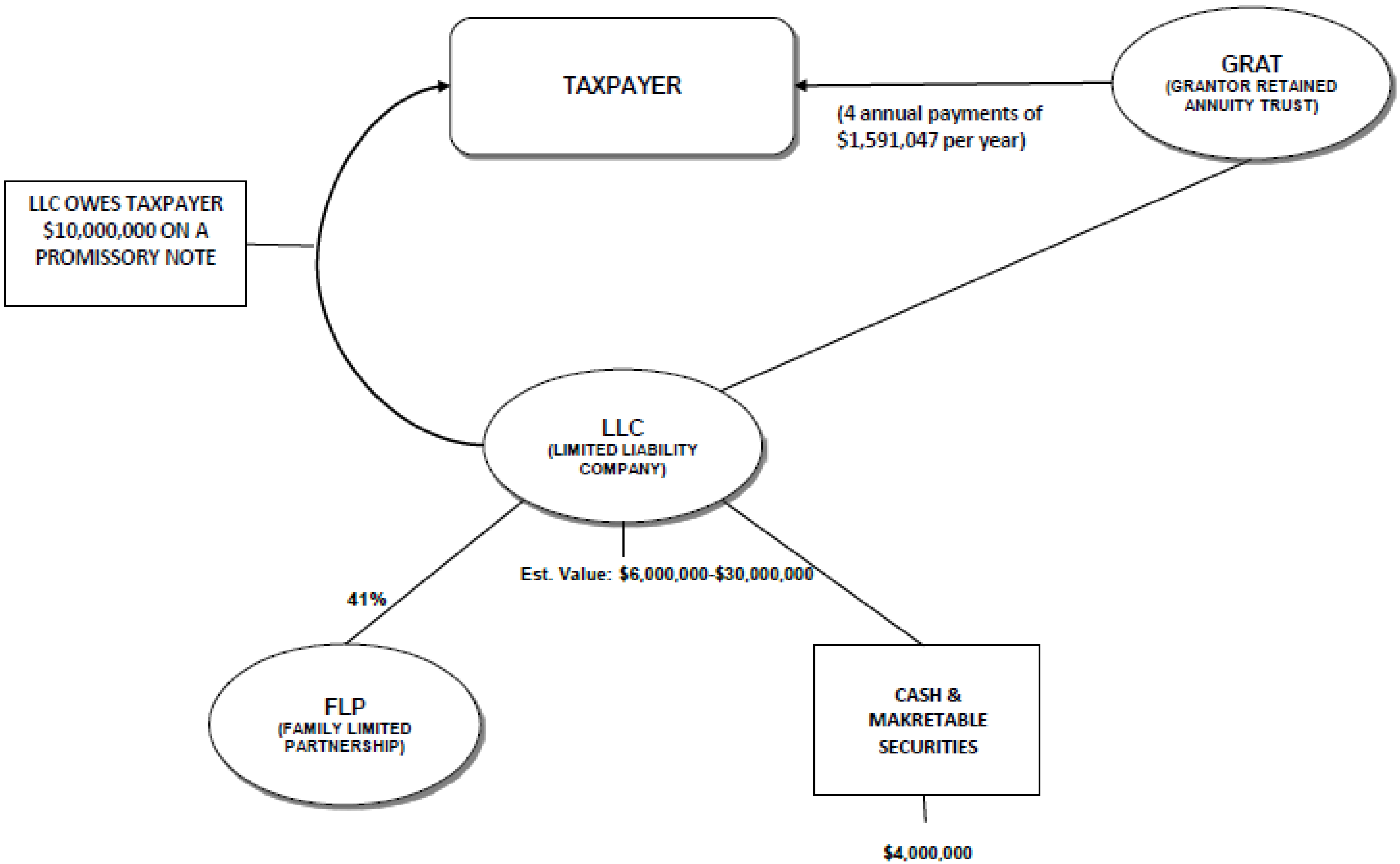

Taxpayer owns 41% of FLP



Taxpayer places FLP interest and $4,000,000 of investments into LLC and received $10,000,000 note.

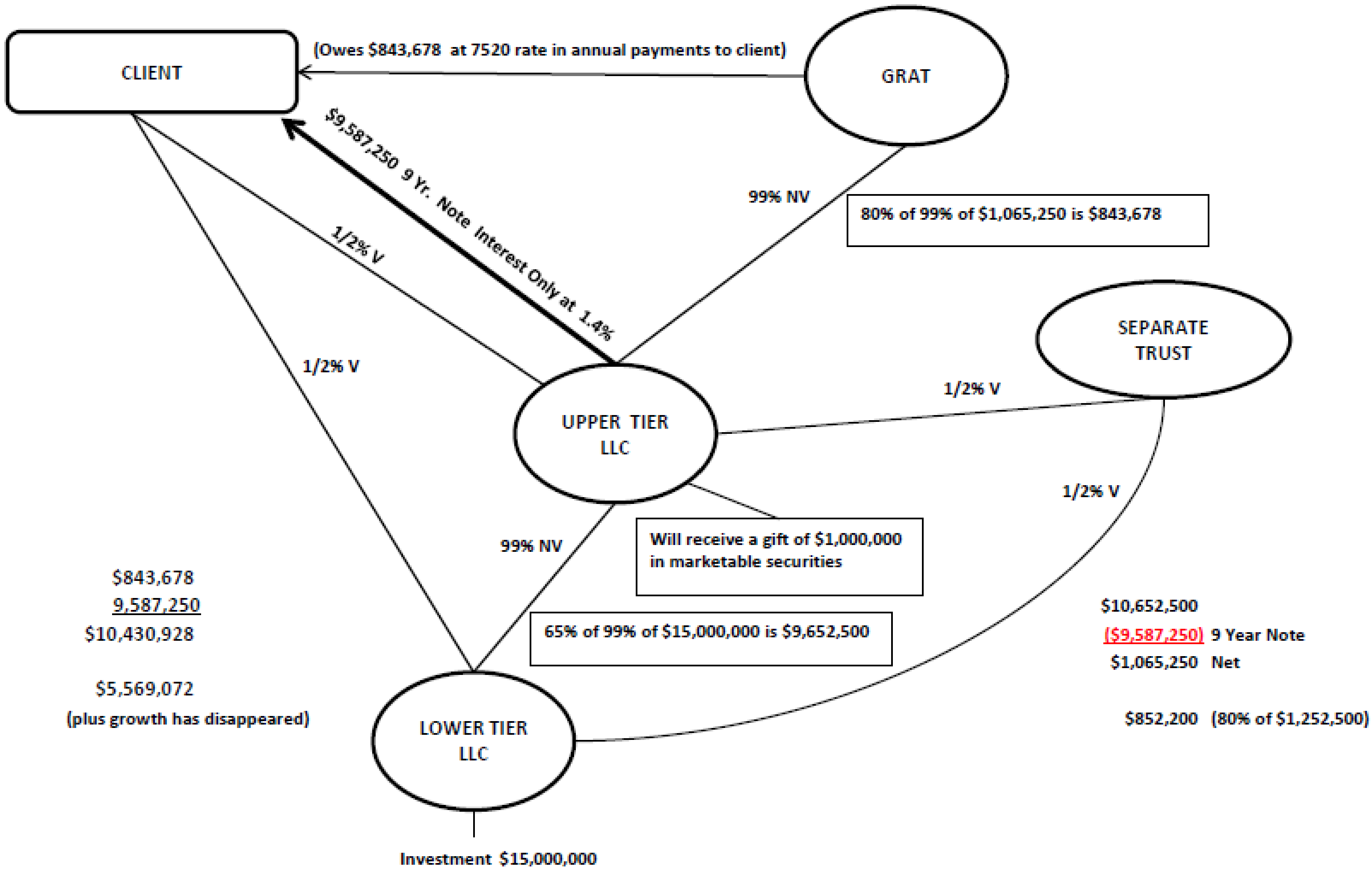


Taxpayer transfers LLC ownership to Grantor Retained Annuity Trust ("GRAT") and is scheduled to receive four annual payments of $1,591,047 per year - gift value is $0.



If the IRS finds that partnership interest is worth $36,000,000, then GRAT payments increase, but there should be no taxable gift.

USING A HYBRID LEVERAGED 2ND TIER LLC TO PRESERVE DISCOUNTS



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

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

EXECUTIVE SUMMARY:

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

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

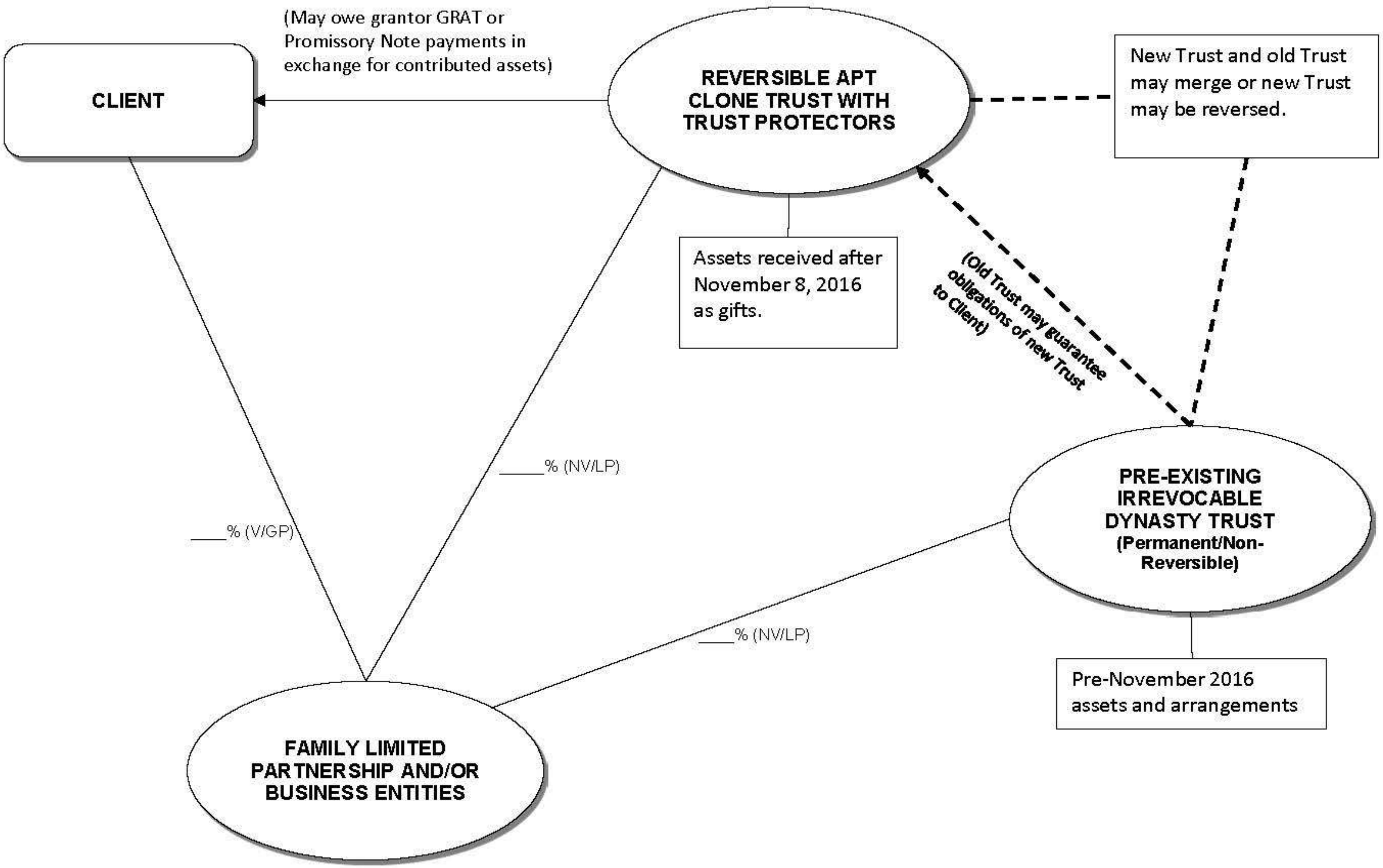
By our view it is crucial to give clients options that include flexible methods of taking advantage of present opportunities, while being able to change or reverse what is done, or assure that it would be wanted in a no estate tax world, while also being ahead in the non basis step up environment that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

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

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

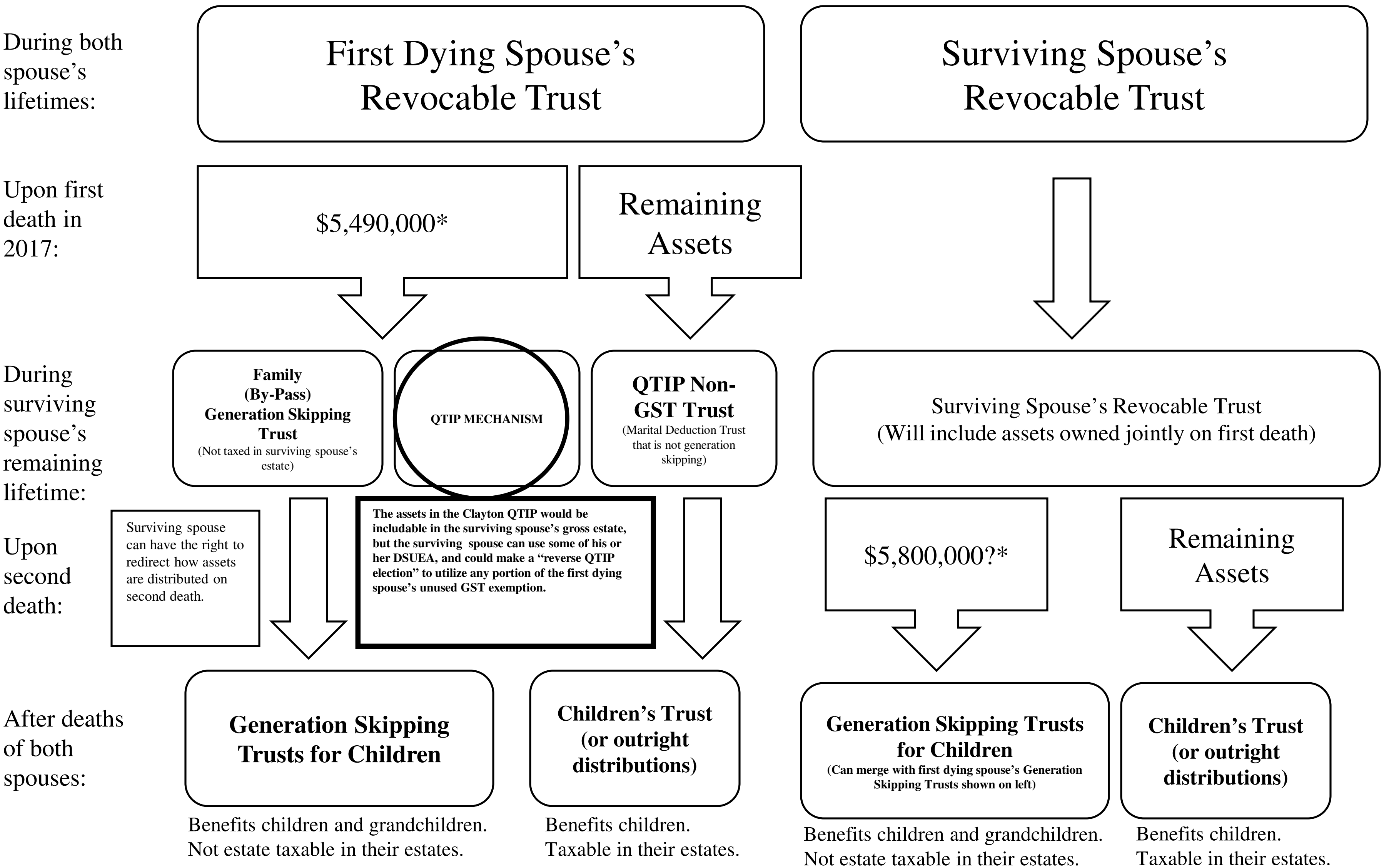
FULL ARTICLE IS INCLUDED WITH SUPPLEMENTAL MATERIALS OR MAY BE VIEWED AT:
http://leimbergservices.com/all/LISIGassmanDenicoloCrottyKetron1_11_2017.pdf

THE REVERSIBLE EXEMPT ASSET PROTECTION (“REAP”) TRUST



If large gifts are being made to existing irrevocable trusts based upon what was in progress before the election results, consider using an identical but reversible irrevocable trust to gift to, which can either be merged into the pre-existing trust, held in parallel, or reversed back by Trust Protectors if and when the estate tax is truly and permanently eliminated.


REVISED PROTECTIVE TRUST LOGISTICAL CHART WITH CLAYTON QTIP



*Assumes first spouse dies in 2017 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 $5,490,000 for those that die in 2017, and increases with inflation.
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.

Assume that John dies with $5,000,000 in assets survived by Ginger who has $3,000,000 in assets and may live for 5 years.

- **Scenario 1**. All assets to Ginger. Ginger has a $10, exemption but only a $5,490,000 (and growing with CPI) GST exemption. On her death all assets will get a step up in basis.

- **Scenario 2**. The $5,000,000 in assets go to a credit shelter trust that is GST exemption, so no step up in basis on Ginger's death, but estate and GST tax proof.

- **Scenario 3**. The $5,000,000 goes into a QTIP trust (typically by “Clayton QTIP election" as described below) and a full marital deduction election is made. Now Ginger has her $10,980,000 exemption and the QTIP trust makes a "reverse QTIP" election to be GST exempt. All assets will get a step up in basis on Ginger's death.

  Ginger can gift $5,490,000 to a GST exempt asset protection trust to lock in and use the portability allowance and her own GST exemption.

  On Ginger's death the QTIP assets get a step up and pass GST tax free. The asset protection trust assets may or may not get a step up because of the defective grantor trust rules, but will also be GST exempt. If the estate tax goes away the Trust Protectors of the asset protection trust can give Ginger a power to appoint appreciated assets to creditors of her estate or use some other technique to enable a step up in basis on her death.

Note-to allocate a decedent's GST exemption to a reverse QTIP, there must be the filing of a Schedule R with the estate tax return when timely filed, or by correction thereafter.

A Clayton QTIP is a QTIP Trust that would have been a credit shelter trust, but for the making of a Clayton QTIP election.

The QTIP election is made on IRS Form 706, which can be filed on extension 15 months after the death of the grantor, therefore the use of a Clayton QTIP election provides an additional six (6) months compared to the nine (9) month time limit for disclaimer planning.

Revenue Procedure 2016-49 makes it clear that a QTIP with full marital deduction can be used on the death of the first dying spouse without worry that the IRS would disqualify the QTIP election under Revenue Procedure 2001-38.

The speakers at Heckerling emphasized their opinion that a professional fiduciary should make decisions on a Clayton QTIP. Perhaps convince the client to have professional or trust company fiduciaries at least during administration of the estate through the filing of the 706, etc.


Four Techniques That Help Avoid "Donor's Remorse":

- Enable the trustee to make a qualified disclaimer of assets pursuant to §2518, so assets can revert back to settlor to undo a transaction. Make sure the donative instrument (aka deed of gift) and state law are clear of the result and remember the doctrine of "acceptance and control" that negates the ability to disclaim. This only gives the family a nine month window of opportunity though.

- If the settlor is married (and there is no divorce likelihood!), enable the trustee to make an inter vivos QTIP election over the trust. If the election is made within 9 months, or 15 months with timely filed extension, this enables the gift to use the marital deduction, and the QTIP could thereafter be terminated and assets distributed to spouse– no gift tax exclusion used, and no worry that trustee acceptance disqualifies the technique. Like Clayton QTIPs, best to have someone other than spouse as trustee.

- Like a DE, AL, NV, OH, etc., DAPT that enables settlor to remain or be added as a beneficiary. However, this may still use gift tax exclusion, unless the gift is an incomplete gift based upon the trust providing for the settlor to retain powers under the trust incompliance with CCA 201208026.

- Use and exploit "swap powers" in irrevocable grantor trusts to anticipate possible swapping of assets should tax changes come about favoring family business/farms. Enable trust protectors and/or lifetime limited powers of appointment to radically change the trust.

Joint Exempt Step-Up Trust (JEST) Chronology - The 4 Steps from Drafting to Implementing
Copyright © 2015 Gassman Law Associates, P.A.
Derived from articles that can be found on Leimberg Information Services (Estate Planning Newsletter #2086) and Estate Planning Magazine October and November 2013 Editions

Before Funding

Husband's Assets

Joint Assets: Joint Tenants w/ Right of Survivorship

½ to each Spouse's share

Joint Assets: Tenancy by the Entireties

½ to each Spouse's share or actuarial value

Wife's Assets

The IRS could find a gift upon contribution of TBE assets to the joint revocable trust, but this gift will qualify for the marital deduction if recipient spouse can withdraw what is added to his or her share. Also see PLR 200201021.

Step 2

Funding of Joint Revocable Trusts; each spouse has the right to revoke his/her share until first death

<u>Husband's Share</u>

Husband's Assets

½ of former JTWROS Assets

½ of former TBE Assets (or by other percentage)

Wife's Share

Wife's Assets

½ of former JTWROS Assets

½ of former TBE Assets (or by other percentage)

Step 3

Division upon First Dying Spouse's Death
Assume Husband dies first

<u>Credit Shelter Trust A</u>
Funded from Husband's Share in the amount of Husband's available Estate Tax Exemption (ETE)

<u>Q-TIP Trust A</u>
If Husband's Share exceeds his available ETE, the excess will fund this trust

<u>Credit Shelter Trust B</u>
If Husband's Share is less than his available ETE, Wife's Share will fund this trust in the amount of Husband's remaining ETE (But not in excess of her available ETE)

<u>Q-TIP Trust B</u>
If Wife's Share has any remaining assets, they will be used to fund this trust

Step 3 Note:

CST A and CST B can be merged if there is no concern with estate tax, stepped-up basis, creditor protection, or credit shelter trust effectiveness. Q-TIP Trust A and Q-TIP Trust B can be merged if there is no concern with respect to stepped-up basis or creditor protection effectiveness.

Step 4

Results of JEST Technique

-For Wife & Descendants benefit (limited by ascertainable standard)
- Assets will receive a stepped-up basis
-Assets are protected from Wife's creditors
- Assets escape estate tax on Wife's death

- Wife can be beneficiary of income and principal
-Assets will receive a stepped-up basis on Husband's death, and then again on Wife's death
-Assets included in Wife's taxable estate
-Will be protected from Wife's creditors

-Assets may receive a stepped-up basis, but this is more likely if wife is not a beneficiary
-May escape estate tax liability on Wife's death
-For creditor protection and estate tax exclusion purposes, CST B may be moved to an APT jurisdiction
Special Consideration: If Wife is found to have made a gift of trust assets to Husband upon Husband's death, this gift may qualify for the marital deduction
If IRS argues that Wife has gifted to trust the gift will be incomplete because of her power of appointment

-Wife will be income beneficiary
-Assets may receive a stepped-up basis on Husband's death & again on Wife's death
-Assets included in Wife's estate
-May not be protected from Wife's creditors unless moved to APT trust jurisdiction
-If IRS argues that Wife has gifted to trust the gift will be incomplete because of her power of appointment

From Howard Zaritsky – Lester Law January 2017 Heckerling Institute Fundamentals presentation (pgs 1-134 & 1-135):

GETTING A FULL STEP-UP USING POWERS OF APPOINTMENT ON FIRST DEATH – THE JEST TRUST

Consider the JEST Trust to fully fund a Credit Shelter Trust while receiving a stepped up basis for all joint and separate assets.

The Joint Estate Step-Up Trust (JEST)

A recently variation on the tax-basis revocable trust is the joint estate step-up trust, or JEST. See Gassman, ' Denicolo, & Hohnadell, *JEST Offers Serious Estate Planning Plus for Spouses - Parts I and 2,* 40 Est. Plan. 3, 14 (Oct., Nov. 2013).

1. Structure of the JEST

a) Joint Revocable Trust

A JEST is a joint revocable trust created by a married couple who reside in a non community property state. The JEST becomes irrevocable when the first spouse dies; both powers to revoke then terminate.

b) Separate Shares for Each Spouse

Each spouse owns a separate share of the trust.

c) Each Spouse Can Terminate Trust During Joint Lives

Each spouse has the power to terminate the trust during their joint lives, when each spouse's share will be distributed to him or her individually.

d) First Spouse to Die Can Appoint Entire Trust Fund

The first spouse to die is given a testamentary power to appoint the entire trust fund.

e) In Default of Exercise

(1) Credit Shelter Trust A

On the death of the first spouse to die, the unappointed assets of his or her share of the trust are divided into a credit shelter trust A, for the benefit of the surviving spouse and descendants.

(2) QTIP Trust

If the first spouse's estate exceeds his or her applicable exclusion amount,. the excess is held in a QTIP trust for the surviving spouse.

(3) Credit Shelter Trust B

(a) Generally

If the share of the first spouse to die is less than his or her applicable exclusion amount, then the assets over which he or she holds a general power of appointment are used to fund credit-shelter trust B, for the benefit of other family members and excluding the surviving spouse as a beneficiary.

(b) Adding the Spouse Later

It is sometimes suggested that the surviving spouse may be added as a beneficiary by a trust protector at some later date. The step-transaction doctrine could be a serious impediment to this approach, because the spouse could be deemed already to be a beneficiary if it can be shown that there was always an intention that he or she be added to the trust.


Note. The step-transaction doctrine is particularly a problem if the estate planner has documented in the planning memoranda that the surviving spouse can be added later.

2. Analysis of the JEST

The JEST has one noteworthy advantage over the tax-basis revocable trust, in that the assets contributed by the surviving spouse do not pass back to the surviving spouse at the first spouse's death. The assets passing subject to the power of appointment will, except to the extent appointed otherwise, pass to a trust for other family members. This should make application of Code § 1014(e) extremely difficult.

3. Analysis of the JEST

The IRS analysis of the tax-basis revocable trust turned on the application of Section I014(e), which denies a basis adjustment to assets transferred to the decedent within one year of the date of his or her death, that pass to the original transferor upon the decedent's death. The JEST gets around Section 1014(e) by not having the assets transferred to the decedent return to the original transferor, to the extent that the original transferor has unused applicable exclusion amount. Thus, there is no reason why the JEST should not work.

4. Asset Protection and the JEST

The JEST offers only limited asset protection benefits.

a) Assets Contributed by the First Spouse to Die

(1) Creditors of the First Spouse to Die

The assets contributed to the JEST by the first spouse to die should be as available to the first spouse to die as any other assets of that spouse's revocable trust.


(2) Creditors of the Surviving Spouse

The surviving spouse should be able to obtain the benefits of the spendthrift clause applicable to the assets contributed by the first spouse to die and then held either as Non-marital Trust A or as a QTIP.

(3) Creditors of the Descendants

The beneficiaries of Non-marital Trust B should be able to do the same

b) Assets Contributed by the Surviving Spouse

The assets contributed by the surviving spouse are also subject to a general testamentary power of appointment held by the first spouse to die. As noted above, these assets may be subjected to the claims of the creditors of the first spouse to die, even though they were originally assets of the surviving spouse.

GOP Tax Reform Blueprint – Corporate Tax Reform

- Would have a flat Corporate Tax Rate of 20%

- Allow full expensing of both tangible and intangible assets in the year of purchase (i.e. unlimited 179 deduction)

- Interest expense will only be deductible against interest income, and any non-deductible amount may be carried forward to offset future interest income.

- Net Operating Losses (NOLs) can be carried forward indefinitely and will be increased by an interest factor, however any NOL carry forwards can only offset 90% of taxable income in future years.

  No Carrybacks of NOLs will be allowed.

- 8.75% Repatriation tax on cash and cash equivalents held overseas, and a 3.5% tax on other assets held overseas. Can elect to pay the resulting tax liability over a period of eight (8) years.

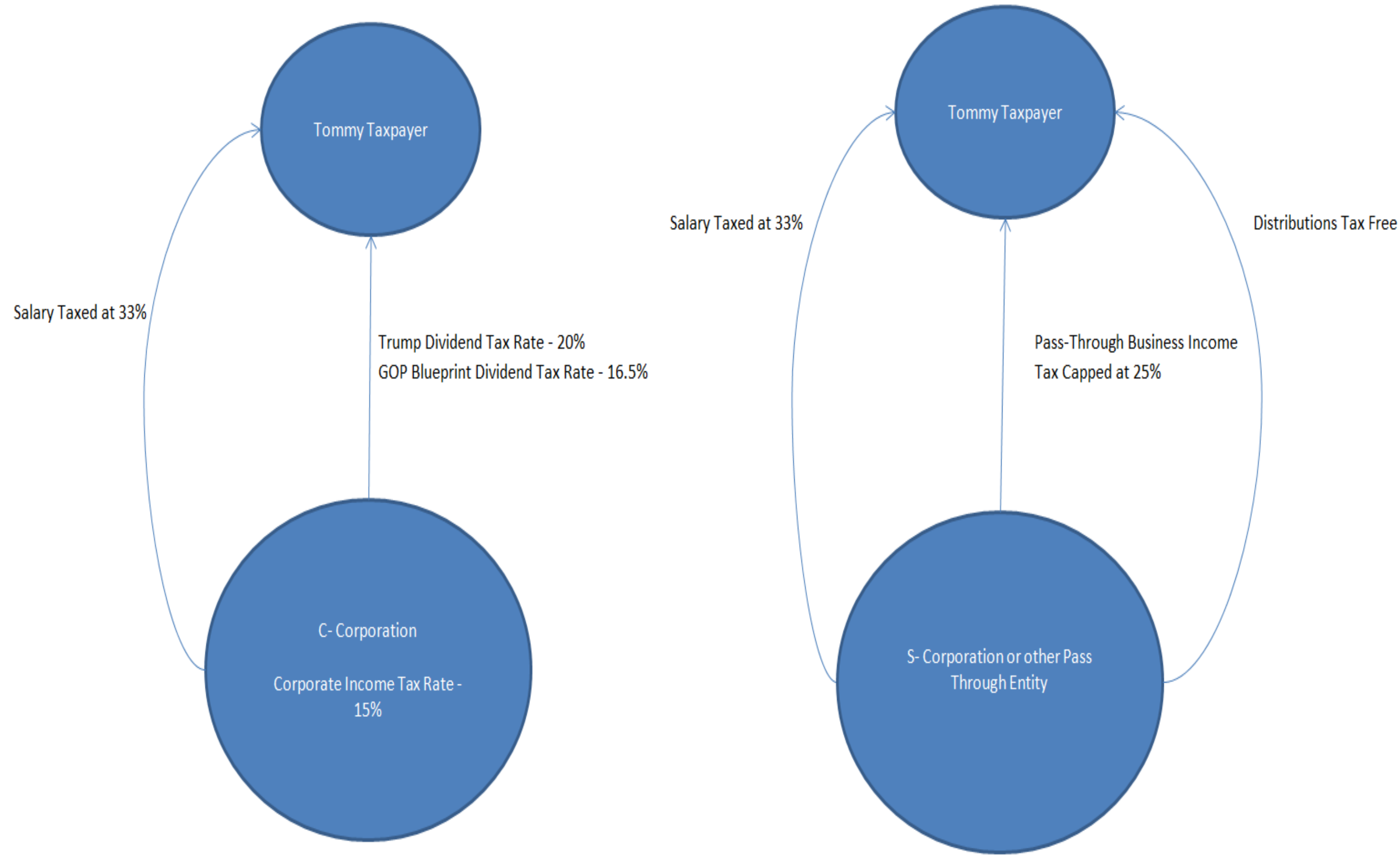
Trump on Corporate Income Tax Reform

- Trump proposes to reduce the top tax rate applicable to C corporations from 35% to 15%, and to eliminate most corporate tax expenditure deductions except for the R&D credit.

- Repatriation of corporate profits held overseas (over $2 trillion) at low tax rates (perhaps up to 10%, perhaps lower) is now highly likely.
- Firms engaged in manufacturing in the US may elect to expense capital investment and lose the deductibility of corporate interest expense. Could this lead to less bank borrowing by corporations?

- Note—Both political parties have proposed and agreed in principal for years on lowering the corporate tax rate and "closing loopholes" – but historically they can't agree on which ones, and whether the changes should be "revenue neutral" (Democrats) or be deficit funded (favored by Republicans).

Should I make an S-corp election?



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

Owned by Physician or as Tenants by the Entireties

S CORPORATION PRACTICE ENTITY

PAYEE	CREDITOR PROTECTED IN FLORIDA?	TAX/EXPENSE	NOTES AND OBSERVATIONS
Pension Plans	Yes	Costs for staff and to maintain plan – spouse on payroll to justify additional contribution.	
Children on the Payroll	Yes – If goes to Roth IRA in the name of the child.	Child in lower rate (Lowest bracket – 10%) but 15.3% employment taxes apply,.	Can do this for parents and in-laws as well!
Wages paid to Doctor	If Head of Household, Florida Statute 222 may apply – deposit directly into protected account.	15.3% employment taxes on first $127,200, and then 2.9% over $127,200 plus .9% tax on wages exceeding $200,000 for single person and $250,000 for married joint filers.	Up to $270,000 countable for pension contribution purposes.
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.	Not creditor protected as wages.
Spouse on payroll.	Yes, if spouse is safe.	15.3% employment taxes on first $127,200, and then 2.9% over $127,200 plus .9% tax on wages exceeding $200,000 for single person and $250,000 for married joint filers.	
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%. Subject to the 3.8% Medicare tax for single taxpayers with MAGI over $200,000 and MFJ taxpayers with MAGI over $250,000.	May be worth paying full retail rent if owner or part owner of building or equipment are children and/or bypass trust for spouse to facilitate estate tax savings.
Interest owed to related parties.	If related party is protected.	Deductible as interest – receiving party pays interest income.	Why pay a bank 7% with personal guarantees when a family limited partnership or trust for the children might loan the money without guarantees at 14% and take a lien on all practice assets.

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

Owned by Physician or as Tenants by the Entireties

S CORPORATION PRACTICE ENTITY

PAYEE	CREDITOR PROTECTED IN FLORIDA?	Current Taxes/Expenses	Proposed Trump Tax Changes
Pension Plans	Yes	Costs for staff and to maintain plan – spouse on payroll to justify additional contribution. Highest tax - 39.6%. Nonqualified plans subject to 3.8% Medicare tax	Highest tax bracket 33%. Eliminate 3.8% Medicare Tax
Children on the Payroll	Yes – If goes to Roth IRA in the name of the child.	Child in lower rate (Lowest bracket – 10%) but 15.3% employment taxes apply.	Lowest bracket will be 12%. Standard Deduction = $9,275
Wages paid to Doctor	If Head of Household, Florida Statute 222 may apply – deposit directly into protected account.	15.3% employment taxes on first $127,200, and then 2.9% over $127,200 plus .9% tax on wages exceeding $200,000 for single person and $250,000 for married joint filers.	Elimination of additional .9% tax on wages exceeding $200,000 for single taxpayer 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, and not subject to the 3.8% Medicare tax unless distributions represent income from passive sources.	Elimination of 3.8% Medicare Tax. Flow Through Business Income tax capped at 25%
Spouse on payroll.	Yes, if spouse is safe.	15.3% employment taxes on first $127,200, and then 2.9% over $127,200 plus .9% tax on wages exceeding $200,000 for single person and $250,000 for married joint filers.	Elimination of additional .9% tax on wages exceeding $200,000 for single taxpayer 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% Subject to the 3.8% Medicare tax for single taxpayers with MAGI over $200,000 and MFJ taxpayers with MAGI over $250,000.	Elimination of 3.8% Medicare Tax
Interest owed to related parties.	If related party is protected.	Deductible as interest – receiving party pays interest income.	Interest expense may only be deducted against interest income

GOP Tax Reform Blueprint and Trump's Proposed Individual Income Tax Reform

<table>
<tr><th colspan="8">Individual Income Tax Brackets</th></tr>
<tr><th>Single Filers</th><th>Married Filing Joint Filers</th><th>Current Law Rates</th><th>Blueprint Proposed Rates</th><th>Trump Proposed Rates</th><th>Current Law Capital Gains Rates</th><th>Blueprint Proposed Capital Gains Rates*</th><th>Trump Proposed Capital Gains Rates</th></tr>
<tr><td>0 to $9,275</td><td>0 to $18,550</td><td>10%</td><td rowspan="2">0-12%</td><td rowspan="2">0-12%</td><td>0%</td><td rowspan="2">0% - 6%</td><td rowspan="2">0%</td></tr>
<tr><td>$9,275 to $37,650</td><td>$18,550 to $75,300</td><td>15%</td><td>0%</td></tr>
<tr><td>$37,650 to $91,150</td><td>$75,300 to $151,900</td><td>25%</td><td rowspan="3">25%</td><td rowspan="2">25%</td><td>15%</td><td rowspan="3">12.50%</td><td rowspan="2">15%</td></tr>
<tr><td>$91,150 to 112,500</td><td>$151,900 to 225,000</td><td rowspan="2">28%</td><td></td></tr>
<tr><td>$112,500 to $190,150</td><td>$225,000 to $231,450</td><td>33%</td><td>15%</td><td rowspan="4">20%</td></tr>
<tr><td>$190,150 to $413,350</td><td>$231,450 to $413,350</td><td>33%</td><td rowspan="3">33%</td><td rowspan="3">33%</td><td>15%</td><td rowspan="3">16.50%</td></tr>
<tr><td>$413,350 to $415,050</td><td>$413,350 to $466,950</td><td>35%</td><td>15%</td></tr>
<tr><td>$415,050+</td><td>$466,950+</td><td>39.60%</td><td>20%</td></tr>
</table>

* individuals are taxed at 1/2 of individual rate on capital gains and dividends

GOP Tax Reform Blueprint – Individual Income Tax Reform

The GOP proposals would

1. Eliminate the Alternative Minimum Tax (AMT)

2. Cap business income tax at 25%,

3. Cap long-term capital gains at 16.5%

4. Eliminate domestic production activity deduction. (what the heck is this?)

5. Simplify the multiple education credits/deductions

6. Increase Standard Deduction to $24,000 for Married Filing Joint, $18,000 for single parents, and $12,000 for single individuals

7. Eliminate all itemized deductions except for the mortgage interest deduction and the charitable contribution deduction. The proposed elimination will result in the loss of deductions for medical expenses, state and local taxes, investment interest, casualty and theft losses, gambling losses, and other miscellaneous deductions.

See the January 12, 2017 Leimberg LISI article by Jonathan Blattmachr & Kevin Matz: The Impact of Limiting the Annual Deduction for Charitable Contributions Proposed by President-Elect Trump at: http://leimbergservices.com/all/LISIBlattmachrMatz1_12_2017.pdf

8. Propose consumption tax similar to European VAT.

Trump on Individual Income Tax Reform

- Trump proposed to reduce the top tax rate and establish three tax brackets with rates of 12%, 25% and 33%. This proposal calls for married couples filing a joint return to pay 33% on their taxable income in excess of $225,000, and unmarried individuals to pay 33% on their taxable income in excess of $112,500.

- Itemized deductions would be limited to $200,000 for married couples filing a joint return, and $100,000 for unmarried individuals.

- The 3.8% Medicare Net Investment Income surtax on AGI over $250,000 would be eliminated. This appears to be entirely deficit funded, with no explanation of revenue offset.

- Trump has proposed to tax compensation received from carried interest as ordinary income to close the "carried interest loophole." This would increase the rate from 23.8% to 33% under Trump's proposed tax plan. Carried interest is a contractual right given to a general partner that is typically received in exchange for a commitment to provide investment management services to a private equity funds, and entitles the general partner/investment manager to a share in the fund's profits. The general partner/investment manager will receive a portion of the fund's profits if the fund meets certain performance goals, and is typically a majority of the compensation received by the investment manager. Amounts received from carried interest rights are treated as capital gains subject to the additional 3.8% Net Investment Income Tax resulting in a total tax of 23.8%. This results in the majority of hedge fund and private equity managers being taxed at significantly lower tax rate than other highly compensated individuals paying taxes at the highest individual rate of 39.6%.
- For further discussion on carried interest see:

http://www.taxpolicycenter.org/briefing-book/what-carried-interest-and-how-should-it-be-taxed

The Proposed Regs under 2704 Are No More?

- Section 25.2701-2 (expansion and clarification of definition of controlled entity, not the most groundbreaking change)
- Section 25.2704-1 (lapse of certain rights, includes 3 yr rule)
- Section 25.2704-2 (transfers subject to applicable restrictions)
- Section 25.2704-3 (transfers subject to disregarded restrictions – the most controversial and confusing) – all the others are amendments, this one is completely new
- Section 25.2704-4 (effective date)

What the vast majority of practitioners saw as a draconian set of rules that would have drastically reduced or eliminated valuation discounts was later said by the IRS to have been intended to be much less pronounced. If the gift tax stays in place these Proposed Regulations could have an impact on future planning, but are more likely to be quashed one way or the other by the Trump administration and Republican leadership.

• Suggested Disclosure Statement.

The Section 6501(c) regulations require estate and gift tax return disclosure of a position contrary to IRS authority, including any position that is contrary to any proposed or temporary Regulations. It is necessary to disclose that the proposed regulations are not being followed in valuations on a gift tax return to make sure that the statute of limitations will run in 3 or 6 years.

The AICPA suggests that the statement include the following language:

The Section 2704 proposed regulations issued on August 2, 2016 were not taken into account in determining value because, under the effective date provisions of the Section 2704 proposed regulations, there is no requirement that the Section 2704 proposed regulations be considered.

Senate Finance Committee Proposals – RESA Would Significantly Reduce Stretch IRAs

- This fall, the Senate Finance Committee UNANIMOUSLY (full bipartisan support) approved the "Retirement Enhancement and Savings Act of 2016" ("RESA").

- RESA would change the post-death RMD (Required Minimum Distribution) rules to generally require that all distributions after death (regardless of whether to a "designated beneficiary") be made by the end of the fifth calendar year following the year of death.
- Exceptions would be made for
- A. surviving spouse
- B disabled, or chronically ill beneficiaries, and
- C. individuals who are not more than 10 years younger than the decedent,
- D. a child who has not reached the age of majority.
- E. where total amount stretched is under $450,000.

- In addition, RESA would provide that the new 5-year distribution requirement only applies to the extent that the amount of an individual's aggregate account balances under all IRAs and defined contributions plans, determined as of the date of death, exceeds $450,000 (indexed for inflation).

BEING ABLE TO TALK ABOUT ABLE 529 PLANS FOR THE DIS-ABLED

By: Alan Gassman and Brandon Ketron

Family Members and Benefactors of Disabled and Special Need Individuals are Now ABLE to Open 529 Plans that Will Not Disqualify from Medicaid or SSI, and Can Grow Tax-Free if Used for "Special Needs".

Congress enacted new Subsection 529A on December 3, 2014 to enable eligible disabled individuals the ability to receive a benefit up to the applicable federal gift tax exclusion amount per year (currently $14,000) that can be used for qualified expenses.

In order to be considered disabled and thus eligible for an ABLE account, the beneficiary must meet any one of the following criteria before obtaining the age of 26:

1. Entitled to Supplemental Security Income (SSI) benefits;
2. Entitled to Social Security Disability Insurance benefits;
3. Have a condition listed in the "List of Compassionate Allowances Conditions" maintained by the Social ` Security Administration;
4. The disabled individual, or his/her parent or guardian, certifies that the individual is blind within the meaning of Section 1614(a)(2) of the Social Security Act; OR
5. The disabled individual, or his/her parent or guardian, certifies that the individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that: (i) can be expected to result in death; or (ii) has lasted, or can be expected to last, for a continuous period of not less than 12 months.

The beneficiary will be considered the owner of the ABLE plan, however a parent, guardian, agent, or beneficiary (if over the age of 18) may establish the plan make contributions to it on behalf of the disabled individual. The designated beneficiary may also be changed with no tax consequences so long as the new beneficiary meets both of the following requirements: (1) an eligible individual for the tax year in which the change is made; and (2) a sibling whether by blood or by adoption of the former designated beneficiary.

As the result of this, parents who would normally gift in trust or outright to children can now make gifts to a disabled child or grandchild (as long as gifts do not exceed $14,000 per year) without being concerned about Medicaid or SSI (social security income for disabled individuals) disqualification. Account balances that exceed $100,000 may cause SSI benefits to be reduced or suspended. Therefore, contributions should not be made into these accounts if the balance would exceed $100,000.


BEING ABLE TO TALK ABOUT ABLE 529 PLANS FOR THE DIS-ABLED (CONT.)

By: Alan Gassman and Brandon Ketron

A major disadvantage to ABLE plans is that unlike Special Needs Trusts, upon the death of the disabled beneficiary, the remaining ABLE account balance has to be repaid back to the state to the extent that medicaid benefits were provided to the disabled beneficiary during his or her lifetime.

Subsection 529A is largely self-explanatory, and requires all contributions to be made in cash to qualified ABLE programs where there will be limited investment choices, no pledging of interest as security, and tax advantaged treatment where distributions must be used for "Qualified Disability Expenses."

Qualified Disability Expenses are those expenses related to the individual's disability and are defined to include: "education, housing, transportation, employment training and support, assistive technology and personal support services, health prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, are approved by the Secretary of the Treasury."

If distributions from an ABLE account are used solely for Qualified Disability Expenses, the distribution is not included in the gross income. However, amounts that are not used for Qualified Disability Expenses are included in gross income and subject to an additional tax of 10%.

Transfers to these plans will qualify for the $14,000 per year federal gift tax exemption, however unlike 529 Plans for College Savings donors cannot average gifts ratably over a five year period and can only make gifts of up to $14,000 per year into an ABLE plan.

Additionally, ABLE plans should be exempt from all claims of creditors of the beneficiary under Fl. Stat. § 222.22, which reads as follows:

Except as provided in s. 1009.986(7), as it relates to any validly existing qualified ABLE program authorized by s. 529A of the Internal Revenue Code, including, but not limited to, the Florida ABLE program participation agreements under s. 1009.986, moneys paid into or out of such a program, and the income and assets of such a program, are not liable to attachment, levy, garnishment, or legal process in this state in favor of any creditor of or claimant against any designated beneficiary or other program participant.

The following slides refer to pages from the outline materials provided by Sanford J. Schlesinger, Esq. and Martin R. Goodman, Esq.


SEE SCHLESINGER’S OUTLINE ON:

- Portability – Page 3

- Code Section 411, 3.8% Medicare Tax – Page 14

  Probably has a 38% or better chance of being repealed.

- “ABLE” ACT – Page 18

Portability Final Regulations – Page 3-7

The final portability regulations under Sections 20.2010-2 and 3 and 25.2505-2 and 3 and the well-written preamble thereto were finalized on June 12, 2015.

TAX RETURN REQUIREMENTS

Under Section 20.2010-2(a), the election can only be made on a timely filed and complete estate tax return Form 706.

Estates that are required to file the Form 706 (i.e. estates that exceed the basic exclusion amount), will lose the portability allowance if the return is filed after the filing deadline (which is 9 months from date of death, or within 6 months after the filing deadline if a valid extension is filed). There is no way whatsoever around this if a return is not filed. A return is not considered to be filed unless it is a valid Form 706 that is actually signed by the fiduciary.

The return may not be perfect, but if it is signed and filed, then it can be updated to save the election under some circumstances. There is no Form 706-EZ.

WHAT ASSETS NEED TO BE VALUED?

If the estate tax return is required to be filed because of the value of the estate, then all assets have to be valued with appropriate appraisals, even if there is no estate tax due.

Small estates will need appraisals where the value of the marital or charitable devise or devises will determine the value of the non-marital charitable assets, such as where the trust says "give my spouse $4,000,000 of assets and the rest will go to my children."

Portability Final Regulations, Continued – Page 3-7

WHEN CAN YOU GET 9100 RELIEF FOR A LATE FILED ESTATE TAX RETURN-OOPS?

	Decedent who died prior to January 1, 2014	Decedent who died on January 1, 2014 or after
Estates with Gross Assets under the Estate Tax Exclusion Amount ($5,490,000)	Relief may be granted under Rev. Proc. 2014-18	Must file for 9100 Relief
Estates with Gross Assets over the Estate Tax Exclusion Amount, but no tax owed due to Marital Deduction or Charitable Deduction	NO RELIEF AVAILABLE	NO RELIEF AVAILABLE
Estates Owing Estate Tax	NO RELIEF AVAILABLE	NO RELIEF AVAILABLE

9100 relief will apply under Revenue Procedure 2014-18 for estates of decedents who died prior to January 1, 2014, if the estate is below the filing threshold (gross assets are less than the exemption amount) or a return was timely filed and the Portability Allowance was inadvertently elected out of.

Typically, 9100 relief in most areas of the tax code will only be available if the taxpayer consulted with an advisor who gave wrong or insufficient advice. This is not being mentioned in the Private Letter Rulings being issued, and is an example of IRS leniency.

For estates of descendents dying after January 1, 2014, the IRS may grant discretionary 9100 relief for estates with gross assets less than the exemption amount, which are not otherwise required to file a return. PLR's now cost $27,500 each, and as of now there are no provisions for permanent relief in the final regulations.

Portability Final Regulations, Continued – Page 3-7

Other important portability points:

Where previous gifts by the decedent exceeded his or her exemption, the DSUE is reduced only by the previous exemption usage, and not by the excess gift that tax was paid upon. So if the decedent made a $5,600,000 gift in 2016 and paid gift tax on $150,000, the DSUE for a death in 2017 will be $40,000 ($5,490,000 minus $5,450,000)

You can only use the last deceased spouse's DSUE, not the DSUE from the spouse before that. The surviving spouse should therefore consider gifting without delay or at least before remarrying and having a new spouse die. The black widow serial killer could keep marrying and making gifts by killing multiple husbands.

Consider funding a hybrid asset protection trust to make use of the DSUE while having the assets available for the surviving spouse if needed - Under a hybrid asset protection trust the spouse is not named as a beneficiary but may be added by Trust Protectors if certain events occur.

SEE SCHLESINGER’S OUTLINE ON:

- 2017 Inflation Adjustments – Page 21

The annual exclusion remains at $14,000 for 2017 but will almost certainly go to $15,000 in 2018 unless there is almost no inflation at all. The annual exclusion for gifts to non US Citizen spouses was raised to $149,000, and when this gets to $150,000 or more then the annual exclusion will notch up to $15,000 (or $16,000 if the above foreign spouse exemption makes it to $160,000 (and does not reach $170,000.

- Defective Grantor Trust and *Woebling v. Commissioner* – Page 43


INSTALLMENT SALES TO DEFECTIVE GRANTOR TRUST CASES-MAY NEVER SEE THE LIGHT OF TAX COURT.

1. *Woebling* settled, and it was apparently very favorable to the taxpayer.

2. The case of *Hatrue III v. Commissioner* is still ongoing and would be appealed to the 10th Circuit where the *Wandry* case was heard.

The estate of *Johnson v. Commissioner* is ongoing as well - a self-cancelling installment note was used to avoid or reduce estate tax.


SEE SCHLESINGER'S OUTLINE ON:

- *Morrissette v. Commissioner* - Page 48

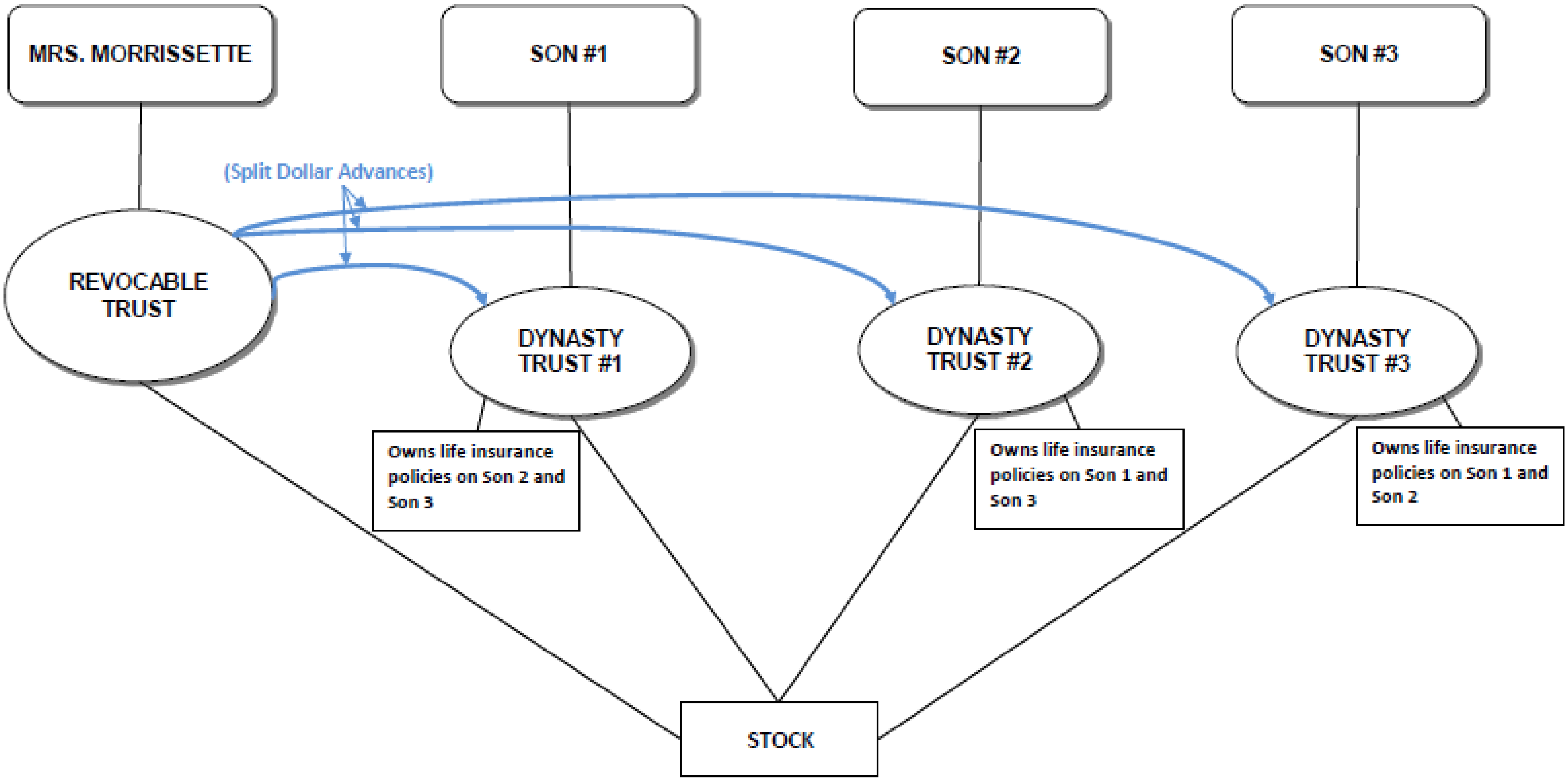
SPLIT DOLLAR VALUATION PLANNING OPPORTUNITIES – MORRISSETTE CONTINUED

Why pay for life premiums using Crummey Powers when you can loan money to the ILIT at very low rates, and use Crummey Powers to transfer discounted LLC interests?

Morrissette v. Commissioner - 146 Tax Court Decision No. 11.

In *Morrissette*, the mother had established Dynasty Trusts for each of her sons, and each Trust and the mother's Revocable Trust held stock in a family business.
The sons and Trusts entered into a Buy-Sell Agreement that required each Dynasty Trust to own
life insurance on the life of the sons' who were not the beneficiary of each Dynasty Trust.
If son A died, then the Dynasty Trusts of sons' B and C would receive insurance proceeds and use these proceeds to buy the stock of son A and son A's Dynasty Trust.
The mother's Trust entered into a conventional economic benefit regime Split Dollar Life Insurance Agreement with each Dynasty Trust under which she advanced the premiums for the life insurance and had the right to receive back the greater of the cash value or the death benefit upon death. The Agreements closely matched an example in the Preamble of the Split Dollar Regulations, which was correctly deemed to be not precedential, but persuasive.
When the mother died, the IRS claimed that she should be subject to estate tax on the $29,900,000 that she had advanced during her lifetime, and the Tax Court granted a summary judgment, finding that inclusion should be based upon the economic benefit regime of the Split Dollar Regulations.
The case is still pending on the question of the valuation of the split dollar repayment rights in Mrs. Morrissette's estate, which reportedly valued these at $7,500,000 on the estate tax return.
A similar result was reached in *Estate of Levine v. Commissioner*, TC July 13, 2016.
Multi-generational split dollar is the new aggressive valuation discount kid on the block and can work much better than a SCIN or private annuity, if sufficient to bring a taxpayer's net worth below the estate tax filing threshold.


MORRISSETTE V. COMMISSIONER - PAGE 48



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

MORRISSETTE - LANGUAGE FROM PREAMBLE OF SPLIT DOLLAR REGULATIONS:

IRS Bulletin: 2003-46, T.D. 9092 - Split Dollar Life Insurance Arrangements

5. *Gift Tax Treatment of Split-Dollar Life Insurance Arrangements*

The final regulations apply for gift tax purposes, including private split-dollar life insurance arrangements. Thus, if an irrevocable life insurance trust is the owner of the life insurance contract underlying the split-dollar life insurance arrangement, and a reasonable person would expect that the donor, or the donor's estate, will recover an amount equal to the donor's premium payments, those premium payments are treated as loans made by the donor to the trust and are subject to §1.7872-15. In such a case, payment of a premium by the donor is treated as a split-dollar loan to the trust in the amount of the premium payment. If the loan is repayable upon the death of the donor, the term of the loan is the donor's life expectancy determined under the appropriate table under §1.72-9 as of the date of the payment and the value of the gift is the amount of the premium payment less the present value (determined under section 7872 and §1.7872-15) of the donor's right to receive repayment. If, however, the donor makes premium payments that are not split-dollar loans, then the premium payments are governed by general gift tax principles. In such a case, with each premium payment, the donor is treated as making a gift to the trust equal to the amount of that payment.

MORRISSETTE - LANGUAGE FROM PREAMBLE OF SPLIT DOLLAR REGULATIONS, Cont'd

Different rules apply, however, if the donor is treated under §1.61-22(c) as the owner of the life insurance contract underlying the split-dollar life insurance arrangement. Under these circumstances, the donor is treated as making a gift to the trust. The value of the gift is the value of the economic benefits provided to the trust, less the amount of any premium paid by the trustee. For example, assume that under the terms of the split-dollar life insurance arrangement, on termination of the arrangement or the donor's death, the donor or donor's estate is entitled to receive an amount equal to the greater of the aggregate premiums paid by the donor or the cash surrender value of the contract. In this case, the donor makes a gift to the trust equal to the cost of the current life insurance protection provided to the trust less any premium amount paid by the trustee. (Thus, a payment by the donor will not constitute a gift if the trust pays the portion of the premium equal to the cost of the current life insurance protection and the donor pays the balance of the premium.) On the other hand, if the donor or the donor's estate is entitled to receive an amount equal to the lesser of the aggregate premiums paid by the donor, or the cash surrender value of the contract, the amount of the economic benefits provided to the trust by the donor equals the cost of any current life insurance protection provided to the trust, the amount of policy cash value to which the trust has current access (to the extent that such amount was not actually taken into account for a prior taxable year), and the value of any other economic benefits provided to the trust (to the extent not actually taken into account for a prior taxable year). The value of the donor's gift of economic benefits equals the value of those economic benefits provided to the trust for the year minus the amount of premiums paid by the trustee.

As discussed earlier, the final regulations treat the donor as the owner of a life insurance contract where the donee is named as the policy owner if, under the split-dollar life insurance arrangement, the only economic benefit provided to the donee by the donor under the arrangement is the value of current life insurance protection. Any amount paid by a donee, directly or indirectly, to the donor for such current life insurance protection would generally be included in the donor's gross income.

MORRISSETTE - LANGUAGE FROM PREAMBLE OF SPLIT DOLLAR REGULATIONS, Cont'd

Where the donor is the owner of the life insurance contract that is part of the split-dollar life insurance arrangement, amounts received by the irrevocable insurance trust (either directly or indirectly) under the contract (for example, as a policy owner dividend or proceeds of a specified policy loan) are treated as gifts by the donor to the irrevocable insurance trust as provided in §1.61-22(e). The donor must also treat as a gift to the trust the amount set forth in §1.61-22(g) upon the transfer of the life insurance contract (or undivided interest therein) from the donor to the trust.

The gift tax consequences of the transfer of an interest in a life insurance contract to a third party will continue to be determined under established gift tax principles notwithstanding who is treated as the owner of the life insurance contract under the final regulations. See, for example, Rev. Rul. 81-198, 1981-2 C.B. 188. Similarly, for estate tax purposes, regardless of who is treated as the owner of a life insurance contract under the final regulations, the inclusion of the policy proceeds in a decedent's gross estate will continue to be determined under section 2042. Thus, the policy proceeds will be included in the decedent's gross estate under section 2042(1) if receivable by the decedent's executor, or under section 2042(2) if the policy proceeds are receivable by a beneficiary other than the decedent's estate and the decedent possessed any incidents of ownership with respect to the policy. One commentator requested that these regulations address the extent to which a decedent's interest in a co-owned policy is included in that decedent's gross estate under section 2042, but the IRS and Treasury believe that issue is beyond the scope of these regulations and may be addressed in future guidance.

Importance of Substantiation of Charitable Gifts

***Brown v. Commissioner* Tax Court Memo 2016-39**.

Charles Brown, a church pastor claimed $19,224 in charitable donations on his 2010 tax return. Mr. Brown stated the contributions were made in cash, but could not produce any contemporaneous records or bank records to verify the contributions. He attempted to rely on receipts generated after the fact and the testimony of his niece stating the donations were made, and neither taxpayer would testify under oath. The Tax Court held that the taxpayer could not rely on self generated records and disallowed the charitable deduction.

***French v. Commissioner* Tax Court Memo 2016-53.**

In *French,* the Tax Court disallowed a deduction for a conservation easement because the trustees failed to obtain a contemporaneous written acknowledgment. The taxpayer attempted to rely on the deed of conservation easement as the contemporaneous acknowledgement, however to do so the deed must state that there is no consideration other than the preservation of the property and that the deed is the entire agreement of the parties. The deed contained neither, and therefore did not satisfy the necessary requirements.

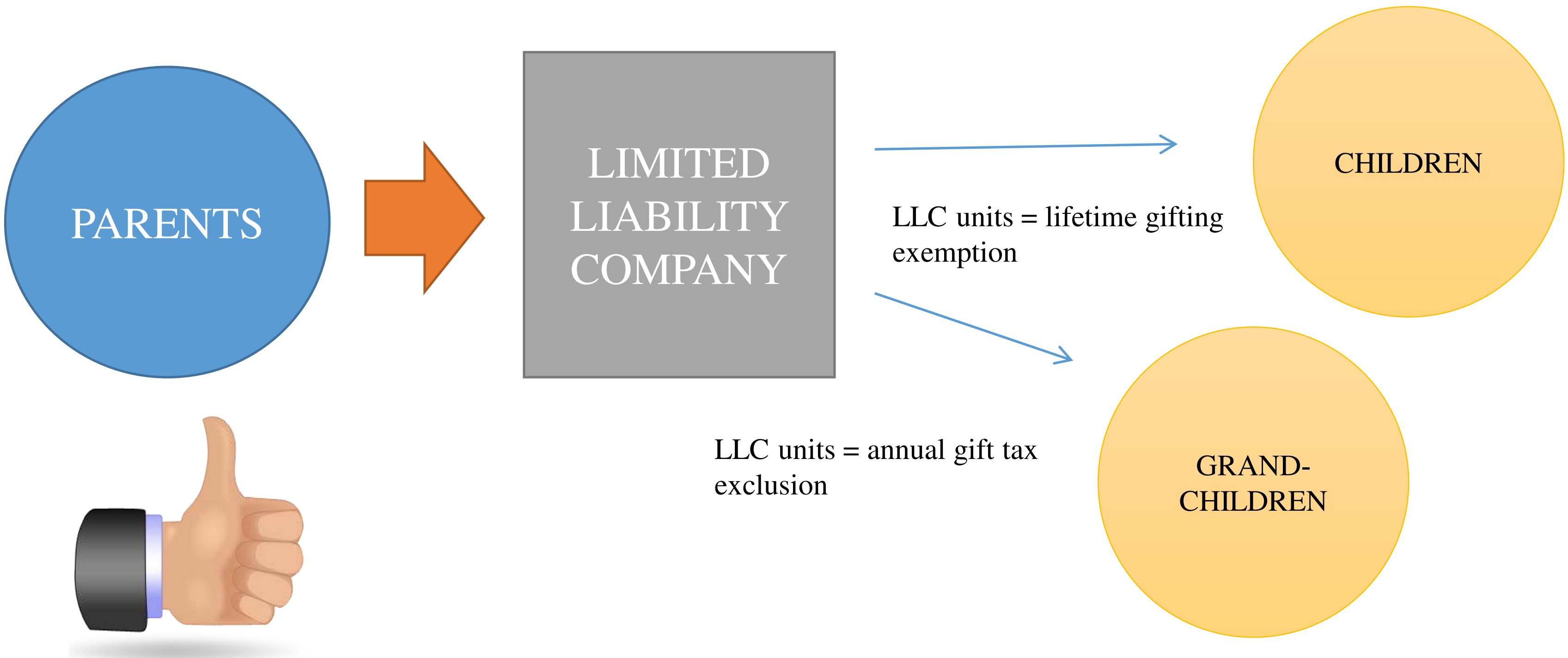
Priority Guidance Plan Projects of the IRS include:

a. Will there be a step-up in basis on the death of the Grantor of a defective Grantor trust?

b. Will promissory notes be valued based upon 7872 or fair market value.

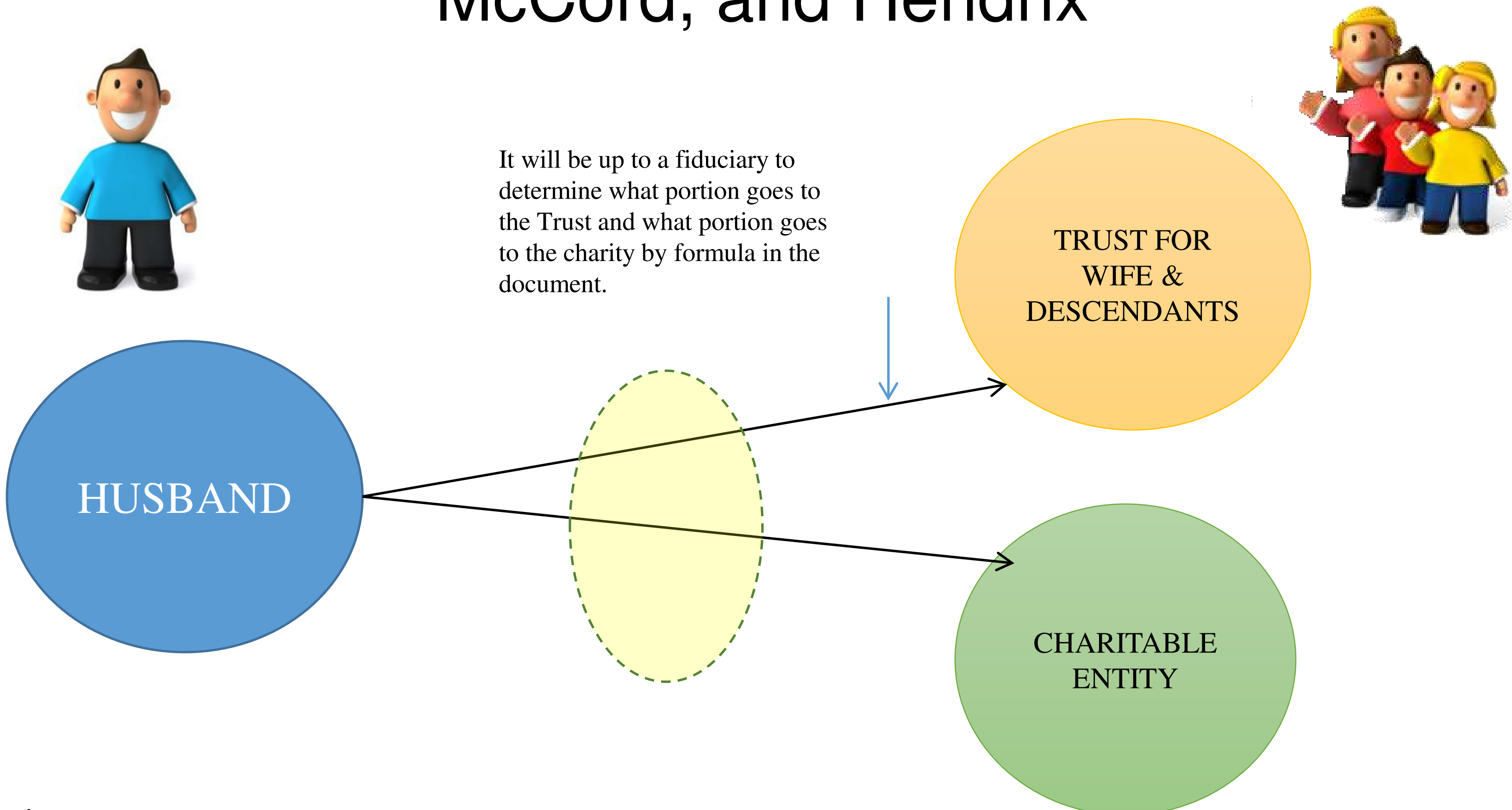
c. When will defined value formula clauses work to adjust a gift or transfer a gift that is re-valued by the IRS, perhaps focusing on installment sales to defective Grantor trust using *Wandry* formula clause (“I give only that percentage of value that is worth no more than $5,000,000”) or King clause (“If the value exceeds $5,000,000 then the recipient agrees to repay the excess with interest accruing annually at the applicable federal rate within 5 years of receipt”).

Wandry v. Commissioner, T.C. Memo 2012-88 (2012)



Language verbatim from *Wandry*: "Although the number of Units gifted is fixed on the date of the gift, that number is based on the fair market value of the gifted Units, which cannot be known on the date of the gift but must be determined after such date based on all relevant information as of that date. Furthermore, the value determined is subject to challenge by the Internal Revenue Service ("IRS"). I intend to have a good-faith determination of such value made by an independent third-party professional experienced in such matters and appropriately qualified to make such a determination. Nevertheless, if, after the number of gifted Units is determined based on such valuation, the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of gifted Units shall be adjusted accordingly so that the value of the number of Units gifted to each person equals the amount set forth above, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law."


Fractional Gift Transfer Arrangement from Petter, McCord, and Hendrix



Requirements:

1. An independent charity that the client has not been involved with in the past and does not sit on the board of.
2. A minimum of 1% or a greater overflow amount passing to the charity.
3. An independent representation by the charity and an independent deal worked out between the charity and the trustees of the family's recipient trust.
4. Paying the bills for all of the above.

Defined Valuation Allocation Formula Versus Defined Value Transfer Formula

Defined valuation allocation formula: allocates the transferred assets among various transferees and defining the dollar amount going to persons who would be treated as donees for gift tax purposes, with any excess passing to charity.

-I give 100 shares of X stock to my child Sally, provided that if the value of the shares is determined to exceed $1,000,000 then the excess shall pass to My Favorite Charity.

Defined value transfer formula: defines the dollar amount of a transfer that the transferor intends to make. If the value of the assets is determined to be higher than the defined amount, the assets will revert back to the transferor.

- I give 100 shares of X stock to my child Sally, provided that if the value of the shares is determined to exceed $1,000,000, then the number of shares given shall be reduced so that the total shares given equal $1,000,000.

	Transfer Subject to Additional Gift Tax?	Language of Valuation Adjustment Analyzed by the Court
Proctor[1] (4th Cir. 1944)	Yes	"The Grantor is advised by counsel and satisfied that the present transfer is not subject to Federal gift tax. However, in the event it should be determined by final judgment or order of a competent federal court of last resort that any part of the transfer in trust hereunder is subject to gift tax, it is agreed by all the parties hereto that in that event the excess property hereby transferred which is decreed by such court to be subject to gift tax, shall automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of Frederic W. Procter free from the trust hereby created."[2]
King[3] (10th Cir. 1976) Taxpayer resided in Colorado **Taxpayer victory**	No	"However, if the fair market value of The Colorado Corporation stock as of the date of this letter is ever determined by the Internal Revenue Service to be greater or less than the fair market value determined in the same manner described above, the purchase price shall be adjusted to the fair market value determined by the Internal Revenue Service."[4]
Harwood[5] (Tax Court, 1984)	Yes	"In the event that the value of the partnership interest listed in Schedule "A" shall be *finally determined* to exceed $ 400,000 for purposes of computing the California or United States Gift Tax, and in the opinion of the Attorney for the trustee a *lower value is not reasonably defendable*, the trustee shall immediately execute a promissory note to the trustors in the usual form at 6 percent interest in a principal amount equal to the difference between the value of such gift and $ 400,000. "

1 *Commissioner v. Proctor*, 142 F.2d 824 (4th Cir. 1944).
2 *Id.* at 827.
3 *King v. U.S.*, 545 F.2d 700 (10th Cir. 1976).
4 *Id. at 703-704.*
5 *Harwood v. Comm'r., 82 T.C. 239 (1984).*

	Transfer Subject to Additional Gift Tax?	Language of Valuation Adjustment Analyzed by the Court
Ward[6] (Tax Court, 1986)	Yes	“In consideration of love and affection, each Donor does hereby assign to each Donee all of the Donor's right, title and interest in and to twenty-five (25) shares of the capital stock of J-SEVEN RANCH, INC., a Florida corporation, hereinafter called the "Corporation". The parties acknowledge that the computation of the number of shares constituting each gift has been based upon their mutual understanding and belief that the fair market value of each share is $ 2,000.00, resulting in tax liability for each Donor less than the amount of unified credit against gift tax to which the Donor is entitled at this time under applicable provisions of law. Each party hereto agrees that if it should be finally determined for Federal gift tax purposes that the fair market value of each share of capital stock of the Corporation exceeds or is less than $ 2,000.00 an adjustment will be made in the number of shares constituting each gift so that each Donor will give to each Donee the maximum number of full shares of capital stock of the Corporation, the total value of which will be $ 50,000.00 from each Donor to each Donee and a total of $ 150,000 from each Donor to all Donees. Any adjustment so made which results in an increase or decrease in the number of shares held by a stockholder of the Corporation will be made effective as of the same date as this Agreement, and any dividends paid thereafter shall be recomputed and reimbursed as necessary to give effect to the intent of this Agreement.”
Knight[7] (Tax Court, 2001)	Yes	“Transferor irrevocably transfers and assigns to each Transferee above identified, as a gift, that number of limited partnership units in Herbert D. Knight Limited Partnership which is equal in value, on the effective date of this transfer, to $ 600,000.”

6 Ward v. Comm’r., 87 T.C. 78 (1986).
7 Knight v. Comm’r., 115 T.C. 506 (2001).


TAX COURT MEMO CASES ON FLP'S SHOW THAT SLOPPY FORMATION AND ADMINISTRATION WILL NOT BE WELL ACCEPTED

Estate of Purdue v. Commissioner - This 2015 Tax Court Memorandum decision upheld the business purpose of consolidation of various investment accounts and a net leased rental property under a limited partnership that also involved a GRAEGIN LOAN (the future interest to be paid on a loan taken by the estate to pay estate tax can be deducted on the estate tax return under the Graegin Loan rules).

Holliday v. Commissioner - the limited partnership was funded and limited partnership interests were gifted in the same day. The court found that asset protection was not a good business purpose where the taxpayer lived in a nursing home. The partnership did not keep books and records and formalities were ignored.


AROUND THE IRA IN 60 DAYS

Revenue Procedure 2016-47 provides relief for taxpayers who waited more than 60 days to roll over a pension or IRA distribution into a subsequent IRA "where the failure to waive such requirement would be against equity or good conscience including... events beyond the reasonable control of the individual..." The reason for missing the 60-day deadline must be for one or more of 12 enumerated reasons, which include postal error, serious illness of a family member, a distribution check being misplaced and never cashed, or having the distribution deposited and held in a non IRA account that was mistakenly thought to be eligible for rollover treatment.

SEE SCHLESINGER'S OUTLINE ON:

- *Clark v. Rameker* – Page 53

The Supreme Court ruled that inherited IRAs are not "retirement funds", and are not exempt assets in bankruptcy unless otherwise provided under State law.

Note – Fl. Stat. Section 222.21(2)(c) provides an exemption for inherited IRAs.

- IRS No Ruling Areas - Rev. Proc. 2016-3, IRB 2016-1 (Pages 61-66)

- IRS Priority Guidance Plan – (Pages 66-67)


BaSis CONSISTENCY RULES (BS for short)

Only apply if there is an estate tax actually due and payable.

Code Section 1014(f) basis consistency rules - a beneficiary who has inherited an asset is required to use the value reported on the Form 706, as indicated on a new Form 8971, as the starting basis of the asset, as are those who acquire from the beneficiary who would receive that same basis, such as upon receipt of a gift, or contribution to a partnership or S corporation.

Under the proposed regulations, the duty of consistency and reporting requirements do not apply to estates below the estate tax threshold even if an estate tax return is filed to allocate GST or to make a portability election.

The fiduciary required to file the Form 706 must provide notice to beneficiaries within 30 days after the return is filed.

The Form 8971 indicates that the beneficiary received the asset, notwithstanding that it may not have been received yet and that if unexpected events occur, it may never be received.

The proposed regulations indicate that an asset not reported on an estate tax return will have a zero basis, even if the beneficiary was not at fault for omitting to report it.

Each beneficiary can receive a Schedule A that only lists what that beneficiary receives, and does not have to be given the Schedule A's for other beneficiaries.

If the beneficiary is another trust, it is not clear whether the fiduciary filing the 706 need only inform the Trustee of the recipient trust, or the underlying beneficiaries thereof.


WHEN A PRIVATE FOUNDATION BENEFITS FOREIGN CHARITABLE PURPOSES:

Private Letter Ruling 2015-110033 provides guidance on how an IRS auditor may interpret Revenue Rulings 63-252 and 66-79 when US charities provide financial support for foreign operations. The organization audited did not know what the money was used for and did exert control.

Final Regulations were issued in September of 2015 that eliminate the ability of a Private Foundation to rely solely on a grantee affidavit in determining if a non-U.S. charity is the equivalent of a U.S. public charity, however a grantee affidavit can still be used as a source of information in making the equivalency determination.

Private foundations will now likely have to rely on the opinion of a qualified tax practitioner in making equivalency determinations.

Will foreign grant making be made more difficult under the Trump Administration?

RELEASING ESTATE TAX LIENS

This function was moved from the estate and gift tax division to the collections division and Form 4422 will now apply for request for lien releases, etc. Practitioners are reporting considerable delays in receiving lien releases for transactions or otherwise.

Estate tax liens will attach to an LLC, and not to real estate owned by an LLC, providing another good reason for real estate to be held under LLCs, and not in the direct name of a taxpayer who may have creditor issues.

No closing letters - still just receive accounting transcripts under Notice 2017-12, which will hopefully be sufficient for the lien release since the lien release rules apparently require a closing letter. The closing letters are no longer available.


FLORIDA LAW UPDATE ITEMS

HEALTH CARE POWERS OF ATTORNEY

ALLOWS AGENT TO ACT BEHIND THE BACK OF THE PRINCIPAL-- CUSTOM DRAFTING RECOMMENDED

Florida's Health Care Surrogate Statutes

A surrogate can be given the power to make health care decisions when the principal is not incapacitated. If there is ever a conflict between the surrogate and the principal, the principal's decision is controlling. A principal may also amend or revoke the health care surrogate by written amendment.

Physicians must discuss treatment and other important information with patient who is not incapacitated regardless of whether or not there is a surrogate who has made a decision or decisions. .

Parents now have an option to name a health care surrogate for minors under FS Section 765.2035(6). This will be useful if a parent is unavailable to provide consent for treatment for their child. This could come up in a variety of situations, such as when the parents are traveling without their minor children.

HEALTH CARE POWER OF ATTORNEY
(Key Language)

I, JOHN SMITH, do hereby appoint my spouse, JANE SMITH, or if and as applicable, the alternate agent or agents appointed below as my Health Care Surrogate ("Agent") under Florida Statute Section 765, and any other applicable law, to make health and personal care decisions for me**, regardless of whether I am incapacitated or fully competent.**

If the above-named Agent or Agents named by me shall be unavailable, by reason of death, disability, resignation, or refusal to act, then the first available of MATTHEW SMITH, MARY SMITH, in the order named, shall serve as alternate Agent.

The cell and home telephone numbers for each of my above-referenced Agents are as follows:

JANE SMITH	Cell:____________________
	Home:__________________
MATTHEW SMITH	Cell:____________________
	Home:__________________
MARY SMITH	Cell:____________________
	Home:__________________

If at any time more than one Agent is appointed under this Agreement, then any of such Co-Agents shall have the power and authority to act on my behalf without the consent or joinder of the others.

By this document I intend to create a Health Care Power of Attorney effective upon signature hereof which shall not be affected by my subsequent incapacity.

I recognize that under applicable law my appointed Agents may access my medical records and make healthcare decisions for me notwithstanding whether I am still competent, and that such healthcare decisions may supersede previous instructions or decisions made by me or by other Agents or surrogates. This shall apply unless I cross through this paragraph and initial next to the cross through.

HEALTH CARE POWER OF ATTORNEY, (Key Language, continued)

In addition to the above, any individual or institution empowered to act for my benefit shall also be empowered to act for the benefit of any minor child of mine, with the intention being that this document will qualify not only as a health care power of attorney for me, but also as a health care power of attorney to act for any minor child of mine, pursuant to Florida Statute Section 765.2035. This shall apply unless I cross through this paragraph and initial next to the cross through.

I strongly encourage my Agents to hire professional nurses to supplement and monitor my care, medical specialist for second opinions, and such other individuals as they deem appropriate to help make sure that I receive the best care, and dynamic representation with respect to my health care.

NOTE: Two witnesses and a notary are required.

CHILD HEALTH CARE POWER OF ATTORNEY AND AUTHORIZATION

The undersigned, being the parent and legal guardian of the following minor child/children:

CHILD/CHILDREN'S NAME

In order to provide for the possibility that authorization or supervision may be needed for medical care of the above-named and any future children I may have, ~~does~~and pursuant to Florida Statute Section 765.2035, I hereby name and appoint ____________________, ____________________, ____________________, and ____________________, and such individuals who are named in Exhibit A attached hereto, as health care agents and surrogates for such child or children, as my attorneys-in-fact and Agents, and I hereby authorize such appointed persons to secure any form of medical treatment which is either necessary or appropriate provided that it is administered by a licensed physician except when emergency circumstances do not permit securing a physician. I agree to be liable for all reasonable medical fees, costs, and charges, dental fees, costs, and charges, diagnostic testing, treatments, and hospital costs associated with any diagnosis or treatment. Such individuals are covered as dependents under a medical insurance plan. A copy of the coverage card may be attached to this document. I request that any and all powers that may be bestowed upon a health care surrogate for a minor shall apply, and authorize and request that all physicians, hospitals and other providers of medical services follow the instructions of such appointed Agent or Agents at any time and under any circumstances whatsoever with regard to medical treatment and surgical and diagnostic procedures and any and all other care, treatment or advice as may be requested or deemed appropriate.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

NOTE: Two witnesses and a notary are required.

Florida Uniform Transfers to Minors Act

As of July 1, 2015, Florida allows custodianships to last until the age of 25. Florida statute 710.123 now allows for an age of 25 to be set as the termination date when the UTMA account is created. A Florida custodianship can be created if the custodian, minor, or transferor lives in Florida or if the property protected by the custodian is in Florida.

Florida Statute 710.123(2) was added, which grants minor beneficiaries of UTMAs with a termination age of 25 the ability to withdraw the funds at 21. However, there is also the ability to limit the right to withdraw to a certain duration so that if the beneficiary does not use their right within the specified time, then the assets cannot be withdrawn until the age of 25 when the UTMA terminates. This time period is generally 30 days. The reason for this addition is so the gifts are not treated as future interests under the Internal Revenue Code and, thus, will qualify for the gift tax annual exclusion. Please keep in mind that creditors of a minor can reach these accounts, so they should generally be discouraged for any large amounts.

Questions and Answers About the Updates to the Uniform Transfers to Minors Act by Alan Gassman

Q. What is the Uniform Transfers to Minors Act ("UTMA")?

A. The Uniform Transfers to Minors Act is an act that allows a minor to receive gifts such as money, patents, royalties, real estate, and fine art without the aid of a guardian or trustee. Under UTMA, the gift-giver or an appointed custodian manages the minor's account until the minor becomes of age. The UTMA also shields the minor from tax consequences on the gifts, up to a specified value. The UTMA was originally drafted in 1986 by the National Conference of Commissioners on Uniform State Laws and is an extension of the Uniform Gifts to Minors Act (UMGA), which was limited to the transfer of securities. Updates to the UTMA became effective on July 1, 2015.


Q. Are the updates retroactive?

A. No. The amendment authorizes a transferor to create a new UTMA account after July 2015 that will not be required to terminate until the minor turns 25, as defined by the updated statutes, instead of 21, as defined by the old statutes.

Q. What do you have to do?

A. To take advantage of the new termination age of 25, you must create a custodianship for a person who is a minor (also known as a person who has not yet attained age 21.)

Q. Can creditors of the child reach account assets?

A. Creditors of the child can reach the account assets, but if these are invested in 529 Plans, creditors can probably not reach into them.

Q. Who is the "owner" of the assets in a UTMA account?

A. The minor beneficiary is considered the owner of the assets as a transfer to the UTMA account is treated as an irrevocable gift.

Florida Guardianship Law-Durable Powers of Attorney No Longer Become Inert Upon Filing of Guardianship if to Spouse, Child or Grandchild.

Guardians must be bonded and insured, and more.

Previously, durable powers of attorney were suspended when anyone initiated a petition for guardianship until the petition was dismissed or withdrawn. Now, certain family members will not be automatically removed from being agents and the powers provided in the document will continue where the agent or agents are one or more of the principal's child, parent, spouse, or grandchild. The new statute also enables the court to suspend a power of attorney that is held by a family member who is abusing their power.

New regulations require that professional guardians have fiduciary bonds and liability insurance. Also, a professional guardian appointed as an emergency temporary guardian cannot become a permanent guardian, with some limited exceptions. There is also a provision that expressly prohibits abuse by the guardian, that has a mandatory reporting requirement.

Settlements involving minors that require court approval, petitions for approval of settlements, reports of ad litems, and the orders approving them may all be kept confidential under Florida Statute 744.3701.

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

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

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

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

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

6.3 Death of Member

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


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

The court noted as follows:

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

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

Perhaps the following provision can be considered:

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

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

SHOULD EVERY ESTATE PLANNING LAWYER OFFER TO BE APPOINTED AS A TRUST PROTECTOR? By Alan Gassman and Seaver Brown

Should every estate planning lawyer offer to be appointed as a trust protector to help ensure that testamentary intent will be followed as occurred in the case of *Minassian v. Rachins*, 152 So. 3d 719 (Fla. 4th Dist. App. 2014)?

Executive Summary

Florida Statute Section 736.0808 allows the settlor of a trust to give a third person the sole discretionary power to amend or terminate the trust for certain specified reasons. This discretionary power is typically given to either a trustee or another individual other than the settlor. [Fla. Stat. §736.0808(3)(2008)]

The concept of a trust protector has a long and storied history. Under British Common Law, it was well-accepted procedure to appoint a trust protector who could change the terms of the trust for the benefit of some or all of the beneficiaries and, in some instances, terminate the trust altogether. One reason settlors would confer this power to amend or terminate trust provisions was to have a viable remedy to address any unforeseen events after their death, some of the most prominent of which included ambiguous trust provisions, a change in circumstances, or a change in the applicable estate tax laws. However, despite the various reasons why a trust might need to be amended, the underlying purpose has always been to effectuate the settlor's original intent.

Facts

In the case of *Minassian v. Rachins*, there was a dispute between the settlor's surviving spouse, acting as trustee, and his children from a prior marriage. [152 So.d 719 (Fla. 4th Dist. App. 2014). The crux of the matter dealt with a trust protector who had the sole and absolute discretion to determine and then alter provisions that were ambiguous or erroneous enough to defeat the settlor's original intent.


The language provided in the trust agreement, with respect to the trust protector's appointment and authority, read as follows:

> "To protect…the interests of the beneficiaries as the Trust Protector deems, in its sole and absolute discretion, to be in accordance with my intentions…The Trust Protector is empowered to modify or amend the trust provisions to inter alia: (1) to correct ambiguities that might otherwise require court construction; or (2) to correct a drafting error that defeats my intent, as determined by the Trust Protector in its sole and absolute discretion, following the guidelines provided in this Agreement."

The disputed revocable trust was created by Mr. Minassian in 1999 and was followed by an executed restatement of trust in 2008 that would become irrevocable upon his death. The primary purpose for creating this trust was so that he and his wife, acting as sole trustees, could provide for themselves during their lives and then have the remaining trust assets pass to his children. Mr. Minassian and his wife were both very passionate about horse racing and legal gambling, and he wanted to provide for his wife so she could continue to live in the same manner she had grown accustomed to. However, Mr. Minassian was concerned that there would be problems between his children and wife, especially in regards to the manner in which she would spend the money contained in the Family Trust during her lifetime.

Eventually, his fears became true, and the beneficiaries sued the wife as trustee, alleging that she breached her fiduciary duties by taking too much out of the trust. The wife moved to dismiss the children's claims for lack of standing because they were not beneficiaries of the trust. She argued that the Family Trust would terminate upon her death, at which point a new trust would then be created naming the children as beneficiaries. Contrary to the wife's argument, the children insisted that the trust provisions would not create a new trust upon her death but instead, would create separate shares in the existing Family Trust for each child. The trial court found that the wording of the trust was unclear and that it would be inappropriate to allow the Trust Protector to change the trust to clear up the ambiguity.

The wife nevertheless appointed a trust protector to clear up these ambiguities, as permitted by the above quoted language of the trust. Under such language, the protector was permitted to correct drafting errors that would have defeated the husband's intent and, in certain circumstances, modify the trust without court authorization. The trust document further required the trust protector to determine the husband's intent and consider the interests of current and future beneficiaries as a whole. [Id. at 722.] However, amending the trust could only be done if the agreement benefitted the beneficiaries as a group or furthered the husband's probable wishes in an appropriate way. [Id.] Most importantly, though, the trust made any exercise of these powers binding and conclusive on all parties.

Pursuant to these guidelines, the trust protector modified the ambiguous trust provisions but did so unfavorably to the children's position. In response, the beneficiaries filed a supplemental complaint against the wife and trust protector, arguing that those modifications were invalid. Both parties then moved for summary judgment as to whether the modifications were valid. Initially, the trial court held that the modifications made by the trust protector were improper and did not benefit all the beneficiaries. The court reasoned that, under the proposed modifications, the children had no right to challenge the actions of the wife as trustee and invalidated the provisions modified by the trust protector.

The wife then appealed the trial court's ruling on the grounds that the provisions of the original trust were ambiguous, and the trust protector could have modified it so as to properly effectuate her husband's intent. Thus, the appellate court first had to address the validity of the trust protector provision under Florida law. If it was found to be invalid, then any subsequent amendments made by the trust protector would have been invalidated. On the other hand, if they were found to be valid, then the trust protector provision would control, and the protector could exercise any powers with sole and absolute discretion.


Florida Statute Section 736.0808(3) allows the terms of a trust to confer on a trustee or other person (i.e. trust protector) the power to direct the modification or termination of a trust. The children's primary argument here was that Florida Statute Section 736.0808(3) conflicts with the common law rule that a trustee cannot delegate their discretionary powers to another person or entity. Here, the Court held that it is the settlor who delegates the power to modify the trust in a third person, not the trustee. Further, "the common law principles of trust and equity supplement [the Florida Trust Code], except to the extent modified by this code or another law of this state." [Fla. Stat. § 736.0106 (2008) (emphasis added); see also Abraham Mora, et. Al., 12 FLA. PRAC., ESTATE PLANNING § 6:1 (2013-14ed.) ("The common law of trusts supplements the Florida Trust Code unless it contradicts the Florida Trust Code or any other Florida law.")] Essentially, the Florida Trust Code controls when the common law of trusts contradicts it.

The children also argued that Florida Statute Sections 736.0410 – 736.04115 and Section 736.0412 [This Section provides for non-judicial modification of an irrevocable trust, which requires the unanimous agreement of the trustee and all qualified beneficiaries.] provide the sole and exclusive means of modifying a trust. [*Minassian.* 152 So. 3d at 724.] Again, the court disagreed and held that those Sections are not the exclusive means for modifying a trust, otherwise Section 736.0808(3) would have no effect. Therefore, the Florida Trust Code permits the settlor to appoint a trust protector with the power to modify the terms of the trust. [Id.]

In sum, the trial court initially found that the trust was unambiguous and that the trust protector acted contrary to the settlor's intent when he modified those unambiguous provisions. On appeal, however, the court found that the provision stating the Family Trust would terminate on the wife's death was ambiguous. Since there was an ambiguity as to the husband's original intent, the court was free to consider extrinsic evidence outside the four corners of the document. The appellate court noted that the trial record contained uncontradicted extrinsic evidence of the husband's intent.166 Specifically, "from the trust protector's affidavit…it appears that the husband settled on the multiple-trust scheme for the very purpose of preventing the children from challenging the manner in which the wife spent the money." [Id.]


While the trust protector's actions may have disadvantaged the children, he was authorized to correct ambiguities as long as the actions benefitted the group of beneficiaries, or, as in this case, furthered the husband's desire to resolve any ambiguity with a trust protector. [Id. at 727.] His intent would have been violated if the authority he granted to the trust protector was stripped and given to a court. Thus, the modifications initially proposed by the trust protector were valid because they furthered the husband's original intent.

Comment:

For many years, trust protectors have been a common theme for offshore trust agreements, but not until recently have they become more prevalent in the design of domestic trusts. Settlors are not limited in who they may select to serve as trust protector, unless by state statute. The protector may be one or several trustees of the trust, as well as one or more of the beneficiaries. They may also be a trusted friend of the settlor, a third party advisor, or some combination of the above.

Generally, the powers granted to a trust protector can take any form, limited only by the Settlor's intent. Some of the most common and, oftentimes, controversial powers granted to protectors include the ability to:

1. Remove or replace trustees;
2. Remove, replace, or add beneficiaries;
3. Terminate the trust;
4. Vary trust provisions to reflect changes in tax laws;
5. Modify distribution provisions;
6. Consent to or veto discretionary powers of the trustee, such as investments or distributions to beneficiaries;
7. Change trust situs to a state with favorable laws;
8. Resolve disputes between beneficiaries and trustees; and
9. Appoint a successor trustee.


As you can see, trust protectors are beneficial for many reasons, most notably because they provide flexibility within trust vehicles that are traditionally not so flexible. For example, an irrevocable trust cannot be changed by the grantor or trustees, but a trust protector can make such amendments as needed. This flexibility, however, can pose some significant problems in the future that the settlor and estate planner did not contemplate.

A settlor who has their mind set on using a trust protector should limit the protector's powers to replacing a trustee and appointing a successor trust protector only. The reason for specifically limiting the protector's powers is to prevent future conflicts between the protector, trustee, and beneficiaries. Without doing so, the protector could inadvertently expose the trust to unnecessary court costs and even completely destroy the original intent of the settlor. In order to maximize these potential complications, the provisions of the trust should clearly delineate the rights and responsibilities between protectors, trustees, and beneficiaries.

This then begs the question – do trust protectors hold personal powers that would allow them to act with impunity, or are they held to the higher standard of conduct related to fiduciaries? Unfortunately, the concept of a trust protector is still relatively new, so there is little statutory and case law guidance defining the fiduciary roles and responsibilities of trust protectors. In those cases where a trust protector's power is deemed to be personal rather than fiduciary, the protector is limited only by exercising such power in good faith. Personal powers are those that a protector is under no duty to exercise and can be contrary to the settlor's intent absent any fraud. [Trust Protectors: What Role Do They Play?, SS043 ALI-ABA 585, 588.]

The Uniform Trust Code, which Florida adopted and modeled their Trust Code after in 2006, states that an individual providing direction to a trustee is a fiduciary per se, but it does not address whether the trust protector is a fiduciary outright. [See, Uniform Trust Code § 808(b) (amended 2005). States such as Alaska and Arizona have statutes that expressly allow for the use of trust protectors and provide that the protector will not be treated as a fiduciary unless the trust instrument expressly provides for such treatment. [See, Alaska Stat. Ann. § 13.36.370(d)(West); Ariz. Rev. Stat. Ann. § 14-10818.] By contrast, other states such as Idaho and Wyoming provide that a protector will be treated as a fiduciary unless the trust provides otherwise. [See, Idaho Code Ann. § 15-7-501 (2005); Wyo. Stat. Ann. §§ 4-10-710 – 4-10-718 (2005)]; Tenn. Code Ann. § 35-15-808 (2005).

Many times, the duties a protector owes to the beneficiaries of a trust are dependent on what other roles they hold with respect to the trust. Alexander Bove provides a fairly simple example that illustrates this point. [Bove, Alexander. The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?, Estate Planning Vol. 30 No. 08: 390, 392, available at http://www.bovelanga.com/publications/articles/The_Protector.pdf.] Imagine that a settlor names his daughter as the trust protector with the sole power to add and delete beneficiaries with no restrictions. [Id.] With this power in mind, the daughter then proceeds to remove all her siblings from the trust and replace them with her children. In this scenario, it is likely that her actions would have been fully contemplated by the settlor, and therefore, a proper use of her personal powers. Using the same scenario, imagine that instead of naming the daughter as trust protector, the attorney who drafted the trust is now the protector. If the attorney began to remove beneficiaries and supplement them with beneficiaries of his own choosing, it is far more likely that the protector breached the applicable fiduciary duty.

Thus, to determine whether a trust protector will be held to a fiduciary standard, one should ask whether the protector is acting pursuant to the powers granted by the trust and in furtherance of the trust and its beneficiaries, as may have been contemplated by the settlor. However, even if a state statute or trust instrument requires the protector to be held as a fiduciary, the scope of those fiduciary duties continues to remain unclear.

As we briefly mentioned, because of this uncertainty, it would be wise to include language expressly stating whether or not the protector is a fiduciary and how they should exercise those powers. Furthermore, the trust protector should be someone that the settlor "trusts," because without the proper safeguards in place, the protector has the ability to cause significant and expensive problems.

In addition to the practical considerations described above, there are important tax considerations that should not be overlooked and often should be carefully thought through. This includes any power to limit the rights of a surviving spouse that could cause loss of the federal estate tax marital deduction, naming foreigners as trust protectors, which can implicate the foreign trust reporting requirements and cause penalties and interests that could exceed the value of the trust assets over time and the impact that trust protector provisions can have upon the income tax status of an irrevocable trust.


Trust settlors, and, to some extent estate planners, typically do not give much thought about how to minimize the cost and frustration of future complications. In our experience, most law firms do not appoint trust protectors or themselves as trust advisors. Consequently, there is no one that will have the ability to resolve ambiguities outside of a court or arbitration. We believe that a trust protector can save a family time, money, and relationship problems when it comes to resolving ambiguities and questions as to intent and what actions have been or should be taken by the trustee.

Language that the authors have drafted, which has benefitted from comments received from Alexander Bove and Juan Antunez is as follows:

Scrivener Protector. The law firm of GASSMAN, CROTTY & DENICOLO, P.A. has drafted this Trust Agreement and it is expected that the law firm will be available in the event of the Grantor's death or incapacity in order to help to assure that the intentions of the Grantor are followed. It is recognized that in the course of drafting and administering trust agreements there can be ambiguities, inconsistencies, and changes in circumstances which can cause inconvenience, disputes, and hardships for trustees and one or more beneficiaries. The Grantor hereby empowers the law firm of GASSMAN, CROTTY & DENICOLO, P.A., or its successor, to make changes to this Trust Agreement by providing written notice confirming such change in order to comport with the Grantor's intentions and to avoid potential uncertainty, litigation, or arbitration. Any such changes will be consistent with a fiduciary duty to follow the Grantor's intentions. Such power granted to the law firm of GASSMAN, CROTTY & DENICOLO, P.A. shall only apply so long as a member of the firm is a Martindale-Hubbell AV-rated and Florida board certified trust and estate lawyer who approves such action, and the exercise of such power shall be limited as to not cause loss of the federal estate tax marital deduction or the federal estate tax charitable deduction with respect to any transfer to such trust or any trust herein established. Further, no such action may be taken without having written notice of the proposed action provided to each adult beneficiary of the Trust, or to the Designated Representative of any adult beneficiary or beneficiaries who are empowered to waive and receive notice for them. Further, such power may be overridden by an action of the Trust Protectors acting under this Trust Agreement, if Trust Protectors are appointed under this instrument and empowered to make changes, and shall further be subject to the following limitations:


(a) Notwithstanding anything in this Trust Agreement to the contrary, no power exercisable hereunder shall be exercisable in any way that would deprive the Grantor of the right to appoint how the assets held under the Trust will be devised in the event of the Grantor's death, or would disqualify any marital devise or marital or Q-TIP Trust established hereunder from qualifying for the federal estate tax marital deduction or deprive any spouse of the Grantor powers to serve as Trustee and to select successor Trusteeship to apply during said spouse's lifetime or to detrimentally affect the Grantor's surviving spouse in any material way or deprive the Grantor's spouse of rights as to Trusteeship or Trustee selection under Article Six hereof. Further, as to any trust funded by IRA, pension, or qualified plan proceeds, the Scrivener Protector shall not be empowered to add any beneficiary who is older than the Designated Beneficiary of any trust herein established as of the time of appointment or a non-individual, as defined under Internal Revenue Code Section 401(a)(9) and the regulations thereunder.

(b) The Scrivener Protector shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this instrument should be exercised. Further, a Scrivener Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to the Scrivener Protectors shall be in the sole and absolute discretion of a Scrivener Protector, and shall be binding and conclusive on all persons. A Scrivener Protector shall not be required to exercise any power or discretion granted under this instrument. Absent bad faith on the part of a Scrivener Protector, the Scrivener Protector is exonerated from any and all liability for the acts or omissions of any other fiduciary or agent thereof hereunder or arising from any exercise or non-exercise of the powers and discretions conferred under this instrument.


THE PECKING ORDER OF PECK - - HOW TO AVOID HAVING AN IRREVOCABLE TRUST AMENDED - - GOOD LUCK!

Peck v. Peck, February 26, 2014, Second DCA Opinion.

CLAUSE #1 –
Appoint a beneficiary who will vehemently contest any proposed change to the Trust Agreement:

JOHN SMITH and his descendants will be discretionary beneficiaries of each Trust established for a Primary Beneficiary who is not JOHN SMITH or a descendant of JOHN SMITH, provided that JOHN SMITH is requested to not accept distributions for himself or his descendants, and is strongly requested to object to any proposed change to any Trust herein established that would result in a sibling or the descendant of a sibling of JOHN SMITH receiving more payments, more access to Trust assets, or influence over selection of any Trustee, and with respect to any Trustee's decision. The purpose for having JOHN SMITH and his descendants as beneficiaries of each Trust herein established is to assure that they will have the ability to veto any proposed change or any termination with respect to any Trust herein established.

CLAUSE #2 –
Appoint an Offshore Foundation managed by a lawyer in a civil law jurisdiction to be a beneficiary of the Trust. Civil law would not allow "public policy" to change what a Grantor has required.

__Trusts To Not Be Reformed Or Altered__. It is my strong desire and binding intention that no trust herein established shall be subject to alteration or change after my death, and notwithstanding any law or exception to any law that would purport to allow any such change, and therefore upon my death a SMITH TRUST MAINTENANCE FOUNDATION shall be established in a jurisdiction that allows for the creation and maintenance of a Foundation, which jurisdictions presently include Switzerland, Lichtenstein, Bermuda and the Bahamas. Such Foundation shall have one or more of my descendants as managers, and shall provide in its charter that it will take any and all actions necessary to prevent any amendment, alteration, reformation, or change of any trust herein established. A reputable lawyer with at least twenty years' experience and the highest rating available in the applicable jurisdiction shall also be appointed as a Foundation manager, with such lawyer's sole duty being to assure that the Foundation is maintained, and that the Foundation will not consent to any change in any trust, as herein set forth. Such appointed lawyer shall be selected by the acting Corporate Trustee under this Trust, and may be replaced by the acting Corporate Trustee with another lawyer meeting the same requirements. Such Foundation shall be a discretionary beneficiary of each trust herein established, except for the SMITH Q-TIP GST TRUST and any SMITH Q-TIP NON-GST TRUST established under Section 4.02(c) hereof, or any trust that would need to qualify for the federal estate tax marital deduction in order to facilitate avoidance of federal estate tax upon my death.


Such Foundation shall request and receive reasonable funds to facilitate its operation from each trust established under this Agreement, and to provide family reunions of my descendants every five (5) years based upon input from my descendants and upon such terms and conditions as are reasonably determined appropriate by the Foundation managers. The budget for each such family reunion shall not exceed $30,000.00, as inflation adjusted pursuant to Section 4.01 (g). My Trustee shall take such further actions as are necessary to assure that no trust under this Agreement can be reformed, modified, or changed in any way after my death, and in the event that such modification, reformation, or otherwise is formally recommended to a court of competent jurisdiction by an acting Corporate Trustee, or is not opposed by court action filed by such Corporate Trustee to make best efforts to avoid a reformation, modification, or change, then such Corporate Trustee shall be required to immediately resign and then replaced by alternate Eligible Corporate Trustee elected by majority vote of my descendants who are not in favor of such reformation, modification, or change, or as appointed by a court of competent jurisdiction if no such majority exists, in order to discourage any such change.

Notwithstanding the above, reformation or modification made to avoid income taxes, to avoid confiscation of Trust assets, or to avoid changes which would not impact or expand the material aspects of the dispository plan set forth under this Agreement and any Agreement herein attached, may be facilitated as and when determined appropriate by a court of competent jurisdiction where the order does not expand distributions or access to assets being given to any of my descendants, or other legal rights that descendants might otherwise have or be given to direct how Trust assets would pass, to increase compensation or expense reimbursement, or to otherwise change from what I have intended in executing and funding this Trust Agreement.


STATUTORY EXPANSION OF ABILITY TO HAVE LAWYER AND RELATED COSTS PAID FROM TRUSTS UNDER EXPANDED FLORIDA STATUTE SECTION 733.106.

The 2016 Florida Statutes

Title XLII | Chapter 733 | View Entire Chapter

ESTATES AND TRUSTS PROBATE CODE: ADMINISTRATION OF ESTATES

733.106 Costs and attorney fees.—

(1) In all probate proceedings, costs may be awarded as in chancery actions.

(2) A person nominated as personal representative, or any proponent of a will if the person so nominated does not act within a reasonable time, if in good faith justified in offering the will in due form for probate, shall receive costs and attorney fees from the estate even though probate is denied or revoked.

(3) Any attorney who has rendered services to an estate may be awarded reasonable compensation from the estate.

(4) If costs and attorney fees are to be paid from the estate under this section, s. 733.6171(4), s. 736.1005, or s. 736.1006, the court, in its discretion, may direct from what part of the estate they shall be paid.

(a) If the court directs an assessment against a person's part of the estate and such part is insufficient to fully pay the assessment, the court may direct payment from the person's part of a trust, if any, if a pour-over will is involved and the matter is interrelated with the trust.

(b) All or any part of the costs and attorney fees to be paid from the estate may be assessed against one or more persons' part of the estate in such proportions as the court finds to be just and proper.

(c) In the exercise of its discretion, the court may consider the following factors:

1. The relative impact of an assessment on the estimated value of each person's part of the estate.
2. The amount of costs and attorney fees to be assessed against a person's part of the estate.
3. The extent to which a person whose part of the estate is to be assessed, individually or through counsel, actively participated in the proceeding.
4. The potential benefit or detriment to a person's part of the estate expected from the outcome of the proceeding.
5. The relative strength or weakness of the merits of the claims, defenses, or objections, if any, asserted by a person whose part of the estate is to be assessed.
6. Whether a person whose part of the estate is to be assessed was a prevailing party with respect to one or more claims, defenses, or objections.
7. Whether a person whose part of the estate is to be assessed unjustly caused an increase in the amount of costs and attorney fees incurred by the personal representative or another interested person in connection with the proceeding.
8. Any other relevant fact, circumstance, or equity.

(d) The court may assess a person's part of the estate without finding that the person engaged in bad faith, wrongdoing, or frivolousness.

History.—s. 1, ch. 74-106; s. 49, ch. 75-220; s. 984, ch. 97-102; s. 82, ch. 2001-226; s. 1, ch. 2015-27.

Note.—Created from former s. 732.14.

CREDITOR PROTECTION CONSIDERATIONS


FOUR YEAR STATUTE OF LIMITATIONS MAY NOT APPLY WHEN TRANSFERS ARE MADE TO AVOID CREDITORS UNLESS THE DEBTOR FILES BANKRUPTCY

The Florida Fraudulent Transfer Statute provides for a statute of limitations that is sometimes four years, and sometimes until the later of four years or one year from when the creditor knew or should have known about the transfer. The solely “four year” statute will generally apply when the transfer is from a non-exempt asset to an asset that is exempt from creditor claims under Florida Statute Section 222, which may not include transfers to tenancy by the entireties, because they are not listed as an exempt asset under Section 222. Homestead is listed as an exempt asset under Section 222, but because the homestead exemption has been found to trump the Fraudulent Transfer Statute, the four year statute will usually be irrelevant with respect to a transfer into homestead.

<u>Florida Statute Section 726.110 provides that:</u>

- A cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought:
- (1) Under s. 726.105(1)(a), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant;
- (2) Under s. 726.105(1)(b) or s. 726.106(1), within 4 years after the transfer was made or the obligation was incurred; or
- (3) Under s. 726.106(2), within 1 year after the transfer was made or the obligation was incurred.


Notwithstanding the above, in the 2014 First DCA case of *Biel Reo, LLC v. Barefoot Cottages Development Company*, the Court determined that no statute of limitation applies where a judgment is being enforced in a proceedings supplementary. A proceedings supplementary is an action filed as part of the same lawsuit in which the judgment was awarded. The *Biel Reo* case took the debtors Bar by surprise and has changed the status quo for a good many debtors who were under the impression that a four year statute applied.

Fortunately, for those debtors who are well positioned to file a bankruptcy to discharge the debt, it appears that the above-referenced four year (or the longer of four years or one year after a creditor knew or should have know of a transfer as applicable) will apply if the debtor files for bankruptcy. In the 2015 Bankruptcy Court decision of *In re C.D. Jones & Company, Inc.,* 2015 WL 2260707, the Bankruptcy Court found that Florida's proceedings supplementary statute would not apply to extend the statute of limitations upon setting aside fraudulent transfers in bankruptcy. This appears to be a well reasoned and accurate conclusion.

As the result of the above, debtors who have judgments against them and have made transfers that should be unchallengeable need to stay positioned to file a Chapter 7 bankruptcy, if they can otherwise qualify for a Chapter 7 discharge. Bankruptcy rules are discussed in the Chapter 2 article entitled "Avoid Catastrophe: Know the Bankruptcy Code to Ward Off Devastating Surprises to an Estate Plan."

BAKER'S DOZEN: NO CUPCAKES FOR THE UNINFORMED DEBTOR

By Alan Gassman and Lydia Greiner

I had 12 cupcakes and 3 ex-friends
When we get together, the fun never ends.

Many debtors prefer to stay out of bankruptcy for a number of good reasons**,** [Often, the primary reason is to avoid losing a homestead protected under state law but not under the 2015 Bankruptcy Act 10-Year Look-Back for Fraudulent Transfers or the 1215-day ownership requirement, or the 730-day residency requirement. Also, a bankruptcy discharge right will be lost forever if a bankruptcy action is filed within one year of making a fraudulent transfer.] however, under Section 303 of the Bankruptcy Code, a debtor can be forced into bankruptcy through an involuntary proceeding. It is well established under Bankruptcy Code Section 303 that it takes three qualified creditors to force a debtor into bankruptcy if the debtor has twelve or more creditors with undisputed claims that together exceed a statutorily established amount.

In determining which creditor (or three, if there are twelve or more) can force a debtor into involuntary bankruptcy, the court will evaluate the creditor's claims and whether they are non-contingent as to liability and amount and whether the claims are undisputed. [11 U.S.C. § 303(b)(1-2)]. Additionally, for a proceeding under 11 U.S.C. § 303(b)(1), the court will need to determine whether the undisputed, non-contingent claims have an aggregate value of $15,325 [The aggregate amount required for claims is statutorily provided and is periodically adjusted to compensate for inflation: $15, 325 is the amount required for filings in 2016.] "more than the value of any lien on property of the debtor securing such claims held by the holders of such claims." [11 U.S.C. § 303(b)(1).]

If there are fewer than 12 creditors, 11 U.S.C. § 303(b)(2) will apply. However, creditors proceeding under Section 303(b)(2) are still subject to some statutory requirements. The aggregate amount of the creditors' claims, for example, must be $15,325 or more. [11 U.S.C. § 303(b)(2).] Additionally, certain types of creditors, insiders, are not eligible to initiate the proceeding. [11 U.S.C. § 303(b)(2).] Unlike Section 303(b)(1), there is no additional requirement under Section 303(b)(2) that the creditor's aggregate claims exceed the value of any lien on the debtor's property securing the claims by the statutorily prescribed $15,325. [11 U.S.C. § 303(b)(2).

Confusion arises when trying to determine what is an eligible creditor that may be counted as one of the twelve required in a Section 303(b)(1) proceeding. Whether a creditor is eligible to file for involuntary bankruptcy depends on their claim(s) against the debtor.

Although "creditor" only has one definition in these types of proceedings,[11 U.S.C. § 101(10)(A-C). Creditor is defined under the Federal Bankruptcy Statute as the "entity that has a claim against the debtor that arose at the time of or before the order of relief concerning the debtor," and an "entity that has a community claim."] the type of creditor qualified to file for involuntary bankruptcy may differ from those counted in determining whether the debtor has a sufficient number of holders to initiate a Section 303(b)(1). Unfortunately for debtors, the definition of "creditor" under Section 303 is not as broad as the common law definition, and there have been a significant number of inconsistent court cases.

Courts have reached different conclusions in deciding who is eligible [In addition to the statutory requirements that their claims be qualified (undisputed and non-contingent.) to count toward the required 12 or more creditors. While some illegitimate creditors may easily be identified and discounted, others require the court to examine factors related to the creditor's claim and the relationship between the debtor and creditor. These inconsistencies result in difficulty and confusion when trying to identify eligible creditors.

The primary categories of creditors that will be eliminated in determining if the 12-creditor requirement is met under a Section 303(1)(b) proceeding are as follows:

1. Creditors whose claims are contingent or not finally determined.
2. Creditors whose claims are adequately secured by collateral worth as much or more than is owed.
3. Creditors who are "insiders."
4. Creditors who owe the debtor more than the debtor owes the creditors.
5. Creditors who owe so little that the debt will not be considered to be "real."
6. Creditors who are considered to be an alter ego of the debtor.

Don't share cupcakes with insiders.
They aren't known to be providers.
You'll end up with just a wrapper,
And not feeling so dapper


In determining the number of legitimate creditors who may trigger involuntary bankruptcy, insiders are a large group of creditors that include different individuals or entities depending on who the debtor is – a natural person, a fictitious entity, or a municipality. [11 U.S.C. § 101(31).] Although an insider is not among the creditors who are counted when determining whether the debtor has a sufficient number of creditors to trigger involuntary bankruptcy under 11 U.S.C. § 303(b)(1), they are not barred from pursuing claims against the debtor if a proceeding is initiated. [11 U.S.C. § 303(b)(2); see also In re Little Bldgs, Inc., 49 B.R., 889 (B.C. N.D. Ohio, 1985). Insiders in an involuntary bankruptcy context include:

(A) If the debtor is an individual --
i. Relative of the debtor or of a general partner if the debtor
ii. Partnership in which the debtor is a general partner
iii. General partner of the debtor; or
iv. Corporation of which the debtor is a director, officer, or person in control;

(B) If the debtor is a corporation –
i. Director of the debtor;
ii. Officer of the debtor;
iii. Person in control of the debtor;
iv. Partnership in which the debtor is a general partner;
v. General partner of the debtor; or
vi. Relative of a general partner, director, officer, or person in control of the debtor;

(C) If the debtor is a partnership –
i. General partner in the debtor;
ii. Relative of a general partner in, general partner of, or person in control of the debtor;
iii. Partnership in which the debtor is a general partner;
iv. General partner of the debtor; or
v. Person in control of the debtor

(D) If the debtor is a municipality, elected official of the debtor, or relative of an elective official of the debtor;

(E) Affiliate or inside of an affiliate as if such affiliate were the debtor; and

(F) Managing agent of the debtor. [11 U.S.C. § 101(31)(A-F).]

Additionally, the requirement of "generally not paying such debtor's debts" may resonate differently with different courts depending on where the creditors filed for the involuntary bankruptcy action. Courts will use a totality of the circumstances test and balance the interests of the parties in determining whether a creditor pursuing involuntary bankruptcy action should be dismissed. A few factors that most courts examine include: the number of unpaid claims, the amount of the claims, the materiality of the non-payments, and the debtor's conduct in financial affairs.

Further, the court in *In re The District of McAllen* found that *ad valorem* tax authorities, insiders, persons that owe more money than they are owed, and lease deposits that are contingent do not count to make creditors eligible to join an involuntary bankruptcy action, while *de minimus* claims do count. [In re The District of McAllen LP, case no. 14-70661 (Southern Dist. TX 2015).]


While there is no bright line rule to determine which creditors are "legitimate creditors," in every situation involving an involuntary bankruptcy proceeding, the table on the following pages may help to provide some general guidelines.

Who is a Legitimate Creditor in an Involuntary Bankruptcy Proceeding under 11 U.S.C. § 303			
Factor or Type of Claim	**Legitimate Claim?**	**Law**	**Cupcake?**
Contingent claims	No	Statute: 11 U.S.C. § 303	
Subject to a bonafide dispute as to liability	No	Statute: 11 U.S.C. § 303	
Subject to a bonafide dispute as to amount	No	Statute: 11 U.S.C. § 303	
Held by insiders of the debtor* (See definition from statute above)	No	11 U.S.C. § 303	
Debtor's debt has an aggregate value less than $15,325	No	11 U.S.C. § 303	
Employee	No	11 U.S.C. § 303(b)(2)	
Former Employee	Yes	*In re Demirco Group*, 343 B.R. 898 (B.C. C.D. Ill., 2006).	
Transferee of a voidable transfer	No	11 U.S.C. § 303(b)(2)	

I like cupcakes,
And I eat quite a few,
But every so often,
Instead I get a screw.

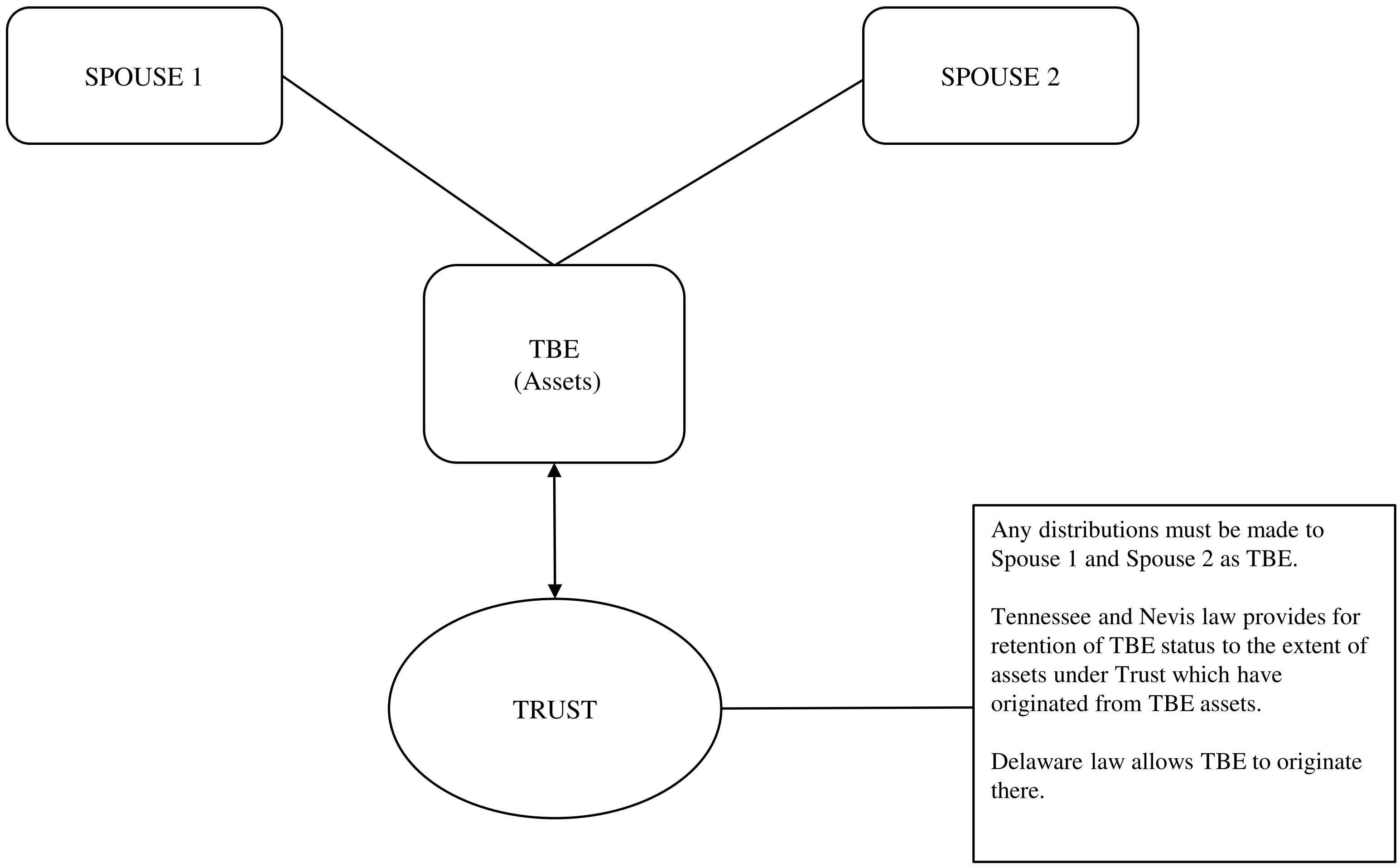
*Insiders are not prohibited from filing a claim against the debtor; they are only excluded from consideration in determining debtor's legitimate creditors. [See *In re Little Bldgs, Inc.*, 49 B.R. 889 (Bankr, N.D., Ohio. 1985).


Who is a Legitimate Creditor in an Involuntary Bankruptcy Proceeding under 11 U.S.C. § 303			
An indentured trustee representing a holder	No	11 U.S.C. § 303	
Creditor to whom debtor's debt is not yet due**	No	*Atlas Machine & Iron Works, Inc. V. Bethlehem Steel Corp.*, 986 F2d 709 (VA Ct. App. 4, 1993).	
Lenders who make loans to debtor without formal loan documentation paperwork	No	*In re Smith*, 415 B.R. 222 (BC ND Tex, 2009).	
Debtor's Accountant	Yes	*In re Blaine Richards & Co.*, 10 B.R. 424 (B.C. E.D. NY, 1981).	
Debt for gasoline when purchased using a credit card	No	*In re Blaine Richards & Co.*, 10 B.R. 424 (B.C. E.D. NY, 1981).	
Small recurring or de minimis claims	Yes	11 U.S.C. § 303; *In re Elsa Designs, Ltd.*, 155 B.R. 859 (B.C. S.D. NY, 1993).	

** A creditor who is paid on time is unable to bring a claim against the debtor, and, thus, the claim would be subject to dispute. [See Atlas Machine & Iron Works, Inc. v. Bethlehem Steel Corp., 986 F. 2d 709 (VA Ct. App. 4, 1993.)]

TBE TRUST PLANNING MAY BE EXPANDED BY DELAWARE, NEVIS AND TENNESSEE APT TRUST LEGISLATION

Nevis, Tennessee, or Delaware TBE APT Jurisdiction Trust



Bifani Case Expands Definition of Ill Gotten Gains That May Not be Protected If Transferred to Homestead

Way Down Upon the Bifani River: Setting Aside Fraudulent Transfer into Florida Homesteads- By: Alan S. Gassman, Travis Arango, and Dena Daniels

Debtor's Transferee Who Received Pre Bankruptcy Fraudulent Transfer Ends Up All Wet

Footnote from Editor--The Suwannee River is a 246 mile blackwater river that can take you much of the way from the Tampa Bankruptcy Court to the 11th Circuit Court of Appeal in Atlanta, which is where this case went before the debtor's raft sank. Made famous by Stephen Foster's song, The Old Folks at Home (Foster never saw the river but read about it), Mr. Gassman owns two lots on this river that he bought in 2007 and would gladly sell for half of what he paid, and no extra charge for the alligators who live there. See Way Down Upon The Suwannee River Far Away, LLC on the Sunbiz Website, and also Hey Santa Fey (river), LLC and Withlacoochiecoochicoo, LLC., which own his other failed river investments.

This article is dedicated to the memory of Joan Rivers, who performed in Tampa Bay shortly before her death at age 81 with great energy and physical strength, like many of us who love what we do and intend to die in the saddle.

The Florida Supreme Court, in *Havoco of America, Ltd. v. Hill,* 790 So.2 d 1018 (Fla. 2001), held that the homestead protection afforded under the Florida Constitution trumps the Florida Fraudulent Transfer Statute, and therefore a debtor subject to an impending or actual judgment can use monies to purchase or pay down the mortgage on a homestead owned by the transferor, with the creditor having no remedy against the homestead unless or until the debtor files for bankruptcy by reason of the provisions of the 2005 Bankruptcy Reform Act "Mansion Law".

But what if the debtor, knowing that he or she may be going into bankruptcy, gives the monies to a close friend who puts them into a homestead and then intends to hunker down and remain judgment proof, and outside of bankruptcy, so that the creditor is not able to recover the funds? And the debtor is able to live with the close friend and enjoy the benefit of the home. Will this boat float?

This exact factual pattern has occurred more than once, leading the courts to look for a way to reach the home equity and prevent this type of conduct, as opposed to waiting for Congress to endorse an appropriate remedy by amending the Bankruptcy Code.

Judge Michael Williamson, a very able and well-respected bankruptcy judge of the Middle District Bankruptcy Court sitting in Tampa, came to the conclusion in 2013 that a fraudulent transfer, directly or indirectly, to the debtor's cohabiting and apparent significant other before filing bankruptcy rose (like a river) to the level of being considered as secretion of "ill-gotten gains" under the Florida case law, saying specifically that:

> **Here, LaMarca's Sarasota house was acquired with ill-gotten proceeds. LaMarca used the nearly $670,000 from the sale of the Golden Eagle Road property to purchase her Sarasota house. It would be inequitable and unjust to allow the Debtor (Bifani to fraudulently transfer property to LaMarca to keep it from his creditors. [**In re Bifani, 493 B.R. 866, 871 (Bankr. M.D. Fla. 2013)]

The Federal District Court sitting in Tampa found that the decision did not hold water, and overturned it, but the Eleventh Circuit Court of Appeal agreed with the judge, finding that:

> **Under Florida law, homestead property purchased with funds obtained by fraud is not exempted from equitable liens. *See Havoco,* 790 So.2d at 1028. The facts of this case do not fall within *Havoco* 's exception because the funds used to purchase the Sarasota property were obtained through Bifani's fraudulent transfers.....That the fraud occurred in a bankruptcy proceeding rather than a criminal offense is irrelevant.**

It is almost certain that the U.S. Supreme Court will not have any interest in hearing this case, and the Florida Supreme Court will not have jurisdiction because bankruptcy court cases pass to the federal system, and not under the state system. The Eleventh Circuit Court of Appeals could have requested guidance from the Florida Supreme Court by certifying the issue as a question of importance but apparently chose not to do so. Floridians and their advisors will now most likely need to wait a number of years before similar factual patterns occur in Circuit Courts and become subject to Circuit Court decisions that are appealed to District Courts of Appeals, and then eventually to the Florida Supreme Court.

A prominent bankruptcy attorney has had this to say about the case:

> **If you think it through, the whole idea of getting around the federal Bankruptcy law by doing something through an apparent straw man that you cannot do directly, you can certainly conclude that at least the spirit of the 2005 Bankruptcy Act was violated. That doesn't really shock me. If you're going to try to take advantage of the Florida homestead law, you need to follow the centuries old method of buying your own house, and if this is a fraudulent transfer you also have to stay out of bankruptcy for 10 years thereafter. It's not escaping taxes or domestic relations liability, it's not money you stole from somebody else, but a well respected bankruptcy judge, with affirmation from the highest federal court overseeing Florida federal courts have found that it is the equivalent of transferring ill-gotten gains into homestead. Debtors and advisors are going to have to stick with the patterns that worked, at least for the foreseeable future. It could be a decade or more before the Florida Supreme Court or the U.S. Supreme Court ever look at this.** In re Bifani, 580 F. App'x 740, 747 (11th Cir. 2014)

Judge Williamson had this to say after the 11th Circuit Court of Appeals opinion was published:

> **While *Havoco* attracts the most attention in allowing a fraudulent conversion of non-exempt property into a homestead, what is often overlooked is that *Havoco* itself recognizes the *Fishbein* exception*,* 619 So. 2d 267 (Fla. 1993), which allows the imposition of an equitable lien where there are two frauds: (1) the permitted fraudulent conversion into the homestead, and (2) the initial wrongful conduct that taints the proceeds as being ill-gotten, e.g. the funds were stolen or obtained through fraud. The 11th Circuit in *Bifani* simply confirms what has long been the law in this area.**

While this case may be criticized by some as being judicial legislation, and may add to the longstanding misconception among some courts and advisors that a fraudulent transfer somehow constitutes fraud and is therefore bad or per se illegal, it also shows that conventional knowledge will sometimes be turned on its ear, without warning, and that clients and advisors should not rely upon any one creditor protection technique, or any particularly creative or aggressive one, when multiple techniques are available. Also, as we all know, hogs are often slaughtered.

In *Havoco,* the Florida Supreme Court found that an intentionally fraudulent transfer into homestead would not be set aside because the protection of homestead under the Florida Constitution trumps the Florida Fraudulent Transfer Statute. In *Fishbein*, however, the Florida Supreme Court found that when ill-gotten monies are transferred into homestead, the transfer can be set aside. In *Bifani,* the 11th Circuit agreed with Judge Williamson that a fraudulent transfer made by someone contemplating bankruptcy will be considered as ill-gotten gains for purposes of recapturing the transfer from the homestead of the transferee that was funded thereby.


FLORIDA BAR ACTION AGAINST LAWYER FOR ALLEGED FRAUDULENT TRANSFER

By Alan Gassman and Dena Daniels

In December 2015, the Florida Supreme Court determined that a lawyer forming a second professional association in an attempt to avoid paying a judgment owed by his first P.A. did not violate Florida's Rules of Professional Conduct. [When violations of the Florida Rules of Professional Conduct occur, the complaint is first brought before the Florida Bar Committee on Professional Ethics, once a decision is rendered at that level, an appeal to the Florida Supreme Court may be filed. Upon the Florida Supreme Court receiving the case, a "Referee" is assigned to the case to determine the final holding.] Initially, the Florida Bar sued the lawyer [The Florida Bar v. Jefferson Riddell, SC 15-1288 (Dec. 18, 2015).] claiming two separate violations. First, that the new professional association was a mere continuation of the prior one and had been formed with the intent to hinder, delay, or defraud another law firm, which the Bar alleged was a violation of Rule 4-8.4, and, second, that the lawyer diverted monies belonging to the first professional association to a bank account owned by the second professional association with the intent to hinder, delay, or defraud the creditor.

Rule 4-8.4(c-d), titled "Misconduct," states that "a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, (d) a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice." The Supreme Court appointed Referee found that the lawyer did not transfer tangible assets or accounts receivable from the first professional association to the second and that there was no transfer of goodwill to the second professional association. The Referee also found that the lawyer's long-standing practice of paying personal expenses from the business operating account of the professional association "is more than norm for small business[es] than the exception," and that every year, his CPA sorted out personal and business expenses so that "nothing was hidden. Nothing was 'laundered.'" The court further noted that the Respondent did not commit fraud, deceit, or misrepresentation.


The Referee indicated that the evidence was not clear and convincing such that it could be proven that the lawyer acted in an unlawful or contrary manner to honesty and justice. It would have been nice if the Referee had further pointed out that even if this lawyer had committed a "fraudulent transfer" to avoid a creditor, this would not be considered as conduct involving dishonesty, fraud, deceit, or misrepresentation. Nor, by our view, would this be considered to be "prejudicial to the administration of justice." In the US Supreme Court case of *Grupo Mexicano v. Alliance Bond Fund*, [527 US 308 (1999).] it was ruled that it is not illegal or "wrong" for a debtor to take steps to preserve assets that may be legally used. The Supreme Court held that it did not have the authority to grant a preliminary injunction that would hinder individuals being sued by creditors from disposing his or her assets pending adjudication of contract claim of the creditor for damages. In the opinion, the late Justice Antonin Scalia stated that allowing federal courts to issue such injunctions to creditors "could radically alter the balance between debtors' and creditors' rights and might induce creditors to engage in a race to the courthouse…which might prove financially fatal to the struggling debtor."

This case does point out that the Florida Bar may pursue lawyers who engage in aggressive transfers to avoid creditors and that it is important to confirm that no such transfer involves dishonesty, fraud, deceit, or misrepresentation.

EXCERPTS FROM HOUSE BILL 206 PROPOSED BY SENATOR KATHLEEN PASSIDOMO – VIDEO WILL AND TRUST EXECUTION – COULD THIS REALLY BE HAPPENING?

A bill to be entitled An act relating to electronic wills; amending s. 731.201, F.S.; revising the definition of the term "will" to include electronic wills;…

Section 3. Section 732.521, Florida Statutes, is created to read:

732.521 Short title-Sections 732.521-732.529 may be cited as the "Florida Electronic Wills Act."

Section 4. Section 732.522, Florida Statutes is created to read:

732.522 Definitions.-As used in ss. 732.521-732.529, the term:

(1) "Certified paper original" means a tangible document that contains the text of an electronic will, including a self-proving affidavit concerning that will if applicable.

(2) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

…

(4) "Electronic will" means an instrument, including a codicil, executed by a person in the manner prescribed by this act which disposes of the person's property on or after his or her death and includes an instrument that merely appoints a personal representative or revokes or revises another will or electronic will.

…

Section 10. Section 732.528, Florida Statutes, is created to read:

732.28 Qualified custodians.-

(1) To serve as a qualified custodian of an electronic will, a person must:

(a) Not be an heir or devisee, as defined in s. 731.201, of the testator.

(b) Be domiciled in and a resident of this state or be incorporated or organized in this state.

(c) Consistently employ a system for ensuring the safekeeping of electronic records.

(d) Create and store in the electronic record of any given electronic will all of the following concerning such electronic will:

1. A photograph or other visual record of the testator and the attesting witnesses, if any, taken by a qualified custodian at the time the electronic will is executed.

2. A photocopy, photograph, facsimile, or other visual record of a document provided to the qualified custodian at the time the electronic will is executed which establishes the testator's identity, including without limitation any of the forms of identification set forth in s. 117.05(5) (b) 2.a.-i.

3. If there are attesting witnesses to the electronic will, a photocopy, photograph, facsimile, or other visual record of a document provided by the qualified custodian at the time the electronic will is executed which provides reasonable proof of each attesting witness' identity, including any of the forms of identification specified in s. 117.05 (5) (b) 2.a.-i.

4. An audio and video recording of the testator and the attesting witnesses or notary public electronically signing the electronic will as provided in s. 732.524 (1) (c).

...

COLORADO ENACTS AID IN DYING ACT TO BECOME 6^{TH} U.S. STATE –

ALL REQUIRE RESIDENCY, AND ALL BUT MONTANA REQUIRE A 6 MONTH OR LESS LIFE EXPECTANCY

Colorado joins the other four states that permit “legal suicide” medication prescriptions for terminally ill individuals–must have less than a six month life expectancy and multiple physician interactions as a Colorado resident.

On December 16, 2016, the governor of Colorado signed into effect the Colorado End of Life Options Act after it was approved by 65% of the state’s voters. The Act allows “individuals with a terminal illness to request from their physician and then self-administer, medical aid-in-dying medication.”

In order to be eligible to request aid-in-dying medication, the individual must:

- Be a Colorado resident age 18 or older;
- Be able to make and communicate an informed decision to health care providers;
- Have a terminal illness with a prognosis of six months or less to live (terminally ill) that has been confirmed by two physicians, including the individual’s primary physician and a second, consulting physician;
- Be determined mentally capable by two physicians, who have concluded that the individual understands the consequences of his or her decision; and
- Voluntarily express his or her wish to receive the medication.

Upon establishing eligibility, the individual must make two oral requests, at least fifteen days apart, and one written request in a specific form to his or her primary physician. The written request must also be witnessed by at least two other persons who meet certain requirements.

There are only four other states in the United States that currently allow physicians to aid an individual in voluntarily ending their life, being: California, Oregon, Vermont, and Washington. Montana does not have a statute that codifies the right to assisted suicide. In 2009, Montana's Supreme Court ruled that there is nothing prohibiting a physician from prescribing medication to hasten the patient's death.

A table of the requirements for physician assisted suicide in each states is shown on the next slide:

State	Date Passed	Residency Required?	Minimum Age	Number of Months Until Expected Death	Number of Requests to Physician
California	10/5/15	Yes	18	Six or less	Two oral (15 days apart) and one written
Colorado	11/8/16	Yes	18	Six or less	Two oral (15 days apart) and one written
Montana	12/31/09	Yes	--	--	--
Oregon	11/8/94	Yes	18	Six or less	Two oral (15 days apart) and one written
Vermont	5/20/13	Yes	18	Six or less	Two oral (15 days apart) and one written
Washington	11/4/08	Yes	18	Six or less	Two oral (15 days apart) and one written

The Estate Planner's Update – Tax and Florida Law

Monday, February 6, 2017

12:30 PM EST

Includes a 1 hour CLE credit upon completion

Join Alan Gassman and Brandon Ketron for this whirlwind tour of planning information, structuring, and tax and legal issues and opportunities

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Free webinar presented by Gassman, Crotty & Denicolo, P.A.