GASSMAN CROTTY & DENICOLO, P.A.

ATTORNEYS AT LAW

THE THURSDAY REPORT

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Re: April Showers Bring May Thursdays

In This Issue:

How to Know Whether You Should Seek Advice About Re-structuring to Qualify for the 20% Tax Deduction Under Section 199A

By: Alan S. Gassman and Brandon L. Ketron

Many taxpayers will mistakenly not qualify for the new 20% deduction available for trade and business income by reason of not restructuring to fit within the definitions that must be satisfied.

While the new law is complicated and will provide an automatic 20% deduction for many business and investment activities, thousands of taxpayers will discover after it is too late that there were things that they could have done to qualify for the deduction.

This article will enable many novices to identify Section 199A deduction arrangements that may be necessary for their situation. This is not intended to be a comprehensive treatment of Section 199A. Our comprehensive article in progress with respect to Section 199A can be viewed by clicking here.

Individuals and separately taxed trusts that have $157,500 or less in total taxable income, or $315,000 if married, will qualify for the 20% deduction if they personally own a trade, business, or active rental activity, or report K-1 income from a partnership or S-corporation that has a trade, business, or active rental activity.

Where the individual taxpayer or trust has more than the above amounts in total income, certain limitations apply to cause a phase out of the deductions if a single taxpayer or a trust has income between $157,500 and $207,500, or if a married couple has between $315,000 and $415,000, and there is zero deduction permitted at above the $207,500 or $415,000 level if certain requirements are not satisfied.

Here are what those requirements for high earner taxpayers are:

1. The entity generating the income must have sufficient wage expenses and/or qualified property used in the business to allow for the deduction.

As the result of this first test, many individual taxpayers, S-corporations, and LLCs and other entities taxed as partnerships will be well advised to pay wages and/or to acquire depreciable assets to allow for the deductions to occur.

For example, a widget company that generates $200,000 a year in K-1 income and provides a $100,000 K-1 to a 50% owner who earns more than $415,000 a year needs to pay wages of at least $80,000 a year to any one or more employees or have sufficient depreciable assets with an original cost of at least $1,600,000 (which are not yet completely depreciated, or have not been placed in service for more than 10 years), or some combination of the above in order for the high bracket shareholder to pay tax on only 80% of the K-1 income.

Many businesses will convert independent contractors to employees or pay wages to owners in order to meet this test.

Many individuals and businesses will form and fund pension plans to get their income below the $157,500 or $315,000 levels to avoid the need to add wages or qualified property to a business.

2. A second prominent prohibition (besides the wages / qualified property requirement above) applies to specified service trades or businesses, and include the practice of medicine, law, consulting, accounting, financial services and other items that are shown below in the footnote.

Only individual taxpayers and trusts who are above the income limits described above are impacted by these limitations.

As the result of this, many professional practices and other specified service businesses and their owners will consider the following:

1. Reduce individual income to be below the limits described above.

2. Allow for ownership by other individuals or trusts or combinations thereof so that each owners' taxable income will be below the income limits described above.

3. Establish arm's length management companies or other entities that will cause reduction of the income from the professional services that can be earned or reported to taxpayers who are below the limits described above or are arranged so that the management, marketing, or other applicable operation has sufficient wages and/or qualified property to qualify for the Section 199A deduction.

The above will be discussed in more detail in an article titled Managing Management Companies Under Section 199A - 29.6 Reasons That High Earners Should Consider This.

In addition to the above, rental operations may need to be active, as opposed to passive triple net leases, for example, to qualify for the deduction. Businesses and their related real estate owner entities might review what fair market value rental amounts should be to determine if rent can be increased to reduce specified services business income or income that would be earned by a business that would not have sufficient wages or qualified property if its owners are above $157,500 / $315,000 levels.

There are other planning opportunities that may be considered in addition to or in conjunction with the above.

Example – John is a lawyer who works as an employee for a law firm. Most of his work is for one client.

John receives only a salary for the law firm, and wages do not qualify for the 199A deduction.

John may establish an S-corporation to provide legal services for the client. John will take a salary, and remaining S-corporation K-1 income will qualify for the 20% deduction if he and his spouse have total income of less than $315,000, which is calculated after reduction for the $24,000 minimum standard/itemized deduction amount and pension plan contributions that might be made by the S-corporation.

Partners in an LLC or other entity taxed as a partnership should consider whether to own their interest through an S corporation and consider whether compensation paid by partners can qualify as wages under the "guaranteed payment rules." - HINT - - They can't.

By reviewing current arrangements, taxpayers may position themselves to be eligible for the Section 199A deduction, which can provide significant tax savings that otherwise may not have been available.

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USING NEW AND ALTERED OLD IRREVOCABLE TRUSTS TO SAVE INCOME TAXES

by: Alan S. Gassman & Brandon L. Ketron

Irrevocable trusts have been popular for many decades as a way to assure that family wealth can be held safely for spouses, descendants, and others.

A primary purpose for establishing irrevocable trusts in the past has been to facilitate the avoidance of federal estate tax. Oftentimes, this has involved making the trust "defective" for income tax purposes by having its income be considered as income of the Grantor. This enables the Grantor to pay income taxes on behalf of the trust, which reduces the Grantor's estate. This worked well for Grantors who had concerns that they would be subject to federal estate tax at the time of death, but is no longer needed for a high percentage of individuals who set these trusts up and would be just as happy now to have the assets back in their own name, or to at least have the trust pay its own taxes.

Another common arrangement that has been very popular in the past decades is an irrevocable trust that benefits a spouse and descendants. These include "Irrevocable Life Insurance Trusts" ("ILITs") where a trustee can pay premiums on life insurance on the life of the Grantor, trusts that benefit the Grantor's spouse, commonly known as "Spousal Limited Access Trusts" ("SLATs"), in addition to trusts for descendants where the Grantor has retained the right to replace trust assets with assets of equal value or has named non-beneficiaries who can add beneficiaries to the trust to make the trusts effective for income tax purposes.

These trusts are normally protected from creditors of either spouse, and considered as owned by the donor spouse for income tax purposes.

One common disadvantage of these "defective" trusts that can be eliminated by proper changes is that the assets under the trust may not get a new fair market value income tax basis when the Grantor, or other senior members of the family die, the way they could if the assets were maintained outside of an irrevocable trust. Many believe that a step-up in basis does not occur on the death of a Grantor if the trust is defective for income tax purposes, but many do not.

There will be no step-up in basis when the Grantor of a complex trust dies, unless he or she holds a power to appoint trust assets to the Grantor, the Grantor's estate, the Grantor's creditors, or creditors of the Grantor's estate, as discussed below.

Times Have Changed for a Great Many.

An $11,200,000 per person (and growing with the chained Consumer Price Index) estate tax exemption now applies, and even though this amount is scheduled to be reduced by half in 2026, a great many families have very little, if any, risk of ever paying federal estate tax.

At the same time, the federal income tax law now often favors trusts, which are taxed at their own bracket on retained income, and can distribute income to low tax bracket beneficiaries to reduce the overall federal income taxes paid by a family. These are called "Complex Trusts," although they are usually not very complicated. If, for example, a "complex" trust receives $112,500 worth of income during a calendar year, it might distribute $20,000 of income to each of five young adult beneficiaries whose income would be taxed in the 22% tax bracket (assuming that the Kiddie Tax does not apply), and it could retain $12,500 of income and pay $3,011.50 of tax on such income, as compared to having a high bracket Grantor of the trust pay a 37% income tax plus a 3.8% Medicare tax (40.8% times $12,500 is $5,100, thus saving $2,088.50 in income taxes on income retained by the trust. 40.8% times $112,500 is $45,900. 22% of $100,000 equals $22,000 of income taxes paid by the beneficiaries plus $3,011.50 of income taxes paid by the trust equals $25,011.50 in total taxes paid by the trust and beneficiaries. $45,900 minus $25,011.50 equals $20,888.50 of income tax savings for the family).

The situation can be even better where the trust allows for other tax savings as described below.

1. Charitable Distributions. If the Trust Agreement authorizes distributions to charity, then distributions made to charity carry otherwise taxable income out to the charity, that is not taxed. The family therefore gets the equivalent of a charitable deduction that might not otherwise be available because of the high itemized deduction threshold ($12,000 for single individuals and $24,000 for married couples filing jointly). For example, a $20,000 charitable contribution made by a 37% tax bracket individual will commonly not result in any tax deduction whatsoever because of the $24,000 standard deduction that now applies. Using a complex trust that specifically allows for charitable payments could save 37% of $20,000 ($7,400) in taxes for a high income bracket family that can place income producing property or S corporation or partnership interests under a complex trust.

2. State and Local Tax (SALT) Deduction. Complex trusts can deduct up to $10,000 of state and local taxes, including real estate taxes, so that they can own personal use real estate and receive a tax deduction that the Grantor and other family members may not be eligible for because of the $10,000 per taxpayer limit on the deductibility of state and local taxes.

For example, a vacation home that is subject to $30,000 a year in property taxes could be owned one-third each by three separate trusts for the primary benefit of each separate child of a married couple, to enable all of the property taxes to be deductible, assuming that each of the trusts has $10,000 or more of otherwise taxable income.

3. Section 199A 20% Income Tax Deduction. Complex trusts can both receive and direct income that can qualify for the 20% flow-through income deduction under new Internal Revenue Code §199A. This can occur even when income from a trade or business partly owned by the trust does not satisfy the wage or qualified property requirement, or is from one of the 11 specified service trade or businesses where deductions are denied to high earner owners, assuming that the trust's income does not exceed $157,500.

For example, a management or intellectual property company that does not pay wages to any individuals may generate $200,000 a year of net income that its high earner owner (a single individual with total taxable income exceeding $157,500 a year or a married couple with taxable income exceeding $315,000 a year) would have to pay the full normal income tax and possibly the 3.8% Medicare tax on such income.

If such a management company was owned in part by an irrevocable trust, the trust might retain up to $157,500 of such income and receive a 20% deduction thereon, and may distribute the remaining $43,000 of income to family members who have less than $157,500 of taxable income if single or $315,000 of taxable income if married so that the $200,000 of management income would be taxed as if it were $160,000 of income ($200,000 less a $40,000 Section 199A deduction).

4. Spraying Flexibility. The complex trust also allows the trustee to decide which beneficiaries receive how much each year. The trust may exert polite pressure on the beneficiaries or even pay beneficial expenses on their behalf instead of outright to them to influence behavior in a way that can be far superior to letting such individuals have direct ownership in a management or intellectual property company. This provides significant flexibility that is not available for S corporations and partnerships because of the second class of stock and substantial economic effect rules.

In addition, distributions made during the first 65 days of the calendar year can be considered to have been made in the previous calendar year for distribution purposes. This allows the trustee and family members to confer with their tax advisors after December 31st to determine where income can best be allocated for the previous year.

5. Reduced Chance of Audit. Having income payable to a trust and distributed to low bracket taxpayers can reduce the chances of audit. Complex trusts file a Form 1041, and 1041 audits are very rare, if existent at all. Audits of low bracket taxpayers occur at a much lower frequency than the audits of high bracket taxpayers. This is certainly not a good sole reason to use irrevocable trusts, but it is an advantage.

Trusts have other income tax advantages, which include the following:

1. Tax-Free Distributions of Appreciated Assets. Appreciated assets can be transferred out of a trust to beneficiaries without triggering income tax that would apply if a trust were taxed as a corporation, or as a partnership if certain "mixing bowl" and related rules apply.

2. New Fair Market Value Income Tax Basis on Death of Power Holders. Assets held in a trust can receive a new income tax basis to avoid payment of capital gains tax on appreciation that occurs up through the date of the Grantor's death, if the Grantor has what is known as general Power of Appointment over trust assets. Court Orders or non-judicial reformation agreements may provide an individual with a short life expectancy with the right to direct how trust assets might pass within reasonably parameters, which can result in a new fair market value date of death income tax basis as if the Power Holder was the owner of the assets. This would include a power to appoint assets to creditors of the estate of the Power Holder, even if such Power is only exercisable with the consent of an independent party. This would be consistent with the intention of a Grantor who set up a trust for estate tax purposes and now wants to assert a reasonable degree of control because estate tax is no longer an issue, and the situation among family members may have changed.

Disadvantages:

1. Formation and Annual Carrying Costs. Costs and possible repercussions of changing irrevocable trusts should of course be considered. This includes evaluation of the cost of forming a trust or changing a disregarded trust to a complex trust, filing of income tax returns, and associated formalities.

2. Loss of 179 deductions. Unlike a "special allocation partnership," depreciation and §179 deductions are not available for trusts, or for beneficiaries who receive trust distributions in the year that §179 property is acquired. Trusts may have to write off furniture, equipment, and other acquired business property under the §168 rules, which will, in many cases, give them the same deduction, but over time.

While trusts are specifically prohibited from taking a §179 deduction, they are eligible for Section 168(k) bonus depreciation, which in many situations will be as good as §179 write off. The Tax Cut and Jobs Act expanded Section 168(k) bonus depreciation to enable taxpayers to immediately expense 100% of qualified business property placed in service between September 27, 2017 and January 1, 2023. Although, the percentage of qualified business property that may be immediately expensed begins to decrease after 2023, and is completely eliminated after 2027, Section 168(k) bonus depreciation provides temporary relief from the inability of trusts to take a §179 deduction.

3. Partnership Taxation May Apply. Trusts that engage in business may be taxed as partnerships instead of complex trusts if the case law that existed before the "check the box" regulations were issued in 1997 would have cause the trust to be considered to be an "association" under the Supreme Court decision of Morrissey v. Commissioner, and the subsequent Section 7701 regulations. There are no known cases where this has occurred, and the result would be that the beneficiaries of the trust will be considered to be partners and thus taxable on the retained income of the trust that would have otherwise been taxed at the trust level.

Clients with irrevocable trusts currently in place that are treated as disregarded for income tax purposes should review the situation and discuss with their advisors whether these structures should be altered in order to take advantage of the income tax planning opportunities that may exists for irrevocable trusts and the structures associate therewith.

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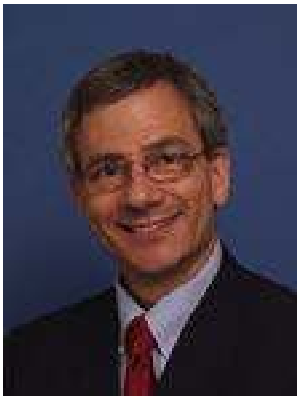

INHERITANCE TRUSTS - ONE SIZE DOES NOT FIT ALL

by: Alan S. Gassman, Esquire

Any client who may inherit should consider whether to receive the inheritance outright, or under a trust that can provide protection from creditors, divorce, unwise conduct, undue influence, or federal estate tax.

It seems clear for most affluent individuals that receiving an inheritance in trust will be the best structure, so the question becomes how to best facilitate this, and how to design the trust or trusts that will be funded on a parent's death for a well-advised child or grandchild.

By the simplest terms, such a trust can name the child or other primary beneficiary as trustee or co-trustee, and may permit the trustee to make distributions as the child and the child's family members need for health, education, maintenance and support. These "magic words," also known as the HEMS standard, can give the child the right to receive trust assets as and when needed to support a reasonable standard of living, while being immune from most, if not all, creditors, loss in divorce in the vast majority of states, and avoidance of federal estate tax at the child's level, to the extent that the parent's "generation-skipping tax exemption" is properly applied to the trust.

From a drafting and establishment standpoint, there are two ways that this type of trust planning can come about:

1. The parents can provide all language needed in their wills or revocable trust estate plan, so that the child doesn't have to do anything but follow the terms of the parent's planning documents, which can provide for the trust to be established on the death of the surviving parent, and for all of the "bells and whistles" herein-described.

2. The child or the spouse or a friend of the child can establish an irrevocable trust that may be drafted by the child's lawyer. The trust may be irrevocable and approved by the parents so that they know exactly how the disposition they will leave is going to be administered. The parents only need to amend their will or trust documents to provide that any inheritance for the child will be payable to the trustee of the Irrevocable Inheritance Trust that the child has established. Whether the Inheritance Trust is facilitated through language in the parents' estate plan or an irrevocable trust provided by the child that will receive the inheritance, a good many decisions and features will apply that merit both consideration and discussion in this article, and are as follows:

   a. Should the trust benefit family members other than the child?

Most commonly, the trust will benefit the child and the child's descendants, but not the child's spouse. Alternatively, the child's spouse may be named as a discretionary beneficiary for health, education and maintenance, but may automatically be excluded in the event of a divorce.

While the trust should not be considered to be a marital asset to be divided between the beneficiary and the beneficiary's spouse upon divorce, judges may take the value of the trust and the contemplated benefits to be received by the child into account when setting alimony or making other decisions that could be influenced by the child's resources.

Some Inheritance Trusts provide that benefits to a child will be limited unless any spouse of the child has executed a prenuptial or postnuptial agreement which provides that the trust assets will not be considered to be accessible in the event of a divorce, or as a resource in setting alimony, support, or otherwise.

A trust might provide, for example, that the maximum benefit to be received from the trust by the child and the child's spouse would not exceed $2,500 a month unless or until such an agreement is signed.

b. Can the trust be moved to an asset-protection trust jurisdiction if an exception creditor would be able to reach into it?

Most states have adopted the Uniform Trust Code, which provides that certain creditors can reach into an otherwise creditor-proof irrevocable trust funded by a third party, such as a parent, for a child. The exception creditors normally consist of ex-spouses, children, and individuals, such as lawyers, who provide services for the beneficiary, such as challenging the trust, and cannot otherwise be paid.

The trust language may provide that if a descendant of the primary beneficiary has "exception creditors," then that descendant may be removed from being a beneficiary. The trust agreement may also provide that the trustee would be required to move the trust to a jurisdiction that does not allow exception creditors to reach trust assets, such as Nevada, South Dakota, or (which others?), or which would permit the trust to be divided into separate trusts for each beneficiary so that the trust of the beneficiary having exception creditors would be relatively small to not cause possible loss of assets that are intended to primarily benefit other individuals who are beneficiaries of the trust.

c. Sole trustee or co-trusteeship?

It is the author's experience that the majority of adults expect that they should be the sole trustee of any trust established for them by their parents, while the majority of parents prefer to see their children serve as co-trustee with the child's choice of a trust company or one or more trusted individuals who can be named in the trust document, to help assure that there are checks and balances and, thus, a built-in "second opinion" on investments, spending, and other financial decisions.

Oftentimes, clients elect to serve as sole trustee but are agreeable to having a "co-trusteeship trigger" that would apply if and when they are ever in a divorce or litigation action that would threaten the trust, upon reaching a certain age, such as 80, or upon having a diagnosis of dementia, or upon written demand of one or more individuals who are deemed by the family to be trustworthy and wise.

In the author's opinion, it is safest and will generally cause no harm to require a co-trusteeship from inception if the clients have trustworthy friends, family or professional who can serve as co-trustees and will be replaceable by the primary beneficiary with other individuals and/or licensed trust companies which may be listed or be described by category and qualification in the trust agreement.

Stay Tuned for Part II in the next issue…

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File Your 2018 Annual Report – But Watch For These 4 Scams

By Phillip B. Rarick, Esq.

Within the past week, the Florida Department of State began sending notices by email to all persons with interests in Florida corporate entities, such as LLC's, corporations, and limited partnerships. These reports are due May 1, 2018 and there is no waiver of the $400 late fee if you miss this deadline.

The official Florida web site at www.sunbiz.org has "Consumer Notices" to alert you to bogus web sites that try to scam persons who file these reports. In my view, this notice highlights the failure of Florida Attorney General Pam Bondi's office to shut down these scam operations which have been in existence for over 5 years.

How To Safely File

The legitimate email notice will state that it is from the Florida Department of State; Subject: Official 2018 Annual Report Notice for: [Name of your corporate entity].

This notice will give you instructions on how to file on line at www.sunbiz.org where you will find a banner that states, "'Florida Department of State, Division of Corporations".

Florida Department of State fees for the annual registration of corporate entities are:
•Limited liability company: $138.75
•Corporation: $150.00
•Limited Partnership: $500

Watch For These Scams

Scam #1: www.sunbiz.com. This is Not the official Florida state site – although they will gladly take your registration fee and charge you an extra $100 for their "services". Avoid this site!

Scam #2: Florida Corporate Filing Services. This outfit sends you a notice in the mail that looks like they are official certificates from the State of Florida with a Tallahassee address and will request about $47 for a Certificate of Status. In another scam they may request $125 for filing corporate minutes. This is all bogus.

Scam #3: Corporate Filing Services Center. This group requests about $68 for a bogus certificate of status.

Scam #4: F.S.C. This gang has exceptionally impressive and official looking paper that resembles the quality paper of a birth certificate. They will request about $49 for a certificate of status. This is a scam.

If you receive correspondence from any of these companies, please report them to: Office of Attorney General, Attn: Pam Bondi, State of Florida, The Capitol PL-01, Tallahassee, FL 32399.

Good Time To Review Your Corporate Records – and Update Them

This is a good time to conduct an annual review of your LLC, corporation or limited partnership.

We have prepared 10 point checklist to assist you. To get this checklist click here: 10 Point Checklist For Florida Corporate Entities

It may be advisable to make an appointment with our office to ensure your corporate minutes are properly prepared, are up to date, and accurately reflect key issues, such as who are the controlling officers, who are the owners, and what shares or units does each owner hold.

To schedule an appointment, call Christy at (305) 556-5209 or email at cmedina@raricklaw.com.

Special Note

The information on this blog is of a general nature and is not intended to answer any individual's legal questions. Do not rely on information presented herein to address your individual legal concerns. If you have a legal question about your individual facts and circumstances, you should consult an experienced Miami asset protection attorney. Your receipt of information from this website or blog does not create an attorney-client relationship and the legal privileges inherent therein.

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Recent Developments in Florida Homestead Law

By Jonathan Gopman, Michael Rubenstein & Evan Kaufman

The Florida homestead exemption against forced sale is an interesting tool to use to help shelter otherwise non-exempt wealth from the claims of creditors. Nonetheless, there are traps for the unwary and situations that merit careful review for planners assisting clients who desire to use this exemption. Four recent cases highlight these potential benefits of pitfalls of the homestead exemption. This commentary exams those cases.

FACTS:

The Florida homestead exemption has gained notoriety over the last several decades as the homestead exemption permits a debtor to shield non-exempt wealth from the claims of his or her creditors even under potentially abusive circumstances. These perceived abuses prompted Congress to make several changes to the manner in which the homestead exemption applies to a debtor in bankruptcy under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "2005 Act"). When planning with the Florida homestead exemption from forced sale, it is important for the planner to familiarize himself or herself with the changes adopted in the 2005 Act (a detailed discussion of these changes is beyond the scope of this commentary).

Generally, Section 4 of Article X of the Florida Constitution provides that a portion of an individual's homestead is exempt from forced sale by process of any court. Furthermore, no judgment, decree or execution is permitted to constitute a lien on a homestead other than for (1) the payment of taxes and assessments related to such property, (2) obligations contracted for the purchase, improvement or repair of such property, or (3) obligations contracted for house, field or other labor performed on such property. The homestead must be owned by a "natural person." The portion of a homestead protected by this exemption will vary depending upon the location of the property. If, the homestead is located in an unincorporated area, the exemption will protect up to one hundred sixty (160) acres of contiguous land and improvements on such land.

On the other hand, if the homestead was originally acquired in an unincorporated area that later incorporates or is annexed by an existing municipality, the protected acreage cannot be reduced without the owner's consent. Except as previously mentioned, if the homestead is located within a municipality, the exemption will only protect up to one-half (1/2) acre of contiguous land and the exemption is limited to the residence of the owner or the owner's family.

A series of recent cases on Florida homestead remind estate planners of some important lessons regarding the application of the exemption and how it protects (or fails to) protect wealth. This commentary provides a brief summary and analysis of each of these recent cases.

COMMENT:

***Dejesus v. A.M.J.R.K, Corp.*, 43 Fla. L. Weekly D331a (Fla. 2d DCA 2018)**

In 2012, Maritsa Dejesus ("DeJesus") suffered injuries on a residential property (the "Property") which was then owned by A.M.J.R.K. Corporation (the "Corporation"), of which Altagracia Guillen ("Guillen") was the president and sole shareholder. At the time DeJesus suffered her injuries, Guillen did not reside on the Property. In 2014, while litigation was still pending, the Corporation purportedly transferred the Property to Guillen by quitclaim deed; however, the deed lacked consideration, a corporate seal, or evidence of proper corporate capacity or authority for the signatures, and the acknowledgment clause signed by the notary was for an individual, not a corporation. Subsequently, in 2015, in an attempt to establish the homestead exemption, Guillen began to reside on the Property with her children. On December 8, 2015, the trial court entered a judgment in favor of DeJesus and awarded Dejesus $390,649.64 in damages.

In an effort to collect on her judgment, DeJesus filed a supplementary complaint on January 11, 2016 alleging that the Corporation had attempted to transfer the Property to prevent a forced sale of the Property. DeJesus further alleged that the 2014 quitclaim deed transferring the Property from the Corporation to Guillen was defective. DeJesus sought a constructive

trust on the Property and injunctive relief preventing the Corporation from transferring the Property. While the supplementary proceeding was pending, the Corporation again attempted to transfer the Property to Guillen by a second quitclaim deed (which suffered from some of the same defects as the first deed).

The trial court ruled that (1) both quitclaim deeds were defective, and that neither attempted transfer from the Corporation to Guillen was effective; (2) despite the ineffective transfers, homestead status attached to the property when Guillen began residing there in 2015, (3) since the property did not receive homestead status until after DeJesus filed her action against the Corporation, DeJesus was entitled to a lien on the property, and (4) despite DeJesus' lien on the property, due to its homestead status, the property was protected from forced sale or transfer to DeJesus. The trial court, citing *Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d DCA 2003), determined that because "Florida law does not require that a person be the owner of a homestead property to be protected by the Florida constitution," homestead protection attached to the Property because Guillen *resided* on the Property.

Importantly, to qualify for Florida's homestead exemption, an individual must have an ownership interest in a residence that gives the individual the right to use and occupy it as his or her place of abode. See *In re Alexander*, 346, B.R. 546, 546 (Bankr. M.D. Fla. 2006). In *Callava*, real property was held in trust for the benefit of Pilar Callava, a natural person ("Callava"). The *Callava* court determined that because Callava had the requisite beneficial interest in the subject property, Callava was entitled to claim a homestead exemption to the forced sale of the property. The *Callava* court, citing *Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566, 569 (Fla. 5th DCA 2002) and *Bessemer Props., Inc. v. Gamble*, 158 Fla. 38, 27 So. 2d 832 (1946) further held that one's ownership interest in property need not be a fee simple title to obtain the homestead exemption from the forced sale of the property to satisfy a judgment lien.

The appellate court in *DeJesus* held that the trial court had misinterpreted *Callava*. Callava had an ownership interest in the subject homestead property as a beneficiary of the trust which owned the property, and Callava also had the right to use and occupy the subject property; Guillen, however, had no such rights or interests in the Property. The appellate court noted that Article X, Section 4 of the Florida Constitution, provides

that "there shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon... property owned by a *natural person*." As the Property was never effectively transferred from the Corporation to Guillen, the appellate court held that the Property was not entitled to homestead protection. Accordingly, the appellate court reversed the trial court's order and remanded for further proceedings consistent with its opinion.

Several other courts have held that a residence owned by a business entity will not qualify as homestead property. See *In Re Terri L. Steffen*, 405 B.R. 486 (U.S. District Court, M.D. Fla. April 27, 2009); *Buchman v. Canard*, 926 So.2d 390 (Fla. App. 3 Dist. 2005) ("partnership property cannot constitute the homestead property of one partner prior to the dissolution of the partnership"). A business entity (such as a partnership, limited liability company or a corporation) is fundamentally different from a trust arrangement. A business entity is recognized as a separate and distinct legal entity with the authority to own property, whereas a trust is a contractual relationship in which title to the trust estate is vested in a trustee to be held subject to the terms of the trust for the benefit of a beneficiary.

In *Callava*, for instance, the subject homestead property was held in a realty trust. The realty trust was a nominee arrangement and the beneficial owner (*i.e.* Callava) could at all times terminate the trust and take record title to the property. Furthermore, Callava retained all authority over the property. Recognition of the different legal attributes between a trust arrangement and a business entity is important distinction in the homestead area. In addition to nominee trusts such as the one in *Callava*, several courts have reached the same result in regards to revocable trusts. See *e.g.*, *In re Alexander*, 346 B.R. 546 (Bankr.M.D.Fla. 2006); *Engelke v. Estate of Engelke*, 921 So.2d 693 (Fla 4th DCA 2006); *In re Edwards*, 356 B.R. 807 (Bankr. M.D. Fla. 2006); *In re Cocke,* 371 B.R. 554 (Bankr. M.D. Fla. 2007); *Cutler v. Cutler*, 994 So. 2d 341 (Fla. Dist. Ct. App. 2008); *Aronson v. Aronson*, 81 So. 3d 515 (Fla. Dist. Ct. App. 2012); *In re Steffen*, 405 B.R. 486 (2009); and *In re Kent,* 411 B.R. 743, 750 (Bankr.M.D.Fla.2009). See also, F.S. Section 736.0505(1)(a) ("*the property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent the property would not otherwise be exempt by law if owned directly by the settlor*." (Emphasis added)).

While Guillen's inability to effectuate the transfer from the Corporation to herself individually is puzzling, planners should be aware of the rules in the Bankruptcy Code which could frustrate the application of the homestead exemption should a debtor client hold title to a personal residence held in a business entity and attempt to deed that residence from the entity to the debtor client personally. See *e.g.*, Bankruptcy Code § 522(p) and § 548(e). Finally, if an entity owning real property is taxed as a corporation for federal income tax purposes, planners should not overlook the potential tax consequences of transferring appreciated property from the corporation to its shareholder(s). See Internal Revenue Code § 311(b).

***In re Bifani*, 580 Fed.Appx. 740 (11th Cir. 2014)**

Beginning in 2006, Ronald Bifani ("Bifani") transferred his interests in several Colorado residences to his girlfriend, Arlene LaMarca ("LaMarca"). LaMarca sold the properties she received from Bifani before the end of 2008, and in 2009, LaMarca applied the sales proceeds to purchase a residence in Sarasota, Florida (the "Sarasota Property") where she thereafter lived with Bifani. While all of these transfers were taking place, Bifani was a defendant in a pending state-court lawsuit in Colorado. The Colorado state court ultimately entered a final judgment against Bifani in the amount of $166,750 on December 12, 2011.

The following month, Bifani filed a Chapter 7 petition in the United States Bankruptcy Court for the Middle District of Florida. The Chapter 7 Trustee (the "Trustee") alleged that the transfers from Bifani to LaMarca were fraudulent because the transfers were made with the actual intent to hinder, delay, or defraud Bifani's creditors. The bankruptcy court imposed an equitable lien on the Sarasota Property and awarded the Trustee $661,000.

LaMarca appealed to the district court, arguing that the imposition of an equitable lien against a homestead was impermissible under Article X, Section 4 of the Florida Constitution. The district court affirmed the bankruptcy court's conclusions as to the fraudulent transfers, however, reversed the equitable lien as unconstitutional. The Trustee appealed the denial of the equitable lien, and LaMarca cross-appealed the determination that the subject transfers were fraudulent.

The appellate court determined that the bankruptcy court properly held that the transfers from Bifani to LaMarca were fraudulent transfers. The appellate court next reviewed the Trustee's request for an equitable lien, which the bankruptcy court granted and the district court reversed. The appellate court discussed the fact that the Florida Constitution provides for three specific exceptions to homestead protection, however, citing *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001) ("*Havoco*"), noted that Florida courts have invoked equitable principles to provide for additional exceptions where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead. While the Florida homestead exemption is to be liberally construed, the appellate court noted that it is not to be so liberally construed "so as to make it an instrument of fraud or imposition on creditors."

The appellate court held that the bankruptcy court properly granted the equitable lien on the Sarasota Property and that the district court erred in reversing it. The appellate court found that the homestead exemption was inapplicable because the funds used to purchase the Sarasota Property were obtained through Bifani's fraudulent transfers. The court dismissed the assertions of LaMarca and the Trustee that an equitable lien is only available in cases of equitable subrogation, finding that while several cases have discussed liens in the context of equitable subrogation, none of the cases limited the availability of an equitable lien to such context.

For a more detailed discussion of *In re Bifani*, see LISI Asset Protection Planning Newsletter #277, "In re Ronald Bifani: Did the 11th Circuit Get It Right?" December 16, 2014.

To read more, please click HERE

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Richard Connolly's World

Insurance advisor Richard Connolly of Ward & Connolly in Columbus, Ohio often shares pertinent articles found in well-known publications such as *The Wall Street Journal*, *Barron's*, and *The New York Times*. Each issue, we feature some of Richard's recommendations with links to the articles.

The attached article from Wealth Management reports:

Corporate Donor on the Hook for $4 Million Charitable Pledge

Federal District court rules that the gift agreement is binding.

By M. Howard Vigderman

Prior to May 29, 2015, Foremost Industries signed a gift agreement promising to pay Appalachian Bible College the sum of $4 million in five equal annual installments. The gift agreement was binding on Foremost and its successors and assigns. The gift agreement stated that in executing the gift agreement, ABC was "relying ... to its detriment" on satisfaction of the pledge in full and that the pledge would be used as "an inducement for other donors to make contributions and gifts to ABC for its charitable purposes."

Subsequently, the board of directors of Foremost ratified the gift agreement and, on the same date, GLD Foremost Holdings agreed to purchase from the owner of Foremost all of its issued and outstanding shares. After the purchase was complete, GLD ratified the gift agreement.

Foremost never made any payments under the gift agreement and later stated that it wouldn't be making any payments.

ABC filed a complaint in federal district court for breach of contract, anticipatory breach of contract and unjust enrichment.

Court's Ruling

In a ruling issued April 17, 2018, the Federal District Court for the Middle District of Pennsylvania analyzed the facts as it would any other contract dispute. The Court held that the gift agreement was legally binding on Foremost, and that Foremost had both breached and anticipatorily breached the gift agreement. It was liable for $4 million in damages to ABC (presumably as the payments came due).

1

Written charitable pledges are contracts and must be treated as such. They're binding on the donor and, if the donor dies before the pledge is satisfied, on the donor's estate. When a donor makes a large pledge to charity, the charity may rely on that pledge to undertake a project such as the construction of a building or might use that pledge as the basis for requesting gifts from other donors. The charity might acknowledge the pledge with a plaque or other marker.

The holding of this case applies to individual and corporate donors. If your client makes a pledge to charity, and especially if he signs a pledge form, be aware that he's bound by the pledge and must be prepared to satisfy it.

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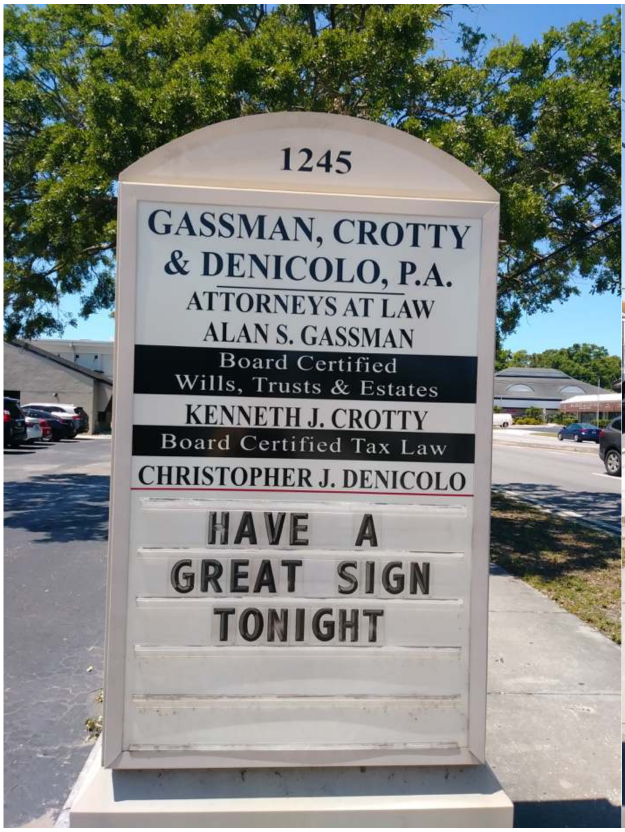
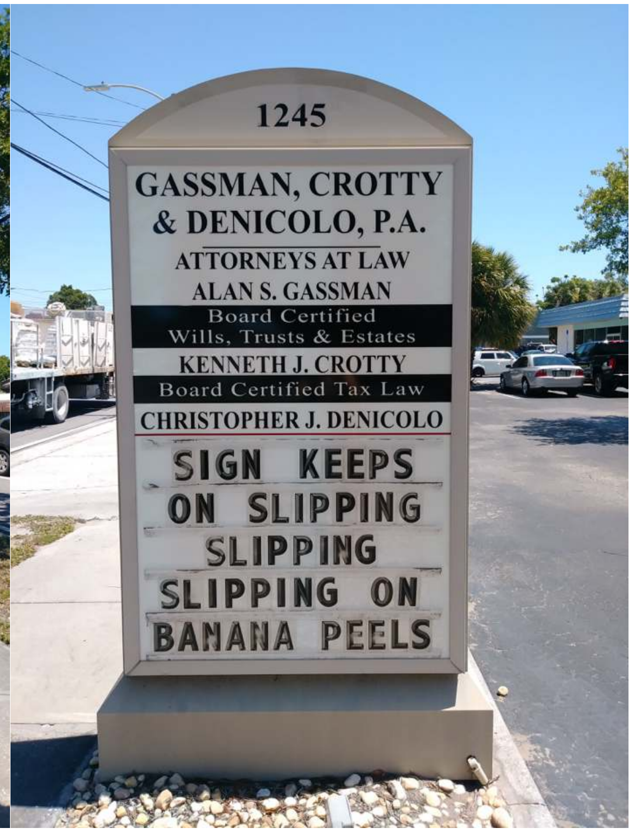
Humor





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Upcoming Seminars and Webinars

Calendar of Events

Newly announced events are shown in RED

Florida Bar Annual Wealth Protection Conference

Date: May 4, 2018
Time: 8:00 a.m. – 5:00 p.m.
Location: Tampa Airport Marriott Live and Webcast

Join the top names in Florida's Wealth Protection community for this wonderful educational opportunity.

Jay D. Adkisson, Esq. **Riser Adkission, LLP**	**8:40-9:30 AM**	Lawyer Responsibility and Strategies for Keeping You and Your Clients out of Trouble with Related Recent Developments
Denis A. Kleinfeld, Esq. **Kleinfeld Legal Advisors, PA**	**9:30-10:20 AM**	The Technical and Tax End of Creditor Exempt Financial Product Planning – 529 Plans, Annuities, Life Insurance and More
Albert F. Gomez, Esq. and **Arthur C. Neiwirth, Esq.** **Johnson Pope**	**10:30-11:20 AM**	10 Things That You Probably Didn't Know About Bankruptcy Planning and Why They Are Important
Alan S. Gassman, Esq. **Gassman, Crotty & Denicolo, P.A.**	**11:20-12:10 PM**	Creditor Protection Planning for Business and Investment Entities and Their Owners – Including 7 Strategies You Didn't Know
Leslie A. Share, Esq. **Packman, Neuwahl & Rosenberg**	**1:10-2:00 PM**	Creditor Protection and Associated Planning for Immigrants – With Practical Pointers That Apply to all Floridians
Richard B. Comiter, Esq. and **Andrew R. Comiter, Esq.** **Comiter, Singer, Baseman & Braun, LLP**	**2:00-2:50 PM**	Current Federal Tax Issues, Developments and Strategies Involved in the Structuring of LLCs and Partnerships
Professor Jerome Hesch	**3:00-3:50 PM**	Hot Topics and New Developments in Tax and Associated Planning for the Wealth Protection Professional
Emily J. Phillips, Esq. **Phillips Lanier, PLLC**	**3:50-4:40 PM**	Keeping Separate Property Separate in Co-Habitation, Marriage and Divorce-Estate Planning and Marital Agreement Drafting and Defense

Sponsored by The Florida Bar Continuing Legal Education Committee and The Tax Section

For more information click HERE

LEIMBERG Information Services, Inc.

Leimberg Information Services Webinar Presentations

Thursday, May 10, 2018, 3:00 PM

Planning for Ownership and Inheritance of Qualified Retirement Plan and IRA Accounts and Benefits in Trust or Otherwise: Opportunities and Pitfalls

Alan Gassman, Christopher Denicolo, Kenneth Crotty and Brandon Ketron will present a discussion of planning for IRAs and other Qualified Plans, and will navigate through the various opportunities and pitfalls associated with planning for such assets. The program will focus on the taxation of retirement plan assets, how to structure beneficiary designations, and how to correctly draft trusts to receive benefits from retirement plans without triggering substantial adverse tax consequences. Practitioners will understand how to draft trusts to qualify as accumulation trusts or conduit trusts, and how to prepare proper language for beneficiary designation purposes to assure that retirement plan assets are payable in the manner intended by the client, and without triggering potentially catastrophic tax consequences. Estate planners, CPAs, tax professionals, and other professionals in the financial planning and client advisory industry will find this program helpful and beneficial to them and their clients.

Thursday, June 21, 2018, 3:00 PM

Asset Protection Opportunities You May Not Know About

Join Alan Gassman for this 90 minute discussion of a number of creditor protection strategies that are not commonly used or understood by planners, as well as tax planning opportunities and traps for the unwary.

Alan will cover the following topics during his webinar:

- Multiple member entities and pledging strategies and pitfalls.
- Innovative homestead, annuity, life insurance, tenancy by the entities and other creditor exempt asset planning.
- Federal Bankruptcy Code considerations
- Planning with tax disregarded but effective foreign LLC's
- Charitable, organizations, foreign foundations, and hybrid trusts.
- Life insurance financing, bonding company pledges, friendly judgments and other strategic debt strategies. Practical uses of foreign trusts.
- and much more.

Thursday, June 28, 2018, 3:00 PM

Asset Protection for Businesses and Their Owners

While a great many planners are familiar with planning techniques to protect individuals and their investments, business and investment entities also need to be protected from creditors of the entities. Learn the many ways that planners can help business and investment clients better protect their business and business assets, and what tax laws and strategies apply in decision making and design.

During his webinar, Alan will cover the following topics:

- Confidentiality and owner/control design to reduce personal exposure of corporate executives.
- When to use and recommend indemnity, hold harmless and customer/patient? client arbitration and liability limitation agreements
- Protection of accounts receivable for professional practices
- How to avoid application of Bankruptcy and state law preferential transfer issues.
- How to remove goodwill and depreciated and appreciated assets from an operating S or C corporation without triggering income tax
- How to design and implement "equity stripping" strategies
- Using leases, license agreements and other "use rental agreements to save taxes and insulate from liability.
- And much more

There are no professional advancement credits (CPE, CLE, etc.) offered for viewing these webinars

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION	FLYER
Ave Maria Estate Planning Conference- With Jonathan Gopman	Friday, April 27, 2018	Ritz Carlton Beach Resort-Naples, FL	"Asset Protection for the Everyday Estate Planning Lawyer: a nuts to bolts review of asset protection techniques from simple to complex"	Contact: Agassman@gassmanpa.com	Click Here
Florida Bar Annual Wealth Protection Conference	Friday, May 4, 2018	Tampa Airport Marriott	Creditor Protection Planning for Business and Investment Entities and Their Owners - Including 7 Strategies you Didn't Know About	Contact: Agassman@gassmanpa.com	Click Here
Maui Mastermind Business Law Webinar	Wednesday, May 9, 1:00PM-2:00PM	Gotowebinar.com	What you Need to Know About Personal and Commercial Liability and Causal Insurances. *Guest speaker with Mr. Gassman will be Holly Kerr	Contact: Agassman@gassmanpa.com	Click Here
Leimberg Services Webinar with Ken Crotty, Chris Denicolo & Brandon Ketron	Thursday, May 10, 3:00 PM – 4:30 PM	Gotowebinar.com	Trust & Estate Planning IRA and Pension Benefits - And Related Topics	Click Here	Click Here
Private CPA Firms 199A talk	Friday, May 11, 2018	Center Club, 123 S. Westshore Blvd, 8th Floor, Tampa, FL 33609	"199A with Filet"	Contact: Agassman@gassmanpa.com	
2018 MER Continuing Education Program Talks For Physicians	May 17-18, 2018	Nassau, Bahamas - Atlantis Paradise Island Resort	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. 50 Ways to	Contact: Agassman@gassmanpa.com	Click Here

			Leave Your Overhead & Increase Personal Productivity.		
Maui Mastermind Business Law Webinar	Thursday, June 7, 1:00PM-2:00PM	Gotowebinar.com	TOPIC: Employee Practices, Hiring, Firing and Everything in Between *Guest speaker with Mr. Gassman will be Colleen M. Flynn, Esq.	Contact: Agassman@gassmanpa.com	
Maui Mastermind Conference	June 15-17, 2018-Our Clients attend for free!	1001 N Westshore Blvd, Tampa, FL 33607	Wealth 101 for Business Owners	Contact: Agassman@gassmanpa.com	
Leimberg Services Webinar	Thursday, June 21, 3:00 PM – 4:30 PM	Gotowebinar.com	Asset Protection Opportunities You May Not Know About	Click Here	Click Here
Leimberg Services Webinar	Thursday, June 28, 3:00 PM – 4:30 PM	Gotowebinar.com	Asset Protection for Businesses and Their Owners	Click Here	Click Here
MER Primary Care Conference	Thursday, July 5-7, 2018	Yellowstone, Wyoming	Alan will be speaking at the Medical Education Resources (MER) event	Contact: Agassman@gassmanpa.com	Click Here
Maui Mastermind Business Law Webinar	Wednesday, July 11, 1:00PM-2:00PM	Gotowebinar.com	Corporate and LLC Structuring - Business, Creditor, Tax and Family Planning Considerations	Contact: Agassman@gassmanpa.com	
Professional Acceleration Workshop	Friday, September 7, 2018. 11AM-5PM	Stetson Law School—Gulfport Campus 1401 61st Street South St. Petersburg, FL 33707	Reach Your Personal Goals, Increase Productivity and Accelerate Your Career.	Contact: Agassman@gassmanpa.com	Click Here
Florida Osteopathic Medical Association Conference	September 14-16, 2018, 7:30 am – 8:30 am	2900 Bayport Drive Tampa, Florida 33607	Mid-Year Seminar	Contact: Agassman@gassmanpa.com	
FBA Trust & Wealth Management	Thursday, September 27, 2018	Sarasota		Contact: Agassman@gassmanpa.com	

Conference					
Notre Dame Tax Institute	October 11-12, 2018	South Bend Indiana	Planning Under Section 199A and Associated Tax and Practical Considerations	Contact: Agassman@gassmanpa.com	
MER Primary Care Conference	November 8-11, 2018	JW Marriott Los Cabos Beach Resort & Spa	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com	
Mote Vascular Foundation Symposium	November 30 – December 2, 2018	The Westin-Sarasota, 1175 N. Gulfstream Ave, Sarasota, FL 34236		Contact: Agassman@gassmanpa.com	

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