

A Brief Interview With Alan Gassman

THE FOLLOWING ARE EXCERPTS OF AN INTERVIEW THAT WILL BE PUBLISHED BY THE UNIVERSITY OF FLORIDA LEGACIES NEWSLETTER, NOTWITHSTANDING POPULAR DEMAND



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When should Florida residents consider using a revocable living trust as their primary distribution tool?

The overwhelming majority of households will want a revocable trust. As lawyers, we primarily draft estate planning documents to be revocable trusts, and then we also draft simple wills called a “pour-over will.” If you have a last will and testament, it is going to be fine, but when you die the assets must go through the probate process. That is a lot of paperwork that could be avoided by having those assets in a trust or payable to a trust.

Why is a “pour-over” will important?

I had a client who died after he signed his revocable trust, but not his last will, and because of that the items in the revocable trust went the way he wanted them to go, but the items in his personal name had to go by Florida law. In his situation, it was half to his spouse and half to his child by a prior marriage, which is not what he wanted. It was a real hardship on the family. So, it is especially important to have the pour-over will. You may want to ask your lawyer to include a section in the trust that says “in the highly unlikely event that I do not have a pour-over will, this will be considered my pour-over will, and an amendment to any old will that is not a pour-over will.”

Do you think the probate courts would support that language in the trust as a substitute for a pour-over will?

Absolutely.

Has the House Ways and Means Committee proposal got you thinking about possible planning, leading up to the end of this calendar year?

Every week, clients with large estates are calling me. They did not do the right planning even for the current \$11,700,000 exemption, let alone planning for the lower exemption (of possibly going back down to \$5,000,000/per person), which is going to occur by 2026, if not sooner. So, every family should run the math on their exact situation and see what planning they need. Whether it is this year or next, after the midterm elections there is a serious risk that your exemption is going to go down. Additionally, you are not going to be able to set up an irrevocable trust that does what

we are able to do right now. What you would set up before the president signs a new bill would be grandfathered, at least according to the Ways and Means Committee proposals.

Most of our planning each day is setting up irrevocable trusts that benefit a spouse and descendants and are disregarded for income tax purposes. Someone can put assets in that trust, and pay the income tax on behalf of the trust, and that is not considered a gift. That person can sell their assets to that trust for a low-interest rate note. Finally, that person can get a discount on how they transfer assets to the irrevocable trust by using a limited liability company, non-voting stock. Anyone whose estate is greater than \$11.7 million should have already been doing this over the last five years.

Now, putting on your estate planner's hat again, are there some general considerations that clients might consider before the end of '21, outside of taxes?

For Floridians, effective July 1, 2021, there is a new community property trust law that says that if spouses put their assets in a community property trust with a Florida trustee, on the death of one spouse they get a full step-up in basis. So, for people who have high mortality risk, it's well-advised to go ahead and get into that type of arrangement or a joint exempt step-up trust (JEST), which is a joint trust between spouses that will get that step-up on the first death. Other than that, what we really emphasize is creditor protection. We're all driving on wet roadways in the Florida weather. People get injured and then they sue my clients and my clients call me and say, "Well, I have a revocable trust. I'm immune from creditors, right?" No, a revocable trust is not immune from creditors. You should have had an irrevocable trust or a tenancy by the entirety type of arrangement. Those are the things that really come to mind at the very top of the list.

There are only a handful of states that I am aware of that offer "tenants by the entirety." Could you explain what "tenants by the entirety" means?

When Florida became a state in the 1800s, the first thing they did was adopt the common law of England. In 1776 in England, women were not allowed to own assets. Because men could own assets and wanted to give their daughters a dowry – in fact, they had to give their daughter a dowry – England invented the concept of an artificial person, called a "tenancy by the entireties." So, for example, I would give my daughter and my new son-in-law the farmland, and the definition of tenancy by the entireties was that you could not transfer the land without joint consent of the husband and wife. It didn't belong to either of them individually. This way the son-in-law could not lose it in a card game. The creditor law in England became, "*Hey if you have a judgment against my no-good son-in-law, you can't take the dowry. If you have a judgment against my daughter, you can't take the dowry. You need a judgment against both spouses.*" Florida has had that law since the very first day that it became a state. It is an absolute creditor immunity; it is not immune from the IRS, the Federal Trade Commission or the SEC, though, because of how federal law works. For a general creditor situation, though, such as a car accident or if you can't pay your bank debts, if only one spouse is responsible, the creditors have no shot at their joint assets in the state of Florida if they are properly titled before the problem has occurred. One spouse could bankrupt out all that debt that he or she owes; it goes away, and the creditor does not get any of the joint assets.

Many states adopted the Commonwealth law, but overtime must have gotten rid of tenancy by the entirety since there's only a handful of states that still have it. Do you think that is what happened over the years?

Yes, the banking and lending industries have gotten involved with the lobbyists and the legislatures and mowed right over it. The pure tenancy by the entirety states that remain are Florida, Pennsylvania, Delaware, and Wyoming. Tennessee is similar but not as protective as those four states.