



Asset Protection Meets Estate Tax Planning

**Monday, July 19, 2021
5:30 to 6:30 PM EDT
(60 minutes)**

Presented by:

**Alan Gassman
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**Brandon Ketron
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GASSMAN CROTTY DENICOLO P.A.
ATTORNEYS AT LAW



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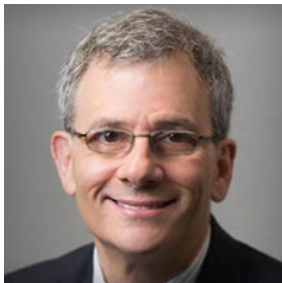


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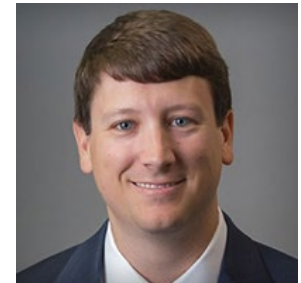
PART 2: The Mathematics of Estate Tax Planning

Wednesday, August 18th, 2021
5:00 PM – 6:00 PM EST
(60 minutes)

Presented by:



Alan S. Gassman
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Brandon Ketron
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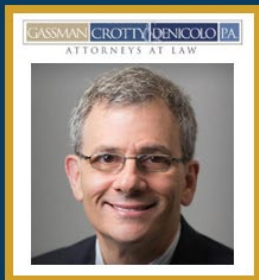
SPC, Charity & Me

Charitable Planning for the Business Owner

Wednesday, July 21st, 2021
from 11:00 AM to 12:00 PM EDT (60 minutes)

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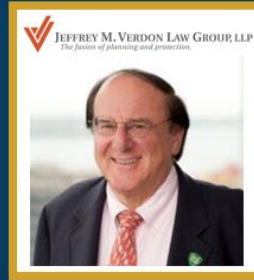
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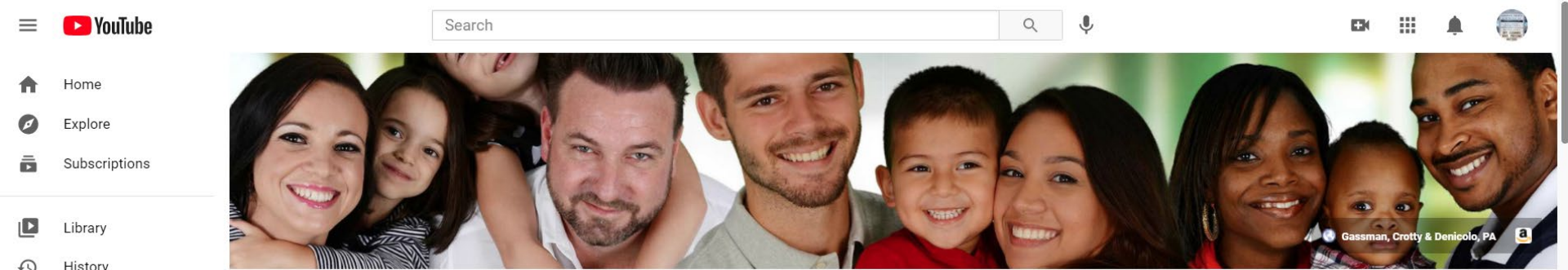
Prof. Jerry Hesch
jhesch62644@gmail.com



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Saturday, July 3rd	Free webinar from our firm	Special Update on Recent Developments and Hot Topics 11:00 AM EDT	Play Recording
Saturday, July 10th	Free webinar from our firm	More Mathematics Of Estate Tax Planning 11:00 AM EDT	Play Recording
Saturday, July 17th	Free webinar from our firm	Hard Questions and Interesting Answers for Estate Planners 11:00 AM EDT	Play Recording
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Gassman & Markham on Florida and Federal Asset Protection Law

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

Michael C. Markham, Esq.

INTRODUCTION

Florida has a unique body of creditor protection planning laws that come from a number of different sources, and a number of different practice areas. The laws can be found in the Florida Constitution and Florida Statutes, and many stem from common law principles. This book seeks to explain these principles in a clear and simple manner, so that advisors can tailor asset protection plans to each client's needs.

Chapter 1 focuses on what creditor protection is, who qualifies, and the key rules that apply.

Chapter 2 discusses tenancy by the entireties, originally a common law protection for a husband and wife, which has been codified in the Florida Statutes. Tenancy by the entireties, or "TBE," provides strong protections for married couples that title property and assets as such.

Chapter 3 discusses annuities and annuity contracts, and how Floridians can protect their assets through permanent life insurance and cash value annuities.

Chapter 4 gives an in depth review of life insurance policies as described in Florida Statutes Section 222.

Chapter 5 discusses the vast homestead protections offered under Florida law. This chapter explains the relevant case law and recommended methods for protecting an individual's homestead and homestead proceeds from creditors.

Chapter 6 is regarding wages and wage accounts – which are protected under the head of household exemption of the Florida Statutes in Section 222 – and can be a valuable asset protection tool for families.

Chapter 7 is on disability insurance and proceeds, which are exempt from creditor claims. This chapter reviews the relevant statutes and case law.

Chapter 8 on pension plans, IRAs, and other qualified retirement plans, presents the current case law on these subjects. To date, there is not a settled consensus among courts as to whether such funds can be withdrawn for personal interests. The chapter also provides the relevant IRS provisions.

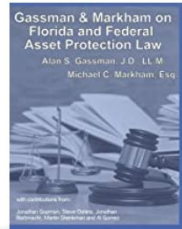
Chapter 9 provides a brief discussion on five subsidiary types of asset protection, including alimony rights, unemployment compensation benefit rights, Florida Prepaid Tuition Fund and 529 Plans, hurricane savings accounts, and physical asset exemptions.

Chapter 10 reviews the federal non-bankruptcy exemptions, including survivor benefits and retirement plans.

Chapter 11 is on Asset Protection Trusts, particularly Domestic Asset Protection Trusts (DAPTs). This chapter provides an in-depth look at minimizing the impact of the Medicaid tax and Florida's rules for lifetime QTIP Trusts.

Chapter 12 looks at Asset Protection Trusts overseas, and includes the famed Oshin's State Ranking Charts for categories such as best states to decant a trust and best states for Domestic Asset Protection Trusts.

Finally, Chapter 13 briefly touches on one of the newest entrants to the asset protection and estate planning game: non-charitable foundations.



Gassman & Markham Florida & Federal Asset Protection Law
by Alan S Gassman and Michael C Markham | Jan 3, 2018

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Topic Objectives

Asset Protection Definitions

Estate Planning Definitions

Florida Laws – The Most Generous in the United States

Firewall Protection

Equity Stripping – Reducing Exposed Assets with Preferred Creditors

Charging Order Entities

Foreign Companies and LLCs

Foreign and Delaware Accounts

For Children and Grandchildren

Life Insurance and Annuity Contracts

IRAs and Pensions

Homestead

Tenancy by the Entireties

Separate Community Property to Avoid All Assets Being Subject to the Claims of the Creditors of Either Spouse

Domestic Asset Protection Trusts

Foreign Asset Protection Trusts and Foundations

Charity

What to Do In The Next 30 Days

Target hit with \$4.6 million jury verdict at trial; retailer had nixed \$12K settlement offer

BY STEPHANIE FRANCIS WARD ([HTTP://WWW.ABAJOURNAL.COM/AUTHORS/20/](http://www.abajournal.com/authors/20/))

POSTED SEPTEMBER 12, 2016, 4:00 PM CDT



Target recently got hit with a \$4.6 million jury verdict after a South Carolina woman in 2014 was stuck with a hypodermic needle her 8-year-old daughter found in the store parking lot.

The Minneapolis company rejected a \$12,000 offer to settle the case before trial, and responded with a counteroffer of \$750, the Independent Mail

(<http://www.independentmail.com/story/news/local/2016/09/09/jury-anderson-woman-gets-46-million-target-lawsuit/90129402/>) reported.

As Carla Denise Garrison was exiting her car, she saw her daughter pick up the needle, and she swatted it out of the child's hand, which resulted in the needle getting stuck in Garrison's palm, the article reports.



Jury awards her \$148M, but woman says O'Hare bus shelter collapse took away 'my life'



A jury awarded Tierney Darden, of Vernon Hills, \$148 million in her lawsuit against the city of Chicago after she was partially paralyzed by a poorly maintained pedestrian shelter at O'Hare International Airport in 2015. (Phil Velasquez/Chicago Tribune)

By **Steve Schmadeke**
Chicago Tribune

AUGUST 25, 2017, 6:10 AM

One day after winning what's believed to be a record \$148 million jury verdict against the city, a suburban woman told reporters Thursday that she remains "heartbroken" that she can no longer dance after being partially paralyzed when a bus shelter at O'Hare International Airport collapsed on her during a storm two years ago.



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Asset Protection Meets Estate Tax Planning
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Ikea Will Pay \$46 Million to Parents of Toddler Crushed to Death by a Dresser

The 70-pound Malm dresser had been the subject of a safety recall when it tipped over on Jozef Dudek, killing the 2-year-old.



Since 2011, at least five other children have been killed when various models of the Malm dresser toppled over, according to the lawsuit. Saul Loeb/Agence France-Presse — Getty Images



By Neil Vigdor

Published Jan. 6, 2020 Updated April 7, 2021

The Swedish furniture retailer [Ikea](#) agreed to pay a \$46 million settlement in a wrongful-death lawsuit brought by the parents of a California toddler who was crushed to death by a popular dresser model that had been recalled after at least five other children were killed.

On Monday, a lawyer for Joleen and Craig Dudek, whose son, Jozef, was killed in May 2017, announced the settlement, which was confirmed by an Ikea spokeswoman. In 2016, Ikea reached a [\\$50 million settlement with three other families with children who were killed by furniture](#) that had toppled over.

Mr. and Mrs. Dudek sued Ikea in 2017 in state court in Pennsylvania, where Ikea's North American headquarters is based, arguing that the furniture maker knew that its Malm line of dressers was prone to tip-overs and had failed to warn customers of the unstable design.



Pizza Hut loses suit, must pay millions

By GREG MORAN

JULY 28, 2010 10:10 PM PT

SAN DIEGO COURTS — A San Diego Superior Court jury on Wednesday awarded a mother and her adult daughter \$10.8 million in damages for the injuries they suffered in a car crash with a Pizza Hut delivery driver in Clairemont.

The jury said that Shari Novak, who was 62 when the November 2008 collision occurred, should receive \$8.6 million for medical and noneconomic damages.

She suffered permanent brain damage and can no longer take care of herself on a daily basis.

Her mother, Olena Novak, who was 87 when the crash happened, suffered a broken neck and other injuries and was awarded nearly \$2.2 million by the jury.



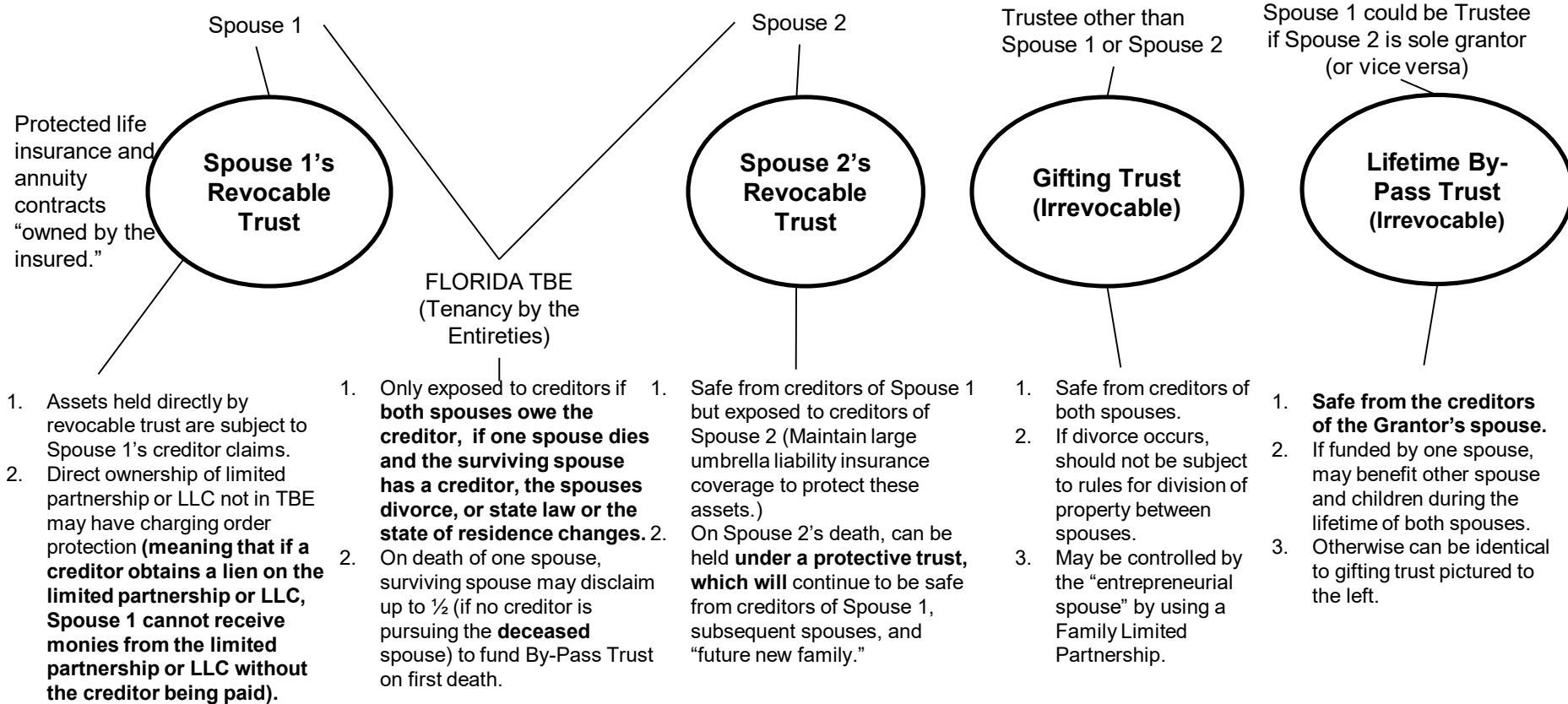
“It wasn’t raining when Noah built the ark.”



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

General Rules:

- Typically want each trust funded with at least \$11,700,000 worth of assets on death for estate tax planning.
- May be funded from ½ of tenancy by the entireties assets via disclaimer and probate or by life insurance/pension/IRA assets.



SEE NEXT PAGE FOR SECOND TIER PLANNING

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

Asset Allocation Considerations

- There are some assets that a creditor cannot reach even if they have a judgment against you under Florida law:
 - Homestead
 - Annuity Contracts
 - Permanent Life Insurance Contracts
 - IRA
 - Pension Accounts
 - 401K
- If these assets are placed into a revocable trust, they make not be protected.
- What if a spouse has a high likelihood of being sued? (ex: Spouse 2 is a neurosurgeon)
 - Avoid placing assets in that spouse's name
 - Purchase a \$11,700,000 term life insurance policy on Spouse 2
 - Set up a SLAT funded solely by Spouse 1 and Spouse 2 can only receive amounts for their health, education, and maintenance.

Asset Allocation Considerations (cont.)

- What if Spouse 1 wants to be a beneficiary of the lifetime bypass trust?
 - In common law states, such as Florida, California, Texas, and New York, a creditor can reach the maximum amounts that the Trustee is authorized to give Spouse 1.
 - In asset protection jurisdictions, such as, Nevada, South Dakota, Alaska, or Delaware, Spouse 1 can set up an irrevocable trust for their benefit that creditors cannot reach.
- What if Spouse 1 lives in Florida and sets up a Nevada trust?
 - Full Faith and Credit Clause vs. *Matter of Cleopatra Cameron Gift Trust*

Matter of Cleopatra Cameron Gift Trust

2019 S.D. 35

In the MATTER OF the CLEOPATRA CAMERON GIFT TRUST, DATED MAY 26, 1998, and the Cameron Family Exempt GST Trust FBO Cleopatra Cameron, created under the Cameron Family Trust, dated December 20, 1996, as amended.

Supreme Court of South Dakota.

ARGUED ON NOVEMBER 13, 2018

OPINION FILED 06/26/2019

Background: Trust beneficiary petitioned for a declaration of whether trust's spendthrift provision prohibited direct payments of her child support obligation to her ex-husband, which had been previously ordered by another state's court as part of couple's divorce. The Circuit Court, Second Judicial Circuit, Lincoln County, Natalie Damgaard, J., concluded that other state's court order was not entitled to full faith and credit and that trust was prohibited from making direct payments. Ex-husband appealed.

Holding: The Supreme Court, Salter, J., held that other state's court order requiring direct payment of child support from trust was not entitled to full faith and credit.



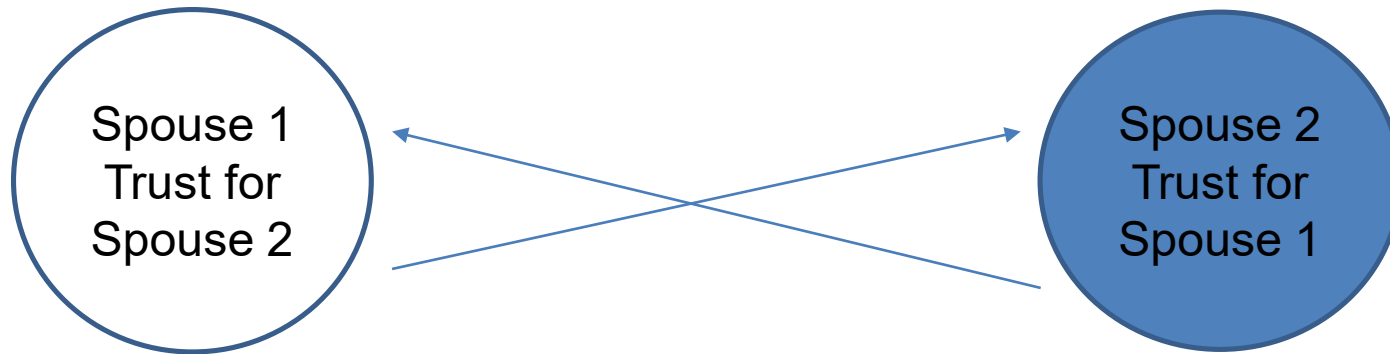
POLLING QUESTION

King Tut by Steve Martin had the following lyrics

- A. Buried in his jammies
- B. Born in Arizona, moved to Babylona
- C. Lived in a condo made of stona
- D. All of the above

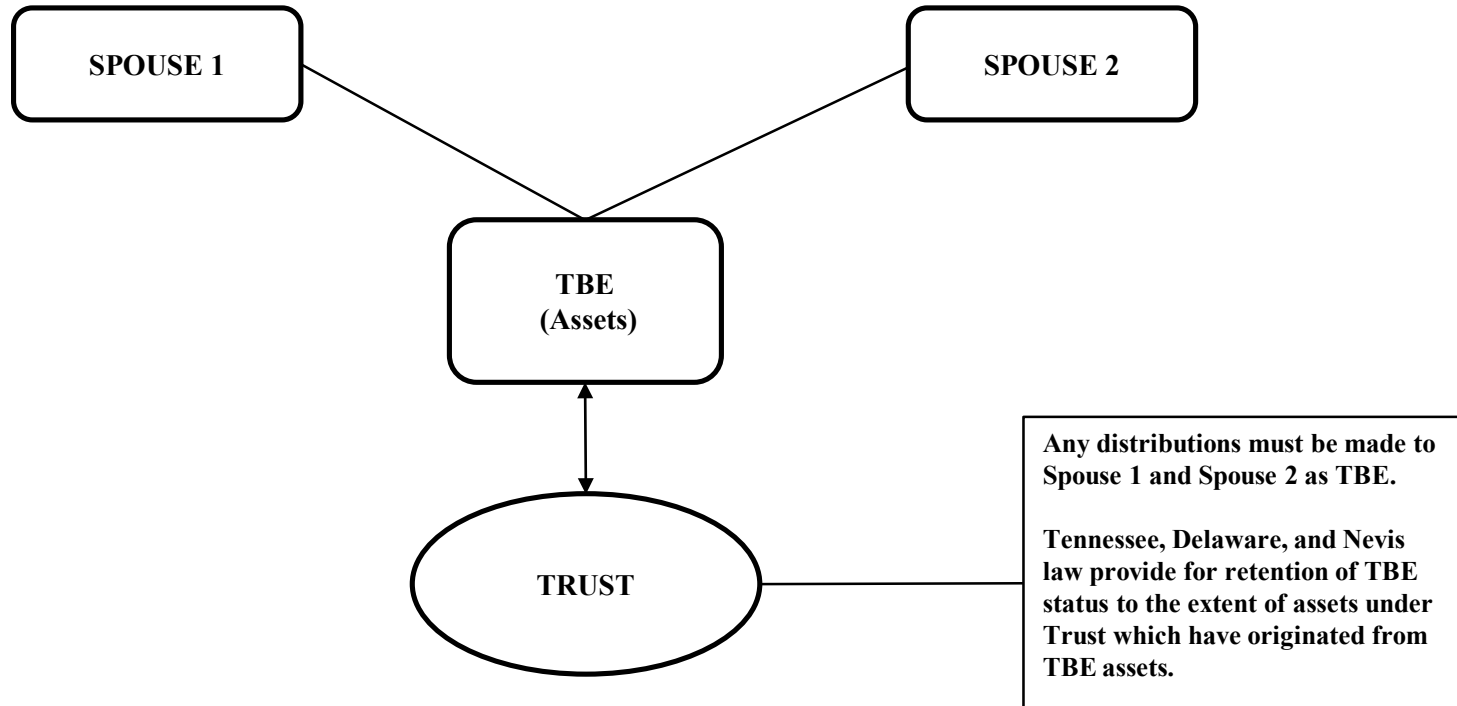
Asset Allocation Considerations (Reciprocal Trust Doctrine)

- Spouse 1 sets up the lifetime bypass trust for Spouse 2 and Spouse 2 sets up a similar, but substantially different lifetime bypass trust for Spouse 1.



- The reciprocal trust doctrine is a judicially-created doctrine developed in response to the perceived tax-avoidance where two parties create trusts for each other which, in effect, leave each other lifetime enjoyment over property while avoiding inclusion in the gross estates
- The doctrine will not apply if the trusts are “substantially different”

Nevis, Tennessee, or Delaware TBE APT Jurisdiction Trust



Decision Making on an Irrevocable Life Insurance Trust

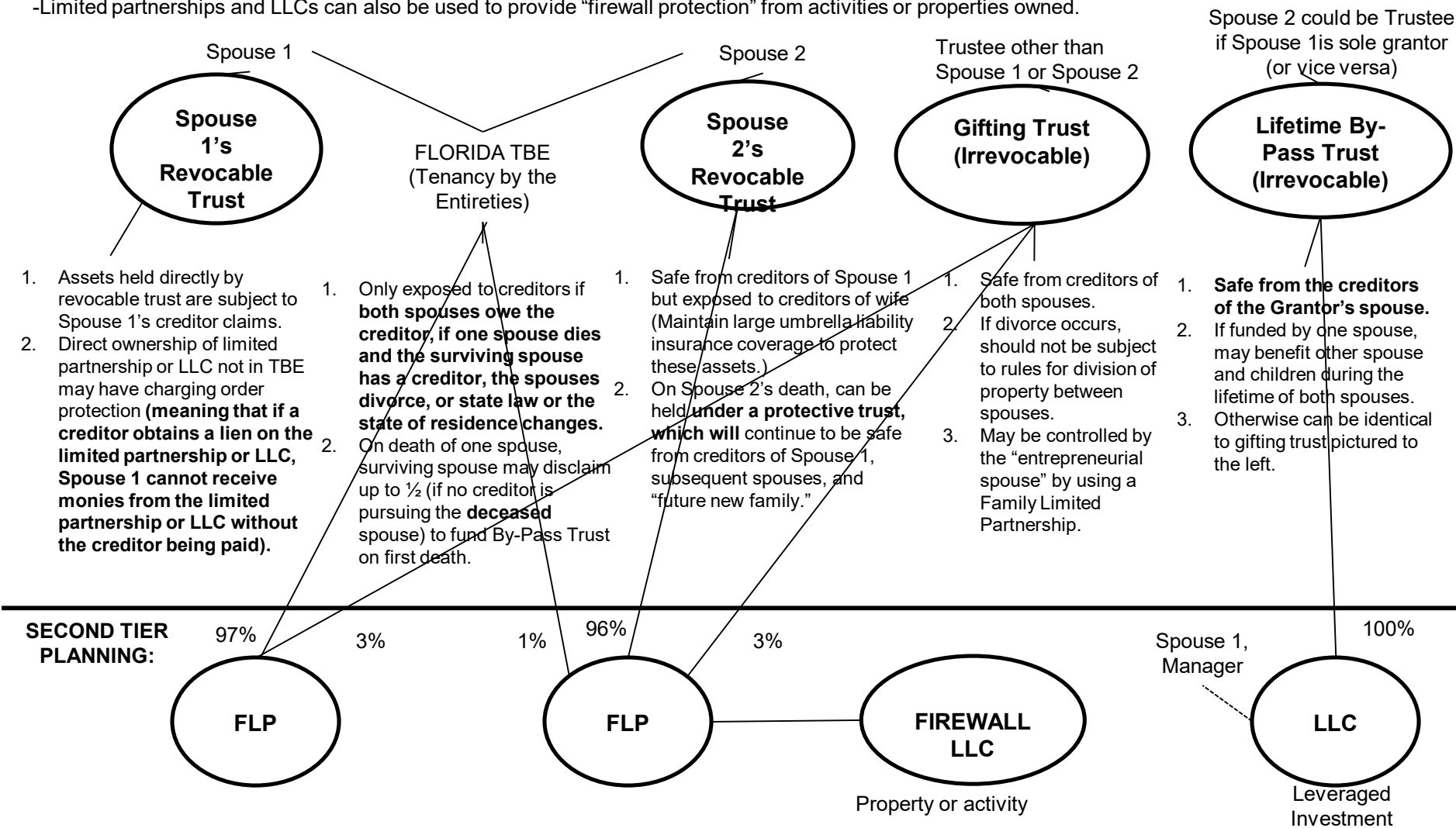
- Spouse 2 owns a permanent life insurance policy and wants to put the policy into an irrevocable trust in order to avoid the estate tax.
- If Spouse 2 wants access to the policy, they need to keep it in their name to keep the policy creditor proof
- If Spouse 2 wants to avoid estate tax on the policy, then Spouse 2 can place the policy in an ILIT (Irrevocable Life Insurance Trust).
- An ILIT owns and controls a term or permanent life insurance policy or policies while the insured is alive, as well as to manage and distribute the proceeds that are paid out upon the insured's death.
- ILITs can



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

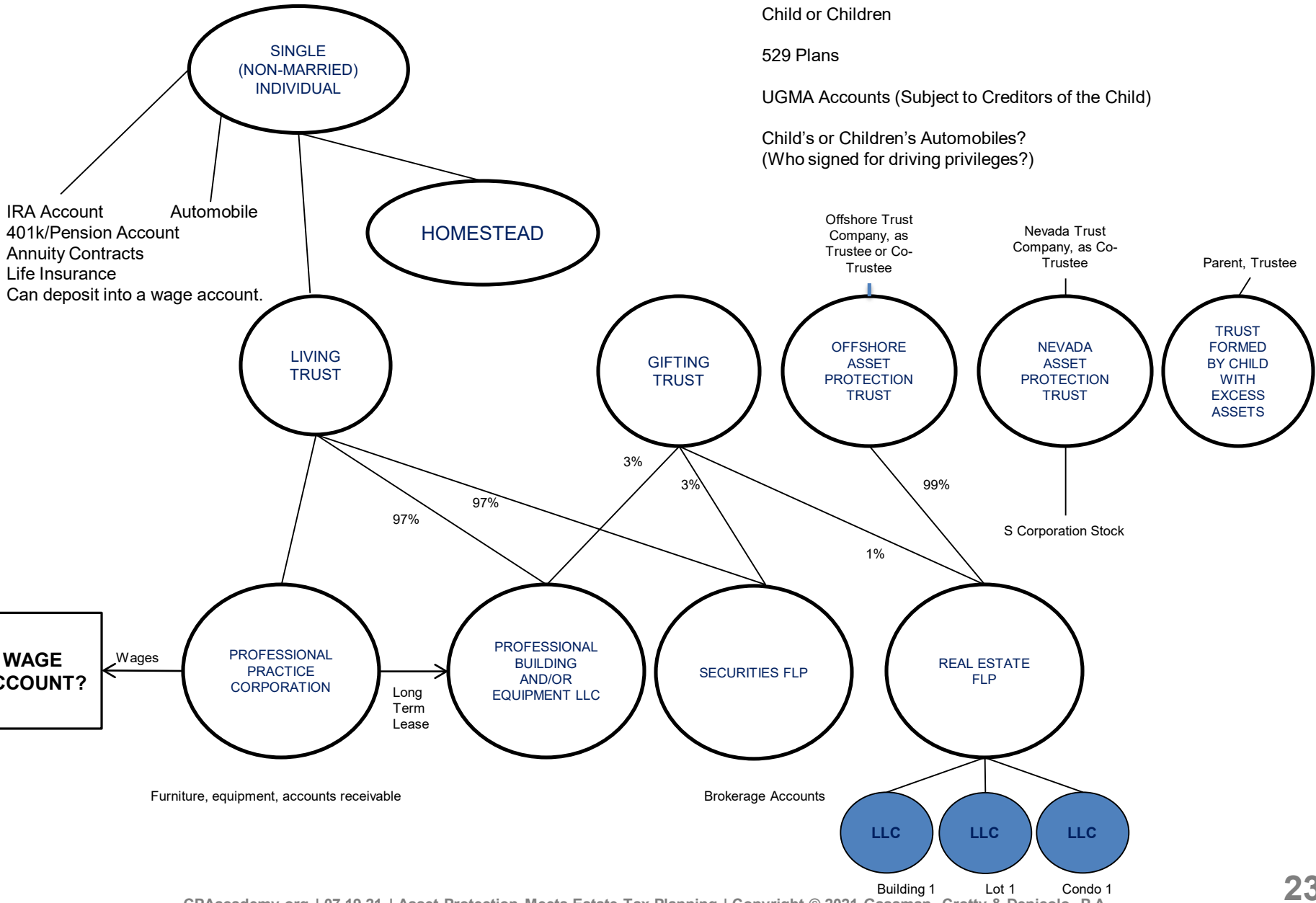
Subsidiary Entity Techniques:

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



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

Estate & Asset Protection Planning for the Single Professional



Asset Protection Definitions

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

Debtor - A party who owes money.

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

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

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

Defendant - A party being sued by a plaintiff.

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

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

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



Asset Protection Definitions

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

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

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

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

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

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

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



POLLING QUESTION

Bad Faith is Not Blind Faith whose members included

- A. Steve Winwood
- B. Eric Clapton
- C. Ginger Backer
- D. All of the above

Asset Protection Definitions

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

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

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

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

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

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

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



Estate Planning Definitions

1. **Probate** - the court supervised process to make sure that a deceased person's Will is valid, creditors are paid, tax requirements are satisfied, and that distributions comply with applicable law; involves red tape and "cleaning up" a person's estate; probate is completely separate and apart from estate tax and inheritance taxes.
2. **Percentage Fee** - in many states, the Executor/Executrix may be paid on a percentage basis and may pay the law firm that provides administrative services on a percentage basis; law firms and trust companies have been severely criticized when a lawyer who drafts documents puts a trust company in as Personal Representative or Successor Trustee, and then, when the person dies, the trust company receives a percentage of the estate and pays the law firm a percentage of the estate. This can be avoided by giving a family member the right to choose a trust company or other fiduciary when the time comes, after advance negotiation of fee issues.
3. **Executor/Executrix/Personal Representative** - the person, people, or company appointed under the Will to take title to estate assets, and to take all actions needed to administer the estate, with court supervision.
4. **Guardian** - a person or people appointed to be the surrogate for a minor whose parents are deceased or unable to act as such.



Estate Planning Definitions

5. **Trust or Trust Agreement** - an arrangement whereby a Trustee holds or will receive assets for a Beneficiary or Beneficiaries pursuant to the terms of a Trust Agreement entered into between the Settlor/Grantor and the Trustee. The Beneficiaries have legal rights associated therewith. The property held by the Trustee does not belong to him or her personally, but is held for the sole benefit of the Beneficiaries.

6. **Revocable Trust** - a Trust that can be changed by the Settlor, often commonly known as a Living Trust.

7. **Irrevocable Trust** – a Trust that cannot be changed by the Settlor; a Testamentary Irrevocable Trust may be formed under the Last Will & Testament of the Settlor to hold assets for Beneficiaries pursuant to the terms thereof. It will, therefore, typically require a probate for the assets to come from the name of the individual to the Testamentary Trust. Other Irrevocable Trusts are formed during the lifetime of the Settlor for tax or other purposes, or may be formed pursuant to the terms of a Revocable/Living Trust. For example:

“During my life, this Trust is held only for me and is revocable; on my death, after payment of expenses and liabilities, divided into three separate Irrevocable Trusts for each of my children.”



Estate Planning Definitions

8. **Spendthrift Clause** - a provision under an Irrevocable Trust that prevents creditors from reaching into the Trust, although in some states, alimony, child support, and legal fees incurred by a Beneficiary to sue a Trust may still have to be paid from the Trust; this is one reason that the “asset protection trust states” like Nevada and Alaska are often preferred.
9. **Living Will** - this is not a Living Trust or a Will; it is a document that enables medical facilities and physicians to withdraw life support, and, in some states (Oregon, Washington, Vermont and Montana), to cause life to end under certain circumstances. (States presently considering Physician Assisted Suicide are Hawaii, Kansas, Massachusetts, New Hampshire and New Jersey.)
10. **Health Care Power of Attorney** – names a Health Care Surrogate to make health decisions if the Principal is unable to do so.
11. **Durable Power of Attorney** – enables an appointed Agent to make financial decisions and to transfer individually owned assets, but loses its power if the Principal is declared incompetent and thus placed under Guardianship (while the Trustee of a Living Trust does not lose such power in the event of a Guardianship).



Estate Planning Definitions

12. **Guardianship** - a court supervised process whereby an individual who has lost his or her mental capacity will have a Guardian appointed, and individual assets overseen by the court (a standby Revocable Trust may be funded by the Guardian with court approval to avoid the need for continued court oversight).
13. **Exempt Assets** – assets that creditors cannot reach.
14. **Non-Exempt Assets** – assets that creditors can reach.
15. **Fraudulent Transfer** – a transfer made to avoid creditors that may be set aside and can result in a judgment imposed against a person who would receive such assets.
16. **Murphy's Law** – anything that can go wrong, will go wrong, at the worst time, and in the worst manner.
17. **Noah's Ark** – it wasn't raining when Noah built the ark.
18. **The F. Lee Bailey Rule** – Any person who does his own legal work has a fool for a client.



Asset Protection Ownership Choices

1. In my own name.
2. In my spouse's name.
3. In my mother's name. Is it really hers?
4. Tenancy by the entireties between spouses in a TBE state.
5. In investments that are protected from creditors.
(But not the IRS, the FTC, the SEC and future government categories).
6. In LLC's and Family Limited Partnerships.
7. An offshore LLC or Family Limited Partnership.
8. An offshore trust or foundation.
9. In our children's name(s).
 - UTMA?
 - 529 Plans?
 - Prepaid college savings plans?

Asset Protection Ownership Choices Continued

10. In a trust for our children.
11. In a trust for our children that we can be added to as beneficiaries if it falls apart.
 - » The above in a traditional law state.
 - » The above in an APT state.
 - » The above for estate tax planning purposes.
12. In a foreign bank account or a Delaware bank account.
13. In an LLC owned 95% by an offshore trust.
14. In a company owned for my children or in a trust described above that earns monies for services rendered from my primary company for services offshore that are actually rendered and tax advantaged.
15. In a trust formed by my parents for me that has invested wisely, and limits what I take out to what is needed for health, education and maintenance.
16. In my assets, but subject to debt owed to others that liens or mortgages my assets.
17. In a private charity.

Sweat The Details Or Let Someone Sweat The Details. We Rarely Find A Client Where All Of The Paperwork Is In Exactly Correct Order:

- A. Beneficiary designations.
- B. Policy ownership
- C. Account titling
- D. Corporate paperwork
- E. Tax returns

Appoint a project manager to have this covered every two years!



Florida Laws – The Most Generous In The United States

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

POLLING QUESTION

A fraudulent transfer is:

- A. Not fraud – need not be dishonest.
- B. A crime in some states.
- C. May be set aside.
- D. All of the above.

Where Do Trusts Fit In Logistically

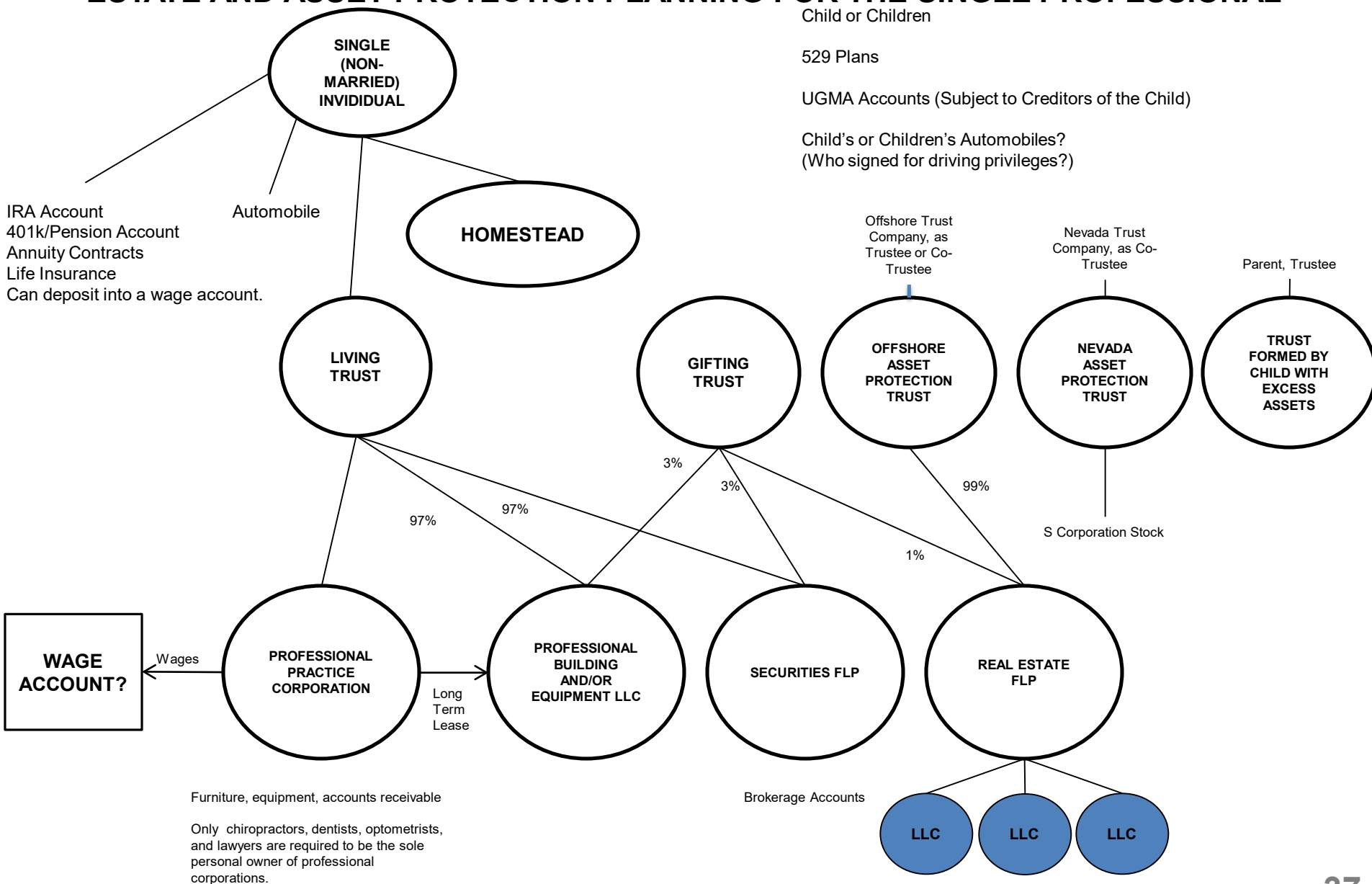
ESTATE AND ASSET PROTECTION PLANNING FOR THE SINGLE PROFESSIONAL

Child or Children

529 Plans

UGMA Accounts (Subject to Creditors of the Child)

Child's or Children's Automobiles?
(Who signed for driving privileges?)



Asset Protection Advisor Choices

1. An estate and tax planning lawyer
2. A lawyer who only does asset protection work all over the country
3. Legal Zoom
4. An investment salesperson who has products that provide everything needed
5. A person someone knows who lives in an island country



#1

Firewall Protection



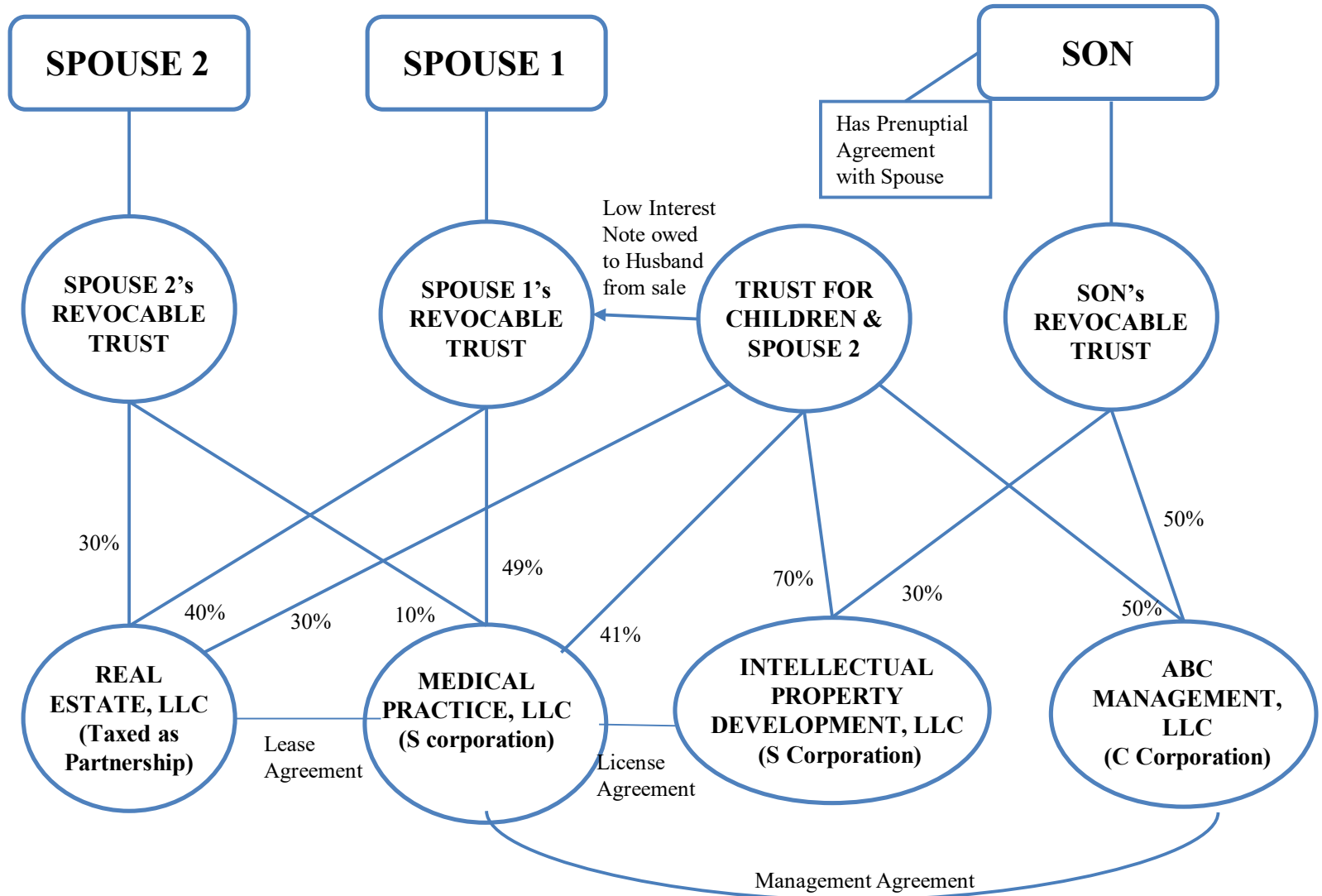
Firewall Protection

Use Firewall Protection and Multiple Entities Where Possible:

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



Possible Family Logistics for a Successful Business and Estate Plan



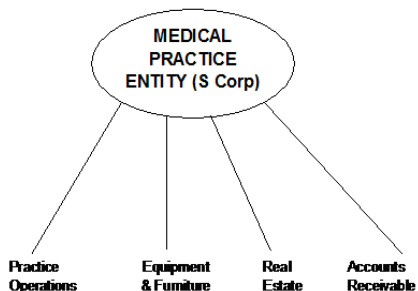
New Parent F Reorganization

Showing Accounts Receivable Factoring Arrangement

IRC Section 368(a) (1)(F) Allows a Regular Corporation to Divide into Separate Corporations Tax-Free by Having a New Common Parent Company Formed

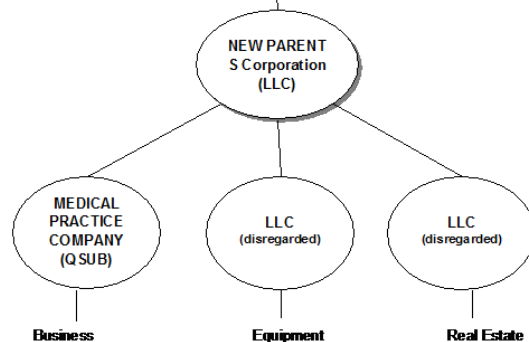
1. Physician or Physicians Owns Medical Practice Entity

Shareholder or Shareholders



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

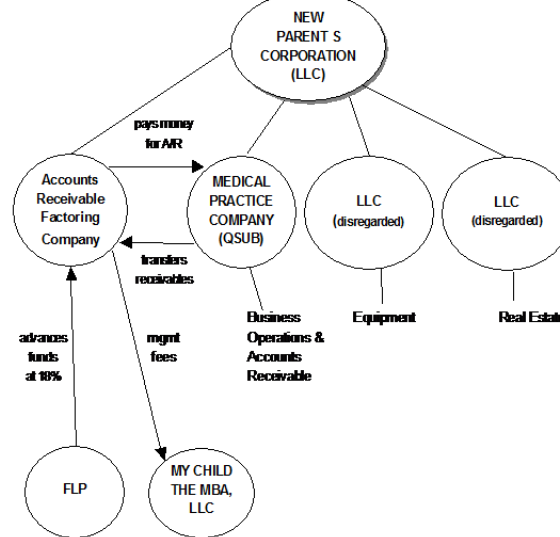
2. Shareholder (S) (and spouses?)



[Retains initial tax identification number and billing identity]

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

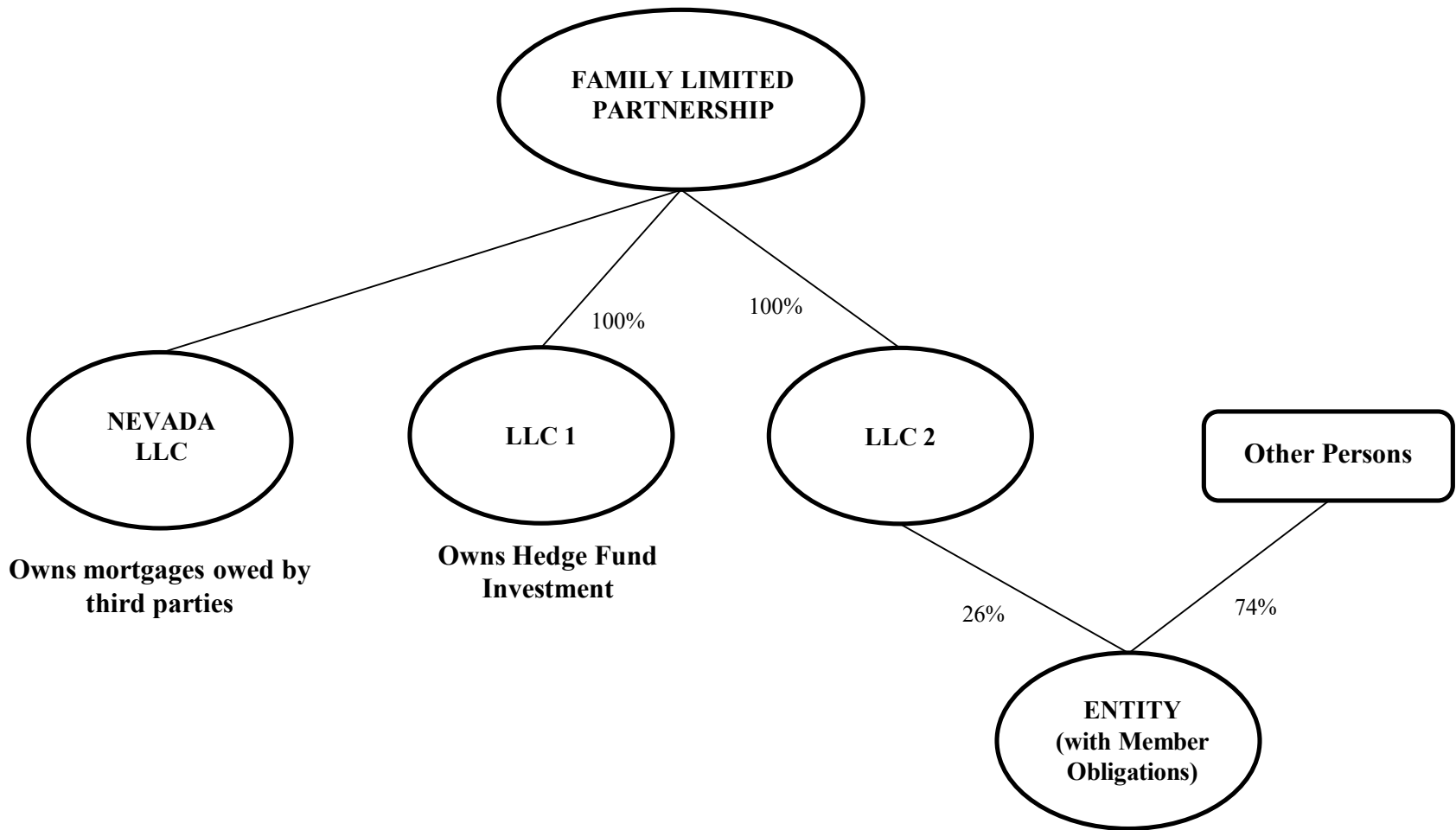
3. Shareholder (S) (and spouses?)



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

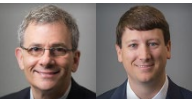


Using Intermediary Entities to Protect Family Limited Partnership From Potential Liability



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

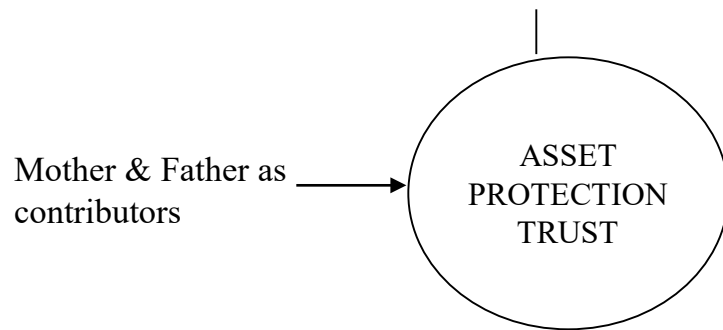
- Florida Statute Section 736.0507 codifies the concept that a trustee's interest in trust assets will not be subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt. This, of course, does not apply to the extent that the trustee is the settlor and the beneficiary.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



Limited Liability Trust – Asset Protection Trust

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

Trust Company in proper jurisdiction = Trustee or Co-Trustee



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

Rental Home(s)

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



Practice and Business Entities and How They Can be Taxed



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

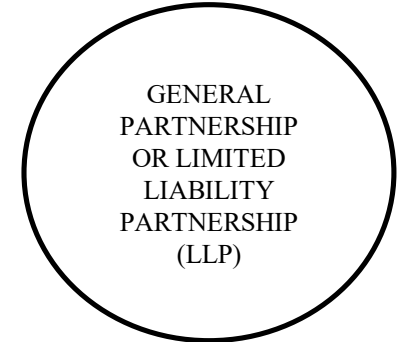
\$35 filing fee
\$150 annual report fee



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

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

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



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

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

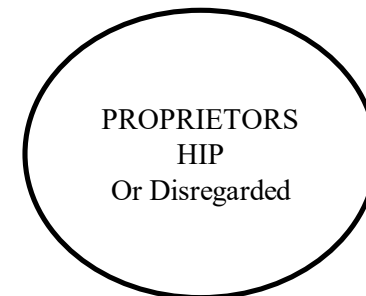
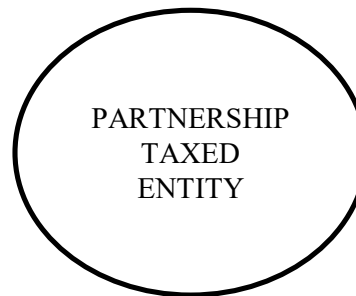
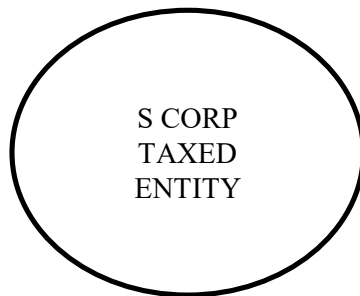
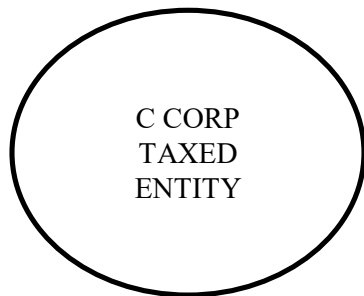


Basic Income Tax Operation of Each Type of Entity

Shareholder
(Dividends are taxed)

Shareholder
(Dividends are not taxed)

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



Corporate level tax – revenues minus deductible expenses.

Dividends are not deductible expenses.

May deduct healthcare and disability insurance expenses under certain circumstances.

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

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

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

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

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

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

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

Distributions to partners are usually subject to employment taxes

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

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

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

All income and deductions are shown on individual’s Form 1040 Schedule C – subject to employment taxes of 12.4% on the first \$113,700 of income, plus the 2.9% Medicare tax, making for a 15.3% tax thereon, plus the 2.9% Medicare tax on income from \$113,700 and an additional 0.9% Medicare tax to the extent of self-employment income that exceeds \$200,000 for a single taxpayer and \$250,000 for a married taxpayer.



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

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

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

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

#2

Equity Stripping – Reducing Exposed Assets with Preferred Creditors



Equity Stripping

Definition:

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

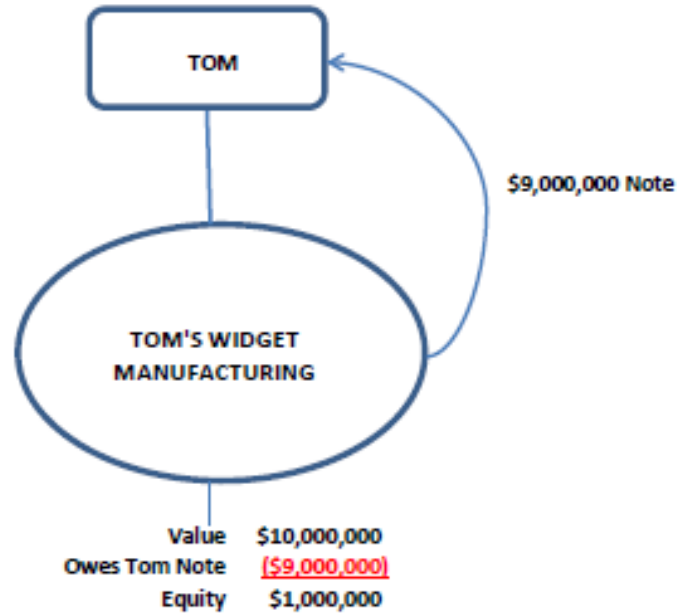


Debt Equity Planning

Tom owns a company that has a \$10,000,000 book value and no debt. It makes widgets and may be sued.

Why not have Tom be owed \$9,000,000 on a note secured by a pledge of the assets of the company, so that if something bad happens in the company, Tom can foreclose and receive \$9,000,000 worth of assets to be in front of the other creditor or creditors.

Typically, this can be done tax-free.



Equity Stripping – Preferred Debtors:

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



What Can Be Pledged?

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



A landlord is a creditor, in effect:

A long term lease that gives the landlord the ability to collect all future rent upon default, and a lien on the assets of the tenant can be an effective creditor protection arrangement.

Cross-collateralization, and guarantees:

Multiple entities can be protected by having common obligations under multiple loans and collateralization arrangements – but the “friendly creditor” will have a lot of leverage against the assets and entities, if it ever becomes unfriendly.



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

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



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

CLIENT

**SPOUSE OF
CLIENT**



\$5,000,000

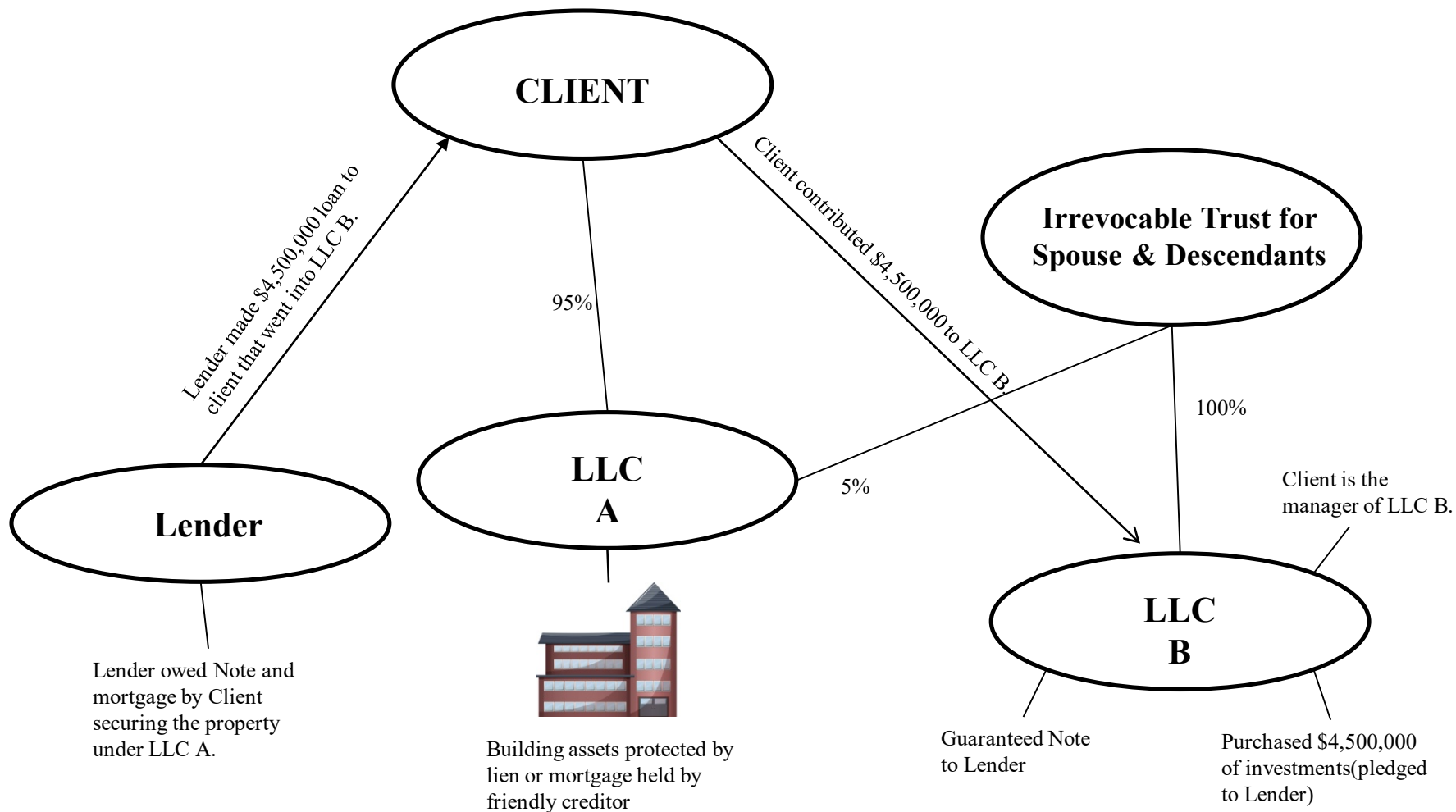
Client owns \$5,000,000 building.

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



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

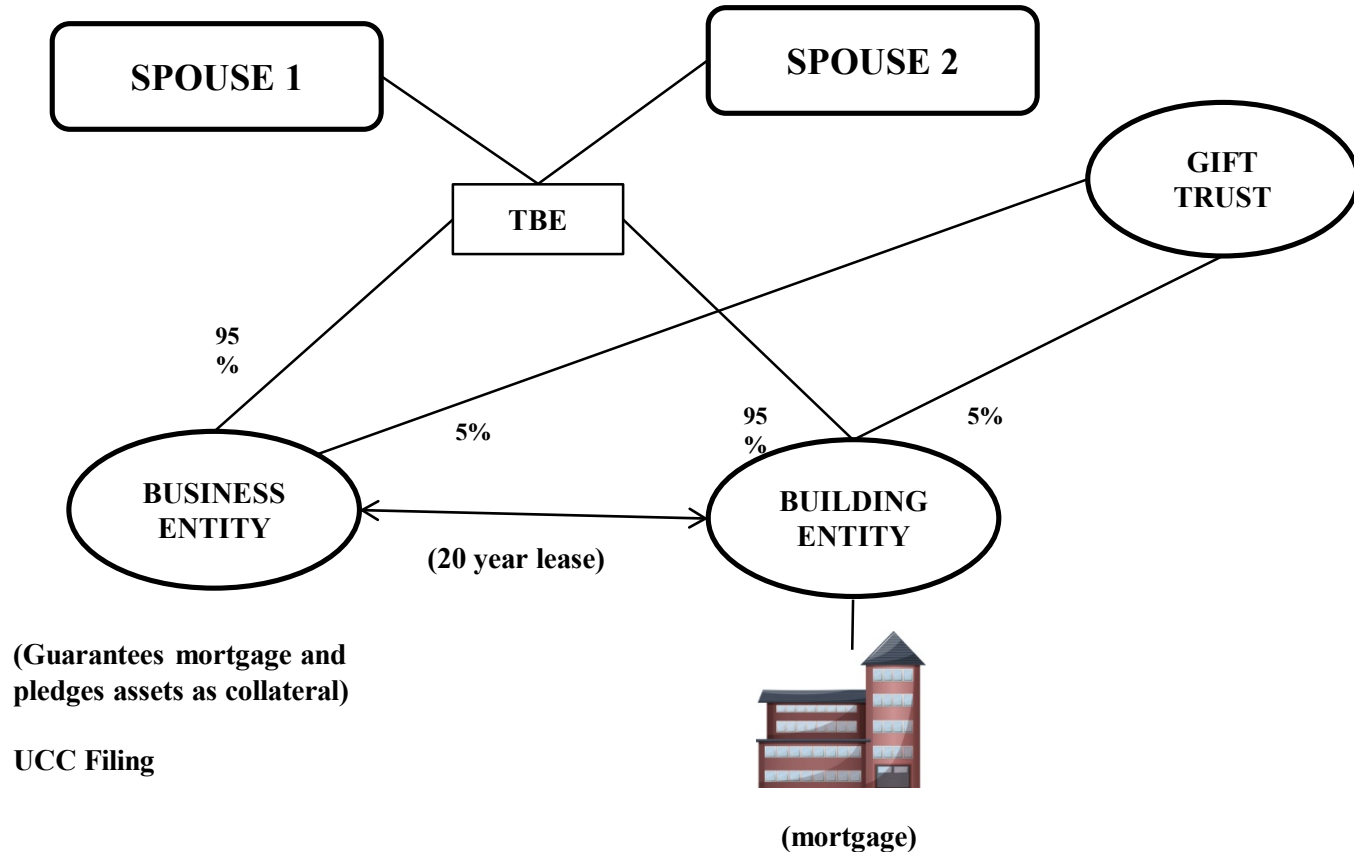
Debt Planning for the Solvent Family that Wants to Stay that Way



Coordination of Buildings and Businesses

Debt on building may protect assets of business equity.

Lease obligation to landlord company provides further protection.



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



Equity Stripping

Example:

- John has ten rental houses worth \$3,000,000 and would like to have \$2,600,000 safely set aside in an offshore trust for future creditor protection.
- Bank of Offshore sets up a Delaware company called ABC Lenders.
- John establishes an offshore trust called DEF Trust for John and his family.
- ABC Lenders places \$2,600,000 into the DEF trust account, and John can direct the investments into CDs, bonds, and other safe (but permitted) vehicles.
- The parties sign agreements so that there is a mortgage of public record owed to the Delaware company and secured by a mortgage on John's properties.

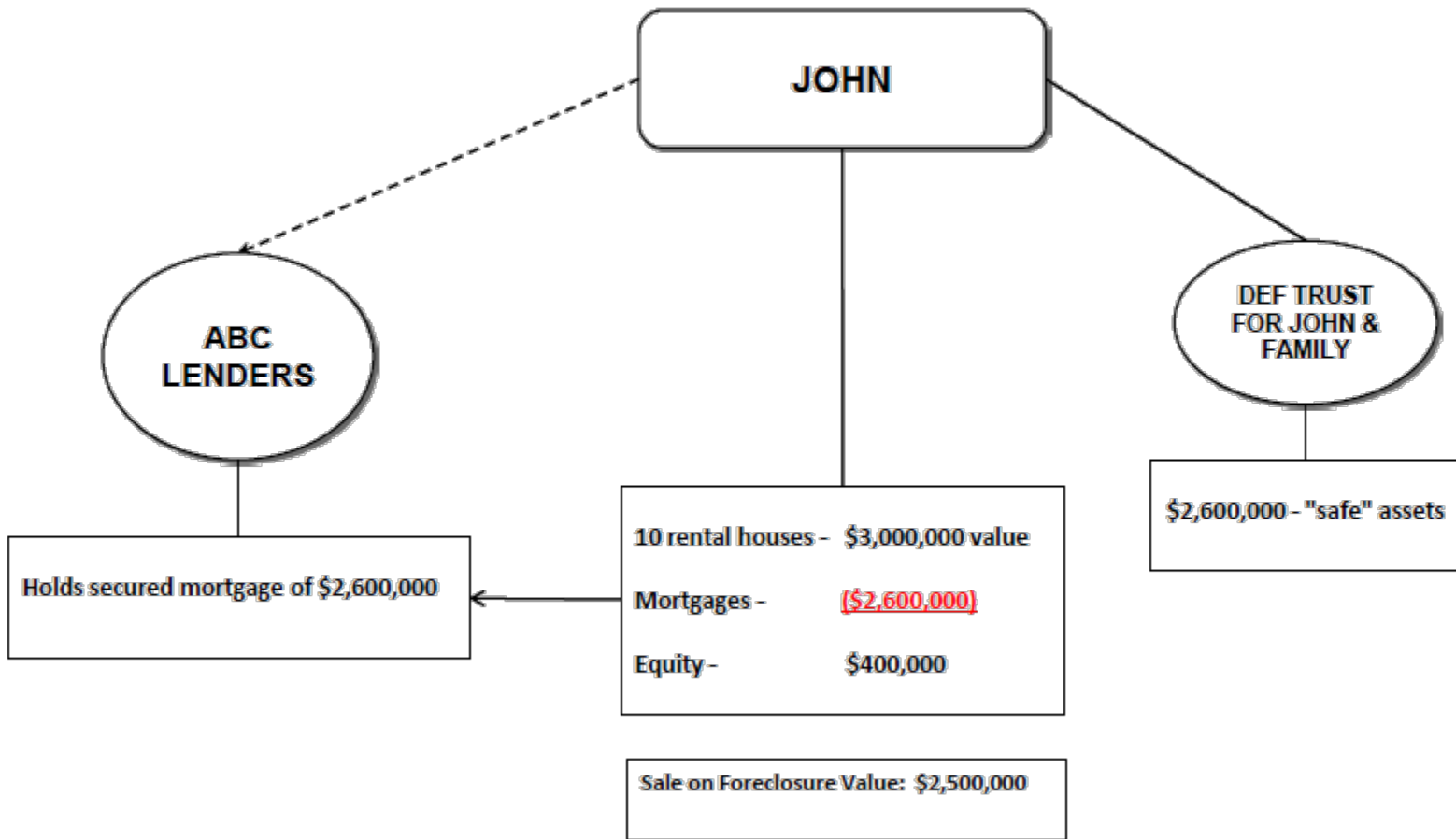


Equity Stripping

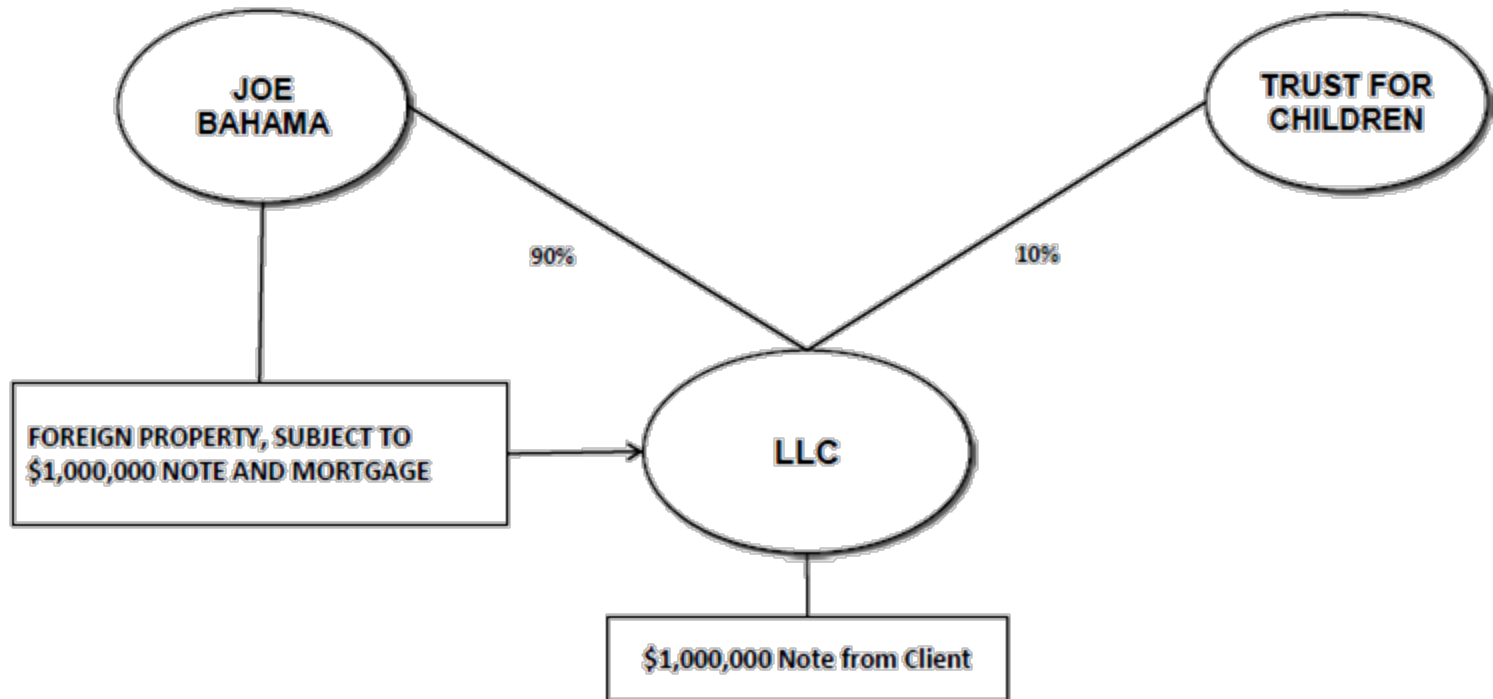
Example, Continued:

- By separate agreement, the DEF Trust pledges its assets as additional collateral in case the foreign lender cannot receive full payment in the event of a default.
- John's financial statements show \$3,000,000 in properties, \$2,600,000 in mortgages owed on the properties, and that John is the discretionary beneficiary of an offshore trust with \$2,600,000 in assets.
- John gets into an unexpected and horrendous creditor situation.
- The creditor settles the case for \$300,000 after reviewing John's financial statements.
- John and his properties live happily ever after.





How to Protect a Foreign Property from Being “Easy Pickin’s” Without Transferring the Property



Friendly Judgments

Definition:

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

20 years is a long time!

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



Judgments

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

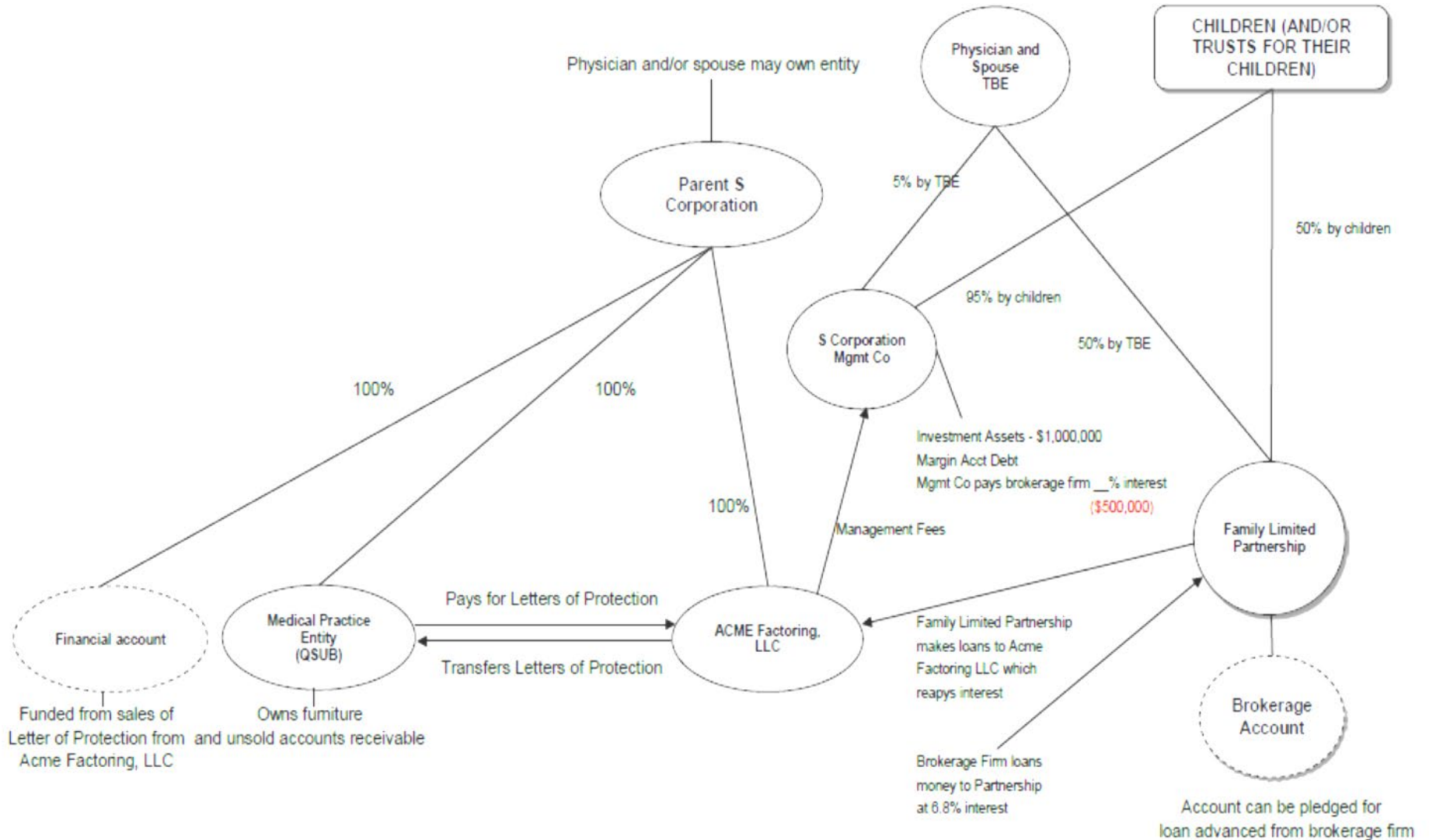
The company obtains the judgment, files it of public record against the debtor in the amount of \$800,000, and the debtor can pledge the debtor's assets as additional collateral for a work out that allows the debtor to pay \$50,000 a year for four years. Upon default, whatever is left of the \$800,000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

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



Extended Letter of Protection Enhancement (ELOPE System)

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



POLLING QUESTION

Which would you prefer to receive for free as a PDF:

- A. Grow Your Medical Practice book
- B. The Florida Physicians Guide to Creditor Protection
- C. 8 Steps to a Successful Estate Plan
- D. None of the above

#3

Charging Order Entities



Charging Order Entities:

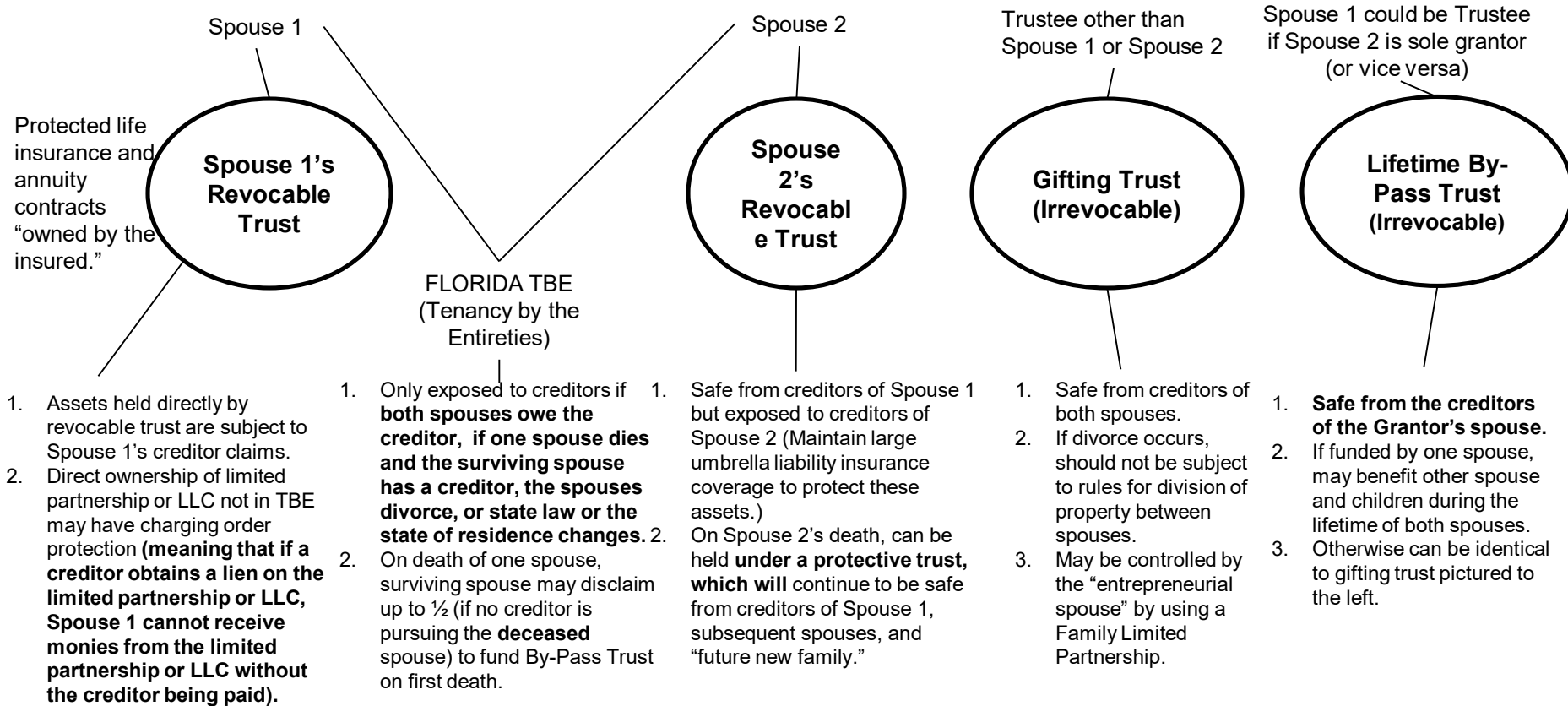
- Limited Liability Companies and Limited Partnerships in jurisdictions that have charging order protection.
- Does your home state have charging order protection?
- Give voting rights away to facilitate protection.



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

General Rules:

- Typically want each trust funded with at least \$11,700,000 worth of assets on death for estate tax planning.
- May be funded from ½ of tenancy by the entireties assets via disclaimer and probate or by life insurance/pension/IRA assets.



SEE NEXT PAGE FOR SECOND TIER PLANNING

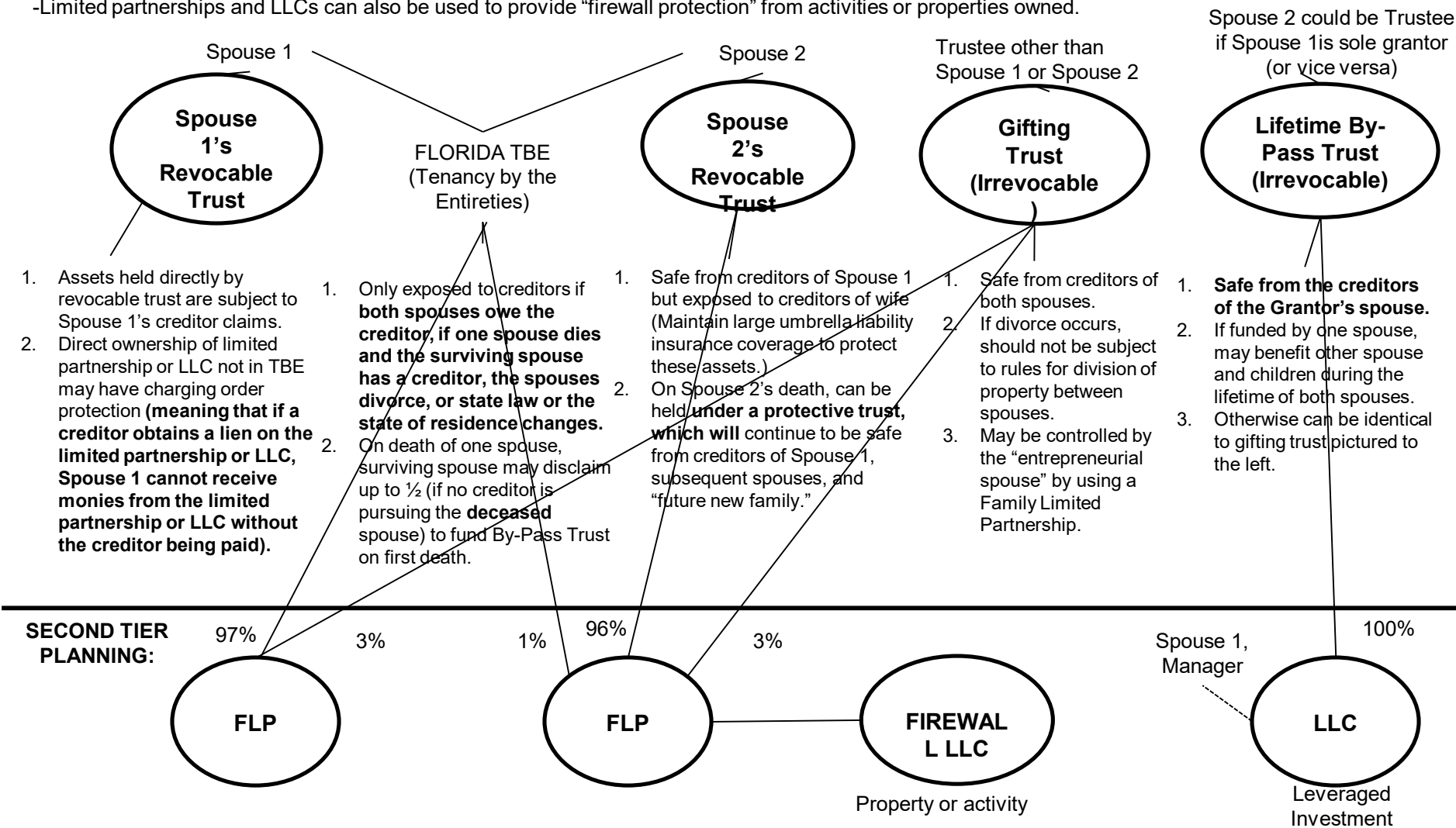
A COMMON SOLUTION - to use a limited partnership or similar mechanisms and have no assets directly in the "high risk" spouse's trust, half to two-thirds of the assets held as tenants by the entireties, and half to two-thirds of the assets directly in the "low risk" spouse's trust.



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

Subsidiary Entity Techniques:

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



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



Other Porcupines:

- Property with hazardous waste
- Other assets that a creditor does not want to touch

Get an orphanage involved...The story of an island on a river!



8 Common LLC Planning Errors

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

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

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

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

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

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



8 Common LLC Planning Errors

2.) Entity Documents Can Disqualify S Election

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

Common causes of this catastrophic treatment are as follows:

- (a) An operating agreement does not provide for all income to be distributed pro rata to ownership. Commonly, “partnership style” clauses assure members that they will recapture their original investment or have some sort of an income sharing that would reflect a “second class of stock,” which is not permitted under the S Corporation Rules.
- (b) Although state law permits a limited liability company to have non-citizens, corporations, and other entities own LLC interests, these and certain other entities are not permitted owners of S Corporation stock and will, thus, cause disqualification.
- (c) Too high of a debt equity ration could cause disqualification from S Corporation status.



8 Common LLC Planning Errors

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

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

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

4.) Forced Sale Provisions

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



8 Common LLC Planning Errors

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

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

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

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



8 Common LLC Planning Errors

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

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

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

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

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



#4

Foreign Companies and LLCs



Excerpt from a *Thursday Report* Article:

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

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

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

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



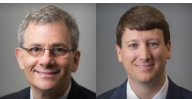
In *No Time for Sergeants*, the character played by Andy Griffith could never get his arms around the situation. Wells Fargo (which has been around since 1852, long before anyone had heard of Andy Griffith,) thought they were going to get their arms around stock but failed. *The Barber of Seville* was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

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

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

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

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



#5

Foreign and Delaware Accounts –

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



#6

For Children and Grandchildren

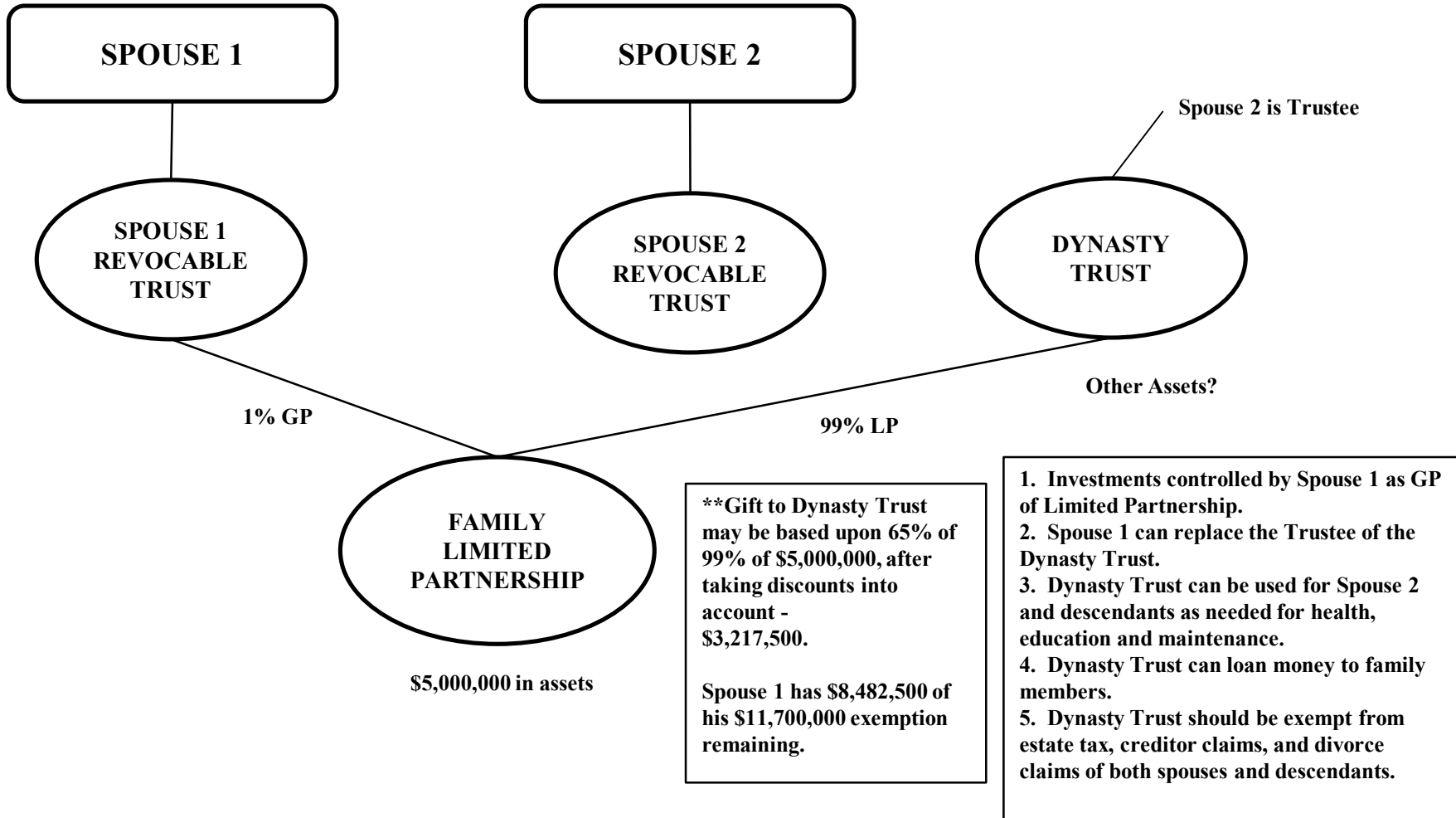


Do Good Estate Tax Planning So That Assets Are Beyond Your Ownership But Not Your Control:

- A. Trusts for others that you can borrow from.
- B. 529 plans.
- C. Uniform Transfers to Minors Act
- D. Managed LLCs
- E. Limited Partnerships and LLCs controlled by the parent, but owned for the children and descendants and/or spouse
- F. Asset protection trust jurisdiction mechanisms that allow you to be added as a beneficiary.



Example of a Spouse 1/Spouse 2 Dynasty Trust Arrangement



Special Clauses for Trust Agreements

Not all trusts are created equal.

While the trust agreements that we typically prepare for clients have a number of clauses that give instructions to trustees on how and when to determine what income, support, and principal payments should be made to beneficiaries, different clients have different views and preferences. Here is a list of questions and approaches that can be considered in trust design and implementation.

1. Whether to let the beneficiary of a particular trust have a voice as co-trustee or the ability to replace any acting trustee with a licensed trust company or other trustworthy trustee or advisor.
2. Whether to require that the beneficiary would have a prenuptial agreement or a post-nuptial agreement before being able to inherit from a trust or to receive any significant benefits or to have control.
3. Whether there should be a monthly or annual distribution amount guideline that would be presumed to be the maximum that a person should receive, the minimum that a person should receive, or a provision that gives a minimum and a maximum that can be changed with the Consumer Price Index.
4. Whether young beneficiaries should be required to finish a four year degree, a post-undergraduate degree, work full time, have a profession, or be a full time homemaker with children before being able to receive any significant benefits.

Special Clauses for Trust Agreements

Not all trusts are created equal.

5. Whether a beneficiary should have an “incentive clause” where the trust would pay minimal benefits except to match W-2 or other professional or entrepreneurial earnings or pay an hourly rate based upon actual hours worked by the beneficiary in any notable endeavor.
6. Whether individuals who may have tendencies towards alcoholism, drug abuse, gambling problems, or other addictions should have separate guidelines and standards.
7. Whether any spouse or a long time spouse should have the ability to be:
 - (a) Added as a beneficiary after a certain number of years of consecutive marriage;
 - (b) To serve as a trustee for the benefit of descendants if that spouse will not be a beneficiary (or if he or she will).
8. Whether the beneficiary should have the power to appoint some portion of the assets upon death to a class of persons, or entities, which can include your descendants, or certain qualified charitable organizations.



#7

Life Insurance and Annuity Contracts



Use Life Insurance Properly

- A. Death benefit to a trust that can support a surviving spouse and descendants.
- B. Tax-free growth?
- C. Consider variable annuities and fixed annuities as well.



What a Difference a 1% Rate of Return Makes “The most powerful force in the universe is compound interest.”

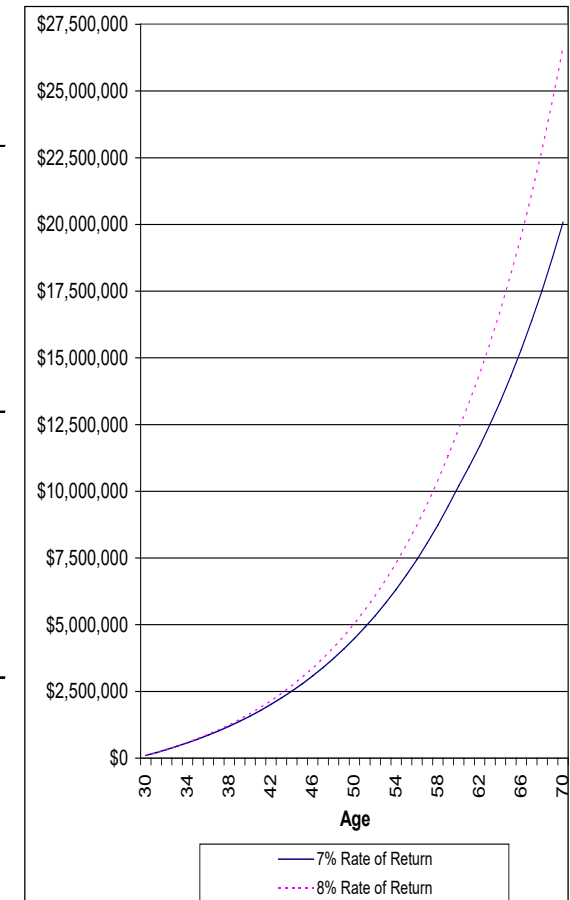
– Albert Einstein

July 2015 – Mavi – Biggest Mistakes

Starting at Age 30, Dr. A Invests \$100,000 annually thru Age 60 at 8%, Followed by 10 years of Growth with No Additions

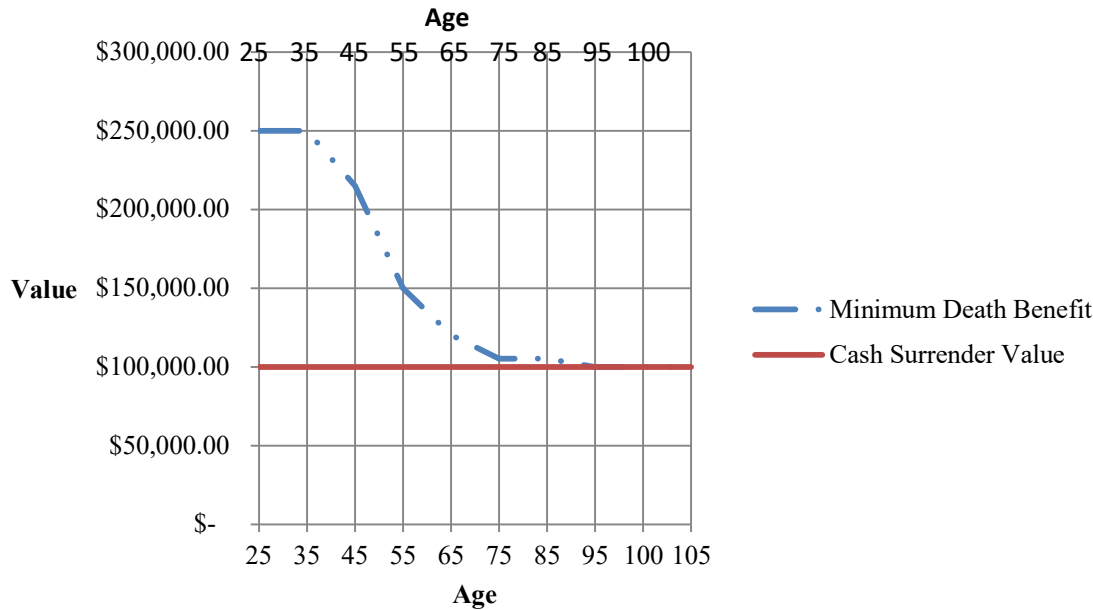
Starting at Age 30, Dr. A Invests \$100,000 annually thru Age 60 at 7%, Followed by 10 years of Growth with No Additions

with No Additions			with No Additions			% Total of	
Age	Total Amount Invested	Investment Value	Age	Total Amount Invested	Investment Value	Net Difference	Investment Amount
30	\$100,000	\$100,000	30	\$100,000	\$100,000	\$0	0.0%
31	\$200,000	\$208,000	31	\$200,000	\$207,000	\$1,000	0.5%
32	\$300,000	\$324,640	32	\$300,000	\$321,490	\$3,150	1.1%
33	\$400,000	\$450,611	33	\$400,000	\$443,994	\$6,617	1.7%
34	\$500,000	\$586,660	34	\$500,000	\$575,074	\$11,586	2.3%
35	\$600,000	\$733,593	35	\$600,000	\$715,329	\$18,264	3.0%
36	\$700,000	\$892,280	36	\$700,000	\$865,402	\$26,878	3.8%
37	\$800,000	\$1,063,663	37	\$800,000	\$1,025,980	\$37,683	4.7%
38	\$900,000	\$1,248,756	38	\$900,000	\$1,197,799	\$50,957	5.7%
39	\$1,000,000	\$1,448,656	39	\$1,000,000	\$1,381,645	\$67,011	6.7%
40	\$1,100,000	\$1,664,549	40	\$1,100,000	\$1,578,360	\$86,189	7.8%
41	\$1,200,000	\$1,897,713	41	\$1,200,000	\$1,788,845	\$108,868	9.1%
42	\$1,300,000	\$2,149,530	42	\$1,300,000	\$2,014,064	\$135,465	10.4%
43	\$1,400,000	\$2,421,492	43	\$1,400,000	\$2,255,049	\$166,443	11.9%
44	\$1,500,000	\$2,715,211	44	\$1,500,000	\$2,512,902	\$202,309	13.5%
45	\$1,600,000	\$3,032,428	45	\$1,600,000	\$2,788,805	\$243,623	15.2%
46	\$1,700,000	\$3,375,023	46	\$1,700,000	\$3,084,022	\$291,001	17.1%
47	\$1,800,000	\$3,745,024	47	\$1,800,000	\$3,399,903	\$345,121	19.2%
48	\$1,900,000	\$4,144,626	48	\$1,900,000	\$3,737,896	\$406,730	21.4%
49	\$2,000,000	\$4,576,196	49	\$2,000,000	\$4,099,549	\$476,647	23.8%
50	\$2,100,000	\$5,042,292	50	\$2,100,000	\$4,486,518	\$555,774	26.5%
51	\$2,200,000	\$5,545,676	51	\$2,200,000	\$4,900,574	\$645,102	29.3%
52	\$2,300,000	\$6,089,330	52	\$2,300,000	\$5,343,614	\$745,715	32.4%
53	\$2,400,000	\$6,676,476	53	\$2,400,000	\$5,817,667	\$858,809	35.8%
54	\$2,500,000	\$7,310,594	54	\$2,500,000	\$6,324,904	\$985,690	39.4%
55	\$2,600,000	\$7,995,442	55	\$2,600,000	\$6,867,647	\$1,127,794	43.4%
56	\$2,700,000	\$8,735,077	56	\$2,700,000	\$7,448,382	\$1,286,695	47.7%
57	\$2,800,000	\$9,533,883	57	\$2,800,000	\$8,069,769	\$1,464,114	52.3%
58	\$2,900,000	\$10,396,594	58	\$2,900,000	\$8,734,653	\$1,661,941	57.3%
59	\$3,000,000	\$11,328,321	59	\$3,000,000	\$9,446,079	\$1,882,242	62.7%
60	\$3,100,000	\$12,334,587	60	\$3,100,000	\$10,207,304	\$2,127,283	68.6%
61	\$3,100,000	\$13,321,354	61	\$3,100,000	\$10,921,815	\$2,399,538	77.4%
62	\$3,100,000	\$14,387,062	62	\$3,100,000	\$11,686,343	\$2,700,720	87.1%
63	\$3,100,000	\$15,538,027	63	\$3,100,000	\$12,504,386	\$3,033,641	97.9%
64	\$3,100,000	\$16,781,069	64	\$3,100,000	\$13,379,694	\$3,401,376	109.7%
65	\$3,100,000	\$18,123,555	65	\$3,100,000	\$14,316,272	\$3,807,283	122.8%
66	\$3,100,000	\$19,573,439	66	\$3,100,000	\$15,318,411	\$4,255,028	137.3%
67	\$3,100,000	\$21,139,314	67	\$3,100,000	\$16,390,700	\$4,748,614	153.2%
68	\$3,100,000	\$22,830,459	68	\$3,100,000	\$17,538,049	\$5,292,410	170.7%
69	\$3,100,000	\$24,656,896	69	\$3,100,000	\$18,765,712	\$5,891,184	190.0%
70	\$3,100,000	\$26,629,448	70	\$3,100,000	\$20,079,312	\$6,550,136	211.3%



Tax Talk

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



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



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

- Investment in the contract or basis is:
 - > (1) the aggregate amount of premiums or other consideration paid for the contract LESS
 - > (2) the aggregate amount received or credited under the contract that is excludable from gross income
- Payments not included in calculating the amount paid for the contract:
 - > Premium payments for (1) disability income, (2) double indemnity provisions, and (3) disability waiver provisions.
 - > Interest payments on policy loans
- What else reduces basis?
 - > Policy Dividends received in cash
 - > Dividends used to purchase policy riders not integral to the insurance policy (e.g. disability income, disability waiver provisions, accidental death insurance, term insurance riders)
 - > **Dividends used to pay policy premiums**
 - > **Dividends used to pay interest on policy loans**



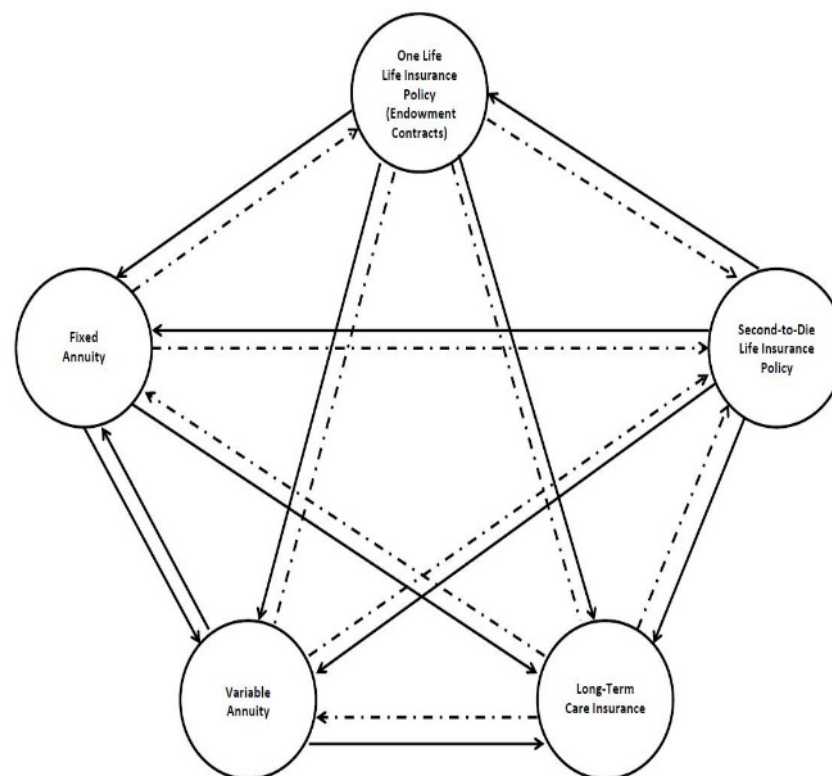
1035 Exchanges

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

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

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

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



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



Does 15% Cost 15% - The Time Value of Money

15% Initial vs Ratable Premium Expense

FRONT LOADED 15% EXPENSE AT 5% GROWTH				
Year	Annual Contribution	Policy Costs	Account Balance	Growth @ 5%
1	\$100,000	\$ (100,000.00)	\$0	\$0
2	\$100,000	\$ (50,000.00)	\$50,000	\$52,500
3	\$100,000	0	\$152,500	\$160,125
4	\$100,000	0	\$260,125	\$273,131
5	\$100,000	0	\$373,131	\$391,788
6	\$100,000	0	\$491,788	\$516,377
7	\$100,000	0	\$616,377	\$647,196
8	\$100,000	0	\$747,196	\$784,556
9	\$100,000	0	\$884,556	\$928,784
10	\$100,000	0	\$1,028,784	\$1,080,223
11	\$0	0	\$1,080,223	\$1,134,234
12	\$0	0	\$1,134,234	\$1,190,946
13	\$0	0	\$1,190,946	\$1,250,493
14	\$0	0	\$1,250,493	\$1,313,018
15	\$0	0	\$1,313,018	\$1,378,668
16	\$0	0	\$1,378,668	\$1,447,602
17	\$0	0	\$1,447,602	\$1,519,982
18	\$0	0	\$1,519,982	\$1,595,981
19	\$0	0	\$1,595,981	\$1,675,780
20	\$0	0	\$1,675,780	\$1,759,569
30	\$0	0	\$1,759,569	\$1,847,548
40	\$0	0	\$1,847,548	\$1,939,925

15% EXPENSE SPREAD OUT OVER 10 YEARS AT 5% GROWTH				
Year	Annual Contribution	Policy Costs	Account Balance	Growth @ 5%
1	\$100,000	\$ (15,000.00)	\$85,000	\$89,250
2	\$100,000	\$ (15,000.00)	\$174,250	\$182,963
3	\$100,000	\$ (15,000.00)	\$267,963	\$281,361
4	\$100,000	\$ (15,000.00)	\$366,361	\$384,679
5	\$100,000	\$ (15,000.00)	\$469,679	\$493,163
6	\$100,000	\$ (15,000.00)	\$578,163	\$607,071
7	\$100,000	\$ (15,000.00)	\$692,071	\$726,674
8	\$100,000	\$ (15,000.00)	\$811,674	\$852,258
9	\$100,000	\$ (15,000.00)	\$937,258	\$984,121
10	\$100,000	\$ (15,000.00)	\$1,069,121	\$1,122,577
11	\$0	0	\$1,122,577	\$1,178,706
12	\$0	0	\$1,178,706	\$1,237,641
13	\$0	0	\$1,237,641	\$1,299,523
14	\$0	0	\$1,299,523	\$1,364,499
15	\$0	0	\$1,364,499	\$1,432,724
16	\$0	0	\$1,432,724	\$1,504,360
17	\$0	0	\$1,504,360	\$1,579,578
18	\$0	0	\$1,579,578	\$1,658,557
19	\$0	0	\$1,658,557	\$1,741,485
20	\$0	0	\$1,741,485	\$1,828,559
30	\$0	0	\$1,828,559	\$1,919,987
40	\$0	0	\$1,919,987	\$2,015,987

IF CONTRIBUTION IS INVESTED OUTRIGHT			
Year	Annual Contribution	Account Balance	Growth at 3.7%
1	\$100,000	\$100,000	\$103,700
2	\$100,000	\$203,700	\$211,237
3	\$100,000	\$311,237	\$322,753
4	\$100,000	\$422,753	\$438,395
5	\$100,000	\$538,395	\$558,315
6	\$100,000	\$658,315	\$682,673
7	\$100,000	\$782,673	\$811,632
8	\$100,000	\$911,632	\$945,362
9	\$100,000	\$1,045,362	\$1,084,040
10	\$100,000	\$1,184,040	\$1,227,850
11	\$0	\$1,227,850	\$1,273,280
12	\$0	\$1,273,280	\$1,320,392
13	\$0	\$1,320,392	\$1,369,246
14	\$0	\$1,369,246	\$1,419,908
15	\$0	\$1,419,908	\$1,472,445
16	\$0	\$1,472,445	\$1,526,925
17	\$0	\$1,526,925	\$1,583,422
18	\$0	\$1,583,422	\$1,642,008
19	\$0	\$1,642,008	\$1,702,763
20	\$0	\$1,702,763	\$1,765,765
30	\$0	\$1,765,765	\$1,831,098
40	\$0	\$1,831,098	\$1,898,849

IF ANNUAL PREMIUM INVESTED AT 5% WITH NO COSTS		
Year	Annual Contribution	Account Balance
1	\$100,000	\$105,000.00
2	\$100,000	\$215,250
3	\$100,000	\$331,013
4	\$100,000	\$452,563
5	\$100,000	\$580,191
6	\$100,000	\$714,201
7	\$100,000	\$854,911
8	\$100,000	\$1,002,656
9	\$100,000	\$1,157,789
10	\$100,000	\$1,320,679
11	\$0	\$1,386,713
12	\$0	\$1,456,048
13	\$0	\$1,528,851
14	\$0	\$1,605,293
15	\$0	\$1,685,558
16	\$0	\$1,769,836
17	\$0	\$1,858,328
18	\$0	\$1,951,244
19	\$0	\$2,048,806
20	\$0	\$2,151,246
30	\$0	\$2,258,809
40	\$0	\$2,371,749

Resulting rate of return 3.7%

TOTAL CONTRIBUTIONS: \$1,000,000

YEAR 20 VALUE- \$1,759,569

RATE OF RETURN- approximately 3.7%

Resulting rate of return 4%

TOTAL CONTRIBUTIONS: \$1,000,000

YEAR 20 VALUE- \$1,828,559

RATE OF RETURN- approximately 4%

Year	Annual Contribution	Account Balance	Growth at 4%
1	\$100,000	\$100,000	\$104,000.0
2	\$100,000	\$204,000	\$212,160.00
3	\$100,000	\$312,160	\$324,646.40
4	\$100,000	\$424,646	\$441,632.26
5	\$100,000	\$541,632	\$563,297.55
6	\$100,000	\$663,298	\$689,829.45
7	\$100,000	\$789,829	\$821,422.63
8	\$100,000	\$921,423	\$958,279.53
9	\$100,000	\$1,058,280	\$1,100,610.71
10	\$100,000	\$1,200,611	\$1,248,635.14
11	\$0	\$1,248,635	\$1,298,580.55
12	\$0	\$1,298,581	\$1,350,523.77
13	\$0	\$1,350,524	\$1,404,544.72
14	\$0	\$1,404,545	\$1,460,726.51
15	\$0	\$1,460,727	\$1,519,155.57
16	\$0	\$1,519,156	\$1,579,921.79
17	\$0	\$1,579,922	\$1,643,118.66
18	\$0	\$1,643,119	\$1,708,843.41
19	\$0	\$1,708,843	\$1,777,197.15
20	\$0	\$1,777,197	\$1,848,285.03
30	\$0	\$1,848,285	\$1,922,216.43
40	\$0	\$1,922,216	\$1,999,105.09

\$150,000 costs \$391,677 if paid up front (\$2,151,246 - \$1,759,569)

\$150,000 costs \$322,687 if paid ratably over 10 years (\$2,151,246 - \$1,828,559)



Existing Life Insurance Review

1. Request inforce ledgers, premium history, and copies of existing policies for permanent coverage.
2. Term insurance policies and a carrier printout confirming ownership and beneficiary designation will also be valuable.
3. Prior policies will have application information attached, which includes full application and medical history information that can be used and updated for subsequent applications.
4. Controversial - have inforce ledger numbers placed on spreadsheets to show historical and expected rate of returns.
 - a. At same time consider requesting the following for permanent policies:
 - i. Inforce Ledger showing reduction of death benefit to minimum corridor amount, and separately to MEC amount for permanent policies, and alternatively showing maximizing death benefit if increase is possible.
 - ii. Confirmation of any payment requirements that must be maintained to keep guarantees or other policy features in place.
 - iii. Are there existing riders that can be added or switched off and costs thereof.
 - iv. Veralytic, Inc. or other report on the carrier and product.

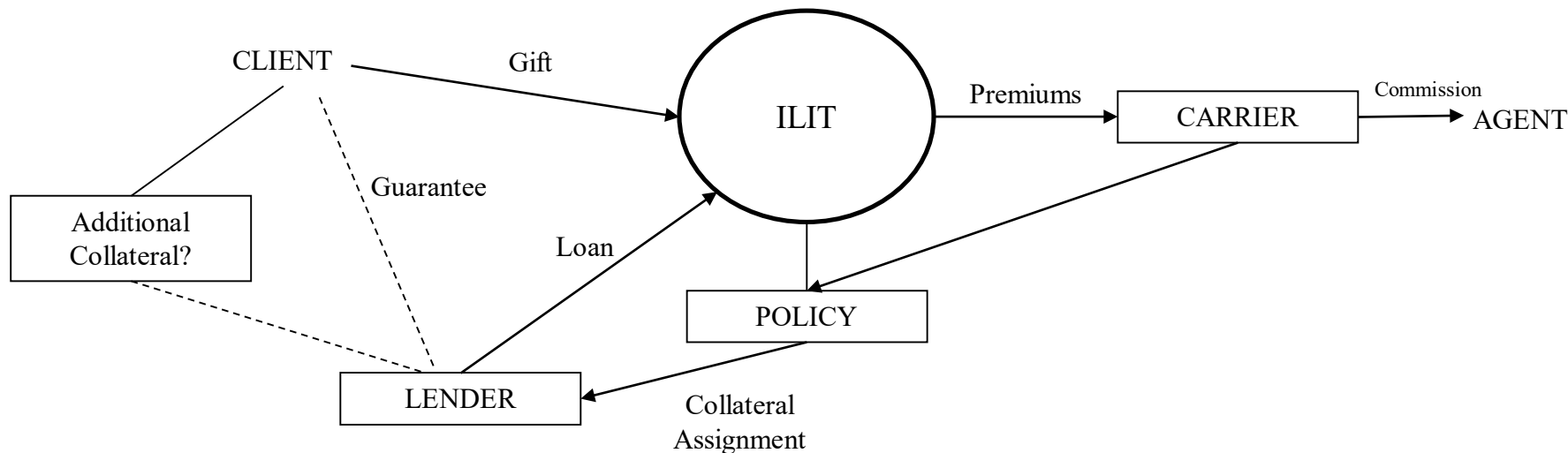


Question to Consider

- Should spreadsheets be run based upon premium history and inforce illustrations to help predict how the policy has performed and how it is expected to perform?
 - » Consider reducing the death benefit to (1) death benefits now needed, (2) minimum corridor amount or (3) modified endowment contract level. Surrender charges may apply when reduced.
 - » Examine financial condition of carrier.
- Quantify risk of insolvency of the carrier and note that reinsurance is used by the carrier to pay for death benefit.



Premium Financing as Simple as it Looks



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



#8

IRAs

and

Pensions



Optimize Qualified Plan Contributions – Confer with a Good Actuary

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



Optimize Qualified Plan Contributions – Confer with a Good Actuary – Employee Census

Name of Employer:						
Provide complete information for all employees employed during the year, even if they have terminated.						
<u>Employee Name</u>	<u>Date of Birth</u>	<u>Date of Hire</u>	<u>Date of Termination</u>	<u>Annualized W-2 Compensation</u>	<u>Hours per Week</u>	<u>Ownership %</u>

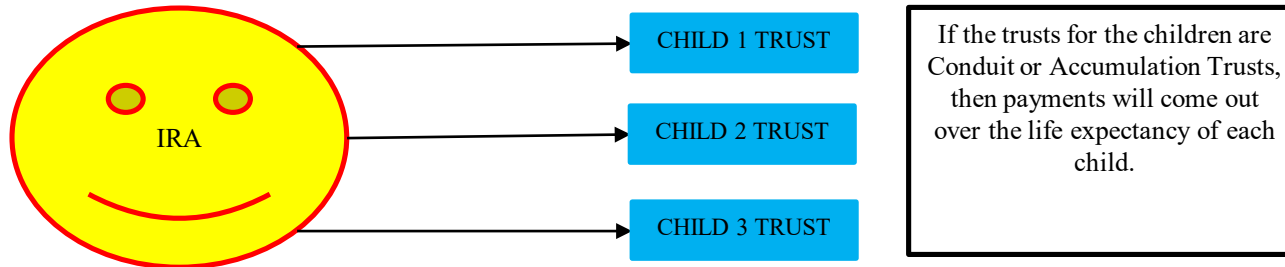
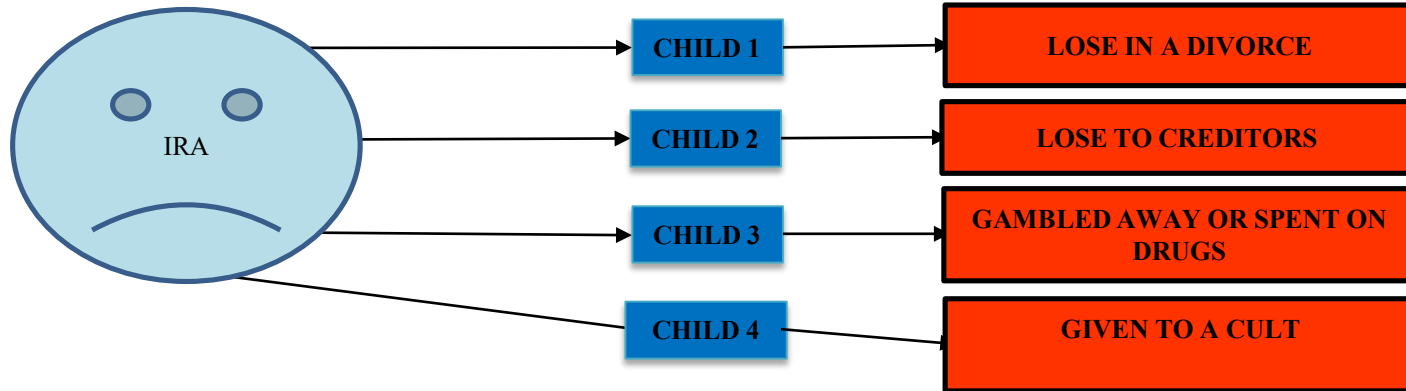


Three Choices for Retirement Plan Benefits

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

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

The Mathematics of Pension and IRA Minimum Distribution Rules



#9

Homestead



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Brandon@gassmanpa.com

GASSMAN CROTTY DENICOLA, P.A.
ATTORNEYS AT LAW

CPAacademy.org | 07.19.21
Asset Protection Meets Estate Tax Planning
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What Else Can You Have On Your Creditor Protected Florida Homestead Besides Your Home?

- Outside City Limits:
 - Property located outside of the city limits can qualify for homestead exemption even where the property (up to 160 acres) for residency of the debtor is used for substantial and independent business activities. This was confirmed in the case of *Davis v. Davis*, 864 So.2d 458 (Fla. 1st Dist. App. 2003), where the homestead property included the home and an independently operated mobile home park.
 - In *In re Earnest*, the Middle District of Florida held that 4.82 acres in unincorporated Marion County was exempt homestead property. There was a warehouse that the debtors used in their business on the property, and a building rented to a third party.
 - In *In re Oullette*, 2009, WL 1936896 (Bankr. M.D. Fla. 2009), the Middle District of Florida held that property located outside a municipality with two mobile home located on it was exempt homestead property even though the debtors rented to second mobile home to a third party. But not all cases have had this result.
- Inside City Limits:
 - The law is not as flexible for debtors with dual purpose homestead properties that are within city limits, and can be very fact specific.
 - A 2007 Bankruptcy Court opinion issued by Judge Isicoff found that while the constitution protects homestead, it limits the protection to the “residence of the owner or his family” and this protection would only apply to structures in which a member of the family resides.

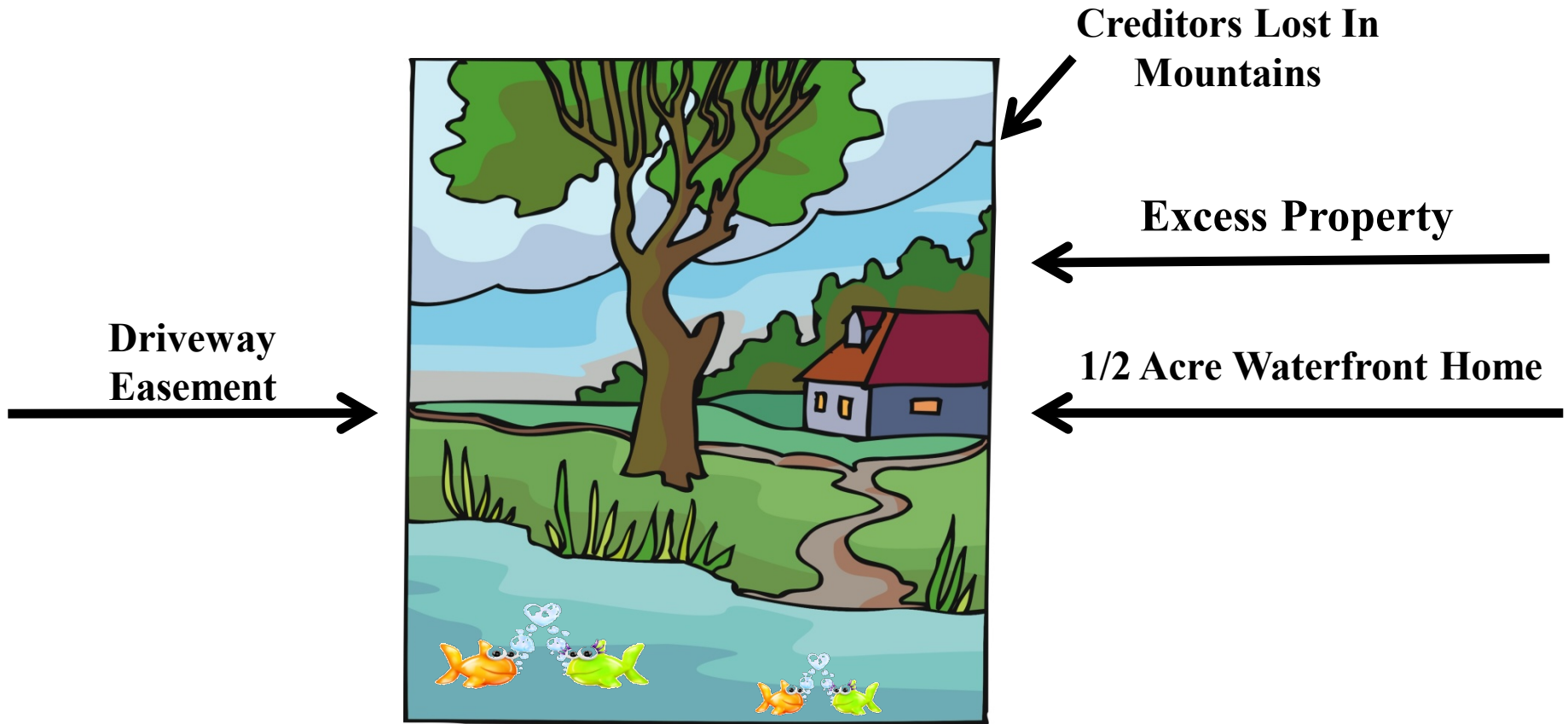


Buying The Florida House Or Condo Next Door?

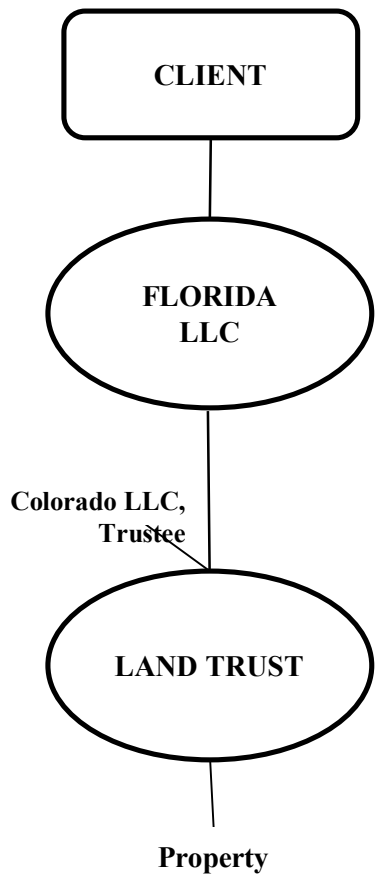
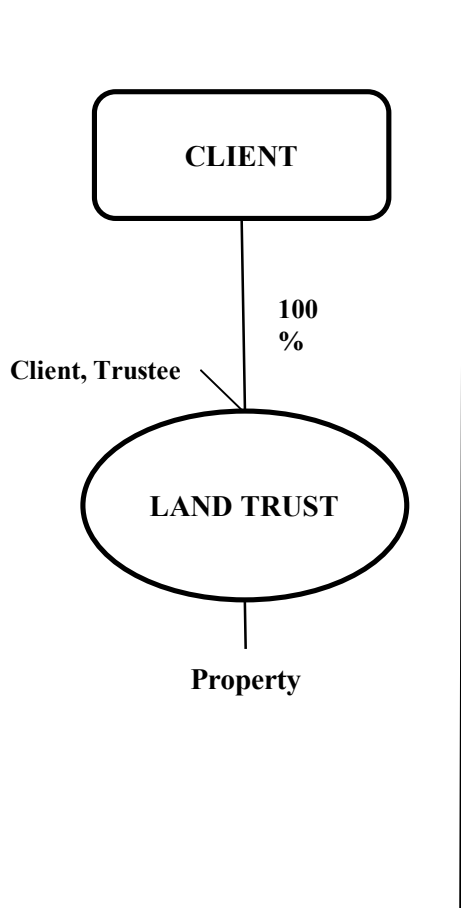
- An adjoining vacant lot may not be considered homestead where it has not been used or considered by logistics and fencing, etc., to be part of the homestead estate. This was the result in *In re: Estate of Ritter*, 407, So. 2d 386 (Fla. Dist. Ct. App. 3d Dist. 1981) where the property in question was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



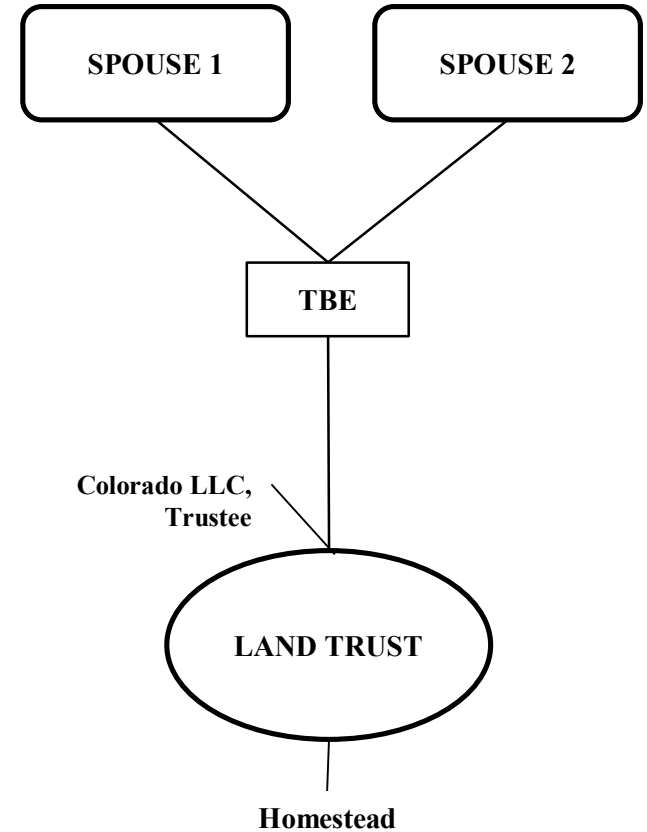
Florida Homestead Planning



LAND TRUSTS



HOMESTEAD



Qualified Personal Residence Trust

The home is transferred to a trust that allows the grantor to make use of the home for a term of years, following which the trust is held for the spouse and descendants, and the grantor must pay rent at fair market value for use.

Not very appetizing for a creditor, and creditor protection provisions may be included in the QPRT document.



Age of Client 68
 Initial Value of Home \$860,000
 Fractional Discount Assumed 15.00%
 Discounted Value of 1/2 of Home \$365,500

QPRT Trust Planning Demonstration

	Gift Component (with respect to each QPRT)		Value of 1/2 of Home at End of QPRT Term Assuming 7% Growth	Estate Tax on Value at End of Term Assuming 35% Estate Tax Rate	Estate Tax Savings on 1/2 of Home at End of QPRT	Estate Tax Savings on Entire Value of Home at End of QPRT	Estate Tax Savings After 16 Years Assuming 7% Growth on 1/2 of House	Estate Tax Savings After 16 Years Assuming 7% Growth on Entire House
6 Year QPRT	Gift %	73.220%	\$645,314.05	\$225,859.92	\$132,193.23	\$264,386.96	\$350,633.96	\$701,267.92
	Value of Gift	\$267,619.00						
8 Year QPRT	Gift %	64.328%	\$738,820.06	\$258,587.02	\$176,295.43	\$352,590.85	\$362,009.05	\$724,018.10
	Value of Gift	\$235,118.84						
10 Year QPRT	Gift %	55.528%	\$845,875.08	\$296,056.28	\$225,022.09	\$450,044.17	\$373,266.45	\$746,532.90
	Value of Gift	\$202,954.84						
12 Year QPRT	Gift %	46.916%	\$968,442.38	\$338,954.83	\$278,937.54	\$557,875.08	\$384,283.35	\$768,566.70
	Value of Gift	\$171,477.98						
14 Year QPRT	Gift %	38.633%	\$1,108,769.68	\$388,069.39	\$338,648.12	\$677,296.25	\$394,879.38	\$789,758.76
	Value of Gift	\$141,203.62						
16 Year QPRT	Gift %	30.840%	\$1,269,430.41	\$444,300.64	\$404,848.70	\$809,697.15	\$404,848.57	\$809,697.15
	Value of Gift	\$112,720.20						

Probability of Death Before Certain Age -- Current Age 68

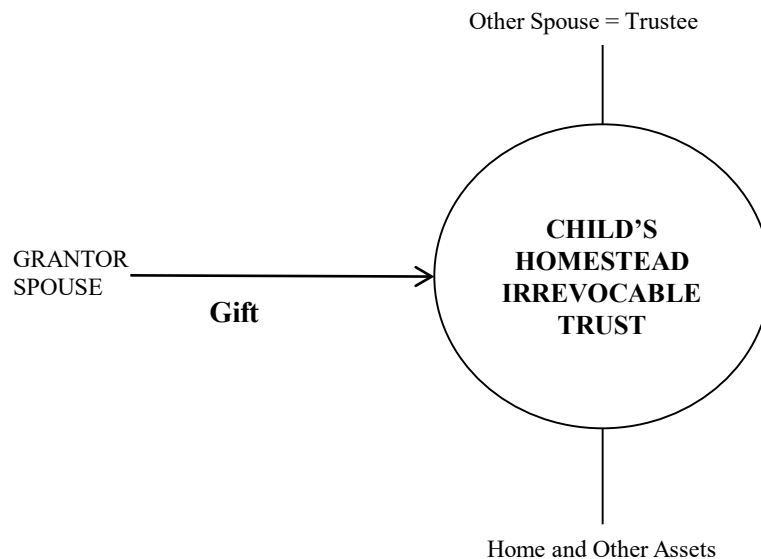
2 years (70) 4.18% 6 years (74) 14.31% 10 years (78) 27.33% 20 years (88) 68.53%
 4 years (72) 8.92% 8 years (76) 20.45% 15 years (83) 47.24%



Child's Homestead Irrevocable Trust

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

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



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

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

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

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

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



Comparison of Methods to Purchase Homes for the Children

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



#10

Tenancy by the Entireties



Definition Of Tenancy by the Entireties

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

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



Definition of Tenancy by the Entireties

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

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

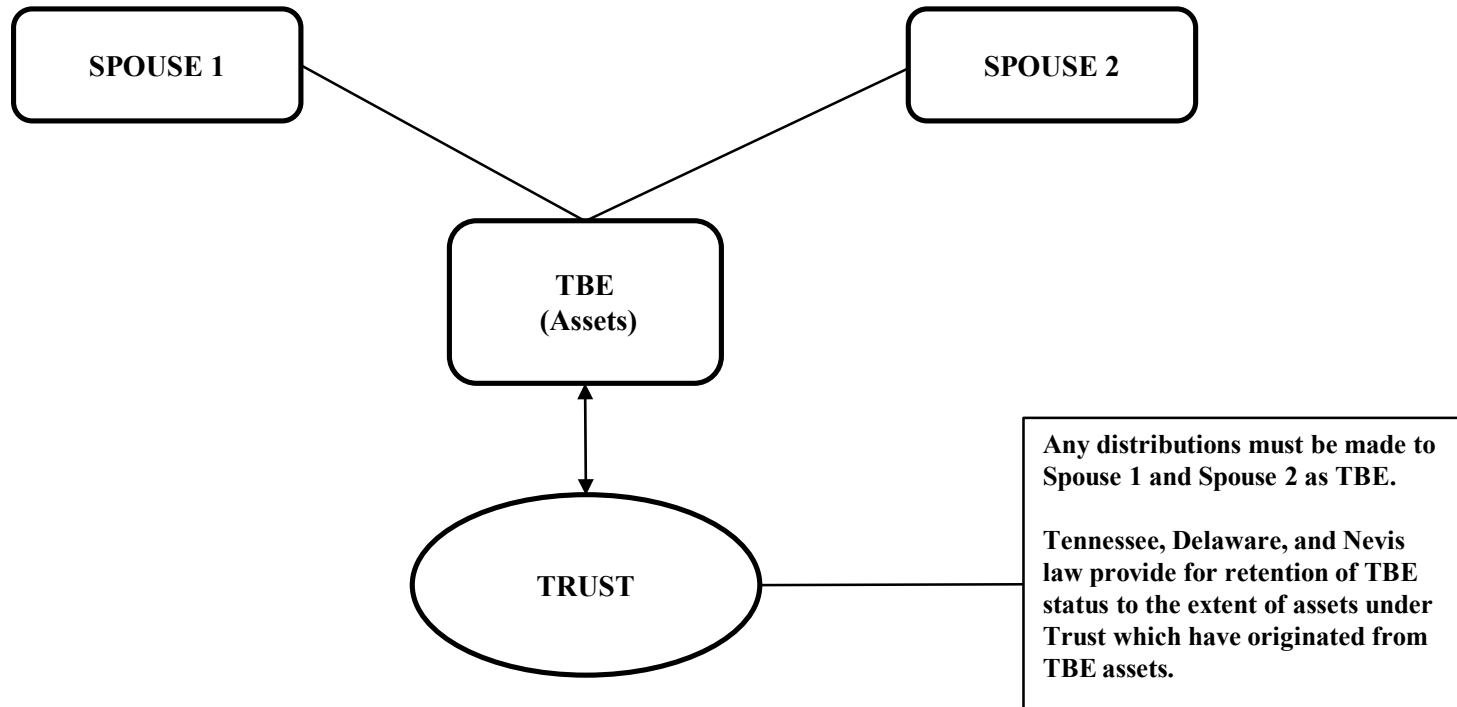


Special Tenancy by the Entireties Issues

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



Nevis, Tennessee, or Delaware TBE APT Jurisdiction Trust



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



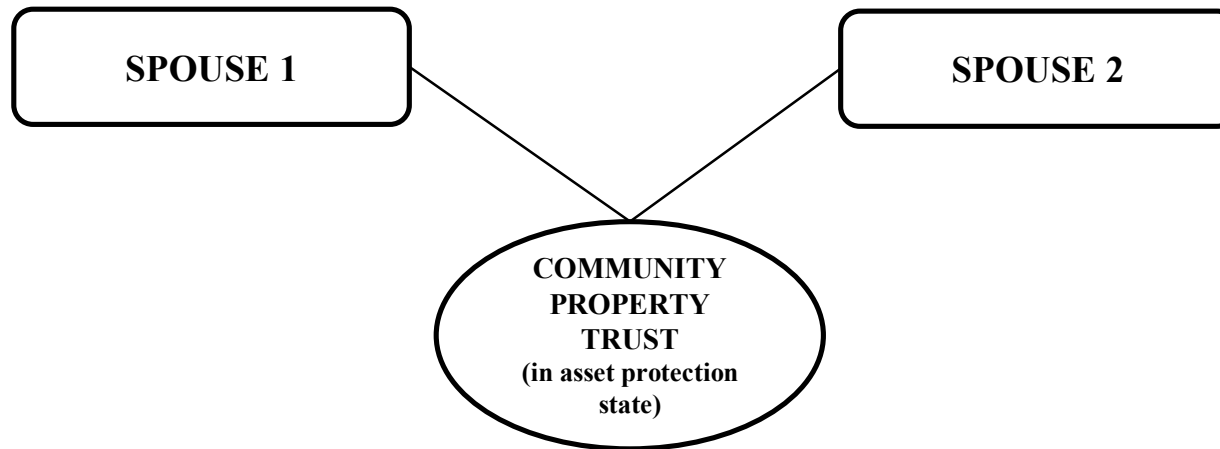
#11

Separate Community Property to Avoid all Assets Being Subject to the Claims of the Creditors of Either Spouse

(If you live in a Community Property State)



Community Property Trust



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

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

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



Community Property States

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

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

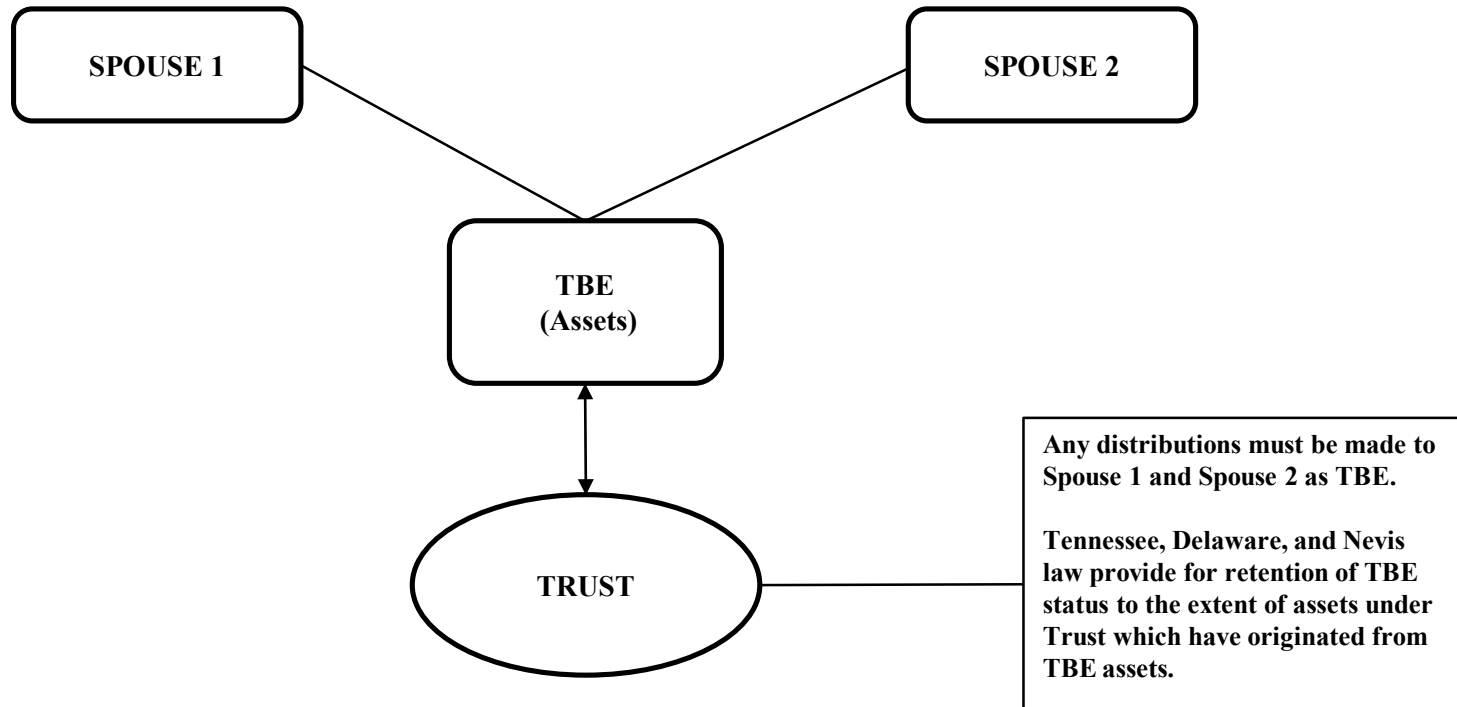


#12

Domestic Asset Protection Trusts



Nevis, Tennessee, or Delaware TBE APT Jurisdiction Trust



Dynasty Wealth Protection Trust

Trustee



Assets gifted to trust and growth thereon.

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

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



Florida and APT Jurisdiction Trust Varieties



To preserve assets for marriage, management, or otherwise.

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



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

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

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

Grantor/Contributor cannot be a beneficiary.



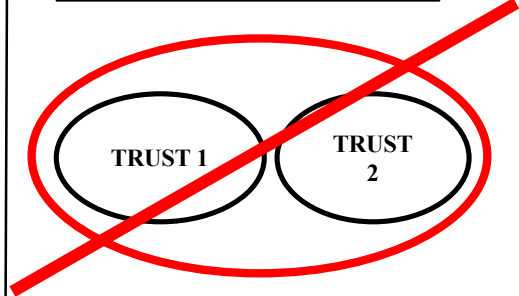
Use Crummey Power for annual exclusions, or part of Grantor's exemption amount.

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

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

Under PLR 200944002, Grantor may be a discretionary beneficiary.

Reciprocal Asset Protection Trusts

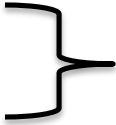



Beware the reciprocal trust doctrine, both under estate tax law and creditor protection law - see Gideon Rothschild's article entitled *Creditor Protection - - The Reciprocal Issue for Reciprocal Trusts (It's Not Just About Estate Taxes)*.

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



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

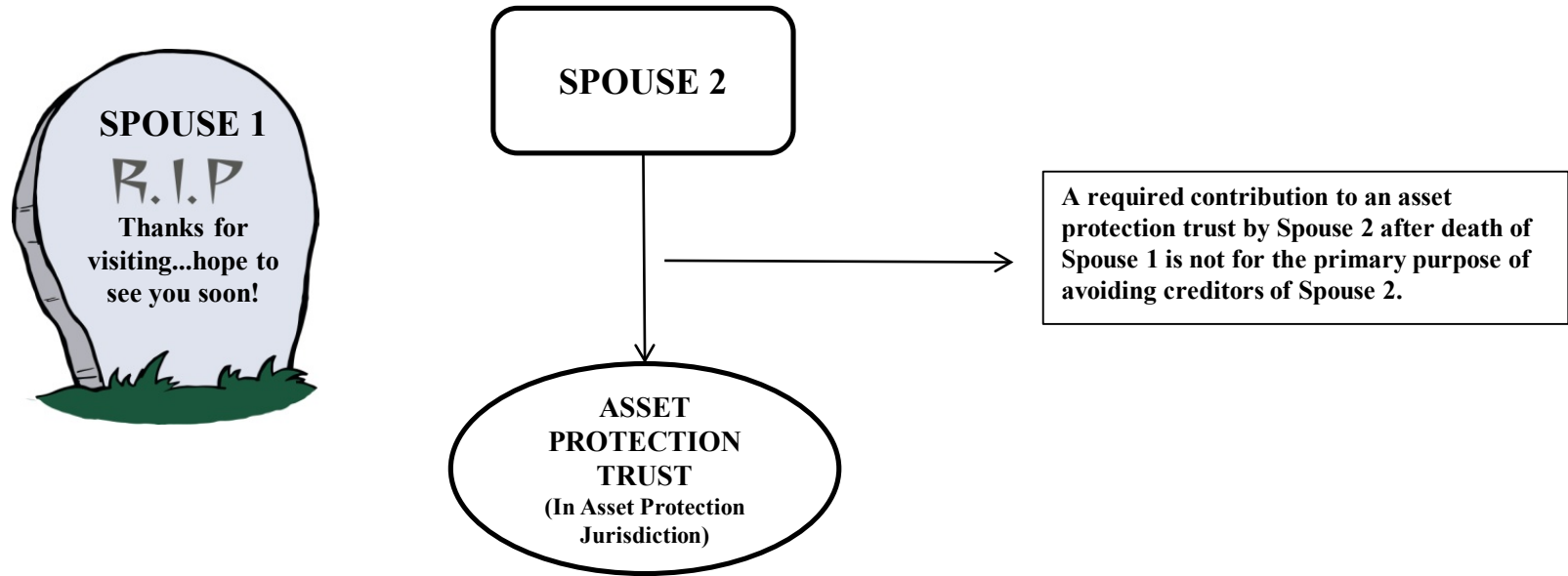
	A	B	C
	Irrevocable, Complete Gift Trust Settlor Not a Beneficiary  Shielded from future estate tax of settlor	Irrevocable, Complete Gift Trust Settlor is a Beneficiary  Shielded from future estate tax of settlor – but in case PLR 200944002 is not correct – empower a third party to deprive the settlor of distribution rights more than 3 years before the settlor dies – IRC §§ 2035 & 2036	Irrevocable Incomplete Gift Trust Treated as if no gift occurred for federal estate and gift tax purposes – business purpose is wealth preservation for family members.
1. Most Domestic States – Including Florida	A1 Protected from creditors of the settlor, and some but not all of the creditors of the beneficiary. Exception Creditors: • Support obligations: beneficiary’s child, spouse or former spouse (i.e., FL, CA, NY, NJ) • Person who has provided services for the protection of the beneficiary’s interest in the trust (i.e., FL) • State or U.S. claim empowered by state or federal law (i.e., public support obligations in CA) • Some states have more exceptions, (i.e., criminal restitution in CA, or punitive damages arising from manslaughter or murder in NJ) • Future legislation – What can they get you on next? NOTE – May benefit spouse but be careful under IRC 2036. If spouse is beneficiary cannot toggle off tax defective status unless an adverse party can approve all distributions to spouse.	B1 Will be subject to estate tax under IRC § 2036 because the settlor may be seen as retaining benefit by having the trust pay his/her creditors – <i>Revenue Ruling 2004-64</i>	C1 If grantor is beneficiary there will be no creditor protection – if grantor is not beneficiary then see A1 for exceptions Any creditor may be able to reach into the trust (unless the trust flees to another jurisdiction – don’t forget the flee clause)
2. Nevada	A2 Protected from all creditors – subject to 2 year Statute of Limitations (Much safer – assuming Nevada law applies)	B2 IRC § 2036 should not be an issue if PLR 200944002	C2 Same as A2: All creditors, 2 yr statute
3. Alaska, Delaware, and Wyoming (WY recently passed amendments to Uniform Trust Code)	A3 Delaware has a 4 year Statute of Limitations and exceptions for divorcing spouse, alimony and child support, as well as for preexisting torts. Alaska has a 4 year Statute of Limitations and an exception only for a divorcing spouse. Wyoming has a 4 year Statute of Limitations and exceptions for child support, property listed on an application to obtain creditor, or for fraudulent transfers.	B3 PLR 200944002 indicates that Alaska is fine – but ex-spouse creditors can get into a trust and may upset the apple cart under present Alaska law. Only single clients should use Alaska? Delaware and Wyoming have more exception creditors and may be more susceptible under PLR 200944002.	C3 Same as A3: Delaware, Alaska, Wyoming have 4 year statutes. Delaware has exceptions for support obligations and preexisting torts. Alaska has an exception only for a divorcing spouse. Wyoming has exceptions for child support, property on an application for creditor, or fraudulent transfer.
4. Offshore – Nevis, Belize, Cook Islands	A4 Completely protected depending on jurisdiction NOTE: Must remain defective for income tax purposes – cannot toggle off except by moving the trust to the United States.	B4 Should be as good as Nevada – Belize has a 1 day statute	C4 Should work fine as in A4 – no full faith and credit clause or state law jurisdiction concerns.

Do Domestic Asset Protection Trusts Work?

- Nevada, Alaska and Delaware have asset protection trust statutes. But the Full Faith and Credit Clause of the U.S. Constitution provides that a judgment issued by the court in one state will be respected by the court in other states.
- There are many questions regarding the effectiveness of domestic APTs. The case law is not yet fully developed on the question of whether the law of a foreign jurisdiction will apply for the determination of whether a creditor protection trust will shield trust assets from creditors of the grantor who is also a beneficiary.
 - *Hanson v. Denckla*, 357 U.S. 235 1958 – the law of the state where the trust administration occurs will be determinative.
 - *In re Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996) and *In re Brooks*, 217 B.R. 98 (Bankr. D. Conn. 1998) – assets placed in offshore APTs were not excluded from the debtor's Bankruptcy estates.



Marital Asset Preservation System (MAPS)



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

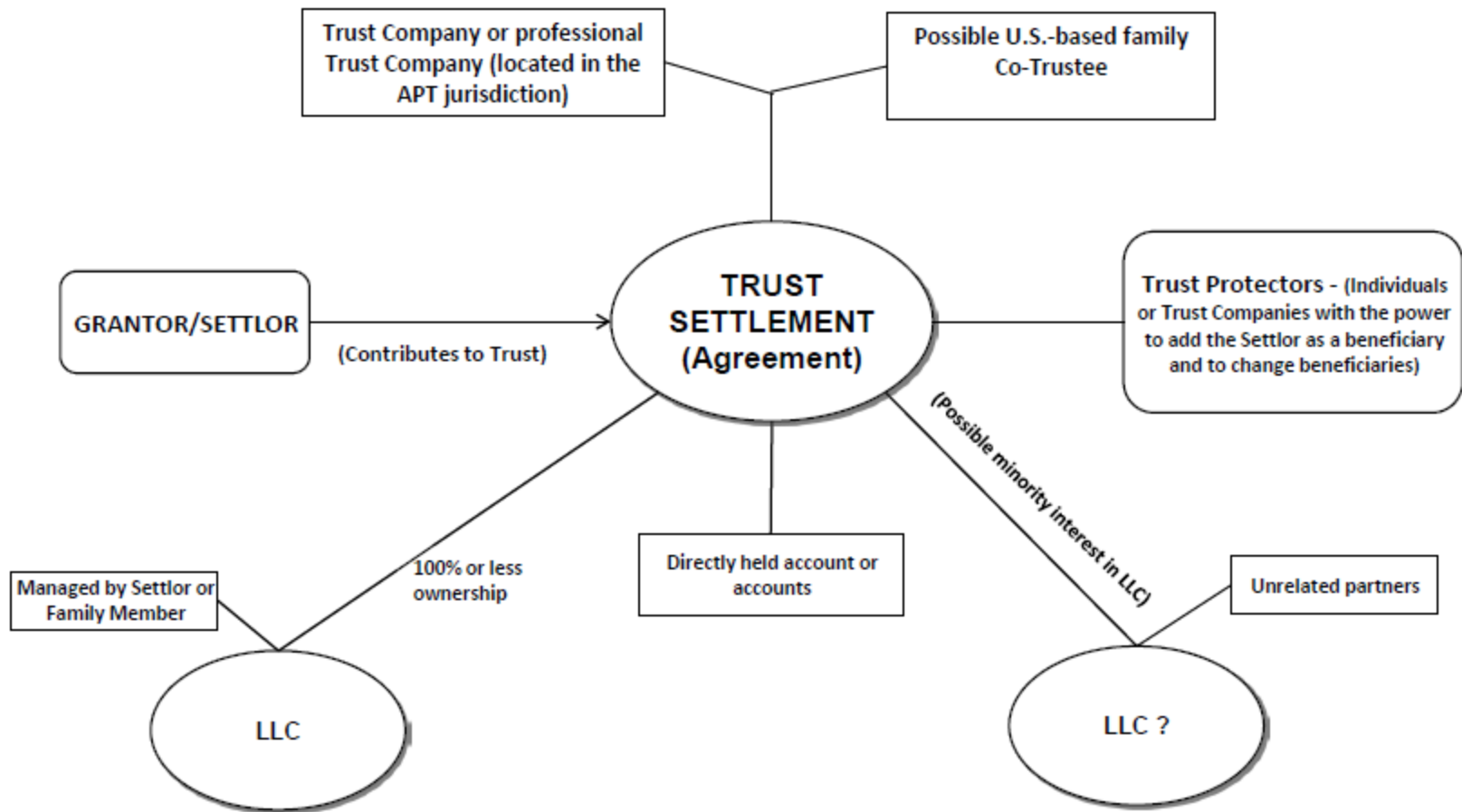


#13

Foreign Asset Protection Trusts and Foundations



The Anatomy of a Typical Offshore or APT State Trust Arrangement



The Anatomy of an Asset Protection Trust

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



The Anatomy of an Asset Protection Trust

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



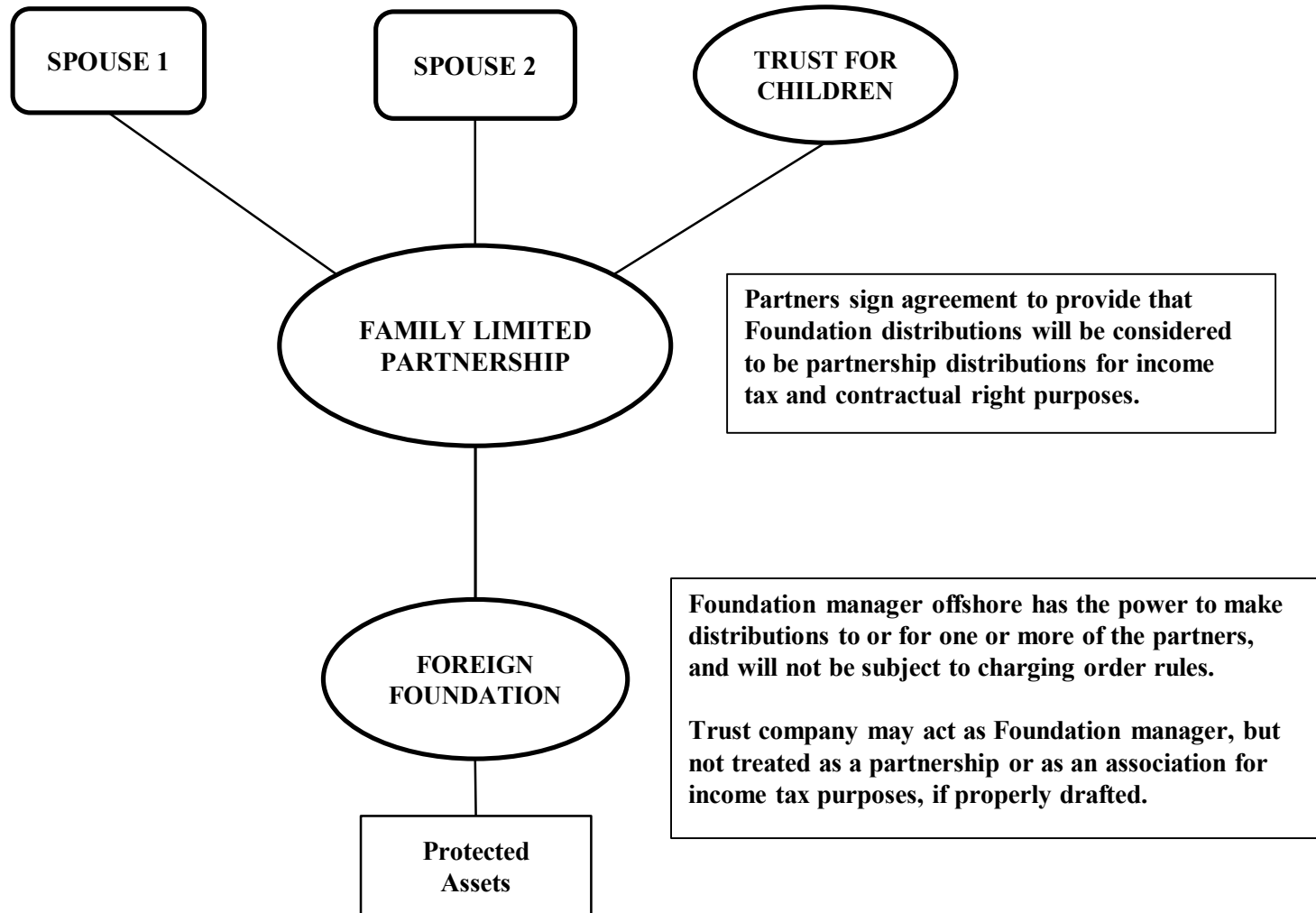
Consider the Offshore Foundation

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



Foreign Foundations

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



Considering Offshore or Domestic Creditor Protection Trusts

Should I Stay or Should I Go?

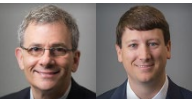
FACTOR	NEVADA	ALASKA	ISLE OF MAN/JERSEY (Channel Island)	NEVIS	BELIZE
Asset protection law – Statute of Limitations	See Page 46 Strong/2 years – BUT full faith and credit issue	Strong/4 years – BUT full faith and credit issue	No statutory limitation on fraudulent transfer – unless import law of jurisdiction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



Considering Offshore or Domestic Creditor Protection Trusts

Should I Stay or Should I Go?

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



A Matter of Opinion – Reasonable Minds Will Differ

House of Bricks/House of Sticks/Soap on a Rope

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

Common Offshore Trust Mistakes



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



Avoid Theft

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



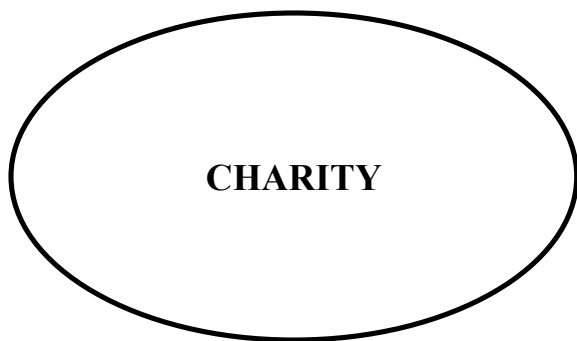
#14

Charity



The Very Best Creditor Protection Technique

(Give Significant Assets to a Private Foundation)



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



#15

What To Do In The Next 30 Days



What To Do In The Next 30 Days -

1. Know your liability limits for personal coverage.
Ask for proposals to increase these.

2. Know your liability limits for business coverage.

Ask for proposals to increase these.

3. Know what it will cost you to replace assets that are lost to casualty.

4. Understand your business interruption insurance if:
 - A. You are disabled.
 - B. A storm or other tragedy stops your business.
 - C. What else might happen?



What To Do In The Next 30 Days -

5. Know the owner and beneficiary and terms of each term life insurance policy.
6. Know how much coverage you need and have.
7. Have agency start informal application for new policies.
8. If you have permanent insurance – know why.
9. Have an annual physical, and consider Mayo.
10. Know how your assets are titled.

This includes any pay-on-death or beneficiary designation.



What To Do In The Next 30 Days -

11. Have a Will and Trust language in place, or set up an appointment to have these prepared or updated.
Set up 3 appointments, one month apart, so that you can review drafts, etc.

12. Know if your assets are protected from creditors. Set up an appointment to find out.
 - Personal Creditor Protection.
 - Business Creditor Protection.

13. Put a succession plan for your business on the agenda.
 - Start with a short essay on what you know that your successors may not know.
 - Who has business sense and integrity and who doesn't?
 - Agree now who the decision making Trustee team should be if you are not there to make decisions.



What To Do In The Next 30 Days -

14. Put an estate plan for your parents on the agenda.
15. Make your marriage great.
16. Make your children self-supporting.



**Steve Leimberg's Asset Protection Planning
Email Newsletter Archive Message #400****Date: 30-Mar-20****Subject: Alan Gassman and Adriana Choi: Creditor Protection During
the Virus Crisis:****22 Definitions, 33 Strategies, and 26 Traps for the Unwary**

"While the world and even the United States has been through much tougher times, the present cash crunch, financial devastation, and social disorder that businesses and self-employed individuals find themselves in today is unprecedented in our generation, and poses a significant challenge to advisors who care about clients and businesses and want to do what we can to help save them.

There is no doubt that there will be years of litigation, tens of thousands of bankruptcies and countless horror stories that result from this terrible financial and business tsunami, but there are things that we can do to help clients, and to prevent them from making terrible mistakes that in many cases will result in significant personal and business losses that will not have had to have happened, but for misinformed or unfortunate decisions and actions or inactions. Many of these will be caused by well-meaning but erring advisors, or will occur under their watch, unnecessarily.

While bankruptcy lawyers may today be the second most in demand professionals, behind intensive care personnel and people who make medical equipment and protective supplies, many of the basic and not so basic concepts and situations may need to be handled in large part by business lawyers and advisors. Hopefully, they will work with debtor creditor law specialists to the extent feasible, and learn as much as possible about this area in order to be able to assure that the client has a sound connection with legal and financial counsel beyond the typically dangerous 30 minute phone call that does not provide the advisors with full information about the situation. Those of us working from home have additional challenges but need to assure that we have high quality uninterrupted time to think and work steadily, and without undue interruptions to give our clients the help they need.



We hope that readers will make a list of clients who may need a good discussion of where they are with things and what to do about it and reach out to them, employing the strategy that what we do for others is much more important than what we do for ourselves and that clients do not always know that they need advice, let alone what advice is needed.”

Alan Gassman and **Adriana Choi** provide members with commentary that examines creditor protection issues that can arise during the virus crisis. The authors thank **Michael Markham, Esq.** of the Tampa and Clearwater law firm of **Johnson Pope** for his guidance and advice with respect to the terms of this newsletter and from years of practicing together. Mr. Markham can be reached at MikeM@jpfirm.com

Alan S. Gassman, J.D., LL.M., is a partner in the law firm of **Gassman, Crotty & Denicolo, P.A.**, and practices in Clearwater, Florida. He is a frequent contributor to LISI, and has published numerous articles and books in publications such as BNA Tax & Accounting as part of the Bloomberg Tax Portfolio Library, Estate Planning, Trusts and Estates, and Interactive Legal and is coauthor of *Gassman and Markham on Florida and Federal Creditor Protection* and several other book including Bankruptcy Law for Estate Planning and Professional Advisors.

Adriana M. Choi, JD is an associate at the law firm of **Gassman, Crotty & Denicolo, P.A.**, in Clearwater Florida, and practices in the areas of Estate Planning, Corporate and Business law.

Here is their commentary:

EXECUTIVE SUMMARY:

While the world and even the United States has been through much tougher times, the present cash crunch, financial devastation, and social disorder that businesses and self-employed individuals find themselves in today is unprecedented in our generation, and poses a significant challenge to advisors who care about clients and businesses and want to do what we can to help save them.



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COMMENT:

Strategies, Rules and Considerations are as Follows:

Hold On To Cash

The immediate help that clients need involves if and when to make payments that are owed and would normally be paid, if and when to terminate, furlough or reduce the hours and compensation of employees



and contractors, and whether to risk going into default on leases, mortgages and contracts in order to do so.

“Anything that can go wrong, will – at the worst possible moment.”¹¹ While we may not believe that things will continue to get worse for much longer, we do believe that it is our job to make sure clients are prepared for what further problems may come.

We recommend that all of our clients engage in an “asset protection stress test” as soon as possible, to determine, if the worst-case scenario happens, what will remain to be absolutely protected from creditors, and what will be potentially exposed. A stress test entails reviewing all expenses and liabilities and walking through a worst-case scenario with experienced advisors.

While President Trump would like to see lockdowns and the closure of commerce be over by Easter, and CARES Act moneys in businesses pockets by May, it is possible that this may be by Easter of 2021, and that money spent in the next four to eight weeks will wipe out businesses and professional practices that would have otherwise survived for several months or years, if they had not used their precious powder naively in the beginning of the crisis.

Our experience from 2008 is that a great many clients who own and operate businesses do not fully appreciate the dangers facing them, and do not take the necessary steps to save their businesses or investments. Instead, they sit back and hope for the best as they become completely overwhelmed with anxiety or compartmentalizing problems, and refuse to make decisions while there is still cash or credit available.

Please do not get caught like a deer in headlights in your own practice, like many clients do, and make sure that you have done your own cash flow planning, and have a basic understanding of bankruptcy and what it means for clients who will need a “fresh start,” so that you can help explain this and let clients know what it costs in money, time and effort to go into bankruptcy to start anew, since this will be the last resort for many. Whether we like it or not, businesses are going to go bankrupt during this recession.



Your client may rely on their customers, clients or patients to pay the client, and those payers may hoard cash or have other problems that are not foreseen. Clients, no matter how smart they are, no matter how well they have done historically, are emotional and often overly optimistic or naïve and really need a conversation with their lawyer, their CPA, their hairdresser, or whomever they rely on, to think things through and make the right decisions.

The following definitions and comments therein are arranged in progressive order to help those who are familiar with debtor creditor law and bankruptcy to familiarize themselves, and to help those with little background to get their feet wet and begin to familiarize. Please read these carefully because many strategies and choices are contained therein. Please note that while most debtors will not need to file bankruptcy, the ultimate settlement with creditors will usually take into account how the parties would come out in bankruptcy.

- Bankruptcy – The federal law and process that permits debtors to adjust creditor situations and receive a “fresh start” under the separate bankruptcy court system.
- Chapter 7 Bankruptcy – A process that provides for the appointment of an independent trustee to liquidate the non-protected assets of a debtor as pre-bankruptcy debts are discharged if certain requirements are met. In an individual Chapter 7 Bankruptcy all debts may be discharged (eliminated) while exempt assets are retained, and businesses may be sold at arm’s-length to related parties in court approved sales. This will be a home run for many unfortunate, but well-advised, debtors. No payment plan is required if the debt is mostly “business debt,” as opposed to being mostly consumer debt. You can advise clients of the importance of this ratio. Further discussion of the implications of Chapter 7 Bankruptcy planning is provided below.
- Chapter 11 Bankruptcy – A reorganization bankruptcy that will typically apply for bankruptcy businesses, investment entities, and individuals having large amounts of indebtedness or



otherwise not qualifying for a Chapter 13 bankruptcy. The CARES Act has raised the amount of debt that a small business debtor can have while filing a Chapter 11 to \$7,500,000. There were many changes in the Chapter 11 laws in 2019 and 2020. These are discussed in detail below.

Prepackaged Chapter 11 – A Chapter 11 bankruptcy where there is an advance agreement between the debtor and a sufficient number of creditors to allow for debt to be reduced and/or paid over time in a bankruptcy proceeding in order to have the ability to avoid federal income tax on debt discharge or adjustment, and state law documentary, intangible and other transfer taxes that may not apply when transitions and transactions occur in bankruptcy.

Chapter 13 Bankruptcy – A payment plan arrangement that individual debtors in bankruptcy meeting certain requirements must comply with under payment plan rules in order to adjust their debts. Normally, this applies when there is mostly consumer debt and results in a five-year payment plan.

Chapter 13 is only available to individuals (not corporations or other business entities). To be eligible to receive a Chapter 13 payment plan in 2020, an individual or married couple must have unsecured debt of less than \$419,275, and secured debt of less than \$1,257,850. Chapter 13 repayment plans are for three to five years and are funded by the debtor's disposable income. Once the plan is approved by the court, the Chapter 13 trustee receives and administers payments. In exchange for compliance with a Chapter 13 plan, the debtor can keep his or her assets and a discharge of all debts is received when all payments have been made.



Bankruptcy Estate

– Upon filing bankruptcy, non-exempt assets (assets not immune from creditors under state or Bankruptcy law) of a debtor become property of the bankruptcy estate, and are then under the control of the trustee in bankruptcy or the debtor in possession, pursuant to 11 U.S.C. § 541. For example, an individual filing bankruptcy who owns a creditor-exempt annuity contract and a bank account will retain ownership of the annuity and lose the bank account. The bank account will become part of the bankruptcy estate.

Discharge, Fiduciary Duty Concerns, and Assignments for the Benefit of Creditors.

– The actual order that results in debt being cancelled under a Chapter 7 bankruptcy, or upon completion of a successful Chapter 11 or Chapter 13 bankruptcy plan. Certain liabilities are generally not dischargeable in bankruptcy. These can include government backed federal student loans, trust fund tax liability, hazardous waste liability, breach of fiduciary duty liability, child support and alimony, Medicare penalty refunds, and Medicaid penalty refunds.

Liabilities generally not covered by insurance include civil rights violations committed by employees or others, environmental liabilities, criminal acts, charitable and religious board activities, and acts of terrorism. Avoid conduct that causes such liabilities and consider paying them first if they arise.

No discharge is issued to non-individual entities (such as corporations and partnerships) under the Bankruptcy Code. Oftentimes, corporations are put into Chapter 7 without realizing that there will be no discharge of debt. One good reason to file a Chapter 7 is for a corporation is to relieve the officers and directors of the entity from having the state law responsibility to properly administer assets and situations for the benefit of creditors. The officer, director or manager of an insolvent business or investment entity has a fiduciary duty to act in the best



interests of creditors. An alternative way to avoid personal liability for the conduct of an insolvent entity is to file a state court action called an Assignment for the Benefit of Creditors (“ABC”) wherein by state statute a debtor entity can request that the court appoint a fiduciary “Assignee” who acts like a receiver by receiving the assets of the entity and liquidating them and then paying what is available to the creditors after all parties have had notice and the right to object to the process.

Loss of Discharge

- What occurs when a debtor in bankruptcy is denied the right to discharge debt by reason of pre-bankruptcy or post-bankruptcy conduct which causes the debtor to never be entitled to receive a discharge of debt then existing, leaving the debtor in “debtor purgatory.” This can occur when the debtor is not truthful about assets, or makes a “fraudulent transfer” within one year before filing bankruptcy. Get any “fraudulent transfers” over well before needing to file bankruptcy, if they are legal to make in the first place (which is one reason that many debtors move to Florida—others are discussed below).

Exempt Assets

- An asset that will not be accessible to creditors and may be retained by a debtor under state or federal law, such as homestead, IRAs, 401(k) plans and 529 plans where law permits. State exemptions do not apply unless the debtor satisfied the 730-day or 180-day rule described below. Obviously, we want clients to own as many of these as possible, and to own them before they are or may become insolvent so that the purchase is not a “fraudulent transfer” that may be set aside. Sometimes it is best to remain optimistic and to put reasonable assets into reasonable categories of assets well before disaster strikes. Every planner should be familiar with what



assets are exempt from creditors in the state where the client resides, and under the Bankruptcy Code.

- Non-Exempt Assets** – Assets which are subject to creditor claims and become assets of the bankruptcy estate upon the filing of a bankruptcy petition. Non-exempt assets cannot be converted into an exempt asset because it may be considered to be a fraudulent transfer. A debtor who files bankruptcy within one year of making a fraudulent transfer risks permanent loss of the ability to discharge any and all debts then existing. Some non-exempt assets are nevertheless difficult for a creditor to reach into, such as multi member LLCs in states where a charging order is the sole remedy and the LLC agreements are executory contracts under the bankruptcy law.
- 730 Day or 180 Day Rule** – A debtor will need to reside in the state where the bankruptcy is filed (to have the exemption laws of that state apply) for at least 730 consecutive days before filing. If the debtor does not meet the 730-day requirement, then the Bankruptcy Court will apply the exemptions of the state where the debtor resided for a majority of the 180 days immediately preceding the 730-day period. For example, if a debtor moves to Florida and has been living there for 729 days and someone forces them into bankruptcy, then the law of the state where the debtor resided for most of the 180 days before the 730 days will apply. Given that litigation often lasts over two years, those considering a move to Florida may wish to do so sooner rather than later to protect annuities, life insurance, homestead, 529 plans, tenancy by the entireties assets (if one spouse is not liable), assuming that moving to Florida is not itself a “fraudulent transfer” that causes loss of exemptions that do not exist in the state the person came from.



- Automatic Stay** – This prohibits creditors from taking action to collect on debts owed by a debtor once the bankruptcy has been filed. The creditor may petition the court to have the stay “lifted.” The automatic stay will not apply to certain federal agencies, such as the EPA. For example, it does not prevent certain federal agencies from taking action against a debtor.
- Fraudulent Transfer** – These have nothing to do with fraud, and are also now known in many states as “voidable transfers”. These can be set aside in bankruptcy if the filing is within the later of two years from the date of the bankruptcy or the applicable state law period, which is four years in most states (including Florida), and six years in some (including New York).
- In some states, it violates state law and/or ethical rules to assist a client in making such a transfer, and in others it does not.
- There are two types of fraudulent transfers. An “actual” fraudulent transfer is a transfer of an interest or obligation that is made with the intent to hinder, delay, or defraud any creditor. A “constructive” fraudulent transfer is a transfer of an interest or obligation by an insolvent or soon-to-be insolvent entity, without receiving reasonably equivalent compensation in exchange.
- Such transfers may cause loss of the ability to receive a bankruptcy discharge, if it has occurred within one year before the debtor files bankruptcy, or may be set aside or subject a transferee to liability if it has occurred within two years before the filing of bankruptcy under the federal Bankruptcy Code, or for whatever longer period of time may apply under state law.
- Preferential Transfer** – A transfer that occurs when a corporation or other entity favors a creditor by making a payment or other



transfer of property during the 90-day period prior to the bankruptcy filing to one or more unsecured creditors not within the “ordinary course of business” and not to others of the same class. Such transfers are deemed voidable by the Bankruptcy Code. If the creditor is an “insider” (e.g., a family member, friend, business partners, or person or entity with a special connection to the debtor), the 90-day lookback period increases to one year.

State law Preferential Transfer rules should be considered as well and may be for one (1) year or more.

Insider

- Under the Preferential Transfer rules, the one (1) year set aside law will apply, if the debtor is an “Insider”. An Insider is a (i) relative of the debtor or of a general partner of 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.

If the debtor is a corporation, an “insider” is a (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.

If the debtor is a partnership, an “insider” is a (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.

All transfers made to “insiders” within one year of filing Bankruptcy should be for contemporaneous



value to avoid having the Preferential Transfer statute apply.

- Involuntary Bankruptcy** – A creditor can force a debtor to a Chapter bankruptcy by filing a petition, but it generally takes three creditors to join in the petition if there are at least twelve creditors. For this reason, many debtors are well advised to have at least twelve creditors, and to make sure that no three of them are “unfriendly”. This is particularly important for debtors who have made fraudulent transfers within one year before they may be forced into bankruptcy, who debtors who have put significant moneys into a Florida homestead that will be protected from creditors unless and until the debtor is forced into bankruptcy within ten years after making a “fraudulent transfer” into a Florida homestead.
- Doctrine of Successor Liability** – State law, which provides that the successor owner of a business or investment arrangement, will be responsible for the liabilities of the previous owner if there is a commonality of related ownership, business identity, customers, and business assets. An arm’s-length Bankruptcy Court approved sale by a Trustee in Bankruptcy in a Chapter 7 or Chapter 11 Bankruptcy can avoid imposition of the doctrine. In some states the doctrine may be avoided by engaging in a non-Bankruptcy Assignment for the Benefit of Creditors.
- Attorney-Client Work Product Privileges** – The two common privileges which prevent a lawyer’s file and work product from being accessible to parties who are adverse to a client. These privileges are often lost in bankruptcy to the surprise of many.
- Crime Fraud Exception** – Federal and state laws which prevent the assertion of the attorney/client privilege if the lawyer’s actions



constitute the perpetration of a crime, committing fraud or in some situations communications with respect to a planned transfer to avoid creditors or concealment of assets.

Super Creditors – These are creditors that can break through the exemptions. Super Creditors presently consist of the IRS, the Federal Trade Commission, the Securities Exchange Commission, Medicare (for penalties), federal agencies for penalties, restitution owed to the government as the result of criminal conduct, and the Federal Deposit Insurance Company in some circumstances. The Small Business Administration also has special collection rights, as discussed in Chapter 9 of our book on Bankruptcy law and planning.

Further Discussion and Strategies

In general, there are two primary types of bankruptcy that will be used by debtors, or forced upon them by aggressive creditors. These are as follows:

- Chapter 7, which enables a debtor to eliminate debt and keep creditor exempt assets.
- Chapters 11 and 13, which contemplate a full or partial repayment plan based upon ability to pay and statutory requirements.

Before it gets to this point, though, it is critical to practice sound creditor protection planning when this is possible.

We have a [chart](#) that we commonly use for our Florida clients that summarizes which assets creditors can and cannot reach under normal circumstance.

Aside from exempt assets, it is imperative to analyze which assets are exposed, and to make adjustments as appropriate. One important rule to keep in mind is that, other than a protected homestead, any assets that are



exempt from creditor claims that the client purchases or transfers into for the purpose of avoiding a creditor may be set aside by the creditor.

And even with a move towards homestead like paying off the mortgage, if the purpose of that was to avoid the creditor and the client ends up in bankruptcy within ten years of making the transfer, then that may be backed out in bankruptcy, although under Florida law a transfer to homestead that avoids creditors cannot be set aside under the Florida fraudulent transfer statute, except that under the 2005 Bankruptcy Act a debtor who has made a fraudulent transfer into bankruptcy within ten years before filing bankruptcy can have such transfer set aside in bankruptcy, which is a good reason to stay out of bankruptcy.

From the above it is obvious that now is the time to encourage clients to share the facts of their situation with you, so that you can make suggestions as to what normal business and estate planning changes might be made to best address their situation, taking into account tax, financial, estate planning, and other considerations. An example of this includes the need to save for college using 529 plans, the advantages of putting assets under the name of a spouse or a spousal limited access trust for estate and estate tax planning, and the tax and practical advantages of using permanent life insurance and variable annuities for tax and investment planning.

There are bankruptcy court decisions which have found that engaging in sound and clearly called for planning that moves assets out of the debtor's hands may be permitted and not considered to be a "fraudulent transfer" that can be set aside, even if the transfer resulting from that planning will clearly keep the asset out of the hands of a creditor, and occurred after the creditor was known to be in existence under dire circumstances.ⁱⁱ This type of planning should not be taken lightly, but may put the debtor in a better negotiating position than would otherwise be the case.

Chapter 11 Bankruptcy and the new Small Business Reorganization Act of 2019

Chapter 11 bankruptcy is an interesting and complicated topic for discussion, but some background may be of interest. While a Plan of Reorganization may be blessed by the court and a vote of each class of creditors, as is normally required, this is not always the case, and clients



should reserve at least \$25,000, or possibly much more, to pay for the legal and accounting fees, which must usually be paid to the bankruptcy lawyer as a retainer before the bankruptcy is filed. A Chapter 11 bankruptcy may provide a client with many benefits, depending on the situation. The client's corporation will normally receive 90 days of safe time when they do not have to pay past bills, and they can still collect their accounts receivable and put together a plan to pay the creditors over time. Any debt that they discharge in the process of negotiation and settlement will normally be income tax free under Section 108 of the Internal Revenue Code, whether the shareholders are the partners of the entity and are insolvent or not. This tax-free rule also applies to debt that is discharged or negotiated down in a Chapter 7 proceeding. Debt planning is crucial, in order to have the best chance of each class of creditors approving a Plan of Reorganization, and best positioning the shareholders and others to be repaid from available assets by having liens and being in first position if this is possible.

It is therefore necessary to be sure that your clients hold on to enough cash or enough collateral so that they can make sure they can pay to file a Chapter 11 bankruptcy if they need to do so.

The Small Business Reorganization Act (SBRA) of 2019, enacted what is now known as a Subchapter V, which changed the bankruptcy law to be more debtor friendly by increasing the amount of debt that a small business debtor can have while qualifying in a Chapter 11 bankruptcy, and making the further change described below.

Effective February 2020 a small business debtor could have had up to \$2,725,625 in debt and qualify to file a Subchapter V bankruptcy.

The CARES Act increased the threshold from \$2,725,625 to \$7,500,000, effective for cases filed after Friday, March 27, 2020.

In addition, the CARES Act eliminated the former requirement that any class or classes of unsecured creditors would have to vote on a plan in order to have the court approve the reduction or restructuring of debt.

After the CARES Act, unsecured creditors cannot vote, and secured creditors will be required to be subject to bankruptcy plan terms approved by the court, which will generally provide that a secured creditor's claim



cannot exceed the value of collateral secured by the applicable debt on the date that a Chapter 11 bankruptcy petition is filed.

This will make it much easier and cost effective for debtors to successfully reorganize under a Chapter 11 bankruptcy.

When to File

Typically, a Chapter 11 bankruptcy should not be filed immediately before any creditor may act or refuse to act in any way that would have a catastrophic impact on the business.

In addition, a Chapter 11 bankruptcy should typically not be filed unless a plan of reorganization and a source of future revenue and income will be identifiable and in place within approximately 90 days of the filing of the Chapter 11 bankruptcy petition.

But on the other hand, if the collateral that secures the debt that is held by a creditor who will not be cooperative is lower now than it will be later, it can make sense to file a bankruptcy petition sooner than would otherwise be the case.

For example, where the collateral is accounts receivable and the Coronavirus business shutdown is still in effect, the value of such accounts receivable may be much lower than what it will be once the virus freeze lifts and things hopefully go back to some semblance of “business as normal.”

File Proper Liens Without Delay – Reach out to Clients Who are Owed Moneys by Their Business or Investment Entities

It can be crucial that any loans or advances from shareholders or related parties be documented with appropriate promissory notes, and also be secured by liens that are properly recorded against real estate (as mortgages) against tangible and intangible non-real estate assets (by Uniform Commercial Code UCC-1 filings), and against any valuable automobiles or other motor vehicles that would be liened by proper registration with applicable State Division of Motor Vehicles and the U.S. Coast Guard with respect to large boats. Failure to have this completed more than one year before the filing of a bankruptcy or a state court creditor action could be catastrophic.



Funding Negative Cash Flow

If the client needs to put money into a possibly insolvent entity it will normally be best to document this as a loan to the entity and to take a lien on any and all assets that may be liened. If the client will pay off debt owned by the entity, it may be best to “buy the paper” from a previous existing creditor that has a lien on assets in order to “step into the shoes” of that creditor.

Many well meaning family members and others may advance moneys for a company without protecting themselves, and end up not only losing what they put in, but also becoming parties to nasty litigation. Having independent legal counsel for separate family members is often advisable, and throwing bad money after bad in unrealistic situations to keep a dying business on its death bed longer without real hope of recovery is not at all unusual. By the same token, many parents and others will guarantee obligations of a faltering business and later lose significant moneys when guarantees are called in or when the Preferential Transfer rules cause a guarantor to have to put in an amount equal to all payments made by the debtor on the guaranteed loan, lease or other arrangement under the theory that each payment benefited the guarantor going back one year before the filing of a bankruptcy petition.

Spend What Is Exposed and Save What Is Protected

In some situations, it may be risky to try to move exposed assets to exempt categories, but still planners should advise clients as to what to save and what to spend.

An example that most planners do not think about is that if the client is a wage earner and earns a wage that would be protected from creditors under the state wage statute, such as in California, then those moneys can be moved into a variable annuity, cash value life insurance policy, homestead, or even a tenancy by the entireties account if both clients are not going to be sued, and therefore be creditor protected while the client may spend down assets that are otherwise exposed. This would not be considered to be a fraudulent transfer, because transferring an otherwise protected asset to another protected asset class is normally not considered a transfer that can be set aside, but would have significant benefits.



As another example, if your client works for themselves, or has a medical practice or other professional practice of their own, their wages and what they invest them in may be protected under state law. The California wage statute has been found by the 9th Circuit Court of Appeals to protect wages paid by a company owned by its working owner, but Florida courts have not been very kind to the owners of companies who employ themselves through the company, even though the Florida and California statutes are almost identical. This may eventually be resolved by the Florida Supreme Court or a legislative clarification. It helps to have a written employment agreement in place that sets the wages to be paid, and to assure that the amounts set forth therein are paid in equal amounts each pay period, and reported as wages.

Cut Personal Spending

This is a time to discuss lifestyle levels and why anyone needs to spend more than they can afford to for living. Many Americans are “hooked” on a high standard of living that includes drinking \$100 bottles of wine, eating only gourmet foods, burning thousands of dollars of fuel in boats and airplanes and spending hundreds of dollars a day on Amazon and other websites for fashions and accessories that far from “necessary” from a practical standpoint. It may be time to stop those patterns. An excellent video that is very revealing and has stopped rampant spending for many families is Professor Sut Jhally’s YouTube video “Advertising and the Perfect Storm” and “Advertising and the End of the World” which can be seen on YouTube and has had a strong impact on the author and others who have seen it. Another impactful and fiscally responsible YouTube video we recommend is “Killing Us Softly” by Professor Jean Kilbourne, which was directed by Professor Jhally. Please watch these and tell us if they do not change your view of what is necessary and appropriate to spend money on in this day and age. Professor Srikumar Rao’s book Happiness at Work and his TED Talk titled Plug into your hard-wired happiness are also required reading and viewing for those who believe that they need significant worldly possessions and cash flow in order to be happy.

Studies have shown that happiness and contentment is increased with income up to a certain level, which would presently be approximately \$135,000 per year for a typical household, but does not go up further even



when income skyrockets. This may be of interest to those who are supporting multiple households of children and others who seem to need many times more than the above amounts. The author often tells new professionals that if they think they need more than 3,500 feet of housing to raise 2 children they need to see a psychologist as opposed to a realtor.

In addition, although the “medium home” in a given area may be increasing in value by 3.5% a year, a real home is getting older every year and losing on average approximately 1/65th of the value of the structure each year, assuming a 65 year life, not to mention the need to pay taxes, insurance, utilities, new roofs and new air conditioning based upon the size of the structure and value. Many families believe that their home has been a very good investment until they run the numbers and discover that putting more money away in a conservative well allocated stock and bond based portfolio, which can be creditor protected by being held in tenancy by the entireties if only one spouse is high risk, under variable annuities that may offer both tax deferral and creditor protection, under pension accounts, in 529 college savings plans and in other ways.

Given the above, the author would sell the vacation home sooner rather than later if its value may be needed to pay for expenses to save or restart a business or profession. The value of vacation homes may plummet when the virus crisis thaws.

Planes, Trains and Automobiles (that are not needed)

Yes, many clients also have expensive sports cars, boats and airplanes that may be sold now at 75% or less of what they were worth before the virus when this thaws. Will they be smart enough to take the 25% loss, or will they hold on to these assets and use them to run down their value and eventually sell them for 35% of the present value, which is what happened many times in 2009 and 2010. The human mind has a funny way of holding on to investments until they recover their value, even when it is obvious that taking the value of a failed investment and shifting it to cash or other investment classes will be a more logical and safer move. “I cannot live without my boat” is a sad thing to hear and see when children have to drop out from college because Dad cannot sell the boat to pay for their tuition, but these things happen.

Clients With Leveraged Investment Real Estate



With respect to clients who have leveraged real estate that may or more not be upside down once the virus lockdown defrosts, the best question may be how much in other assets can they safely take off of the table so that if the real estate goes upside down, or there are no or fewer paying tenants to service mortgages, they have creditor exempt assets that lenders cannot touch.

When the bank comes to them and asks for a refinancing or a substantial pay down, can the client look the bank in the eye and say, “well wait a minute, I have a lot of assets that are exempt from creditor claims, so I am not going to use them in my refinancing.” This will be a sound strategy if the creditor exempt assets were acquired before there was a high risk of insolvency, and for good tax, estate planning and business reasons.

After 2008, banks appraised real estate and gave borrowers the choice of putting more equity in by paying the loan down, giving additional collateral, or having the loan called in if the borrower could not find a new lender. The CARES Act may provide some help to landlords in the form of being able to borrow moneys to keep employees of the landlord employed and to pay mortgage interest and certain other expenses, but this is not going to go very far in keeping landlords afloat for the number of years it may take to recover economic turmoil.

A separate LISI newsletter is in progress to discuss making an S election for LLC’s and other entities now taxed as partnerships or disregarded, if this can be done without triggering income tax, so that loan work outs and foreclosures are less likely to result in taxable income from the discharge of indebtedness being sprayed onto LLC owners who will already have enough economic burdens if things do not go well for their leveraged real estate.

Conclusion

Whatever your client’s situation is, it should be looked at to help them think through what is going on and what move they can make to update their planning and safeguard what they have.

Another consideration discussed above is how much cash the client has and what their “burn rate” is. If banks do not extend lines of credit, and you



never looked into your client's burn rate, your client might not realize that they will be out of money before it's too late. As such, it is essential to examine a client's financial and contractual positions and the burn rate, and to help reduce the burn rate and increase revenues, while keeping in mind what risks they might have.

If you think your client may go into bankruptcy, make sure you understand that your attorney-client privilege may be lost on the date of filing. As with other proceedings, privilege can be asserted or waived in a bankruptcy case, but the question of who or what entity or entities own the privilege, and whether creditors or a trustee in bankruptcy can take it over to waive it, is crucial to pre-bankruptcy planning, and is much different than what applies under state law in many jurisdictions.

A bankruptcy court appointed trustee in bankruptcy may get to see all of your legal documents and all your legal letters and may be able to depose the debtor and lawyers if there is no attorney-client privilege anymore. As such, you might want to be careful about what you put in writing. Also, there is no CPA client privilege in bankruptcy or other Federal Court Proceedings, so a lawyer who may have attorney-client privilege can consider hiring the CPA who helps with strategy to be a contractor for the lawyer under a "Kovel-Type Letter" or agreement.

Please do not "try this at home" with any difficult situation without the active assistance of a lawyer who will be there in the event of litigation that may call to question whether you properly advised your client, and whether you and your client took all of the right steps in this thorny area.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Alan Gassman
Adriana Choi



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CITATIONS:

ⁱ *Murphy's Law*, *The Oxford Dictionary of Phrase and Fable*, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100217459> (last visited March 30, 2019).

ⁱⁱ See *In re Montgomery*, 475 B.R. 742 (DC Kansas 2011), where the Bankruptcy court concluded that the look-back period 90 days is only counted once, not once for each such event.





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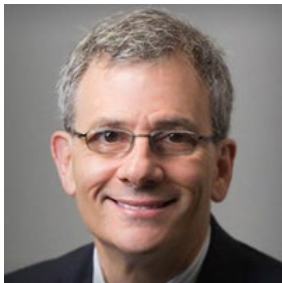


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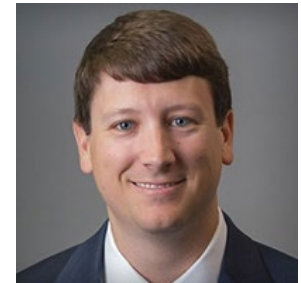
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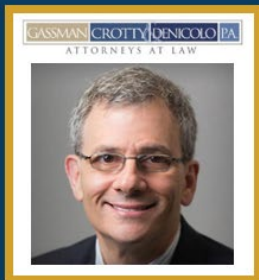
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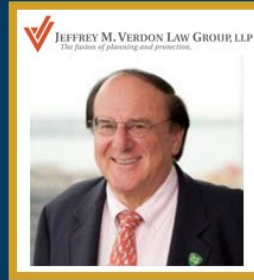
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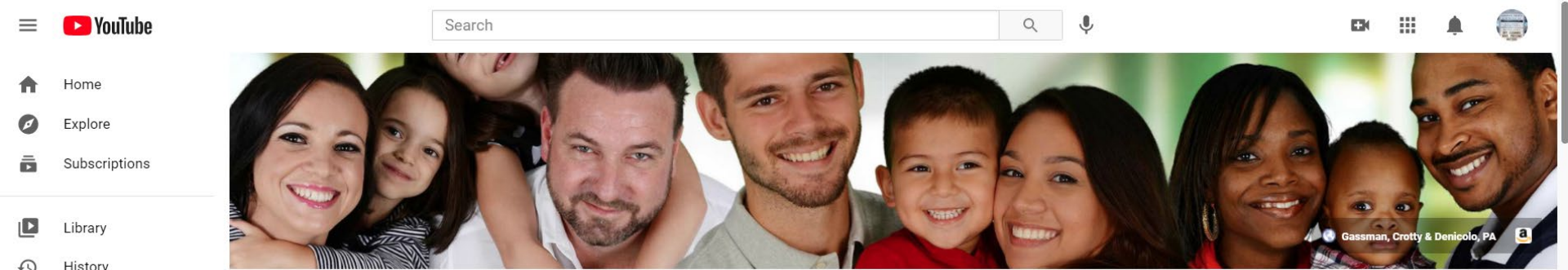


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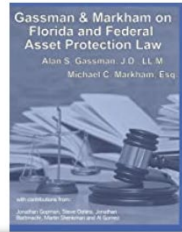
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Gassman & Markham on Florida and Federal Asset Protection Law

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

Michael C. Markham, Esq.



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INTRODUCTION

Florida has a unique body of creditor protection planning laws that come from a number of different sources, and a number of different practice areas. The laws can be found in the Florida Constitution and Florida Statutes, and many stem from common law principles. This book seeks to explain these principles in a clear and simple manner, so that advisors can tailor asset protection plans to each client's needs.

Chapter 1 focuses on what creditor protection is, who qualifies, and the key rules that apply.

Chapter 2 discusses tenancy by the entireties, originally a common law protection for a husband and wife, which has been codified in the Florida Statutes. Tenancy by the entireties, or "TBE," provides strong protections for married couples that title property and assets as such.

Chapter 3 discusses annuities and annuity contracts, and how Floridians can protect their assets through permanent life insurance and cash value annuities.

Chapter 4 gives an in depth review of life insurance policies as described in Florida Statutes Section 222.

Chapter 5 discusses the vast homestead protections offered under Florida law. This chapter explains the relevant case law and recommended methods for protecting an individual's homestead and homestead proceeds from creditors.

Chapter 6 is regarding wages and wage accounts – which are protected under the head of household exemption of the Florida Statutes in Section 222 – and can be a valuable asset protection tool for families.

Chapter 7 is on disability insurance and proceeds, which are exempt from creditor claims. This chapter reviews the relevant statutes and case law.

Chapter 8 on pension plans, IRAs, and other qualified retirement plans, presents the current case law on these subjects. To date, there is not a settled consensus among courts as to whether such funds can be withdrawn for personal interests. The chapter also provides the relevant IRS provisions.

Chapter 9 provides a brief discussion on five subsidiary types of asset protection, including alimony rights, unemployment compensation benefit rights, Florida Prepaid Tuition Fund and 529 Plans, hurricane savings accounts, and physical asset exemptions.

Chapter 10 reviews the federal non-bankruptcy exemptions, including survivor benefits and retirement plans.

Chapter 11 is on Asset Protection Trusts, particularly Domestic Asset Protection Trusts (DAPTs). This chapter provides an in-depth look at minimizing the impact of the Medicaid tax and Florida's rules for lifetime QTIP Trusts.

Chapter 12 looks at Asset Protection Trusts overseas, and includes the famed Oshin's State Ranking Charts for categories such as best states to decant a trust and best states for Domestic Asset Protection Trusts.

Finally, Chapter 13 briefly touches on one of the newest entrants to the asset protection and estate planning game: non-charitable foundations.

with contributions from:

Jonathan Gopman, Steve Oshins, Jonathan Blattmachr, Martin Shenkman and Al Gomez



Asset Protection Meets Estate Tax Planning

Monday, July 19, 2021
5:30 to 6:30 PM EDT
(60 minutes)

THANK YOU FOR PARTICIPATING!

Presented by:

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