OFFSHORE FINANCIAL LLC AND TRUST STRUCTURES FOR THE CONSERVATIVE CLIENT AND PLANNER

Saturday, July 15, 2023

From 11:00 AM TO 12:00 PM EST

(60 minutes)

Remo Tiefenauer
Remo.tiefenauer@kaiserpartner.com

Presented By:

Alan Gassman, JD, LL.M. (Taxation), AEP® (Distinguished)

Remo Tiefenauer, BA, Executive MBA HSG

Alan Gassman, Esquire
agassman@gassmanpa.com

1245 Court Street
Clearwater, FL 33756

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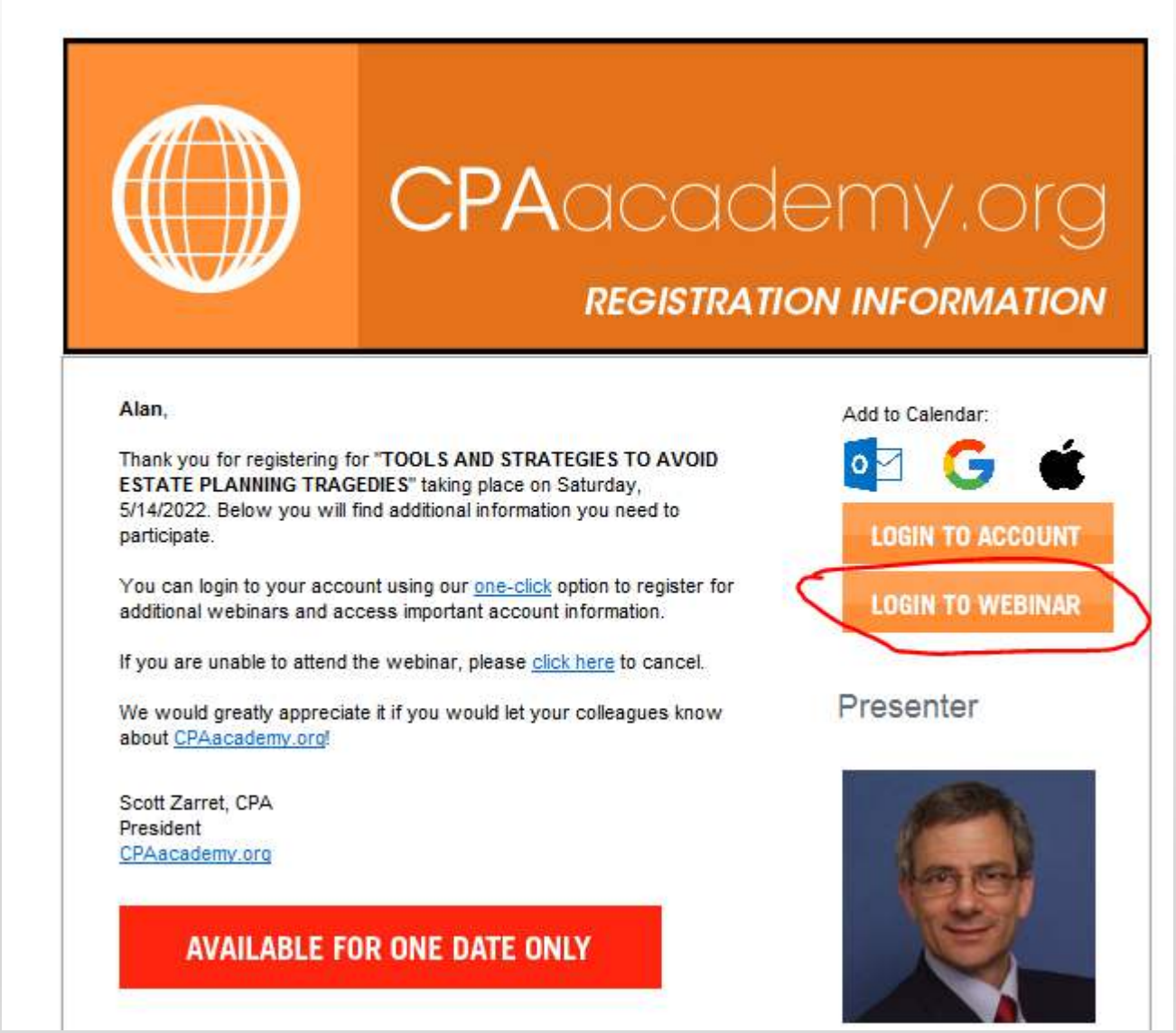
If you want 1.0 CPE credit -

RIGHT!



WRONG!

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Thank you for registering for "TOOLS AND STRATEGIES TO AVOID ESTATE PLANNING TRAGEDIES".

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Course Description:

It takes more than knowledge and revocable trusts to facilitate estate tax planning for wealthy families. In addition, the IRS has been regularly attacking certain effective estate tax planning tools because of chinks in the armor that planners must be aware of. This presentation will discuss primary and effective strategies for estate tax avoidance, and how to avoid having "chinks in the armor" that can cause tragedy instead of success.

Learning Objective:

Identify primary and effective strategies for estate tax avoidance.

This is a complimentary webinar program. After registering, you will receive a confirmation email containing information about joining the webinar. Approximately 3-5 hours after the program concludes, the recording and materials will be sent to the email address you registered with.

Important: If you are already on the "Register For All Upcoming Free Webinars" list, you will be auto-registered on Friday for non-CPE credit. If you would like 1.0 free CPE Credit for this webinar, please also register above through CPA Academy.

Please email registration questions to info@gassmanpa.com.

Please send your questions, comments and feedback to: agassman@gassmanpa.com

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1. Click the link to join the webinar at the specified time and date:

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   WARNING: They are not very good!


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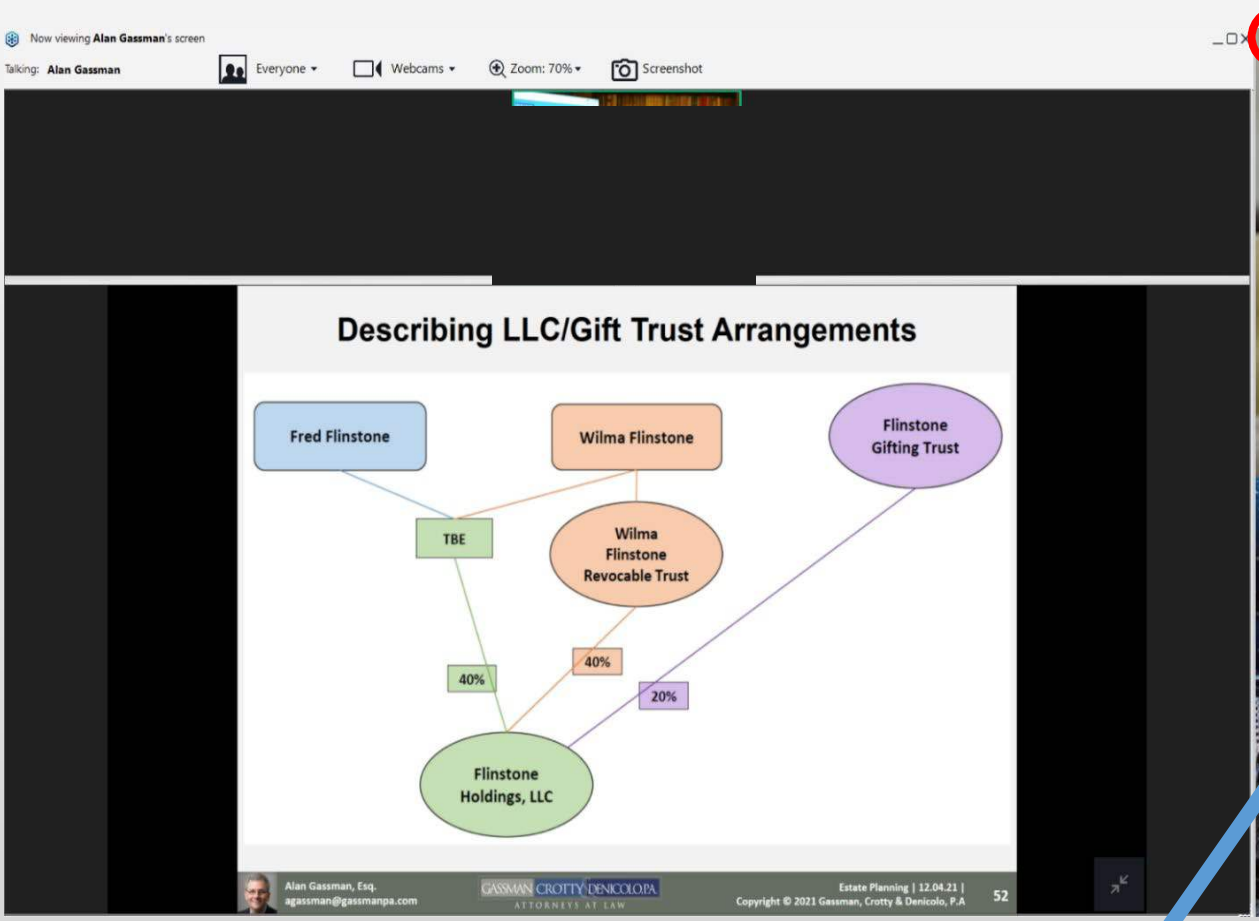

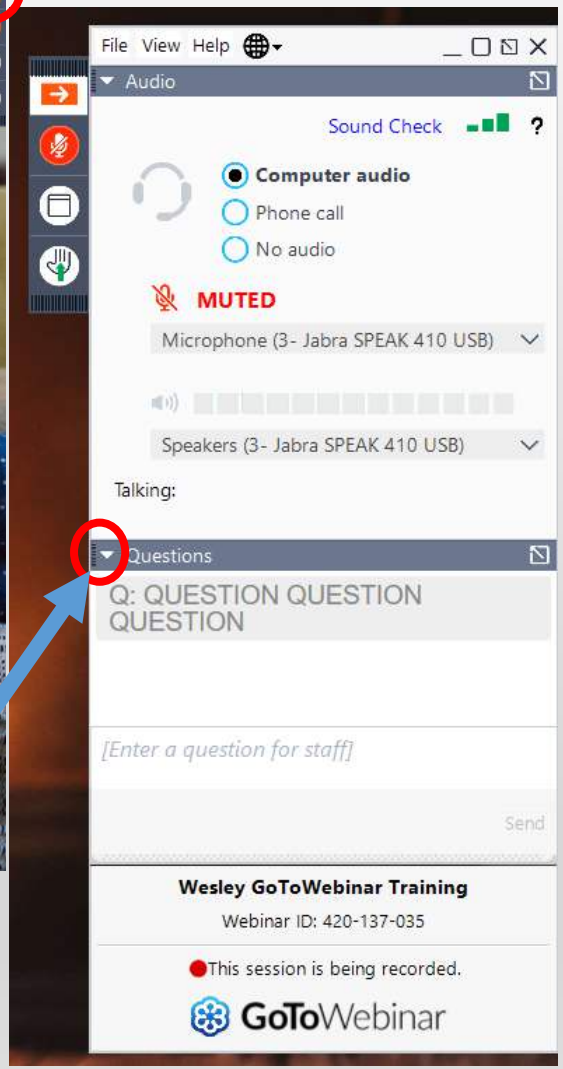

STEP 2: Open Drop Down Arrow to Question Section; Type and send your question.

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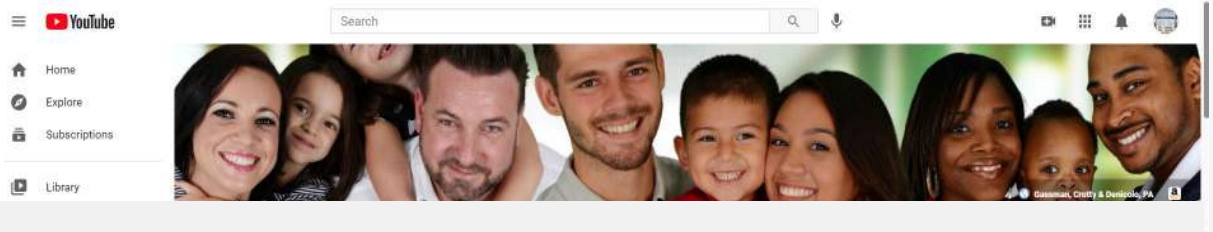

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THE SLIM PICKENS REPORT

Slim Pickens was born on this day in 1919. Louis Burton Lindley, Jr., better known by his stage name Slim Pickens, was an American actor and rodeo performer.

GASSMAN CROTTY DENICOLO P.A.
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Thursday, June 29, 2023

Issue #338

Coming from the Law Offices of Gassman, Crotty & Denicolo, P.A. in Clearwater, FL.

Edited By: Wesley Dickson

Article 1

Precious Metals Are Personal Property

Written By: P. Jill Ashley, Juris Doctorate Candidate, Stetson Law School

Article 2

Recent Developments in Real Estate Taxation?

Written By: Kenneth J. Crotty, JD, LL.M

Article 3

The Walton GRAT

Written By: P. Jill Ashley, Juris Doctorate Candidate, Stetson Law School

For Finkel's Followers

The Difference Between Doing a Task and Owning a Task

Written By: David Finkel

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European Investing Accounts & Structures

Presented by: Alan Gassman, JD, LL.M. (Taxation), AEP (Distinguished) and Remo Tiefenauer, BA, Executive MBA HSG

Hot Topics & Recent Developments in Estate Tax Planning

Presented By: Alan Gassman, JD, LL.M. (Taxation), AEP (Distinguished)

FREE

HOT TOPICS, JERRY HESCH, NOTRE DAME & WHY ESTATEVIEW IS THE BESCHT

Saturday, July 22, 2023

From 11:00 AM TO 1:00 PM EST

(120 minutes)

Jerome M. Hesch, Esquire
jhesch@meltzerlippe.com

Presented By:

Alan Gassman, JD, LL.M. (Taxation), AEP® (Distinguished)

Jerome M. Hesch, JD, LL.M.

Alan Gassman, Esquire
agassman@gassmanpa.com

1245 Court Street
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ESTATE TAX PLANNING SATURDAY SERIES WITH ALAN GASSMAN THESE PROGRAMS ARE FREE INFORMATIONAL WEBINARS FROM OUR FIRM. *THESE PROGRAMS DO NOT QUALIFY FOR CLE/CPE CREDITS.			
Saturday, July 22, 2023	**Free from our Firm (Virtual Session - *CPE Credits Will Be Offered Through CPAacademy.org)**	**Alan Gassman Presents: HOT TOPICS & RECENT DEVELOPMENTS IN ESTATE TAX PLANNING 11:00 AM - 12:00 PM (60 minutes)**	**REGISTER HERE FOR 1.0 CPA CPE CREDIT REGISTER HERE FOR NON-CPE CREDIT REGISTER HERE FOR FLORIDA CLE CREDIT**
Saturday, July 29, 2023	**Free from our Firm (Virtual Session - *CPE Credits Will Be Offered Through CPAacademy.org)**	**Ken Crotty Presents: LET'S LEARN ABCs and QOZs 11:00 AM - 12:00 PM (60 minutes)**	**REGISTER HERE FOR 1.0 CPA CPE CREDIT REGISTER HERE FOR NON-CPE CREDIT REGISTER HERE FOR FLORIDA CLE CREDIT**
Saturday, August 5, 2023	**Free from our Firm (Virtual Session - *CPE Credits Will Be Offered Through CPAacademy.org)**	**Alan Gassman Presents: Using Grantor Retained Unity Trusts 11:00 AM - 12:00 PM (60 minutes)**	**Coming Soon!**

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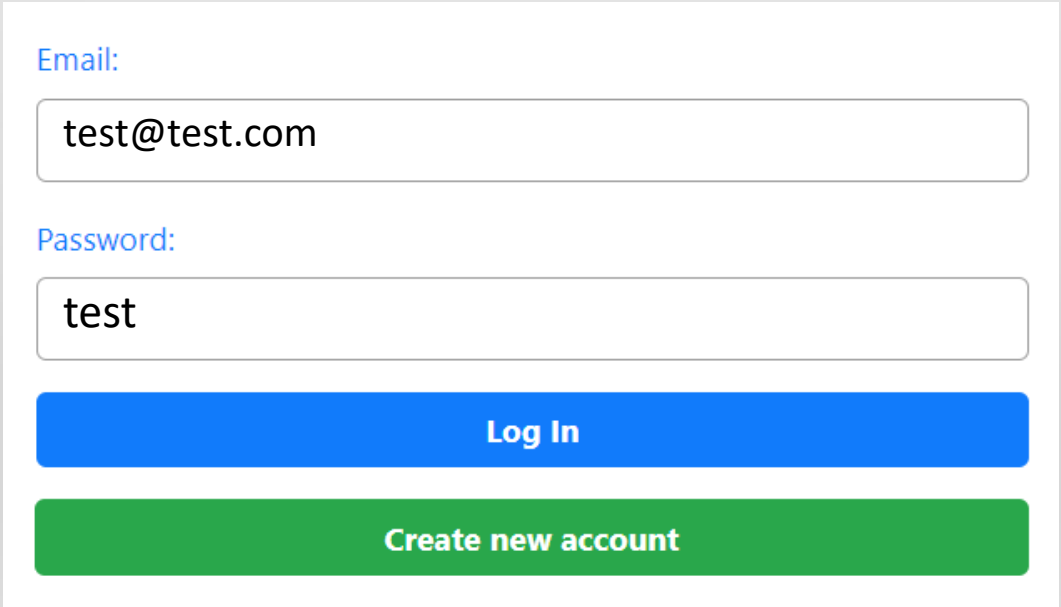


Today's Special Guest:

Remo Tiefenauer, BA, Executive MBA HSG

kaiser.partner

Member of the Executive Board, Senior Investment Advisor

Remo.tiefenauer@kaiserpartner.com

Polling Question

Remo Tiefenauer:

A. Resides in Zurich, Switzerland
B. Works for Kaiser-Partner as an Investment Advisor
C. Is not related to Arnold Schwarzenegger
D. All of the above

Polling Question

Offshore investments can be held…

A. Under individual's name
B. Under an LLC
C. Under a trust or a foundation
D. Under a life insurance policy or annuity
E. All of the above

Polling Question

The Know Your Customer Rules

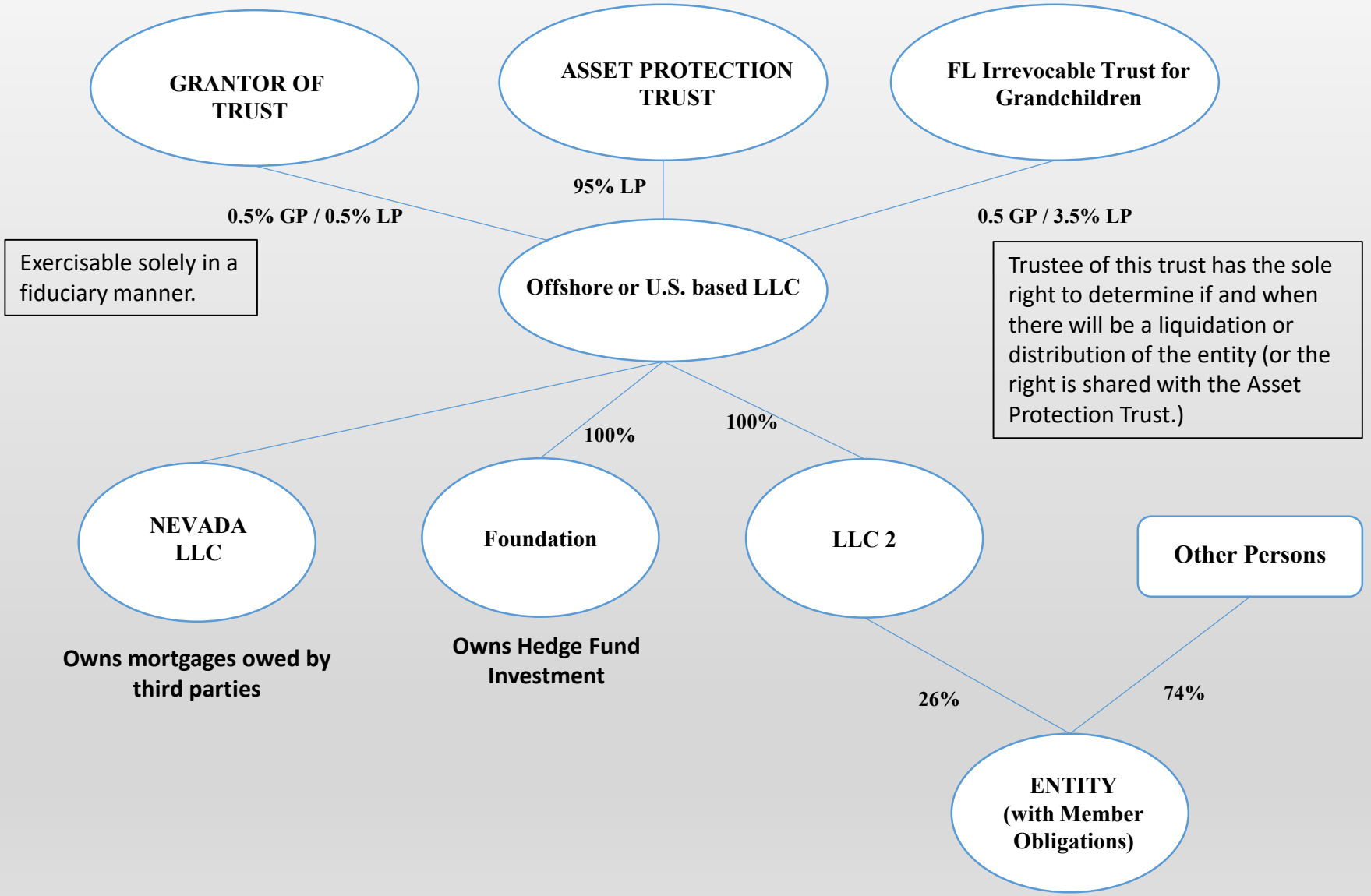
A. Are required under U.S. and International law
B. Require international firms to verify identity
C. May require annual verification
D. Cannot be avoided
E. All of the above

Polling Question

The U.S. based asset protection trust

A. Is very similar to an offshore APT
B. Require far fewer tax forms to be filed
C. Is less expensive to maintain
D. May be less effective especially if the grantor lives in an a no APT jurisdiction
E. All of the above

Possible Planning Schematic



Definition of an Asset Protection Trust

An Asset Protection Trust is a Trust formed by one or more individuals to protect assets from the creditors of those individuals.

By contrast, a Third Party Settled Trust may be formed to protect assets from creditors of the beneficiaries.

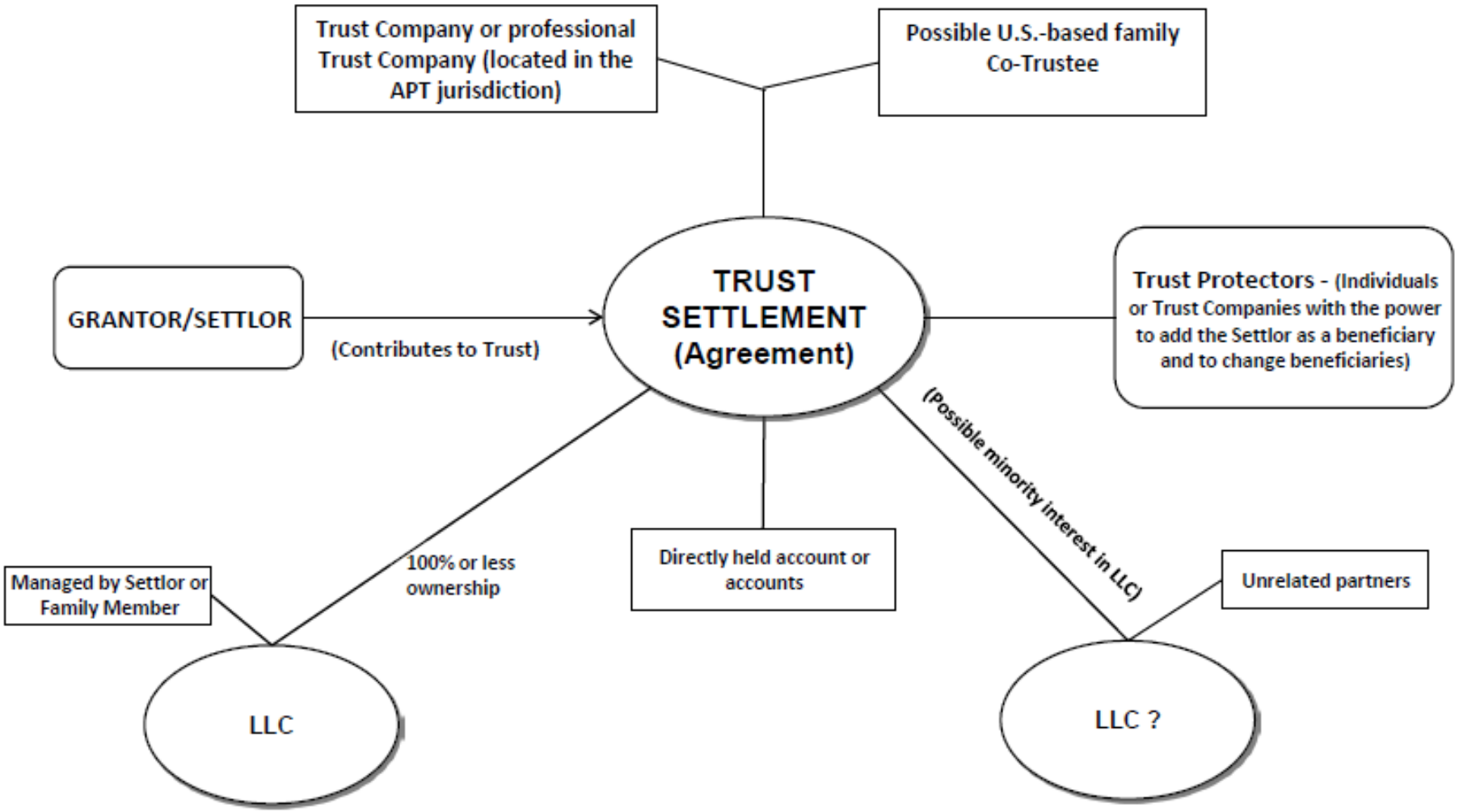
Third Party Settled Trusts may establish situs in Asset Protection Trust jurisdictions so that “exception creditors” cannot reach into them.

For example, Nevada, South Dakota, and Alaska do not permit exception creditors to penetrate a Third Party Self-Settled Trust.

The Cleopatra case discussed later involved a Third Party Self-Settled Trust that was moved from California to South Dakota and was found to be immune from responsibility for child support by the South Dakota Supreme Court.

The Asset Protection jurisdictions now include 19 states in the United States and over 30 international jurisdictions, most notably including Nevis, the Cook Islands, and Belize.

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 for whom the trust is established. Reputable offshore trust companies will require passports, utility bills, professional letters of reference, and sometimes affidavits from each beneficiary when the trust is established.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The Anatomy of an Asset Protection Trust, (Continued)

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.

4. United States Judgment – A judgment from a U.S. Court, which means nothing whatsoever in the jurisdiction where the trust is sitused (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.


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The Anatomy of an Asset Protection Trust, (Continued)

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 foreign asset protection jurisdictions, lawyers must charge their clients by the hour, and not on a contingency fee basis.

   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.

   Court Registry deposit requirement – Nevis requires a 100,000 Nevis dollars ($37,037.04) deposit into the Court Registry before a trust can be challenged. A 100,000 Nevis dollars ($37,037.04) deposit is also required to challenge an LLC. A Nevis trust and LLC challenge will therefore require a 200,000 Nevis dollars ($74,074.07) 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.

The Anatomy of an Asset Protection Trust, (Continued)

10. Judicial Bias - The asset protection trust jurisdictions derive significant income and lawyer work, not to 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.

Asset Protection Trust Jurisdictions

A review of all of the differences between the various jurisdictions can be exhausting and time-consuming.

Many planners recommend a particular jurisdiction because of a good relationship with a trust company there, or good experiences (or not such good experiences with other jurisdictions).

Notable offshore jurisdictional factors are as follows:

- Nevis – A creditor challenging a Nevis trust must post a bond of $100,000 U.S. dollars into the court registry, which may be used to pay the legal fees incurred by the trust for defending the action. Nevis law also provides that any oral agreement or understanding between a Grantor and Trustee with respect to rights of the Grantor to receive assets will be considered as null and void.

- Belize will not recognize the validity of any claim against an Asset Protection Trust that is formed, unless the debtor has a judgment against them in Belize.

- The Cook Islands has the longest standing “custom drafted creditor protection” law, and excellent trust companies with extensive experience in this arena.

- Utah and Wyoming have 1,000 year Rules Against Perpetuities, and Jersey, Nevis, and the Isle of Man have no Rule Against Perpetuities.

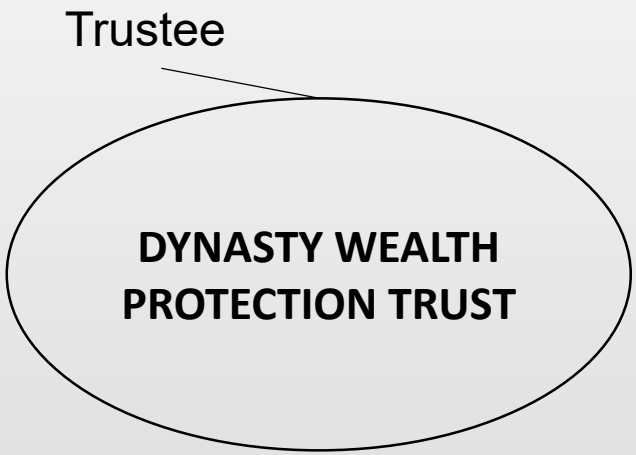
Asset Protection Trust Jurisdictions, (Continued)

Many planners use traditional European jurisdictions which have common law protection from creditors, but often longer statutes of limitations, and less “stigma” than the more aggressive jurisdictions discussed above.

These include Gibraltar, the Isle of Man, and Jersey and Guernsey in the Channel Islands.

Jersey and the Isle of Man have statutes that allow the creditor protection rules of another jurisdiction to apply if a trust company or individual from such other jurisdiction is serving as Co-Trustee.

Dynasty Wealth Protection Trust



Assets gifted to trust and growth thereon.

Note: Nevada, South Dakota and Ohio **[?]** get gold stars 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 has a weaker argument that the grantor retains "secret" 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

INCOMPLETE GIFT TRUST

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.

FLORIDA COMPLETE GIFT TRUST

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.

APT COMPLETE GIFT TRUST

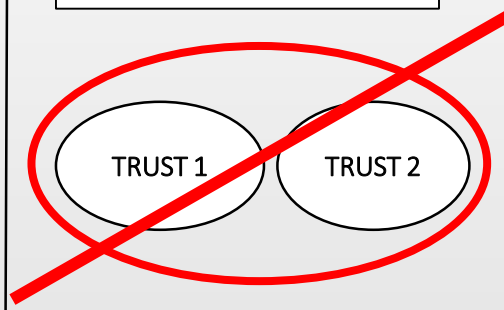
Use Crummey Power for annual exclusions, or part of Grantor's exemption amount.

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

Domestic Asset Protection Trusts

In the United States most Asset Protection Trusts have been formed in Alaska, which has had legislation the longest.

Nevada passed legislation in 2005 that does not allow for exception creditors.

South Dakota also has a very modern statute and a number of international trust companies holding considerable assets for international clients.

Significant international capital has come to the U.S. to take advantage of the South Dakota laws, which specifically provide that the trustee of a South Dakota trust is required to transfer the trust to another jurisdiction and resign as trustee if there is an order from a non-U.S. court with respect to the trust. SDCL Section 55-3-47.

This should prevent a trustee from being held in contempt for failure to follow the orders of any non-U.S. judgment that may be recorded in South Dakota, since the trustee has the explicit obligation to resign and transfer the trust assets elsewhere.

Private Letter Ruling 200944002

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200944002**
Release Date: 10/30/2009
Index Number: 2511.00-00, 2036.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-103772-09
Date: JULY 15, 2009

In Re:

Legend

Grantor =
Trust =
State =
Trust Company =
State Statute =
$X =

Dear :

This responds to your authorized representative's letter of January 15, 2009, requesting gift and estate tax rulings with respect to a trust.

The facts and representations submitted are as follows: Grantor proposes to create an irrevocable trust (Trust) for the benefit Grantor, his spouse and descendents. Trust will be initially funded with $X. Trust Company will serve as trustee.

Article Second, paragraph A of Trust provides, in part, that trustee will pay over the income and principal of Trust in such amounts and proportions as trustee in its sole and absolute discretion may determine for the benefit of one or more members of the class consisting of Grantor, Grantor's spouse and Grantor's descendants. Any income not paid will be accumulated and added to principal.

Under the terms of Article Second, paragraph B, upon termination of trust, no part of the income or principal of Trust may be transferred or paid to Grantor, Grantor's estate, Grantor's creditors or the creditors of Grantor's estate. Article Second, paragraph B, also provides that upon the death of Grantor and Grantor's spouse, the

entire principal together with any accrued income shall be distributed to any descendant of Grantor then living to be held in separate trusts. If there is no descendant then living, the principal and income shall be disposed of in accordance with the terms and conditions of Article Fourth, which provides that the property shall be transferred, conveyed and paid over to one or more organizations described in §§ 170, 2055 and 2522 of the Internal Revenue Code.

Article Eighth, paragraph B, provides that the following persons may not be a trustee of Trust or any other trust created under trust: (1) Grantor; (2) the spouse or a former spouse of Grantor; (3) any individual who is a beneficiary of Trust or a trust created under Trust; (4) the spouse or a former spouse of a beneficiary of any trust hereunder; (5) anyone who is related or subordinate to Grantor within the meaning of § 672(c).

Article Eleventh, paragraph B, provides Grantor with the power, exercisable in a nonfiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to acquire property held in the trust by substituting other property of an equivalent value. Grantor will exercise the power by certifying in writing that the substituted property and the trust property for which it is substituted are of equivalent value and Trustee shall have a fiduciary obligation to ensure Grantor's compliance with the terms of the power to substitute property. Before the substitution of property is completed, the trustee must be satisfied that the properties acquired and substituted are in fact of equivalent value. In addition, the power can not be exercised in a manner that can shift benefits among the trust beneficiaries.

Article Twelfth, paragraph B, provides that Grantor may not be a trustee of Trust or remove any trustee of trust. Article Twelfth, paragraph D, provides that trustee shall not pay Grantor or Grantor's executors any income or principal of Trust in discharge of Grantor's income tax liability. Trustee is not a related or subordinate party within the meaning of § 672(c).

Grantor is a resident of State and the situs of Trust is State. State Statute provides that a person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust, including a beneficiary who is the settlor of the trust, may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. Under State Statute, if the trust instrument contains this transfer restriction, it prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor, from satisfying a claim out of the beneficiary's interest in the trust unless, (1) the trust provides that the settlor may revoke or terminate all or part of the trust without the consent of a person who has a substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust; (2) the settlor intends to defraud a creditor by transferring the assets to the trust; (3) the settlor is currently in default of a child support obligation by more than 30 days;

Private Letter Ruling 200944002

or (4) the trust requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor.

You have requested the following rulings:

1. A completed taxable gift will occur when Grantor makes a contribution to Trust.

2. No portion of Trust's assets will be includible in Grantor's gross estate.

RULING 1

Section 2501 provides that a tax, computed as provided in § 2502, is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 2511 (a) provides, in part, that subject to limitations contained in chapter 12, the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part thereof, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for the donor's own benefit or for the benefit of another, the gift is complete.

Section 25.2511-2(c) provides, in part, that a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves.

In this case, Grantor has retained no power to revest beneficial title or reserved any interest to name new beneficiaries or change the interests of the beneficiaries. Consequently, we conclude that Grantor's transfer of $X to trust will be a completed gift of $X.

RULING 2

Section 2036(a)(1) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for life or for any period not ascertainable without reference to

the decedent's death or for any period that does not in fact end before death the possession or enjoyment of, or the right to the income from, the property.

Section 20.2036-1(b)(2) of the Estate Tax Regulations provides that the use, possession, right to income, or other enjoyment of transferred property is treated as having been retained by the decedent to the extent that the transferred property is to be applied towards the discharge of a legal obligation of the decedent.

Rev. Rul. 2008-16, 2008 I.R.B. 796, provides guidance regarding whether the corpus of an *inter vivos* trust is includible in the grantor's gross estate under § 2036 or § 2038 if the grantor retained the power, exercisable in a nonfiduciary capacity, to acquire property held in the trust by substituting other property of equivalent value. The ruling provides that, for estate tax purposes, the substitution power will not, by itself, cause the value of the trust corpus to be includible in the grantor's gross estate, provided the trustee has a fiduciary obligation (under local law) to ensure the grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the grantor are in fact of equivalent value and further provided that the substitution power cannot be exercised in a manner that can shift benefits among the trust beneficiaries.

Based on Rev. Rul. 2008-16, we conclude that in this case the substitution power, by itself, will not cause the value of the trust corpus to be includible in Grantor's gross estate.

Rev. Rul. 2004-64, 2004-2 C.B. 7, considers situations in which the trustee reimburses the grantor for taxes paid by the grantor attributable to the inclusion of all or part of the trust's income in the grantor's income. In Rev. Rul. 2004-64, a grantor created an irrevocable inter vivos trust for the benefit of the grantor's descendants. The grantor retained sufficient powers with respect to the trust so that the grantor is treated as the owner of the trust under subpart E, part I, subchapter J, of chapter 1 of the Code. When the grantor of a trust, who is treated as the owner of the trust under subpart E, pays the income tax attributable to the inclusion of the trust's income in the grantor's taxable income, the grantor is not treated as making a gift of the amount of the tax to the trust beneficiaries. If, pursuant to the trust's governing instrument or applicable local law, the grantor had to be reimbursed by the trust for the income tax payable by the grantor that was attributable to the trust's income, the full value of the trust's assets would be includible in the grantor's gross estate under § 2036. If, however, the trust's governing instrument or applicable local law gave the trustee the discretion to reimburse the grantor for that portion of the grantor's income tax liability, the existence of that discretion, by itself, whether or not exercised, would not cause the value of the trust's assets to be includible in the grantor's gross estate. However, such discretion combined with other facts (including but not limited to: an understanding or pre-existing arrangement between grantor and the trustee regarding the trustee's exercise of this discretion; a power retained by Grantor to remove the trustee and name

Private Letter Ruling 200944002

grantor as successor trustee; or applicable local law subjecting the trust assets to the claims of grantor's creditors) may cause inclusion of Trust's assets in grantor's gross estate for federal estate tax purposes.

In this case, under the terms of Article Twelfth, paragraph D, the trustee is prohibited from paying Grantor or Grantor's executors any income or principal of Trust in discharge of Grantor's income tax liability. Although, Rev. Rul. 2004-64 does not consider this situation, it is clear from the analysis, that because the trustee is prohibited from reimbursing Grantor for taxes Grantor paid, that Grantor has not retained a reimbursement right that would cause Trust corpus to be includible in Grantor's gross estate under § 2036. See Rev. Rul. 2004-64. In addition, the trustee's discretionary authority to distribute income and/or principal to Grantor, does not, by itself, cause the Trust corpus to be includible in Grantor's gross estate under § 2036.

We are specifically not ruling on whether Trustee's discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust's assets in Grantor's gross estate for federal estate tax purposes under § 2036.

We are specifically not ruling on whether or not Trust is a trust described in subpart E, part I, subchapter J, of chapter 1 of the Code.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

James F. Hogan
Senior Technician Reviewer
Branch 4
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
Copy for section 6110 purposes

Complete vs. Incomplete Gift Trusts

For Federal Estate and Gift Tax purposes there are two basic categories of Asset Protection Trusts: **complete** gift trusts and **incomplete** gift trusts.

With a complete gift trust, the transfer to the trustee constitutes a gift for Federal Estate and Gift Tax purposes, with the objective of having the trust excluded from the estate of the Grantor for Federal Estate Tax purposes. A gift tax return will be filed by the transferor, which will use of part of the Grantor's estate and gift tax exemption.

Under IRC Section 2036(a)(1), the assets of a trust that may benefit the Grantor by making payments to creditors of the Grantor will be included in the Grantor's estate.

It is therefore important to make sure that no creditors of a Grantor can reach into a "completed gift trust."

While the IRS indicated in **Private Letter Ruling 200944002** that a complete gift occurred with a trust established in an asset protection jurisdiction, it did not rule that the trust would not be subject to Federal Estate Tax. Instead, the IRS stated that the trustee's discretionary authority to distribute income and/or principal to the Grantor did not, by itself, cause the trust corpus to be includible in the Grantor's estate. Thus, it would appear that the IRS would somehow need to show that the Grantor and the trustee had an understanding that distributions would be made to the Grantor.

Complete and Income Gift Trusts and Section 2036

Can the Grantor benefit from having the trust pay amounts owed to Exception Creditors?

There might be a question as to whether a trust established in an asset protection jurisdiction that allows exception creditors (like an ex-spouse for alimony or child support) to reach into the trust could trigger a 2036(a)(1) retained interest for estate tax purposes because the Grantor can have a child who could be supported with trust assets.

It is safer to have such a trust held in a jurisdiction that does not allow exception creditors to reach into the trust, such as Nevada, South Dakota, Alaska, Utah, or one of the many offshore APT jurisdictions.

Is there an understanding that the Grantor can recoup the trust assets?

Further, with a completed gift trust, Section 2036(a)(1) can also apply if there is an understanding between the Grantor and the Trustee to the effect that the Trustee will restore the assets to the Grantor upon request.

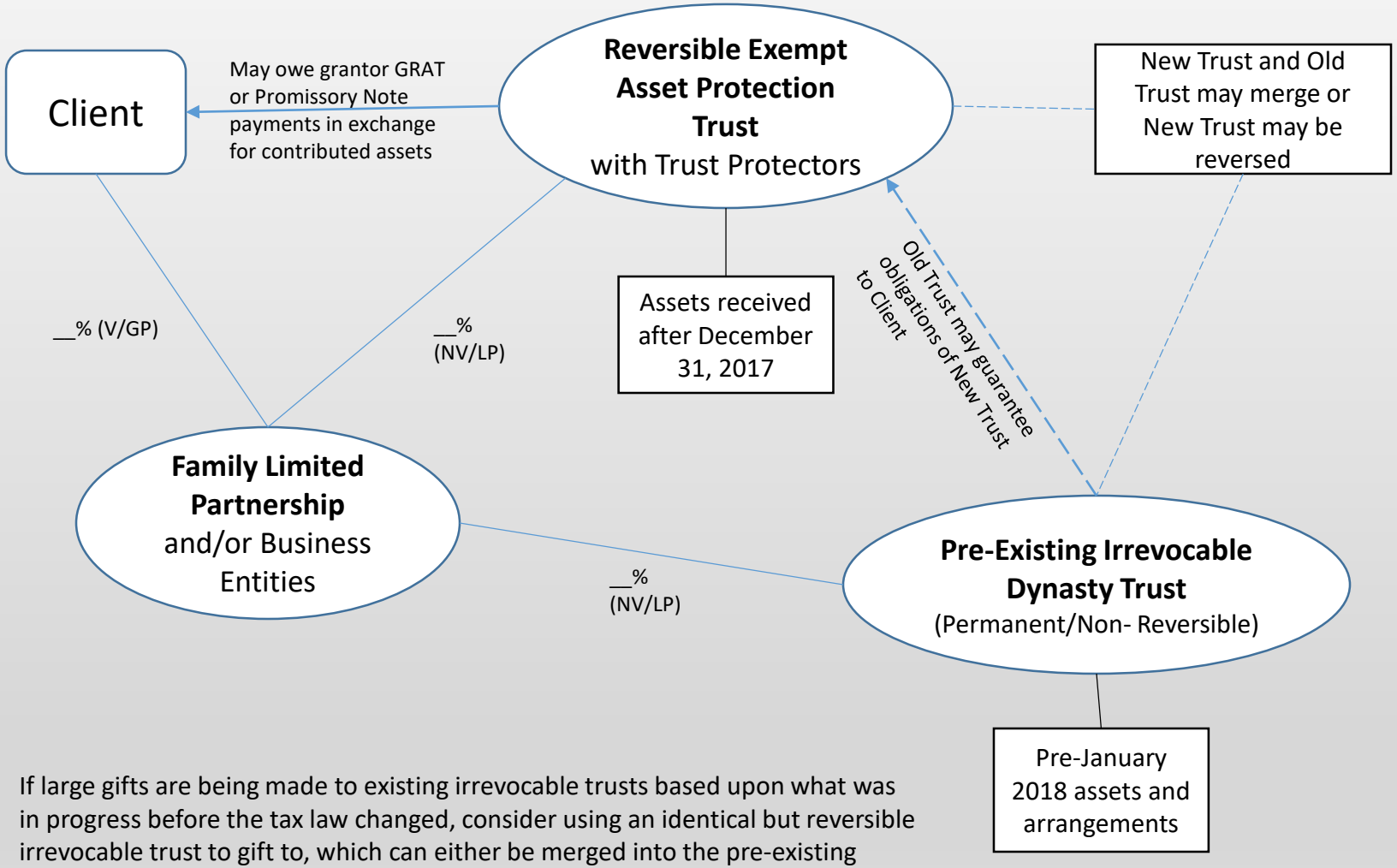
The trust laws of Nevis, Belize and the Cook Islands specifically provide that no pre-existing understanding will be legally enforceable, which is helpful from the standpoints of both estate tax and creditor protection.

Complete and Income Gift Trusts and Section 2036

Recouping the exemption when there is inclusion – keep the assets in the trust.

If a completed gift trust is included in the estate of the Grantor, then the previously used Estate and Gift Tax exemption when the transfer was funded will be credited and restored to the extent that the assets of the trusts equal or exceed such amount. If the trust is emptied out by payment to the Grantor, then the loss of the exemption from gifting is not restored. Code Section 2012(a).

The Reversible EXEMPT ASSET PROTECTION TRUST (THE "REAP TRUST")



If large gifts are being made to existing irrevocable trusts based upon what was in progress before the tax law changed, consider using an identical but reversible irrevocable trust to gift to, which can either be merged into the pre-existing trust, held in parallel, or reversed back by Trust Protectors if and when the estate tax is not a concern for the client.

Leimberg Information Services, Inc.

Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2500

Date:11-Jan-17

Subject: Alan Gassman, Christopher Denicolo, Kenneth Crotty & Brandon Ketron: The Reversible Exempt Asset Protection ("REAP") Trust for 2017 Planning

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

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

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

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

Now, **Alan Gassman**, **Ken Crotty**, **Chris Denicolo** and **Brandon Ketron** provide members with their commentary on what they refer to as "The Reversible Exempt Asset Protection ("REAP") Trust."

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, Estate Planning, Trusts and Estates, Interactive Legal and Haddon Hall Publishing. The Alan Gassman Channel at Interactive Legal has recently opened, and features many books and resources, including many Florida and Federal based materials, forms and resources. He is also the Moderator for Bloomberg BNA's 2017 Estate Planning Webinar Series. Alan and Srikumar Rao, Ph.D. will be giving a seven hour program entitled Professional Acceleration Workshop that is free for law students, and only $125 for other attendees on Saturday, February 11th at Stetson Law School beginning at 9:00 a.m. You can contact Alan at agassman@gassmanpa.com for more information with respect to this Stetson Law School Benefit Event sponsored by InterActive Legal.

Christopher Denicolo, **J.D., LL.M.**, is a partner at the Clearwater, Florida law firm of **Gassman, Crotty & Denicolo P.A.**, where he practices in the areas of estate tax and trust planning, taxation, physician representation, and corporate and business law. He has co-authored several handbooks that have been featured in Bloomberg BNA Tax & Accounting, Steve Leimberg's Estate Planning and Asset Protection Planning Newsletters and the Florida Bar Journal. is also the author of the Federal Income Taxation of the Business Entity Chapter of the Florida Bar's Florida Small Business Practice, Seventh Edition Mr. Denicolo received his B.A. and B.S. degrees from Florida State University, his J.D. from Stetson University College of Law and his LL.M. (Estate Planning) from the University of Miami. His email address is christopher@gassmanpa.com.

Kenneth J. Crotty, J.D., LL.M., is a partner at the Clearwater, Florida law firm of **Gassman, Crotty & Denicolo, P.A.**, where he practices in the areas of estate tax and trust planning, taxation, physician representation, and corporate and business law. Mr. Crotty has co-authored several handbooks that have been published in BNA Tax & Accounting, Estate Planning, Steve Leimberg's Estate Planning and Asset Protection Planning Newsletters and Estate Planning magazine. Mr. Crotty is a co-author of the

BNA book Estate Tax Planning in 2011 & 2012. His email address is ken@gassmanpa.com.

Brandon Ketron, J.D., LL.M., CPA, is an associate at the law firm of **Gassman, Crotty & Denicolo**, P.A. in Clearwater, Florida and practices in the areas of Estate Planning, Tax, and Corporate and Business Law. Brandon attended Stetson University College of Law where he graduated cum laude, and received his LL.M. in Taxation from the University of Florida. He received his undergraduate degree at Roanoke College where he graduated cum laude with a degree in Business Administration and a concentration in both Accounting and Finance. Brandon is also a licensed CPA in the States of Florida and Virginia. His email address is brandon@gassmanpa.com.

Here is their commentary:

EXECUTIVE SUMMARY:

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

Alternatively, when we look back in five years we may find that the estate tax "went away" but came back in harsher form, after a period of time during which those who planned ahead came out much better than those who did not.

While some commentators believe that repeal of the estate tax is a strong possibility, others have pointed out the several likely alternatives that must be considered to stay two or more move moves ahead on the chess board of family wealth planning in this dynamic environment.

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

may be coming.

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

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

FACTS:

When Mr. Trump was elected on November 9, the possibility of a repeal or at least a substantially modified estate tax system, became closer to a reality. Mr. Trump has not formally announced a detailed proposal on the estate tax, but his campaign website offered the following:

The Trump Plan will repeal the death tax, but capital gains held until death and valued over $10 million will be subject to tax to exempt small businesses and family farms. To prevent abuse, contributions of appreciated assets into a private charity established by the decedent or the decedent's relatives will be disallowed.1

It remains to be seen how (or if) this proposal or something similar thereto will be developed into law, and how it will apply from a practical standpoint. During his campaign and since he has been elected, Mr. Trump has discussed many objectives other than estate tax repeal that have received a lot more attention and have generated and likely will continue to generate much debate. Accomplishing these objectives, and being postured for re-election in 2020 will require the expenditure of much political capital, which could limit, delay, or hinder the possibility of significant estate tax law changes, and increase the likelihood that any estate tax law changes will occur only as part of changes to the budget. Further, under the Byrd Rule, any legislation which affects the budget can only be effective for ten (10) years unless a three-fifths (3/5) majority in the Senate (i.e., sixty (60) senators) vote for such legislation.

With the Republicans currently having a slim majority of fifty-two (52) in the Senate, it is unlikely that the sixty (60) senators threshold would be overcome in order to avoid the Byrd Rule from restricting estate tax legislation from sun setting in ten (10) years. Given the amount of political capital that is likely to be expended by Mr. Trump on other issues which were on the forefront in the campaign process, and the present controversy with respect to Russia's alleged involvement in the election, it is unlikely that there will be a standalone estate tax elimination bill that is not tied to the budget.

In short, we cannot be sure if anything is going to happen to the estate tax, or if any such changes to the estate tax will sunset within the next decade or so to cause to the estate tax to come back with a vengeance to apply to a greater fraction of the population than the current law. Accordingly, a sound estate planning structure needs to be fluid and malleable to account for whatever lies beyond the horizon.

COMMENT:

The Reversible Exempt Asset Protection Trust operates in a conventional way- it is an irrevocable trust established by an individual for the benefit of his or her spouse and/or descendants. It allows for assets to be held thereunder for the benefit of the grantor's desired beneficiaries in a protective manner where the assets can be protected from the beneficiaries' creditors, and can be exempt from federal estate tax at their levels under current law (and, more than likely, under any new estate tax regime espoused by Mr. Trump's administration). Also, presumably, the assets can be shielded from a possible capital gains income tax on the death of the grantor or other family members if the Canadian style tax on appreciated property upon death is enacted.

However, a key difference from the conventional dynasty trust is that the Reversible Exempt Asset Protection Trust will be established in an asset protection jurisdiction, and the Trust will name a committee of independent trust protectors who have the power to amend the Trust under certain circumstances. Specifically, the trust protectors' authority will include the power to cause the transfer of the Trust the assets back to the grantor under limited conditions as determined in their discretion, such as if the

grantor's net worth ever drops below a certain level, or if the federal estate law is ever repealed or is no longer considered to be a concern to the family.

It is important that the Trust be drafted as a domestic or offshore asset protection trust, and that it be sitused in a jurisdiction that provides for the protection of the Trust assets from the creditor of the grantor despite the possibility of the grantor becoming a beneficiary of the Trust. Under PLR200944002, assets held under a self-settled trust under which the grantor was a discretionary beneficiary was protected from the creditors of the grantor based upon Alaska law and found to not be includable in the estate of the grantor for federal estate tax purposes. The jurisdiction in question in this PLR was Alaska, and the grantor was a resident of Alaska when the trust was established and when the ruling was given. Some commentators have expressed concern that having the resident of non APT jurisdiction use a domestic asset protection jurisdiction will not be sufficient because the Full Faith and Credit Clause of the United States Constitution or conflict of law rules may allow a creditor holding a judgment against the grantor in another state to access the assets of the trust. Commentary to the Uniform Voidable Transfers Act supports this hopefully incorrect position, although the Huber2 case gives planners some pause as to setting up a domestic asset protection trust in a state in which the grantor does not reside.

In the Huber case, an Alaska asset protection trust was set up by a Washington resident for the obvious purpose of avoiding creditor claims involving real estate outside of Alaska that was held indirectly via LLC's by the trustee. The grantor's creditors were able to reach the assets under the trust due to the Bankruptcy Court finding that Washington state law applied to the trust, rather than Alaska law, due to Washington having the most significant relationship to the trust and the trust having minimal contacts with Alaska. This is why the ability of the Trustee to benefit the grantor of the trust is best non-existent unless or until an issue of independent significance exists.

Most planners agree that it is safest to establish the trust in an offshore asset protection jurisdiction, such as Nevis, the Cook Islands, or Belize, which each has well-developed trust law, if the client resides in a non-asset protection trust state and wishes to be a discretionary beneficiary from the

beginning.

The Trust also will normally include a committee of independent trust protectors whose powers must be carefully drafted in order to prevent estate tax inclusion of the Trust assets in the estate of the grantor upon creation of the Trust. For example, the grantor should not have any power to remove and replace any of the trust protectors, nor should the grantor have any power or authority to exercise the trust protectors' powers. Further, the trust protectors' exercise of power should not be conditioned upon the approval of the grantor or any individual who is related or subordinate to him (such as his or her spouse, children, parents, or siblings), and may be conditioned upon events that are beyond the control of the grantor and the trust protectors.

The trust protectors' powers should be exercisable only in their sole and absolute discretion, and may include the power to add the grantor as a beneficiary of the trust if his or her net worth drops below a certain level that is unforeseen and independently significant.

Additionally, because the trust protectors will have a wide latitude under the Trust documents, it is important to assure that the parties appointed are trusted individuals or financial institutions with appropriate checks and balances in place between them. The authors typically recommend that the committee consist of at least three trust protectors, and that there is a clearly articulated mechanism for the succession and possible replacement thereof by other trust protectors or by another independent party. **Alexander Bove**'s wonderful writings on Trust Protectors should be reviewed carefully by anyone drafting trusts of this nature.

In situations where the client has considered or has undertaken the process of making transfers to an irrevocable trust for the benefit of his or her spouse and/or descendants, drafting the trust as a Reversible Exempt Asset Protection Trust with trust protectors does not require significant restructuring. The Reversible Exempt Asset Protection Trust can have the same dispositive and trusteeship provisions as a pre-existing irrevocable dynasty trust that the client has established, and may be merged into existing trusts if and when it becomes apparent that this is in the best interests of the family.

Further, a client who has considered entering into an installment sale or private annuity sale to a pre-existing irrevocable dynasty trust that has an independent net worth of sufficient assets as ballast capital may instead sell assets to the new Reversible Exempt Asset Protection Trust in exchange for the installment note or private annuity. The Reversible Exempt Asset Protection Trust can provide for the same beneficiaries as the pre-existing trust, and the pre-existing trust can guarantee the installment or private annuity obligation of the new Reversible Exempt Asset Protection Trust which is owed to the client.

The Reversible Exempt Asset Protection Trust can be drafted as a grantor trust for federal income tax purposes so the client will be responsible for paying any taxes associated with the trust's income, and the client can engage in an installment sale transaction with the Trust without causing any adverse income tax consequences. This can allow the Trust's assets to grow on a tax-free basis, while allowing the grantor to engage in future transactions with the trust (such as installment sale or private annuity transactions) with any income taxes resulting from any such transactions.

A similar approach was articulated by **Marty Shenkman** and **Jonathan Blattmachr** in a recent presentation on planning for the possible new estate tax regime. They have discussed the advantages of using a "Hybrid Asset Protection GRAT" as a very desirable planning strategy in light of the uncertainty that is on the horizon. This technique involves a grantor establishing a grantor retained annuity trust (GRAT) in an asset protection jurisdiction where trust protectors would also have the right to directly or indirectly allow assets to pass to or for the benefit of the grantor. By using a zeroed-out GRAT that is drafted to provide that the annuity payments owed back to the grantor are based on a percentage of the initial contribution, and that the trust protectors under the GRAT have the discretion to distribute additional assets to the grantor, flexibility is attained if circumstances change or the estate law materially changes. The Hybrid Asset Protection GRAT is one variety of Reversible Exempt Asset Protection Trust that can help families with significant wealth navigate the present not so calm waters very successfully.

If the estate tax is permanently eliminated, the Reversible Exempt Asset Protection Trust could be merged into the pre-existing dynasty trust, or the assets thereof could be distributed back to the grantor by the trust

protectors. If the estate tax remains in its current form, or continues to be a concern for the client, then the assets can remain under the Reversible Exempt Asset Protection Trust and escape the impositions of federal estate tax on the death of the grantor, and perhaps at the levels of his or her descendants.

Conclusion

A great many planners have clients who have spent a lot of time and money working on their estate plans that are currently in process, or have sales, liquidity, repaid growth in value, high earnings or near death situations that call for conventional planning. Planners are unsure what to tell their clients in light of this uncertainty. It is incumbent upon planners to inform and educate their clients of all options and alternatives, to make them aware of possible risks and downside that could occur if laws do not change, or if the tax law system is different from what is expected. The REAP Trust provides planners with a tool can be used effectively in differing estate tax climates to achieve the clients' planning objectives, tax and otherwise, while also providing significant asset protection opportunities that should not be ignored.

YOU CAN'T SOW WHAT YOU DON'T REAP!

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan Gassman
Chris Denicolo
Ken Crotty

Brandon Ketron

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CITATIONS:

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[1] *See*, https://www.bna.com/trump-plan-repeals-n57982077269/.

[2] *Waldron v. Huber (In re Huber)*, 2013 WL 2154218 (Bk. W.D. Wa., Slip Copy, May 17, 2013).

Leimberg Information Services, Inc.

Steve Leimberg's Asset Protection Planning
Email Newsletter Archive Message #395

Date:16-Oct-19

Subject: Alan Gassman & Adriana Choi on *In the Matter of the Cleopatra Cameron Gift Trust* - South Dakota Supreme Court Denies "Full Faith And Credit" To California Child Support Order Against Asset Protection Trust

"Proponents of the use of Domestic Asset Protection Trusts by individuals residing in non-Asset Protection Trust states scored a large victory on the playing field in South Dakota, when a California-based trust established by a decedent for his daughter, Cleopatra, was moved to South Dakota after having been ordered to pay child support by a California court that subsequently ordered the trust to continue making payments after the South Dakota Trustee refused to do so. Pigs get fat, but Cleopatra did not get slaughtered, and in this case, she received a better remedy than BC powder. This may be the first of a number of cases that deliberate over whether the 'Full Faith and Credit' clause of the U.S. Constitution requires a state court judge to ignore judgment enforcement rules in his or her state where an Asset Protection Trust has been properly formed and funded."

Alan Gassman and **Adriana Choi** provide members with timely commentary on *In the Matter of the Cleopatra Cameron Gift* Trust, an important development involving Domestic Asset Protection Trusts established by individuals residing in non-Asset Protection Trust states. Members will find their commentary most helpful as it contains a chart that summarizes three important DAPT decisions where a judgment from one state was attempted to be enforced in another state.

Alan Gassman, JD, LL.M. is the founding partner of the law firm of **Gassman, Crotty & Denicolo, P.A.** in Clearwater, Florida. Alan is a frequent contributor to LISI and has authored several books and many articles on Estate Tax Planning, Trust Planning, Creditor Protection Planning, and associated topics. Most recently, Alan is the coauthor of The *Section 199A (and 1202) Handbook: The Advisor's Guide to Saving Taxes*

LISI Article – In The Matter of Cleopatra…Continued

on Business and Investment, with Brandon Ketron, Martin Shenkman, Jonathan Blattmachr, and Robert Schenck. Alan is also the primary author of *Gassman and Markham on Florida and Federal Asset Protection law*, which is part of the Bloomberg BNA portfolio library.

On Tuesday, October 22, 2019, Alan is speaking on this case and strategic planning for the **Florida Bar Annual Advanced Wealth Preservation Planning Conference** live at University of Miami and by webinar. Alan will also discuss the *In re Rensin* opinion with attorney **Ron Neiwrith** who represented Mr. Rensin. For more background, see **Alan Gassman**, **Martin M. Shenkman**, **Wesley Dickson** & **Joe Cuffel** on *In re Rensin*: Pigs Get Fat, But What About a Hippo? - How an FTC Judgment, a Transported Offshore Trust and Florida Annuity Purchases All Caused the Perfect Storm for a Unique and Noteworthy Bankruptcy Court Opinion, LISI Asset Protection Newsletter #390. You can email Alan at a@gassmanpa.com for more information.

Adriana 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:

Proponents of the use of Domestic Asset Protection Trusts by individuals residing in non-Asset Protection Trust states scored a large victory on the playing field in South Dakota, when a California-based trust established by a decedent for his daughter, Cleopatra, was moved to South Dakota after having been ordered to pay child support by a California court that subsequently ordered the trust to continue making payments after the South Dakota Trustee refused to do so. Pigs get fat, but Cleopatra did not get slaughtered, and in this case, she received a better remedy than BC powder.[i] This may be the first of a number of cases that deliberate over whether the "Full Faith and Credit" clause of the U.S. Constitution requires a state court judge to ignore judgment enforcement rules in his or her state where an Asset Protection Trust has been properly formed and funded.

LISI Article – In The Matter of Cleopatra…Continued

FACTS:

The Domestic Asset Protection Trust ("DAPT") industry has been closely watching recent cases which have held that the law where a debtor resides will apply to penetrate a trust formed in another state that has laws to prevent creditor access.

For example, Florida does not have a Domestic Asset Protection Trust statute that enables the Grantor of a trust to contribute to the trust and also be a discretionary beneficiary. Under Florida law, a creditor of the Grantor can reach the maximum amount that a trustee would have the discretion or power to distribute.

Presently, only 19 states (most recently Indiana and Connecticut) have passed DAPT laws that enable a Grantor to place assets into a spendthrift trust that may benefit the Grantor, while having the trust be immune from future creditors that did not have a claim or an expected successful cause of action at the time that the trust is established.

However, not all spendthrift trusts are fully immune from "exception creditors". Under the laws of most states, an exception creditor would be able to penetrate a trust established and funded by someone or an estate other than the debtor. For example, in the subject case, Arthur A. Cameron Jr. established an irrevocable trust and also a revocable trust that split into one separate trust for his daughter, Cleopatra, to provide her with lifetime benefits for health, education and maintenance.

The trust agreement in *In the Matter of the Cleopatra Cameron Gift Trust*, provided that Cleopatra's creditors could not reach into the trust, and that distributions would be made for Cleopatra as deemed appropriate by the trustee. Since Cleopatra did not form the trust or fund it with her own assets, in most states it would normally not be accessible to Cleopatra's creditors.

Unfortunately for Cleopatra, this trust, which was formed and funded in California, and had a California trustee, was found to be accessible to Cleopatra's ex-husband in order to pay him court ordered child support and also attorney's fees in the California family court. This is because

LISI Article – In The Matter of Cleopatra…Continued

California law will allow a court to order a trustee to pay support obligations, where a court finds that the trustee exercised its discretion in bad faith.

In most states, the Uniform Trust Code has been adopted and will permit an "exception creditor" to penetrate a trust. Normally, an exception creditor will include a creditor who is making a legitimate child support claim or who is pursuing attorney's fees for having litigated for the beneficiary or a third party in order to penetrate the trust in situations where the beneficiary has no other means of satisfying these "exception creditor" obligations.

California apparently goes farther, and allows such invasion of a third party settled and funded trust without regard as to whether the beneficiary has other resources or the ability to pay individually.

These trusts for Cleopatra were in existence after the death of her father in 2001, and continued to exist in 2009 when they were ordered to pay and did pay child support, and were ordered to pay over $250,000 in legal fees.

In 2009, Cleopatra and the initial trustee (Wells Fargo) petitioned the California court that had jurisdiction over the operations of the trust in order to remove Cleopatra and Wells Fargo as co-trustees and to appoint BNY Mellon as sole successor trustee.

In 2012, Cleopatra invoked her authority under the Trust provisions and petitioned to have the trust moved to South Dakota, where Citicorp Trust of South Dakota became the Trustee, and was replaced that same year by Bankers Trust Company of South Dakota.

Bankers Trust Company obeyed the California order and continued the payment of child support until November 2016 when Trident Trust Company became the trustee, and Empire Trust was appointed Trust Protector.

Empire Trust, as Trust Protector, determined that there were insufficient assets to pay the child support and to also support Cleopatra for her lifetime. In January 2017, Trident stopped paying child support.

LISI Article – In The Matter of Cleopatra…Continued

Trident relied upon South Dakota trust law, which does not allow for exception creditors. It may be noteworthy to readers for future planning that Nevada and Utah also do not permit exception creditors.

As would be expected, Cleopatra's ex-husband filed suit in South Dakota, and claimed that the full faith and credit clause of the U.S. Constitution required the South Dakota court to follow the determination of the California family court to the effect that California law applied to enable the court to order child support to be paid by the trustee of the "now in" South Dakota trust.

The South Dakota circuit court found that the Full Faith and Credit Clause of the U.S. Constitution did not apply in this situation, because the question of remedies available to satisfy a judgment against a California resident, like the trust, should be based on South Dakota law, and not California law.

The decision of the circuit court was appealed to the South Dakota Supreme Court, which affirmed the decision of the South Dakota circuit court, and found that the trust's spendthrift provision prevented any creditors of Cleopatra, including exception creditors, to penetrate the trust.

The South Dakota Supreme Court's description of the issue of creditor rights is as follows:

> Our Legislature has placed formidable barriers between creditor claims and trust funds protected by a spendthrift provision. See SDCL 55-1-41 ("If the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level."); SDCL 55-1-35 ("No trustee is liable to any creditor for paying the expenses of a spendthrift trust."). More to the point, the Legislature has emphatically rejected even the specter of an argument that would allow a child support creditor to reach trust funds protected by a spendthrift provision. Indeed, this precise legal theory is identified in § 59 of the Restatement (Third) Trusts (2003) which states that "[t]he interest of a beneficiary in a valid spendthrift trust can be reached in satisfaction of an enforceable claim

LISI Article – In The Matter of Cleopatra…Continued

against the beneficiary for ... support of a child...."
However, the Legislature anticipated such an argument in South Dakota courts and definitively foreclosed it with its 2007 enactment of SDCL 55-1-25 which provides in part:

In the area of creditor rights, the Restatement of Trusts (Third) and the Uniform Trust Code create many new positions of law as well as adopts many minority positions of law. The provisions of §§ 55-1-24 to 55-1-43, inclusive, affirmatively reject many of these positions. Therefore, the Legislature does not intend the courts to consult the Restatement (Third) of the Law of Trusts ... § 59 ... with respect to subject matters addressed by the provisions of §§ 55-1-24 to 55-1-43, inclusive.

The South Dakota Supreme Court, in making their decision, quoted the case of *Baker by Thomas v. General Motors Corp.* This US Supreme Court case focused on the issue of whether a Michigan county court's permanent injunction barring a former employee from testifying as a witness in any litigation involving General Motors ("GM") would also prevent the employee from testifying in proceedings against GM in Missouri. In *Baker,* Justice Ginsburg, delivering the opinion of the Court, ruled that an order commanding an inaction may be denied in a sister state[ii] when the order interferes with a separate legal issue. Justice Ginsburg further explained in the opinion that "[f]ull faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law." The court held that the Michigan court's injunction could not prevent the plaintiff from subpoenaing the former employee, Elwell, to testify in a Missouri issue that the State of Michigan has no jurisdiction over.

The South Dakota Supreme Court also cited the 2009 Indiana Supreme Court case of *Hamilton v. Hamilton*, where a Florida child support and contempt judgment was sought to be enforced in Indiana, where the payee husband had moved. The Indiana Supreme Court found that the Florida

LISI Article – In The Matter of Cleopatra…Continued

judgment as to the specific amounts owed and payable would be enforceable without alteration by the Indiana court, but that the decision as to how much the ex-husband/father would have to pay to avoid being incarcerated for 170 days on contempt would be the decision of the Indiana court, based on the analysis Justice Ginsburg provided in *Baker,* and quoted above, stating that "enforcement measures do not travel with the sister state judgment as preclusive effects do."

The Court held that the Indiana trial court's contempt order did not modify the Florida support judgment in violation of the Full Faith and Credit for Child Support Orders Act or the Uniform Interstate Family Support Act, and was, therefore, consistent with the Full Faith and Credit Clause.

The three cases are summarized in the chart that can be found at this link: Gassman/Choi

It is clear from the decisions in *Baker, Hamilton* and *Cleopatra* that situations where a judgment from one state is to be enforced in another state with incongruent remedy laws cause jurisprudential analysis that is somewhat like putting a square peg into a round hole. Section 4467 titled Res Judicata Between State Courts of the book Federal Practice and Procedure further elaborates on this and provides that "it has long been accepted that although judgments in one state are not immediately enforceable by execution in another state, all other states are obliged to provide for registration or an independent action on the judgment and to enforce it by means of execution as are available for local judgments."[ii] Essentially, if one state lacks jurisdiction over the matter in the sister state then the means of enforcement may be denied, which is what the courts did in the cited cases.

It is unknown to the authors whether the lawyers for Cleopatra's ex-husband will be appealing this decision, but it stands as a significant obstacle to creditors who might otherwise conclude that they can simply receive a judgment in the state where the debtor resides, and then domesticate it to the jurisdiction where a legitimate irrevocable trust with spendthrift provisions will otherwise protect the assets from the subject creditor.

LISI Article – In The Matter of Cleopatra…Continued

The cases that run contrary to this decision, as to both foreign and domestic asset protection trusts have determined that the law of the residence of the debtor will be controlling, but without discussion of the Full Faith and Credit Clause of the U.S. Constitution. Time will tell whether all states with DAPTs will apply the law of the residence of the debtor or will follow South Dakota's lead.

Conclusion

The South Dakota Supreme Court did a good job in construing existing case law and confirming that the enforcement of a judgment from another state can only proceed in accordance with the law of the state where the judgment is being enforced. It is likely that there will be further litigation in other states, and that eventually guidance may be forthcoming from the U.S. Supreme Court. In the meantime, advisors who recommend or help to maintain Domestic Asset Protection Trusts should keep their clients posted on the risk that the law of the state where a debtor is domiciled may be found to be controlling.

It is therefore best to always have belts and suspenders in place, which can include partial ownership of LLCs to help assure charging order protection, flee clauses to permit the transportation of trusts to an offshore jurisdiction, and not having the debtor as a beneficiary of a particular trust, unless or until circumstances beyond the reasonable control of the debtor exist, so that the trust may be protected from creditors in the state where the debtor resides.

In the words of Moses, Cleopatra: "Let my assets go, so that they may serve me!"

Cleopatra: "Holy Moses, we did it."

And Moses added the 11th Commandment "Thou shall not invade properly funded Asset Protection Trusts or cross Justice Ginsburg."

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan Gassman
Adriana Choi
TECHNICAL EDITOR: DUNCAN OSBORNE

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[i] BC powder was created in 1906 in Durham, North Carolina. The powder is meant to relieve headaches faster than any other over the counter pain reliever. This powder is known for its slogan "Take a BC powder and you come back Strong!"

[ii] The authors note that calling states sisters instead of brothers is a form of discrimination. The movies The Blues Brothers and Marx Brothers are further examples of this, as is Twisted Sister.

[iii] Federal Practice and Procedure (Wright & Miller), 18B Fed. Prac. & Proc. Juris. Section 4667 (2d ed.) (August 2019).

Domestic vs. Foreign – Why Does It So Often Depend On Who You Ask?

While many lawyers who provide "Asset Protection Planning" services regularly recommend and prepare both domestic and foreign Asset Protection Trusts, there is a significant disparity between those lawyers who "only provide domestic trusts," and those lawyers who "strongly recommend offshore trusts."

Given the risks inherent in not knowing whether the Full Faith and Credit Clause could apply to an Asset Protection Trust established in a domestic jurisdiction by a settlor who resides in a non-Asset Protection Trust jurisdiction, it seems safest for the lawyer to have the client decide whether to use domestic or offshore, and to retain documentation in the lawyer's file that the client was informed, and that the client knew that a domestic Asset Protection Trust is more likely to be challenged.

On the other hand, clients can become quite frustrated with the costs and "red tape" that has become inherent with respect to the "know your client," tax compliance, and asset titling inconveniences for most offshore structures.

Belts and Suspenders – notwithstanding whether the client desires to go with a domestic or foreign structure, the author recommends belts and suspenders so that even if a trust is set aside, there may be protections derived from a charging order, offshore and/or state laws, or protected life insurance and annuity contracts.

Domestic v. Foreign – Why Does It So Often Depend On Who You Ask? – (Continued)

The Court's central holding was as follows:

> [5] For the purposes of determining the enforceability of a charging order, we hold that a member's membership interest is located where the LLC was formed. Our holding aligns with the anomalous characteristics of a membership interest in an LLC, particularly because a charging order is directed to the LLC rather than the individual member since it requires the LLC to redirect the debtor-member's distributions to the creditor. *See *8 Iowa Code § 489.503(1); See also* Fla. Stat. Ann. § 605.0503(1).
>
> Additionally, Iowa law governs an LLC's internal affairs" and "[t]he liability of a member as member and a manager as manager for the debts, obligations, or other liabilities" of the LLC. Iowa Code § 489.106. Locating the membership interest in the state in which the LLC was formed recognizes this authority and promotes uniformity. "To conclude otherwise (i.e., that the interest lies wherever the debtor happens to be domiciled) could result in substantial uncertainty and confusion," as an LLC could become subject to various and competing charging orders from differing foreign jurisdictions. *JPMorgan Chase Bank, N.A.,* 393 P.3d at 959. Likewise, our holding creates certainty for creditors because it provides them with a fixed jurisdiction to pursue charging orders.

Jurisdictions Where The Grantor Can Revoke The Trust

Many jurisdictions, including the Cook Islands, Nevis and Belize permit a trust to be revocable by the Grantor, and the Grantor to have plenary powers over the trust as Trust Protector, while still being protected from creditors.

Asset Protection Entities – Key Features and Considerations

Categories	Domestic Trust	Offshore Trust	U.S. LLC	Foreign LLC	U.S. Foundation	Foreign Foundation
Filing Documents and Annual Maintenance	No filing required - trust document forms entity.	A private document - some jurisdictions require registration and annual fees.	Must file and maintain with Secretary of State and must have a Registered Agent in state of formation.	Must file and maintain with Secretary of State and must have a Registered Agent in state of formation.	Must file and maintain with Secretary of State and must have Officer in jurisdiction of formation.	Must file and maintain with Registrar and must have Officer in jurisdiction of formation.
Trusteeship / Officer / Registered Agent Expense	Less expensive than offshore trust.	Most expensive	Inexpensive.	More expensive than domestic.	Inexpensive for entity - officers will normally charge much less than a Trustee.	Inexpensive for entity - officers will normally charge less than a Trustee.
Creditor Protection Characteristics	Creditors cannot reach trust assets pursuant to law of the trust - but U.S. courts may try to override this by applying law of the residence of the debtor.	Creditors cannot reach trust assets pursuant to law of the trust - but U.S. courts may try to override this by applying the law of the residence of the debtor.	Jurisdiction may require charging order to be the sole remedy, even if it is a single member LLC. But will the law of the residence of debtor apply?	Jurisdiction may require charging order to be the sole remedy, even if it is a single member LLC. But will the law of the residence of debtor apply?	Creditors of the debtor/contributor cannot reach assets - same as offshore asset protection trust. No charging order mechanism in statutes.	Creditors of the debtor/contributor cannot reach assets - same as offshore asset protection trust. No charging order mechanism in statutes.
Additional Creditor Protection Considerations	Case law is evolving - hybrid possible.	Case law is evolving - decisions are anti-debtor, but have not been reviewed by a Federal Circuit Court of Appeals or the U.S. Supreme Court.	Consider having the debtor or a trust hold only non-voting member interests in case charging order protection is not available.	Consider having the debtor or a trust hold only non-voting member interests in case charging order protection is not available.	While relatively new for the United States, Foundations have been used in Liechtenstein, Switzerland and other countries for many decades. It is unclear how these entities will be treated by U.S. courts.	Foundations have been used in Liechtenstein, Switzerland and other countries for many decades.
Taxation	Normally disregarded, or may be taxed as a complex trust if specially drafted. If taxed as a Complex Trust, the highest marginal tax rate is met at relatively low income.	Can be disregarded, but cannot own S corporation stock.	Can be taxed as disregarded, partnership, or a corporation, including S corporation status depending upon ownership and use. Operating Agreement must be carefully drafted.	Usually the same as U.S. LLC, if proper forms are timely filed with the IRS.	Can be drafted to be taxed as partnership, C corporation or complex trust. Will not normally be eligible for S corporation status or treated as disregarded.	Can be drafted to be taxed as partnership, C corporation or complex trust. Can probably not be an S corporation or a disregarded entity.
IRS Filing Requirements	Will apply for a Tax Identification Number on Form SS-4 and be disregarded or file Form 1041 annually.	Must file Form 3520 on formation and Form 3520A annually thereafter and pertinent F-BAR forms.	Will apply for a Tax Identification Number on Form SS-4, and be disregarded or file the tax return form applicable for the tax status the LLC elects.	Must file Form 8869 to be classified as disregarded or a domestic partnership. See Form 8832 for entities from various countries that will qualify to be taxed other than as C corporations.	Need not file a Form 3520 or a 3520A. Is required to file Articles of Formation with the Secretary of State, and should have an Operating Agreement which does not need to be filed.	Generally will be required to file a Form 3520 or a 3520A. Governing documents may need to be filed with the jurisdiction in which the Foundation is created, pursuant to that jurisdiction's laws.
Fiduciary Duties	Trustees have a high duty to beneficiaries - may specifically not have investment obligations.	Trustees have a high duty to beneficiaries - may specifically not have investment obligations.	Officers have a duty to the entity and members, including obligations to give accountings or have them waived.	Officers have a duty to the entity and members, including obligations to give accountings or have them waived.	Officers only have a duty of "good faith" with respect to the entity itself, with no direct duty to any beneficiary. The interests of the Foundation and the beneficiary may overlap, so it may be possible that the good faith duty owed to the entity may apply to a beneficiary in certain circumstances.	Officers only have a duty of "good faith" with respect to the entity itself, with no direct duty to any beneficiary. The interests of the Foundation and the beneficiary may overlap, so it may be possible that the good faith duty owed to the entity may apply to a beneficiary in certain circumstances.

Categories	Domestic Trust	Offshore Trust
Filing Documents and Annual Maintenance	No filing required - trust document forms entity.	A private document - some jurisdictions require registration and annual fees.
Trusteeship / Officer / Registered Agent Expense	Less expensive than offshore trust.	Most expensive
Creditor Protection Characteristics	Creditors cannot reach trust assets pursuant to law of the trust - but U.S. courts may try to override this by applying law of the residence of the debtor.	Creditors cannot reach trust assets pursuant to law of the trust - but U.S. courts may try to override this by applying the law of the residence of the debtor.
Additional Creditor Protection Considerations	Case law is evolving - hybrid possible.	Case law is evolving - decisions are anti-debtor, but have not been reviewed by a Federal Circuit Court of Appeals or the U.S. Supreme Court.
Taxation	Normally disregarded, or may be taxed as a complex trust if specially drafted. If taxed as a Complex Trust, the highest marginal tax rate is met at relatively low income.	Can be disregarded, but cannot own S corporation stock.
IRS Filing Requirements	Will apply for a Tax Identification Number on Form SS-4 and be disregarded or file Form 1041 annually.	Must file Form 3520 on formation and Form 3520A annually thereafter and pertinent F-BAR forms.
Fiduciary Duties	Trustees have a high duty to beneficiaries - may specifically not have investment obligations.	Trustees have a high duty to beneficiaries - may specifically not have investment obligations.

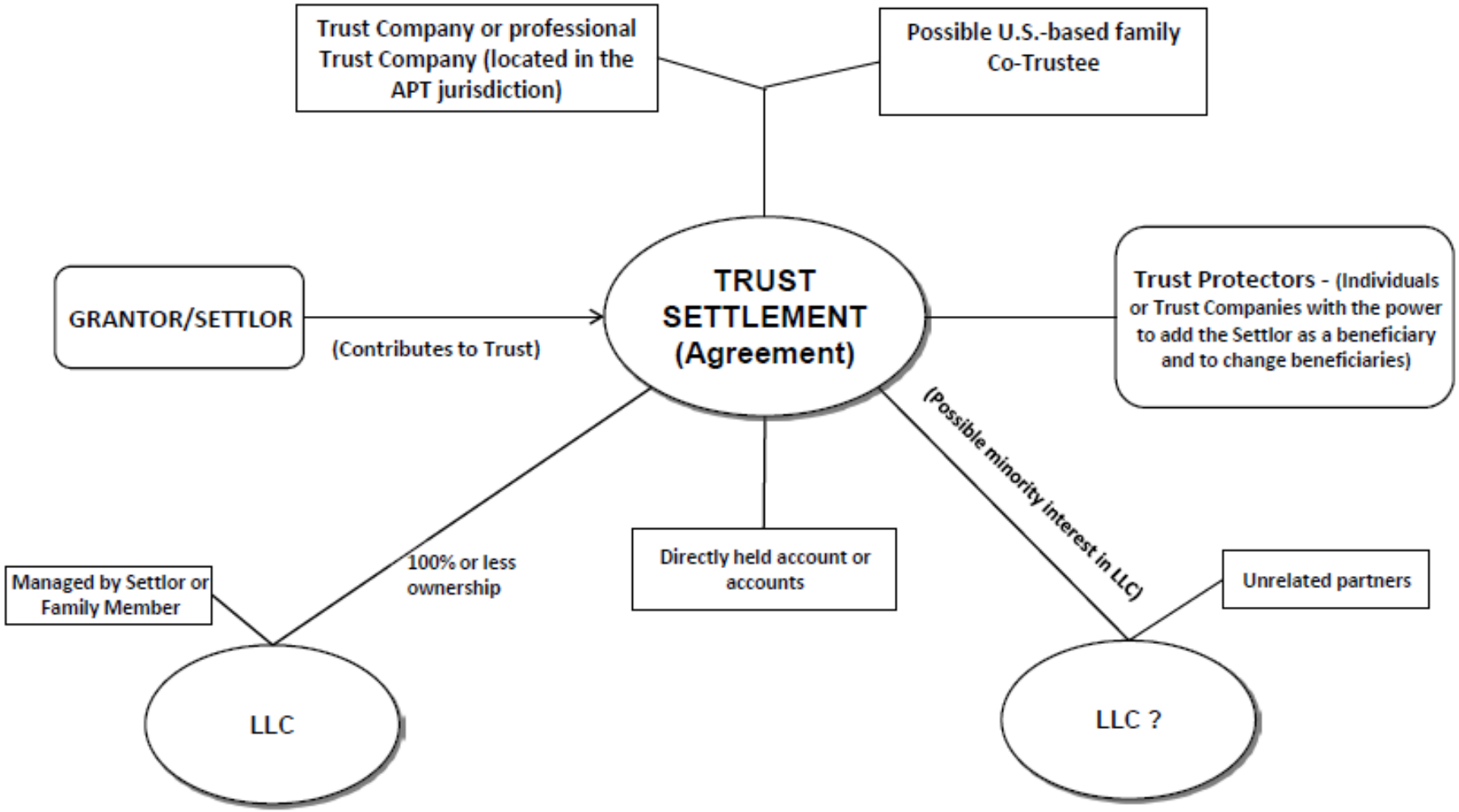
Categories	U.S. LLC	Foreign LLC
Filing Documents and Annual Maintenance	Must file and maintain with Secretary of State and must have a Registered Agent in state of formation.	Must file and maintain with Secretary of State and must have a Registered Agent in state of formation.
Trusteeship / Officer / Registered Agent Expense	Inexpensive.	More expensive than domestic.
Creditor Protection Characteristics	Jurisdiction may require charging order to be the sole remedy, even if it is a single member LLC. But will the law of the residence of debtor apply?	Jurisdiction may require charging order to be the sole remedy, even if it is a single member LLC. But will the law of the residence of debtor apply?
Additional Creditor Protection Considerations	Consider having the debtor or a trust hold only non-voting member interests in case charging order protection is not available.	Consider having the debtor or a trust hold only non-voting member interests in case charging order protection is not available.
Taxation	Can be taxed as disregarded, partnership, or a corporation, including S corporation status depending upon ownership and use. Operating Agreement must be carefully drafted.	Usually the same as U.S. LLC, if proper forms are timely filed with the IRS.
IRS Filing Requirements	Will apply for a Tax Identification Number on Form SS-4, and be disregarded or file the tax return form applicable for the tax status the LLC elects.	Must file Form 8869 to be classified as disregarded or a domestic partnership. See Form 8832 for entities from various countries that will qualify to be taxed other than as C corporations.
Fiduciary Duties	Officers have a duty to the entity and members, including obligations to give accountings or have them waived.	Officers have a duty to the entity and members, including obligations to give accountings or have them waived.

Categories	U.S. Foundation	Foreign Foundation
Filing Documents and Annual Maintenance	Must file and maintain with Secretary of State and must have Officer in jurisdiction of formation.	Must file and maintain with Registrar and must have Officer in jurisdiction of formation.
Trusteeship / Officer / Registered Agent Expense	Inexpensive for entity - officers will normally charge much less than a Trustee.	Inexpensive for entity - officers will normally charge less than a Trustee.
Creditor Protection Characteristics	Creditors of the debtor/contributor cannot reach assets - same as offshore asset protection trust. No charging order mechanism in statutes.	Creditors of the debtor/contributor cannot reach assets - same as offshore asset protection trust. No charging order mechanism in statutes.
Additional Creditor Protection Considerations	While relatively new for the United States, Foundations have been used in Liechtenstein, Switzerland and other countries for many decades. It is unclear how these entities will be treated by U.S. courts.	Foundations have been used in Liechtenstein, Switzerland and other countries for many decades.
Taxation	Can be drafted to be taxed as partnership, C corporation or complex trust. Will not normally be eligible for S corporation status or treated as disregarded.	Can be drafted to be taxed as partnership, C corporation or complex trust. Can probably not be an S corporation or a disregarded entity.
IRS Filing Requirements	Need not file a Form 3520 or a 3520A. Is required to file Articles of Formation with the Secretary of State, and should have an Operating Agreement which does not need to be filed.	Generally will be required to file a Form 3520 or a 3520A. Governing documents may need to be filed with the jurisdiction in which the Foundation is created, pursuant to that jurisdiction□s laws.
Fiduciary Duties	Officers only have a duty of □good faith□ with respect to the entity itself, with no direct duty to any beneficiary. The interests of the Foundation and the beneficiary may overlap, so it may be possible that the good faith duty owed to the entity may apply to a beneficiary in certain circumstances.	Officers only have a duty of □good faith□ with respect to the entity itself, with no direct duty to any beneficiary. The interests of the Foundation and the beneficiary may overlap, so it may be possible that the good faith duty owed to the entity may apply to a beneficiary in certain circumstances.

Do Domestic Asset Protection Trusts Work?

- Nevada, Alaska, Delaware, South Dakota and other states 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.
  - *Dahl v. Dahl*, 2015 UT 23, Supreme Court of the State of Utah (January 30, 2015) – Under Utah law, wife had an enforceable interest in a NV APT that husband created because the trust was revocable regardless of stating in the trust language that the trust is irrevocable. The language that the Court based its reversal upon stated that, "Settlor reserves any power whatsoever to alter or amend any of the terms or provisions hereon."
  - *In re Mortensen, Battley v. Mortensen*, (Adv. D.Alaska, No. A09-90036-DMD, May 26, 2011) – assets situated in Alaska were placed in an Alaska APT. The Court held that the exemptions would be determined under state law rather than federal law because the state law is applied to determine if the trust was established correctly.

The Anatomy of a Typical Offshore or APT State Trust Arrangement



How Can A Domestic Asset Protection Trust Qualify for Foreign Asset Protection Trust Immunity?

The Treasury Regulations allow a Trust having a foreign Co-Trustee serving with a domestic Co-Trustee to be considered as domestic and thus not required to file foreign disclosure forms, as long as the "Control Test" and the "U.S. Court Test" are both met.

An active U.S. Trustee and U.S. Court authority can be installed, and this may change if and when the U.S. Trustee resigns, which may be required if requested by the Foreign Trustee.[1]

1. "Under this approach, the trust is settled with two trustees: (i) an active domestic trustee and (ii) a passive foreign trustee. When trouble is brewing, the active domestic trustee might then informally agree to resign at the request of the passive foreign trustee." *Migrating The Domestic Asset Protection Trust Offshore* by David M. Grant/The Southpac Offshore Planning Institute – The 2009 Annual Conference/October 2, 2009.

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 – *Revenue Ruling 2004-64*	**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.

Choice for Change of Situs:

- Although having an automatic flight clause in an Asset Protection Trust could cause the trust to be taxed as foreign, provided that the U.S.-based Trust Protectors have discretionary authority to change the situs could avoid classification as a foreign trust.
- It is important to make sure that the Trust Protector will choose a jurisdiction that provides adequate asset protection. It would also be helpful if the trust does not specifically state that certain jurisdictions could be used because they are considered asset protection jurisdictions.
- A definition could be added which could provide guidance to a Trust Protector in making such a decision which does not clearly state the intention of why particular jurisdictions may be chosen.

A good example of language that can be used is as follows:

> Approved Jurisdiction. The term "Approved Jurisdiction" shall mean a state within the United States, a U.S. territory, or any sovereign country outside of the United States that is determined by the acting Trustee to be an appropriate jurisdiction for a Trustee to reside in, after taking into account taxation, distribution laws, what party or parties would have access or the ability to receive or obtain Trust assets, and such other considerations as would be consistent with the Grantor's intention in forming, funding and proliferating protective and effective trusts for the beneficiaries hereof. Presently, the Approved Jurisdictions include Alaska, Delaware, Nevada, South Dakota, the Isle of Man and Nevis.

Choice For Change Of Situs, (Continued)

- The definition provided on the previous slide for “Approved Jurisdiction” could be used as follows:

> The Trustee will transfer the Trust assets and the situs of the Trust to _____ Trust Company in an Approved Jurisdiction, or such other trust company as is selected by the Trust Protectors, unless such transfer is vetoed by the Trust Protectors, in which event the transfer will occur on the sixth anniversary of the settlement, unless vetoed by the Trust Protectors before such sixth anniversary, in which case the transfer will occur on the ninth anniversary, unless vetoed by the Trust Protectors, in which event the transfer shall occur on the twelfth anniversary, unless vetoed by the Trust Protectors.

Non-Charitable Foundations - Introduction

Wyoming and New Hampshire have recently created a type of entity that is mainly unknown to the U.S. taxpayers and to many U.S. tax professionals. The new entity is a non-charitable private foundation which has the potential to be used for unique and valuable asset protection and tax planning.

It is too early to tell if these entities will be widely utilized in the United States but there may be certain circumstances where it would make sense for a client to create one of these entities to either hold an interest in a business or to hold assets that will eventually be passed along to that individual's heirs.

This presentation will provide an overview of the new Wyoming and New Hampshire statutes and potential planning ideas for this new form of entity.

Non-Charitable Foundations – Introduction, (Cont'd)

Wyoming's Statutory Foundation Statute creates an entity that resembles an LLC. New Hampshire creates an entity that more resembles a trust.

From our review of the statutes, it appears that the new entities may be taxed in relation to how they are created and operated, but it is unclear how the federal government and other states will treat these entities.

The use of these entities may be limited until there is more guidance on exactly how each jurisdiction will treat these entities and how one can make sure that the entity is taxed as desired.

The Wyoming and New Hampshire statutes are based upon the European Foundation laws, which date back to the early 1900's, when Liechtenstein legislated the use of the stiftung, which became known in English as a foundation.

Wyoming vs. New Hampshire Foundations – 5 Main Differences

Wyoming	New Hampshire
A protector is required and must make sure the purpose of the Foundation is carried out.	A protector is not required but can be appointed. Governing documents will provide for the protector's duties.
Statute explicitly provides that the creditors of a beneficiary cannot reach into the Foundation. Beneficial interest is personal property.	Creditors can reach a beneficiary's interest if the beneficiary can withdraw funds or appoint funds to creditors.
Does not have specific provisions on how a merger could take place.	Does have specific provisions on how Foundations can merge with other Foundations.
Can operate a business.	Explicitly grants trust powers if not conducting business with the general public. If transacting business with general public the directors can be personally liable.
Director's duty is to the Foundation.	Director has a duty of impartiality to beneficiaries.

Non-Charitable Private Foundations and Estate Planning

- There are a number of estate planning strategies that may be better served by use of a Non-Charitable Private Foundation.
- Since none of the beneficiaries have a vested right to receive assets from the Foundation, the Foundation assets should not be subject to the claims of their creditors.
- Similar to a trust, the Foundation could withhold distributions to certain beneficiaries if there is a reason to withhold such a distribution, such as if the beneficiary is going through a divorce or has creditor issues.
- For those contributors who are more concerned with the growth of the assets of the Foundation, those individuals could form a Statutory Foundation which would allow the director to put the needs of the Foundation above the needs of the beneficiary.

Added Flexibility Over The Use Of Trusts

- For those families that own a business and would like to make sure that the business stays within the family, it may be possible to use a Wyoming Statutory Foundation that has a perpetual existence to make sure that the business stays in the family in perpetuity, or until the business ceases to exist.

- The governing documents of the Foundation could direct who would have an interest in the business entity and who would manage that entity without the need to administer a separate trust.

- Other beneficiaries of the Foundation could receive other assets and have other sources of income from the Foundation without having to split the Foundation into separate entities.

- It is unclear whether an S corporation could be owned by a Foundation but it would seem that as long as the Foundation is treated as a grantor trust in relation to a founder, or any other person, then the Foundation would likely be able to own S corporation stock but extra precautions must be taken to make sure that the S corporation rules are not violated.

Will The Statutory Foundation Replace Self-Settled Trusts?

- The statutes indicate that the Wyoming Statutory Foundations will be protected from the creditors of the contributor, and it seems that the contributor can remain a beneficiary of the Statutory Foundation although this seems to be against public policy.

- One idea would be to allow the contributor to be a permissible beneficiary of the Foundation, but not be vested in any specific interest therein. If another individual controlled whether distributions would be made to the contributor, then it would be difficult for a creditor to argue that they should be able to recover against funds held by the Statutory Foundation.

- It is likely that fraudulent transfers to a Statutory Foundation would not be protected even though it appears that the Wyoming statute implies that any transfer made to a Statutory Foundation would not be voidable for any reason.

    - The statute does not specifically mention fraudulent transfers.

Could The Non-Charitable Private Foundation Replace LLCs?

- Statutory Foundations in Wyoming seem to provide a very high level of asset and creditor protection while having a structure that is very similar to an LLC.

- In some cases the Statutory Foundation may be more desirable than an LLC because it has more flexibility in terms of choosing whether owners are vested or not vested and it may be easier to divest individuals under certain circumstances.

- It seems that foreigners will have an easier time creating a Non-Charitable Foundation in the United States than another form of for-profit company which may entice more foreigners to open and operate businesses within the United States.

Wyoming Statutory Foundations

- A Wyoming Statutory Foundation operates and is treated more like a company as opposed to a trust when compared to the New Hampshire Foundation Act.
- The Wyoming Statutory Foundation requires articles of formation to be filed with the Secretary of State. Just like with the New Hampshire Private Foundation, the Wyoming Foundation will have a founder and could have multiple contributors.
- A registered agent in the state of Wyoming is also required.
- The statute provides that any transfer to a Statutory Foundation shall not be rendered ineffective for any reason including that the law of a foreign jurisdiction prohibits or does not recognize the concept of a Statutory Foundation and regardless of whether the transfer avoids or defeats forced heirship or any claim of legitimate right whether or not that claim is made under the law of a foreign jurisdiction.
    - It is unclear exactly how far this creditor protection aspect will go. We will need to see how case law develops in this area.

Wyoming Statutory Foundations, (Cont'd)

- Wyoming Statutory Foundations are assumed to have a perpetual duration, avoiding the application of the statute of limitations that generally applies to trusts.

- The Foundation must have at least one beneficiary, but that beneficiary does not need to be vested.

- The initial documents creating the Foundation must state the Foundation's purpose and that purpose can only be amended if the original documents permit such an amendment.

    - A Protector must be appointed in order to make sure that the Foundation's purpose is being followed.

- Given the flexibility in relation to determining how a Wyoming Statutory Foundation will be operated in accordance with its governing documents, careful drafting will be important to make sure that the founder's intentions are followed.

Wyoming Statutory Foundation – Founder's Right to Amend, Revoke, Restate or Terminate

- A founder can retain the right to amend, revoke, restate, or terminate the Statutory Foundation.
- In order for the founder to retain such powers, the founder must expressly reserve those rights in the articles of formation.
- If the founder retains such rights, those rights are considered to terminate upon death.
- This is similar to a revocable trust and it is likely that having such powers held by the founder will subject the founder to income taxes on all income generated by the Statutory Foundation.

Wyoming Statutory Foundations – Protection From Successors and Creditors

- The creditors, heirs, or spouse of a founder will have no right to amend the organizing documents of the Statutory Foundation or to terminate the Statutory Foundation.
    - This can be useful in the event that the founder wants to make sure that the entity cannot be “decanted” in the future.
- This makes it clear that the Wyoming Statutory Foundation is anticipated to be an asset protection vehicle and that the creditors of a Statutory Foundation would have no right to access or levy against the funds of the Statutory Foundation.
- This protection does not appear to be dependent upon the founder’s right to amend or revoke the Statutory Foundation which may or may not be respected by other jurisdictions.
- It would seem that allowing the founder to modify or revoke the Statutory Foundation should subject the Statutory Foundation to the claims of the founder’s creditors. We will likely have to wait for case law to clarify this issue as the statute does not address this situation.

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. One or more trusted lawyers who practice in the jurisdiction where the foundation is formed will typically be managers, and charge less than Trustees normally charge under asset protection trusts.

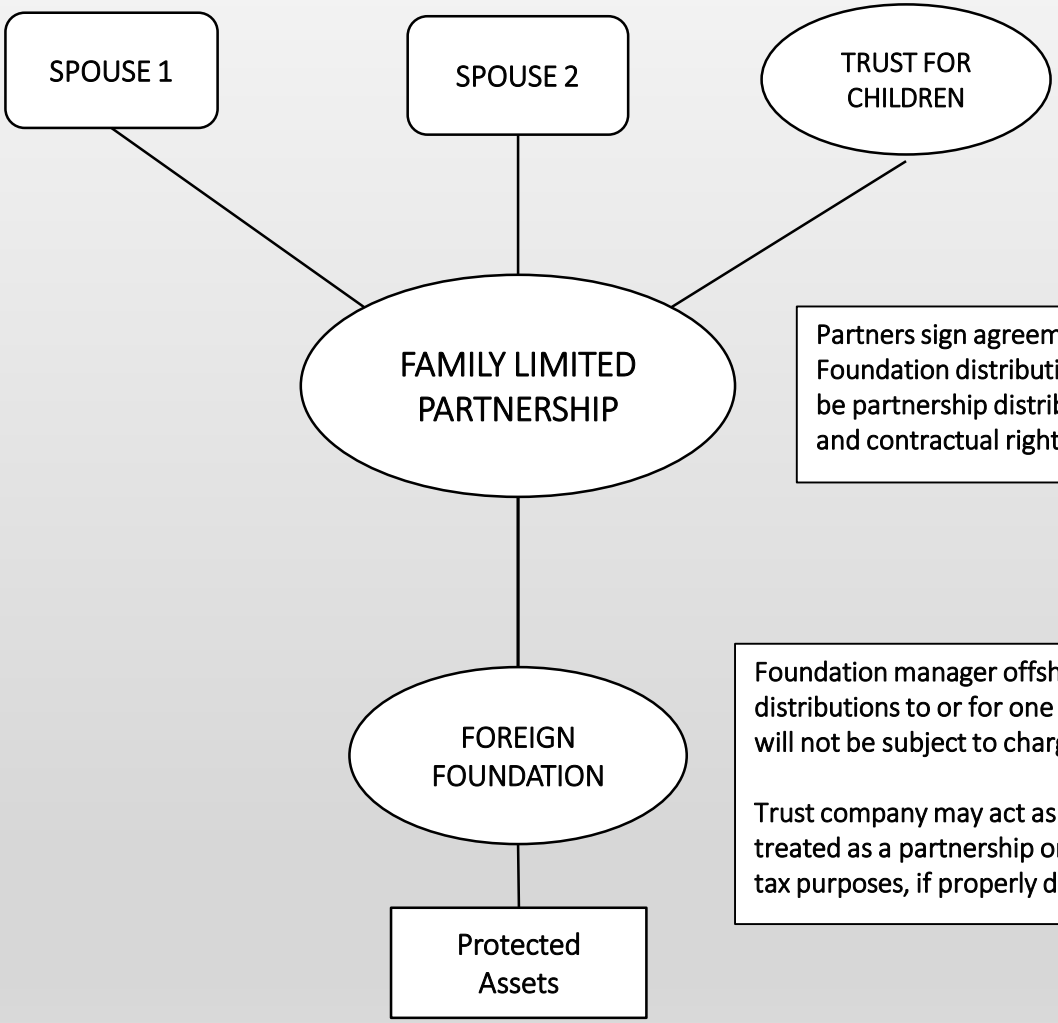
- Trust reporting requirements may be eased considerably.

- 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



Foreign Charitable Foundation

- No U.S. income tax deduction for funding, but may qualify for gift tax charitable deduction.
- Formed in foreign jurisdiction that does not impose income tax.
- Non-U.S. source income not subject to tax, even though foundation is controlled by U.S. taxpayers.
- Not subject to estate tax on U.S. taxpayer's death – must be held solely for charity.
- See Jonathan Moore's book – A Practical Guide to International Philanthropy.

Adding The Grantor As A Beneficiary Of The Trust

- A Grantor may wish to have the ability to be added as a beneficiary of a trust at a future date. If that is the case, it is a good idea to allow the Grantor to only become a beneficiary under certain circumstances.

- Requiring certain circumstances to be met before the Grantor can be added as a beneficiary will help to mitigate the argument that the Grantor should be considered a beneficiary, and that part of the trust could be subject to the claims of creditors.

- There are a number of situations that could be used as a triggering event, such as if the Grantor's net worth goes below a certain threshold, if the Grantor gets divorced, or upon another event that is out of the Grantor's control.

- Using an event that is outside of the Grantor's control will help to alleviate the argument that the Grantor retained the ability to add himself back as a beneficiary.

Adding The Grantor As a Beneficiary Of The Trust

Possible Language To Consider:

Notwithstanding the above, the Trust Protectors shall not be permitted to add the Grantor as a beneficiary of this Trust, unless or until the Grantor no longer has assets to provide the Grantor with reasonable expenses for health, education and maintenance, or if the value of all assets that are accessible and controlled by the Grantor, including personally owned assets that are immune from creditor claims under applicable law, are ever less than $_____ in total value.

If the Grantor has a $_____ net worth, or creditor exempt assets such as a homestead, IRAs, pension accounts, and the cash value of annuities and life insurance that are protected under state law, then a negative net worth would not permit the Grantor to be added as a beneficiary of the Trust if the creditor exempt assets are worth at least $_____.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ATTORNEYS AT LAW

Speaking of Divorce –

Would a Self-Settled Trust Divide Into Two Separate Shares, With Each Share Being Controlled Directly or Indirectly by Each Spouse in Case They Go Their Separate Ways?

This should be discussed while the trust is being drafted to avoid potential problems down the road.

What About A Possible Divorce?

Typically an offshore Asset Protection Trust will be a "SLAT" (Spousal Limited Access Trust) funded by one spouse for the primary benefit of the other, with a "backdoor" provision allowing the Grantor to be added back as a beneficiary in the event of certain circumstances.

The following clause can be used to facilitate separation of an Asset Protection Trust into two separate trusts in the event of a divorce:

Possible Impact of Divorce. In the highly unlikely event that either the Grantor or _____ **[GRANTOR'S SPOUSE]** has filed for a dissolution of marriage, then at the time such dissolution is finalized (or sooner if determined appropriate by the unanimous consent of all acting Trustees) the Trustee shall divide the assets of this Trust and any separate trusts herein established, into separate equal trusts which will have equivalent values. The Grantor shall have the authority to remove and replace the Trustee as described above only with respect to one such described Trust (or Trusts equaling 50% of the value of the assets of this Trust prior to division), and _____ **[GRANTOR'S SPOUSE]** shall have the authority to remove and replace the Trustee as described above only with respect to the other Trust (or Trusts equaling 50% of the value of the assets of this Trust prior to division). In such event, the Trust Protectors of the separate trust that _____ **[GRANTOR'S SPOUSE]** will have the right to replace the Trusteeship of which shall be One of the Ten Largest Trust Companies in the United States, as defined in Section 1.04 of this Trust Agreement, one of the trust companies named in Section 1.04, or any two board certified trust and estate lawyers having AV-ratings in Martindale-Hubbell directories and at least twenty (20) years' experience, and the Trust Protectors of the separate trust that the Grantor shall have the power to replace the Trusteeship of shall be the relatives of the Grantor who are named as Trust Protectors. Further, in such event, the Trust Protectors may name alternate Trust Protectors to serve in lieu of one or more of the Trust Protectors then serving of each such separate trust, but only with the advanced written approval of _____ **[GRANTOR'S SPOUSE]**, as to the separate trust that she will have the power to replace the Trusteeship of, and only with the advanced written approval of the Grantor, with respect to the separate trust that he will have the power to replace the Trusteeship of.

Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **201208026**
Release Date: 2/24/2012

CC:PSI:04:DSRyan
POSTF-120621-11
Third Party Communication: None
Date of Communication: Not Applicable

UILC: 2511.04-00, 2503.03-00

date: SEPTEMBER 28, 2011

to: Frances F. Regan
Area Counsel (CC:SB:1)

Mary P. Hamilton
Senior Attorney (CC:SB:1:BOS:2)

from: Curt G. Wilson
Associate Chief Counsel (CC:PSI)

ISSUES

1. Whether the Donors made completed gifts on transferring property to the Trust.
2. Whether annual exclusions are allowable under I.R.C. § 2503(b) for the withdrawal rights provided in the Trust.

CONCLUSIONS

1. On transferring the property to the Trust, the Donors made completed gifts of the beneficial term interests.
2. The withdrawal rights are unenforceable and illusory. No annual exclusion is allowable under I.R.C. § 2503(b) for the purported withdrawal rights.

FACTS

Donor A and Donor B (Donors) gratuitously transferred property to a trust (Trust) on Date and designated their adult child, Child A, as the sole trustee. The Trust beneficiaries are the Donors' children, other lineal descendants, and their spouses. The Trust will terminate when both Donors have died.

The Trust provisions

The Trust states that it is irrevocable, and that the Donors renounce any power to determine or control the beneficial enjoyment of Trust income or principal. However, the Trust provides the Donors with testamentary limited powers of appointment. If the Donors do not exercise their testamentary powers, the property remaining in the Trust at termination will be distributed to Child A and Child B.

The trustee, Child A, has absolute and unreviewable discretion in administering the Trust for the benefit of the Donors' children, other lineal descendants, and their spouses (beneficial term interests). Income and principal may be distributed at any time for a beneficiary's health, education, maintenance, support, wedding costs, purchase of a primary residence or business, or for any other purpose. Income and principal may also be distributed to a charitable organization.

Each beneficiary may withdraw an amount of property (based on the § 2503(b) annual exclusion amount) in any year in which a transfer is made to the Trust. However, this may be voided by the trustee for additions made to the Trust.

The Trust provides that the construction, validity, and administration of the Trust are to be determined by State law, but provision is made for Other Forum Rules. Specifically, all questions and disputes concerning the Trust must be submitted to the Other Forum that is charged with enforcing the Trust. A beneficiary filing or participating in a civil proceeding to enforce the Trust will be excluded from any further participation in the Trust.

LAW AND ANALYSIS

ISSUE 1:

The Donors' representative contends that, because the Donors retained testamentary limited powers of appointment over the Trust, they retained dominion and control over the transferred property. Therefore, they did not make any completed gifts.

Section 2501 of the Internal Revenue Code imposes a tax on the transfer of property by gift by any individual. Under § 2502(c), the gift tax imposed under § 2501 is the liability of the donor.

Section 2511 provides that the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(a) provides, in part, that the gift tax is an excise upon the donor's act of making the transfer and is measured by the value of the property passing from the donor.

Section 25.2511-2(b) provides, in part, that as to any property or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, the gift is complete.

Section 25.2511-2(b) further provides, in part, that, if upon a transfer of property the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

Section 25.2511-2(c) provides, in part, that a gift is incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves (unless the power is a fiduciary power limited by a fixed or ascertainable standard). The relinquishment or

termination of a power to change the beneficiaries of transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event that completes the gift and causes the tax to apply.

In Chanler v. Kelsey, 205 U.S. 466 (1907), the Supreme Court considered, in part, the legal interest that is subject to a testamentary power of appointment. In that case, a grantor created a trust providing a lifetime income interest for his daughter. The trust also provided the daughter with a testamentary limited power to appoint the trust property. If she failed to exercise the power when she died, the trust property was to be distributed to designated persons. The Court held that, for New York inheritance tax purposes, the daughter's execution of her testamentary power was considered "the source of title" to the remainder. As the holder of a testamentary power of appointment, she controlled the remainder passing at her death. See 205 U.S. at 474.

Though it predates the enactment of the gift tax, the Chanler opinion supports the proposition that a testamentary power of appointment relates to the remainder of a trust, not the preceding beneficial term interests. The testamentary power does not (and cannot) affect the trust beneficiaries' rights and interests in the property during the trust term. Rather, a trustee with complete discretion to distribute income and principal to the term beneficiaries may, in exercising his discretion, distribute some or all of the trust property during the trust term. The holder of a testamentary power has no authority to control or alter these distributions because his power relates only to the remainder, i.e., the property that will still be in the trust when the beneficial term interests are terminated. See Bowe-Parker, Page on the Law of Wills § 45.12 (1962). See also Bittker and Lokken, Federal Taxation of Income, Estate and Gifts ¶ 226.6.7 (2011); Howard M. Zaritsky, Tax Planning for Family Wealth Transfers (4th ed. 2011 Cum. Supp. No. 2) ¶ 3.03[1].

From the time the gift tax was enacted, taxpayers have contested the issue of when a donor parts with dominion and control so as to make a completed gift. For example, in Sanford's Estate v. Commissioner, 308 U.S. 39 (1939), the grantor, in 1913, transferred property to a trust for others. He reserved (i) a revocation power exercisable at any time during his life to retrieve the property and thereby terminate every beneficial interest; and (ii) a modification power exercisable at any time during his life to terminate or change every beneficial interest. In 1919, the grantor relinquished his revocation power, but he retained his modification power. In 1924, he relinquished his modification power. The Court held that notwithstanding the grantor's creation of the trust and relinquishment of his revocation power, he retained dominion and control over the disposition of the trust property until he renounced his power to modify the trust. Consequently, the grantor made a taxable gift in 1924 when he relinquished his modification power. See Burnett v. Guggenheim, 288 U.S. 280 (1933).

Following Sanford's Estate, the Supreme Court considered various situations in which a trust instrument purported to divest the respective grantor of all dominion and

control over property to the extent that the property could not be returned to the grantor except by reason of contingencies beyond his control. In these cases, the Court noted that the respective grantor lost all economic control upon making the transfer, which he would not regain unless certain contingencies occurred. The Court concluded that the respective gifts were complete except for the value of the retained rights. Smith v. Shaughnessy, 318 U.S. 176 (1943); Robinette v. Helvering, 318 U.S. 184 (1943); Estate of Kolb v. Commissioner, 5 T.C. 588 (1945). See § 25.2511-2(c).

Consistent with Chanler v. Kelsey, the Service has maintained in litigation that a power holder's testamentary limited power of appointment relates only to the remainder of the respective trust. See Poinier v. Commissioner, 858 F.2d 917 (3d Cir. 1988) (testamentary power holder's renunciation of her power relates to the remainder), aff'g 86 T.C. 478 (1986). See also Robinson v. Commissioner, 675 F.2d 774 (5th Cir. 1982) (grantor's power to change the beneficiaries who would receive trust property when her lifetime income interest terminated constituted a gift of the remainder), aff'g 75 T.C. 346 (1980). See Smith v. Shaughnessy, supra (right to receive income during the trust term and testamentary power to appoint the remainder are separate and severable interests).

In the case at hand, when each Donor transferred property to the Trust on Date, he or she retained a testamentary limited power to appoint so much of it as would still be in the Trust at his or her death.[1] The Trust emphasizes that the Donors do not retain any powers or rights to affect the beneficial term interests of their children, other issue, and their spouses (and charities) during the Trust term. With respect to those interests, the Donors fully divested themselves of dominion and control of the property when they transferred the property to the Trust on Date. Indeed, during the period extending from the creation of the Trust until the Donors' deaths, the trustee, Child A, has sole and unquestionable discretion to distribute income and principal to the beneficial term interests. He may even terminate the Trust by distributing all of the property.

Accordingly, for gift tax purposes, the Donors' transfers to the Trust constituted a completed gift of the beneficial term interests. The Donors' testamentary limited powers of appointment relate only to the Trust remainder. Their relinquishment of their testamentary powers during the Trust term would affect only the ultimate disposition of the remainder and, as such, would constitute a transfer of the remainder. Bittker and Lokken, Federal Taxation of Income, Estates and Gifts ¶ 126.6.7 (2011).

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[1] We note that the Trust has conflicting provisions. In one provision, the Donors emphatically renounce any power to determine or control the beneficial enjoyment of the Trust, but other provisions state that the Donors have testamentary limited powers of appointment. Under State law, generally, if two provisions conflict and cannot be reconciled, the latter provision is considered to indicate the grantor's subsequent intention, and that provision prevails. That is the rule unless the general scope of the trust leads to a contrary conclusion. Cite 1. We believe that the highest court of State would conclude that the Donors intended to retain the testamentary limited powers and, thus, did so.

ISSUE 2:

The Donors' representative contends that, if the Donors made completed gifts on Date, the gifts were of minority interests to the beneficiaries equal in value to their respective withdrawal rights (Crummey Powers). Therefore, the gift tax exclusions allowable under § 2503(b) effectively reduced the amount of taxable gifts to zero.

The withdrawal rights are not legally enforceable and thus are not present interests

Section 2503(a) provides, in part, that the term "taxable gifts" means the total amount of gifts made during the calendar year.

Section 2503(b) provides, in part, that in the case of gifts (other than gifts of future interests in property) made to any person during the calendar year, the first $10,000 of such gifts to such person shall not, for purposes of § 2503(a), be included in the total amount of gifts made during such year.

Section 25.2503-3(a) provides, in part, that no part of the value of a gift of a future interest may be excluded in determining the total amount of gifts. An unrestricted right to the immediate use, possession, or enjoyment of property or the income from property is a present interest in property.

To be a present interest, a withdrawal right must be legally enforceable. For example, if a trust provides for withdrawal rights, and the trustee refuses to comply with a beneficiary's withdrawal demand, the beneficiary must be able to go before a state court to enforce it. See Cristofani v. Commissioner, 97 T.C. 74 (1991); Restatement of the Law of Trusts § 197 (Nature of Remedies of Beneficiary); Bogert, Trusts and Trustees Vol. 41, § 861 (Remedies of the Beneficiary and Trustee).

As a matter of public policy, the federal courts are the proper venue for determining an individual's federal tax status, and the federal courts are not bound by the determinations of a private forum (such as Other Forum) concerning such status. Alford v. United States, 116 F.3d 334 (8th Cir. 1997). Likewise, as a matter of public policy, a State court will not take judicial notice of a private forum's (or group's or sect's) construction and determination of State law pertaining to a trust agreement, such as the Trust in this case. Cite 2. These determinations are strictly within the purview of the State courts. Cite 3; Cite 4.

Under State law, a trust clause may prohibit a beneficiary from seeking civil redress. Cite 5. Although the State legislature made a public policy decision to allow a beneficiary to make certain inquiries without fear of risking forfeiture, these "safe harbors" are not relevant here. Cite 6.

Under the terms of the Trust in this case, a beneficiary cannot enforce his withdrawal right in a State court. He may only press his demand before an Other Forum and be subject to the Other Forum's Rules. Notwithstanding any provisions in the Trust to the contrary, the Other Forum will not recognize State or federal law. If the beneficiary proceeds to a State court, his existing right to income and/or principal for his health, education, maintenance and support will immediately terminate. He will not receive any income or principal for his marriage, to buy a home or business, to enter a trade, or for any other purpose. He will not have withdrawal rights in the future, and his contingent inheritance rights will be extinguished. Thus, a beneficiary faces dire consequences if he seeks legal redress. As a practical matter, a beneficiary is foreclosed from enforcing his withdrawal right in a State court of law or equity.

Withdrawal rights such as these are not the legally enforceable rights necessary to constitute a present interest. Because the threat of severe economic punishment looms over any beneficiary contemplating a civil enforcement suit, the withdrawal rights are illusory. Consequently, no annual exclusion under § 2503(b) is allowable for any of the withdrawal rights. See Rev. Rul. 85-24, 1985-1 C.B. 329; Rev. Rul. 81-7, 1981-1 C.B. 474.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

It is our belief that § 2702 applies in valuing the gifts in this case. Section 2702 provides special valuation rules with respect to transfers of interests in trusts. Generally, under § 2702(a)(2), the value of any retained interest which is not a qualified interest shall be treated as being zero. Section 25.2702-2(a)(4) provides that an interest in trust includes a power with respect to a trust if the existence of the power would cause any portion of a transfer to be treated as an incomplete gift. Accordingly, under § 25.2702-2(a)(4), the Donors' retained testamentary powers are interests, and the value of their retained interests is zero. Therefore, the value of the Donors' gift is the full value of the transferred property.

If additions were made to the Trust, annual exclusions are not allowable for withdrawal rights relating to the additions because the trustee can void those rights after an addition is made. Section 25.2503-3(c), Example (1) and Example (3).

Please note, however, that our belief in this regard carries certain hazards to the extent further study is required. Should you wish to pursue this argument, please coordinate with the National Office.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Deborah S. Ryan at (202) 622-4045 if you have any further questions.

Sincerely,

Associate Chief Counsel
(Passthroughs & Special Industries)

By: Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #207

Date: 11-Sep-12
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: Gassman, Share, Crotty & Hohnadell: Planning After IRS Memo 201208026: How Foreign Can Creditor Protection Trust Laws Get?

"The asset protection and international trust law community was taken by surprise by the publication of IRS CCA 201208026, which somehow concluded that a taxpayer made a taxable gift to an irrevocable trust, despite retaining a power to appoint the trust assets upon death. This ruling seems to conflict with the language of the Treasury Regulations that define complete and incomplete gifts for federal gift tax purposes, along with a number of Private Letter Rulings issued over the past seven years.

It is important to note that a Chief Counsel Advice Memorandum (CCA) is not "the law" and simply reflects the opinion of the IRS attorney that prepared it. One well known authority in this area indicated that "this ruling is plainly wrong, and it is unfortunate that taxpayers will have to wait until the IRS corrects this deviation from accuracy or until this issue is determined by a court decision." We can only hope that the IRS does the right thing and revokes this opinion in the near future. The authors highly recommend that this occur or, at a minimum, the IRS limit its application to trust arrangements entered into after its publication."

Now, **Alan Gassman**, **Leslie Share**, **Ken Crotty**, and **Kacie Hohnadell** provide members with their commentary on a controversial Chief Counsel Advice Memorandum.

Alan S. Gassman, J.D., LL.M. practices law in Clearwater, Florida. Each year he publishes numerous articles in publications such as BNA Tax &

Accounting, Estate Planning, Trusts and Estates, The Journal of Asset Protection, and Steve Leimberg's Asset Protection Planning Newsletters. Mr. Gassman is a fellow of the American Bar Foundation, a member of the Executive Council of the Tax Section of the Florida Bar, and has been quoted on many occasions in publications such as The Wall Street Journal, Forbes Magazine, Medical Economics, Modern Healthcare, and Florida Trend magazine. He is an author, along with Kenneth Crotty and Christopher Denicolo, of the BNA Tax & Accounting book Estate Tax Planning in 2011 and 2012. He is the senior partner at **Gassman Law Associates, P.A.** in Clearwater, Florida, which he founded in 1987. His email address is agassman@gassmanpa.com

Leslie A. Share, J.D., LL.M., is a shareholder in the Coral Gables, Florida law firm of **Packman, Neuwahl & Rosenberg**, where he practices in the areas of domestic and international tax, estate and business planning, and wealth preservation. Mr. Share has been quoted in numerous publications, has served as an adjunct professor at the University of Miami School of Law, and has written or co-authored articles for Estate Planning, the Asset Protection Journal, Entertainment Law & Finance, the University of Florida Law Review and an American Bar Association book entitled Foreign Investment in U.S. Real Estate-A Comprehensive Guide. Mr. Share received his B.A. from Northwestern University, his J.D., with honors, from the University of Florida, and his Master of Laws in Taxation from New York University. His e-mail address is las@pnrlaw.com.

Kenneth J. Crotty, J.D., LL.M., is a partner at the Clearwater, Florida law firm of **Gassman Law Associates, P.A.** , where he practices in the areas of estate tax and trust planning, taxation, physician representation, and corporate and business law. Mr. Crotty has co-authored several handbooks that have been published in BNA Tax & Accounting, Estate Planning, Steve Leimberg's Estate Planning and Asset Protection Planning Newsletters and Estate Planning magazine. He, Alan Gassman and Christopher Denicolo are the co-authors of the BNA book Estate Tax Planning in 2011 & 2012. His email address is ken@gassmanpa.com.

Kacie A. Hohnadell, B.A., J.D. candidate, is a third-year law student at Stetson University College of Law and is considering pursuing an LL.M. in taxation upon graduation. Kacie is also the Executive Editor of Stetson Law Review and is actively involved in Stetson's chapter of the Student Animal Legal Defense Fund. In 2010, she received her B.A. from the University of Central Florida in Advertising and Public Relations with a minor in Marketing, and moved to St. Petersburg shortly after graduation to pursue her Juris Doctor. Her email address is Kacie@gassmanpa.com.

Here is their commentary:

EXECUTIVE SUMMARY:

The asset protection and international trust law community was taken by surprise by the publication of IRS CCA 201208026 on February 24, 2012, which somehow concluded that a taxpayer made a taxable gift to an irrevocable trust, despite retaining a power to appoint the trust assets upon death. This ruling seems to conflict with the language of the Treasury Regulations that define complete and incomplete gifts for federal gift tax purposes, along with a number of Private Letter Rulings issued over the past seven years.

It is important to note that a Chief Counsel Advice Memorandum (CCA) is not "the law" and simply reflects the opinion of the IRS attorney that prepared it. Chief Counsel Advice is defined as: (1) written advice or instructions under whatever name, prepared by the Chief Counsel's office and issued to the field or service center personnel or to regional or district counsel attorneys (2) that conveys any legal interpretation of a revenue position, or Chief Counsel position concerning a revenue matter or any legal interpretation of any law relating to the assessment or collection of any liability under a revenue provision.[1] CCAs may not be cited as precedent, but such memoranda often show how the IRS may consider a particular tax issue in the event of a taxpayer examination.

FACTS:

In the new ruling, a husband and wife as joint Grantors transferred property to an irrevocable trust, with their adult child as the sole trustee. The trust's beneficiaries were the Grantors' lineal descendants and their spouses along with a charitable organization (but neither of the Grantors were beneficiaries), with the trustee having sole discretion over income and principal distributions. The issues reviewed in the ruling were: (1) whether the Grantors made completed gifts upon transferring property to the trust; and (2) whether § 2503(b) annual exclusions were allowable for the withdrawal rights provided to the trust beneficiaries.

The new ruling distinguished the arguably clear language of the Treasury Regulations and the prior IRS rulings regarding incomplete gifts by stating that: "[t]he relinquishment or termination of a power to change the beneficiaries of transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event that completes the gift and causes the tax to apply." The ruling cites a number of cases, including Chandler v. Kelsey, 205 U.S. 466 (1907), a New York inheritance tax case that predated the federal gift tax, as arguably tenuous support for this new position that a Grantor-retained testamentary power of appointment is insufficient to render a gift incomplete when the Grantor has no right to control the disposition of any of the assets during the Grantor's lifetime.

The Grantors' "bail out" position that the Crummey powers held by the trust's beneficiaries effectively negated any completed gifts to the trust was also deemed insufficient. The ruling indicated that certain trust language made it relatively difficult to make such rights legally compulsory; therefore, the IRS found that these rights were "unenforceable and illusory" and thus did not to cause the transfers to the trust to be treated as gifts of present interests eligible for the § 2503(b) annual exclusion.

Finally, to add insult to injury, the IRS held that under § 2702(a)(2)[2] and Treasury Regulation § 25.2702-2(a)(4),[3] the value of the Grantor's retained testamentary power interest was considered to be zero, thus making the amount of the gift the full value of the transfer to the trust. Significantly, under § 2702(a)(3)(A)(i), these Chapter 14 special valuation rules never would have come into play if the transfer had instead been treated as an incomplete gift. The IRS recognized that the application of these rules was not a legal slam-dunk, as it indicated that "our belief in this regard carries certain hazards to the extent further study is required."

COMMENT:

The new IRS ruling paraphrases Treasury Regulation § 25.2511-2(c), which the vast majority of asset-protection trust drafters have reasonably relied upon to make gifts incomplete with the intention of avoiding the imposition of the gift tax upon transfers to such trusts regardless of their amount:

> A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

In addition, many knowledgeable professionals believe that the following language from Treasury Regulation § 25.2511-2(b) further clarifies what was thought to be the IRS position in this area:

> As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined. **For example, if a donor transfers property to another in trust to pay the income to the donor or accumulate it in the discretion of the trustee, and the donor retains a testamentary power to appoint the remainder among his descendants, no portion of the transfer is a completed gift.** (emphasis added)

At the very least, in those asset protection trusts where the Grantor remains a potential discretionary income (or principal) beneficiary, it would appear at first glance that a retained testamentary special power of appointment would fall within the Service's regulatory definition of a completed gift.

This position was echoed in a number of Private Letter Rulings. For example, in Private Letter Ruling 200502014, the Grantor retained a testamentary special power of appointment over the trust principal and any accumulated accrued and undistributed income. In this ruling, the IRS cited Sanford's Estate v. Commissioner, 308 U.S. 39 (1939), for its holding that a donor's gift was incomplete for purposes of the gift tax when the donor reserves the right to determine the donees who ultimately receive the trust assets. In Sanford's Estate, the court ruled that the Grantor's gift was complete once the Grantor relinquished his right to change the trust beneficiaries. In accordance with this decision, the ruling concluded that under its facts: (1) the Grantor retained the ability to change the beneficiaries to the trust though the testamentary special power of appointment; (2) the Grantor thereby continued to possess dominion and control over the transferred property; and (3) as a result, the Grantor's contribution of property to the trust was not a completed gift for U.S. gift tax purposes.

Private Letter Ruling 200715005 similarly confirmed that the Treasury Regulations supported this type of incomplete gift planning, with "A" being the trust's Grantor:

> In this case, A retains a limited testamentary power to appoint the Trust corpus and accumulated income to any persons (other than A, A's creditors, A's estate or the creditors of A's estate). In view of this retained power, A's transfer of property to Trust will not be a completed gift subject to Federal gift tax. See, §25.2511-2(b)…

The new IRS ruling could conceivably be distinguishable from these previous Private Letter Rulings because the grantors in those situations retained some control over the distribution of the trust assets in addition to retaining testamentary powers of appointment, such as by effectively retaining the power to veto distributions to other beneficiaries and by preventing the trustee of the trust from transferring trust assets to individuals other than the grantor.

Although the new IRS ruling in effect takes a contrary position to the analysis of the Treasury Regulations and other existing tax law found in prior rulings, its conclusions on the complete/incomplete gift issue could conceivably be upheld by a trial court, and may then need to be appealed. For this reason, a number of respected asset protection professionals have indicated that they will no longer completely rely upon testamentary power of appointment to render a gift incomplete, and instead will use alternative incomplete gift tools such as a retained Grantor lifetime power of appointment or distribution veto power, notwithstanding the related issues that could potentially arise from an asset protection standpoint.[4]

Practitioners who have relied solely upon testamentary powers of appointment for this type of planning clearly did the right thing and should not have to worry about it. It is expected by many that the IRS will either revoke this CCA or will limit its applicability to trust arrangements entered into after its publication. Again, a CCA is not binding authority and cannot be cited in court, but often shows the viewpoint of the IRS regarding a particular issue.In the authors' opinion, it should not be considered to be even remotely negligent to have followed the advice provided by the leading practitioners and published authors in the estate and gift tax field (as well as the prior rulings and the above regulation), which included the following:

In LISI Estate Planning Newsletter #931, **Steve Akers** wrote:

> The most conservative planning is to contribute the limited partnership interests to an irrevocable trust (with a third party trustee) that is an incomplete gift (i.e., have the client retain a testamentary power of
>
> appointment over the trust).

The following statement was made by **Ms. Carol Harrington** in the Question & Answer Session of the **2006 Heckerling Institute on Estate Planning**, which can be found in Chapter 11 at page 11-11 in the Institute book published in 2006 by Mathew Bender & Company, Inc.:

Another thing we have talked about is to get rid of all the units, either by selling them or giving them all away. If you need the economic benefit, sell them to a grantor trust for a note and keep that income stream. If you are not willing to monetize it in that way and your client is worried about keeping the interest for life, you can put it into a trust that is irrevocable, but avoid a completed gift by retaining a testamentary nongeneral power of appointment. The client can keep the economic stream of payments, and with an independent trustee of that trust, would not be voting those limited units. So you could negate a control argument. I think that is a more difficult and complex analysis than most clients will find acceptable, but if a great deal of money is on the table, I think that eliminates the Section2036(a)(2) risk.

Dennis, tell us what you are doing in your practice with new clients who have not created these partnerships already. Coming in to see you for estate planning advice, what are you telling them?

Mr. Dennis Belcher condoned this method on page 11-12 by stating: If you believe that Section2036(a)(2) is a significant risk and there are enough dollars involved, you may want to use the technique that Carol described by which I convey my limited partnership interest to an irrevocable trust that is an incomplete gift.

Professor Jeffrey Pennell from **Emory University** was the third member of the panel and had no comment on the above (which is unusual for the beloved Professor Pennell, who known not to be bashful about disagreeing with mainstream opinions or to side with the IRS on questionable situations.)

Howard Zaritsky's *Tax Planning for Family Wealth Transfers* Treatise stated as follows on pages 3-21 in the Fourth edition:

> Donor has not made a completed taxable gift of either principal or income, because Donor's testamentary power of appointment and the indefinite nature of Beneficiary's income interest give Donor the potential power to decide who shall receive all parts of the trust."[1]
>
> (A footnote to the above sentence is as follows: This power, however, would not have caused the Grantor to be taxed as the owner of the trust under the Grantor rules."See Internal Revenue Code Section 647(b)(2).)
>
> Additionally, the treatise states, "A donor's reserved power to ... change the beneficiaries or their respective interests will always render the transfer incomplete for gift tax purposes."

Conclusion:

One well known authority in this area indicated that "this ruling is plainly wrong, and it is unfortunate that taxpayers will have to wait until the IRS corrects this deviation from accuracy or until this issue is determined by a court decision." We can only hope that the IRS does the right thing and revokes this opinion in the near future. The authors highly recommend that this occur or, at a minimum, the IRS limit its application to trust arrangements entered into after its publication.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan Gassman
Leslie Share

Ken Crotty
Kacie Hohnadell

TECHNICAL EDITOR: DUNCAN OSBORNE

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CITES:

CCA 201208026; Private Letter Ruling 200502014; Private Letter Ruling 200715005; Treasury Regulation §25.2511-2(b); Treasury Regulation §25.2702-2(a)(4).

CITATIONS:

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[1] Michael I. Saltzman, *IRS Practice and Procedure*, ¶ *3.04 Other Statements of IRS Position and Practice* (Thomson/RIA 2012).

[2] Internal Revenue Code §§ 2702(a)(2)-(3) provide as follows:

(2) Valuation of retained interests.

(A) In general. The value of any retained interest which is not a qualified interest shall be treated as being zero.

(B) Valuation of qualified interest. The value of any retained interest which is a qualified interest shall be determined under section 7520.

(3) Exceptions.

(A) In general. This subsection shall not apply to any transfer-

(i) if such transfer is an incomplete gift,

(ii) if such transfer involves the transfer of an interest in trust all the property in which consists of a residence to be used as a personal residence by persons holding term interests in such trust, or

(iii) to the extent that regulations provide that such transfer is not inconsistent with the purposes of this section.

(B) Incomplete gift. For purposes of subparagraph (A), the term ' incomplete gift' means any transfer which would not be treated as a gift whether or not consideration was received for such transfer.

[3] Treasury Code Regulation § 25.2702-2(a)(4) provides as follows: "An interest in trust includes a power with respect to a trust if the existence of the power would cause any portion of a transfer to be treated as an incomplete gift under chapter 12."

[4] Howard Zaritsky, Mitchell Gans, and Jonathan Blattmachr discuss these alternative methods of creating an incomplete gift in Estate Planning Newsletter #1936 (Mar. 6, 2012) at http://www.leimbergservices.com. Jeffrey Pennell also describes these methods in Estate Planning Newsletter #1937 (Mar. 7, 2012) at http://www.leimbergservices.com.

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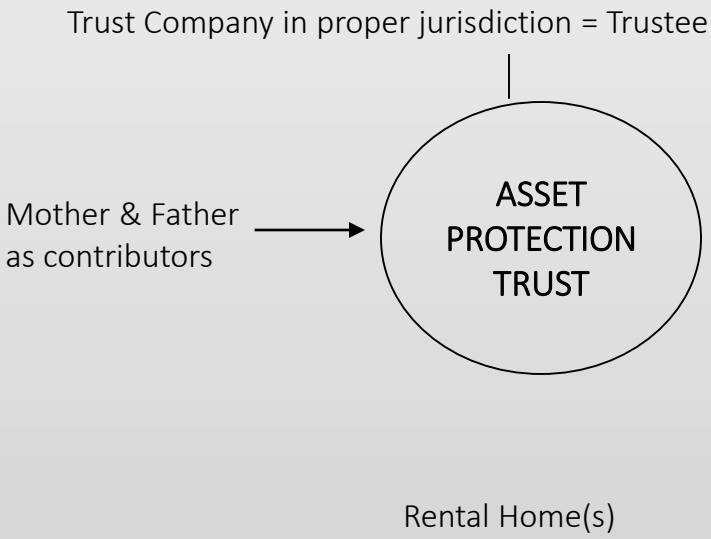
Limited Liability Trust – Asset Protection Trust

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



- 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).

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.

Foreign Trust Status For Domestic Trusts

Treasury Regulation Section 7701-7 takes a very aggressive stand on when a domestic trust will be treated as "foreign" and thus subject to being required to file a Form 3520 upon formation, a Form 3520A each year after formation, or to pay significant penalties that equal or exceed 35% of the value of the trust in the year formed and 5% of the value each year thereafter, plus interest.

Situation One – the trust agreement provides that the trust will automatically "flee" to a foreign trustee in a foreign jurisdiction if there is a judgment against the trust.

Example 2.A under Treasury Regulation Section 77.01-7(c)(5) goes further to provide that a trust will be classified as foreign if it is required to automatically change its situs to a foreign jurisdiction in the event that a creditor sues the Trustee in the U.S.

In addition, under the "control test" a trust will be classified as foreign if a foreign trustee has control over "Substantial Decisions."

Will a trust be respected by a U.S. Court as being "foreign" and subject to the law of the foreign trust's jurisdiction if the foreign trustee has not had any authority or control over the trust assets or activities, and no foreign court has had any authority over the trust?

Because there cannot be an "automatic flee" clause in the trust agreement without causing it to be considered as "foreign" it will be necessary for a trustee or a Trust Protector to "order the trust" to flee to a foreign jurisdiction.

Foreign Trust Status For Domestic Trusts

- Regulation Section 7701-7 provides a number of examples on what type of control a foreign fiduciary can maintain. A couple of good examples are as follows:

EXAMPLE 1.

Trust is a testamentary trust with three fiduciaries, *A, B,* and *C. A* and *B* are United States citizens, and *C* is a nonresident alien. No persons except the fiduciaries have authority to make any decisions of the trust. The trust instrument provides that no substantial decisions of the trust can be made unless there is unanimity among the fiduciaries. The control test is not satisfied because U.S. persons do not control all the substantial decisions of the trust. No substantial decisions can be made without *C*'s agreement.

EXAMPLE 2.

Assume the same facts as in *Example 1,* except that the trust instrument provides that all substantial decisions of the trust are to be decided by a majority vote among the fiduciaries. The control test is satisfied because a majority of the fiduciaries are U.S. persons and therefore U.S. persons control all the substantial decisions of the trust.

Foreign Trust Status For Domestic Trusts, (Cont'd)

Alternatively, if there is a co-trusteeship of a foreign and U.S. trustee, and the U.S. trustee resigns, then the trust would become foreign and the U.S. trustee will not have taken an affirmative action.

It would be best for the U.S. trustee to have situs in an Asset Protection jurisdiction so that a court would be more likely to respect the trust from the time of its establishment, which is hopefully well before a creditor situation arises.

Normally, Trust Protectors are explicitly classified as not being "Fiduciaries," so that the power take to take actions such as adding or deleting beneficiaries or changing trustee powers, are not considered to be the powers of the trustees themselves. Nevertheless, the appointment of licensed professionals or trust companies who might have licensing or malpractice issues if they do not act properly will be advisable.

A foreign Trust Protector can be given the power to change the situs of a domestic trust to foreign, but the presence of a foreign Trust Protector will make the trust itself foreign, if the foreign Trust Protector has the ability to make Substantial Decisions with the approval of any U.S. person.

Can Creditors Reach A Trust That Cannot Benefit The Settlor Unless or Until Certain Events Occur?

A. Trust Protectors with no fiduciary duty must add the settlor as a beneficiary (Steve Oshins' "Hybrid Trust.")

B. They cannot add the settlor as a beneficiary unless certain further events occur, such as the following.

   i. The settlor is unable to support himself or herself – creditor exempt assets are not sufficient for support.

   ii. The settlor's net worth drops below a certain level.

   iii. The settlor becomes divorced.

The Jones' Clause

While the offshore trust that was the subject of the Campbell case did not require the Trustee to pay tax liabilities of the Grantor, many lawyers who draft asset protection trusts explicitly provide that the Trustee will be required to pay tax liabilities of the Grantor, in order to avoid a claim that the drafter and the Grantor conspired, or that the lawyer aided and abetted in the evasion of income tax or any other obligation that a debtor may have to the government where it is a criminal or civil offense to assist in evading payment.

Internal Revenue Code Section 684

IRC Section 684 is a relatively short code section aimed at taxing US persons that wish to fund and use offshore trusts. The statutes reads as follows:

(a) In general. Except as provided in regulations, in the case of any transfer of property by a United States person to a foreign estate or trust, for purposes of this subtitle, such transfer shall be treated as a sale or exchange for an amount equal to the fair market value of the property transferred, and the transferor shall recognize as gain the excess of—

(1) the fair market value of the property so transferred, over

(2) the adjusted basis (for purposes of determining gain) of such property in the hands of the transferor.

(b) Exception. Subsection (a) shall not apply to a transfer to a trust by a United States person to the extent that any person is treated as the owner of such trust under section 671.

(c) Treatment of trusts which become foreign trusts. If a trust which is not a foreign trust becomes a foreign trust, such trust shall be treated for purposes of this section as having transferred, immediately before becoming a foreign trust, all of its assets to a foreign trust.

Transfers Not Subject To Tax

- Section 684 generally taxes any transfer of assets from a U.S. trust to a foreign trust based upon the fair market value over the taxpayer's basis.

- In the event that a beneficiary of the foreign trust is a U.S. person, then Section 679 will apply to treat the trust as a Grantor Trust.

- As a result of the above, Section 684 will not apply unless a U.S. person makes a transfer to a foreign trust that has no U.S. beneficiaries, and that trust with no U.S. beneficiaries is a complete gift trust.

- Regulation Section 1.684-4(d) Example 1 provides an examples as follows:

> Reg. Section 1.684-4(d) Example 1 states: A transfers property which has a fair market value of 1000X and an adjusted basis equal to 400X to T, a domestic trust, for the benefit of A's children who are also U.S. citizens. B is the trustee of T. On January 1, 2001, while A is still alive, B resigns as trustee and C becomes successor trustee under the terms of the trust. Pursuant to Section **301.7701-7(d)** of this chapter, T becomes a foreign trust. T has U.S. beneficiaries within the meaning of Section **1.679-2** and A is, therefore, treated as owning FT under section **679**. Pursuant to Section 1.684-3(a), neither A nor T is required to recognize gain at the time of the migration. Section **1.684-2(e)** provides rules that may require A to recognize gain upon a subsequent change in the status of the trust.

Application of Section 684 Upon Death

- In the event that Section 684 did not apply during the Grantor's lifetime, then Section 684 may apply upon the Grantor's death.

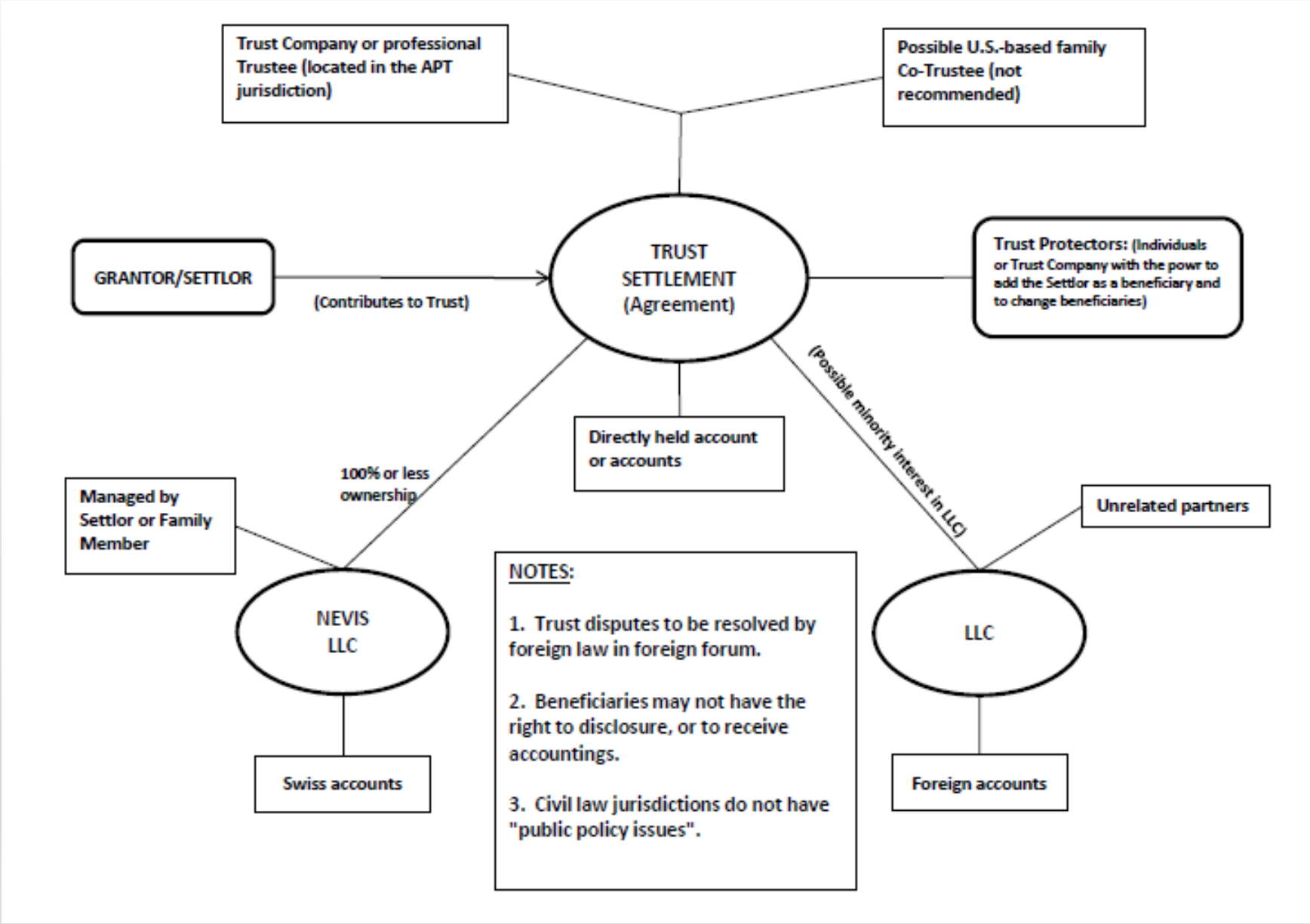
- The only exception to the application of Section 684 upon the Grantor's death is when the assets of the foreign trust are included in the Grantor's estate. In that event, Section 684 would not apply.

1.684-3(c)Related
Certain Transfers At Death— 1.684-3(c)(1)Related
Section 1014 Basis. — The general rule of gain recognition under §1.684-1 shall not apply to any transfer of property to a foreign trust or foreign estate or, in the case of a transfer of property by a U.S. transferor decedent dying in 2010, to a foreign trust, foreign estate, or a nonresident alien, by reason of death of the U.S. transferor if the basis of the property in the hands of the foreign trust is determined under section 1014(a).

Are Foreign Asset Protection Trusts A Dirty Word?

You Bet Your APT They Are(n't)!

The Anatomy of a Typical Offshore or APT State Trust Arrangement



Advantages of Foreign Asset Protection Jurisdiction Use - 1

1. No Full Faith and Credit Clause Issue

2. No Conflict of Law Issues – Comment to Uniform Voidable Transfers Act Issue

3. Nevis Requires a $100,000 Court Deposit to Challenge a Trust in that Jurisdiction, and another $100,000 if a Nevis LLC is used.

4. Lawyers in most FAPT Jurisdictions Are Not Permitted to Work on a Contingency Basis, and Most of Them Are Conflicted Out for Having Represented the Trust Company Involved.

Advantages of Foreign Asset Protection Jurisdiction Use - 2

5. Civil Law Jurisdictions Do Not Bend Trusts for Public Policy Considerations, Such as Prohibiting Distributions to Beneficiaries Who Marry Same Sex or Other Races or Religion Requirements.

6. Absolutely No Exception Creditors.

7. Holocaust Survivors and Potential Political Refugees for Peace of Mind.

8. Delaware and Nevis have statutes that allow married couples to transfer TBE assets to trusts and then receive assets back as TBE to provide protection for situations where there would be a creditor with a judgment against one of the spouses.

9. Assures Grantor Trust status without having any “Grantor Trust Powers” being necessary.

Impact of Rensin, Campbell and Cleopatra

Three (3) recent Asset Protection Trust cases will bolster the use and morale of Asset Protection Trusts, given that these were successes for debtors and those who established the trust arrangements.

In **Rensin**, a Cook Islands Asset Protection Trust formed many years before the debtor had problems was moved to Belize, and the debtor added $350,000 to the trust after he had a judgment against him from the Federal Trade Commission.

The trustee of the trust invested in Cayman Island annuity contracts that had the debtor as beneficiary.

The debtor resided in Florida.

The bankruptcy court concluded that the trust itself would not protect the debtor, but that the annuity contracts were exempt from creditor claims under Florida law, and that the Florida Fraudulent and Bankruptcy Fraudulent Transfer Acts did not apply because the debtor did not purchase the annuities – the trustee did.

Impact of Rensin, Campbell and Cleopatra, (Cont'd)

In **Campbell**, an Asset Protection Trust formed many years before the debtor had financial problems was found by a tax court judge to be immune from the collection powers of the IRS in determining whether a Offer in Compromise made by the debtor should be accepted.

In **Cleopatra**, a third party trust established by the debtor's father for her health, education and maintenance was accessible to her ex-husband for child support as an exception creditor under California law.

The trust was moved to South Dakota and some time thereafter the trustee refused to make continuing payments.

The South Dakota Supreme Court determined that the Full Faith and Credit Clause of the U.S. Constitution did not require California law to apply with reference to collection law rules.

Taking the above into consideration, we have interviewed a number of experts in this field, and have provided you with their articles and insight on the following slides.

Leimberg Information Services, Inc.

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #390

26-Aug-19

Subject: Alan Gassman, Martin M. Shenkman & Wesley Dickson on *In re Rensin*: How One Man's "Hippo"crisy Might Change Offshore Trust Planning Forever

"This decision can be viewed as a victory for both offshore and domestic asset protection trusts, given that, by the judge's ruling, an independent trustee can purchase an asset that is exempt from creditor actions in the state of a debtor's domicile and place it in the debtor's name, even if a court rules that the law of the residency of the state applies. Many states have statutes that are worded identically or almost the same as Florida's, so this backdoor safety hatch could be a very nice thing for debtors to have in their back pocket. Mr. Rensin moved to Florida to protect his homestead, and he quickly moved his Trust to Belize to protect his assets. The move to Florida turned out to be a good idea, as explained below."

Alan Gassman, **Martin M. Shenkman** and **Wesley Dickson** provide members with commentary on *In re Rensin*.

Alan Gassman, JD, LL.M is the founding partner of the law firm of **Gassman, Crotty & Denicolo, P.A.** in Clearwater, Florida. Alan is a frequent contributor to LISI and has authored several books and many articles on Estate and Estate Tax Planning, Trust Planning, Creditor Protection Planning, and associated topics. Most recently, Alan is the coauthor of The Section 199A (and 1202) Handbook: The Advisor's Guide to Saving Taxes on Business and Investment, with Brandon Ketron, Martin Shenkman, Jonathan Blattmachr, and Robert Schenck.

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in Fort Lee, New Jersey and New York City who concentrates on estate and closely held business planning, tax planning, and estate administration. He is the author of 42 books and more than 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), on the Board of the American Brain Foundation, and the American Cancer Society's National Professional Advisor Network.

LISI Article – *In re* Rensin…Continued

Wesley Dickson is a 3rd year law student at Stetson University College of Law in Gulfport, Florida. Prior to beginning law school, he attended Stetson University, attaining a bachelor's degree in Public Management. After finishing law school, Wesley plans on practicing tax or business law in Florida.

Here is their commentary:

EXECUTIVE SUMMARY:

The judge in *In re Rensin* found that an old and cold asset protection trust formed in the Cook Islands and moved to Belize was subject to Florida law and not protected from the creditors of a Florida resident who was the settlor and beneficiary, but also found that monies that were recently added to the trust, and used by the trustee to buy a creditor exempt annuity, could not be recouped by creditors. The reasoning was that the debtor himself did not engage in a transfer to avoid creditors. The trust, which was formed and originally funded well before the debtor engaged in criminal action that caused over $14,000,000 dollars of debt that could not be discharged, has, so far at least, managed to preserve over $2,000,000 invested in customized Caymans Island annuity contracts. This apparently favorable result occurred despite the Judge ruling that Florida law would apply to the Belize Trust, and that creditors would have been able to reach the trust assets if they were not held in annuities.

The May 2019 Florida Bankruptcy Court ruled in the case of *In Re Rensin*. *Rensin* is a story involving a terrible fraud perpetrated by a company called BlueHippo. Money was scattered across three islands, and subject to a $14,000,000 dollar FTC judgment.[i] Apparently Mr. Rensin became a hardcore and deceptive debtor with aggressive advisors whose strategy of having the Trustee of the offshore trust purchase annuities has worked well, so far.

The well written opinion covers the following topics, and will hopefully be appealed to the Federal District Court, and then possibly to the 11th Circuit, so that we can have more certainty with respect to offshore trust and annuity planning.

LISI Article – *In re* Rensin…Continued

The court's opinion primarily covered the following questions:

1. Will Florida or Belize law apply to the Trust? If Florida law applies, then will the Trust assets be considered as being accessible to the trustee in bankruptcy?

2. Will the annuities, annuity payments, and the Regions Bank account that was funded from annuity payments be protected from creditor claims under Florida Statute Section 222.14 when the trust was the "owner" of the annuities but Mr. Rensin was the named beneficiary under the policies?

3. Does Florida Statute 222.30, which aims to prevent transfers made by a debtor into otherwise exempt assets to avoid the reach of creditors, apply to allow the transfers of the annuities to be held for Mr. Rensin?

4. What happens to Mr. Rensin's Florida homestead?

Practitioners in states other than Florida should evaluate the lessons of *Rensin* as several important points will apply in other contexts, even if the applicable state law differs from the Florida statutes above.

FACTS:

Mr. Rensin sold a business in 2001 for approximately $9,000,000 and placed the proceeds with SouthPac Trust Company in the Cook Islands under an irrevocable trust (hereinafter referred to as "Joren Trust" or "Trust") of which he was the beneficiary.

He subsequently started a business called BlueHippo Funding, which apparently was solely intended to defraud people who had bad credit. The company promised that people with bad credit could send $100 initially, and then subsequent lay away payments, to qualify for full financing of a computer. This, of course, was a ploy; and over the many years that the company was in business, only one computer ever got delivered.[ii]

The BlueHippo website, as it existed in 2008, offered to "provide an effective alternative [to purchasing computers] for people with limited

LISI Article – *In re* Rensin…Continued

financing options due to less than perfect credit or no credit at all."[iii] They called themselves "the nation's leading direct response merchandise lender," and claimed to specialize in providing computers and televisions.[iv] This Hungry Hungry Hippo kept taking peoples' hard-earned cash, and in the end took in approximately $15 million from unfortunate victims.

After years of litigation, the Federal Trade Commission (FTC) received a $13,400,627.60 judgment against BlueHippo Funding and Mr. Rensin, personally. Between the initial filing of the complaint by the FTC in 2008, and the handing down of this judgment, there was intense litigation and a number of financial and property transfers and purchases which are beyond this discussion.

Despite facing litigation as both BlueHippo, and as an individual, Mr. Rensin apparently caused SouthPac to transfer the trusteeship of the Joren Trust from the Cook Islands to Orion Trust Company in Belize. The Orion Trust Company is affiliated with the law firm of Arguelles & Company, LLC, and is considered to be a reputable trust company in Belize.[v] For many years, Belize has been a very debtor-friendly country which basically has no fraudulent transfer statute that can be used to override last minute transfers to trusts there, even those intended to avoid creditors, as long as the creditor does not have a judgment against the debtor in Belize. The website for Orion Trust Company shows 12 employees, including a banker who has 30 years' experience, including work at Barclays' branches in Belize and the Cayman Islands. The founder of Arguelles & Company, LLC, Emil Arguelles, is a member of both the Belize and New York Bars and has an undergraduate degree from Marquette University in Milwaukee, WI.[vi]

There is no allegation that any of the "Hippo money" was transferred to the Trust, although Mr. Rensin transferred $350,000 to his lawyer towards the end of 2015, and apparently instructed the lawyer to transfer these funds to the Belize trustee. The Trust also paid Mr. Rensin around $8.6 million in distributions during the course of the lengthy litigation. This money was reportedly used to pay legal fees and some creditors.[vii]

While we do not know if the annuity purchases were the only transactions that occurred with respect to the Trust, we do know that the fixed annuity transferred approximately $15,000 to Mr. Rensin per month.[viii] Additional funds were used by Mr. Rensin to purchase a home in Florida seemingly to

LISI Article – *In re* Rensin…Continued

utilize the state's gracious homestead protections. These protections were lost upon the filing of bankruptcy, which begs the question as to why Mr. Rensin went into bankruptcy. What we do know about the Trust's transactions is that the Trust used all, or almost all, of its assets to purchase two annuity contracts from a Cayman Islands annuity carrier in December of 2015.[ix] These annuities were apparently written to provide lifetime payments to Mr. Rensin, with the residue of assets held under the variable annuities to be owned by the Trust after Mr. Rensin's death.

One annuity went to "fixed payment mode" immediately upon funding. As mentioned above, this gave Mr. Rensin the irrevocable right to receive $15,000 per month for the rest of his life, with the remainder of the annuity assets to be held by the Trust under the "annuity wrapper" after his death.

Under the second annuity contract, Mr. Rensin had no enforceable legal right to receive payments until the contract went into "payment mode." Until then, the Trust had the ability to prevent Mr. Rensin from receiving payments from this "variable" annuity. This annuity gave Mr. Rensin a right to borrow up to 90% of the value of the assets held under each contract, but the Trustee had the right to cancel the annuity at any point in time, effectively making Mr. Rensin's right to borrow subject to veto.

Mr. Rensin also had a $79,014 Regions Bank account that was funded solely from the $15,000 per month payments received from the annuities, which he claimed was exempt under Florida Statute 222.14, which provides, in relevant part, that "[t]he cash surrender values of . . . proceeds of annuity contracts issued to citizens or residents of the state . . . shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor. . ."[x]

The court did not discuss whether Mr. Rensin might be found to be in contempt of court for not turning over assets under the trust that he might be alleged to have control over. This will be a tough argument to win for the Trustee in Bankruptcy, given the Bankruptcy Court's findings as to the degree of independence that the Trustee had under the Trust.

COMMENT:

LISI Article – *In re* Rensin…Continued

1. What Law is Binding on Whether Creditors Can Reach into the Trust?

Mr. Rensin argued that Belize law should apply. He claimed that, since the Trust and the Trust assets were located in Belize, the ruling should be subject to its laws. The FTC, however, argued that Florida law would be more appropriate, as the State was the venue for the court proceedings and recently became the home of the defendant. Those who have used domestic asset protection trusts should take note that this is at least the third Bankruptcy Court decision to determine that the law of the domicile of the settlor of an asset protection trust applies to allow creditors into the trust, and that domestic asset protection trusts may be at risk if they cannot be moved offshore during the pendency of litigation that might arise from matters that occur after such trusts have been formed and funded. However, these cases have solely been bankruptcy cases, and certainly the instant case is one of a bad actor. So, it is not certain that the same result will apply in other instances.

Despite the fact that bankruptcy courts are split on which choice-of-law rules apply in state bankruptcy cases, the court determined that Florida law should apply in this case. Additionally, the opinion indicated that under these rules, the law of another jurisdiction will not apply if that law is contrary to a public policy of Florida.[xi]

The judge cited previous bankruptcy court decisions, including *In re Brown* and *In re Lawrence*, which all had a similar result without explanation of how the courts have come to this conclusion, as discussed below.[xii] This, however, was the first decision known to the author where an "old and cold" asset protection trust, that was formed and funded well before a creditor problem was known or expected to have had occurred, was given this treatment. Note that in the *Lawrence* case, the beneficiary held the power to repeatedly replace the trustee until one complied with the wishes of the beneficiary. Facts of that nature may not be replicated in properly planned spendthrift trusts. Further, in the instant case, Mr. Rensin was clearly a bad actor. So, as noted above, it is not clear that the decisions in the *Lawrence* or *Rensin* cases should be applied to spendthrift trust cases with better facts.

Like the aforementioned bankruptcy court decisions, the judge did not discuss the U.S. Supreme Court case of *Hanson v. Denckla*, which

LISI Article – *In re* Rensin…Continued

determined that Delaware law had to apply to a Delaware trust when the State of Florida had no *in rem* jurisdiction over the testatrix. While this case was ultimately decided on the lack of personal jurisdiction, the Supreme Court analyzed the legitimacy of a "Full Faith and Credit Clause" argument that Delaware courts would have to honor the decisions of the Florida courts, and visa-versa.[xiii] The Supreme Court found that Delaware was not required to honor the judgment of the Florida court, given that the Florida court lacked initial jurisdiction. Richard Nenno, a well-published author who has written extensively on the subject of trust jurisdiction, wrote that "*Hanson* continues to be the starting point for analyzing whether personal jurisdiction exists in trust cases."[xiv] If only Bankruptcy Court judges would take notice of this.

Interestingly, Mr. Rensin had litigated over personal jurisdiction in the past. In the case of *Rensin v. State,* the Attorney General of Florida sued Mr. Rensin and his two businesses (collectively "BlueHippo") for violation of the state's Deceptive and Unfair Trade Practices Act as well as its Retail Installment Sales Act.[xv] The State argued that Mr. Rensin had falsely advertised his business and breached the contracts that BlueHippo made to customers.[xvi] The First District Court of Appeals, however, found that Florida did not have jurisdiction and remanded the case to the Circuit Court for Leon County.[xvii]

The *Hanson v. Denckla* decision, as well as subsequent decisions that support the proposition that Florida law should *not* apply to Trusts that are validly formed and funded outside of Florida, are discussed in depth in LISI Newsletter #363 by Alan Gassman and Kateline Tobergte. A part of this article is cited below:[xviii]

> For a party to bring a claim in a non-DAPT state court against a DAPT, it must establish that the court has jurisdiction over the trust or the trustee. The settlor's domicile is a factor when determining if jurisdiction exists, but is not determinative. In the 1958 case of *Hanson v. Denckla*, the U.S. Supreme Court decided that if a state court lacks jurisdiction over a trust and trustee(s), the state law of the state court with jurisdiction over the trust controls even if it affects the application of laws in the state court lacking jurisdiction.[4]

LISI Article – *In re* Rensin…Continued

In *Hanson v Denckla*, Mrs. Donner established a trust while domiciled in Delaware. She later became domiciled in Florida where she executed a will and, shortly before her death, exercised her inter vivos power of appointment which appointed $400,000 to a previously established Delaware trust and $500,000 to Denckla and Stewart. The will entered probate in Florida. Denckla and Stewart argued that the appointment to the trust was not "effectively exercised," so the $400,000 should pass to them through the residuary clause. The Florida court ruled that the appointment was testamentary and therefore void under Florida law. Before the Florida decree had been entered, a declaratory judgment action was brought in Delaware to determine who was entitled to the trust assets. The Delaware court ruled that the appointment was proper and the assets had been properly paid out to the trustees.

The decision went to the U.S. Supreme Court. The U.S. Supreme Court held that "[t]he Florida court did not have in rem jurisdiction over the corpus of the trust or personal jurisdiction over the trust company," and found that the Delaware court decision was controlling. The Supreme Court reasoned that the minimum contacts required for a state court to have personal jurisdiction over a non-resident were not met by a unilateral action of a resident. That means that Florida did not have personal jurisdiction because of the unilateral transfer of funds from Mrs. Donner, a Florida resident, to the Delaware trust. The Supreme Court also reasoned that in rem jurisdiction could not be established just because the owner is or was domiciled in Florida. Furthermore, the Florida court did not have jurisdiction just because the validity of the inter vivos appointment affects Florida's application of Florida probate law. This case makes two important points: (1) a settlor's domicile is not

LISI Article – *In re* Rensin…Continued

determinative of jurisdiction; and (2) the laws in Delaware were not trumped just because Florida had contradicting laws. This is analogous to the issue between DAPT states and non-DAPT states. A settlor's domicile does not dictate the protections afforded a trust because courts must have jurisdiction to hear a claim, and the settlor's domicile does not automatically create jurisdiction. Also, just because one state is DAPT and another is non-DAPT does not mean that the DAPT laws can be trumped by the non-DAPT state.

Richard Nenno, a Managing Director at Wilmington Trust Company and a prolific author on the topic of estate planning, discusses *Hanson* in his award-winning Bloomberg BNA Portfolio 867-2.

> The leading case in this area is *Hanson v. Denckla*, which involved a controversy concerning the right to part of the principal of a trust established in Delaware by a Pennsylvania trustor who subsequently moved to Florida. The U.S. Supreme Court held that a Delaware court was under no obligation to give full faith and credit to a judgment of a Florida court that lacked jurisdiction over the trust's assets and the trustee. The Court, affirming the decision of the Supreme Court of Delaware, discussed the jurisdictional issues as follows:
>
> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case."
>
> *Hanson* remains controlling precedent. In fact, it was cited as such numerous times in at least three U.S. Supreme Court cases that have been decided since 2011. [324] *Hanson* continues to be the

LISI Article – *In re* Rensin…Continued

starting point for analyzing whether personal jurisdiction exists in trust cases. Since *Hanson*, numerous cases have found that insufficient minimum contacts existed to create personal jurisdiction.
(Internal citations omitted)

Notwithstanding the conclusion that Florida law should apply to this Trust, the judge noted that the court did not have jurisdiction over Orion Trust Company, which is probably because it was not served and has never done business in the United States. Reasonable minds can agree that, even if the trust company had been a party, the case would not have ended any differently. The Joren Trustee would have thumbed his or her nose at the bankruptcy court's decision, as discussed briefly below.

It is interesting to note that during the ongoing litigation, the trustee of the Joren Trust (the Belize trust that Mr. Rensin created) sought guidance from the Supreme Court of Belize.[xix] The Belize Supreme Court advised the Trustee not to hand over any assets to the FTC. The Bankruptcy Court decision repeatedly notes that its authority would carry more weight, and would be broader in scope, had the Joren Trustee been added as a party to the litigation, so stay tuned for the hoped for sequel to this interesting drama. Nevertheless, it is doubtful that any Belize Court will follow the instructions of a US Bankruptcy Court without confirming that it is consistent with Belize law. Mr. Rensin may therefore be able to move to Belize or another country that does not respect U.S. judgments and live "happily thereafter" with free economic rights unless or until the injured parties file suit in Belize and get an independent judgment to pursue there, in which event the Trust may still be immune, even if it still were in Belize once a judgment has been received there.

Even if the Belize Supreme Court were to agree with the Bankruptcy Court's opinion, it is unlikely that the Cayman Islands insurance carrier that is apparently holding the annuity company assets would turn those assets over without an order from a Cayman Islands court, if they are still in the Caymans years from now when such an order might someday be obtained. Like Belize, the Cayman Islands do not recognize U.S. judgments, so a trial on the merits of reaching into the annuity contract would have to be won by the creditors, if the Cayman law would even recognize a cause of action.

LISI Article – *In re* Rensin…Continued

One reason that the Trust may have been moved to Belize was so that it could receive contributions from Mr. Rensin that would not be reachable by creditors. The Cook Islands has a 2 year lookback statute. Belize has a "that day" statute, meaning that a creditor cannot chase fraudulent transfers into the trust unless the creditor had a judgment against the debtor, in Belize, on "that day".

2. Does Florida's Fraudulent Transfer Statute That Applies to Transfers Into Exempt Assets Apply As If This Were a Transfer By Mr. Rensin?

The court found that the fixed annuity, which was paying $15,000 a month, qualified for protection under the Florida statutes. Therefore, Mr. Rensin's interest would be exempt from attachment by creditors, assuming that Section 222.30 of the Florida Statutes did not apply. Section 222.30 is aimed at preventing the conversion of assets that would be subject to creditor claims into exempt assets for the purpose of avoiding creditors, but as we see below, the statute only applies if the debtor makes the transfer. The bankruptcy trustee argued that allowing a transfer of funds into annuity contracts "only encourage[s] fraudulent or inappropriate behavior."[xx]

Despite the State's argument, the Bankruptcy Court determined that Mr. Rensin did not make any transfer into the annuities, let alone a transfer for the purpose of avoiding creditors. Instead, the Trustee of the Joren Trust independently decided to invest the monies into the annuity contracts. Even if Mr. Rensin *may* have wanted to transfer the funds, the Trustee determined, in the end, whether or not the funds were to be transferred. Because of Mr. Rensin's lack of total control over the transfer, Section 222.30, in this case, did not apply. Had he maintained control over the decisions involving the trust, the analysis by the judge would have been different.

The judge applied this finding to all of the monies placed in the annuities, including $350,000 that Mr. Rensin transferred to his lawyer, who then transferred it to the Joren Trust, in order to acquire the variable annuity (just months before the $13.4 million judgment was handed down).[xxi] The court reasoned that there was apparently no *direct* evidence indicating Mr. Rensin required or requested that the annuity contract be procured with the $350,000.[xxii]

LISI Article – *In re* Rensin…Continued

3. Are the Annuities Protected Under the Florida, Belize or Cayman Islands Law?

After reaching the conclusion that Section 222.30 did not apply to the transfer of funds to the annuity contracts, the court looked at whether the annuity contracts, and payments from the contracts, were property of Rensin's bankruptcy estate. They held that "[a]lthough exempt from administration, Mr. Rensin's payment rights under [both] annuities . . . are property of the estate."[xxiii]

Next the Court looked at the two annuities separately, in order to determine the rights associated with both.

The court closely examined the language of the first annuity contract, which provided for fixed payments, and determined that it fit within the language of the statute. While the court found that the trustee in bankruptcy has the right to attach and own the remainder interest in the annuity contract, doing so will presumably not result in the loss of Mr. Rensin's sole right to receive payments of $15,000 per month each month for the rest of his life, and to have monies held under the Regions account or other future bank accounts that he may open and fund with such payments also be exempt from creditor claims.

The court also closely examined the language and circumstances of the second annuity contract, which it referred to as a "variable annuity." This name stems from the ability of the trust company, as owner, to control investments, and to make withdrawals when it deems appropriate. The court found that Mr. Rensin's interest in the annuity contract was not an annuity subject to Florida Statute Section 222.14 because Mr. Rensin had no right to benefit from the annuity unless or until it began making payments. The court indicated that the annuity contract included confusing language because there was no definition or rule set forth on when payments would begin.

It is noteworthy that a "Supercreditor" can break into otherwise protected assets per Federal law, so this opinion will be of no solace to those who may owe money to the Government. These types of creditors, which include the SEC, the FTC, or the Department of Justice (as to restitution and Medicare penalties imposed), are creditors that are provided

congressionally mandated collection abilities that far exceed those of traditional creditors.

Citing Florida Statute Section 222.14, Mr. Rensin argued that he was entitled to exempt the payments ($15,000 monthly) from administration in the bankruptcy issue. Section 222.14, in relevant part, allows certain annuity payments to be protected from the reach of creditors.[xxiv] There was no discussion as to whether the lawyer who transferred the $350,000 may have liability under Bankruptcy Code Section 548(a)(1) or 550(a)(1), which is what occurred in the case of *In re Harwell*. This case was discussed in LISI Newsletter #243, which can be viewed by clicking here.[xxv] Perhaps the legal counsel was outside the United States and also has his assets held by the Orion Trust Company, thus being immune from liability from a practical standpoint.

Any lawyer involved in this kind of conduct should tread very carefully, if at all, to assist a debtor in the way that Mr. Rensin was assisted. The best advice from a U.S.-based lawyer may be to have the would-be client hire reputable offshore counsel in order to determine how to proceed.

4. What happens to Mr. Rensin's Florida home?

This issue did not require a great deal of pontification from the bankruptcy court. When filing for bankruptcy, Mr. Rensin only claimed a $160,375 homestead exemption because "he acquired the home within 1,215 days prior to the petition date[,]".[xxvi] The bankruptcy court agreed with the Trustee's contention that his entire exemption was lost because of 522(o) of the Bankruptcy Code, which disallows the entire homestead exemption to the extent that the transfer of assets into homestead has occurred within 10 years of filing for the purpose of keeping assets out of the reach of creditors.[xxvii] Mr. Rensin, in a last ditch effort, attempted to claim a *Maryland* homestead exemption (for a home in Florida), the Court found that the only state exemption law which applied was Florida's.[xxviii]

Conclusion

Even with bad facts, the bad guy doesn't always lose. While it is clear that the debtor had big problems, an ethical judge reading a specific statute gives credit to our legal system by not going outside the present laws.

LISI Article – *In re* Rensin…Continued

Advisors with clients who are relying on domestic or offshore asset protection trusts must communicate the risk that courts may rightly or wrongly apply the law of the residence of the settlor, making "belts and suspenders" planning a necessity. Examples of such planning strategies include: using multiple member LLC's and limited partnerships that have charging order protection, possibly having the client live in a DAPT friendly state, and being able to move the trust offshore to avoid the application of the full faith and credit clause of the U.S. Constitution, while also considering possible contempt of court and other risks that are inherent with aggressive conduct.

This decision can be viewed as a victory for both offshore and domestic asset protection trusts, given that, by the judge's ruling, an independent trustee can purchase an asset that is exempt from creditor actions in the state of a debtor's domicile and place it in the debtor's name, even if a court rules that the law of the residency of the state applies. Many states have statutes that are worded identically or almost the same as Florida's, so this back door safety hatch could be a very nice thing for debtors to have in their back pocket. Mr. Rensin moved to Florida to protect his homestead, and he quickly moved his Trust to Belize to protect his assets.[xxix] He, however, did not emerge from the proceedings unscathed, and it is not clear why he filed bankruptcy in the first place, which apparently turned out to be a mistake.

Judge Kimball wrote an excellent opinion that explains his findings and helps to clarify: Florida Statute Section 222.30, when an annuity is protected under Florida law, and when an offshore trust will be respected in great part, notwithstanding that the law of the debtor's residence may apply.

If this had been a 2014 judgment as the result of an otherwise innocent car accident or a business deal gone awry, the result may have been different. Bankruptcy judges typically feel a duty to creditors who have been flim-flammed, and will continue to "legislate" when they can until higher court decisions may overrule these bankruptcy court level decisions.

It will be interesting to see whether the creditors pursue a contempt holding, given that the Trust was formed and fully funded with apparently legitimate funds well before the flim-flam creditor problem occurred.

LISI Article – *In re* Rensin…Continued

As mentioned above, the court spent most of its decision on the treatment of the annuities. Although the variable annuity was not considered as held by Mr. Rensin, or protected under Belize law, Mr. Rensin had no interest in it that a creditor could take. The Joren Trustee can now easily convert it to a fixed annuity. These annuities turned out to be a house made of sticks or bricks, depending on whether the Florida non-bankruptcy courts agree with this conclusion, if and when a state court supplemental proceeding's cause of action is pursued.

Right now, it seems that even a hog (or in this case a hippo) may have the ability to safeguard some degree of assets when competent planning is used. While Mr. Rensin was able to keep *some* of the assets, most everything he had is gone, including his companies. The age-old phrase may have changed in this case: "Pigs get fat, while well represented hippos might not get completely slaughtered."

Stay tuned, as we will monitor this case and report on subsequent developments as they occur.

Additionally, in the next few days the authors will publish a newsletter where a Tax Court judge ruled that the IRS cannot invade an "Old and Cold" Asset Protection Trust.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan Gassman

Martin M. Shenkman

Wendy Dickson

TECHNICAL EDITOR: DUNCAN OSBORNE

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CITATIONS:

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[i] *In re Rensin*, 17-11834-EPK, 2019 WL 2004000 (Bankr. S.D. Fla. May 6, 2019).

[ii] https://www.ftc.gov/news-events/press-releases/2009/11/ftc-lodges-contempt-charge-against-bluehippo

[iii] https://web.archive.org/web/20071214065418/http://www.bluehippo.com/aboutUs.asp

[iv] *Id.*

[v] According to its website, Arguelles & Company, LLC is one of the premier law firms in Belize, is "Top Ranked" by Chambers Global, and represents such clients as Credit Suisse, Bloomberg, and Chevron.

[vi] This might be the case that made Milwaukee famous.

[vii] *In re Rensin,* at *9.

[viii] *Id.* at *11.

[ix] *Id.* at *10.

[x] Fla. Stat. § 222.14

[xi] *Id.* at *7.

[xii] *See, Goldberg v. Lawrence* (In re Lawrence), 227 B.R. 907, 917-18 (Bankr. S.D. Fla. 1998).

[xiii] *Hanson v. Denckla,* 357 U.S. 235, 78 S. Ct. 1228 (1958).

[xiv] Portfolio 867-2nd: Choosing a Domestic Jurisdiction for a Long-Term Trust, Detailed Analysis, IV. Beneficiaries' Ability to Defeat Clients' Section of Trust Sales

[xv] 34 Fla. L. Weekly D402 (1st Dist. Ct. App.) (Feb. 2009).

[xvi] *Rensin v. State*, 18 So. 3d 572, 574 (Fla. Dist. Ct. App. 2009).

[xvii] *Id.*

[xviii] *Id.*

[xix] *In re Rensin,* at *11.

[xx] *In re Rensin,* at *33-34.

[xxi] *Id.*

[xxii] One of the more common behaviors of aggressive hippos is the ever-dominant practice of dung showering, a ritual in which these gentle giants show dominance with their tails rather than their legal representation. Many litigation attorneys are still following this example today.

[xxiii] *Id.* at *11.

[xxiv] Fla. Stat. § 222.14

[xxv] http://leimbergservices.com/openfile.cfm?filename=d%3A%5Cinetpub%5Cwwwroot%5Call%5Clis%5Fapp%5F243%2Ehtml&criteria=harwell

[xxvi] *In re Rensin*, at *46.

[xxvii] 11 U.S.C. § 522(o).

[xxviii] *In re Rensin,* at *47.

What about life insurance or annuity contracts with offshore carriers that own entities holding investments and businesses?

- Florida offers unlimited protection of life insurance and the cash values of annuity contracts. The life insurance and annuity industries have come to market with mutual fund wrapped products that provide income tax deferral and creditor protection for policyholders and their families.

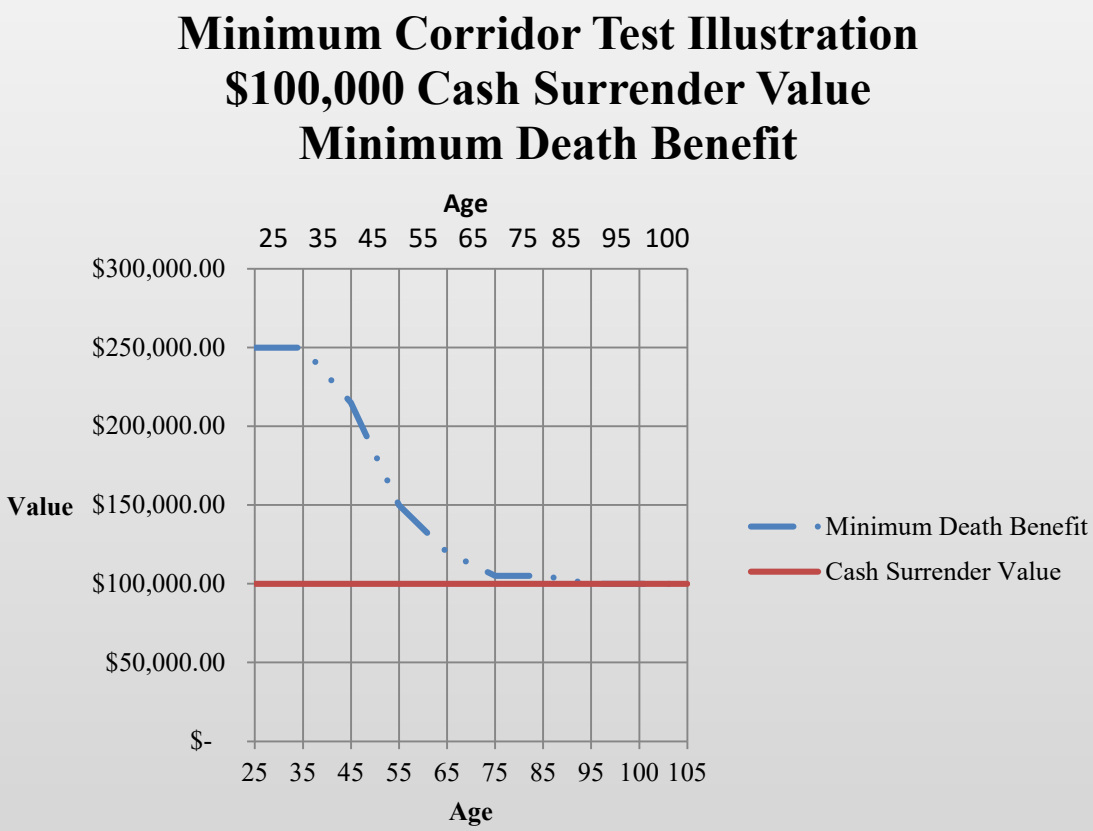
- Florida Statute Section 222.14 provides as follows:

> **Exemption of cash surrender value of life insurance policies and annuity contracts from legal process. -- The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected for the benefit of such creditor.**

This applies to variable annuities pursuant to a Florida Supreme Court decision.

	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	Option A: maintain level death benefit Option B: face amount increases as cash value grows Option C: 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

Tax Talk



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%

A good reason to go offshore with life insurance policies – besides to escape State Regulators with regard to investments, is the added advantage of having foreign asset protection laws apply.

HAMPTON FREEZE

Crag T. Hampton is a tax lawyer who invented or popularized the “Hampton Freeze” in 1995.

The Hampton Freeze is based upon the premise that the mortality element of a life insurance policy can be provided through appreciation in the cash value of a policy. However, the policy owner must be restricted from controlling or directing the assets held by the insurance company in a separate account for the lifetime of the policy.

There are reputable private placement life insurance carriers that are willing to structure policies using the Hampton Freeze, and there are reputable law firms that will issue opinion letters thereon.

Typically a regular policy will be amended to become a Hampton Freeze policy when the insured reaches an older age where a mortality clauses are more material.

The amount received upon death is the sum of:

1. The guaranteed amount of the death benefit from the life insurance policy; plus
2. The cash value on the date of death, less any loans, expenses and fees; plus
3. The policy’s mortality reserve value, which is the appreciation in the policy’s segregated account less the amount of cumulative premiums.

The amount received upon surrender is the lesser of:

1. The case value (defined in #2 above); or
2. The sum of all premiums paid

Frozen cash value structures are only available in the offshore markets. They don't work in the United States because they are intentionally designed to fail Section 7702(b)(c) of the Internal Revenue Code.

Instead, these structures rely on Section 7702(g) which refers to contracts that qualify as life insurance under "applicable law," which has been interpreted to mean state law, territorial law or foreign law.

Can a private placement life insurance policy own a term life policy in order to provide the necessary death benefit?

Off-shore private placement life insurance is typically more expensive than domestic life insurance because of the higher mortality costs that apply in the life insurance industry outside of the U.S.

There is nothing in the Internal Revenue Code which prevents having the mortality feature of a life insurance policy based upon one or more term policies that the carrier can own under the policy “wrapper”.

There are reputable private placement carriers and U.S. law firms willing to use this technique and provide opinion letters as well.

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
- The Tax Cuts and Jobs Act reversed the IRS's position in Revenue Ruling 2009-13 and provides that basis is not reduced by "cost of insurance" charges incurred under the contract.

Leimberg Information Services, Inc.

Steve Leimberg's Asset Protection Planning
Email Newsletter Archive Message #389

Date:05-Aug-19

Subject: Alan S. Gassman, Martin M. Shenkman & Joe Cuffel on *Campbell v. Commissioner* - Tax Court Concludes that the IRS Cannot Reach Assets in an Old and Cold Self-Settled Offshore Trust

"In Campbell v. Comm'r of Internal Revenue, the IRS sought to classify assets that the taxpayer had placed in an offshore trust before the income tax problems arose as being accessible for the purpose of determining his ability to pay a tax judgment in an Offer in Compromise review proceeding. The taxpayer appealed the reasonableness of this determination to the U.S. Tax Court, and Tax Court Judge Kathleen Kerrigan presided over the proceedings and concluded that the IRS abused its discretion in concluding that the assets under the trust would be considered as an available source of payment in an Offer in Compromise."

Alan S. Gassman, **Martin M. Shenkman** and **Joe Cuffel** provide members with commentary on *Campbell v. Commissioner*.

Alan S. Gassman, JD, LL.M is the founding partner of the law firm of **Gassman, Crotty & Denicolo, P.A.** in Clearwater, Florida. Alan is a frequent contributor to LISI and has authored several books and many articles on Estate and Estate Tax Planning, Trust Planning, Creditor Protection Planning, and associated topics. Most recently, Alan is the coauthor of The Section 199A (and 1202) Handbook: The Advisor's Guide to Saving Taxes on Business and Investment, with Brandon Ketron, Martin Shenkman, Jonathan Blattmachr, and Robert Schenck.

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in Fort Lee, New Jersey and New York City who concentrates on estate and closely held business planning, tax planning, and estate administration. He is the author of 42 books and more than 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), on the Board of the American Brain Foundation, and the American Cancer Society's National Professional Advisor Network.

Joe Cuffel is a third-year law student at Stetson University College of Law in Gulfport, Florida and is a summer clerk at Gassman, Crotty & Denicolo, P.A. Prior to law school, he attended Florida State University, attaining bachelor's degrees in Marketing and Real Estate. After law school, Joe intends to practice in Florida in the areas of Tax and Business Law.

Here is their commentary:

EXECUTIVE SUMMARY:

In *Campbell v. Comm'r of Internal Revenue*, the IRS sought to classify assets that the taxpayer had placed in an offshore trust before the income tax problems arose as being accessible for the purpose of determining his ability to pay a tax judgment in an Offer in Compromise review proceeding. The taxpayer appealed the reasonableness of this determination to the U.S. Tax Court, and Tax Court Judge Kathleen Kerrigan presided over the proceedings and concluded that the IRS abused its discretion in concluding that the assets under the trust would be considered as an available source of payment in an Offer in Compromise.

FACTS:

John F. Campbell filed personal income taxes in 2001, reporting income of $201,519, and paid the taxes due thereon. In 2002, Campbell and his family moved to St. Thomas in the U.S. Virgin Islands. At that time, he also began the process of setting up a family trust. In April, 2004, Campbell established the First Aeolian Islands Trust (the Trust), and funded it with $5,000,000 (20% of his then-applicable net worth). In May of that same year, the IRS notified Campbell that his 2001 personal income tax form was going to be audited.

In 2006, Campbell moved back to the U.S. to take advantage of real estate opportunities in the Gulf Coast Region after the series of devastating hurricanes in that area prompted law makers to establish the "Go-Zone Initiative".[i] Those investments failed due to economic and Chinese drywall problems that were beyond Mr. Campbell's control.

LISI Article – Re: *Campbell v. Commissioner*…Continued

In 2007, the IRS issued a "statutory notice of deficiency" seeking to collect Campbell's 2001 unpaid tax liability – a "$1,135,192 deficiency and a Section 6662(a) accuracy-related penalty of $113,519."[ii]

In an attempt to settle the tax liability, Campbell filed for an Offer in Compromise ("OIC"). The IRS Offer in Compromise program enables taxpayers to reduce the amount of tax they would otherwise owe based upon the taxpayer's ability to pay, or "doubt as to collectibility," and other factors, which include "doubt as to liability" and "promotion of effective tax administration."[iii]

The IRS rejected Campbell's offer to settle for $12,603, and calculated that his "Reasonable Collection Potential" was millions of dollars.

A taxpayer whose Offer in Compromise application is rejected has the right to appeal the rejection to the Tax Court by filing a petition for judicial review of a determination within 30 days of the date of the rejection letter pursuant to 26 U.S.C. § 6330(d)(1)(B). While the IRS has no duty to negotiate with a taxpayer before rejecting an OIC, under 26 U.S.C. § 6330(c)(2) a taxpayer who has filed an Offer in Compromise may raise any relevant issue relating to the unpaid tax or the proposed levy, including spousal defenses, challenges to the appropriateness of the collection action, and offers of collection alternatives.

Judge Kerrigan found that Mr. Campbell had placed approximately $5,000,000 under a Nevis offshore asset protection trust with Meridian Trust Company in April of 2004.[iv]

> Petitioner funded the Trust with a $5 million contribution. At the time of the contribution petitioner's net worth was approximately $25 million. No contributions to the Trust have been made since petitioner's initial contribution in 2004.
>
> The taxpayer and his family were beneficiaries of the Trust, but did not retain the right to replace the trust company or the Trust Protector. The Trust Protector had the power to suggest a replacement trust company, but also did not have the power to replace the trust company.

LISI Article – Re: *Campbell v. Commissioner*…Continued

as changed to SouthPac's Nevis office. At the time of the Offer in Compromise appeal, the trust was valued at $1,493,912 by the IRS.[v]

The roughly $3,500,000 of trust assets that were spent for the benefit of Mr. Campbell and his family was determined by the IRS to be dissipated asset funds "used for investments between 2006 and 2010," which brought the IRS's calculation of Mr. Campbell's reasonable collection potential to at least $19,500,000.[vi]

The Tax Court concluded that Mr. Campbell set up and funded the trust well before investing over $27,000,000 in 2006 in GO Zone Properties in Louisiana, Alabama, and Mississippi. Unfortunately, he had a terrible economic result, not only because of plummeting home values, but also because of Chinese drywall issues.

For those who do not recall the calamity of Chinese drywall, up to 100,000 homes in the U.S. were remodeled or built with defective drywall manufactured in China. This drywall, when placed in conditions with high heat and humidity (e.g. the entire Gulf Coast Region that had just been battered by a series of hurricanes), emitted a gas called hydrogen sulfate that smelled like rotten eggs, corroded copper, and caused health issues to the houses' inhabitants. Because the main issue associated with Chinese drywall is the fact that it releases a corrosive gas that can effectively get into every part of a house, reconciling a Chinese drywall situation can sometimes cost more than building a new house.[vii]

The "funds [Campbell] used for the production of income" between the time he invested in GO Zone until 2010, when he had accumulated $3.5 million of negative equity, were sought by the IRS in 2019, as dissipated assets, which contributed to his reasonable collection potential.[viii] The Court found that the investments Campbell made after becoming aware of his 2001 tax liability were not "in an attempt to avoid paying" and were outside the period of time that the Internal Revenue Manual guidelines would permit an appeals officer to look back to in determining whether the taxpayer dissipated assets.[ix]

In this case, because the additional tax and penalty was assessed in April of 2010, the IRS revenue officer could only have looked back six months from that date for assets that Campbell "sold, transferred, encumbered or otherwise disposed of…in an attempt to avoid the payment of the tax

liability."[x] Despite Campbell's awareness of the examination of his 2001 Form 1040 in May 2004, his "ability to pay" was dependent upon the date he was assessed the tax liability at issue.

The Tax Court was not looking at the petitioner's underlying tax liability. The Tax Court reviewed the "administrative determination made by the Appeals Office regarding nonliability issues."[xi] The Standard of Review for these cases is "abuse of discretion."

In assessing whether or not the appeals officer abused her discretion in determining Campbell's appeal, the court looked at the process by which the officer analyzed, chose, and calculated the assets which the IRS believed the taxpayer possessed.

Campbell's ground for the compromise of his tax liability was "doubt as to collectability," which "exists in any case where the taxpayer's assets and income are less than the full amount of the tax liability."[xii] Judge Kerrigan stated that "[g]enerally, under respondent's administrative pronouncements, an OIC based on doubt as to collectability will be acceptable only if the offer reflects the RCP of the case[.]"[xiii]

The RCP is the "Reasonable Collection Potential". To determine a taxpayer's RCP, the appeals officer follows the IRM guidelines. These guidelines are comprised of four categories of assets:

(1) Assets, including dissipated assets;
(2) Future income;
(3) Amounts collectible from third parties; and
(4) Assets available to the taxpayer but beyond the reach of the Government.[xiv]

The appeals officer "calculated petitioner's RCP as $19.5 million, which included dissipated assets, amounts collectible from third parties, and assets beyond the reach of the Government."[xv] Judge Kerrigan assessed the validity of the inclusion of each category of asset included in the calculation and applied the "abuse of discretion" standard to the decision to include these assets in the RCP.

LISI Article – Re: *Campbell v. Commissioner*…Continued

COMMENT:

The petitioner put a large sum of money into an irrevocable grantor trust in Nevis, before knowledge of any pending IRS review. Given that the only contribution was made before the IRS audit, and that no contribution was made thereafter, coupled with the fact that the Trust was not considered to have held assets as "a transferee, nominee, or alter ego of petitioner,"[xvi] the Trust was respected as not being available as a source of payment by the Tax Court.

The Tax Court did not discuss whether state or federal law would enable the Internal Revenue Service to reach the assets of an offshore trust, but Judge Kerrigan, who delivered the Opinion, is a former partner in the law firm of Baker and Hostetler, with a background in tax and legislative processes. She has been sitting on the Tax Court for 7 years of her 15-year term.

Judge Kerrigan must have concluded that the IRS would not be able to reach the assets of a legitimately formed Nevis asset protection trust, even though the trustee of that trust apparently allowed $3,500,000 of assets, plus growth thereon, to benefit the taxpayer.

We believe that Judge Kerrigan made the right call. Even if she had concluded that the questionable Bankruptcy Court decisions that have indicated that U.S. law should apply when a U.S. debtor forms an asset protection trust, the Nevis law does not recognize U.S. judgments. In fact, the recent Belize Supreme Court decision referenced in *In Re Rensin* concluded that the trustee of a Belize asset protection trust should not turn assets over as the result of a U.S. bankruptcy court order. The Belize Supreme Court ordered the trustee in that case "not to comply with any court order to turn over assets in the Joren Trust other than an order from the Supreme Court of Belize."[xvii]

The Court noted a number of positive facts in its evaluation of the case:

> Petitioner created the Trust in 2004 as an irrevocable grantor trust. He and his family are named beneficiaries of the Trust. Under Section 671, petitioner is required to report all tax consequences of the Trust's activities on his personal federal tax return. The Trust document indicates that petitioner has no control over the trustee and [**20] cannot force the trustee to make distributions or investments. Petitioner contends that as a beneficiary of the Trust he does not hold a property interest in the Trust assets.

LISI Article – Re: *Campbell v. Commissioner*…Continued

Specifically, Judge Kerrigan indicated that it was "arbitrary, capricious, and without sound basis in fact or law" for the IRS to determine the Trust was a nominee of Mr. Campbell where the IRS representatives failed to present "any evidence supporting the determination that [Campbell] has a property right in the Trust under State law."[xviii] Beyond failing to characterize Mr. Campbell's 2006 GO Zone investments as deceptive means to "shirk his financial obligation to the public fiscal policy," the Court found that the $19.5 million determination could not be sustained against the proposed levy:[xix]

> The trustee, in its sole discretion, directed a portion of the Trust's assets to be invested in Antilles Offshore Investors, Ltd. Petitioner could not and did not control this decision. For reasons addressed previously, we conclude that the Trust's assets are not considered assets available to petitioner but beyond the reach of the Government. Therefore, we find that the appeals officer abused her discretion in determining that petitioner had control over the Trust's assets.
>
> We have considered all other arguments made and facts presented in reaching our decision, and to the extent not discussed above, we conclude that they are moot, irrelevant, or without merit.[xx]

The Court noted that the taxpayer did not have any control over trust distributions or investments. "Petitioner maintains no control over the trustee to make distributions or investments." It is surprising that investments were noted as control over investments, which is not generally viewed as a tax sensitive power.

Tax Court Memorandum Opinions, such as the one considered here, can be appealed to one of the U.S. Courts of Appeals once a decision is entered by the Tax Court.[xxi] The notice of appeal must be filed with the Tax Court within 90 days after a decision is entered, or 120 days if the IRS appeals first. The taxpayers may also file a motion for reconsideration of an opinion within 30 days after the written opinion was mailed; the motion is considered by the Judge that decided the case, and is rarely granted. However, in a case such as Mr. Campbell's, the matter may be sent back to the IRS to reconsider collection alternatives or other matters.

Conclusion

The taxpayer's foreign asset protection trust ultimately escaped inclusion as an asset to be considered for purposes of the taxpayer's Reasonable Collection Potential. While the IRS wanted to count it among the assets that could be used to pay the tax levy, Judge Kerrigan ruled that the Trust was not includable in the calculations of Campbell's assets. The factors that may have impacted this decision were as follows:

(1) The taxpayer established the Trust many years before the notice of tax levy occurred, therefore his decision to place assets in the Trust was not viewed as an attempt to hide and protect the money from creditors.

(2) The transfers to the Trust were reasonable relative to the taxpayer's net worth.

(3) The taxpayer was a beneficiary but was not in direct control of the assets. The Tax Court noted that the trustee directed the funds of the Trust in the trustee's sole discretion.

(4) Inherent in the Court's opinion is the fact that the Trust was properly administered. Had the taxpayer in reality controlled the Trust, had Trust formalities been ignored, etc., the results may have been different. For example, in *Wyly*, the Court imputed control over the protectors to the taxpayer and disregarded the trust.[xxii]

(5) The taxpayer's financial issues were not a result of the taxpayer being a bad actor, as in the *Klabacka*[xxiii] or *Rensin* cases.

(6) The Court did not focus on public policy issues.[xxiv]

The Tax Court ruled that the Nevis Trust must be respected in this case, for good reason. Due to the timing of the establishment of the trust, and the way the trust was structured, there is no doubt why Judge Kerrigan ruled that the Appeals Officer abused her discretion in her attempt to include the Trust assets in her RCP calculation.

The difficulty for advisors is how to synthesize the various cases addressing domestic and foreign asset protection trusts. Many of the unfavorable cases have involved bad actors, and there has been almost no discussion in the decisions as to what the basis is for determining that a trust established in a foreign jurisdiction would for some reason be subject to the law of the residence of the settlor. While "bad facts" are often not relevant to the legal analysis of the case involved, one cannot help but wonder what the implications are. Overall, the facts in so many cases have been so egregious that one must wonder whether or how the legal reasoning in those cases may be applied to more reasonable circumstances. Perhaps this *Campbell* case is an illustration of a better fact case, and a Judge who understands how these trusts work and can legitimately be used. This situation may be communicated to clients who have or are considering the use of a self-settled trusts of any type.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Alan Gassman
Martin M. Shenkman
Joe Cuffel

TECHNICAL EDITOR: DUNCAN OSBORNE

CITE AS:

CITATIONS:

[i] 26 U.S.C.A. § 1400N (West). The Gulf Opportunity Zone Act, also known as the GO Zone Act, was enacted in 2005 and repealed in 2018. The tax benefit encouraged investment in areas affected by Hurricane Katrina.

[ii] *Campbell v. Commr. of Internal Revenue*, 117 T.C.M. (CCH) 1018, 3 (Tax 2019).

[iii] 26 C.F.R. § 301.7122-1(b).

[iv] *Campbell v. Commr. of Internal Revenue*, 117 T.C.M. (CCH) 1018, 1 (Tax 2019).

[v] *Id.* at 3.

[vi] *Id.* at 4.

[vii] Chinese Drywall Woes. The Newsletter for Warranty Management Professionals. December 10, 2009. https://www.warrantyweek.com/archive/ww20091210.html. To completely remove and replace defective Chinese drywall, home construction and real estate companies estimate at least $100,000 per home.

[viii] *Campbell v. Commr. of Internal Revenue*, 117 T.C.M. (CCH) 1018, 6 (Tax 2019).

[ix] *Id.* at 15.

[x] *Id.* at 14-15.

[xi] *Id.* at 12.

[xii] *Id.* at 13.

[xiii] *Id.*

[xiv] *Id.* at 14.

[xv] *Id.* at 13.

[xvi] *Id.* at 18.

[xvii] *In re Rensin*, 600 B.R. 870, 876 (Bankr. S.D. Fla. 2019).

[xviii] *Campbell v. Commr. of Internal Revenue*, 117 T.C.M. (CCH) 1018, 6 (Tax 2019).

[xix] *Id.* at 17.

[xx] *Id.* at 22.

[xxi] https://www.ustaxcourt.gov/taxpayer_info_after.htm.

[xxii] SEC v. *Wyly* et al, No. 1:2010cv05760 - Document 622 (S.D.N.Y. 2015).

[xxiii] Blattmachr, Blattmachr, Gassman & Shenkman, "Toni 1 Trust v. Wacker – Reports of the Death of DAPTs for Non-DAPT Residents Is Greatly Exaggerated," LISI Asset Protection Planning Newsletter #362 (March 19, 2018).

[xxiv] Shenkman Rothschild, "Self-Settled Trust Planning in the Aftermath of the Rush University Case," LISI Asset Protection Planning Newsletter #215 (December 6, 2012).

Another look at the *Campbell* case, from our book: Gassman & Markham On Florida & Federal Asset Protection Law

***20. Campbell v. Com'r.*, T.C. Memo. 2019-4.** **(Write-up by Jonathan Gopman)**

In *Campbell v. Com'r.*, T.C. Memo. 2019-4, the court recognized the validity of an offshore Nevis asset protection trust. On April 26, 2004, John F. Campbell ("**Campbell**"), the taxpayer, established the First Aeolian Islands Trust (the "**Trust**") in Nevis. This was an irrevocable trust that Campbell funded with an initial gift of $5 million. At the time he established and funded the Trust Campbell's net worth was approximately $25 million. See *Campbell v. Commissioner*, T.C. Memo. 2019-4 at pg. 3. The deed establishing the Trust appointed a corporate trustee located in Nevis, Meridian Trust Company Limited ("**Meridian**"), and appointed an independent person as its trust protector. Campbell did not retain any control over the trustee, including control over decisions relating to distributions or investments, however, he could request, however not force, the trust protector to remove and replace the Trustee. Campbell believed Meridian was overbilling the trust and requested that the trust protector remove Meridian as trustee and appoint Southpac Trust Nevis, Ltd. ("**Southpac**") to serve. The trust protector complied with Campbell's request and Southpac was appointed as trustee of the Trust. *Id*.

Excerpt From Gassman & Markham On Florida & Federal Asset Protection Law, Cont'd:

In 2001 (prior to the time that Campbell established the Trust), Campbell invested in a customizable rate debt structure ("**CARDS**") transaction, however, he failed to report the transaction on his Federal tax return for that year. This resulted in underreported income in excess of $13.5 million. *Id.* On May 10, 2004, the Service notified Campbell that his 2001 Federal income tax return was being submitted for examination and issued a statutory notice of deficiency on July 2, 2007. *Id.* Campbell disagreed with this tax assessment. In response, Campbell submitted an Offer in Compromise ("**OIC**") of $12,603 on the basis of doubt as to collectability. *Id.* at pgs. 4, 7. The Service disagreed with Campbell's OIC and calculated his reasonable collection potential ("**RPC**") to be $1,499,698 including "**net realizable equity**" in the Trust of $1,493,912. *Id.* The IRS Appeals Officer later calculated the RCP was more than $19.5 million using the Internal Revenue Manual ("**IRM**") and based on her view that Campbell had dissipated assets from 2006 to 2010 and the original funding amount and value of the assets in the Trust should be included in the RPC. *Id.* at pg. 10. Upon conclusion of a lengthy procedural repartee, the Appeals Office sustained the proposed levy.

In 2006, Campbell made a $27 million investment in real estate opportunities pursuant to the Gulf Opportunity Zone Act ("**GO Zone**"). *Id.* at pg. 4. Campbell had a net worth of approximately $19 million at the time of his investment in the GO Zone properties and approximately $6.5 million in liquid assets after the investment. *Id.* at pgs. 4, 5. Campbell structured his investments through limited liability companies ("**LLCs**") which purchased and owned the real estate. He created and was the sole member of Sidell Property Management, LLC ("**Sidell**") and Clairise Court, LLC ("**Clairise Court**"), both of which were formed to own properties in Louisiana. In 2009, it was discovered that over half of residential properties held in Sidell were uninhabitable due to Chinese drywall issues and the lender foreclosed on the assets in 2011. *Id.*

Excerpt From Gassman & Markham On Florida & Federal Asset Protection Law:

In December 2013, Campbell formed the Antilles Master Fund Limited Partnership (the "**Antilles Master**"), a Cayman Islands limited partnership, which had two investors, Campbell and Liberty Mountain Corp. ("**Liberty**"). Liberty was a wholly owned corporation held in the Trust. *Id.* at pgs. 5, 6. Campbell made Liberty and the trustee of the Trust aware of his conflicts of interest regarding this transaction. Antilles Master formed Antilles Offshore Investors, Ltd. ("**Antilles Offshore**"), a wholly owned LLC. *Id.* at pg. 6.

In March 2014, Campbell successfully brought a suit against the buyer of the Slidell properties pursuant to a Louisiana law that provided borrowers with litigious rights to repurchase properties that had been sold by a lender if an underlying debt obligation existed when the sale occurred. Campbell repurchased the properties in Sidell. Campbell sold Sidell's assets to Clairise Court which borrowed funds from Antilles Offshore to fund the purchase. *Id.* at pgs. 5, 6.

Campbell continued to invest in the GO Zone using Clairise Court and he personally guaranteed loans for Clairise Court. *Id.* at pg. 6.

If a taxpayer submits an OIC based on doubt as to collectability the Appeals Officer must follow the IRM guidelines to determine the taxpayer's RCP. Those guidelines consist of determining: (1) assets, including dissipated assets, (2) future income, (3) amounts collectible from third parties and (4) assets available to the taxpayer however beyond the reach of the government. *Id.* at pg. 14. IRM pt. 5.8..4.3.1 (Apr. 30, 2015). The Service argued that its position to reject Campbell's OIC was reasonable taking into consideration factors (1), (3) and (4), however, the court rejected this argument. In reaching its decision the court examined whether the argument by the Service that Campbell "dissipated assets" was valid. According to the IRM dissipated assets must be included in calculating the RCP "in situations where it can be shown the taxpayer has sold, transferred, encumbered or otherwise disposed of assets in an attempt to avoid the payment of the tax liability" or otherwise used the assets "for other than the payment of items necessary for the production of income or the health and welfare of the taxpayer or their [*sic*] family, after the tax has been assessed or during a period up to six months prior to or after the tax assessment." *Id.* at pgs. 14, 15. IRM pt. 5.8.5.18(1) (Mar. 23, 2018). The court held that the Appeals Officer abused her discretion to include the assets held in the Trust and the losses Campbell incurred with his Go Zone investments as dissipated assets.

Excerpt From Gassman & Markham On Florida & Federal Asset Protection Law:

The court emphasized that Campbell only used part of his wealth to fund the Trust and his investment in the GO Zone as he remained solvent after each transaction. Furthermore, the court determined that Campbell funded the Trust prior to receiving notice that the Service was examining his 2001 Federal tax return and that the original funding of the Trust was beyond the applicable look back period of the OIC. The court also noted that Campbell did not invest in the Go Zone in an attempt to avoid paying his outstanding tax liability. *Id.* at pgs. 17, 18.

The court also addressed whether the argument by the Service that even if the Trust was not considered a dissipated asset the assets held in the Trust should be considered as held by a transferee, nominee, or alter ego of Campbell under the *Drye v. United States* test. *Id.* at pgs. 18, 19. 528 U.S. 49 at 58. The *Drye* two-part analysis considers "State law to determine what rights a taxpayer has in property and then turns to Federal law to determine whether a taxpayer's rights in that property qualify as property or rights to property under Federal tax law." *Id.* at pg. 19. 528 U.S. 49 at 58. On this issue the court determined that Campbell's home state of Connecticut had not adopted the nominee theory and there was no evidence that Supreme Court of Connecticut would adopt Federal principles of nominee theory. *Id.* at pg. 19, 20 United States v. Snyder, 233 F. Supp. 2d 293, 296 (D. Conn. 2002). The court also noted that Campbell did not have control the assets held in the Trust or possess a property interest in those assets because he had no control over the Trustee and could not demand or force the Trustee to make any distributions or investments. *Id.* at pg. 19.

Finally, the court addressed whether the assets held in the Trust were available to Campbell however beyond the reach of the government. The Service argued that Campbell maintained sufficient control over the Trust and therefore retained access to the assets by appointing a trust protector, by directing investments, and by virtue of the investment by the Trust in the GO Zone business ventures. The court rejected this argument, however, noting that the record indicated that the Trustee acted in its sole discretion and was not controlled by Campbell. *Id.* at pgs. 20, 21.

Excerpt From Gassman & Markham On Florida & Federal Asset Protection Law:

Campbell is an excellent result for the taxpayer and for individuals seeking to protect their wealth through the formation and establishment of an offshore trust structure.

Points:

1. Funding occurred with less than twenty percent (20%) of the settlor's net worth.
2. A corporate trustee was appointed and an independent protector.
3. The settlor retained minimal powers over the trust following funding – thus, a well-designed structure.
4. The trustee maintained adequate records documenting its exercise of proper fiduciary authority and discretion.
5. Investments held in the trust included assets located in Louisiana, that is, the United States.
6. The wealth protection aspects of the structure were clearly respected by the court.

Case	Original state court findings	"Sister" state court findings	Reasoning
Baker by Thomas v. General Motors Corp., 522 U.S. 222 (1998)	A Michigan court ordered a permanent injunction preventing a former General Motors' employee from testifying against GM.	A Missouri court refused to enforce the injunction and allowed the witness to testify against GM.	The Michigan court did not have jurisdiction over the case in Missouri and, therefore, could not prevent the plaintiff from subpoenaing the former employee to testify in Missouri. The Full Faith and Credit Clause did not apply because "mechanisms for enforcing a judgment do not travel with the judgment itself."
Hamilton v. Hamilton, 914 N.E. 2d 747 (2009)	A Florida court issued a support order that held father in contempt for not paying child support and sentenced him to 170 days in jail unless he paid $7,500 within twenty days.	An Indiana court issued a contempt order requiring the father to pay the mother $1,000, obtain full-time employment, and execute a wage assignment in an amount specified by the Indiana Child Support Guidelines or $150 per week to avoid incarceration.	The Indiana trial court's contempt order gave "full faith and credit" to the Florida support order, and the contempt order issued by the Indiana court was "a valid enforcement mechanism."
Matter of Cleopatra Cameron Gift Trust, 931 N.W. 2d 244 (2019)	The California family court ordered the Trustee of Cleopatra's Trust to pay child support and attorney's fees.	The South Dakota Supreme Court held that the creditor protection laws of the state applied, and therefore, the Trustee would not be required to pay child support from the trust funds.	The South Dakota Supreme Court did not apply the Full Faith and Credit Clause because the question of remedies available to satisfy a judgment against a California resident, like the trust, should be based on South Dakota law, and not California law. South Dakota law does not allow creditors to force distribution out of a trust with a spendthrift provision.

Enforcing Judgments On Property Held In Other Jurisdictions

We know that in the *Sargeant* case the 4th DCA held that a Florida trial court did not have the authority to order debtors to turn foreign stock certificates over to their counsel.

The 4th DCA determined that it would take a court in the country where the stock certificates were located to compel the turnover because Florida courts do not have *in rem* or *quasi in rem* jurisdiction over foreign property.

In *Wells Fargo v. Barber*, the Federal District Court held that "unlike stock certificates in a corporation, a membership interest in a limited liability company is intangible personal property ... which "accompanies the person of the owner." Barber's membership interest "is located with her in Florida and is properly subject to *in rem* jurisdiction in this state."

Enforcing Judgments On Property Held In Other Jurisdictions, (Cont'd)

In *Schanck v. Gayhart*, the 1st District Court of Appeal of Florida decided on April 30, 2018 that a Florida debtor could be ordered to turn over both stock and membership certificates of a Florida LLC and a Florida corporation owned by him, even though the certificates were physically located in Canada.

While the court acknowledged that under the *Sargeant* case it could not direct the debtor to return the certificate to Florida, it found an alternate "back door" under Florida Statute Section 678.1121, which authorizes a court to aid creditors trying to collect against certificated security interests by exercising personal jurisdiction over the debtor and ordering him to cancel the certificates and reissue new ones to the estate... I mean to the creditor. The 1st district court of appeal agreed that the trial court had the legal and equitable authority to aid the estate in executing a monetary judgment against the debtor.

The court relied upon *Ciungu v. Bulea* a 2015 1st DCA case which found that Florida Statute 678.1121(5) authorized it to aid the creditor "in reaching the security or in satisfying the claim by means allowed by law or in equity." Florida Statute 678.405 requires that "the issuer of a certificated security must reissue a certificate upon request from the owner of the certificate.

Enforcing Judgments On Property Held In Other Jurisdictions, (Cont'd)

Florida Statute Section 678.1121(5) and 678.405(1) read as follows:

(5) A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

(1) If a certificated security has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after she or he has notice of it and the issuer registers a transfer of the security before receiving notification, the owner is precluded from asserting against the issuer any claim for registering the transfer under s. 678.404 or any claim to a new security under this section.

Wells Fargo Equipment Finance v. Rutterath

In addition to the above, the April 12, 2019 Iowa case of *Wells Fargo Equipment Finance v. Rutterath* involved Florida judgments that were filed in Iowa against a debtor who owned interests in an Iowa LLC with its home offices in Iowa. An Iowa court granted a charging order against the membership interest applying Iowa law.

The debtor had been the original owner of the LLC, but transferred ownership to himself and his wife as joint tenants with right of survivorship, which could be considered as owned as tenants by the entireties pursuant to Florida law.

The Iowa Supreme Court held that the situs of intangible personal property such an LLC interest "is governed by the law of the owner's domicile, and not by the law of the corporate domicile."

On the other hand, the court found that "an individual's interest in an LLC is unlike other forms of intangible personal property since the typical levying procedures available to creditors for similar forms of intangible personal property are unavailable to creditors seeking to levy an individual's interest in an LLC."

The court therefore found that the Florida judgments were properly registered in Iowa and that the Iowa charging order law applied.

Wells Fargo Equipment Finance v. Rutterath, (Cont'd)

This case is good news for Floridians who have formed single member LLCs in jurisdictions that provide for a charging order to be the sole remedy, but time will tell whether the Iowa Supreme Court's decision will be respected in other jurisdictions.

Clients will be well advised to form multi-member LLCs instead of relying upon an out-of-state single member LLC charging order statute, and to also use voting and non-voting stock so that if a charging order statute is eliminated or compromised a creditor may not be able to take over voting control of an entity where the debtor does not have voting control.

Section 199A Planning by Adding a Domestic Asset Protection Trust (DAPT) That Can Own S Corporation Stock?

Some clients have offshore trusts which hold interests in entities taxed as partnerships or disregarded.

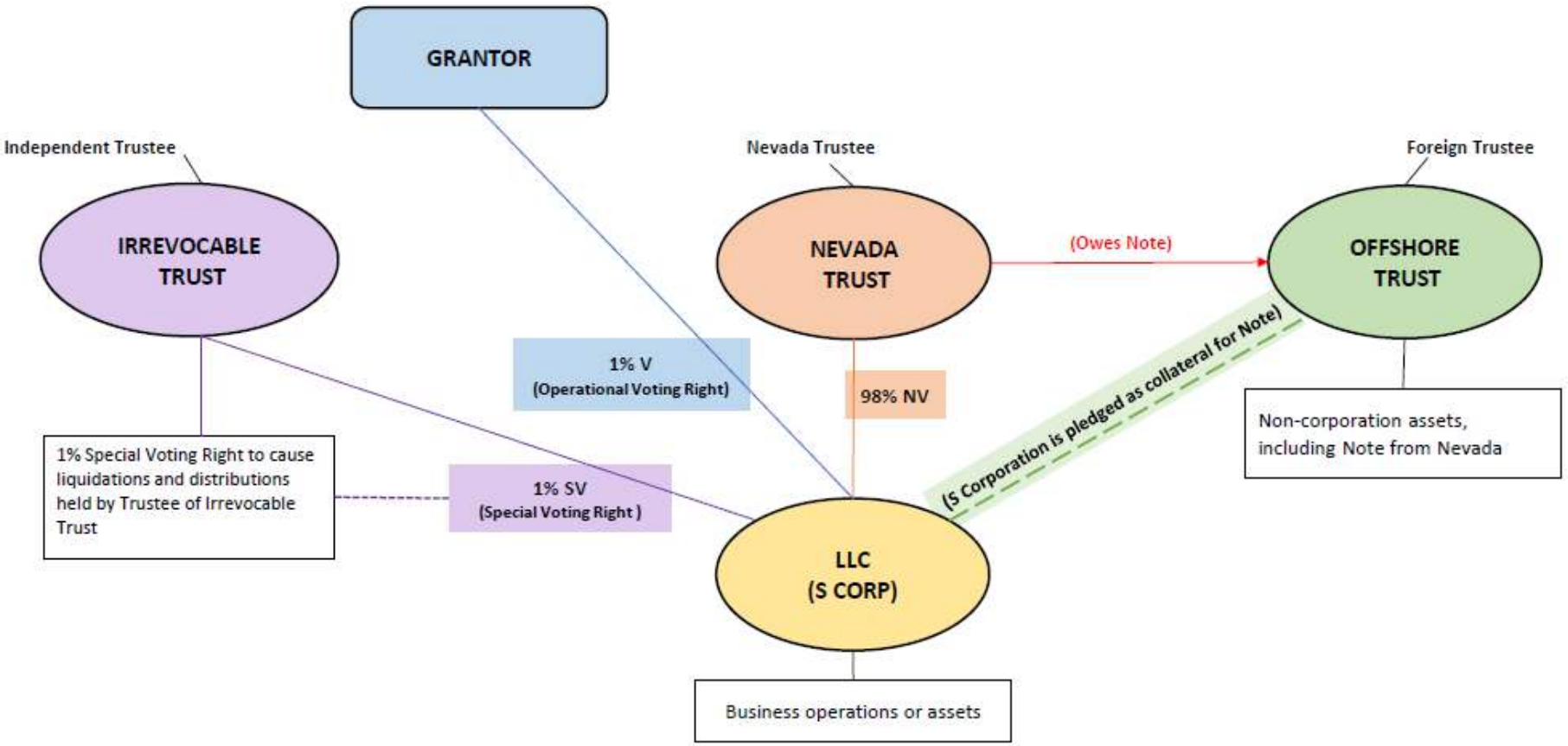
If the Grantor of the trust is a high income taxpayer, then qualified business income may not be eligible for the Section 199A 20% deduction unless wages are paid.

Wages paid under a Schedule C entity or a partnership entity to the owner or a partner will not count as wages for the 50% test or the 2.5% qualified property plus 25% of wages test.

How do we reasonably protect such interests while also going to S Corporation status?

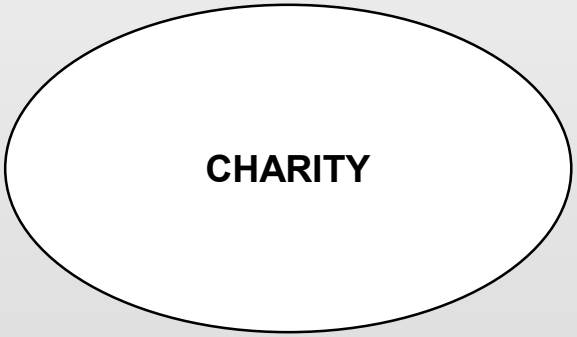
Set up Nevada Trust and sell business assets/entity to Nevada Trust for a Note – the Nevada Trust conveys the business/entity to an S corporation and owes monies to the Offshore Trust.

Getting A 199A Deduction From Business or Rentals Formerly Held Under Offshore Trusts



The Very Best Creditor Protection Technique

(Give Significant Assets to a 501(c)(3) Charitable 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.

Equity Stripping

Definition:

Reducing the value of an asset that a creditor or divorcing spouse may be able to reach by reason of the asset that might otherwise be subject to forfeiture or sharing currently serves as security for a debt.

Advantages of Equity Stripping

1. Avoids the expense associated with transferring assets
2. Avoids transfer taxes and taxes that would be imposed upon the sale of an asset
3. Allows equity amount to be protected in jurisdiction separate from where the asset exists
4. Oftentimes, the indebtedness amount can be kept confidential but must be disclosed on financial statements, tax returns, and as otherwise required by law.

Disadvantages of Equity Stripping

1. The equity in the asset remains exposed.
2. Expenses associated therewith.
3. Substance over form arguments where there is no tax or business purpose for the arrangement.
4. The doctrine of Marshaling of Assets or "the over secured creditor" in bankruptcy.

Marshaling of Assets

- In general terms, the equitable doctrine of "Marshaling of Assets" means that a creditor, with two funds available to satisfy his debt, cannot "by his application of them to his demand, defeat another creditor who may resort to only one of the funds." *In re Talmo*, 192 B.R. 272 (Bankr. S.D. Fla. 1996).
- The rule of marshaling assets sets forth the order in which senior creditors can proceed against other collateral properties. Importantly, it does not bar the senior creditor from proceeding against a subsequent purchaser or a junior creditor if the value of the first collateral is insufficient.
- Courts are reluctant to allow a claim for marshaling when it would be unjust or unfair to allow the junior creditor to do so.
- To invoke the doctrine, there must be:
  1. Two creditors asserting claims against a common debtor;
  2. Two funds that belong to the debtor ("common debtor requirement"); and
  3. One creditor with legal rights to satisfy its debt from either of the funds, while another creditor has rights in only one of the funds

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.

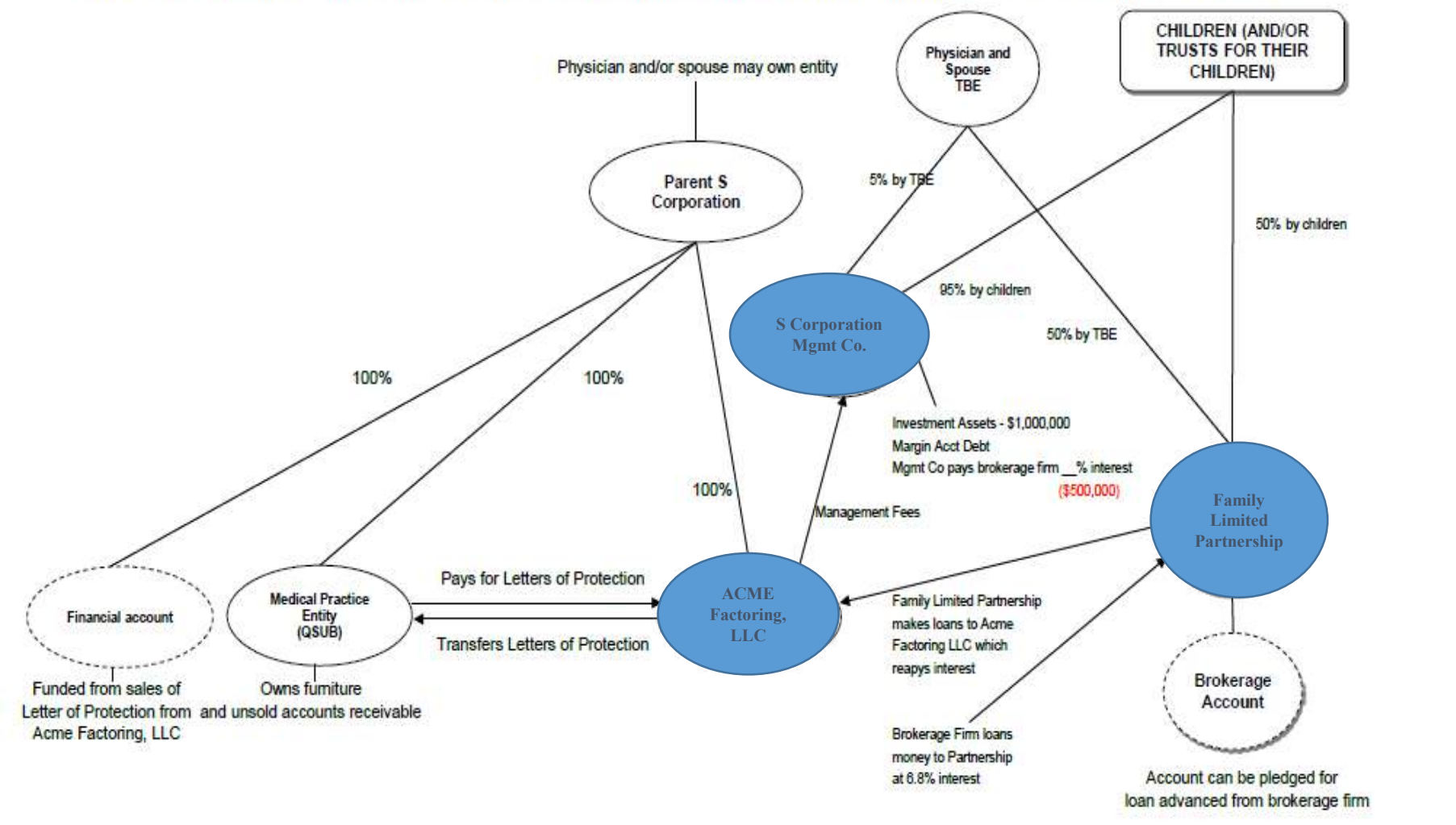
e. Vehicles can be liened by filing the proper paperwork with the Department of Revenue. The Coast Guard handles liens on boats in international waters.

f. 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.

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



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

CLIENT

SPOUSE OF CLIENT

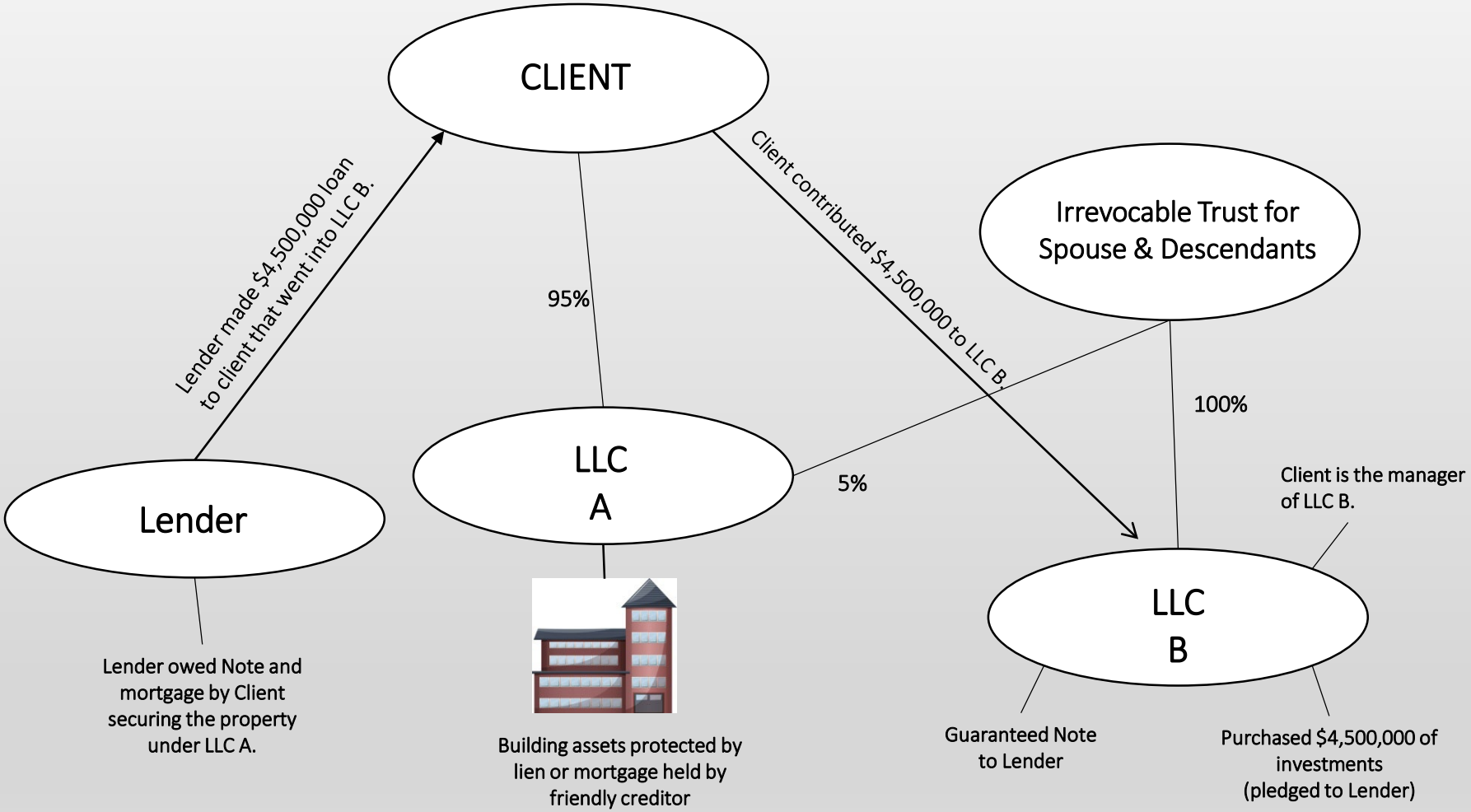
$5,000,000

Client owns $5,000,000 building.

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

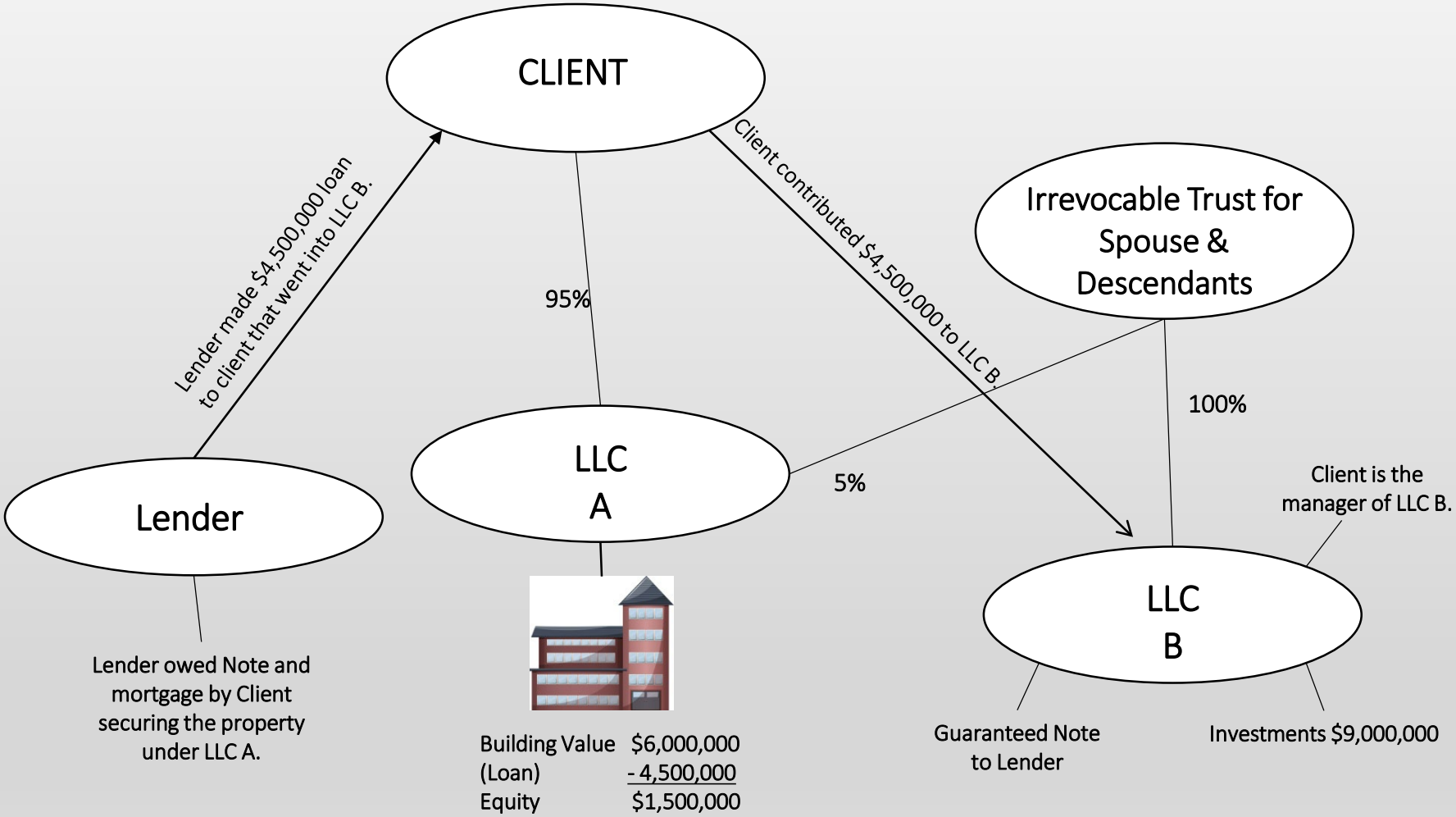
Using LLCs and Trusts to Protect Otherwise Exposed Assets, Part 2

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

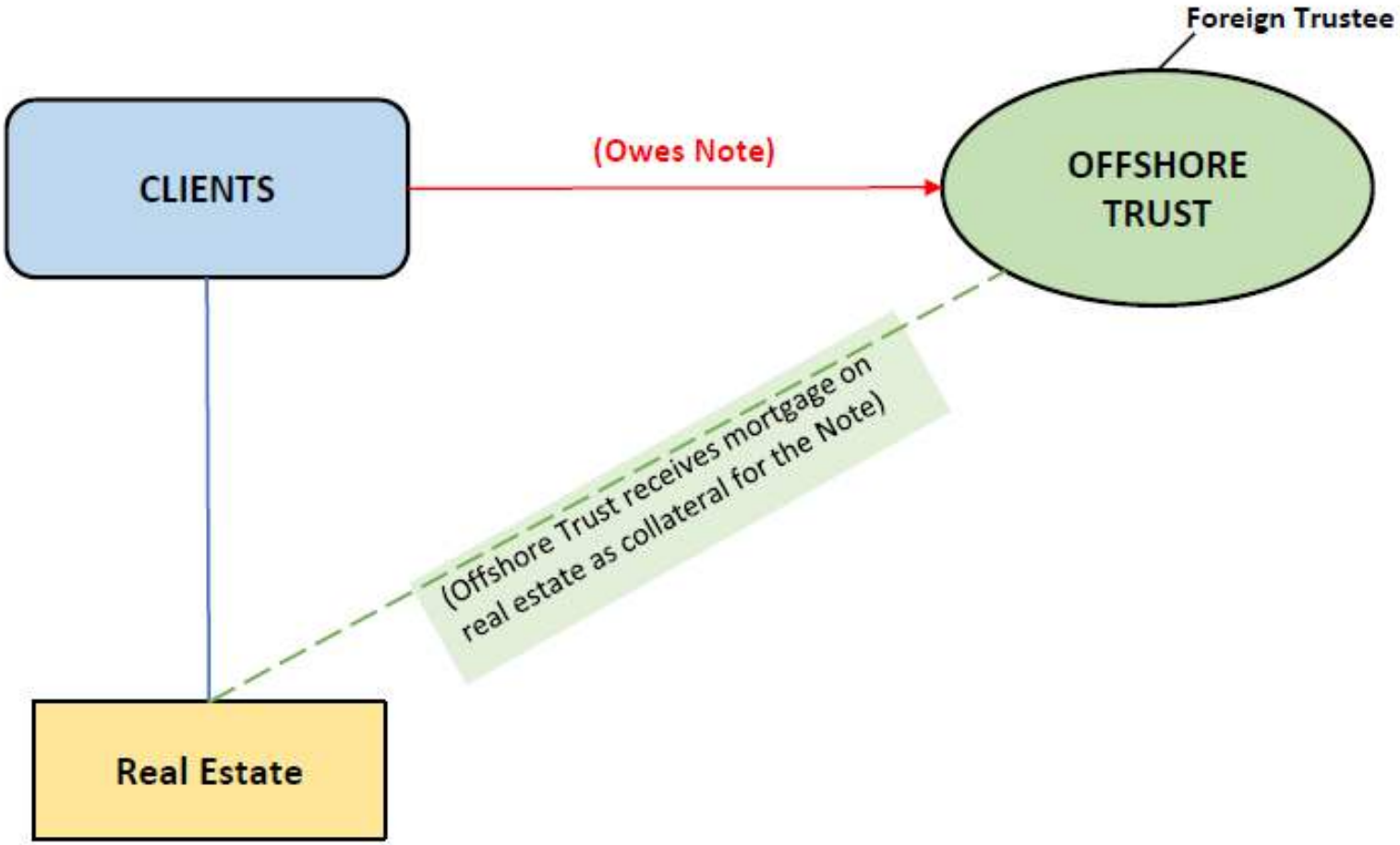


Using LLCs and Trusts to Protect Otherwise Exposed Assets, Part 3

(in 10 years)



Protecting Offshore Real Estate Without Conveying It To Offshore Trust



Contempt of Court

Definition and Review of Cases

Contempt of Court

An equitable remedy that may be applied by a bankruptcy judge to force a debtor to go to jail in order to induce conduct with respect to making assets available to the trustee in bankruptcy under circumstances where the debtor is believed to have control over the assets or a third party in possession of the assets, or has inappropriately created an impossibility with respect thereto.

F.T.C. v. Affordable Media, 179 F.3d 1228 (9th Cir. 1999)

- The Andersons committed a number of civil offenses in the process of raising investor money by aggressive television and telephone methods. After they realized the investors and FTC were pursuing them, they wired money to a Cook Islands Trust.

- The Andersons misrepresented their trust situation to the court and apparently did not receive good legal advice in structuring the trust, having made themselves the trust protectors and failed to have provisions in the trust that would remove them as trust protector when an event of duress occurred.

- The Ninth Circuit Court of Appeals concluded that virtually any offshore asset protection strategy will be presumed to be illicit and reversible by the grantor, with a heavy burden of proof.

- Consequently, the Andersons spent many months in jail on contempt.

In re Lawrence, 251 B.R. 630 (S.D. Fla. 2000)

- Lawrence involved a self-settled trust created in Mauritius, a remote foreign jurisdiction. This trust was created two months prior to the conclusion of a 42 month arbitration, which concluded that Lawrence owed Bear Sterns roughly $20 million.

- Once the arbitration was over Mr. Lawrence filed for bankruptcy. Consequently, the court inquired about this transaction and Mr. Lawrence lied about the transfer, nature of the trust arrangement, and powers he held over the trust, although he retained complete control of the trust.

- Mr. Lawrence was sentenced to jail on contempt and remained there for over six years. If he had admitted that he had control over the trust, then he might have been prosecuted for a federal crime – this was a very difficult catch-22 situation.

U.S. v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)

- Bilzerian owed $130,650,328.17 of non-dischargeable debt to the SEC and one other creditor based upon an enforcement action that was commenced in 1989 when Mr. Bilzerian was convicted of securities laws violations and sentenced to four years in prison.

- Two year later, Bilzerian filed a bankruptcy and then transferred his assets to a Cook Islands Trust and a Nevada Limited Partnership owned 99% by the Cook Islands Trust. In addition, Bilzerian purchased a multi-million dollar home in Tampa, Florida through the offshore trust.

U.S. v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)

Bilzerian said his most recent stint in prison was 'horrifying - - it included a short stay in Tampa Bay area jails, several months at a minimum-security 'camp' in Miami, and the longest period at a maximum-security lock-up there.

Bilzerian was quoted as follows in the St. Petersburg Times (now the Tampa Times):

> People don't understand just how awful those places are. There were weeks upon weeks that I wasn't able to see the sunlight or brush my teeth.
>
> He indicated the facility was housed with violent criminals. During one of three periods he spent in special confinement, he shared a cell with 'Queenie,' who Bilzerian said was there for allegedly 'smashing and cracking the skull of another inmate.' Bilzerian said 'Queenie' called himself a thug, then proceeded to demonstrate by showing me his bullet holes and the obituaries of his gang members.

S.E.C. v. Solow, 682 F. Supp. 2d 1312 (S.D. Fla. 2010)

- The defendant engaged in a fraudulent trading scheme involving the sale of inverse floating rate collateralized mortgage obligations. The SEC obtained a judgment against the defendant.

- The defendant transferred assets that were owned by him and his wife into an offshore trust in Cook Islands. After transferring the money, he claimed that he could not pay the disgorgement.

- Because Solow did not comply with the disgorgement payment, he was placed in jail for contempt.

AVOIDING ESTATE AND TRUST LITIGATION BEFORE IT HAPPENS – ETHICAL AND PRACTICAL CONSIDERATIONS

THE RED FLAG	PROBLEMS ASSOCIATED THEREWITH	SOLUTIONS	NEXT ACTIONS
Client has chosen a not-so-good trustee. (Continued)	5. The trustee may not account to beneficiaries or even let them know they are beneficiaries. 6. Lack of tax planning because the "run of the mill" professionals hired by the trustee know what to recommend. 7. The beneficiaries may accuse the trustee of the above items whether they happen or not.	b. Use Trust Protectors. c. Allow for division of trusts into separate trusts with pre-designated percentages at the option of any beneficiary (i.e., can use standard tables to determine portable discounted value of future rights, and then release and take 40% of that value now). d. Allow someone to move the trust offshore for leverage. 5. Make sure that all the trustees are replaceable by someone or some entity.	Client Name: _____ Who to delegate to: _____
A child or children out-of-kilter. ***"Don't handicap your children by making their lives easier."*** ***- Robert Heinlein***	1. Highly dependent on the client's money. 2. Resentful of other beneficiaries who interfere. 3. The above is exacerbated by heavy drinking and drug abuse. 4. May get poor advice from a lawyer who knows that the trust must pay fees under the exception creditor rules. 5. May move in with parents and exercise undue influence over inheritance in exchange for helping the parent get to the bathroom, etc. 6. Do not allow the out-of-kilter child to have a power of appointment unless it will be approved by a responsible party. 7. Don't have this child as a beneficiary but make him/her addable by the protectors after the client's death.	1. Make them get a job while living on a tightly agreed budget. 2. Let them know upfront that this is the way it will be – sense of entitlement. 3. Documents can require counseling certification and "AA Type" gambling and other problematic addiction compliance so that the trustee will know if they have a beneficiary who is sane to talk to. 4. Allow for elimination of beneficiary as a beneficiary and/or start the trust in an APT state of most states ala the Florida *Casselberry* case. 5. Have a safety latch provision in the trust and involve children in all decisions.	Next Actions: _____ Client Name: _____ Who to delegate to: _____
The unfair estate plan. 	1. Things changed after signing so someone does not get what they were supposed to get. 2. Not clear what the client would have wanted to do if the changes had been considered. 3. Tax apportionment and tax issues dramatically change who will get what. 4. Beneficiary designations or lack thereof change what people get.	1. Trust Protectors to the rescue, but cannot reduce or meddle with the marital deduction. 2. Write as much as you can about the client's intensions as to each contingency you can think of. 3. Warn clients and consider a blanket change thereto.	Next Actions: _____ Client Name: _____ Who to delegate to: _____

AVOIDING ESTATE AND TRUST LITIGATION BEFORE IT HAPPENS – ETHICAL AND PRACTICAL CONSIDERATIONS

THE RED FLAG	PROBLEMS ASSOCIATED THEREWITH	SOLUTIONS	NEXT ACTIONS
The incapacitated or unhealthy client. 	1. No one is sure if this client knows what they are doing is within reason. 2. Manipulations come out of the woodwork. 3. Bad decisions hurt the future inheritance. 4. Last minute planning changes may not be well thought through or considered.	1. Involve family members and other advisors to get the planning done ASAP and then refine as you can. Have intake form permit you to call family members without knowledge or consent of client. Put this in the Durable Power of Attorney as well. 2. Identify and strategize. This can include product sales people. 3. Document that you have warned the client and the family as best you can.	**Next Actions:** _____ _____ _____ _____ _____ **Client Name:** _____ **Who to delegate to:** _____
Ambiguity or ~~mistkaes~~ mistakes in the ~~docments~~ documents.	1. The drafter makes an error in drafting that causes an ambiguity or problem that exacerbates one or more of the other problems above.	1. Allow for trust to be amended without notice to all secondary beneficiaries. 2. Allow for Trust Protectors to make changes. 3. Note in the document that specific detailed devices can be reformed by independent trustee or trustees. 4. Have someone else in the office or in the client's world proof read the documents before they are signed, and to allow for refinement after they are signed but before the client dies. 5. In terrorem clauses to the rescue?	**Next Actions:** _____ _____ _____ _____ _____ **Client Name:** _____ **Who to delegate to:** _____

AVOIDING ESTATE AND TRUST LITIGATION BEFORE IT HAPPENS – ETHICAL AND PRACTICAL CONSIDERATIONS

In all situations consider:

1. Waiver by jury trial.

2. Require good faith immediate mediation.

3. Consider requiring arbitration, which may be by the Trust Protectors as arbitrators.

   Enable the arbitrators to bifurcate actions so that any document and interpretation issues are resolved before the more expensive to analyze and evaluate items are considered, since the interpretation questions may change or be irrelevant based on the first stage rulings.

4. Use in terrorem and/or King Solomon clauses.

5. Appoint Trust Protectors.

6. Reverse attorney fees to reduce share of unsuccessful person challenging any action or document.

7. Pre-death probate.

8. Import the laws of other states or countries by using trusts there:

   a. can eliminate exception creditors.

   b. can be a better forum to litigate or a formidable shield to discourage litigation.

   c. can eliminate the need to give accountings to certain beneficiaries.

   d. community property step-up basis or JEST trusts can avoid income taxes.

   e. Avoid public policy interference with intent by using offshore jurisdictions that do not change things with respect to religious, marital or other requirements that clients may want to install.

9. Explain to the clients and the other side that tax planning in a structure of settlement may be very advantageous compared to what the judge or arbitrator may award.

10. Consider requiring that beneficiaries comply with good business ethics, be responsive to trustee requests, disclose personal situations and health records and sign releases to receive benefits of any kind.

11. Read Jonathan's excellent outline at Chapter 21. Give yourself an extra day to get back if you ever go to the Arctic Circle.

12. Consider an extensive videotaped interview with the client to demonstrate mental acumen and create a dramatic record of intent.

13. Consider having beneficiaries sign a legally binding agreement to not allow changes and to compensate for any changes from what the client's documents say.

Arbitration Advantages:

1. Privacy.

2. Each party can reject from a list of potential arbitrators as opposed to a possible "weak judge." Arbitrators are most often successful and knowledgeable practicing lawyers. The document can require use of a board certified trust and estate lawyer with 20 years experience practicing more than 100 miles from the residence of the decedent's place of residency.

3. Litigators are more likely to settle and cannot expect long shot or emotional issues to sway a decision.

4. Usually faster than a trial.

5. Party taking a long shot position will have to pay large arbitration fees and other costs.

6. Can bifurcate issues if allowed in document.

Arbitration Disadvantages:

1. Very expensive but can limit to one arbitrator and use state arbitration rules AAA (American Arbitration Association) or otherwise.

2. The party filing has to pay the initial filing fee. The trust can provide that this will come out of the complaining beneficiary's share.

3. Privacy enables parties to not have community peer pressure impact decisions.

4. Prevents the party who wants to delay judgment to stall effectively.

5. No appeal rights to correct bad decisions unless stated in document that AAA appeal rules and procedures will work.

6. Inability to sway a jury that might better appreciate emotional issues.

7. Arbitrators almost always find a way to "split the baby."

Incomplete Charitable Gift Foundations

A not so well-known and under-utilized charitable planning tool is to create an irrevocable Grantor Trust for the benefit of charities. These trusts have to be set up in a manner that will not cause the trust to be subject to the Private Foundation self-dealing rules and other limitations placed on Private Foundations. These trusts are usually set up as follows:

1. The trust should list both 501(c)(3) entities and other charitable entities that do not qualify for 501(c)(3) treatment.

   Cemetery Associations and Police/Firemen Benevolent Associations are not 501(c)(3) entities, and including these organizations as discretionary beneficiaries will prevent the Private Foundation rules from applying to the trust.

2. The Grantor can retain control over which charities will receive the funds.

3. The Grantor, or another person the Grantor designates, should have the ability to permanently set-aside all of the trust assets for 501(c)(3) entities.

4. The trust should be a Grantor Trust to allow the Grantor to receive an income tax charitable deduction for monies contributed to charity.

5. Can benefit Cemetery Associations and Police/Firemen Benevolent Associations.

Incomplete Charitable Gift Foundations, (Cont'd)

Benefits of an Incomplete Charitable Gift Foundation

1. This is easy to set up and maintain (does not need to abide by the Private Foundation Rules).
2. The donor can still receive an income tax charitable deduction when monies are actually given to charity.
3. The donor retains a significant amount of control.
4. After the donor's death, the trust can automatically become irrevocable, and qualify for the estate tax charitable deduction.
5. The funds will be protected from creditors if the funding is not a "voidable transfer."
6. The donor can receive recognition for donating those funds to the trust.
7. The trust can perform virtually any charitable function it desires.
8. There are no annual minimum distribution requirements or excise taxes.

Downsides Of Using The Incomplete Charitable Gift Foundation

1. The donor will not receive an immediate income tax deduction for the initial contribution of funds to the trust or on death.

2. The trust cannot advertise that it is a 501(c)(3) entity, or that donations will qualify for the charitable income tax deduction.

3. If administered improperly, the trust could accidentally be deemed to be a Private Foundation, and could find itself to be in violation of certain Private Foundation rules. This could occur if the non-501(c)(3) entities are removed as beneficiaries, or if the trust makes certain commitments to the 501(c)(3) entities that would essentially provide 501(c)(3) entities with entitlement to all of the trust assets.

4. The trust is generally irrevocable, meaning that the donor cannot take the assets back from the trust.

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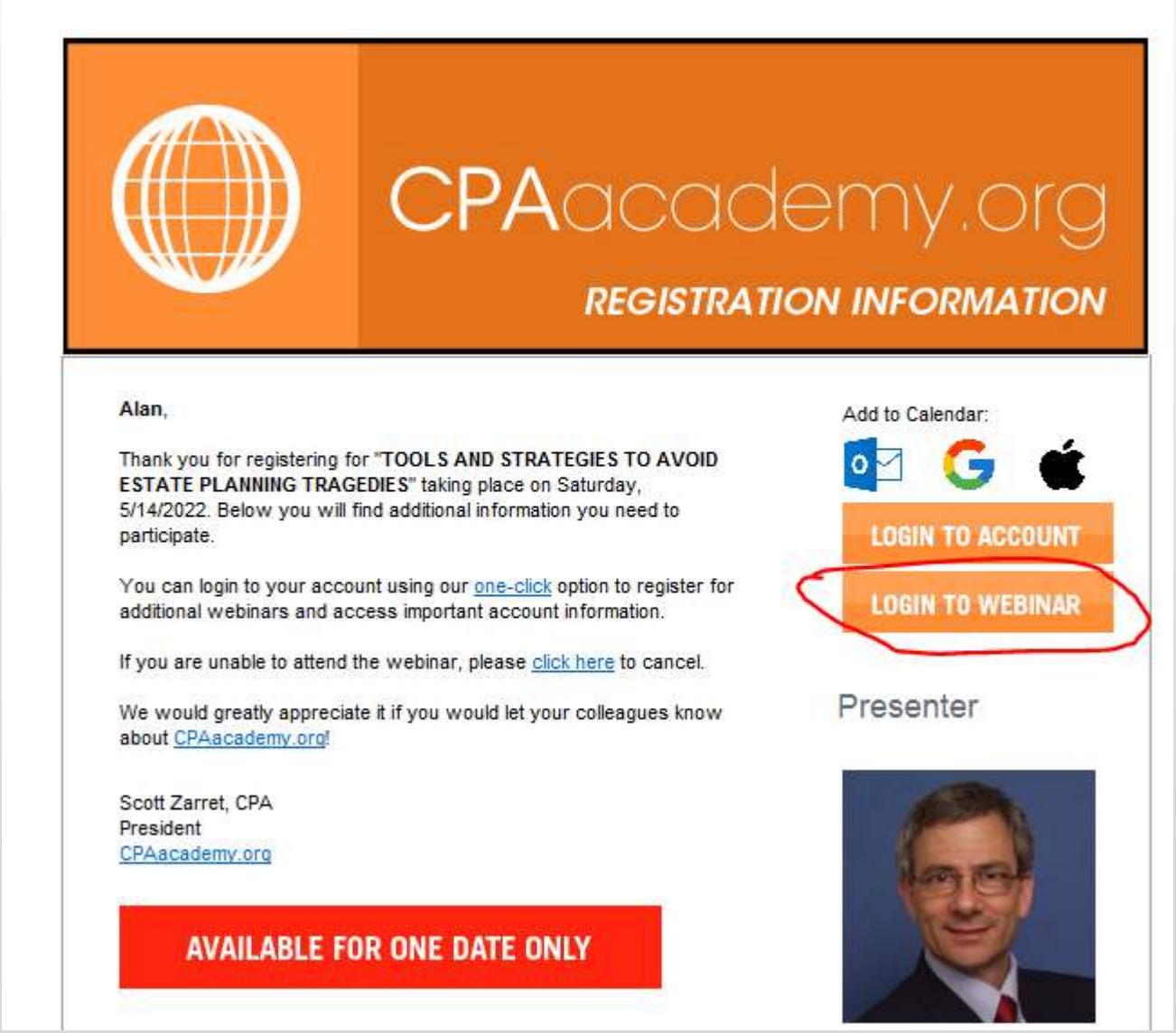

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Course Description:

It takes more than knowledge and revocable trusts to facilitate estate tax planning for wealthy families. In addition, the IRS has been regularly attacking certain effective estate tax planning tools because of chinks in the armor that planners must be aware of. This presentation will discuss primary and effective strategies for estate tax avoidance, and how to avoid having "chinks in the armor" that can cause tragedy instead of success.

Learning Objective:

Identify primary and effective strategies for estate tax avoidance.

This is a complimentary webinar program. After registering, you will receive a confirmation email containing information about joining the webinar. Approximately 3-5 hours after the program concludes, the recording and materials will be sent to the email address you registered with.

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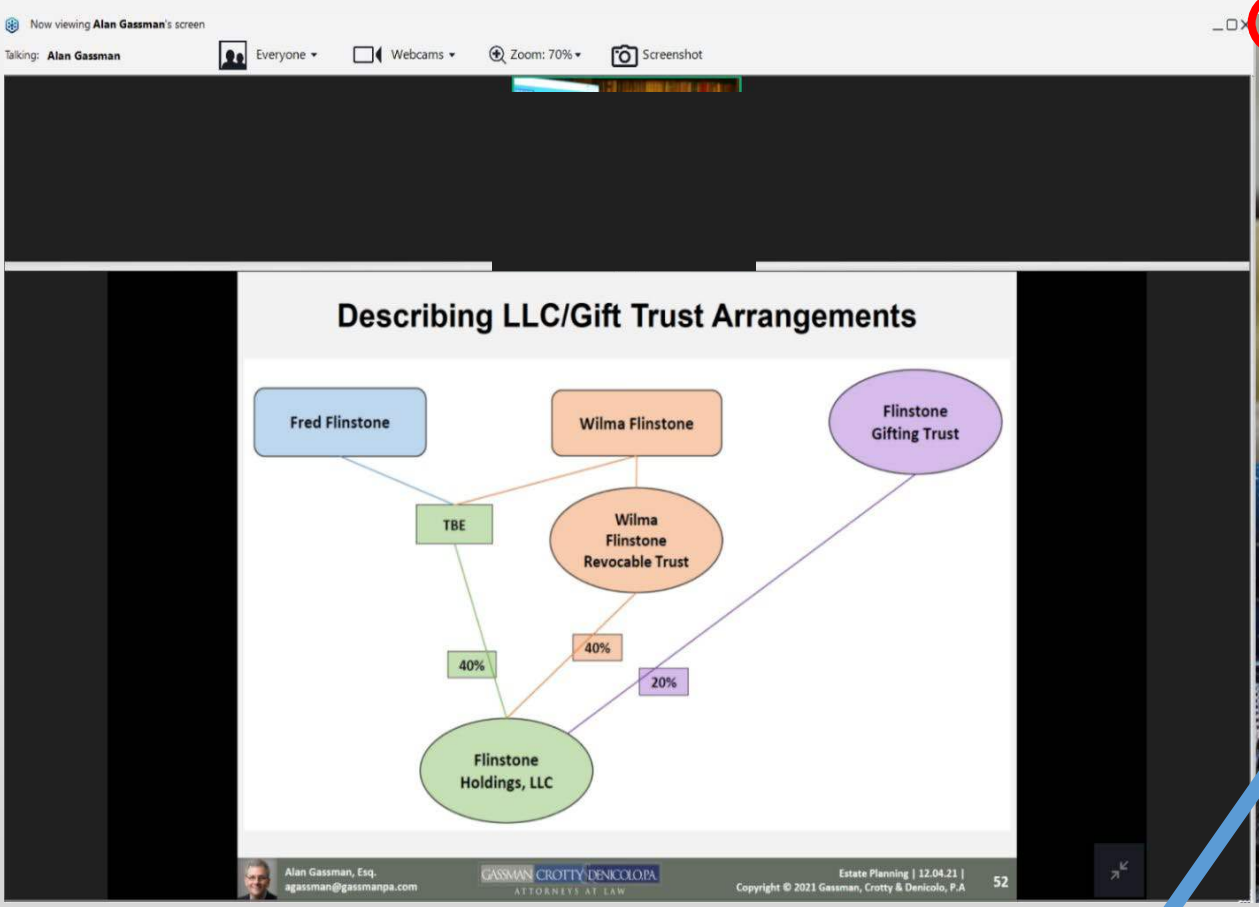
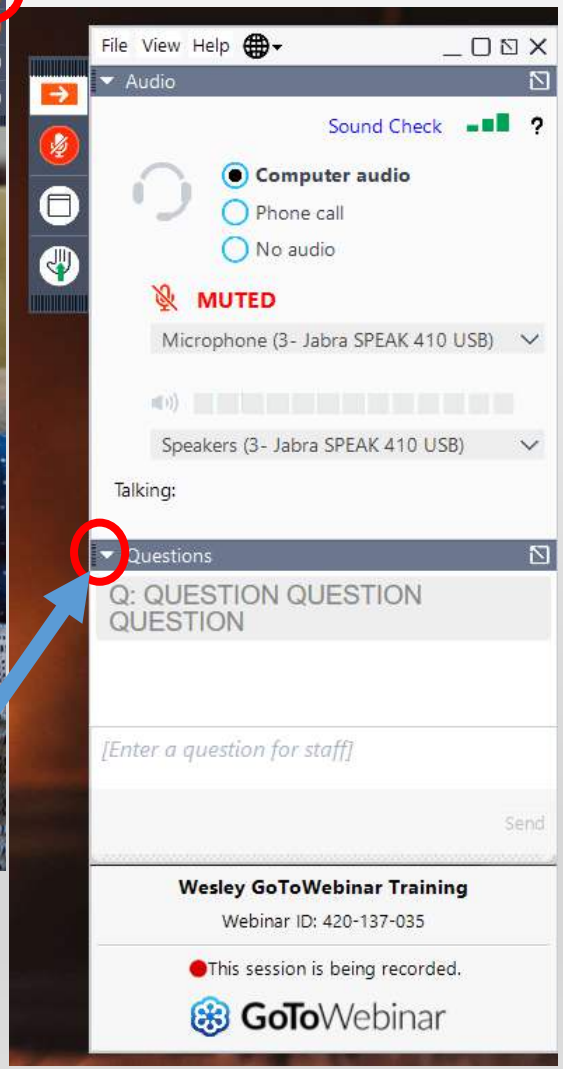
How Do I Ask A Question?

STEP 1:
Click Red Arrow to open Control Panel





STEP 2: Open Drop Down Arrow to Question Section; Type and send your question.

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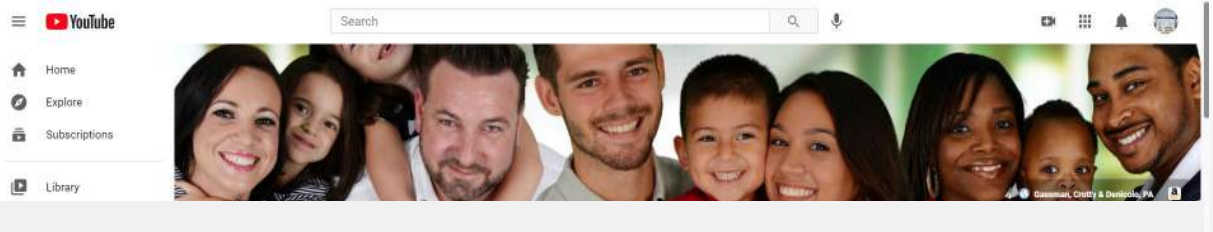

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The Thursday Report Presents:

THE SLIM PICKENS REPORT

Slim Pickens was born on this day in 1919. Louis Burton Lindley, Jr., better known by his stage name Slim Pickens, was an American actor and rodeo performer.

GASSMAN CROTTY DENICOLO P.A.
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Thursday, June 29, 2023

Issue #338

Coming from the Law Offices of Gassman, Crotty & Denicolo, P.A. in Clearwater, FL.

Edited By: Wesley Dickson

Article 1

Precious Metals Are Personal Property

Written By: P. Jill Ashley, Juris Doctorate Candidate, Stetson Law School

Article 2

Recent Developments in Real Estate Taxation?

Written By: Kenneth J. Crotty, JD, LL.M

Article 3

The Walton GRAT

Written By: P. Jill Ashley, Juris Doctorate Candidate, Stetson Law School

For Finkel's Followers

The Difference Between Doing a Task and Owning a Task

Written By: David Finkel

Free Upcoming Webinars

European Investing Accounts & Structures

Presented by: Alan Gassman, JD, LL.M. (Taxation), AEP (Distinguished) and Remo Tiefenauer, BA, Executive MBA HSG

Hot Topics & Recent Developments in Estate Tax Planning

Presented By: Alan Gassman, JD, LL.M. (Taxation), AEP (Distinguished)

FREE

HOT TOPICS, JERRY HESCH, NOTRE DAME & WHY ESTATEVIEW IS THE BESCHT

Saturday, July 22, 2023

From 11:00 AM TO 1:00 PM EST

(120 minutes)

Jerome M. Hesch, Esquire
jhesch@meltzerlippe.com

Presented By:

Alan Gassman, JD, LL.M. (Taxation), AEP® (Distinguished)

Jerome M. Hesch, JD, LL.M.

Alan Gassman, Esquire
agassman@gassmanpa.com

1245 Court Street
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Saturday, July 22, 2023	**Free from our Firm (Virtual Session - *CPE Credits Will Be Offered Through CPAacademy.org)**	**Alan Gassman Presents: HOT TOPICS & RECENT DEVELOPMENTS IN ESTATE TAX PLANNING 11:00 AM - 12:00 PM (60 minutes)**	**REGISTER HERE FOR 1.0 CPA CPE CREDIT REGISTER HERE FOR NON-CPE CREDIT REGISTER HERE FOR FLORIDA CLE CREDIT**
Saturday, July 29, 2023	**Free from our Firm (Virtual Session - *CPE Credits Will Be Offered Through CPAacademy.org)**	**Ken Crotty Presents: LET'S LEARN ABCs and QOZs 11:00 AM - 12:00 PM (60 minutes)**	**REGISTER HERE FOR 1.0 CPA CPE CREDIT REGISTER HERE FOR NON-CPE CREDIT REGISTER HERE FOR FLORIDA CLE CREDIT**
Saturday, August 5, 2023	**Free from our Firm (Virtual Session - *CPE Credits Will Be Offered Through CPAacademy.org)**	**Alan Gassman Presents: Using Grantor Retained Unity Trusts 11:00 AM - 12:00 PM (60 minutes)**	**Coming Soon!**

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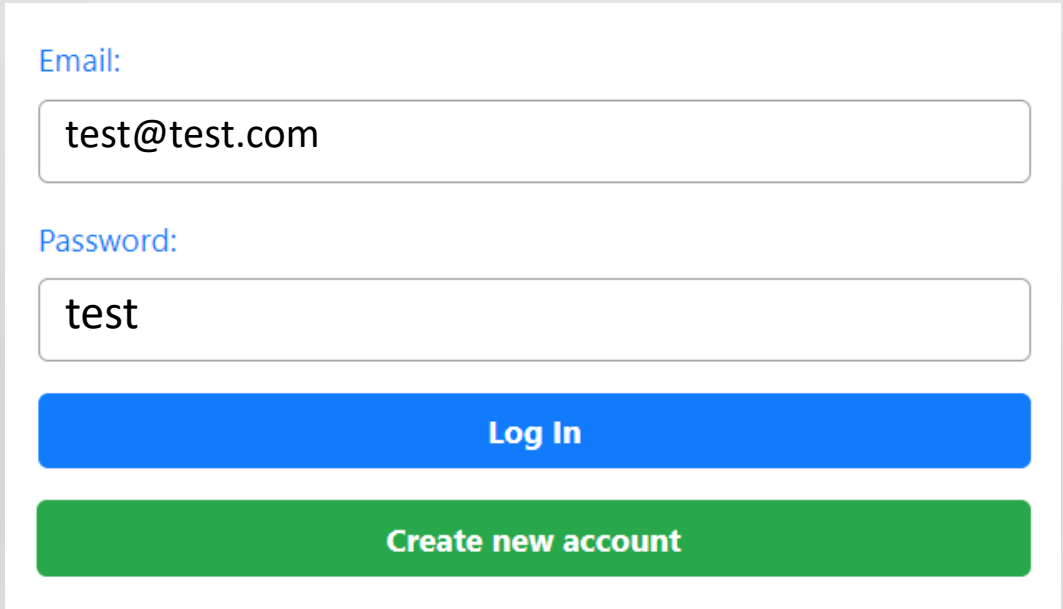

Thank you for participating!

OFFSHORE FINANCIAL LLC AND TRUST STRUCTURES FOR THE CONSERVATIVE CLIENT AND PLANNER

Saturday, July 15, 2023

From 11:00 AM TO 12:00 PM EST

(60 minutes)

Remo Tiefenauer
Remo.tiefenauer@kaiserpartner.com

Presented By:

Alan Gassman, JD, LL.M. (Taxation), AEP® (Distinguished)

Remo Tiefenauer, BA, Executive MBA HSG

Alan Gassman, Esquire
agassman@gassmanpa.com