Asset Protection Trust Handbook For Advisors

Design, Implementation and Administration Formalities for Advisors

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As with so many topics, a hurdle to gaining understanding is first becoming familiar with the terminology involved. Thus, this book begins with a simplified glossary for readers unfamiliar with the asset protection field.

Glossary – Terms (definitions from knowledge and Black's Law)

Basic Terms

Estate: The interest which any one has in lands, or in any other subject of property.

Will: A document by which a person directs his or her state to be distributed upon death.

Executor: A person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease.

Testamentary: A paper, instrument, document, gift, appointment. etc., is said to be "testamentary" when it is written or made so as not to take effect until after the death of the person making it, and to be revocable and retain the property under his control during his life.

Administrator: A personal representative appointed by the court when no other personal representatives are named.

Donee: The party who receives something from another party.

Donor: The party who gives or appoints something to another party.

Power of Appointment: A power or authority conferred by one person by trust, deed or will upon another (called the "donee") to appoint, that is, to select and nominate, the person or persons who are to receive and enjoy an estate or an income therefrom or from a fund.

General Power of Appointment: A power given to an individual to appoint property under a trust in a way that causes the trust assets to be considered as owned by the power holder for estate tax purposes when he or she dies.

Special/Limited Power of Appointment: The power to designate beneficiaries under a trust that does not cause the trust assets to be considered as owned by the power holder for estate tax purposes, because of special drafting. Often such a power is limited to being exercisable only for the benefit of lineal descendants of the grantor of the trust.

Probate: The act or process of proving a will.

Probate Assets: Assets such as real estate that are in the name of a deceased person.

Trust: An equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognized and enforced by courts.

Grantor: A grantor is an individual or other entity that creates a trust. A grantor may function as the trustee.

Settlor: A settlor is an individual or other entity that creates a trust. (Identical to grantor)

Beneficiary: A beneficiary is an individual who may receive benefits from a trust. In a FAPT or APT, a beneficiary will include the settlor, but sometimes only under certain circumstances.

Trustee: The Trustee holds the trust assets for the benefit of the beneficiaries pursuant to the terms of the Trust Agreement.

Co-Trustee: Co-Trustees are one of two or more people or entities who work together to hold the trust assets for the benefit of the beneficiaries pursuant to the terms of the Trust Agreement.

Trust Protector: A Trust Protector is an individual, professional firm, or company named under a trust that holds the power to make certain changes to the trust and trusteeship. A Trust Protector may be considered to be a fiduciary, or may not be, depending upon the circumstances. If a Trust Protector has the power to add the Grantor of a Trust to the permissible beneficiaries and has a fiduciary duty to do so if and when the Grantor needs to be supported by the trust, then the IRS may argue that the Grantor is in fact a beneficiary of the trust. If the Grantor resides in a non-APT state, then creditors may argue that the law of the non-APT state should enable the creditors to reach trust assets in that the Full Faith and Credit Clause of the U.S. Constitution may require a court in an APT jurisdiction to respect a judgment to that effect.

Fiduciary: A fiduciary is an individual or entity that has a duty to a beneficiary or other party based on the legal relationship between them. Trustees have a fiduciary duty to beneficiaries, while an attorney has a fiduciary duty to their client. A trust protector may be under a fiduciary duty or not. A power to add a beneficiary to a trust is normally held in a non-fiduciary capacity.

Power to Add Beneficiary: If someone holds a power to add a beneficiary that must be held in a non-fiduciary capacity. For example, the APT may not include the settlor as an initial beneficiary, so that arguably at that time it is not even an APT. Someone might be given a power to add the settlor as a beneficiary in the future in a non-fiduciary capacity.

Trust Distribution: A trust distribution is a payment or other distribution of trust assets made a trustee to a beneficiary.

Asset Protection Trust (“APT”): An asset protection trust is an irrevocable trust that may benefit the settlor, while not being accessible to creditors of the settlor. The typical asset protection trust will benefit the settlor, the settlor’s spouse and the settlor’s family members.

In many APT plans, the settlor may not become a beneficiary of an APT unless or until certain circumstances have occurred, e.g. after some specified period of time, only if the settlor divorces, or only if the settlor’s net worth declines below a specified amount, etc.

Creditor: A person or company to whom a debt is owed.

Debtor: A person or company that owes a debt.

Powerholder: A person who has the power to decide who will receive property or an interest in property from a trust.

Situs: Situs refers to the jurisdiction where a trust is established, or where its assets are located.

Four common categories of APTs are as follows:

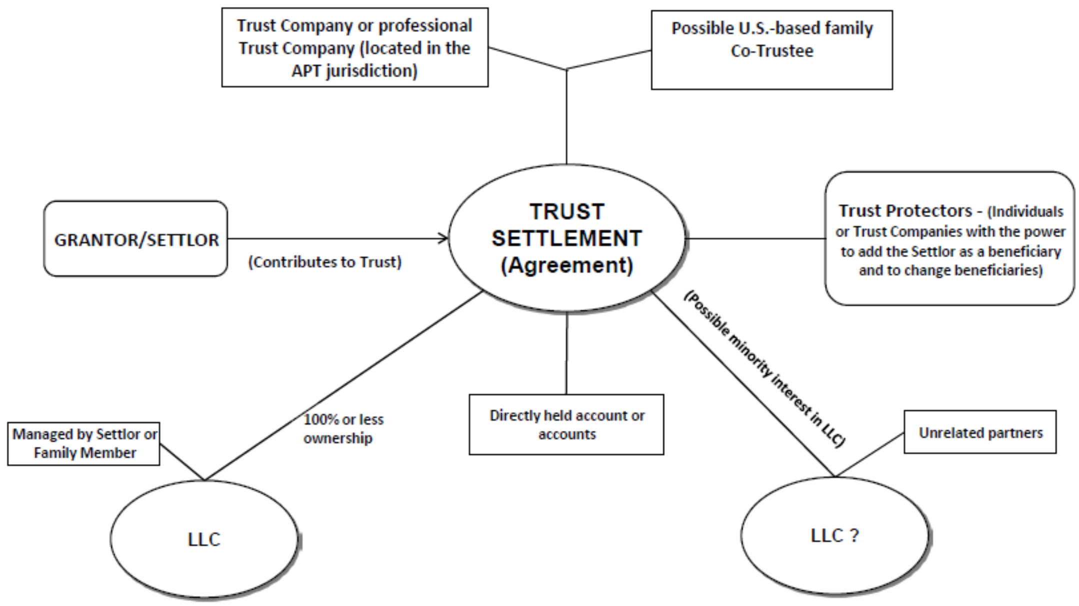
1. Domestic APT: This is a trust established in the United States under the laws of one of the APT jurisdictions that is designed specifically for tax planning purposes.

2. Foreign APT: This is a trust that has a foreign trustee or trustees, while being formed under the law of a foreign APT jurisdiction such as the Cook Islands, Nevis, or Belize.

3. Complete Gift APT: This is drafted so that the assets of the APT will not be subject to Federal estate tax on the death of the grantor. The transfer of assets to a complete gift APT will normally be reported on a Form 709 gift tax return and reduce the Settlor’s estate and gift tax exclusion or cause imposition of gift tax if such exclusion has been totally used.

4. Incomplete Gift: This occurs when the grantor retains certain powers which result in no need to file a gift tax return, and the trust assets being considered as owned by the grantor for income tax purposes, as well as Federal estate and gift tax purposes upon the grantor’s death.

The Anatomy of a Typical Offshore or APT State Trust Arrangement



The above chart briefly summarizes key details in a typical FAPT plan.

Asset Protection Jurisdiction: An asset protection jurisdiction is a jurisdiction that has laws that make it difficult for creditors to access assets held in an Asset Protection Trust that was funded by a beneficiary. Asset protection jurisdictions may have other laws that make it difficult to invade such a trust. According to Steven Oshins' 11th Annual Domestic Asset Protection Trust State Rankings Chart[1], the current U.S. states that are considered to be asset protection jurisdictions are as follows in enacted order: Alaska, Delaware, Rhode Island, Nevada, Utah, Oklahoma, South Dakota, Tennessee, Wyoming, Hawaii, Virginia, Ohio, Mississippi, West Virginia, Michigan, New Hampshire, Indiana, Connecticut, Alabama, and Missouri. It should be noted that irrevocable trusts properly established in any jurisdiction may provide some measure of asset protection, although those seeking asset protection will often use jurisdictions that provide what is perceived to be better protection. A key reason that one of the above states is used is those states permit the settlor to be added back (i.e., a so-called self-settled trust). This cannot be done in other jurisdictions that do not have domestic asset protection trust ("DAPT") enabling legislation. However, those seeking asset protection will often use a combination of trusts, limited liability companies, family limited partnerships, and other vehicles which may be

[1] *See Steve Leimberg's Asset Protection Planning Email Newsletter – 11th Annual Domestic Asset Protection Trust State Rankings Chart*

located in foreign and domestic jurisdictions. Quite enough, one or more DAPT's own some or all of the other entities.

Corporation: A corporation is a legal entity, usually a group of people or a company, that is separate and distinct from its owners and acts as a single entity.

Partnership: A partnership is a legal arrangement that allows two or more people to share responsibility for a business. Such partners share the ownership and profits, but they also share the work, responsibility, and potential losses.

General Partnership: A general partnership is an entity formed by a mutual agreement between two or more parties, agreeing to work together. In most situations, each partner in a general partnership has unlimited liability for partnership obligations.

Limited Partnership: A limited partnership is a type of partnership, which separates at least one general partner with unlimited personal liability. The limited partners have liability only up to the amount they invested into the partnership.

Limited Liability Company ("LLC"): An LLC is a company that is filed in compliance with the laws of a state in the United States or a foreign jurisdiction. LLCs were unique to the United States for many years, but have been adopted in a number of offshore jurisdictions, including Nevis and Saint Kitts, the Cook Islands, Panama, Costa Rica, Belize, and Anguilla.[2] One can elect to have an LLC treated as disregarded (ignored for income tax purposes but not for legal purposes), or a corporation (if there is one member), or as a partnership or a corporation (if there are multiple members).

Limited Liability Partnership ("LLP"): An entity that consists of a general partnership that has filed with the Secretary of State where the partnership exists to limit the liability that would otherwise apply for the general partners.

Family Limited Partnership ("FLP")/Family Limited Liability Company ("FLLC"): This is typically an LLC or limited partnership that is used by a family or individual for creditor protection, tax, and other purposes.

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[2] *International LLC Formation: Everything you need to know. UpCounsel. (November 12, 2020) https://www.upcounsel.com/international-llc-formation*

Community Property: Community property is a legal concept applicable in the nine community property states, Guam, and a number of countries with respect to the legal rights of spouses in a marriage with respect of property acquired while they have resided in a community property jurisdiction. The community property states consist of California, Texas, Nevada, Washington, Arizona, Louisiana, Wisconsin, New Mexico, and Idaho.

Separate Property: Separate property is a legal concept used to describe assets that are owned individually by one spouse and are not subject to division as community property or marital property on divorce. This concept is particularly relevant in community property states and in the context of divorce. In the event of a divorce, separate property is not normally subject to division and remains with the spouse who owns it.

Tenancy by the Entirety: Tenancy by the entirety is a form of joint property ownership that is available only to married couples in certain states. Some states, such as Florida, Delaware, and Wyoming recognize tenancy by the entireties for virtually all kinds of assets, and have laws which provide that creditors of one spouse cannot reach tenancy by the entireties assets. Many other states only recognize tenancy by the entireties for real estate, or homestead, and have varying degrees of creditor protection to apply.

Joint Tenancy: Joint tenancy is a form of property co-ownership where two or more individuals hold an equal share of the property with the right of survivorship. All joint tenants have an equal share in the property. Joint tenancy simplifies the transfer of property upon death, as it avoids probate and ensures the property goes directly to the surviving joint tenants.

Charging Order: A charging order is an order issued by a court that orders any distributions that would have gone to a debtor to instead go to the creditor holding the charging order. In many states and foreign jurisdictions, the charging order is the sole recourse accessible to a creditor that is owed funds by a debtor that has an LLC interest. In many jurisdictions, the charging order cannot be the sole remedy if the debtor is the only member of the LLC.

Decanting: Decanting is the act of transferring assets from one trust to another. Decanting may be used to improve the provisions of a trust, e.g. in a manner that enhances the new trust's asset protection over the perceived asset protection of the existing or old trust.

Renunciations: Giving up a right, such as a gift under a will, or abandoning the right to collect a debt on a note. For example, if a beneficiary is subject to a claim, they might opt to renounce rights to benefit in order to make those assets unreachable by their creditors.

Promissory Note: A promissory note is a legal document that is a promise of payment.

Flee Clause: A provision included in trust documents that allows the trustee or fiduciary to transfer the trust's situs or move assets to another jurisdiction if certain triggering events occur.

Types of Trusts

Irrevocable Trust: An irrevocable trust is a trust that cannot be changed by the debtor. While that historic definition is still used, irrevocable trusts can usually be modified by non-judicial modification agreements ("NJMA"), decanting, trust protector actions, or the use of powers of appointment.

Revocable Trust: A revocable trust is a trust that can be changed, modified or revoked by the settlor and is therefore subject to the grantor's creditors.

Grantor Trust: A grantor trust is a trust where the grantor who has formed and funded the trust has retained certain rights, or has provided for another person or entity to have certain rights which cause the trust to be disregarded for income tax purposes, and all of the income and deductions of the trust are reported on the grantor's personal tax return under Internal Revenue Code Section 671. The most common rights retained are the right to replace trust assets with assets of equal value and the right to borrow without adequate collateral. Also, a right given to a third party to exchange trust assets with assets of equal value or to add beneficiaries will also cause a trust to be a "grantor trust." This is an income tax characterization which may have little relevance to the asset protection status of the trust.

It is noteworthy that in many situations a grantor or trust protectors can "toggle off" or "toggle on" grantor trust status to make an APT a separate trust for income tax purposes, or a grantor trust, as applicable.

Non-Grantor Trust: A non-grantor trust is a trust that is treated as a separate taxable entity under the Internal Revenue Code.

Descendants Trust: Descendants trusts are used when a grantor wants to keep their assets for their future descendants and protect their wealth for generations. Again, as noted above this goal can be accomplished by using various other techniques in a single trust. In modern trust drafting most trusts are drafted to be dynastic in nature (subject to the availability of generation skipping transfer ("GST") tax exemption). The broader the class of beneficiaries the better the asset protection such a discretionary trust might afford.

Q-Tip Trust: A Q-TIP Trust is a trust that is established and funded by one spouse to pay income and possibly other benefits to the other spouse. A Q-TIP Trust will qualify for the Federal estate or gift tax marital deduction. Be aware that special rules apply if the spouse is not a citizen of the U.S.

Domestic Asset Protection Trust ("DAPT"): A DAPT is an asset protection trust that is set up in a US asset protection jurisdiction. There are currently 20 DAPT jurisdictions.

Incomplete Non-Grantor Trust ("ING"): An ING is an irrevocable trust that is designed to be considered a separate taxable entity situated in a state that does not tax irrevocable trusts. The gift to an ING is considered to be incomplete for income tax purposes. Most INGs are used to avoid income tax on certain investment income where the grantor lives in a state that imposes a high income tax. Note that New York and California have restricted the use of ING trusts and the IRS will no longer issue rulings on them so that some advisers may prefer to use different techniques. The traditional ING format makes use of an incomplete gift trust which may reduce or eliminate the asset protection benefits of the arrangement.

Spousal Lifetime Access Trust ("SLAT"): A SLAT is a trust where one spouse sets up and funds a trust for the other spouse and their descendants for their lifetime. SLATs can be combined with a myriad of other powers and access mechanisms such as designating a person who can loan trust assets to the settlor, in combination with the SPAT technique, etc. These are additional reasons why many SLATs are created in asset protection friendly jurisdictions.

Special Powers of Appointment Trusts ("SPAT"): A SPAT is a trust where the settlor never becomes a beneficiary, and the trustee is never able to make distributions to the settlor. An individual holds a special power of appointment in a non-fiduciary capacity that may be exercised to direct the trustee to make a payment to the settlor.

Foreign Asset Protection Trusts ("FAPT"): A foreign asset protection trust is an asset protection trust that is set up in a foreign jurisdiction.

Grantor Retained Annuity Trust ("GRAT"): A type of trust where the person who creates the trust (the grantor) transfers assets into it and receives an annuity, or more frequently an annual payment for a set number of years. After the set period ends, any remaining assets in the trust go to the beneficiaries (usually the grantor's children) without additional estate or gift taxes. GRATs are often used to minimize estate and gift taxes.

Dynasty Trust: A trust that is designed to be held for the benefit of multiple generations of descendants.

Generation Skipping Trust: A trust that is established to avoid estate tax on transfers for descendants who are more than one generation level from the grantor; i.e. a grandchild.

Generation Skipping Tax: A tax imposed when assets pass through a generation in excess of the transferor's federal generation skipping tax exemption.

Generation Skipping Tax Exemption: The amount that an individual can pass directly to grandchildren or other "skip generations" without incurring federal generation skipping tax, which is $13,610,000 as of 2024.

Charitable Definitions

Private Non-Charitable Foundation: A private non-charitable foundation holds assets for the benefit of a stated family or group of individuals and or entities, but no beneficiary has any specific right to receive foundation assets or distributions, or any ownership interest.

Statutory Foundation: A statutory foundation is a foundation created by Wyoming under the Wyoming Statutory Foundation Act.

501(c)(3) Foundation: 501(c)(3) foundations are referred to as charitable organizations, and they are not able to be organized for private interests. No part of the organization's net earnings may benefit any private shareholder or individual.

Glossary – Concerns

Attorney-client privilege: Attorney-client privilege is when documents are classified and out of the scope of discovery when they are between an attorney / CPA, or other included professional, and their client. The privilege is limited and many common planning steps, such as having an attorney share documents with a financial adviser or other non-attorney, may cause loss of its protection.

Practitioner Protection: Practitioner protection is a measure that practitioners can take to better protect themselves from malpractice, such as disclosing that no estate plan is foolproof, etc. This is important for any professional considering their own asset protection.

Reciprocal Trust Doctrine: The reciprocal trust doctrine is a prohibition against two individuals setting up a trust for the benefit of the other. It is a particular issue when it comes to spouses creating irrevocable trusts, e.g. SLATs, for each other. However, it can also apply to siblings and others. It is important to be familiar with the reciprocal trust doctrine and advise clients about it, so trusts are not challenged. Some practitioners assume that this doctrine can only be raised by the IRS but that is incorrect as creditors may raise it to unwind trusts and reach assets held under trust arrangements.

PREFACE

This handbook has been written to provide estate and creditor protection lawyers, accountants, financial planners and other advisors with a background, checklists and appropriate knowledge that can be used to navigate the waters of asset protection trusts and alternatives. Readers should be advised however that every situation is different and that a plan that might work for some clients may not be viable for others. No plan, technique, idea or documents will be foolproof. Also, the judicial system is not perfect and a client that is in the right might still be ruled against by a court that views the client in a negative light for its own reasons. Therefore, caution should always be exercised. Also, the law is constantly changing and nothing in this book should be assumed to be current. Finally, the laws vary significantly from state to state so that practitioners must consider the laws in each state involved. Thus, this book should at most be assumed to be a general guide of ideas and not as providing definition legal guidance.

Alaska passed the first United States based asset protection trust legislation in 1997, and since then, thousands of Americans and individuals and families from outside of the United States have formed and funded U.S. based asset protection trusts, with most of these being in Alaska, Delaware, Nevada, and South Dakota.

The decision as to whether to form and fund a U.S. based asset protection trust, or a foreign asset protection trust, is one that should be carefully undertaken, after considering the circumstances of the client, the challenges that creditors may pose (particularly if the client does not reside in an asset protection trust jurisdiction), the costs that will be incurred to form and maintain the structure, and what assets or what parts of assets should be held under the asset protection trust structure, as opposed to being held in the name of a spouse who may not have high exposure to creditors, or state law protected assets ("exempt assets") such as homestead, cash value life insurance, annuities, 401k plans, 529 plans, and IRAs.

An additional consideration is to what extent assets may be held under limited liability companies, limited partnerships, or other entities that may be owned in whole or in part by an asset protection trust or trusts to provide additional layers of protection, so that piercing the asset protection trust would leave a creditor with nothing more than a charging order against LLC interests over which the debtor has no control. This point illustrates a fundamental concept of many asset protection plans. The more components and moving parts, with each having tax, practical, and business purposes, the more protection that might be achieved. This approach, however, is often at odds with client desires for simplicity, lower cost and easier administration.

Income and estate tax planning must also be an integral part of any asset protection trust strategy.

Many asset protection trusts, particularly those that are formed based upon the advice of non-tax experts, are structured as “incomplete gift trusts” that are not considered to be transfers or what are known as “completed gifts” under the federal estate and gift tax rules. With incomplete gifts, no gift tax return has to be filed, and no part of the contributor’s $12,920,000 (2023, but inflation adjusted in future years and reduced by one-half in 2026) estate tax exemption will be used upon funding. When the grantor dies, such trusts will be considered as owned by the grantor for federal estate tax purposes. While that may accomplish asset protection from creditors, it does not address potentially costly estate taxes that may pose a significant risk to the grantor/client. Also, it is possible that a creditor or court might interpret, even if incorrectly, that an incomplete gift transfer should somehow be reachable by the creditor. If the incomplete gift trust can provide state income tax savings as a non-grantor trust, that state tax savings may provide a justification for the plan independent of any asset protection motives. However, be aware that some states are restricting the viability of such trusts.

Alternatively, individuals who reside in states, such as New York and California, may be better served by having an asset protection trust established and funded as a “completed gift trust” where part of the grantor’s estate tax exemption is used, and the trust is carefully drafted and managed for the purpose of having the assets held under the trust excluded from the estate of the grantor for federal estate tax purposes. Providing a non-asset protection purpose for the trust and creating a pathway that allows a grantor to effectively estate tax plan while also having a possible “back door” into the trust if financial and personal circumstances change, and assuming that the trust is drafted, designed, and managed properly to avoid federal estate tax exposure.

Most asset protection trusts are grantor trusts, which are “disregarded” for federal income tax purposes, meaning that all income and deductions from the trust will be reported on the grantor’s federal income tax return as if he or she maintained ownership of the trust assets.

This can be especially effective as a planning tool when the trust will not be subject to federal estate tax, because it allows the trust to grow income tax-free, and for the grantor’s estate to continue to be reduced by the taxes paid, under present law. This hopefully will continue to reduce the exposed assets and increase the assets inside the trust that are protected. It would seem difficult for a creditor to successfully argue that the client’s payment of income taxes on trust income, as required under the tax laws, is somehow a fraudulent transfer to the trust.

Some asset protection trusts, however, are intentionally designed to pay their own income taxes, called an incomplete non-grantor ("ING") Trust. These so-called ING trust acronyms are often modified to reflect the state where the trust has situs, such as the NING, DING, SDING, WING, and AKING, which indicate a Nevada, Delaware, South Dakota, Wyoming, or Alaska non-grantor incomplete Gift trusts. These ING trusts have been used by individuals and families who reside in states that have high-income taxes. If the trust is separately taxed as a "complex trust" and located in one of the above-referenced states, then the family may avoid or defer paying income tax to the state where they reside when the ING trust owns income-producing assets. The IRS has ceased issuing private letter rulings ("PLRs") approving such trusts, causing some practitioners to become more cautious in the use of INGs. The discussion of the appropriateness of INGs is beyond this introductory section but does serve to illustrate that the asset protection planning landscape is always changing, and that practitioners and commentators often have quite different views about the efficacy of any particular technique, and those views also are subject to change. For example, on June 28, 2023, California passed a new law which essentially requires California residents to pay income tax on the income of complex trusts, thus obliterating the use of complex trusts to avoid income tax that would have otherwise been taxed to a California resident.[3]

Estate and creditor protection planner, Steven Oshins, recently published the following, with respect to this.

It finally happened. California passed SB 131 in its 2023 legislative session which, among other things, sadly contains a provision treating all so-called Incomplete Non-Grantor Trusts ("ING Trusts") as grantor trusts taxed to the settlor.

This takes away a key tool planners have used for many years to reduce California state income tax on taxable income not sourced to California.

The legislation is effective retroactive to January 1, 2023, so many California residents were wrongly punished for following the law that existed prior to the date this legislation passed. It remains to be seen whether an ultra-wealthy California resident will challenge the constitutionality of the statute.

Does this mean the end for California taxpayers? No, it does not.

[3] *S.B. 131*

New York enacted a similar statute in 2014 and clever estate planners have continued to create NY state income tax saving trusts. Just not ING Trusts!

The key is to complete the gift. No more incomplete gift trusts.

a. Move Out of California

One obvious option is to pick up and leave! Move to another state where there are no state income taxes or where the laws allow ING Trusts to save state income taxes.

This will likely happen. History tells us that tax increases (and in this case taking away tax savings opportunities) drive residents to move out. At some point, they simply cannot take the high taxes.

The ocean is much, much warmer in Florida than it is in California!

b. Completed Gift Non-Grantor Trusts

If you like your home and you do not want to move, current planning may involve creating one or more Completed Gift Non-Grantor Trusts. Just like New York's taxing statute, California's anti-ING Trust taxing statute does not tax Completed Gift Non-Grantor Trusts.

There are multiple alternative approaches to creating Completed Gift Non-Grantor Trusts. Here, just as with an ING Trust, the client must be willing to give up sufficient control.

- **Completed Gift Non-Grantor Trust for Descendants:** This trust is simply a trust that does not violate any of the grantor trust rules and can be set up using the laws of any state that has no state fiduciary income tax on trusts. Therefore, neither the settlor nor the settlor's spouse is a beneficiary of this trust. The trust is generally set for the benefit of the settlor's descendants, but other beneficiaries can be added too.
- **Completed Gift Non-Grantor Trust for Spouse and Descendants:** This trust can be set up using the laws of any state that has no state fiduciary income tax on trusts. But in addition to that requirement, the trust must also require any at least one adverse party (such as a child of the settlor who is a beneficiary of the trust and hence has interests adverse to the spouse) to approve any distribution. What constitutes a sufficiently "adverse party" is not clear and will introduce risk into the plan. Unlike an ING

Trust, it only requires any one single adverse party signature. The advantage of including the settlor's spouse is that the settlor retains indirect access through distributions to the settlor's spouse.

- **Completed Gift Non-Grantor Trust for Settlor, Settlor's Spouse and Descendants:** The trust must be set up using the laws of a state that has a Domestic Asset Protection Trust ("DAPT") statute and no state fiduciary income tax on trusts. Just like the spousal option described above, the trust must also require at least one adverse party (such as a child of the settlor who is a beneficiary with interests adverse to the spouse) to approve any distribution. Unlike an ING Trust, it only requires any one single adverse party signature. The advantage of including the settlor is that the settlor retains access. However, there is still an open question regarding whether the trust is includible in the taxable estate of the settlor if the settlor is not a resident of a Domestic Asset Protection Trust state. To this date, after many, many years of these statutes, this author is not aware of even one case where such a trust was ruled to be in the settlor's taxable estate. Therefore, the odds appear to be very favorable, but still, the planner should factor in the estate inclusion risk in determining whether to use this option.

c. Life Goes On

There are still plenty of alternatives. As estate planners, we all have to be aware of these alternatives. It is also imperative that financial advisors, accountants, and trust officers to be familiar with alternative planning strategies and this type of planning.

While questions and uncertainty exists with respect to the ability of creditors to pierce an asset protection trust, particularly when the debtor resides in a non-asset protection trust jurisdiction, additional steps may bolster the plan. However, practitioners should all caution clients that there is no certainty that any such mechanism will succeed, and the law may evolve in a manner that is contrary to the protections an asset protection trust may provide to a resident of a non-asset protection jurisdiction. For example, these trusts can include "Flee Clauses" or simply provide that the resignation of a trustee will cause the trust to be administered under the law of a foreign jurisdiction that recognizes asset protection trusts, considers them to be effective as of the date they are first formed in the United States, and does not recognize U.S. judgments. A creditor reviewing such a trust and contemplating the cost and risks associated with pursuing years of litigation, first in an asset protection jurisdiction, and then offshore, may be willing to settle for significantly less than what is owed, if the trust was established well before a problem was expected, and the creditor was not misled by the planning that occurred. Notwithstanding the opportunities and possible advantages offered by the use of an asset protection trust, there are a good many considerations and concerns that can be found in this handbook, but the discussions do not cover ever consideration.

Another tax and non-asset protection purpose for establishing an irrevocable trust is that a new fair market value income tax basis may be received on trust assets that have a fair market value exceeding cost or depreciated basis by giving an older or infirm family member or close friend a general power to appoint trust assets to creditors of his or her estate. Much has been written on the OBIT ("Optimal Basis Increase Trust"). The senior family member will also be a discretionary beneficiary of the trust, and the power to direct appreciated assets to creditors of his or her estate will be limited so as not to exceed the amount of assets that can pass free of estate tax in the powerholder's estate for federal estate tax purposes, and may only be exercisable with the consent of one or more individuals who meet the definition of a "non-adverse party" and are not acting in a fiduciary capacity. Incorporating limitations on the extent of such powers may be particularly important considering the reduction by half of the estate tax exemption in 2026.

Oftentimes, planners will encounter situations where a client seem susceptible to undue influence or simply seem infirm and at risk to losing their assets or having their assets mismanaged. If these clients place their assets with a reputable trust company sitused in an asset protection jurisdiction for the primary purpose of asset protection, then it may be more difficult for someone to take advantage of the clients, to mismanage the assets, or to receive them as "gifts." Other steps can be taken to enhance this type of planning, such as incorporating a trust protector in the trust instrument with the power to remove and replace trustees (providing a check and balance on the trustee), adding a requirement for an independent care manager to perform an assessment of the settlor annually (or more frequently if circumstances warrant) and providing a copy of the written assessment to the trustee, the trust protector, and the agent under the settlor's health care proxy. The key point is that there are many risks to a client's assets, not only malpractice claimants and lawsuits. Taking proactive steps to mitigate a broad array of identifiable risks is perhaps a better approach to protecting a client's wealth. As the population continues to age this will become an ever more important rationale for asset protection planning especially, when coupled with professional trustees.

While this preface only covers the tip of the iceberg of what asset protection trusts do and how they can be used, the reader will hopefully review the remainder of this handbook with care and consideration. Reading other literature and engaging in conversations with experts before proceeding to draft, design, and implement asset trusts for clients can be helpful too.

The authors welcome any questions, comments, or suggestions to shenkman@shenkmanlaw.com and alan@gassmanpa.com. Thank you to the readers for the opportunity to provide this handbook and future editions of it.

PART I:

Chapter 1: Introduction and Overview: What is an Asset Protection Trust and What Primary Priorities Should Be Considered and Used?

By definition, an "Asset Protection Trust" ("ATP") is an irrevocable trust formed in a jurisdiction ("ATP Jurisdiction") which may benefit the settlor who establishes and funds it with appropriate pre-transfer precautions, while not being accessible to the creditors of such individual.

Asset Protection Trusts were first made popular in the United States in the 1980s by a well-known lawyer, who had been practicing securities law and saw a significant need for people to be able to put their assets into a trust or other arrangement that would make it difficult for creditors to reach them.

Offshore Trusts are also often used because the laws of many jurisdictions will not permit creditors of an Offshore Trust Settlor or beneficiary to pierce the trust if certain requirements are not met and many jurisdictions will not recognize US judgments or court orders. There are reputable jurisdictions with reputable trust companies that may be used under proper circumstances, when other exemptions are not sufficient for a particular situation. There are a number of jurisdictions that have stringent asset protection legislation. Just as many people move to Florida to enjoy asset protection laws, it is not uncommon for individuals to protect a portion of their overall assets under the laws of offshore jurisdictions.

It may be significantly more difficult for a creditor to pursue assets held by an offshore account or life insurance under an offshore corporation, but typically such assets are used under an offshore asset protection trust or to help assure that there is charging order protection, and commonly similar protection can be derived from using a domestic limited liability company ("LLC") or limited partnership.

The well-known attorney worked with lawyers in the Cook Islands, which is twenty-four hundred miles North of New Zealand and twenty-six hundred miles South of Hawaii, and worked with them to establish legislation which generally provided that creditors of a Cook Islands trust would not be able to penetrate the trust if it was established in the Cook Islands before a judgment against the debtor was received.

That firm effectively popularized the Asset Protection Trust and established a significant number of them.

Oftentimes, the client would appoint an individual such as a sibling, trusted friend, or advisor to serve as co-trustee with the Cook Islands trust company[4], and the Cook Islands trust company would send invoices annually for serving as co-trustee but in many situations do nothing further.

Certain endeavors that would normally result in liability may be placed under a limited liability company, a regular corporation, or certain other limited liability entities to provide "firewall" protection. The law is very clear that the shareholder or member of a company or limited liability company (LLC) is not responsible for liabilities of the company itself absent guarantees, personal negligence, or certain other exceptions to what we call "firewall" liability insulation. See Fl. Stat. § 608.4227 (discussing liability for members of a LLC).

"Firewall" liability insulation refers to the concept that the shareholder of a corporation or limited partner in a limited partnership will not be liable for liabilities incurred by the entity. This is why many companies put the more hazardous activities under a separate company.

This helps to explain why virtually all successful businesses, professional practices, and many real estate and other endeavors are established under corporations, LLCs, limited liability limited partnerships (LLLPs), and similar entities.

It is important to make sure that business entities are properly managed from a legal documentation and fiscal standpoint. Individuals working on behalf of or managing a limited liability entity may become responsible for their own acts or acts of those that they are or should be supervising.

Many non-married professionals have significant furniture, equipment, and accounts receivable held under their professional practice corporations. It is often possible to structure debt, ownership, and multiple corporate arrangements to reduce exposure to creditors under professional practice circumstances.

To make the Asset Protection Trust more user-friendly, many lawyers in the early stages of FAPTs would have their clients form a U.S. limited partnership and allow the client or an entity owned by the client to be the controlling 1% general partner of the limited partnership. The client would then fund the limited partnership with the assets to be protected, which could include stocks, bonds, real estate entities, cash, and other investments that would be held in the United States or abroad.

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[4] See Denis Kleinfeld's opinion regarding co-trustee selection and Cook trusts with U.S. co-trustees Click Here; He believes that if you are going to set up an off shore trust, that you should have an off shore trustee and assets in accounts before opening a trust as to not set up a shadow trustee.

The client would sign the Offshore Asset Protection Trust with a Cook Islands trust company and transfer the 99% limited partnership interest in the limited partnership to the trustee.

Some felt that it was possible to "import the laws of the Cook Islands" into the U.S. and to maintain the assets in the United States using this method, and reported many years later that there were very few challenges to the arrangement, with almost all creditors being willing to settle upon favorable terms.

If and when a U.S.-based settlor of a Cook Islands Asset Protection Trust was in hot water by reason of being in litigation or possibly almost having a judgment against him, the U.S.-based limited partnership could be liquidated, and the assets could be held offshore to help safeguard against a creditor that might attempt to obtain an injunction to restrain the transfer of assets to a foreign country or countries.

While there were court cases in which the settlors of offshore Asset Protection Trusts were put into jail on contempt of court for failing to cause the offshore trustee to bring the assets back when the debtor was in bankruptcy, these cases have been few and far between (Anderson, Lawerence, and Bolizerien)[5] and were believed by many to be aberrations based upon the fact that the debtors in these situations had been far less than candid with the bankruptcy court and creditors, and then set the arrangements up in conjunction with or shortly after engaging in highly undesirably conduct.

Some U.S.-based advisors were of the opinion that a contempt order could not apply if the planning had been done well in advance of the situation. A court could not imprison someone for contempt for not doing something that was not possible. Nevertheless, the concept of "self-caused impossibility" was an exception to this.

While the Cook Islands law was unique and the very first explicitly legislated asset protection law of its time, a good many jurisdictions had, for many decades, if not centuries, laws that prevented the creditor of a settlor from abroad from pursuing an irrevocable trust that enabled the trustee to make discretionary distributions for a settlor and his or her family.

Such trusts existed in jurisdictions like the Isle of Man (in the Irish Sea between England and Ireland), Guernsey (in the Channel Islands off the coast of France), and Jersey Channel Islands.

[5] Anderson, Lawerence, and Bolizerien

In the 1980s, a number of reputable international trust companies had offices in a variety of offshore jurisdictions.

As a result of this, a number of jurisdictions, including Nevis, enacted asset protection laws which required a deposit in the court registry before a creditor could challenge a Nevis trust. Belize basically had no statute of limitations on transfers made to a Belize asset protection trust, even if creditors had a judgment against the settlor of the trust outside of Belize on the date the trust was established.

The majority of the trusts formed were "incomplete gifts" trusts, and almost all of them were disregarded for income tax purposes. Therefore, the assets of the trust were never considered to have been transferred for Federal estate and gift tax purposes, and the income and deductions from the trust's assets and activities were reported on the federal income tax return of the settlor.

On April 02, 1997, Alaska became the first U.S. state to enact asset protection jurisdiction. The Full Faith and Credit Clause of the Constitution requires each state to honor and enforce the laws, official documents, and court rulings of other states. While at the time (and still now even), it was unclear whether the full faith and credit clause of the U.S. Constitution would enable a court in any of the other 49 states to set aside an Alaska asset protection trust situation, the Alaska asset protection trust became popular in a number of states. States enacted domestic asset protection trusts, and Oshins has ranked each state in his 10th Annual Domestic Asset Protection Trust State Rankings Chart[6]:

Ranking	State	Affidavit Needed?	Score	Date Enacted
1	Nevada	No	99	October 1, 1999
2	South Dakota	No	98	March 2, 2005
3	Ohio	Yes	85	March 27, 2013
4	Missouri	No	84.5	August 28, 2002
5	New Hampshire	No	84	September 16, 2017
5	Tennessee	Yes	84	July 1, 2007
7	Delaware	No	83	July 9, 1997
8	Alaska	Yes	82.5	April 2, 1997
9	Rhode Island	No	82	July 1, 1999
10	Wyoming	Yes	78	July 1, 2007
11	Hawaii	No	77	July 1, 2011
12	Michigan	Yes	75	March 8, 2017
13	Mississippi	Yes	72.5	July 1, 2014
14	Utah	Yes	65	December 31, 2003

[6] *See Steve Leimberg's Asset Protection Planning Email Newsletter – 11th Annual Domestic Asset Protection Trust State Rankings Chart. May 1st ,2020*

NR	Oklahoma	No	NR	June 9, 2004
NR	Virginia	No	NR	July 1, 2012
NR	West Virginia	Yes	NR	June 8, 2016

Mr. Oshins' ranking have been criticized in the past, but his write up on the various factors that apply can be very helpful.

For example, he notes that the states of Ohio, Tennessee, Alaska, Wyoming, Michigan, Mississippi, Utah and West Virginia require affidavits to be executed whenever assets are added to an asset protection trust in such states.

While it may be advisable for estate planners to consider having the donor/transferor sign a solvency affidavit before each material transfer to entities or trusts, even if state law does not require it, such affidavits can be a tripwire for those attempting to execute asset protection trusts. A solvency affidavit is meant to demonstrate that there are no known claims, liens, or debts prior to the transaction, thereby avoiding circumstances similar to some of the bad fact DAPT cases where the settlor/transferor appeared insolvent or faced significant financial issues before the transfer. However, obtaining a client's signature on an affidavit or a confirmation of the accuracy of a financial statement may inadvertently signal that the planner is concerned about solvency or the veracity of the client, potentially harming the debtor if they later become insolvent.

Choosing a DAPT jurisdiction that mandates affidavits, such as Alaska, Indiana, Michigan, Mississippi, Ohio, Tennessee, Utah, West Virginia, and Wyoming, could expose the debtor to allegations of perjury if the affidavit is found to be inaccurate. Thus, when comparing DAPT jurisdictions, estate planners should consider the implications of affidavit requirements, including the risks associated with incorrect or unintentionally misleading information provided on such affidavits and the consequences of not adhering to these requirements.

The federal estate tax exemption is the amount in assets that an individual can transfer at their death without incurring federal estate tax. As of 2024, the federal estate tax exemption is $13.610 million per individual. In addition to the exemption amount, individuals can give away up to a certain amount each year to an unlimited number of recipients without incurring federal gift tax. As of 2024, the annual gift tax exclusion is $18,000 per recipient.

As the estate and gift tax exemption dramatically increased from Three Hundred and Twenty-Five Thousand Dollars in 1984 to Six Hundred Thousand Dollars from 1987 – 1997 to Six Hundred and Twenty-five Thousand Dollars in 1998 to a million dollars in 2002, and then as follows:

Year	Estate Tax Exemption	Top Estate Tax Rate	Gift Tax Annual Exclusion

1983	$275,000	60%	$10,000
1984	$325,000	55%	$10,000
1985	$400,000	55%	$10,000
1986	$500,000	55%	$10,000
1997	$600,000	55%	$10,000
1998	$625,000	55%	$10,000
1999	$650,000	55%	$10,000
2000	$675,000	55%	$10,000
2001	$675,000	55%	$10,000
2002	$1,000,000	50%	$11,000
2003	$1,000,000	49%	$11,000
2004	$1,500,000	48%	$11,000
2005	$1,500,000	47%	$11,000
2006	$2,000,000	46%	$12,000
2007	$2,000,000	45%	$12,000
2008	$2,000,000	45%	$12,000
2009	$3,500,000	45%	$13,000
2010	$5,000,000 or $0	35% or 0%	$13,000
2011	$5,000,000	35%	$13,000
2012	$5,120,000	35%	$13,000
2013	$5,250,000	40%	$14,000
2014	$5,340,000	40%	$14,000
2015	$5,430,000	40%	$14,000
2016	$5,450,000	40%	$14,000
2017	$5,490,000	40%	$14,000
2018	$11,180,000	40%	$15,000
2019	$11,400,000	40%	$15,000
2020	$11,580,000	40%	$15,000
2021	$11,700,000	40%	$15,000
2022	$12,060,000	40%	$16,000
2023	$12,920,000	40%	$17,000
2024	$13,610,000	40%	$18,000

More individuals and families forming irrevocable trusts decided that they would like to have the trusts be "completed gifts" for federal estate and gift tax planning, while also being possibly accessible by the settlor if that were needed. A "completed gift" refers to a gift that is considered to have been irrevocably given for estate gift tax purposes and immediately transfers ownership and control of the gifted asset to the recipient of the trust or individual donee.

Until 2012, it was generally believed by the tax community that an irrevocable trust would be considered incomplete for estate and gift tax purposes, if the grantor had the ability to direct how trust assets would pass at the time of the grantor's death.

In 2012, the IRS surprised the tax community by issuing Chief Counsel Advise 201208026,[7] which provided that a gift to an irrevocable trust will be considered to be complete for estate and gift tax purposes unless the settlor has both: (1) the right to veto distributions to any person other than the settlor and (2) the right to direct trust assets upon death (which is known as a "testamentary power of appointment").

Commentators believe that a lifetime power of appointment will also be sufficient.[8]

Some advisors also went a step further with respect to the convenience of the settlor by drafting trusts that had a co-trusteeship between an offshore trust company and a trusted friend, relative, or professional residing in the United States who would hold the ownership interest in certain trust assets and possibly even in a limited partnership.

While there have now been thousands of domestic asset protection trusts formed, the authors are only aware of two court decisions with respect to challenges by creditors of APT grantors, particularly where the debtor and the creditor reside in a non-APT jurisdiction state, and the debtor has attempted to seek protection using and APT trust in "last minute planning."

In the case of *Waldron v. Huber* (In re Huber) on May 17, 2013, the court ruled that the debtor attempted to shield their assets from creditors before filing bankruptcy, the law of Alaska where the trust was formed was not controlling, and the trust was invalid under the law of Washington. The court ruled this way because the debtor was domiciled, the trust assets were transferred, and the creditors and beneficiaries were all located in Washington. The court granted the trustee's motion for summary judgment concerning fraudulent transfers.[9]

In the case of *Marine Midland Bank v. Portnoy* (In re Portnoy) on October 8, 1996, the debtor had transferred nearly all assets into an offshore trust in the Jersey Channel Islands and began depositing personal paychecks into a spouse's bank account, months before a personal guarantee of his corporation's indebtedness was going to be called. The court denied the defendant debtor's motion for a summary judgment seeking a discharge of indebtedness because of a failure to prove entitlement to discharge of all debts.[10]

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[7] [7] CCA 201208026; see Leslie Share and Alan Gassman discussing IRS CCA 201208026; Click Here; Mr. Shares discusses (1:36) that his firm gives a lifetime and testamentary power of appointment if the client wanted it to be an in-complete gift

[8] *See Diana Zeydel, When is a Gift to a Trust Complete-Did CCA 201208026 Get it Right?.*

[9] *Waldron v. Huber* (In re Huber), 493 B.R. 798

[10] *Marine Midland Bank v. Portnoy* (In re Portnoy), 201 B.R. 685

The fact that there are only two known cases after nearly thirty years of APT jurisdiction gives some credence to the proposition that creditors are not likely file a lawsuit to challenge an asset protection trust if a reasonable settlement can be reached.

To the knowledge of the authors, there are no studies or statistics released on the rate of settlements or settlement amounts, but the few settlements that the authors are aware of have been favorable to individuals who have established asset protection trusts well before problems have arisen.

An essential component of most traditional and now modern asset protection trusts is the selection and proper installation of trust protectors and trust protector provisions.

In traditional asset protection trusts, the trust protectors are typically offshore or U.S.-based professionals, close friends of the family, or even relatives who are typically identified as being "non-fiduciary", so that they do not have a duty to benefit the settlor or any particular beneficiaries of the trust.

The trust protectors can typically replace the trustees, move the trust to an alternate jurisdiction that may be safer from creditors, or change the trust by excluding or adding the settlor or family members of the settlor as beneficiaries.

A creditor may look at an asset protection trust that includes the settlor as a beneficiary, unless or until the trust protectors remove them, in which event they may have no claim against the trust. Alternatively, the creditor may face the possibility that the trust protectors would move the trust to another jurisdiction after years of litigation in the jurisdiction where the trust is situated at the time that litigation is initially being considered.

It is important to remember that a trust having non-U.S. persons as trust protectors will have to register as a foreign trust for federal income tax purposes, although it is possible to have U.S. protectors and to list foreign protectors as alternates for if or when the U.S. protectors resign.

Many believe that South Dakota has the best legislation, and South Dakota seems to be the darling jurisdiction for foreign individuals and families to form entities to hold their wealth within the United States.

South Dakota is highly regarded for its favorable legal environment for trust formation and wealth management, offering several key benefits that attract individuals and families, including international ones. One of the primary advantages is the absence of state income tax, allowing trusts to accumulate and distribute income without state tax liabilities, which is particularly beneficial for high-net-worth individuals. Additionally, South Dakota boasts robust asset protection laws, including self-settled trust statutes that enable grantors to remain discretionary beneficiaries, providing significant protection from creditors while retaining access to trust assets.

One of the key provisions that enhance its attractiveness is South Dakota Codified Laws § 51A-5-8.[11] This statute provides reciprocal privileges for foreign banks or trust companies, allowing them to serve in various fiduciary capacities within South Dakota. Specifically, it states that a bank or trust company organized under the laws of any other U.S. state, including Nevada, may be appointed and may serve as a trustee, executor, administrator, guardian, conservator, or in any other fiduciary capacity in South Dakota, provided that the home state of the foreign entity grants similar privileges to South Dakota-based entities.

Nevada asset protection lawyer, Steven Oshins, has written extensively about "hybrid trusts," which do not have a settlor as a beneficiary, unless or until the trust protectors add him or her. If the persons holding the power have a fiduciary duty to add the settlor, then the settlor may be considered a beneficiary from the beginning. This is an important reason that APT language should usually make clear that a person or persons holding this power are not fiduciaries.

Many APT jurisdictions have laws that specifically provide the trust protectors are not fiduciaries unless otherwise set forth in the trust agreement and that there can be no agreements between the settlors, trustees, trust protectors, or relevant powerholders, to add or delete the settlor or to make any payments to or for the benefit of the settlor unless in writing or included in the trust instrument in order to defeat any allegations that unwritten agreements or misunderstandings exist.

Aside from traditional asset protection trusts that are incomplete gifts and are not established for federal estate and gift tax avoidance purposes, there is an entirely new generation of APT trusts established in both APT and non-APT jurisdictions, which are designed to be excluded from the settlor's estate and from the estate of any spouse and the estates of descendants of the settlor, in addition to the expectation or goal that the asset of such trust will also not be accessible to creditors of the settlor or the settlor's family.

This will happen naturally when a settlor is solvent and forms an irrevocable trust in a non-APT jurisdiction that the settlor is not a beneficiary of. In terms of business, the term 'solvent' refers to when someone is unable to pay their financial debts.

A common example is a Spousal Limited Access Trust ("SLAT") that can benefit the settlor's spouse and even a future spouse of the settlor (not as a

[11] S.D. Codified Laws § 51A-5-8

“floating spouse”), and can be outside of the settlor’s estate for federal estate tax purposes.

Even settlors who do not have spouses will commonly be comfortable setting up irrevocable trusts to benefit only their descendants, with the knowledge that the trustee (who the settlor may replace at any time) can make loans to the settlor or buy assets from the settlor upon reasonable requests. But if the trustee is an individual, and especially a family member or long-time friend of the settlor, a claimant (or the IRS) may argue that there was an implied agreement with the trustee and use that argument to pierce the trust. Using an independent institutional trustee will commonly be a safer approach.

In addition, such trusts will commonly provide that the trustee has the discretion to reimburse the grantor for income taxes that the grantor must pay as the result of the existence of the trust if the trust’s income and deductions are required to be reported on the grantor’s federal income tax return because the trust is “disregarded” for federal income tax purposes. Clients should be advised to avoid any pattern of reimbursement and ideally use an independent professional trustee and have a CPA calculate the amount of the reimbursement so that there is a basis for any such payment made.

The laws of many states that are not “APT jurisdiction” specifically provide the power of a trustee to reimburse the grantor for such taxes, even years after the years that the grantor has paid taxes, because the trust will not be considered an asset or right that a creditor of the settlor can reach.

Similarly, eleven states have enacted laws that provide that the creditors of the settlor of a SLAT will not be able to reach into the SLAT even if and when the settlor has the right to or becomes the primary beneficiary by reason of having survived the spouse who was the lifetime beneficiary of the SLAT.

Some states generally have the same law to apply to Lifetime Qualified Terminable Interest Property (“QTIP”) trusts, which can work almost the same way as a lifetime SLAT, but must require that all income be paid to the beneficiary spouse for his or her lifetime and that the beneficiary spouse must have the right to require that the trust assets remain productive.

The lifetime SLAT and the lifetime QTIP trusts have both tax and creditor protection purposes that are recognized legitimate and worthwhile by the legislators of a number of non-APT jurisdictions. However, note that if the spouse who is a beneficiary of the QTIP is sued, the income stream may be more likely to be seized by a creditor than if a SLAT was used where an independent trustee had sole discretion (not a health, education, maintenance and support standard) for discretionary distributions to the spouse.

Please note, if the spouse of the grantor who is a beneficiary of the QTIP is sued, the income stream will typically be available to a creditor, and that this will not be the case with a SLAT. The trustee of a QTIP trust is required to pay all income, as defined under Internal Revenue Code Section 2056 (b) (7) to the surviving spouse, making a QTIP "somewhat leaky" as compared to a SLAT, where the trustee will normally have the discretion to withhold distributions.

Advisors should confer with clients to make sure that they understand what assets can be protected from creditors and what tax planning can be done without the use of asset protection trusts, or when various strategies are layered with asset protection trusts.

For example, Florida law allows for unlimited exemption from creditors of IRAs, pension plans, properly owned annuity contracts, properly owned permanent life insurance policies, homestead and 529 plans, and tenancy by entireties assets when a creditor is only pursuing one spouse.

Therefore, Floridians are less likely to attempt to make use of an asset protection trust, particularly since Florida law generally does not recognize asset protection trusts, so the full faith and credit clause of the U.S. Constitution can be of concern.

In addition, creditor protection trust planning can have implications or nuances unique to a particular state or a particular situation.

For example, Delaware and Tennessee have laws which provide that tenancy by the entireties assets transfer to an asset protection trust cited in that state should remain a tenancy by the entireties asset as to the married couple as joint beneficiaries of the trust, and Florida's exemption of annuity contracts has been held to extend to an irrevocable trust formed and funded by a father where his daughter was the beneficiary of the trust that he received an annual lifetime annuity payment in exchange for assets transferred.

Delaware enacted its asset protection trust legislation in 1997 and may be the most popular jurisdiction for advisors who are in the Northeastern United States, or who have used Delaware as a jurisdiction for companies and limited liability companies.

Delaware has a very strong judiciary and a history of creditor protection. For example, Delaware law has no garnishment statute, and it is very rare, if even any possible, to levy upon a Delaware bank account under normal circumstances by reason of this.

It is also of importance to some planners that the federal statute that enables the IRS, the FTC, the SEC, and Medicare in some circumstances to pierce structures holding assets that are made exempt from creditors by state law, but these "super creditors" governmental agencies may not reach into asset protection trusts, and have been found by courts to be limited to charging order remedies in states where the charging order is the same remedy of the judgment creditor. In the tax court case of *Campbell*, the judge found that the IRS offer in the compromise program was required to consider the assets of an offshore asset protection trust to not be available to the IRS or to the debtor who was the beneficiary of the trust that was formed many years before the individual had terrible business experiences that caused him to be both insolvent and unable to pay his federal income taxes.[12] Setting up and funding such a trust for the purpose of avoiding expected IRS taxes can be a Federal crime under the tax evasion statute.

When trusts are made irrevocable both for asset protection purposes and to avoid Federal estate and gift taxes, other considerations can arise.

Above, we have discussed that the trustee may have the authority to reimburse the grantor of a trust for income taxes incurred upon trust income that is taxed to the grantor.

Asset protection trusts may be drafted to enable the grantor to "toggle off" such income tax responsibility, and the IRS may consider the ongoing payment of such taxes by the trust, which cause the trust to be subject to Federal estate tax as if the trust assets were owned by the grantor, if this is shown to be a preexisting understanding between the parties.

In terms of tax, a "toggle off" provision typically refers to a mechanism within a legal or financial structure, such as a trust, that allows certain tax benefits or attributes to be switched off under specific circumstances. This is often used to address changes in tax laws or to achieve specific tax planning objectives

The reciprocal trust doctrine must also be considered. If two people set up trusts for one another, a creditor may "uncross the trusts" and consider each trust to have been formed by its beneficiary, so that the common law that still applies in approximately 31 states would enable the creditors of each such grantor to reach into the applicable trust or trusts, notwithstanding that the U.S. Supreme Court has ruled that a sufficiently dissimilar "reciprocal trust" may not cause estate tax inclusion.

Planners should also be aware that other entities may provide APT-like protection from creditors, such as foreign, New Hampshire, or Wyoming for-

[12] *Campbell v. Commissioner*: Tax Court Concludes that the IRS Cannot Reach Assets in an Old and Cold Offshore Trust.". See Leslie Share's thoughts on the *Campbell* case. Click Here. Mr. Share thinks that a taxpayer can do very well because there was no prearranged plan to avoid tax liability and there was no control over the trust and no fraudulent transfer. He also warns that practitioners have to be aware of client's situations if you are going to set up a trust for them. (1:15)

profit foundations, private placement life insurance, and by then, flexible annuity contracts.

PART II: SAFER PRACTICE AND APTs

2. Chapter 2: Defensive Practice for Practitioners Doing APT Planning Generally.

a. Introduction.

Practitioners should exercise caution when providing any planning advice, and especially asset protection planning advice. If the practitioner knew or should have known that the client was transferring assets in a manner that constituted a fraudulent conveyance, the advisor could be implicated. However, if the adviser does not offer a client adequate guidance, the client may make a claim against the adviser. Thus, advisers must walk a careful path of prudent but adequate planning. Avoiding asset protection planning does not generally seem viable, as it is a seemingly synonymous goal for most clients. However, delineating specifically what depth, level, or type of client issues a particular practitioner will handle will be a matter of judgement. This Chapter will discuss which professionals providing asset protection planning whether as a standalone objective or as part of financial, estate or other general planning, on how to be more defensive in those engagements.

b. Why Defensive Practice Is Important.

i. Malpractice Exposure for Estate Planners.

Estate and trust planning are somewhat risky areas of the law from a malpractice standpoint. Claims have grown in both number and size over past decades and commonly include administrative issues, court filing deadlines, election deadlines, drafting errors, state law mistakes or conflict of interest issues.. A common theme among many of the recent high-profile estate planning malpractice claims is that the practitioners (attorneys, CPAs) did not inform the client of particular risks or consequences of the transaction pursued.

The general guidance for safer practice is to communicate the risks of planning and possible shortcomings that every plan has to clients in writing. A general communication, especially concerning asset protection planning, is that there can never be a guarantee of results.

Even the best-crafted asset protection planning may be subject to challenge. The vagaries and uncertainties of the legal system make it challenging to predict outcomes accurately. For example, a trust formed in an asset protection jurisdiction may be safer than forming a trust in another jurisdiction, or a trust with an independent institutional trustee might be safer than a trust using a family trustee. The incremental benefit of the better jurisdiction or institutional trustee cannot be quantified. Clients should be cautioned as to these types of issues.

ii. Protecting the Practitioner by Reducing Risks Associated With Accusations of Malpractice and Exposure to Creditors.

> **Disclaimer:** While the following discussion will address this specifically, comments and suggestions made throughout this book may also be helpful to reduce risks faced by advisers. The authors do not intend to have the comments in this book be considered to suggest standards of practice, but those who believe that "you can never be too careful" may find many observations and suggestions that are of interest. It is also important to understand that just as with planning techniques themselves, steps practitioners can take to mitigate liability is not a 'one size fits all' issue. What some practitioners view as inadvisable or too risky to recommend for the client to undertake a particular type of plan, e.g., a DAPT or FAPT, other practitioners may view those same techniques as being proper and routine. In fact, some commentators might suggest that not offering techniques others view as too risky may itself be an issue that could give rise to a claim against the practitioner.

Practitioners who engage in asset protection planning for their clients should be cognizant of issues that affect their liability exposure, while also attempting to work efficiently and effectively. The degree of due diligence will vary significantly as between situations where a client is clearly solvent and will clearly be solvent after the funding of the DAPT, versus a situation where a client has a known or expected creditor situation that could not be satisfied from assets that will be remaining after an APT is formed and funded.

The first category of clients may not need to go through rigorous financial statement preparation and review, and may be put off if asked to sign an affidavit of solvency. A plaintiff lawyer may someday claim that all the steps that the lawyer took to be careful are evidence that the lawyer thought that there was "something up" as part of the process of planning for that particular client. Therefore, practitioners might consider making certain steps routine and required in their practices for any large transfers of any type. In that way the practitioner can testify if necessary that a lien and judgment of search, solvency affidavit and other steps were not taken because there was an issue facing that particular client, but rather because it is the routine in that practice.

One advantage of choosing an APT situs that requires affidavits is that it can be confirmed that the reason for verifying assets and obtaining an affidavit is to comply with state law, as opposed to being because the planner was fearful that the client might have been honest or accurate.

If the standards of practice include recommending asset protection steps, not doing so might present an exposure, so ignoring the advisable asset protection measure may not be appropriate either. Thus, not only attorneys, but also all allied professionals, should be fully aware of their own liability exposure risks, and not just the risks faced by the clients they are advising.

For practitioners advising clients about malpractice and other liability concerns, some of the risks an attorney may face are different from those faced by practitioners in other specialties. When addressing estate and asset protection planning, it is important to practice safely, and use proactive steps that can be taken regardless of professional discipline.

Practitioners should make intentional decisions that are deliberate and reasonable for their practice, based upon the laws and practices of the applicable states involved, and unique considerations associated with each separate client situation. Documenting those decisions in writing may be protective.

In certain situations, what is in the client's best interest may open up practitioners to potential liability from the client themselves and potential creditors. It is in the best interests of a client to take risks that may expose the advisor to potential liability, not only from the client, but also, from potential creditors. In such situations, practitioners may want to refer to legal counsel outside of the United States who do not have the same limitations and potential liability exposure that U.S.-based legal counsel may have. Some attorneys feel the opposite, believing that offshore planning is inherently suspect and could be problematic for almost any client pursuing it.

Many Clients/Debtors who have these sorts of issues will move to Florida and become Floridians (e.g., to take advantage of the generous Florida homestead exemption) before engaging in creditor protection planning. Any action or possible action that a client or anyone else might take which would violate a law of the United States or even the law of a foreign country should be discouraged, and an advisor should terminate any relationship and go on record in writing as discouraging any such conduct to protect their license.

c. Ethical and Criminal Considerations.

iii. Ethical and Criminal Considerations.

Ethical and criminal law issues may also arise when planners get involved with helping clients avoid making payments or losing assets to creditors when the debtor resides in a jurisdiction that criminalizes or punishes clients and professionals who do this or where the planning will disadvantage certain agencies of the U.S. Government. According to an article published in 2015 by Jay Adkisson, the following jurisdictions then imposed felony or misdemeanor charges against individuals involved in transfers that are made to avoid creditors:

Alabama, Alaska, Arizona, Arkansas, California, Kentucky, Massachusetts, Michigan, Nevada, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Washington, West Virginia, Wyoming, and the U.S. Virgin Islands.[13]

Further, when funding may allow creditor protection advice, assistance can be illegal if the purpose or effect of a transfer is to avoid paying taxes that are, or will become due to the Internal Revenue Service, or other federal or quasi-federal entities. This may also be considered to be criminal conduct when steps are taken to avoid payment being made to state governments or foreign countries.

It is also noteworthy, that a plot to defraud a foreign government of tax revenue violates the Federal Wire Fraud Act (when untruthful information is communicated by mail or internet), exposing the advisors to U.S. criminal law prosecution and loss of professional licenses.[14] Tax revenue is considered to be "property" for purposes of the Wire Fraud Statute.[15]

If and when a lawyer actively assists a client in making a "fraudulent transfer," and also assists that client in misleading a creditor in a way that causes violation of law, such as under the Federal Wire Fraud Act, the Civil Conspiracy Law may apply and the advisor or advisors may be jointly and severally liable for the value of assets transferred, and damages, including attorneys' fees and costs."

iv. The Florida Law on Advisor Liability and Responsibility.

In 2004, the Florida Supreme Court held that the Florida Uniform Fraudulent Transfers Act ("FUFTA") does not provide a cause of action against third parties who actively aid and abet a fraudulent transfer, notwithstanding the "catch all" phrase in the statute which permits a court to award "any other relief the circumstances may require." [16]

All fifty states have "fraudulent transfer" laws which generally follow the Statute of Elizabeth, which was enacted in England in the year 1571. Most states have adopted some form of either the Uniform Fraudulent Transfer Act, the Uniform Voidable Transfer Act, or the Uniform Fraudulent Conveyance Act. Each of these laws provide creditors with a cause of action against a debtor and transferees and depositories that are recipients or holders of assets that have been transferred by a debtor for the purpose of avoiding the loss of assets by reason of known or imminently expected creditor. These laws vary significantly with

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[13] *See* Adkisson, "U.S. Jurisdictions That Criminalize Fraudulent Transfers," https://www.forbes.com/sites/jayadkisson/2015/11/22/u-s-jurisdictions-that-criminalize-fraudulent-transfers/?sh=282d5c079439.
[14] *See Pasquantino v. United States*, 544 U.S. 349 (2005).
[15] *See* 18 U.S.C. §§ 1341, 1343.
[16] *See Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004)

reference to their effect, but a typical statute, such as the Florida Uniform Transfers Act, has the following characteristics. Under FUFTA, a transfer is considered fraudulent if it was made with the actual intent to hinder, delay, or defraud any creditor of the debtor. Additionally, a transfer can be deemed fraudulent if it was made without receiving a reasonably equivalent value and the debtor was engaged or about to engage in a transaction for which the remaining assets were unreasonably small, or the debtor intended to incur debts beyond the ability to pay as they became due. Courts examine various factors, commonly referred to as "badges of fraud," to determine actual intent. These factors include whether the transfer or obligation was to an insider, whether the debtor retained possession or control of the property transferred, whether the transfer was concealed, whether the debtor had been sued or threatened with suit before the transfer, whether the transfer was of substantially all the debtor's assets, whether the debtor absconded, whether the debtor removed or concealed assets, whether the value of the consideration received was reasonably equivalent to the value of the transferred asset, whether the debtor was insolvent or became insolvent shortly after the transfer, whether the transfer occurred shortly before or after a substantial debt was incurred, and whether the debtor transferred essential business assets to a lienor who then transferred them to an insider.

Most APT jurisdictions have special statutory language which limits the amount of time that a creditor would have to challenge a transfer to an asset protection trust.

An example of this is Alaska Statute 34.40.110, which governs the creation and administration of Alaska's Domestic Asset Protection Trusts (DAPTs). This statute provides a framework for establishing a self-settled trust intended to protect assets from creditors, but with specific requirements and limitations.[17] Alaska Statute 34.40.110(j) requires that the settlor of a DAPT must file an affidavit stating that the transfer of assets to the trust will not render the settlor insolvent. [18] In *Battley v. Mortensen*, the court found that the transfer of assets into the Alaska DAPT constituted a fraudulent conveyance because the debtor transferred the property with the actual intent to hinder, delay, or defraud his creditors.[19] In Mortensen's case, although he filed such an affidavit, the court determined that he was, in fact, attempting to defraud creditors. The statute also states that a settlor's expressed intention to protect trust assets from a beneficiary's potential future creditors is not, by itself, evidence of an intent to defraud.[20]

[17] Alaska Stat. § 34.40.110
[18] Alaska Stat. § 34.40.110 (j)
[19] *Battley v. Mortensen (Mortensen),* 2011 Bankr. LEXIS 5560
[20] *Id.*

However, the court found additional evidence indicating Mortensen's fraudulent intent, such as his significant outstanding debts and the timing of the transfer.

Another example is in *Freeman* where victims of a $90,000,000 international Ponzi scheme sued First Union National Bank for "aiding and abetting" a bank customer who allegedly defrauded approximately 16,000 people who were led to pay money as a "deposit" in connection with the assembly of necklaces.[21] The Court concluded that FUFTA was not intended to serve as a vehicle by which a creditor may bring a suit against a non-transferee party (like First Union in this case) for monetary damages arising from the non-transferee party's alleged aiding-abetting of a fraudulent money transfer.[22]

The law differs in various states and a transaction may have nexis to states other than the client's home state. Practitioners should be mindful of these potential issues. By having clients sign solvency affidavits (regardless of whether required under state law), provide a signed balance sheet, and having lien, judgment, and other searches performed, those steps may all serve to not only protect the client, but the advisors as well if there may be solvency or associated issues.

d. Weigh Risks.

v. What to Consider When Weighing Risks

Although in broad terms it may sometimes be feasible to rank the risk of different asset protection planning options, there is no recognized scale by which to weigh the different risk levels of most planning techniques. Consider the following protections:

1. Endeavor to document the tax or other non-asset protection motivations for any planning in written communications. For example, if a client is purchasing permanent life insurance inside an Irrevocable Life Insurance Trust ("ILIT"), the gifts to the trust and value of the life insurance policies themselves may be protected, assuming no fraudulent conveyance on funding. The practitioner may document the estate liquidity needs, or provide for the needs of the settlor's children, etc. as the primary motivations for the plan. It may even be better to have an analysis completed by an independent insurance consultant determine the financial needs or liquidity needs that are being met. These efforts may protect the client, the client's plan, and the practitioner.

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[21] See Freeman v. First Union National Bank, 865 So. 2d 1272 (Fla. 2004)
[22] *Id.*

2. Limitations on work undertaken should be documented in the retainer agreement or by correspondence. Therefore, it is clear to the client what the estate planner is doing and what they are not responsible for. Additionally, it should also be confirmed in the retainer agreement that there are no guarantees of results and that risks are inherent in every plan and technique. Consider reinforcing these limitations in the disclosures made in cover letters, memorandum, and footers on bills, etc.

3. Use safer words when discussing asset protection with clients and in follow up emails, letters, and memorandum. Endeavor to use terms that are less certain, such as "may," instead of "shall," etc. Language is important. Instead of terms or phrases like, "the best asset protection plan," "the optimal strategy", and so forth, use more subdued and reasonable terms. After all, what could ever really be an "optimal" strategy given the myriad of uncertainties that might affect any plan? Instead opt to use terms like, "the plan has been designed to facilitate some creditor protection and may provide beneficial tax results as well," etc.

4. Offer clients options, as there are often several ways to accomplish a particular objective. Let the client know that there are options, all with their own advantages and disadvantages, and have the client select which option to pursue. It is recommended that practitioners document that the client was presented with options and that the client made the final decision as to which plan to pursue. Many clients will nevertheless simply indicate that they will do "what you would do for yourself." When this happens, it is wise to consult with other advisors, such as the client's general lawyer or lawyers, certified public accountant, financial advisor, and perhaps a debtor/ creditor expert lawyer to make sure that someone has deliberated for the client.

5. For example, it is not clear that a so-called hybrid DAPT (one where the grantor is not initially a beneficiary but may become one later) is assuredly going to succeed as compared to a regular DAPT, or a SPAT, or an Offshore Asset Protection Trusts. Therefore, offering various options, and perhaps others, and letting the client determine which approach to use may provide additional protection to the practitioner, as contrasted to merely recommending and using one approach. If, for example, the practitioner does not advise on the use of FAPTs, a communication to the client might mention that as an option and that if the client is interested, a co-counsel could be involved or a referral made.

Document risks that the client may be subject to in writing when possible. Many practitioners prefer to communicate planning risks only verbally. However, you should not rely on verbal discussions a client can forget, remember differently, or even deny what was said.

The rationale for not putting this in writing might be to avoid creating a paper trail for the IRS with respect to tax structuring, or a roadmap for a claimant seeking to pierce the plan. However, that needs to be weighed against the exposure that the approach creates for the practitioner. While every practitioner will no doubt make his or her own decisions, this may now be a time when practitioners may opt for safer practice techniques to protect their interests. However, it may be sufficient to have one or more other professionals in the room with the client and to take contemporaneous notes, and then prepare a memorandum to file, and at least a short letter to the client confirming what was decided and why, and warning of any prominent issues that might arise from the planning.

As noted above, a common element in many recent malpractice cases has been the client's claim that the advisers did not inform the client of key tax or other risks. Documenting risks that the client faces, especially as to asset protection goals, may also motivate the client to do better planning. A client who understands the limitations of asset protection trusts may be less inclined to ignore the importance of having a robust underlying liability insurance program in place, or to follow up with annual review meetings with the entire advisory team to increase the likelihood of proper administration of the plan.

Disclaimers should be added to letters and other writings concerning risks and issues. Consider an approach such as, "Although we have discussed various risks and issues to the plan, we have not identified all risks and issues, which we cannot do without hindsight. You should only proceed if you understand these limitations."

Unless you have the expertise to address debtor/creditor law, it may be advisable, if appropriate for the particular client matter, to have an independent lawyer who specializes in debtor/creditor litigation review possible strategies, and advise as to his or her recommendations. The client cam have more than one view, and the estate-planning lawyer has support from a technical and practical standpoint. A litigation lawyer may be more willing to defend the structure after problems arise for the decisions the client makes if he or she was involved in determining the strategy to use. In addition, a separate law firm might be a good witness as to what the client was or was not told. Some of the same benefits are obtained by having a collaborative team effort so that the input of each discipline (insurance, CPA, attorney, wealth adviser, etc.) are marshalled to help the client plan, and each adviser will have notes and memory of points the client was cautioned about.

a. *Jackson v. Calone*.

In *Jackson v. Calone*, the plaintiff hired counsel to provide estate planning, and a grantor trust was created.[23] The grantor trust did not have a tax reimbursement clause or a mechanism to turn off grantor trust status, so the Plaintiff was responsible for all income taxes on income received by the trust and was not able to be reimbursed for these. The settlor became cash-strapped as a result of the success of the plan and sued the attorney who created it. In 2012, when the trust in the case was created, how many settlors had the time to have a financial forecast done? Even now, many clients do not heed the recommendation to have financial modeling completed to help confirm the financial adequacy of the plan. In most families, the settlor and beneficiaries would be able to agree to try to modify or decant the trust, in whole or in part, to prevent this result. However, it is not clear that decanting to add a tax reimbursement clause will always be feasible as some may view that as the addition of a new beneficiary (e.g., since the settlor had not been able to benefit from the trust prior to the decanting but could do so afterward). In this situation, however, there was a family conflict that apparently caused the beneficiaries to want to punish the settlor. Was this foreseeable by the advisors? While the family conflict may not have been foreseeable, some practitioners might suggest that the possible economic hardship of not having a tax reimbursement clause was foreseeable.

There are really no general standards or approaches appropriate in all situations. While some commentators have suggested that the failure to include a tax reimbursement clause is wrong, that is incorrect. Other commentators have suggested the opposite approach, namely not using tax reimbursement clauses, because of the risk of their being mishandled and potentially resulting in estate tax inclusion for trust assets. The reality is that the decision may vary depending on the circumstances and client's wishes. Perhaps clients may be best served by having a discussion of this type of provision and practitioners can document the client’s decision. Perhaps a better approach still is to have the client’s wealth situation forecasted to illustrate to the client the impact of the grantor trust tax burn, so that the client can see the implications of including a tax reimbursement clause or not. If a decision is made not to use a tax reimbursement clause, consider confirming that decision in writing.

Continuing to look at the facts of the case, the settlor retained $10,000,000 of assets after the gifts to the trust. Was it reasonable for counsel to assume that someone with that type of wealth should also have some basic common

[23] *See Jackson v. Calone*, No. 2:16-cv-00891-TLN-KJN (E.D. Cal. Sep. 30, 2019).

knowledge about cash flows and some reasonable degree of financial sophistication?

Additionally, is it an estate planner's responsibility to create and evaluate a client's budget and review its appropriateness? Is it really in the purview of the wealth adviser, perhaps the CPA, or even the attorney, to create a budget and financial forecast to project cash flow in future years as a result of a gift (sale if applicable) and grantor trust status? Indeed, a client making any significant transfers might benefit from having a budget and financial forecast prepared by their wealth adviser. However, not every client will make the effort or incur the cost of proper modeling. Even if the modeling is accurate and illustrates possible future economic consequences of the trust plan, including the grantor trust implications, is the modeling done with sensitivity analysis? What tax rates, inflation rates, rates of return on investments, and other factors are assumed? Are those factors modeled using the Monte Carlo simulation? Are the inputs and assumptions varied, and is the analysis revised to evaluate the impact?

Estate planners generally need to gain the knowledge and expertise to determine what rates of return to consider in creating a forecast. How should inflation adjustments be made to living expenses? An attorney does not have the expertise to review a client's housing and healthcare insurance costs or potential future college tuition costs the client will cover for children, grandchildren, or others. That is not within an attorney's expertise. How might an attorney factor in the myriad of risks a forecast might consider? If the attorney provided an analysis, but the client's budget was dramatically off, does that make the attorney responsible for a faulty analysis?

In this case, the same analysis that informed the settlor may also help deflect a fraudulent conveyance claim. Theoretically, a model suggesting that a settlor has adequate resources outside of the trust to handle living expenses should deflect a claim by a creditor that the asset transfers to the trust constituted a voidable conveyance. However, this also raises complications. The assumptions used to demonstrate that the transfers are not voidable conveyance may differ from the assumptions that the client may wish to feel comfortable with the plan.

It is certainly not clear, as the case *Jackson v. Calone* implies that practitioners always use a tax reimbursement clause or a mechanism to turn off grantor trust status. When trusts have a tax reimbursement provision is that under Internal Revenue Code Section 2036(a), an issue that arises is that inappropriate use or understanding about tax reimbursements may result in estate tax inclusion. In these situations, the grantor may be considered to be the owner of trust assets that are expected to be used to reimburse the grantor for income taxes, which would be evidenced by reimbursing income taxes on a regular basis. Those constant payments might be viewed as a suggestion that an implied agreement exists between the settlor and trustee that distributions to the settlor would be regularly made, causing both creditor and estate tax concerns. Further, tax reimbursements create leakage out of the trust, which undermines the objective of reducing the client's estate, which may have been a primary goal the client sought. The reimbursement clauses if exercised may make the trust plan less effective as a wealth transfer tool. It may be advisable to install Trust Protectors who will have the power to toggle off grantor trust status when circumstances are appropriate, and to design trusts that can be toggled off, and also divided into separate trusts so that one separated trust can be toggled off, and the other can remain as a defective grantor trust as and when necessary. Caution should be exercised. It may be best for the Trust Protectors not to be acting in a fiduciary capacity as, if grantor trust status is turned off, that may constitute a violation of the fiduciary obligation the Trust Protector has to the beneficiaries. An alternative may be to designate a person other than the Trust Protector who the instrument expressly provides will act in a non-fiduciary capacity only.

What about other approaches to accessing the trust? If the Trustee holds the power to loan the settlor funds, would that suffice to offset other financial access concerns? Could or should the trust be structured as a self-settled trust (or some variation of that) so that the settlor could receive distributions? Would that have sufficed to negate the income tax cost? For example, assets could be sold to a trust in exchange for an installment note in place of being gifted, and the note could bear interest at a higher rate than the applicable federal rate and be a self-canceling installment note. How does one weigh the incremental risk of a self-settled trust versus the financial protection it affords by permitting distributions to the settlor? Would a Special Power of Appointment Trust ("SPAT"), in which a person in a non-fiduciary capacity holds the power to direct the Trustee to make distributions to the settlor or others, be a safer approach?

For example, suppose the trust had a swap power (a power to substitute assets of equivalent value for those in the trust). The settlor might have swapped out the business interests, producing significant income for other assets. Is that also the lawyer's responsibility? Can a lawyer evaluate the economic and investment considerations of substituting assets?

The *Jackson* case and discussion highlight several issues practitioners may consider in creating an irrevocable trust for tax and asset protection goals. It also points out some of the risks that practitioners can face while engaging in this planning.

b. Get Up to Speed – Training and Knowledge.

vi. Read Specific Sources On The Subject.

Creditor protection planning requires significant knowledge and experience in many areas that are less commonly addressed in the mainstream articles, books, and conferences. It can take years for a lawyer to become fully competent in this field. Laws and court interpretations change frequently, and cause a lack of certainty for any asset protection trust planning. This field encompasses state and federal creditor law, bankruptcy law, and income and estate tax law, so the planning team for each client should, in the aggregate, be knowledgeable with respect to the relevant subjects. A collaborative team approach can accomplish this. For example, if the attorney involved does not have income tax expertise, the CPA on the team may. If neither the attorney nor the CPA can create financial models to demonstrate that the intended transfers should not be fraudulent conveyances, perhaps the wealth adviser on the team can. If the attorney is an estate planner, then a litigation or bankruptcy partner from the same firm or another firm can, perhaps, consult on the plan if advisable.

If the firm does not have litigation expertise and that discipline seems advisable to consider, then another firm can be brought into a co-counsel relationship and join the team.

c. The "SALY" Mentality is Dangerous.

It is imperative that clients permit their advisor team to monitor the entirety of their plan so that changes can be addressed. The danger with many plans can be summarized in an old accounting acronym: "SALY" or "same as last year." Too often clients, and even many practitioners, are lulled into a SALY mentality.

Just because an insurance trust has been in place for decades without change does not make it the right plan for the client's current circumstances. In fact, age almost assures that an old plan will be less than optimal. For example, drafting practices decades ago commonly included having trusts pay out corpus at specified ages, e.g., when a beneficiary attains age 35. That is an anathema to modern trust drafting, and a proper asset protection plan. Identifying such an issue and taking corrective action, e.g., decanting into a long-term trust is essential to the success of the client's asset protection plan.

d. Chapter Summary.

As discussed in Chapter 1, the importance of cautious and defensive planning is crucial to a safe, effective, and legal asset protection plan. The considerations laid out in this chapter are not all of the considerations that should be accounted for when planning for asset protection, but they generally should not be overlooked. Practitioners and clients alike should be aware of the risks at all times throughout the planning process, and once a plan goes into effect, planners should stay up to date on case law, regulations, and statutes that may otherwise affect a client's plan.

3. Chapter 3: Defensive Practice Considerations during the Engagement.

a. Introduction.

In addition to the general protective steps outlined in Chapter 2, practitioners should consider the more specific steps discussed in this Chapter.

b. Pre-Engagement Steps.

vii. Who Referred the Client?

Consider the manner in which the client identified you as a practitioner to consult. A referral from a colleague might suggest that the client has been vetted by another practitioner. In contrast, a client that merely identified the practitioner from an internet search may not only not have been vetted by a colleague, but might not have a history of working with professional advisers. If the client found the adviser or identified the type of planning desired through a particular website, perhaps that website should be perused to see what the nature of that website is.

viii. What are the Client's Goals?

One of the first points discussed with a prospective client is what objectives they have for the engagement. Objectives which are unreasonable or unattainable before the engagement even begins are clear signs that there might be an issue. Can the prospective client's expectations (whether as to time, cost, or desired results) be modified to parameters that are both realistic and acceptable to the practitioner? If the services desired are not within the expertise of the practitioner then the potential of using co-counsel should be reviewed and if that is not agreeable to the prospect or for other reasons is not feasible, then perhaps the prospect should not be accepted as a client.

ix. Pre-Retention Considerations for Prospective Clients

Before accepting a new client, consider making certain inquiries. For example, it might be advisable to have a staff person in the attorney's office perform basic internet (e.g., Google) searches on a prospective client before even accepting an introductory meeting. If such a search identifies issues, it may be advisable to defer or even cancel the initial meeting, or if not, address those concerns directly at the initial meeting.

Prospective clients should be evaluated before they are accepted as clients. For example, a simple internet search might be done on the client's name, and any company names the client provides. If this step is taken, it may be advisable to make it a standard procedure for every prospective client so that no prospect can ever claim that somehow they were singled out for disparate treatment. These simple searches may generally provide little interesting or relevant information, but in other instances, they may provide clues that suggest to the practitioner that caution is in order and perhaps the prospective client should not be allowed to proceed. For example, if a prospect indicates that they own a valuable business, but there is no website or the website appears to be something quickly created (perhaps even to deceive a prospective adviser), that inconsistency between the claimed valuable business and the website appearance may suggest at minimum caution or that the prospect should be avoided. For example, a physician may seek to retain a practitioner specifically for asset protection services and an internet search may reveal scores of complaints that belie statements by the physician-prospect that there are no current claims.

Saving these documents may be the first line of due diligence if later transfers are consummated when retained and planning pursued. Some law firms have access to the LexisNexis Personal Reports search, which may be equivalent to a fully automated "detective report" that can only be run with the consent of the individual, or a licensed detective provides an equivalent report.[24] Client intake forms can specifically request consent to run this report.

Practitioners might also have an intake form completed by the client, perhaps with administrative staff, before a new prospective client meets with an attorney with the firm. That form may inquire as to prior counsel, tax reporting compliance, current or pending suits and claims, and other possible red flags that might be important to consider in advance.

c. Commencing the Engagement and Engagement Agreement.

While firm policies vary widely, it may be safest to not begin an engagement or provide any professional advice until a written engagement, retainer, or similar agreement is signed by the prospect so that they become a client. Practices as to payment also vary widely but some practitioners have determined that they will not consider a prospect a client nor begin work until some type of payment is received. Some practitioners have found that receiving an actual payment is an important filter to avoid prospects that are not serious about proceeding.

Having a detailed signed engagement letter may help avoid some of the potentially problematic prospects from becoming entangled in an ambiguous relationship that is not clearly a client nor a non-client prospect.

d. Pre-Planning Meetings.

It may be important to have and document pre-planning discussions and options suggested to the client to help assure that planning meets appropriate asset

[24] *See* LexisNexis Risk Solutions, FACT Act Consumer Disclosure Report, https://consumer.risk.lexisnexis.com/factact.

protection and other goals, while also providing protection for the practitioner assisting the client. Offering options from which the client chooses the approach to use may also provide more "buy-in" by the client, so that the client may be more committed to the plan. The following points may be discussed with a client who is interested in, or in need of asset protection services.

e. What Practitioners Should Discuss with Clients Interested in Asset Protection.

x. How Assets Should Be Allocated.

There are several points to consider about how assets should be owned. When one spouse is at high risk because of professional, business, or loan situations, so that the other spouse would be the logical majority or sole owner of family assets, a discussion of how assets should be owned as between a married couple and their family members should be had. Keep in mind that the assets of both spouses may be reachable by a creditor of one spouse, if the couple resides in a community property state that allows this. Additionally, consider the advantages of irrevocable trusts or entities owning those assets, such as majority ownership of a multiple member LLC, rather than sole ownership by the lower-risk spouse who resides in a jurisdiction where a "charging order" is the sole remedy available to a judgment creditor of a debtor. A charging order is a court order against and only against distributions otherwise made to the debtor from an entity. Fractionalizing (that is, dividing) ownership of entities between various irrevocable trusts can enhance the protection afforded by the trusts with a second layer of protection. While some states have charging order statutes that would apply even if there were only a single member of the LLC, most state LLC statutes require multiple members to obtain charging order protection. Since it can never be certain in advance (at the planning stage) which state law may apply, it may be safer to have a multi-member LLC. This might be accomplished by having a family member or a non-grantor trust own even a small percentage of the LLC involved. There could be important repercussions if the couple ever divorces, so consideration of the law in the couple's state of residence, and possible consultation with a family lawyer, may be worthwhile.

Practitioners should be cautious about providing advice concerning retitling assets between spouses. Some questions to consider would be: Who is the practitioner representing? If representing the couple and retitling assets from the high-risk to the low-risk spouse seems like a prudent step, what are the matrimonial considerations of that change in asset title? Even if the clients reside in a state that has laws providing for equitable distribution of assets in a divorce, what strategic advantage might one spouse gain by having had significant assets retitled to his or her name? Again, practitioners should consider appropriate disclosures in their retainer agreement, reviewing the risks of a conflict of interest, and suggesting that each spouse may retain independent counsel to confirm the implications of planning and alternatives to the structure and steps with respect to what will occur. In most states, a transfer of marital or community assets between spouses will have no impact on the outcome of a divorce, but this is not always the case. It is preferable to have clients at least sign conflict of interest letters to confirm that they each have had the opportunity to seek independent legal counsel with respect to the work being done.

xi. Attorney-Client Communication.

While clients are accustomed to sending emails that have blatant statements such as, "Will this definitely protect my assets if XYZ ever decides to come after me?" These communications could be damaging in situations where creditors or a trustee in bankruptcy, or a judge reviewing documents in depth might see them. These types of statements also are not advisable in situations where the client may want to give up attorney-client privilege to show that nothing was being hidden or done clandestinely. It is much more difficult to adequately represent an individual without putting certain things in writing, but this may sometimes be necessary. Practitioners, however, need to weigh the benefits of fewer communications with the possible greater protection from more communication. It is sometimes best to give clients articles or books that provide the information that they should review, as opposed to explicitly pointing this out in correspondence.

xii. Protection from Theft.

Protection from theft is another topic that should be covered whenever a client will be entrusting assets to an individual or company. While U.S. banks and mutual fund companies are safe because of FDIC, SPIC, and brokerage platform insurances, private investment funds, and offshore banks can become insolvent and unable or unwilling to return monies to an investor. The same issues can occur with an offshore private placement life insurance and annuity policies. Offshore trusts, life insurance, and annuity-based accounts can be established with reputable brokerage firms and banks with multiple signatures to be required before any significant withdrawal can occur.

FDIC coverage and the CDARS program should be considered if potential bank failure is a concern. When the economy gets shaky, clients may ask why bank accounts are not protected from bank failure due to FDIC limitations or creditor exposure.

Creditor protection statutes may also apply to safeguard wage accounts. In some states, the wages of an employee, or in some cases an independent contractor, may be protected from creditors if the employee is the "head of household" and thus provides more than 50% of the support of the professional and one or more relatives, or a significant other. Wages that are exempt from creditor claims may be deposited into other creditor exempt assets without violating state fraudulent transfer laws, and the professional may wish to spend down unprotected assets in the normal course of living, while banking the paycheck and earnings from exempt assets that may be purchased with the paycheck.

Many state laws provide for very few creditor-exempt assets or limit the value that can be protected to very small amounts. Clients who reside in these states need to understand the risk of residing there. Clients in less protective jurisdictions may consider the use of family limited partnerships ("FLPs") and limited liability companies ("LLCs"), which may limit a creditor to receiving a charging order, asset protection trusts that may stop a creditor challenge, life insurance and annuity contracts in US or offshore jurisdictions which may offer income tax savings, death benefits and a reasonable degree of financial security.

xiii. Separate Legal Counsel.

It may be preferable to have each spouse retain separate independent legal counsel. As noted above, in the context of changing titles to assets in the context of the implications of a future marital issue, separate counsel can be much broader and critical. That way, a spouse's communications with lawyers and other professionals may be privileged if the spouse and their legal team did not take any actions relating to the transfer of assets to avoid creditors.

f. Data to Obtain from the Client

xiv. Total Assets

A balance sheet or financial summary might be prepared by the client or another adviser and then reviewed by counsel. Identify which assets are exempt from creditor claims and which assets are not, along with the practical implications associated with those classifications. Consider whether existing non-exempt assets might, in part or whole, be converted to exempt assets. Debtors residing in most states have a choice of whether to use the exemptions under Federal or state law.

ii. "Family" Data

Family information should be obtained from all clients. Answers to the following questions are important for planning purposes: Are there prior marriages? Are there alimony, child support, or other obligations? Are there children of college age to whom the client owes financial support under state law? Which family members are suitable to be fiduciaries or powerholders?

g. Disclosures to Make to the Client

xv. Crime-Fraud Exception.

It is important to note that the "crime-fraud exception" to attorney-client privilege may apply if a lawyer was involved in an illegal act or in the bankruptcy court or other jurisdiction where the lawyer was involved with a "fraudulent transfer" that may be set aside under Bankruptcy Code Section 523(a)(2)(A). The 2016 U.S. Supreme Court case *Husky International Electronics, Inc., v. Ritz*,[25] concluded that a fraudulent transfer as determined under the Bankruptcy Code Section 523(a)(2)(A) is sufficiently "improper" to allow for loss of the attorney-client privilege, even if no law is broken in the process. No state-court decisions have had the same result where the conduct did not constitute fraud or illegal activity, which is normally the case, with the exception of one case in New York, *Fragin v. First Funds Holdings LLC*[26] case. In this case, the court found that the crime-fraud exception applied and the Defendant, represented by Moses & Singer LLP, was required to produce withheld documents and testimony. By definition, fraud means false representations along with wrongful intent that is much different than committing a "fraudulent transfer" or a "voidable transfer" under the state laws that empower courts to set certain transfers aside.

h. Chapter Summary.

The considerations laid out in this chapter discuss the pre-engagement steps to be defensive in accepting a new client, and following these steps can help to ensure the planner covers all of their bases. Once the planner accepts the client, there are several important follow-up considerations, including disclosures, communications, and requisite data that protect the planner from potential claims and provide the client with clarity as to the attorney-client relationship. Proper representation of a client may include more than these considerations, but that depends on the comfort level of both the client and planner, and the planning the client is hiring the planner to provide.

[25] *See Husky International Electronics, Inc., v. Ritz* 787 F. 3d 312 (2016).
[26] 2016 N.Y. Slip Op. 31537(U), 2016 WL 4256984 (Sup Ct., N.Y. County Aug. 11, 2016)

4. Chapter 4: Attorney-Client Privilege.

a. Introduction.

As discussed in Chapter 3, the planner and client should be aware of the fact that privileged information is being exchanged throughout an engagement. The client's privacy should be at the forefront of planner's minds, and the discussion below can help when considering.

b. Attorney-Client Privilege.

xvi. Discussion on Attorney-Client Privilege.

When planning and implementing any asset protection strategy, practitioners might consider how discussions with other advisers might affect the attorney-client privilege. Should the attorney retain the CPA, appraiser, and perhaps other experts working on the matter directly, so that communications may be protected? It is not certain that the protection sought by some is as secure as anticipated. There is no client/CPA privilege in bankruptcy. For example, the CPA could be retained under a "Kovel letter."[27]

xvii. *Kovel* Letters.

Even if you are not accustomed to using Kovel-type arrangements generally for estate planning, you might consider the potential benefits of doing so when asset protection is one of the motivations for planning.[28]

1. The attorney-client privilege, which applies in many states, allows conversations between a client and an attorney to be kept confidential. However, attorney-client privilege and the Federal rules of evidence do not provide a client with CPA privilege during bankruptcy, meaning any communication that a person has directly with their CPA is discoverable. On the other hand, if the attorney hires the CPA using a Kovel Letter, and if the CPA's work, is an extension of and, a necessary input for, the lawyer's work, which allows confidentiality to apply and thus gives a reason for the Kovel Letter. Using this technique can extend to other experts, such as valuation experts.

2. While practitioners commonly assume that written and oral communications can remain confidential and not be disclosed under the attorney-client privilege, this is not always the case in debtor-creditor and certain other matters. For example, the Trustee appointed by the bankruptcy court to oversee a liquidation or reorganization may "own" the attorney-client privilege, and

[27] *See United States of America v. Louis Kovel*, 296 F.2d 918 (2d Cir. 1961).
[28] *See* Shenkman, "*Raia v. Lowenstein Sandler, LLP* – Thoughts on a Recent Malpractice Case," https://shenkmanlaw.com/blog/2019/06/05/2400/.

therefore examine all client file materials, and be able to take the lawyer's deposition. This is why many lawyers who practice in this area are very careful about who they do and do not represent. For example, if an individual is an officer and director of a company that is possibly insolvent, it may be advantageous to represent the individual, and not the company, because if the company files bankruptcy, then attorney-client privilege for communications made by legal counsel for the company may be held by a receiver or trustee in bankruptcy. Separate legal counsel may be retained by the company, and may be more circumspect about what is put into writing with reference to the situation.

3. A sample Kovel letter is included in Exhibit A[2]

It may be prudent to include a disclaimer with most, if not all, communications and documents that are exchanged between the attorney and client to add protection to both parties. However, simply placing "privileged information" at the header of a letter may not be the cure-all for challenges to privilege – in 2015, the Federal Rules of Civil Procedure were amended to place requirements on a party responding to requests for production. If a client is involved in litigation and documents from his attorney are requested for production, the attorney should consider each of the following: (1) be specific, (2) be prepared, (3) be frank, and (4) be timely.[29,30] Ultimately, the boilerplate use of "privileged information" on documents alone does not provide the necessary specificity under FRCP 34.

c. Chapter Summary.

Like conflicts of interest, both the planner and client should be aware of privileged information exchanged throughout the engagement. This may include the attorney refreshing themselves on the American Bar Association's rules, and their local or state bar's rules on attorney-client privilege. The client should be made aware of the limitations placed on both parties during the engagement, and the client's privacy should be of the utmost importance to the representative planner or attorney. Additionally, the description of services rendered should be carefully considered on the client's bill.

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[29] Konkel, David. "Four Things Every Practitioner Needs to Know About New FRCP 34." https://www.americanbar.org/groups/litigation/committees/corporate-counsel/practice/2015/four-things-every-practitioner-needs-to-know-about-new-frcp-34/

[30] *See* Fed. R. Civ. P. 34.

PART III: SELECTING THE TYPE OF APT AND STRUCTURE

5. Chapter 5: Life Cycle of Trust Used in Asset Protection Planning.

A. Introduction to the Life Cycle.

This section will review the lifecycle of asset protection trust ("APT") structures from formation, to administration, to termination.

a. Design of the Plan

This chapter includes the basics for different design plans suitable for various clients. For example, using non-grantor trusts for clients seeking to garner federal income tax benefits, or save state income taxes, versus a grantor trust or some combination of both trusts may be advantageous. Design features can enhance a structure's ability to survive a challenge. For example, a DAPT created by a client, who is not a DAPT state resident, is subject to certain uncertainties and risks. It is not unusual to have a DAPT prevent any distributions to or for the settlor until ten years and one day after the time of funding, given that the United States Bankruptcy Code allows a Bankruptcy court to set aside any asset protection trust where the funding was considered to be a transfer for the purpose of avoiding creditors under applicable state, or bankruptcy "voidable transfers/fraudulent transfer" law if made within ten years of the transfer. This may not be effective if a bankruptcy court finds that the possibility that the transferor may receive a benefit even after the tenth year does not prevent the transfer to the trust from being subject to these rules.

Similarly, design features may enhance the ability of the client to benefit from trust assets in future years. This might include tax reimbursement provisions, loan provisions, hybrid Domestic Asset Protection Trusts ("DAPTs"), or Special Power of Appointment Trusts ("SPATs"). Practitioners should bear in mind, while informing clients, that each incremental means of access adds some additional measure of risk of a creditor or the IRS piercing the trust. However, none of these can be measured. Consideration can be given to the fact that a person (some might label the role as a Trust Protector, others use different titles) can be named in a document to add certain rights or privileges at a later time if and when needed. A trust might divide into two separate trusts in the event of divorce, with each trust having separate trust protectors that were chosen by each respective spouse when the trust is established.

If the trusts have different purposes and structures that are based upon legitimate and even compelling non asset protection objectives, then it may be difficult for a creditor to convince a court that one or more such trusts should be set aside or made accessible to a creditor. If the trusts own less than 100% of one or more multi-member LLCs that are also owned in part by individuals or entities who are not debtors in a particular situation, then a creditor who is able to set aside an irrevocable trust may nevertheless be only able to obtain a charging order against an LLC interest, which may not be worth pursing in the cost of attacking a trust and the limited benefit of having a charging order are compared to the cost versus the benefits.

b. Funding of the Plan.

Funding considerations will also be reviewed. These include addressing underlying entity structures to provide a second layer of protection to apply if the asset protection trusts are ever pierced. Precautions before funding, such as conducting lien and judgment searches, solvency affidavits, financial forecasts, and financial statements, may also provide additional safeguards to demonstrate that no known issues or claims existed at the time of executing the trust or funding the trust. Further precautions might be integrated into the plan by spacing or timing funding, etc.

c. Administration of the Plan.

Administration of the trust is vital to the success of any APT. These might include reporting consistency with respect to legal documents, tax returns, trust accounts, entity records, etc.

APT planning for married couples can be different than planning for single clients. This might include variations of SLATs, such as adapt them for non-spouse relationships, e.g., a partner or sibling. It might also include structural variations from the typical SLAT to provide indirect access to the settlor since that will not be achieved by naming a spouse. This might include using DAPTs, SPAT, or other trust structures. Including a loan provision, tax reimbursement clause, and perhaps a floating spouse clause should the settlor marry in the future, may all provide access.

Asset protection and trust-related plans tend to have a somewhat similar lifecycle even for plans that are quite different. This is important to explain to clients, as many operate under the misconception that once documents are signed and a plan is implemented that, the process is completed and there is nothing else to be done. Some clients never even implement the plan. After all, how many ILITs were never funded after the trusts were signed and the insurance inappropriately taken in the client's personal name instead of the ILIT?

Clients need to be educated to understand that planning is a process, not a single step. If the client does not let their entire advisory team coordinate the planning, and monitor, implement, and modify as appropriate, the plan will more likely fail. When asset protection is a client goal, proper administration and documentation is vital. Practitioners might consider informing clients in writing of the critical nature of plan administration.

If it appears that the client or his or her team members will not allow for periodic review and updating, then the strategy implemented might perhaps be simplified, i.e., put on autopilot to the extent feasible. One possible approach to this might be by having the client place significant portions of their available cash and fixed income portfolio under a variable annuity contract that may be protected under state law. Another option might be to have the client hold investments under a limited partnership or LLC that would, in turn, be owned in large part by an Asset Protection Trust, but the addition of an entity will only complicate administration. Practitioners should consider documenting the importance of proper administration in communications and even indicate that the practitioner, baring being specifically retained, is not providing such services.

It is impossible for the practitioner to determine how responsible the client will be about follow-up and plan administration, although most clients are not. Some practitioners provide clients with standard memoranda as to plan administration. Providing general memoranda or checklists seems reasonable and helpful because of the constraints many, if not most, clients put on practitioners in terms of the costs they are willing to incur on trust and plan administration.[31] It can be a good idea to send a letter to a client and the client's other advisors attaching one or more articles that discuss any issues that are appropriate to review, and to strongly request that the articles be read, while offering to explain them or to write a detailed, customized letter if desired.

This approach can be problematic if the memorandum or checklists are not accurate to the particular transaction, changes in client circumstances, or if laws change. Another step that may be used as well is including language in the client engagement letter or retainer agreement to confirm how vital follow-up and review meetings are to the success of every plan. Many of the practical administrative steps discussed below are along these lines.

Creation of an irrevocable trust structure and asset protection plan, can at best, only be based on current law, drafting conventions, and circumstances. These all evolve over time, even if facts remain similar. "Nothing has changed" is the excuse given as the common reason most clients never address or update planning after execution of documents. Even if nothing that the client is aware of has changed, many things likely have if a number of years have passed.

An anesthesiologist once described administering anesthesia as 99% boring and 1% panic. When all events are anticipated, it can be so routine as to be boring. When something does not proceed as intended, then it may well be an

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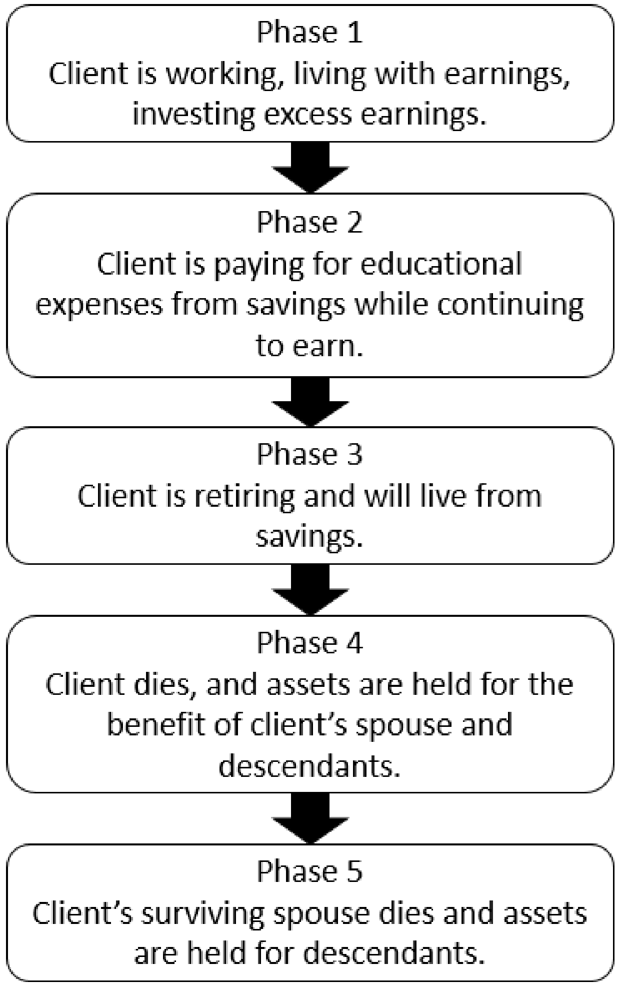
[31] See Leslie Share discussing the comparison off offshore trusts and modern domestic low cost investment options. Click Here Mr. Share stated that offshore trusts used to be much higher than domestic fees, but in recent years they have come down, still higher, but more comparable to domestic rates.

emergency. Asset protection planning can be similar, and clients need to understand this analogy. If there is no meaningful claim, all might be boring. For years or decades after a plan is implemented, all may remain routine. However, "boring" should not detract from ongoing administration and maintenance of the plan. Clients must keep their guard up (i.e., have their advisor team properly administer their planning). When the issue arises, it may be too late to make adjustments. The problem with many client situations is that clients can be overwhelmed with tasks and obligations and simply forget or give up on being able to do everything they should be doing, or may wish to save expenses or rely upon professionals who do not get around to doing what needs to be done, resulting in inefficient administration of a plan. That can be problematic, and clients who find themselves in hot water resulting from this phenomenon may blame advisors when things do not work out as planned or hoped for. That can be a mistake. To make this point, consider including a caution in your retainer agreement that if clients do not return annually for review and update meetings, their plan may be jeopardized (or if you are comfortable, will not be expected to succeed, as it likely will not if attacked).

xviii. Termination of the plan

a. Unwinding of Structures No Longer Needed.

Retaining an old irrevocable trust that no longer has significant assets or is no longer serving a planning purpose can be detrimental, resulting in confusion, incorrect transactions, and worse. It may be best to terminate old trusts formally. For example, when an old trust is no longer needed, leaving the "shell" in existence, rather than terminating it, might leave accounts opened, resulting in incorrect deposits of funds intended for other more protective trusts inappropriately being deposited in old trusts, etc. In addition, the "weight" of old, unused planning structures can lead to complexity and confusion for clients and advisers. From an asset protection perspective, when deciding to terminate a structure that is no longer needed, the decision should be weighed against the potential benefits of continuing such entities. For example, the client may have an old trust with modest assets. In general, circumstances terminating the trust would perhaps happen under a clause or state statute permitting the termination of a small trust. From an asset protection perspective, it may be advantageous for the trust to remain in existence if a creditor situation arises. The trust might contribute assets to a family limited partnership ("FLP") or family limited liability company ("FLLC") and further fractionalize the ownership of the entity, be subject to laws of a different jurisdiction than other trust owners, etc. serving to strengthen the asset protection and tax planning structure.



Phase 1: Client is working, living with earnings, investing excess earnings.

During this initial phase, the client is actively employed, earning an income, and saving or investing any excess funds. The trust may be accumulating assets or investments during this period, with the client likely having control over the trust and its assets.

Phase 2: Client is paying for educational expenses from savings while continuing to earn.

In this phase, the client is still earning income but begins to use the savings or trust funds for educational expenses. This might include paying for the education of children or grandchildren. The trust may have provisions that allow for distributions to cover these costs.

Phase 3: Client is retiring and will live from savings.

Upon retirement, the client transitions from earning an income to living from their savings and investments. The trust becomes a primary source of income for the client. The client may begin receiving regular distributions from the trust to cover living expenses.

Phase 4: Client dies, and assets are held for the benefit of client's spouse and descendants.

Following the client's death, the trust's terms dictate that the remaining assets are managed for the benefit of the surviving spouse and descendants. The trust may provide income or distributions to support the spouse and, potentially, other beneficiaries (such as children or grandchildren).

Phase 5: Client's surviving spouse dies, and assets are held for descendants.

When the surviving spouse passes away, the trust's assets are then held exclusively for the benefit of the descendants. This could mean that the trust continues to provide for children, grandchildren, or other specified beneficiaries according to the terms laid out by the client.

b. Chapter Summary.

Trusts, by nature, have a life cycle. It is essential to identify the phases of a trust, from formation, administration, and termination. Each segment is important and should be carefully considered periodically. This is especially true as parties to the trust, trust assets, and laws change over time. The approach for the planner and client may differ in each phase, so it is important to consider the plan and its associated changes at least annually. Clients should be aware that even small changes might affect a plan greatly, so the communication between client and planner should be open and frequent to account for these changes.

6. Chapter 6: Planning APT Characteristics.

a. Introduction.

There are many variations as to how any trust used in asset protection planning can be structured. These differences may be important to the client's particular circumstances. Different approaches may be used to help differentiate trusts spouses create to endeavor to reduce the risks of a reciprocal trust challenge (which can be brought by a creditor, not only by the IRS). If techniques can be selected that provide state or federal income tax savings, or estate tax savings, those tax benefits may help support a meaningful non-asset protection reasons for the plan. In addition, reducing tax burdens can be vital to overall wealth protection. This chapter explores some of the many variables that might be considered in trust construction.

b. Grantor versus Non-Grantor.

xix. Use of Non-Grantor Trusts for Clients Not Subject to Estate Taxes.

For all clients, but especially for lower-wealth clients not subject to estate tax, income tax savings may be an important, or only, tax planning benefit. This was illustrated above in the example of using a non-grantor trust's income tax benefits to provide a non-asset protection motive for a physician's transfers to an irrevocable trust.

Political changes in Washington DC might cause increases in income tax rates, making non-grantor trusts more valuable because they can distribute income to taxpayers in lower brackets. That might result in a rush to convert trusts before the effective date of new legislation and a future reliance on non-grantor trusts. That would change estate tax and asset protection planning. If the only way to shift value out of an estate will be to make transfers to non-grantor trusts, clients with leveraged real estate and similar assets with negative basis may have to explore new means of planning to both protect assets and save future estate taxes.

Although the creditor law is ambiguous as to when and if the reciprocal trust doctrine will apply, judges in bankruptcy and state courts may not follow the tax law, and the expectation that the IRS permits reciprocal trusts to be deemed to be non-reciprocal if there are notable distinctions between them. A bankruptcy or state court judge may conclude that spouses who create and fund trusts that substantively benefit each other will each be considered to have formed and funded the trust that is held for his or her benefit, so that creditors can proceed against the trust assets if the law of a non-APT state applies. It would appear that grantor and non-grantor status might be a distinguishing factor between the two trusts. Do not stop there, as it is not clear how much weight this distinction alone would be, but it would seem to be one factor to consider.

Another use of grantor and non-grantor trusts may be to differentiate trusts for a client seeking to create multiple trust buckets to make piercing them by a creditor more laborious and difficult. Trusts that have multiple tax purposes and structures may better withstand a creditor's attempt to pierce them. Trusts in different jurisdictions may further enhance the protections afforded by the plan.

xx. Grantor or Non-Grantor Trusts Based on the Character of the Assets and State Taxation.

The structure of the plan, and the allocation of assets between grantor or non-grantor trusts may in part be based on the character of the assets and state taxation of those assets.

For example, the client may divide an irrevocable trust into one trust to hold passive assets and a second trust to hold an active business, since the risk profile of each is different. That may provide more protection for the passive non-business assets. Also, the client may move the trust that holds passive assets to a tax-friendly jurisdiction and convert it to a non-grantor trust to avoid high home-state taxation on passive assets. The other post-division trust may hold business assets, the income of which will remain taxable in the high-tax home state in all events.[32]

When endeavoring to shift significant wealth by a note sale to a trust, it is generally presumed that the transaction must be consummated with a grantor trust to avoid capital gain on the sale. However, if the basis of the asset to be sold was stepped up on the death of a spouse, it may be feasible to consummate a sale to a non-grantor trust without triggering a capital gain. An advantage to that type of transaction may be that the non-grantor trust has a substantial net worth based on prior transfers, the transaction may be viewed as safer in terms of the economics of the transaction. Perhaps a guarantee may not be needed.

c. Chapter Summary.

This chapter discussed the various reasons to use a grantor or non-grantor trust. Practitioners should consider the client's current and future finances, occupation, and planning goals, among other considerations, when deciding how the APT will be drafted. To reiterate, trusts are tailored to achieve specific goals, and changes in the client's estate will affect the trust through formation, modification, and administration. The planner should also make the client aware of the "unknowns," such as legislative proposals or uncertainty from the courts, and how specific characteristics of the APT may hedge against such uncertainties.

[32] *See* Blattmachr and Shenkman, "State Income Taxation of Trusts: Some Lessons of Kaestner," https://shenkmanlaw.com/uploads/2022/03/ETPL-19-10-03-BLATTMACHR.pdf.

7. Chapter 7: Planning the APT Structure.

a. Introduction.

As discussed, each APT is different and should be customized to client situations. As discussed below, this can be done through getting the full information from the client during intake, and understanding their wishes as well as potential provisions to include.

b. Designing Customized Plans to Suit Each Client's Unique Situation.

Every plan should be customized to the client's situation. Practitioners should identify unique client circumstances to tailor the plan. Too often, clients hear of a technique and seek advisers to implement it, rather than a more holistic and customized plan designed to address the client's circumstances.

While that may be helpful for clients who do their own research, disjointed planning that addresses just one element of the client's goals is unlikely to provide the asset protection the client seeks. Many planners are said to have "only one hammer and every situation looks like a nail." It is wise to attempt to work with colleagues on the planning team who are willing to consider and implement a combination of different techniques. This way, the client can have choices and diversification of techniques. Advisors who "pitch" only one technique for almost every situation are often doing their clients a significant disservice. In many situations, the unique circumstances of a client may help suggest specific and unique planning nuances that can make a particular plan more effective and even safer from attack.

Example: A client who owns active business interests may be able to support larger transfers of equity interests to an irrevocable trust, even though the trust does not benefit the client. If the client is providing services and can continue to earn fair compensation from the business interests so transferred, that may help assure that the client, post-transfer, has adequate financial resources to meet her lifestyle expenses. An important component of such planning may be to document the compensation arrangements based upon the advice of an independent CPA firm, and with arm's-length contracts between the various entities and the client providing services. However, the very involvement that may support the payment of arm's-length compensation may also suggest ties to the asset transferred that may be argued to create estate tax inclusion risks, or strings that claimants may assert to argue that incomplete transfers have occurred.

Example: A client with a taxable estate seeks to transfer rental real estate interests to a trust. The greater the discount that can be supported, the more that can be transferred. Perhaps, because of the unique nature of the assets involved, an approach specific to the client's special circumstances will be helpful. For example, if the real estate comprises a substantial portion of those types of properties in the local market, it might support a market saturation discount in addition to the usual discounts. If the properties are shopping centers, it may be appropriate to have them be repositioned because of the changes in the environment, e.g., online shopping, or perhaps they are specifically vulnerable because the market might not support such a repurposing of the properties. Identifying unique facts and integrating them into a plan can prove advantageous compared to more "standard" planning.

c. Gather Client's Data.

Practitioners should have a standard form or intake sheet to serve as a checklist for obtaining client information. Consider Exhibit A and the following:

1. Obtain family data, balance sheet information, details on existing trusts and entities, and tailor the plan (and offer options) for the client's circumstances.

2. Be wary of the prospect who calls asking, "Do you do INGs?" Does the requested acronym work for the prospect? ("ING" stands for an "Incomplete Non-Grantor Trust," primarily used to avoid state income taxes).

3. Insist on creating a plan for the client before jumping to a solution (for the client's sake as well as for your protection as the practitioner). Apropos of earlier comments about steps practitioners should take to protect themselves, these types of clients might be warned in writing that the practitioner is completing the requested planning technique and not taking a more holistic overall view of the client's circumstances at the client's insistence.

<u>Example</u>: Physicians having a net worth below the federal estate tax exemption, may consider a non-grantor trust for income tax avoidance purposes to support state income tax avoidance as being a key reason for the plan. The income tax savings of a non-grantor trust may also provide a valuable non-asset protection reason to support the plan.

<u>Example</u>: While the client might want an ING ("Incomplete Non-Grantor" Trust), should it be the typical incomplete gift or a completed gift variant? Perhaps, creating these trusts before unfavorable legislation becomes a reality may permit grandfathering of existing trusts. Although a non-grantor trust for income tax benefits may be part of the plan, if the client does not have an existing grantor completed gift trust, perhaps that too should be implemented.[33]

d. Design Features That Can Enhance a Structure's Potential of Surviving a Challenge.

Discerning what steps can improve a plan is fact-dependent and not always obvious. Practitioners should consider cautioning clients that while certain steps might be used to attempt to enhance a plan, there is no assurance that any particular step will succeed. In fact, some efforts to enhance a plan may be viewed by a court in a negative light. For example, the optimum income tax planning for a particular situation may be to put an investment activity under a customized private placement life insurance policy that has to be flexible and permit the investment arrangement chosen. It may be necessary to have such a policy established in a foreign jurisdiction that permits such activities to be held under a life policy, which can be provided by a cost-effective carrier. A court might view this as being an overly aggressive creditor protection, when taking significant value to a jurisdiction that the court has no authority over. In addition, clients should be informed that there is no means of weighing the relative benefit of the various options that may exist. This is an important point to communicate to clients who often do not understand the relative risks of different planning techniques or believe that a particular technique is assuredly "safer" than another technique. Practitioners should educate clients that not only is it impossible to delineate all risks, but that there is no touchstone for weighing or comparing the efficacy or riskiness of one technique versus another.

Example: A client resides in a non-DAPT jurisdiction. Is a DAPT assuredly riskier than a SLAT for asset protection? While many might immediately suggest that the SLAT is less risky, that may not always be an accurate statement. Consider whether a second SLAT (that is, the beneficiary of the SLAT has created one for the spouse who created the SLAT in question) was also created. How significant are the differences between the two SLATs to avoid imposition of the reciprocal trust doctrine under both estate tax and creditor protection law? Moreover, while the IRS or a court may permit a reciprocal tax situation, it is doubtful to many that a bankruptcy or state court judge would from a creditor protection standpoint. If the differences are not significant or not well drafted and implemented, perhaps the SLAT is riskier than the DAPT. Consider non-reciprocal SLATs formed in the client's non-DAPT home state, or better yet, the

[33] *See* Shenkman, "Can You Cut Income and Estate Taxes with A Trust Called an ING?" https://www.forbes.com/sites/martinshenkman/2018/12/20/can-you-cut-income-and-estate-taxes-with-a-trust-called-an-ing/?sh=375aa03417d4.

husband is a beneficiary of the wife's SLAT and vice versa. A distribution is made from the wife's SLAT to the husband, and the husband deposits that distribution check into a joint checking account. The wife then uses that joint checking account to pay her personal medical bills. Has the wife just accepted a benefit from her own trust that she was not a beneficiary of? How much riskier might a SLAT operated in that manner be as contrasted to a well-administered DAPT? The answers are not always obvious and are certainly not clear from a superficial consideration of just the structure without details on ancillary planning and documents, as well as trust and plan administration.

1. In many cases, it would appear that simple and even minor steps might add to the safety of a plan. Having entities complete periodic consents or minutes may be useful to demonstrate respect for the independence of the entities. Paying professional fees from the correct accounts and entities may be useful to demonstrate that the client is respecting the formalities of the transaction. Many clients make gifts from inappropriate accounts by paying the fees for an irrevocable trust and make indirect gifts to that trust. Having an independent CPA keep books and records for trusts and entities may itself demonstrate respect for the formality and independence of the entities and trusts involved. It may also avoid the common accounting errors and mistakes non-professionals often make.

   Example: Wife creates a SLAT for husband. A bill from the institutional trustee is sent to the family home, and the husband pays the trustee fee for wife's SLAT's trustee from his personal checking account. Does that make the husband a grantor and part of the trust? Probably. What damage results from a client's business paying for a client's personal estate planning fees? Does that show a personal use of business funds? Probably. Is there a provision in the SLAT that indicates that any such payment or benefit causes the SLAT to owe the person or entity making the payment, plus interest at a reasonable interest rate, and would that alleviate or reduce the risk of a problem?

2. How much more negative impact does such an inappropriate payment make if the payment is made from the business after the business was transferred to an irrevocable trust for which the client receiving the estate planning services is not a beneficiary? Frequently, clients continue to pay professional fees for personal work from entities. If the creditors take control of the company when paying for the services rendered or the company ends up in bankruptcy, a claimant or court may seize on such payments as evidence of the client disregarding the form of the transaction or loss of the individual attorney-client privilege, even if those expenses are modest or even insignificant compared to the value and income of the entity. While a small mistake will probably not be fatal to a plan, how many

infractions are acceptable before the weight of mistakes calls into question the validity of the entity, trust, or plan?[34]

e. Settlor as a Discretionary Beneficiary.

When the client, or others, are mentioned as discretionary beneficiaries of the trust, the trustee still has the ability, but no requirement, to distribute income or assets to the settlor. In order to provide a measure of independence in making distribution decisions, consider naming an institutional or professional trustee to serve under an irrevocable trust created for asset protection purposes, although an individual trustee may serve in lieu of or with a trust company. According to some, the risk of having a traditional DAPT naming the settlor as a discretionary beneficiary being disregarded by a court has grown in recent years. It is interesting to note that as the number of states with enabling DPAT legislation has increased to now 20 states, the crescendo of some naysayers has also grown. It would seem that a DAPT created by a resident of a DAPT jurisdiction should be respected. The heightened risk some perceive of creating a DAPT should only then apply to residents in a non-DAPT jurisdiction, creating a DAPT in a DPAT jurisdiction, or if the trustee or a co-trustee resides in a non-DAPT state. As a result, variations of the traditional DAPT may be used.

f. Settlor is Not an Initial Beneficiary but May be Added.

The settlor may not be listed as a beneficiary of the trust unless or until a named person (some might refer to this person as a "Trust Protector") so designates. However, caution is in order, as that role in some instances should perhaps not be held by the same person who may hold other powers often granted to a Trust Protector, (who should not be acting in a fiduciary capacity, could add the grantor as a beneficiary). Some commentators suggest that the power be given to add any descendant of the settlor's grandparents as beneficiary so that the class of potential beneficiaries is greater than merely the settlor to, perhaps, be better able to deny that there is an implied agreement between the powerholder and settlor. Some states have legislation which specifically provides that no oral or implied agreement that is not squarely on the face of an Asset Protection Trust Agreement can exist. This approach, often referred to as a hybrid DAPT, should be safer than a DAPT that directly names the settlor as a beneficiary that is not fully certain. However, a New York case, *Iannotti v. Commr. N.Y. St. Dept., Health*, suggested, that at least when the powerholder is in a fiduciary capacity, creditors can reach the DAPT assets. *Iannotti* suggests that a DAPT may not

[34] *See* Shenkman and Rothschild, "Self-Settled Trust Planning in the Aftermath of the Rush University Case," https://shenkmanlaw.com/uploads/2021/11/Self-Settled-Trust-Planning-in-the-Aftermath-of-the-Rush-University-Case-Dec-6-2012.pdf.

succeed, at least if the person who can add the grantor (e.g., Trust Protector) is acting under a fiduciary duty.[35]

g. Settlor Is Not a Permitted Beneficiary but May Directly or Indirectly Benefit from the Exercise of a Power of Appointment.

This technique (or the SPAT technique discussed below) might be made more protective by adding additional prerequisites to exercise. For example, the grantor (or anyone in the permitted class) might not be addable as a beneficiary until an event of independent significance occurs, such as if and when the grantor does not have assets or income sufficient to support himself or herself, after taking into account the ownership of assets that are immune from creditors. Please note that this type of trust may be immune from creditor claims in a non-DAPT jurisdiction where the most that a creditor can reach is the highest amount that a trustee is able to distribute by the terms of the trust agreement. If the trustee cannot distribute to the settlor, no creditor of the settlor should be able to attach trust assets.

h. Chapter Summary.

Practitioners should be kept updated with respect to changes in the law, trends, and primary literature with respect to planning techniques for a number of reasons: First, to stay up to date with how other planners are trying to solve problems presented by laws or court decisions. Second, to be made aware of what clients may want. Staying up to date on any recent developments in the estate planning world will give a practitioner more tools to use and provide clients either (a) more options to fit their needs or (b) a specific recommendation that is well-tailored to their needs. Doing so will provide the client with added protection that the estate plan is designed with their needs and goals in mind, as well as taking into account the uncertainties an estate plan faces by adding safety features and language. As with much of estate planning, designing the APT is a balancing test, and the practitioner and client should work together to achieve this balance. By utilizing or considering the techniques suggested in this chapter, this balance may be easier to find.

[35] *See Iannotti v. Commr.* N.Y. St. Dept., Health, 725 NYS 2d 866 (2001).

8. Chapter 9: Different Types of Trusts that May Provide Asset Protection Planning.

a. Introduction.

There are many different types of trusts that can be involved in an asset protection plan that estate-planning attorneys should be familiar with. Different types of trusts are best for different clients, dependent on their marital status, domicile, net worth, creditor exposure, domestic situation, etc. The trusts mentioned in this chapter are an excellent place for planners to start when designing a plan for their clients.

b. Irrevocable Trusts Generally.

Irrevocable trusts, as their name suggests, cannot be amended except by a designated trust protector. They are the opposite of a revocable trust in that the grantor's creditors cannot obtain the assets in the trust, as the grantor no longer "owns" the assets. Examples of irrevocable trusts are charitable trusts, asset-protection trusts, Q-Tip trusts, and QPRT trusts.

c. Insurance Trusts.

Insurance trusts are used when a client wants to transfer the ownership of their insurance policy to a trust. For example, one spouse can create a trust for the other spouse and descendants. That trust can own life insurance on the life of the spouse who created the trust and is called an Irrevocable Life Insurance Trust ("ILIT"). When that policy matures on the death of the insured spouse, the proceeds are held in a trust to provide for the surviving spouse (and, perhaps, other family members such as descendants), and on the death of the surviving spouse, the assets pass in whatever manner is specified for the successor's heirs Insurance trusts can be a valuable tool to protect a life insurance policy.

There are many complexities associated with ILIT planning, but these are often worth considering, particularly where the life insurance is on the life of one spouse who wishes to assure that there will be creditor-proof and estate tax-free benefits for the surviving spouse and descendants.

Some clients also purchase "second to die" life insurance that can have relatively low premiums, because the death benefit is only payable on the death of the surviving spouse, which is when federal estate tax will become due. Second to die policies are typically owned by irrevocable "dynasty" life insurance trusts in order to generate benefits that can benefit one or more generations without being subject to estate or generation taxes at the levels of the clients and their children and grandchildren and even further descendants for up to 360 years from formation of the trust.

As a result of the above, many families have one life insurance trust to hold the life insurance on the husband which can benefit the wife, a separate life insurance trust to hold the wife's life insurance for the benefit of the descendants and a third life insurance trust to hold one or more second to die life insurance policies for descendants. Typically the wife's life insurance trust would not benefit the husband because of something called the "reciprocal trust doctrine," which prevents spouses from forming "reciprocal trusts" to benefit one another.

d. Trusts for Heirs.

Too often people overlook the benefits of leaving assets in a trust for children instead of leaving the property to them outright.

We have seen countless individuals inherit monies or receive large gifts only to have them dissipated in a few months or years. As a result, the beneficiary and his or her family become penniless or again dependent upon the parent or other family members for financial sustenance, which can cause financial and psychological harm.

While beneficiaries may complain that they do not have total access or control of an inheritance, a good many planners believe that is best to limit access and control to trust assets in many situations. A responsible self-supporting beneficiary may appreciate the fact that his or her inheritance is well-secured and beyond the reach of spouses, creditors, and future spouses of children and grandchildren.

Descendant trusts can be set up for the grantor's children and future descendants. This can be an excellent option for clients with a high net worth who want to preserve that wealth for generations to come.

e. QTIP and Marital Trusts.

xxi. Q-TIP Trust.

A Q-TIP Trust is a trust that pays all income to the recipient spouse, and it has the benefit of being able to qualify for the federal estate tax marital deduction (as long as the spouse is a US citizen). Some states have statutes which provide that a Q-TIP Trust funded by one spouse, the "donor spouse," will not be considered to be a self-settled trust, even if the trust benefits the donor spouse after the death of the income recipient spouse.

The states that have statutes that provide that a Donor to a lifetime Q-TIP trust will not be considered to be a contributor to the trust after the death of the lifetime benefit spouse if a gift tax return Q-TIP marital deduction election is timely included. These states include Arizona, Arkansas, Delaware, Florida, Kentucky, Maryland, New Hampshire, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, and Wyoming.

Further, Arizona, Kentucky, North Carolina, Tennessee and Texas permit this treatment regardless of whether a gift tax marital deduction "Q-TIP" election is made, but require that the Trust be sitused in the applicable state and thus subject to income tax there, if the state has an income tax, and there is no assurance that such a trust that is not the subject of a QTIP election will not be excluded from the estate of the contributor who is a remainder beneficiary, as would otherwise apply under Treasury Regulation Section 25.2533(f)-1(f), Example 11.

Consider as the paradigm a "Lego system" instead of the use of a form or acronym. Tailor the plan to the client's situation. Lego blocks permit you to take whatever blocks work to create the structure that is desired and to cobble together the array of blocks that facilitate creating the desired end project. When using the Lego system, estate planners can creatively assemble standard blocks into tailored plans to meet the client's goals. Too often, practitioners use the same form for different situations that merit significantly different documents (especially if they do not use document generation software) or in the planning stages, seize on a particular acronym to explain the plan. Focusing on a specific document or planning acronym can be a mistake in creating asset protection trusts.

It is preferable to focus on using the component parts that facilitate creating the plan that is desirable for the particular client, hence the concept of a Lego approach to planning. For example, non-reciprocal SLATs may be determined to be a reasonable plan for a particular client seeking asset protection and estate planning benefits, but rigidly sticking to the construct of a SLAT when structuring the plan or creating the document can be a mistake.

Several significant variations can be integrated into a SLAT. One slat may have hybrid DAPT provisions or SPAT provisions, etc. If that is done, a better result might be achieved, but then none of the acronyms of SLAT, DAPT, or SPAT are fully appropriate to describe the planning documents. Instead, as the practitioner, you select the planning components best for the client.

Consider having a different state situs, governing law, and institutional trustee for each SLAT to enhance the differences and independence and require a creditor to pursue collection in multiple states.

f. SLATs Qualifying as DAPTs.

xxii. Make SLATs Qualify as DAPTs.

Example: What if the wife receives a distribution from her husband's SLAT and deposits it into a joint bank account? (Indeed, you probably should suggest clients with SLATs have separate bank accounts to deposit distributions received from the SLAT.) What if the husband pays a utility bill from that account? Hasn't the husband then accepted a benefit from the SLAT that he funded, thereby calling into question the validity of the structure (especially as such instances grow in number and size)? A SLAT structured to qualify as a DAPT (situs and governing law in a DAPT jurisdiction with an independent institutional trustee) may have a fallback position if the SLAT is challenged on such grounds. See the previous example of the payment of SLAT expenses.

This could provide a valuable backstop if funds are inappropriately handled by the clients. Clients often confuse accounts and funds. That is yet another reason that periodic reviews are vital to the success of every plan. This is also why involving all of a client's advisers in such a review meeting can be important so that each adviser is aware of all components of plan implementation.

g. Domestic Asset Protection Trusts (DAPTs).

xxiii. DAPTs.

Some practitioners are reluctant to use the traditional DAPT and instead endeavor to build in safeguards to avoid self-settled trust characterization as long as possible. It appears that even many naysayers of DAPTs suggest that if the settlor resides in a DAPT jurisdiction that a DAPT should be effective. As the number of DAPT jurisdictions has increased to 20, the possibility of a client relocating to a DAPT jurisdiction is becoming more reasonable. That option should be explored as it may be a significant enhancement to the likelihood of the plan succeeding. For example, if the client resides in New York City, she may relocate her domicile to nearby Connecticut, which became a DAPT jurisdiction in 2020, and choose to commute to work. By changing her domicile to a DAPT jurisdiction and away from New York's non-DAPT jurisdiction, the plan's potential to be respected is significantly enhanced. In addition, COVID's dramatic changes to the work environment and allowing more work-from-home opportunities allow for moving to DAPT jurisdiction to be even more reasonable.

xxiv. Hybrid DAPTs.

The power held in a non-fiduciary capacity to add the settlor as a beneficiary.

Some prefer structuring this as a broader power to include a class of people (e.g., descendants of the settlor's grandparents) that also includes as one of such persons, the settlor. It is important to be able to establish that there was no pre-existing plan or agreement that the settlor would be added to the trust. It would be safest to provide that the settlor cannot be added as a beneficiary, except in the absolute discretion of the powerholder, who is not a fiduciary, and only if and when the settlor would otherwise be unable to support herself in a reasonable manner (including support from creditor exempt assets).

As noted above, at least one case, *Iannotti v. Commr. N.Y. St. Dept., Health*, might suggest that a hybrid DAPT may not be successful if the person who can add the grantor as a beneficiary is acting under a fiduciary duty. This might suggest that a SPAT, discussed below, may be a safer alternative, but as with so many of these issues the relative risks and uncertainties cannot be measured.

h. Special Powers of Appointment Trusts (SPATs).

In light of the possible risks of the DAPT and hybrid DAPT approaches for a client domiciled in a non-DAPT jurisdiction, the SPAT is another option that may be worth presenting to the client for consideration. The argument is that a SPAT does not create a self-settled trust as the settlor never becomes a beneficiary, and the trustee can never make a distribution to the settlor. Rather, a person holds a special power of appointment in a non-fiduciary capacity that may be exercised to direct the trustee to make a payment to the settlor.

Several commentators have proposed the SPAT as a non-DAPT solution to the above set of planning goals. The SPAT involves the creation of an irrevocable trust for beneficiaries other than the grantor, where a named individual or several individuals acting as a committee, is granted a lifetime Limited Special Power Appointment is granted a lifetime Limited Special Power of Appointment (an "LOA") held in a non-fiduciary capacity. Who might serve as the powerholder (or on the committee of powerholders) will depend on whether the goal is to create a grantor or non-grantor trust? If the goal is a non-grantor trust, then the powerholder will have to be an "adverse party" under IRC Section 672(C)[36], and, therefore, a beneficiary of the trust to the settlor. Whether or not the powerholder should be a beneficiary will also depend on the analysis of whether the exercise of the LPOA would be deemed a gift by the beneficiary/powerholder.

i. Foreign Asset Protection Trusts (FAPTs).

xxv. Foreign Asset Protection Trust Considerations.

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[36] Internal Revenue Code Section 672.
(c) Related or Subordinate Party
(1) the grantor's spouse if living with the grantor;
(2) any one of the following: The grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.
For purposes of subsection (f) and sections 674 and 675, a related or subordinate party shall be presumed to be subservient to the grantor in respect of the exercise or non-exercise of the powers conferred on him unless such party is shown not to be subservient by a preponderance of the evidence.

Foreign Asset Protection Trusts are beyond the purview of this Handbook but should be considered as an alternative to DAPT planning. In particular, clients need to know that it is very unlikely or impossible that a court in a FAPT jurisdiction will recognize a U.S. judgment or be sympathetic to a creditor who claims that a properly formed and funded FAPT should be disregarded. On the other hand, horrendous tax and tax reporting issues can arise when FAPTs are used.

These include the following:

1. A transfer of assets from a completed gift DAPT to a FAPT that does not have at least one US beneficiary, can trigger income tax as if the assets were sold under IRC Section 684(a)[37].

See Treasury Regulation Section 1.684-4(d), mentioned in Example 2. In this example, which is quoted verbatim below, A and B are U.S. citizens, C is a nonresident alien, and T is a trust. The example reads as follows:

EXAMPLE 1. Migration of Domestic Trust with No U.S. Beneficiaries.

> ***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 mother, who is not a citizen or resident of the United States. T is not treated as owned by another person. 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 this chapter, T becomes a foreign trust, FT. FT has no U.S. beneficiaries within the meaning of § 1.679-2, and no person is treated as owning any portion of FT. T is required to recognize a gain of 600X on January 1, 2001. This section provides rules with respect to an inadvertent migration of a domestic trust.***

A DAPT that provides that it will automatically "flee" to a foreign jurisdiction in the event of litigation, or upon demand by any one or more foreign individuals or entities (unless they can be outvoted by domestic individuals or entities) will be considered a foreign trust, even when it is sitused and

[37] See Leslie Share and Alan Gassman discussing IRC Section 684. Click Here Mr. Gassman discusses that the Section follows Section 679 which states that if a U.S. tax payer establishes an irrevocable trust which could benefit any other U.S. taxpayer that trust is disregarded for income tax purposes. Mr. Gassman believes that trust is treated as a defective grantor trust. The only difference Mr. Gassman is aware of is that the foreign trust cannot own S Corporation stock (0:40). Mr. Share believes the basic difference is the underlying holding entities that are in the trust (1:08).

administered in the United States by a U.S. trustee. The treasury regulation that defines whether a trust is foreign or a "U.S. person" reads as follows[38]:

(a) In general. (1) A trust is a United States person if—

(i) A court within the United States is able to exercise primary supervision over the administration of the trust (court test); and
(ii) One or more United States persons have the authority to control all substantial decisions of the trust (control test).
(2) A trust is a United States person for purposes of the Internal Revenue Code (Code) on any day that the trust meets both the court test and the control test. For purposes of the regulations in this chapter, the term domestic trust means a trust that is a United States person. The term foreign trust means any trust other than a domestic trust.
(***) Except as otherwise provided in part I, subchapter J, chapter 1 of the Code, the taxable income of a foreign trust is computed in the same manner as the taxable income of a nonresident alien individual who is not present in the United States at any time. Section 641(b). Section 7701(b) is not applicable to trusts because it only applies to individuals. In addition, a foreign trust is not considered to be present in the United States at any time for purposes of section 871(a)(2), which deals with capital gains of nonresident aliens present in the United States for 183 days or more.
(b) Applicable law. The terms of the trust instrument and applicable law must be applied to determine whether the court test and the control test are met.
(c) The court test—(1) Safe harbor. A trust satisfies the court test if—
(i) The trust instrument does not direct that the trust be administered outside of the United States;
(ii) The trust is in fact administered exclusively in the United States; and
(iii) The trust is not subject to an automatic migration provision described in section (k.)(vi.) of this Handbook.
(2) Example. The following example illustrates the rule of paragraph (c)(1) of this section:
Example. ***A creates a trust for the equal benefit of A's two children, B and C. The trust instrument provides that DC, a State Y corporation, is the trustee of the trust. State Y is a state within the United States. DC administers the trust exclusively in State Y, and the trust instrument is silent as to where the trust is to be***

[38] 26 CFR Section 301.7701-7

administered. The trust is not subject to an automatic migration provision described in section (k.)(vi.) of this Handbook. The trust satisfies the safe harbor of paragraph (c)(1) of this section and the court test.
(3) Definitions. The following definitions apply for purposes of this section:
(i) Court. The term court includes any federal, state, or local court.
(ii) The United States. The term the United States is used in this section in a geographical sense. Thus, for purposes of the court test, the United States includes only the States and the District of Columbia. See section 7701(a)(9). Accordingly, a court within a territory or possession of the United States or within a foreign country is not a court within the United States.
(iii) Is able to exercise. The term is able to exercise means that a court has or would have the authority under applicable law to render orders or judgments resolving issues concerning administration of the trust.
(iv) Primary supervision. The term primary supervision means that a court has or would have the authority to determine substantially all issues regarding the administration of the entire trust. A court may have primary supervision under this paragraph (c)(3)(iv) notwithstanding the fact that another court has jurisdiction over a trustee, a beneficiary, or trust property.
(v) Administration. The term administration of the trust means the carrying out of the duties imposed by the terms of the trust instrument and applicable law, including maintaining the books and records of the trust, filing tax returns, managing and investing the assets of the trust, defending the trust from suits by creditors, and determining the amount and timing of distributions.
(4) Situations that cause a trust to satisfy or fail to satisfy the court test. (i) Except as provided in paragraph (c)(4)(ii) of this section, paragraphs (c)(4)(i)(A) through (D) of this section set forth some specific situations in which a trust satisfies the court test. The four situations described are not intended to be an exclusive list.
(A) Uniform Probate Code. A trust meets the court test if the trust is registered by an authorized fiduciary or fiduciaries of the trust in a court within the United States pursuant to a state statute that has provisions substantially similar to Article VII, Trust Administration, of the Uniform Probate Code, 8 Uniform Laws Annotated 1 (West Supp. 1998), available from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611.
(B) Testamentary trust. In the case of a trust created pursuant to the terms of a will probated within the United States (other than an ancillary probate), if all fiduciaries of the trust have been qualified as

trustees of the trust by a court within the United States, the trust meets the court test.
(C) Inter vivos trust. In the case of a trust other than a testamentary trust, if the fiduciaries and/or beneficiaries take steps with a court within the United States that cause the administration of the trust to be subject to the primary supervision of the court, the trust meets the court test.
(D) A United States court and a foreign court are able to exercise primary supervision over the administration of the trust. If both a United States court and a foreign court are able to exercise primary supervision over the administration of the trust, the trust meets the court test.
(5) Examples. The following examples illustrate the rules of this paragraph (c):
Example 1. A, a United States citizen, creates a trust for the equal benefit of A's two children, both of whom are United States citizens. The trust instrument provides that DC, a domestic corporation, is to act as trustee of the trust and that the trust is to be administered in Country X, a foreign country. DC maintains a branch office in Country X with personnel authorized to act as trustees in Country X. The trust instrument provides that the law of State Y, a state within the United States, is to govern the interpretation of the trust. Under the law of Country X, a court within Country X is able to exercise primary supervision over the administration of the trust. Pursuant to the trust instrument, the Country X court applies the law of State Y to the trust. Under the terms of the trust instrument, the trust is administered in Country X. No court within the United States is able to exercise primary supervision over the administration of the trust. The trust fails to satisfy the court test and therefore is a foreign trust.
Example 2. ***A, a United States citizen, creates a trust for A's own benefit and the benefit of A's spouse, B, a United States citizen. The trust instrument provides that the trust is to be administered in State Y, a state within the United States, by DC, a State Y corporation. The trust instrument further provides that in the event that a creditor sues the trustee in a United States court, the trust will automatically migrate from State Y to Country Z, a foreign country, so that no United States court will have jurisdiction over the trust. A court within the United States is not able to exercise primary supervision over the administration of the trust because the United States court's jurisdiction over the administration of the trust is automatically terminated in the event the court attempts to assert jurisdiction. Therefore, the trust fails to satisfy the court test from the time of its creation and is a foreign trust.***
(d) Control test—(1) Definitions—(i) United States person. The term United States person means a United States person within the

meaning of section 7701(a)(30). For example, a domestic corporation is a United States person, regardless of whether its shareholders are United States persons.

(ii) Substantial decisions. The term substantial decisions means those decisions that persons are authorized or required to make under the terms of the trust instrument and applicable law and that are not ministerial. Decisions that are ministerial include decisions regarding details such as the bookkeeping, the collection of rents, and the execution of investment decisions. Substantial decisions include, but are not limited to, decisions concerning—

(A) Whether and when to distribute income or corpus;
(B) The amount of any distributions;
(C) The selection of a beneficiary;
(D) Whether a receipt is allocable to income or principal;
(E) Whether to terminate the trust;
(F) Whether to compromise, arbitrate, or abandon claims of the trust;
(G) Whether to sue on behalf of the trust or to defend suits against the trust;
(H) Whether to remove, add, or replace a trustee;
(I) Whether to appoint a successor trustee to succeed a trustee who has died, resigned, or otherwise ceased to act as a trustee, even if the power to make such a decision is not accompanied by an unrestricted power to remove a trustee, unless the power to make such a decision is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa; and
(J) Investment decisions; however, if a United States person under section 7701(a)(30) hires an investment advisor for the trust, investment decisions made by the investment advisor will be considered substantial decisions controlled by the United States person if the United States person can terminate the investment advisor's power to make investment decisions at will.

(iii) Control. The term control means having the power, by vote or otherwise, to make all of the substantial decisions of the trust, with no other person having the power to veto any of the substantial decisions. To determine whether United States persons have control, it is necessary to consider all persons who have authority to make a substantial decision of the trust, not only the trust fiduciaries.

(iv) Safe harbor for certain employee benefit trusts and investment trusts. Notwithstanding the provisions of this paragraph (d), the trusts listed in this paragraph (d)(1)(iv) are deemed to satisfy the control test set forth in paragraph (a)(1)(ii) of this section, provided that United States trustees control all of the substantial decisions made by the trustees of the trust—

(A) A qualified trust described in section 401(a);
(B) A trust described in section 457(g);

(C) A trust that is an individual retirement account described in section 408(a);
(D) A trust that is an individual retirement account described in section 408(k) or 408(p);
(E) A trust that is a Roth IRA described in section 408A;
(F) A trust that is an education individual retirement account described in section 530;
(G) A trust that is a voluntary employees' beneficiary association described in section 501(c)(9);
(H) A group trust described in Rev. Rul. 81–100 (1981–1 C.B. 326) (See § 601.601(d)(2) of this chapter);
(I) An investment trust classified as a trust under § 301.7701–4(c), provided that the following conditions are satisfied—
(1) All trustees are United States persons and at least one of the trustees is a bank, as defined in section 581, or a United States Government-owned agency or United States Government-sponsored enterprise;
(2) All sponsors (persons who exchange investment assets for beneficial interests with a view to selling the beneficial interests) are United States persons; and
(3) The beneficial interests are widely offered for sale primarily in the United States to United States persons;
(J) Such additional categories of trusts as the Commissioner may designate in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b)).
(v) Examples. The following examples illustrate the rules of paragraph (d)(1) of this section:
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 the 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 United States 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 United States persons and therefore United States persons control all the substantial decisions of the trust.***
Example 3. ***Assume the same facts as in Example 2, except that the trust instrument directs that C is to make all of the trust's investment decisions, but that A and B may veto C's investment decisions. A and B cannot act to make the investment decisions on***

their own. The control test is not satisfied because the United States persons, A and B, do not have the power to make all of the substantial decisions of the trust.

Example 4. ***Assume the same facts as in Example 3, except A and B may accept or veto C's investment decisions and can make investments that C has not recommended. The control test is satisfied because the United States persons control all substantial decisions of the trust.***

Example 5. ***X, a foreign corporation, conducts business in the United States through various branch operations. X has United States employees and has established a trust as part of a qualified employee benefit plan under section 401(a) for these employees. The trust is established under the laws of State A, and the trustee of the trust is B, a United States bank governed by the laws of State A. B holds legal title to the trust assets for the benefit of the trust beneficiaries. A plan committee makes decisions with respect to the plan and the trust. The plan committee can direct B's actions with regard to those decisions and under the governing documents B is not liable for those decisions. Members of the plan committee consist of United States persons and nonresident aliens, but nonresident aliens make up a majority of the plan committee. Decisions of the plan committee are made by majority vote. In addition, X retains the power to terminate the trust and to replace the United States trustee or to appoint additional trustees. This trust is deemed to satisfy the control test under paragraph (d)(1)(iv) of this section because B, a United States person, is the trust's only trustee. Any powers held by the plan committee or X are not considered under the safe harbor of paragraph (d)(1)(iv) of this section. In the event that X appoints additional trustees including foreign trustees, any powers held by such trustees must be considered in determining whether United States trustees control all substantial decisions made by the trustees of the trust.***

(2) Replacement of any person who had authority to make a substantial decision of the trust—(i) Replacement within 12 months. In the event of an inadvertent change in any person that has the power to make a substantial decision of the trust that would cause the domestic or foreign residency of the trust to change, the trust is allowed 12 months from the date of the change to make necessary changes either with respect to the persons who control the substantial decisions or with respect to the residence of such persons to avoid a change in the trust's residency.

(ii) Request for extension of time. If reasonable actions have been taken to make the necessary change to prevent a change in trust residency, but due to circumstances beyond the trust's control, the trust is unable to make the modification within 12 months, then the trust may provide a written statement to the district director having jurisdiction over the trust's return setting forth the reasons for failing to make the necessary change within the required time period. If the district director determines that the failure was due to reasonable cause, the district director may grant the trust an extension of time to make the necessary change. Whether an extension of time is granted is in the sole discretion of the district director and, if granted, may contain such terms with respect to assessment as may be necessary to ensure that the correct amount of tax will be collected from the trust, its owners, and its beneficiaries. If the district director does not grant an extension, the trust's residency changes as of the date of the inadvertent change.

(iii) Examples. The following examples illustrate the rules of paragraphs (d)(2)(i) and (ii) of this section:

Example 1. ***A trust that satisfies the court test has three fiduciaries, A, B, and C. A and B are United States citizens and C is a nonresident alien. All decisions of the trust are made by majority vote of the fiduciaries. The trust instrument provides that upon the death or resignation of any of the fiduciaries, D, is the successor fiduciary. A dies, and D automatically becomes a fiduciary of the trust. When D becomes a fiduciary of the trust, D is a nonresident alien. Two months after A dies, B replaces D with E, a United States person. Because D was replaced with E within 12 months after the date of A's death, during the period after A's death and before E begins to serve, the trust satisfies the control test and remains a domestic trust.***

Example 2. ***Assume the same facts as in Example 1 except that at the end of the 12–month period after A's death, D has not been replaced and remains a fiduciary of the trust. The trust becomes a foreign trust on the date A died unless the district director grants an extension of the time period to make the necessary change.***

(4) Examples. The following examples illustrate the rules of this paragraph (d):

Example 1. ***A, a nonresident alien individual, is the grantor and, during A's lifetime, the sole beneficiary of a trust that qualifies as an individual retirement account (IRA). A has the exclusive power to make decisions regarding withdrawals from the IRA and to direct its investments. The IRA's sole trustee is a United States person within the meaning of section 7701(a)(30). The control test is satisfied with respect to this trust because the special rule of paragraph (d)(1)(iv) of this section applies.***

Example 2. ***A, a nonresident alien individual, is the grantor of a trust and has the power to revoke the trust, in whole or in part, and revest assets in A. A is treated as the owner of the trust under sections 672(f) and 676. A is not a fiduciary of the trust. The trust has one trustee, B, a United States person, and the trust has one beneficiary, C. B has the discretion to distribute corpus or income to***

C. In this case, decisions exercisable by A to have trust assets distributed to A are substantial decisions. Therefore, the trust is a foreign trust because B does not control all substantial decisions of the trust.

Example 3. ***A trust, Trust T, has two fiduciaries, A and B. Both A and B are United States persons. A and B hire C, an investment advisor who is a foreign person, and may terminate C's employment at will. The investment advisor makes the investment decisions for the trust. A and B control all other decisions of the trust. Although C has the power to make investment decisions, A and B are treated as controlling these decisions. Therefore, the control test is satisfied.***

Example 4. ***G, a United States citizen, creates a trust. The trust provides for income to A and B for life, remainder to A's and B's descendants. A is a nonresident alien, and B is a United States person. The trustee of the trust is a United States person. The trust instrument authorizes A to replace the trustee. The power to replace the trustee is a substantial decision. Because A, a nonresident alien, controls a substantial decision, the control test is not satisfied.***

(e) Effective date—(1) General rule. Except for the election to remain a domestic trust provided in paragraph (f) of this section and except as provided in paragraph (e)(3) of this section, this section is applicable to taxable years ending after February 2, 1999. This section may be relied on by trusts for taxable years beginning after December 31, 1996, and also may be relied on by trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the Small Business Job Protection Act of 1996, (the SBJP Act) Public Law 104–188, 110 Stat. 1755 (26 U.S.C. 7701 note).

(2) Trusts created after August 19, 1996. If a trust is created after August 19, 1996, and before April 5, 1999, and the trust satisfies the control test set forth in the regulations project REG–251703–96 published under section 7701(a)(30) and (31) (1997–1 C.B. 795) (See § 601.601(d)(2) of this chapter), but does not satisfy the control test set forth in paragraph (d) of this section, the trust may be modified to satisfy the control test of paragraph (d) by December 31, 1999. If the modification is completed by December 31, 1999, the trust will be treated as satisfying the control test of paragraph (d) for taxable years beginning after December 31, 1996, (and for taxable years ending after August 20, 1996, if the election under section 1907(a)(3)(B) of the SBJP Act has been made for the trust).

(3) Effective date of safe harbor for certain employee benefit trusts and investment trusts. Paragraphs (d)(1)(iv) and (v) Examples 1 and 5 of this section apply to trusts for taxable years ending on or after August 9, 2001. Paragraphs (d)(1)(iv) and (v) Examples 1 and 5 of this section may be relied on by trusts for taxable years beginning after December 31, 1996, and also may be relied on by trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the SBJP Act.

2. On the death of the grantor of a complete gift FAPT, there may be a constructive sale of assets, and the triggering of income tax as read under the following in IRC Section 684(a).

I.R.C. § 684(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—

I.R.C. § 684(a)(1) —

the fair market value of the property so transferred, over

I.R.C. § 684(a)(2) —

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

I.R.C. § 684(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.

I.R.C. § 684(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.

(Added by Pub. L. 105-34, title XI, Sec. 1131(b), Aug. 5, 1997, 111 Stat 788; amended by Pub. L. 107-16, title V, Sec. 542, June 7, 2001, 115 Stat. 38; Pub. L. 111-312, title III, Sec. 301(a), Dec. 17, 2010, 124 Stat. 3296.)

3. Generally, a FAPT, and any other foreign trust, that may benefit a U.S. Person will be treated as a grantor trust pursuant to Section 679 and will not be subject to tax unless there are no US beneficiaries. Upon the death of the grantor, the FAPT will no longer be considered a grantor trust, and Section 684 will apply to impose tax, unless the assets are included in the grantor's estate for estate tax purposes, in which case see Section 679, which reads as follows:

(a) TRANSFEROR TREATED AS OWNER

(1) IN GENERAL

A United States person who directly or indirectly transfers property to a foreign trust (other than a trust described in section 6048(a)(3)(B)(ii)) shall be treated as the owner for his taxable year of the portion of such trust attributable to such property if for such year there is a United States beneficiary of any portion of such trust.

(2)EXCEPTIONS Paragraph (1) shall not apply—

(A) Transfers by reason of death

To any transfer by reason of the death of the transferor.

(B) Transfers at fair market value

To any transfer of property to a trust in exchange for consideration of at least the fair market value of the transferred property. For purposes of the preceding sentence, consideration other than cash shall be taken into account at its fair market value.

(a)TRUSTS ACQUIRING UNITED STATES BENEFICIARIES If—

(1)

subsection (a) applies to a trust for the transferor's taxable year, and

(2)

subsection (a) would have applied to the trust for his immediately preceding taxable year but for the fact that for such preceding taxable year there was no United States beneficiary for any portion of the trust,

then, for purposes of this subtitle, the transferor shall be treated as having income for the taxable year (in addition to his other income for such year) equal to the undistributed net income (at the close of such immediately preceding taxable year) attributable to the portion of the trust referred to in subsection (a).

(c)TRUSTS TREATED AS HAVING A UNITED STATES BENEFICIARY

(1)IN GENERAL

For purposes of this section, a trust shall be treated as having a United States beneficiary for the taxable year unless—

(A)

under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year to or for the benefit of a United States person, and

(B)

if the trust was terminated at any time during the taxable year, no part of the income or corpus of such trust could be paid to or for the benefit of a United States person.

For purposes of subparagraph (A), an amount shall be treated as accumulated for the benefit of a United States person even if the United States person's interest in the trust is contingent on a future event.

(2)ATTRIBUTION OF OWNERSHIP

For purposes of paragraph (1), an amount shall be treated as paid or accumulated to or for the benefit of a United States person if such amount is paid to or accumulated for a foreign corporation, foreign partnership, or foreign trust or estate, and—

(A)

in the case of a foreign corporation, such corporation is a controlled foreign corporation (as defined in section 957(a)),

(B)

in the case of a foreign partnership, a United States person is a partner of such partnership, or

(C)

in the case of a foreign trust or estate, such trust or estate has a United States beneficiary (within the meaning of paragraph (1)).

(3)CERTAIN UNITED STATES BENEFICIARIES DISREGARDED

A beneficiary shall not be treated as a United States person in applying this section with respect to any transfer of property to foreign trust if such beneficiary first became a United States person more than 5 years after the date of such transfer.

(4)SPECIAL RULE IN CASE OF DISCRETION TO IDENTIFY BENEFICIARIES

For purposes of paragraph (1)(A), if any person has the discretion (by authority given in the trust agreement, by power of appointment, or otherwise) of making a distribution from the trust to, or for the benefit of, any person, such trust shall be treated as having a beneficiary who is a United States person unless—

(A)

the terms of the trust specifically identify the class of persons to whom such distributions may be made, and

(B)

none of those persons are United States persons during the taxable year.

(5)CERTAIN AGREEMENTS AND UNDERSTANDINGS TREATED AS TERMS OF THE TRUST

For purposes of paragraph (1)(A), if any United States person who directly or indirectly transfers property to the trust is directly or indirectly involved in any agreement or understanding (whether written, oral, or otherwise) that may result in the income or corpus of the trust being paid or accumulated to or for the benefit of a United States person, such agreement or understanding shall be treated as a term of the trust.

(6)UNCOMPENSATED USE OF TRUST PROPERTY TREATED AS A PAYMENT

For purposes of this subsection, a loan of cash or marketable securities (or the use of any other trust property) directly or indirectly to or by any United States person (whether or not a beneficiary under the terms of the trust) shall be treated as paid or accumulated for the benefit of a United States person. The preceding sentence shall not apply to the extent that the United States person repays the loan at a market rate of interest (or pays the fair market value of the use of such property) within a reasonable period of time.

(d)PRESUMPTION THAT FOREIGN TRUST HAS UNITED STATES BENEFICIARY

If a United States person directly or indirectly transfers property to a foreign trust (other than a trust described in section 6048(a)(3)(B)(ii)), the Secretary may treat such trust as having a United States beneficiary for purposes of applying this section to such transfer unless such person—

(1)

submits such information to the Secretary as the Secretary may require with respect to such transfer, and

(2)

demonstrates to the satisfaction of the Secretary that such trust satisfies the requirements of subparagraphs (A) and (B) of subsection (c)(1).

(e)REGULATIONS

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section.

Categories	Domestic Trust	Off Shore Trust
Formation Documents and Annual Maintenance	No filing required – the trust document and initial funding causes the trust to come into place	Same as domestic trust
Trusteeship/Officer/ Registered Agent Expense	Usually less expensive than offshore trust	Usually more expensive than domestic trust
Creditor Protection Characteristics	Creditors cannot reach into trust assets pursuant to the law of the trust – but U.S. courts may try to override this by applying the law of the residence of the debtor	Creditors cannot reach into trust assets pursuant to the 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 many be taxed as a complex trust if specifically drafted. If taxed as a Complex Trust, the highest marginal tax rate is met at relatively low income (over approximately $13,000 each year).	Can be disregarded, but cannot own S corporation stock
IRS Filing Requirement	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 high duty to beneficiaries – may specifically not have investment obligations.	Same as domestic trust

Example Death of Grantor.

The initial facts are the same as in paragraph (I) of the above Example. On July 1, 2003, A dies, and as of that date no other person is treated as the owner of FT. On that date, the fair market value of the property is 1200X, and its adjusted basis equals 350X. Under of this section, A is treated as having transferred the property to FT immediately before his death, and generally is required to recognize 850X of gain at that time under § 1.684-1. However, an exception may apply under § 1.684-3(a).[39]

j. Reversible Exempt Asset Protection Trusts ("REAP").

The Reversible Exempt Asset Protection ("Reap") Trust is a name given to an APT that can be established by a settlor to receive a large gift that can be held for the benefit of the settlor's spouse and/or descendants to make use of some or all of the settlor's remaining gift tax exclusion. The REAP Trust is designed to be "reversible," so that if the settlor decides that the gift was not necessary or advisable, the trust assets may be returned to the settlor. Alternatively, if it is

[39] https://www.govinfo.gov/content/pkg/CFR-2014-title26-vol8/pdf/CFR-2014-title26-vol8-sec1-684-2.pdf

determined that the transfer should not be reversed, then the assets of the REAP Trust can be transferred to an existing Dynasty Trust that cannot be returned to the settlor. (https://gassmanlaw.com/wp-content/uploads/2017/08/Reversible-Exempt-Asset-Protection-REAP.lisi_.1e.pdf.)

A REAP Trust is drafted as a domestic or offshore Asset Protection Trust that is established in a jurisdiction that provides for the protection of the trust assets from the creditor of the settlor, despite the possibility of the settlor becoming a beneficiary of the trust. The Asset Protection Trust can hold the assets gifted for the purposes of funding a new or existing Dynasty Trust that may have been formed in a non-DAPT state where the settlor resides. The Trustee of the REAP Trust can decide whether to keep the assets in the Asset Protection Jurisdiction, return them to the settlor, or transfer them to the above-referenced Dynasty Trust, once tax law changes are understood and evaluated.

The use of a REAP Trust provides flexibility for changing estate tax law and a client's financial situation and goals by allowing the trustee and Trust Protectors of the Trust to do the following: (1) to hold assets under the REAP Trust indefinitely, (2) to transfer the assets to the dynasty trust, or (3) to return the assets to the settlor.

Careful drafting of the Trust Protector's powers is required in order to prevent the Trust assets from being included in the settlor's taxable estate.

An alternative, which may be simpler in some ways, but will require a rather quick decision on returning the assets to the settlor, is to provide that the trustee or one of the beneficiaries may make a qualified disclaim under Code Section 2518 on behalf of the trust and provide that, should such a disclaimer be made (which must be within nine months of the transfer to the trust), the assets will revert to the settlor. Neither the gift to the REAP trust nor the disclaimer needs to be reported to the IRS.

k. Laws affecting these trusts:

xxvi. Florida Law.

Income tax reimburse rights may be protected. It is noteworthy that Florida law (and that of several other states) also prevents creditors from reaching into a trust formed by a settlor when the settlor is not a beneficiary, even though the trustee has the power to reimburse the settlor for income taxes paid as the result of the trust income being taxable to the settlor. The trustee's discretionary right to make distributions may be deferred for many years and could conceivably exceed the value of the assets held under the trust.

xxvii. Flee Cause to DAPT Jurisdiction.

Further, if the Trust Agreement required the trustee to transfer the trust's assets to an asset protection trust jurisdiction in the event that the settlor was sued or had a claim exceeding a certain amount, would a domestic trust created in a non-DAPT jurisdiction that benefits the settlor and other family members be within the reach of a creditor? While the law of the jurisdiction where the trust is formed and funded may allow the creditors to reach into the trust, the trust and its assets would be long gone well before there would ever be a judgment against the settlor in those situations, and the settlor and trustee may not be considered to have made transfers to avoid creditors when the trustees have simply followed the instructions of a trust that was formed and funded well before any creditor issues existed or were expected. However, note that the trustee may be concerned of being accused of acting to avoid creditors under fraudulent transfer statutes by making the move to another jurisdiction.

xxviii. Foreign Flee Clause May Be A Tax Trap.

A trust that is required to flee to a foreign Asset Protection Jurisdiction, upon specified circumstances, or allows that decision to be made by a U.S.-based Trust Protector or trustee, will be treated as a foreign trust for federal income tax reporting purposes under the complicated "Automated Migration Provisions" which are restated below.

(ii) Automatic migration provisions. Notwithstanding any other provision in this section, a court within the United States is not considered to have primary supervision over the administration of the trust, if the trust instrument provides that a United States court's attempt to assert jurisdiction or otherwise supervise the administration of the trust directly or indirectly would cause the trust to migrate from the United States. However, this paragraph will not apply if the trust instrument provides that the trust will migrate from the United States only in the case of foreign invasion of the United States or widespread confiscation or nationalization of property in the United States.[40]
(3) Automatic migration provisions. Notwithstanding any other provision in this section, United States persons are not considered to control all substantial decisions of the trust if an attempt by any governmental agency or creditor to collect information from or assert a claim against the trust would cause one or more substantial decisions of the trust to no longer be controlled by United States persons.[41]

This is true even if the trust in situs within the United States and has a U.S. trustee, because U.S. courts will not have exclusive jurisdiction over the trust. The same result occurs if any foreign individual or entity has the authority to cause the trust to move offshore without joinder or consent of any U.S. person or entity and can have a staggering cost, given that the penalty for failure to file a

[40] 26 CFR Section 301.7701-7
[41] *Id.*

Form 3520 income tax return for a foreign trust is 35% of the value of the assets of the trust, and the failure to file a subsequent a year Form 3520A each year results in a penalty of 5% of the value of the trust assets each year, plus additional penalties and interest. This is why a flee clause should permit the transfer to be to the trustee's choice of a U.S. or foreign Asset Protection Jurisdiction, or allows the decision as to when to go offshore or stay in the U.S. to be made by a U.S.-based Trust Protector.

xxix. International Movement to South Dakota.

The significant trend of having foreign wealth that was formally held in offshore Asset Protection Jurisdictions by non-U.S. taxpayers moving to the U.S., has continued in significant volume, based in large part upon the decision of a number of reputable offshore trust companies to open trust companies and situs trusts in South Dakota. The South Dakota law specifically provides that a trustee of a South Dakota trust that receives an order from a court in a foreign jurisdiction to repatriate the trust to a foreign country or deliver the trust assets based upon the order, must step down as trustee and transfer the assets to a successor trustee that would presumably not have a presence in a foreign jurisdiction, so that courts in that foreign jurisdiction cannot punish a trust company for not complying with such an order.

l. Summary.

This segment will take a more detailed look at issues related to APT structures, including use of entities to reduce ties to non-DAPT states (e.g., LLCs to house trust directors, Trust Protectors, investment advisers, etc.), the role of investment policy statements and documentation for underlying entities to support the plan and structure (IPS, minutes, unanimous consents, etc.), "defined value" issues (interplay of Wandry and Powell, double or two-tier Wandry, defined value spillover mechanisms on large transfers, etc.), avoiding reciprocal trust characterization (which creditors, in addition to the IRS, may use to unwind transactions), formalities in trust administration (sample annual trust consents, entity consents, etc.) and the use of checklists to close and administer trust transactions.

m. Statutory Foundations as an APT Alternative.

xxx. Consider Statutory Foundations as an APT Alternative

a. A statutory foundation is a foundation created by Wyoming under the Wyoming Statutory Foundation Act. Besides considering domestic or offshore annuity or life insurance private placement or conventional arrangements, Statutory Foundations are becoming more commonly used. The foundation offers the same "firewall" creditor protection as an LLC - the foundation can engage in business or investment activities, and its beneficiaries and director will not be responsible for its obligations, if they have not acted inappropriately. More like a trust, however, the beneficiaries do not "own an interest" in the entity, and it is up to the director to determine if and when there will be distributions, and who or what will receive them, but there is no fiduciary duty to make a distribution under any circumstances, which is similar to how discretionary trusts work in many states.

The director may be replaced or instructed by a Foundation Protector or Foundation Protectors, who may be appointed or replaced by the settlor.

The director's fiduciary duty is limited to the entity and held to a relatively low standard, in which the director must act in good faith when conducting activities regarding the foundation.

A foundation can own an LLC formed in any state, and it seems less likely that a judge situated in a state where the debtor resides, that does not have charging order protection as its sole remedy, would be willing or able to order that a Wyoming or New Hampshire (further discussed on their specific laws below) court should allow the creditor of one of several beneficiaries to receive control over or assets from the entity.

A foundation can be taxed as a grantor trust, a complex trust, or a partnership or corporation, depending upon drafting and whatever election might be made under the "Check-the-Box regulations."

Foundation documents may provide that the foundation will be moved to an offshore jurisdiction that recognizes and protects these entities in the event of a challenge. If the foundation is taxed as a partnership, then such a "flee clause" should not cause it to be required to report as a foreign trust in the same manner that applies DAPT's.

A "flee clause" refers to a provision included in trust documents or other financial instruments that allows the trustee or fiduciary to transfer the trust's situs or move assets to another jurisdiction if certain triggering events occur.[42]

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[42] The "Cuba clause" finds its origins in the U.S. embargo against Cuba, which began in the early 1960s. This embargo, formalized through the Cuban Assets Control Regulations (CACR) administered by the Office of Foreign Assets Control (OFAC), significantly restricted economic transactions with Cuba and Cuban nationals. As a result, estate planners and trust administrators developed specific provisions to address the unique challenges posed by these restrictions, ensuring compliance with U.S. laws while protecting the interests of beneficiaries. These provisions, commonly known as "Cuba clauses," have since evolved to provide trustees with the

n. Private Non-Charitable Foundation in New Hampshire and Wyoming.

New Hampshire and Wyoming both passed laws that allow for the formation and operation of a private non-charitable foundation, which is an organization similar to an Asset Protection Trust. A private non-charitable foundation is an entity that is held for the benefit of a stated family or group of individuals and/or entities, but no beneficiary has any specific right to receive foundation assets or distributions, or any ownership interest. The foundation is managed by its director or directors, who do not have a fiduciary duty to any particular potential beneficiary, or any obligation to make distributions. Creditors of a beneficiary, therefore, have no solid ownership interest to seize. The foundation also offers limited liability in the same manner as a corporation, in that if the foundation conducts business and is sued, the beneficiaries are not held liable unless they have acted negligently or have engaged in wrongful conduct. The same insulation applies for the foundation manager. These new laws have provided an important new domestic creditor and wealth protection tool. Europe has had similar private foundation laws for many decades, and the foundation has been popular, especially in jurisdictions that do not recognize trusts.

Statutory foundations are much less expensive to establish and maintain than an Asset Protection Trust, because a trustee residing in the jurisdiction where the foundation is formed and maintained is not necessary. The foundation manager can reside anywhere. Wyoming's filing fee is only $150, with an annual report fee of $100 per year. New Hampshire's filing fee is only $75, with an annual report fee of $100 per year. In other states like California, residents are required to pay $800 per year for all companies owned throughout the world, but a statutory foundation does not appear to be considered a "company" under California law. A statutory foundation could be a popular vehicle for owning real estate and operating businesses owned by residents of California. Statutory foundations are unlike an offshore trust in that there is no need to have a trust company or maintain filings, accountings, and disclosures that would normally be needed by a trust company.

There are several defined terms for statutory foundations within Wyoming Statutory Act, W.S. 17-30-102. The "Founder" or "Organizer" acts to form the foundation. A "Contributor" is the person who contributes property to the foundation; this can be any person except the founder. The "Operating

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flexibility to manage and relocate trust assets as needed to navigate the complexities of international sanctions. *See generally Office of Foreign Asset Control*, "Cuban Assets Control Regulations (CACR).

Agreement" is a written agreement required to be executed shortly after the formation of the entity. The "Beneficiary" is the person designated as a beneficiary under the Operating Agreement and may have a present or future vested or contingent beneficial interest in the entity. The "Protector" is designated as the Protector with the same role of restraining and directing the foundation, the "Principal Office" does not necessarily have to be in Wyoming, and the "Director" or "Directors" who must exist and constitute the operating officers of the entity.

In order for a foundation to be formed, an Article of Formation must be filed, which provides a name for the foundation that ends with the words "Statutory Foundation" or the letters "SF." The name should not be one that would cause third parties to believe that the foundation is a corporation, LLC, limited partnership, or other conventional entity.

Any type of property can be owned by a Statutory Foundation. Directors have the same rights to use the property and conduct the business that officers and directors would have. As such, directors are required to act "in good faith" and in a manner not opposed to the "best interests of the Statutory Foundation." Protectors serve as a fiduciary to the express terms of the Operating Agreement.

W.S. 17-30-502 states that a "director is not personally liable for the acts, omissions, obligations or debts of the statutory foundation, whether arising in contract, tort or otherwise." The Operating Agreement may authorize a Protector to approve or disapprove any qualified action of the Board of Directors.

A Statutory Foundation is similar to a company or limited liability partnership in that a Protector will not be responsible for the debts or liabilities of the foundation, except in the event of personal involvement with fraud, inadequate capitalization, failure to observe foundation formalities as required by law, or intermingling of assets, business operations, and finances of the foundation.

Unless the express terms of the Operating Agreement say otherwise, the beneficiary of a Statutory Foundation does not have any right to or any interest in the property of the foundation.

A Statutory Foundation in Wyoming may convert its jurisdiction, or it may become the successor entity for a foundation from another jurisdiction that has been moved to Wyoming.

The differences between Wyoming and New Hampshire private non-charitable foundations and comparing US-based and Foreign Foundations that compare US versus Foreign LLCs and US versus Foreign Asset Protection Trusts. We note that many practitioners use "only one or the other" of each type of entity, while others, including one of the authors, use both foreign and domestic varieties of each entity depending upon what best fits the client's situation and perceptions.

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 require 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 person property.	Creditors can reach a beneficiary's interest if the beneficiary can withdraw funds or appoint funds to creditors.
Does not have specific provision on how a merger could take place.	Same thing as Wyoming.
Can operate a business.	Explicitly grants trust powers if not conducting business with the general public. If transacting business with the general public the directors can be personally liable.
Director's duty is to the Foundation.	Direct has a duty of impartiality to the beneficiary.

o. Chapter Summary

The above-mentioned trusts are the tools of the trade for estate planning attorneys, but having multiple tools at one's disposal is not the metric of a successful plan. Rather, utilizing the right trust for a client's needs is the way to appropriately plan for asset protection. For example, Q-TIPs and SLATs are great devices for many clients, but they do no good for a single man that owns a restaurant and is looking to protect his business and personal assets. Furthermore, a resident of Ohio will not benefit from copying his friend in Florida's estate plan due to differences in state law and how courts in each state have interpreted or will interpret various estate planning techniques. Practitioners and clients will benefit greatly from having a wide knowledge of the trusts and techniques, then filtering out those that are not set up for the client's circumstances, such as the client's (a) marital status, (b) state of residence or domicile, (c) net worth, or (d) exposure to creditors, just to name a few primary considerations.

9. Chapter 10: Ancillary Planning and Documentation.

a. Introduction.

Often, clients will come to a planner with an existing estate plan and want to improve it. Editing an existing estate plan is easier and more advisable than starting from scratch. This can be done through decanting, non-judicial modification, and trust protectors. Additions or factors often affect an estate plan, such as investment policies, family limited partnerships, marital agreements, retirement plans, entities, debt, etc. These additions and modifications are discussed further throughout this chapter.

b. Improving Existing Trusts.

xxxi. Why Retain Existing Trusts.

xxxii. Decanting.

Decanting, which is the process of moving assets from one trust into another, has become quite common. Approximately 30 states now have decanting statutes that permit a trustee to decant a trust into another trust, and a trustee may have decanting authority under common law. Many trusts are drafted with decanting provisions included in the trust document. This can provide a trustee with the opportunity to effectively re-write the trust if advisable, although subject to the limitations of the terms of the trust and state law, and the trustee's fiduciary obligations. Decanting of a trust can be used to improve the security of trust assets (e.g., modifying distribution standards, moving the trust to a better jurisdiction, etc.)

Decanting may be used to modify and update trusts. See Chapter 7 for clarification concerning the lifecycle of a trust.

If a potential claim or other issue could adversely affect the trust, decanting (e.g., changing the situs and governing law, extending the term, etc.) may serve to safeguard the trust from that challenge.

Consider including express provisions in the governing trust instrument to permit decanting in addition to whatever provisions state law might provide.

Be mindful that many institutional trustees will suggest a non-judicial modification to limit their liability for any changes effected. However, a non-judicial modification might be less desirable because the individuals involved, e.g., beneficiaries, settlor, etc., may be requested to consent or at least not object to the non-judicial modification. A court might somehow construe such involvement as being intentional acts that would cause the trust assets to be reachable by creditors. A decanting may be preferable because the trustee consummates the decanting, not the beneficiaries or settlor. The *Powell-Ferri*[43] and *Kaestner*[44] case all noted decanting in a positive light in this regard.

Consider that an institutional trustee may have a specific committee (e.g., some institutions have a formal decanting committee) that will have to consider the options, circumstances, and potential risks of a decanting. This process may take some time, require the provision of additional information and disclosures (which, depending on the circumstances itself might be problematic), and the eventual result may depend on policies of that committee. For example, one large institutional trust company's decanting committee has a policy not to permit the decanting of a trust to lengthen the duration of the trust. That unexpected position is contrary to one of the most common reasons for decanting, and the benefits that may have been achieved in both *Kaestner* and *Powell-Ferri*.[45]

xxxiii. Non-Judicial Modifications.

Delaware and similar state statutes are quite robust. If the grantor is alive and the grantor and all beneficiaries consent or do not object, almost any change desired can be made to an otherwise irrevocable trust. However, in the asset protection context, caution should be exercised if the person desiring protection joins in such an agreement. Query whether a non-objection might be any more protective than consent to the non-judicial modification when a creditor may claim that a debtor has made a "fraudulent transfer" by encouraging or allowing a trust to be changed, so that trust assets cannot be reached by creditors.

In the case of *In re Cleopatra Cameron Gift Trust*[46], a California trust left by Cleopatra Cameron's father to provide her with lifetime benefits, was ordered to pay child support by the California court when the trust was sitused in California, and complied with the order for several years. Cleopatra resigned as a trustee, and the trust was moved as to South Dakota. Years later, a South Dakota trustee refused to continue to pay child support, based upon the conclusion that there were not sufficient trust assets to both support Cleopatra and to pay child support. The South Dakota Supreme Court ruled that South Dakota law would apply, and that the California judgment ordering payment from the South Dakota court was not enforceable under these circumstances.

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[43] *Ferri v. Powell-Ferri,* 165 A.3d 1137 (Conn. 2017).
[44] *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust,* 139 U.S. 2213 (2019
[45] *See* Harrison, Kamin, and Shenkman, "The Gumby Trust: Creating Flexibility," https://www.wealthmanagement.com/estate-planning/gumby-trust-creating-flexibility.
[46] *In re Cleopatra Cameron Gift Trust* 2019 SD 35, 931N.W.2d 244.

The case of *In re Rensin*[47] supports the proposition that the decision of the independent trustee of an APT to move a trust from one jurisdiction to another, and to transfer trust assets into an ownership form that is exempt from creditor claims of the debtor, will not be considered to be transfers made by the debtor to avoid creditors, assuming that the debtor does not control the trustee and other appropriate facts exist to support the proposition that the trustee is truly independent of the debtor. The *Rensin* case is discussed below. The Bankruptcy Court determined that it could reach into the trust to seize assets that were not creditor exempt, the purchase of annuities that would be protected from creditors of the debtor under Florida law would not be considered an action taken by the debtor that would implicate the Florida Fraudulent Transfer Statute, because the action was taken by the trustee of the trust without the request, cooperation or approval of the Mr. Rensin, so the Cayman Island annuities that the trustee purchased were not accessible to Mr. Rensin's creditors.

xxxiv. Trust Protector Actions

Trust protector actions may be used to effectuate changes in a trust as circumstances change, or as the advisory team becomes aware of improved planning techniques. If a trust was created in the client's home state, it may be possible, by the simple action of a Trust Protector, to remove a family trustee and replace that family member with an institutional trustee in a jurisdiction that is more supportive of asset protection (e.g., a DAPT state), and by changing governing law and situs, to enhance the asset protection afforded by that trust. Often, simple changes to a plan may be overlooked as the focus remains on more substantial components, but having enhanced planning, even for smaller assets (e.g., a small IRA, an old ILIT, etc.), can enhance the client's protection overall.

xxxv. Renunciations and Disclaimers.

Resignations or renunciations may be useful to accomplish a variety of goals. For example, if someone is given a general power of appointment, and that power would subject trust corpus to the reach of the power-holder's creditors in many states, renunciation may be beneficial, although again, not in all states. If a family trustee is a co-trustee with an institutional co-trustee in a trust friendly jurisdiction, the individual trustee's resignation as trustee may enhance asset

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[47] *See* In re Rensin, 600 B.R. 870 (Bankr. S.D. Fla. 2019).; See Denis Kleinfeld discussing his strategy in Rensin. Click Here. Mr. Kleinfeld stated that he thought they needed to keep the trust in place, find a new trustee and move to a new jurisdiction. (1:32). Mr. Kleinfeld said the safest thing he could do would be to have the Belize trustee have an LLC and have an annuity policy from the Cayman Islands procured by the trust and payable to the beneficiary who resides in Florida, where the assets would be exchanged to create an arms-length for value transaction.(2:00). Mr. Kleinfeld continues on to talk further about his inspired strategy.

protection. This might eliminate a connection to the trustee's home state, whose laws may be less favorable than the trust's jurisdiction. Renunciations, however, may not always be the optimal approach.

Example: A client is contemplating divorce and serves as a trustee or co-trustee of a trust for her own benefit. She may resign before the divorce action is commenced. However, a court might look at the situation in a negative light as pre-divorce planning. Perhaps, a trust protector could remove and replace the beneficiary/trustee with an independent trustee instead. If that action is not controlled by the beneficiary who files for divorce, the same negative implications may not apply.

Powers of Appointment. The exercise of powers of appointment can be used to revise an older trust that might not be ideal under current circumstances by appointing assets to a new trust. If a power can permit achieving this goal it may be preferable to a non-judicial modification that involves the beneficiaries and others consenting. A court might view that participation as tainting the desired result. For example, in the *Powell-Ferri*[48] case, the court noted that the son/beneficiary had not participated in the decanting of his trust. The use of a power of appointment to accomplish similar goals might provide a similar benefit. In addition, decanting must be effectuated by the trustee, who often has a fiduciary duty to all beneficiaries. A holder of the right to appoint trust assets may have more latitude to effectuate the changes that the trustee may not be willing to facilitate.

xxxvi. Inter-vivos Limited Powers Of Appointment ("LPOA").

A lifetime LPOA can provide a valuable safety valve to change trust terms and even beneficiaries should an issue arise.

A designated person acting in a non-fiduciary capacity may be more willing to act by exercising a power, than a trustee might be willing to exercise a power or decant.

This could be particularly useful to include a means to change the situs, governing law, distribution provisions, and even beneficiaries of the trust, quite quickly and without the time and formalities of an institutional trustee needing to

[48] *Ferri v. Powell-Ferri,* 165 A.3d 1137 (Conn. 2017).

request that a decanting committee evaluate the risks and concerns of a decanting.[49]

c. Investment Policy Statements.

xxxvii. Role of Investment Policy Statements

An IPS is a written record that describes a client's financial goals and investment objectives, while documenting the roles and responsibilities of all parties in managing the client's investment portfolios.[50] The implementation of an IPS has become the best practice for investment advisors, but that implementation can be enhanced to better serve a range of tax, asset protection, and estate and succession planning needs. To enhance the implementation of an IPS, practitioners should remain open and have transparent communications with clients and investment advisors to ensure that the IPS in question addresses the client's needs.

During these communications, a practitioner should not hold themselves out to be investment advisors or give investment advice, unless they actually have the expertise to make investment decisions and manage investments, or do so in conjunction with a licensed and qualified investment advisor who will take responsibility for and oversee the advice given. The authors believe that most, if not all, investment advisors should hold and manage investments on what is known as a "fiduciary platform," whereby the advisor has an explicit written duty to act in the best interest of the client. In past decades, the standard of practice was that the investment advisor was not a fiduciary, but would only sell products that were "suitable" for the applicant. The suitability standard was much lower than the fiduciary standard, which has become more prevalent. Fiduciary standards means the investment advisor is bound to act in the best interest of the client or be subject to potential financial and professional liability. Additionally, prior to engaging the services of an investment advisor should confirm, in writing, that the investment advisor is a fiduciary.[51]

Consider obtaining an overall family IPS for the client relationship. Consider obtaining individual IPS for each investment entity (e.g., a family LLC that holds marketable securities), and each trust. This might not only help asset

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[49] *See* Shenkman, "Modern Trusts Fiduciary and Non-Fiduciary Positions," https://shenkmanlaw.com/uploads/2022/03/October-2017-study.pdf.

[50] Suzanne Lindquist, *The Importance of an Investment Policy Statement*, MORGAN STANLEY (Feb. 17, 2023), https://www.morganstanley.com/articles/investment-policy-statement#:~:text=An%20investment%20policy%20statement%20describes,investment%20committee%2C%20investment%20managers%20and.

[51] ERISA §3(38) (Investment managers are fiduciaries).

location planning decisions but might also support the independence and validity of the entity.

It may be advisable for a client with several investment categories to have an overall IPS that sets forth general investment parameters (e.g., for the family unit). This can set the tone for an overall entity and trust investment strategy that is then tailored to the different investment accounts. It can also provide general guidance as investment buckets change over time.

d. Family Limited Partnerships

Family limited partnerships and family limited liability companies (collectively, "FLPs") are often used as tools in an asset protection plan, and many of them can be enhanced with an IPS. Historically, FLPs were used to provide a second tier of protection after the irrevocable trusts that own interests, and to provide charging order protection, etc. Considering that the transfer tax exemption is scheduled to be reduced by half to $5,000,000 (inflation adjusted) in 2026, and that the exemption may be reduced further by new legislation in the interim. More individuals should consider making transfers out of their estate now that utilize FLPs for tax planning purposes in addition to asset protection. Apart from these estate tax implications, FLPs remain essential tools for asset protection planning.

If clients create nonreciprocal SLATs or DAPTs, the marketable securities owned may be transferred to a FLP, and then FLP interests given to each SLAT. This might be used to fractionalize the ownership of the FLP, providing a useful second tier of protection against claimants and perhaps increase valuation discounts under current law. If the business purpose of the FLP is to own marketable securities or other investment assets, that purpose may be memorialized in an IPS signed by the general partner (manager).

e. Summary.

Memorializing the investment objectives of a trust is another means of corroborating that the independent legal nature of a trust is being respected and should be helpful in the event of a challenge by the IRS or a claimant.

f. Marital Agreements.

xxxviii. Prenuptial Agreements (and DAPTs and backstop).

Prenuptial agreements are commonly challenged, and in some cases, overturned. So, consider backstopping the prenuptial agreement before the marriage by creating a self-settled trust in a DAPT jurisdiction to hold pre-marital/non-marital assets. Before the marriage, there is generally no fiduciary obligation of either future spouse to the other, if everything is properly disclosed in the prenuptial agreement, so the transfer of assets to a DAPT should not be subject to challenge by the future spouse and can be explicitly consented to in the prenuptial agreement.

Each party to a prenuptial or postnuptial agreement should have a separate independent lawyer to review or draft the agreement, although one spouse may pay both sets of legal fees. Both spouses do not always have to have independent lawyers for a prenuptial agreement to be enforceable in most states, but it is strongly recommended.

Consider attaching the DAPT to the prenuptial agreement and disclosing assets of the DAPT. Opinions vary significantly on what should be done in this regard. Certainly, in some instances, if the client is willing, full disclosure may make a later claim by the other spouse more difficult to sustain. After all, the existence of the irrevocable trust and its assets were made known.

Consider whether a transfer of assets to a spouse in exchange for the waiver of marital rights by that spouse may be considered to be a transfer for value that could not be set aside by a creditor.[52] The Bankruptcy Court heard *In re Gosman*[53] and found that a payment made to a spouse that was allegedly in lieu of support obligations was nothing more than a ruse to avoid creditors. The law firm that recommended the strategy was sued by the creditor under the theory that its malpractice caused loss of assets that should be recouped by Mr. Gosman's creditors. The court found that Mr. Gosman and the law firm were "in pari delicto" (working together for a bad purpose), so that there was no right by the creditors against the law firm.

Sometimes the prenuptial agreement negotiations result in a break-up. It may be better to lose a relationship in the negotiation of a prenuptial agreement than to get married to someone who is not on the same page from a financial and responsibility/entitlement standpoint.

Example: Ken and Barbie get married in the year 2027, and at that time Ken owns a rental house that he keeps in his personal name. After the marriage, Barbie's parents give her a $200,000 brokerage account. Ken's hobby is restoring buildings, and he works a few hours every month to improve the rental house. He also manages the house and receives rental income that he deposits into an account in his name. Barbie lets her parent's stockbroker manage her individual brokerage account, and it grows significantly. When Ken and Barbie divorce in the year 2037, Barbie will get one-half of the rental income account, and Ken will have to pay Barbie one-half of the increase in the value of the rental house that

[52] *See* the Bove & Langa Report, "Marriage," http://www.bovelanga.com/wp-content/uploads/bovelangareports/Report-2015-06.pdf.
[53] *See* In re Gosman, 382 B.R. 826 (S.D. Fla. 2007).

occurred between 2027 and 2037. Ken gets no part of Barbie's brokerage account. If Ken earns significantly more than Barbie, then he may have to pay alimony to Barbie for a few years, but this will be reduced to some extent to take into account that Barbie's financial needs are reduced by the brokerage account and other monies that she has received from the rental house appreciation and the rental account. If Ken and Barbie had signed a valid prenuptial agreement before they were married, then the results above would generally follow the premarital agreement instead of the laws of the state they are located in.

xxxix. During A Marriage

While clients are best advised to enter into prenuptial agreements before marriage, this does not always happen. During the marriage, a high earner may recognize that his/her earnings will be shared equally with a spouse who may become an ex-spouse and adversary. It is not unusual for the higher earning spouse in a marriage to negotiate a postnuptial agreement in recognition that the only viable alternative might be to get divorced sooner rather than later as opposed to staying in the marriage to try to work things out. Such a post-marital agreement may explicitly permit the higher earning spouse to place a portion of future earnings into an APT for purposes of protecting the assets from creditors, which could conceivably include the lower earner spouse in the event of a divorce.

Sometimes one spouse will make a "fraudulent transfer" to the other spouse, resulting in a creditor having a judgment against the spouse who received the fraudulent transfer. As a result, the creditor will have the ability to hold a judgment against both spouses and levy upon the tenancy by the entireties assets that might have otherwise been protected.

Clients Beware: Family law judges have all of the powers of a court of equity, including contempt power, in most states, and may be biased and even retaliate against a spouse who is perceived to have used asset protection trusts in an inappropriate manner. Even some divorce lawyers erroneously will send clients to an asset protection lawyer without thinking through the anger of a judge and that contempt power might easily override any benefit that an asset protection trust would have. Any client who requests the preparation or funding of an APT to protect marital rights should probably be directed to a family lawyer to determine what strategies and outcomes may apply.

xl. Marital Asset Preservations System ("MAPS")

Consider a Marital Asset Preservation System ("MAPS") arrangement where a married couple may not believe that a DAPT will be needed until after one of them dies. This might occur if they live in a tenancy by the entireties property jurisdiction, like Florida, Pennsylvania, or Delaware, which protects the property if the judgment is against only one spouse, and only one spouse is at high risk of being sued. It is noteworthy that tenancy by the entireties protection will vary from state to state. Under a MAPS agreement, the surviving spouse can be required to fund an asset protection trust ("APT") to protect the inheritance of the children of the marriage. This might make the funding of the APT an event with a significant business and family purpose.[54] A sample MAPS Agreement, which provides that a company owned jointly as tenants by the entireties is to be placed into an asset protection trust after the first death and can be found in Appendix A.

g. Debt.

xli. "Friendly" Debt.

When entities have valuable assets or operations and do not have debt encumbering, the assets may prove helpful when adding protection for that entity, in which the client might benefit from putting "friendly debt" in place. For example, the family's debt-free business might structure a loan to encumber the at-risk assets to a less at-risk family entity or trust.

When evaluating strategies and implementation, it is important to discuss with clients the costs associated with owning and maintaining life insurance, annuities, offshore investment accounts, and other investment products and services. Most variable annuity owners need to realize the costs imposed by an insurance company, and the commissions associated are often paid to sales agents, which can indirectly affect the judgment of a commissioned advisor and cause the costs to be higher than usual. Neither approach is always preferable to the other, as the evaluation depends on the role played and the services provided by the agent. Alternatively, clients can work with fee-for-service advisors or purchase non-commissioned annuity and life products. Although an attorney or other professional does not have an ethical duty to inform the client they spent too much on a product to protect assets, it may be helpful to the client to discuss this with them.

New York Regulation 194 § 30.3(a) requires life insurance agents to disclose the following information to the purchaser at or prior to the time of application for a life insurance product: (1) a description of the role of the insurance producer in the sale; (2) whether the insurance producer will receive compensation from the selling insurer or other third party based in whole or in part on the insurance contract the producer sells; (3) that the compensation paid to the insurance producer may vary depending on a number of factors, including (if applicable) the insurance contract and the insurer that the purchaser selects, the

[54] "Marital Asset Protection Systems (MAPS)" by Alan Gassman. https://gassmanlaw.com/wp-content/uploads/2017/08/Marital-Asset-Preservation-Systems-MAPS.1a.pdf

volume of business the producer provides to the insurer or the profitability of the insurance contracts that the producer provides to the insurer; and (4) that the purchaser may obtain information about the compensation expected to be received by the producer based in whole or in part on the sale, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the producer, by requesting such information from the producer. In time, this might become a national fiduciary standard to apply also to annuities and other investments. The new SECURE Act provides IRA and pension plan fiduciaries with certain safe harbors from liability, if certain steps are taken and a carrier fails, or it is later determined that the cost of a product materially exceeded what comparable product expenses would have been. To qualify for the first exemption, there must be certain written representations received from the carrier. To qualify for the second exemption, the fiduciary must make a "reasonable decision" after evaluating the advantages and disadvantages of purchasing a given product.

xlii. Aggressive Use of IRAs.

On June 26, 2019, the 11th Circuit U.S. Court of Appeals case of *Yerian v. Webber* (*In re Yerian*)[55] found that a debtor forfeited his creditor exemption "when he engaged in self-dealing transactions prohibited by the IRA's governing instruments" by titling IRA-owned cars into his own and his wife's name and purchasing a condominium to live in with IRA funds. It is no surprise that the Florida court concluded that Yerian's actions caused his IRA to lose its tax-exempt status.

Yerian conceded that he had lost the tax-exempt status on the IRA, but continued to contend that his IRA was creditor-exempt under Florida statute §222.21(2)(a)(2), which provides creditor protection to accounts like IRAs if they are maintained in accordance with the applicable "IRA plan."

Thus, Floridians who choose to have self-directed IRA accounts are subject to loss of both tax advantages and creditor protection if they fail to adhere to the governing instrument of the IRA.

Peak Trust Company (formerly, Alaska Trust Company) provides practitioners with a number of helpful forms and literature on their website. We thank the Peak Trust Company and Jonathan Blattmachr, who is Director of Estate Planning for Peak, for their willingness to share the specimen Affidavit of Solvency in Exhibit A, and encourage LISI members to peruse the materials at the following.[56]

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[55] *Yerian v. Webber (In re Yerian),* 927 F.3d 1223 (11th Cir. 2019)

[56] https://www.peaktrust.com/

h. Different Components of the Plan in Different Jurisdictions.

Using independent trustees in different jurisdictions may enhance the likelihood of the plan being respected (certainly, if contrasted to naming the same family member in the home state on each trust). For example, if interests in a family business are to be sold in note sales to grantor non-reciprocal SLATs, consider having the situs of husband's SLAT in one DAPT jurisdiction and wife's SLAT in another DAPT jurisdiction. That may support discounts and the reality of fractionalization if the structure is attacked.

GRAT Benefitting the Spouse

i. Entities

The Grantor Retained Annuity Trust (GRAT) is a tool specifically permitted under the Internal Revenue Code. Under a GRAT, an individual transfers assets into the trust and receives a fixed annuity payment for a specified term of years. After this period, any remaining assets in the trust pass to the beneficiaries free of estate tax. The value of the gift made when the trust is funded is calculated as the value of the transferred assets minus the present value of the annuity payments to be made back to the grantor.

For effective estate planning, especially when multiple trusts are involved, it is crucial to consider the situs and governing law of each trust. When utilizing both GRATs and Spousal Lifetime Access Trusts (SLATs), it may be beneficial to have the situs of each trust in different jurisdictions with different independent trustees. This approach can also help in avoiding the application of the Reciprocal Trust Doctrine, which can sometimes allow creditors to reach a trust situated in a non-DAPT jurisdiction.

Example: Husband creates a SLAT in Alaska to benefit his wife and descendants. Wife creates a non-reciprocal SLAT in Nevada to benefit her husband and descendants. Utilizing different state laws and different institutional trustees can be critical factors in differentiating the trusts and avoiding the Reciprocal Trust Doctrine. In this scenario, the husband and wife each sold interests in various family business entities to their respective SLATs. Each sale transaction employed a defined value mechanism, stipulating that the first $1,000,000 of any valuation adjustment (i.e., the first $1,000,000 of value above the purchase price paid by the SLAT, or the full excess value if less than $1,000,000) would be transferred to a donor advised fund (DAF), with any remaining excess value directed to a GRAT.

In this example, each GRAT was established in South Dakota with a different institutional trustee, separate from the trustees of the SLATs. This arrangement enhances the independence of each transaction, with each trustee having a fiduciary obligation to enforce their respective positions in the defined value mechanism. This structure could improve the optics of the wealth transfer if scrutinized by creditors or the IRS, making it more challenging for a creditor to pierce the structure, especially if all components were not situated in the client's home state.

xliii. Using Entities to House Directors.

1. If the home state endeavors to assert jurisdiction because a Trust Protector or investment trustee resides in the home state, that could (although that outcome is not certain) jeopardize the plan by having home state law, rather than the law of the trust's jurisdiction, apply. The state's motivation may be to exert taxing authority over the trust, but the asset protection consequences could also be undermined.

2. Consider naming out-of-state (i.e., non-home-state) persons to serve in fiduciary capacities. However, for many clients this may not be viable as they will want people who they know and trust in those roles. It may also not be feasible as the investment advisor or trustee may need to be someone knowledgeable of the business interests involved. The solution may be the use of an entity to house such persons.

3. Consider designating an entity in the trust instrument to serve as a Trust Protector, investment director, or other role. The individual to provide the service in that capacity would do so as the manager of the entity, e.g., the LLC, named in the trust instrument. Creating an entity in the state where the trust was formed and is administered, even if a home state person serves as manager, is a step removed from a home state person directly serving in such a capacity.

4. An issue that remains to be addressed in such instance is who would own that entity that will house a Trust Protector, investment trustee, distribution committee, or other person. It might be possible to create a purpose trust to hold that ownership, but that requires additional costs, complexity, and yet another trust, and indirect control assertions when the settlor or beneficiaries are affiliated with a trust company or Trust Protector Entity.

xliv.Compensation from Entities.

5. Salaries from underlying entities

If the irrevocable trust holds interests in business or investment entities that may employ the settlor, this may provide a means to reasonably allow the payment and expenses for creditor-proof (or at least safer) wages to the settlor. Caution should be exercised in order to assure that the salary can in fact be demonstrated to be reasonable and at arm's length. If it is not, the IRS or a creditor may argue that the settlor retained an interest in the entity interest so transferred.

6. Consider having an independent appraisal or CPA firm evaluate and corroborate that the salaries taken are reasonable compensation. A reasonable compensation study for the entities involved, and overall, may be warranted.

j. Chapter Summary.

Starting a new estate plan from scratch may not be advisable in many cases. Utilizing the ability to modify an existing trust through decanting, non-judicial modification, and trust protectors can give the settlor of a trust greater flexibility. It is important that when starting an estate plan, that the planner drafts language and communicates the purpose of each provision before executing the plan. That way, the client is able to anticipate future challenges should they arise, and have a better idea of what the trust instrument can or cannot do. In many states, the settlor's intent is the primary consideration for courts looking at whether a trust modification is allowable or legal, for example, in Florida, the settlor's intent is the polestar of trust interpretation; therefore, it is common and often advisable to explicitly write the settlor's intent into the trust instrument to avoid potential uncertainty or ambiguity. Planners should also consider the client's retirement accounts, debt, and potential creditor claims in drafting a trust to withstand challenges, while maintaining a comfortable level of flexibility for the client.

PART V: DRAFTING THE APT

10. Chapter 11: Drafting the APT

a. Introduction.

When drafting a trust instrument and estate plan for asset protection, the goal of every planner and client should be to both (a) protect the client's assets, and (b) withstand a challenge to the structure. Discussed below are certain provisions that can be included to help achieve this goal.

b. Using Design Features to Enhance Likelihood of Plan Succeeding

i. Use Institutional or Professional Trustees

There is an expectation of independence when an institutional trustee is involved that does not exist with a family member, friend, or other individual trustees. Institutions have formalities, committees, processes, and recordkeeping that few individual trustees observe. If an individual trustee is used, consider professional, not family trustees, such as an attorney who acts regularly as a trustee, whenever possible. Simply put, the optics of an independent professional trustee are better when addressing a challenge from an ex-spouse, other creditor, or the IRS. The *Levin*[57] case extolled the benefits of independent trustees. Even outside the split-dollar planning area, the reasoning of the Levine Court should be considered.

While clients may bristle at having to provide documentation for a distribution request to an institutional trustee's distribution committee, the approval process may well provide important independence of the beneficiary not having control over the process, that there is no implied agreement between the client and the trustee, and that the plan may be respected when challenged by a claimant.

ii. Trust Protectors

Practitioners should be cautious with respect to the use of common trust terminology. For example, the term "Trust Protector" has been used to mean several very different concepts. Some uses intend a fiduciary role, and some do not. Regardless of intent, state law may mandate fiduciary status for some roles that might be encompassed by the phrase "Trust Protectors," although it seems that the Trust Agreement can effectively provide that no Trust Protector is a fiduciary, nor has any fiduciary duty to anyone, and the powers granted to the Trust Protectors can be considered to be "naked" special powers of appointment, meaning that there is no limitation or fiduciary constraints involved. Too often, power-holders are generically called "protectors" along with those persons given specific tasks or powers to change a trustee or situs. Practitioners should be certain that the use intended and the provisions in the governing instrument are consistent.

1. Differentiate between what is meant by a "Trust Protector" and what specific powers the Trust Protector may hold. Too often, clients and even some practitioners use the term "Trust Protector" generically to imply a range of different powers and functions. If someone is holding a special power of appointment, that person likely cannot act in a fiduciary capacity, or the power or exercise of the power may be moot. Further, if the protector must act in a fiduciary capacity (or if it is desired that this be done) and a power-holder cannot act, these may be separate positions which would be better filled by different people.

[57] *In re Levine*, 287 B.R. 683 (Bankr. E.D. Mich. 2002)

2. Consider incorporating a Trust Protector provision granting powers so that a Trust Protector can quickly modify administrative provisions of the trust, change situs and governing law, remove and replace a family trustee, and take other protective actions.

3. Consider whether the protector should act in a fiduciary or non-fiduciary capacity. There can be pros and cons to each, but it may be best to have the Trust Protectors not be fiduciaries, especially when they can add the settlor as an additional beneficiary and might be seen as being the equivalent of trustees with a sprinkle power if they are required to act in a fiduciary manner. A more precise answer might be that there are several different roles lumped under the generic description of "Trust Protector" and the use intended might suggest that distinct roles be defined with different people filling each. For example, if a person is given the power to add a charitable beneficiary, that role should be a non-fiduciary role; otherwise, the fiduciary obligation to other beneficiaries might prevent adding a new charitable beneficiary. In addition, that role might be distinct from a protector empowered to remove and replace the Trustee, which may be a fiduciary role, or may be required to be exercised in a fiduciary capacity by state law, or which the client may expect would only be exercised in a fiduciary manner or capacity.

4. Consider what language should be placed in a Trust Agreement to assure that the protector will not be considered to have a fiduciary duty, assuming that this can be avoided. Alternatively, consider whether it is best for a Trust Protector to act as a fiduciary under some or all circumstances state law might provide, as some jurisdictions may mandate that a protector act in a fiduciary capacity. From a pure asset protection perspective, it is normally considered best to have a protector act in a non-fiduciary capacity, but state law may impute a fiduciary standard under some circumstances. Some clients will prefer to have a requirement that any trust protector actions must be approved by a beneficiary of a trust or a family member to have better checks and balances. Any beneficiary of a trust who approves a trust protector action that benefits individuals other than the beneficiary may be considered to be making a gift for estate and gift tax purposes to those other beneficiaries.

5. Regardless of whether the Trust Protector is a fiduciary, it is best to use someone who resides in a non-DAPT jurisdiction. If the person the client wants to act as Trust Protector resides in a non-DAPT state, consider having him or her form an entity in a DAPT state that is the Trust Protector, with the authority to exercise the protector power.

iii. Change in Situs and Governing Law.

For example, a trust may have held interests in a family business that was actively conducted in the settlor's high-income tax home state. If the business is sold, it may be feasible to move the trust to a no tax state and change the situs and law applicable to the trust, and reduce the state income tax burden. While state income taxes may not be viewed as a significant goal of asset protection planning, stemming an annual drain on value of that state income tax, over years of time can have a valuable compounding effect. Tax avoidance can be a good non-creditor protection reason for the change in situs of the trust. Also, if the new jurisdiction has laws that are more favorable to creditor protection, then the prior jurisdiction that may enhance the overall protection afforded by the trust plan.

iv. Impact of Democratic Proposals on Asset Protection Planning

If there is a sufficient change in Washington from the 2024 election, Democratic tax legislation could change the dynamics of trust structuring and funding dramatically. It is impossible to predict the outcome of the election or what tax changes may be enacted, but the bottom line is that practitioners should encourage all clients to act prior to the election in the event a Democratic victory results in changes that the Democrats have previously proposed that could be very detrimental to asset protection planning. Planning for possible harsher taxes should also provide a significant justification for planning independent of asset protection planning.

It behooves all clients concerned about estate taxes or asset protection to transfer assets before restrictions are enacted.

However, if the Democratic proposals are enacted, the $1,000,000 Million gift exclusion will effectively emasculate asset protection planning transfers to completed gift trusts, and incomplete gift trusts will have to be used more frequently instead. That will result in part because the 2024 Biden Administration Greenbook proposals would eliminate or severely restrict the use and utility of many other techniques, such as grantor trusts, discounts, GRATs and other planning tools. How will clients seeking protection shift assets out of their estate? The bottom line is it may be valuable to plan before law changes.

If gift transfers to irrevocable asset protection trusts must be made incomplete to avoid incurring a current gift tax cost, the incomplete gift ING trust approach that may also reduce state income taxes may become more popular. To assure an incomplete gift on the transfer to the ING, the settlor retains a testamentary limited power of appointment and other powers. A gift is incomplete if the settlor/donor reserves the power to name new beneficiaries, or to change the relative interests among the beneficiaries, although the IRS position is that a settlor must have the right to consent to any distribution and additionally have a testamentary power of appointment.

a. For example, in the U.S. Supreme Court case, *Estate of Sanford*[58], the taxpayer created a trust for the benefit of named beneficiaries and reserved the power to revoke the trust, in whole or in part, and to designate new beneficiaries other than himself. Six years later, the taxpayer relinquished his power to revoke the trust, but retained the right to change beneficiaries. In 1924, the taxpayer relinquished his right to change the beneficiaries. The Court held that a donor's gift is not complete, for purposes of the gift tax, until the donor relinquishes the power to determine who would ultimately receive the property. The transfer to this type of trust is an incomplete gift for transfer tax purposes. Properly structured, such a trust can also be a non-grantor trust for income tax purposes to achieve the state income tax planning objectives of the ING plan.

b. Since the limited power of appointment held by the settlor is not deemed a property right that retained power should not taint the trust for purposes of a claimant of the settlor reaching the asset. See: "The Bernie Sanders Estate Tax Proposal: Might it Foreshadow Future Democratic Proposals?" Also see "Sanders Estate Tax Proposal: Estate Planning Steps to Take Now."

c. Using Design Features to Enhance Settlor Access

i. Floating Spouse Clause.

Instead of naming the client's current spouse, consider discussing with the client naming the person that the client/settlor is married to at any given time. In that manner, whoever the client is married to at that time is a beneficiary, thereby permitting indirect access. If the client's current spouse divorces or dies prematurely, remarriage will again provide the client/settlor indirect access to the funds in the trust.

As is no surprise, current spouses sometimes take offense at this drafting technique, and caution is in order. Practitioners should be mindful that if they are representing both spouses that this might be viewed as a possible issue, rather than merely as protecting the surviving spouse in the event of premature death. As a practical matter, the authors have found that most spouses are reluctant to recommend or accept that a "next spouse" would become a beneficiary of an irrevocable trust that benefits common descendants of the marriage.

In some instances, including life insurance may accomplish a means of protection against premature death without the implications of a floating spouse clause. This sample clause can be included in instances of joint representation:

[58] *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939)

1. **Sample Clause**: [Lawyer Name] has represented both [Husband and Wife] in this transaction and because of such joint representation cannot and has not advised either of [Husband or Wife] with respect to the execution of the trust, [Trust Name], inclusive of a floating spouse clause, any waiver and each is advised to retain independent counsel to review the consequences of signing the Trust, or any Waiver, in advance of so signing.

Consider provisions to include in prenuptial agreements if a floating spouse clause appears in the client's irrevocable trusts (e.g. a SLAT created when the prior spouse was living). The soon-to-be-new-spouse should be able to waive rights that would otherwise be obtained under such a floating spouse clause in an existing trust prior to the marriage in the couple's prenuptial agreement (or perhaps instead limit those rights).

ii. Tax Reimbursement Clause.

If state law permits a tax reimbursement without exposing trust assets to the settlor's creditors, this may provide a useful means to economically benefit the settlor without having the trust become subject to creditor claims. For example, Florida Statute 736.08145 provides that a trust that does not have the settlor as a beneficiary may nevertheless reimburse an amount equal to the income taxes that the settlor has paid as the result of the trust being considered as owned by the settlor for income tax purposes, and creditors of the settlor cannot reach into the trust even though the amount of taxes that the trustee has the discretion to reimburse over a number of years might exceed the value of the assets held in the trust. However, note that a court in another non-DAPT state might seize the assets that are subject to reimbursement.

If the state law applicable to the trust permits tax reimbursement without subjecting trust assets to the claims of the settlor's creditors, this could be a valuable access point to consider incorporating into the plan. See the discussion in Chapter 2 concerning the *Jackson v. Calone*[59] case in which the practitioner who did not include a tax reimbursement clause or mechanism to turn off grantor trust status was subjected to a malpractice claim, as discussed above.

As noted in that prior discussion, the inclusion of a tax reimbursement clause could result in undermining the planning objectives as to removal from the settlor's estate and protection from the settlor's creditor if the reimbursement power is mishandled. For example, how often and when is a tax reimbursement made? As discussed above, it is possible that if the reimbursement is made quarterly for many years, the frequent application might be inferred to suggest

[59] *Jackson v. Calone*, No. 2:16-cv-00891-TLN-KJN (E.D. Cal. Sep. 30, 2019).

that an implied agreement existed between the settlor and the trustee making the reimbursement. If successful, that could undermine the plan. Another consideration is how is the reimbursement calculated? Consider having an independent CPA hired by the trustee to calculate the appropriate reimbursement based on the terms of the trust, the client's tax return, and applicable state law, if any. Having an independent determination of the income tax attributable to trust income might deflect a challenge that the tax reimbursement clause was inappropriately used to shift trust assets back to the settlor.

iii. Loan Provisions.

A non-fiduciary may have the power to direct the trustee to loan funds at arm's length to the settlor and take a lien upon the settlor's assets without having the trust characterized as being self-settled.

The settlor should be cautioned, however, that a court may apply a substance over form analysis if the loan is part of a preconceived arrangement or may set the arrangement aside if the loan is not properly documented and otherwise respected. (Regularly paying interest on the loan should help show that it is legitimate.) However, if the settlor had no right to distributions, could such an argument succeed to maintain that it was a self-settled trust despite no inclusion of the settlor as a beneficiary? The loan director also should ideally be someone in a DAPT state because a court in a non-DAPT state which exercises jurisdiction over the director may order him or her to loan funds to the settlor which funds are then attached by the settlor's creditors.

Be certain that a note is executed, the terms of the note are adhered to, and that interest is at least at the applicable federal rate to avoid the imputation of interest if it is a non-grantor trust. Consider whether a higher arm's-length rate might be preferable in an asset protection context, as it is not certain that a loan at the minimum rate required under federal tax law to avoid interest imputation would suffice to demonstrate that the loan is adequate to protect against characterization as part of the "loan" being an inappropriate distribution to the settlor in the form of below-market interest.

iv. Adding Charitable Beneficiaries.

Having charitable beneficiaries can help assure that grantor trust status will apply, but may also provide indirect access to the trust corpus without a distribution to the settlor or even a spouse.

If the clients have charitable giving as a regular part of their lifestyle expenses, meeting distributions out of the irrevocable trust may indirectly benefit the clients by meeting desired charitable gifts. It may be important to be certain that these payments are not discharging a pledge (or any binding charitable commitment) by the clients that could taint the trust plan as a non-self-settled trust being used to inappropriately discharge the settlor's liability. What constitutes a "pledge" may be a gray matter, so caution is in order.

If the trust is a non-grantor trust, include Code Sec. 642(c) language in the trust so that the donation will carry income out to the charity, so that all income goes to charity and is not subject to taxation, without regard to the grantor or beneficiaries adjusted gross income.

Having a person in a non-fiduciary capacity hold a special power of appointment to direct distribution to qualified charities will meet the Section 642(c) requirements. It would appear that use of such a limited power of appointment would not cause the trust to be treated as a grantor trust in the manner that providing a person in a non-fiduciary capacity the right to add a charitable beneficiary would cause grantor trust status. Thus, the choice of mechanism might depend upon the desired income tax result.

v. Roll Over Business Start-Up (ROBs

a. ROBs Planning Structure: Be wary

ROBS stands for Rollover Business Start-Up, and refers to an arrangement whereby an IRA owner converts his or her IRA into a 401(k) plan, which can attach to and start a business that the IRA/401(k) owner can operate, but these are not without technical or practical challenges.

Example: Many financial planners evaluate the pros and cons of a non-deductible IRA and often advise clients only from a financial perspective. In some cases, it is not determined to be a worthwhile strategy. However, in many states, a non-deductible IRA contribution can create an asset-protected "pot" even if it is small. While small additions to IRAs will not safeguard significant wealth, they can constitute useful sources of creditor-proof capital, and clients who have judgments against them, and protected IRAs may be used to own a business that the client can work in using the ROBS technique.

In fact, the IRS website at: https://www.irs.gov/retirement-plans/rollovers-as-business-start-ups-compliance-project has the following discussion of ROBS, which is well-written:

What is a ROBS? ROBS is an arrangement in which prospective business owners use their retirement funds to pay for new business start-up costs. ROBS plans, while not considered an abusive tax avoidance transaction, are questionable because they may solely benefit one individual – the individual who rolls over his or her existing retirement funds to the ROBS plan in a tax-free transaction. The ROBS plan then uses the rollover assets to purchase the stock of the new business.

Promoters aggressively market ROBS arrangements to prospective business owners. In many cases, the company will apply to IRS for a favorable determination letter (DL) as a way to assure their clients that IRS approves the ROBS arrangement. The IRS issues a DL based on the plan's terms meeting Internal Revenue Code requirements. DLs do not give plan sponsors protection from incorrectly applying the plan's terms or from operating the plan in a discriminatory manner. When a plan sponsor administers a plan in a way that results in prohibited discrimination or engages in prohibited transactions, it can result in plan disqualification and adverse tax consequences to the plan's sponsor and its participants.

a. Employee Plans ROBS Project
b. EP initiated a ROBS project in 2009 to:
c. Define traits of compliant versus noncompliant ROBS plans;
d. Identify ROBS plans that are noncompliant and take action to correct them; and
e. Use results to design compliance strategies focusing on identified issues and trends (for example, Employee Plans Compliance Resolution System, Fix-It Guides, Web-based information, newsletters, and speeches).
f. Using compliance checks, we initially focused on companies that sponsored a plan and received a DL but didn't file a Form 5500, Annual Return/Report of Employee Benefit Plan, or Form 5500-EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan (PDF), and/or Form 1120, U.S. Corporation Income Tax Return.
g. Our contact letter to plan sponsors asked questions about the ROBS plan's recordkeeping and information reporting requirements, including:
h. the plan's current status
i. plan contribution history
j. information on the rollover or direct transfer of the assets into the ROBS plan
k. participant information
l. stock valuation and stock purchases
m. general information about the business itself
n. why no Form 5500 or 5500-EZ and/or Form 1120 were filed
o. We always invite a plan sponsor to furnish any other documents or materials that they believe will be helpful for us to review as part of the compliance check.
p. ROBS Project Findings
q. New Business Failures

r. Preliminary results from the ROBS Project indicate that, although there were a few success stories, most ROBS businesses either failed or were on the road to failure with high rates of bankruptcy (business and personal), liens (business and personal), and corporate dissolutions by individual Secretaries of State. Some of the individuals who started ROBS plans lost not only the retirement assets they accumulated over many years, but also their dream of owning a business. As a result, much of the retirement savings invested in their unsuccessful ROBS plan was depleted or 'lost,' in many cases even before they had begun to offer their product or service to the public.
s. Not Filing Form 5500 or Form 1120
t. Many ROBS sponsors did not understand that a qualified plan is a separate entity with its own set of requirements. Promoters incorrectly advised some sponsors they did not have an annual filing requirement because of a special exception in the Form 5500-EZ instructions. The exception applies when plan assets are less than a specified dollar amount, and the plan covers only an individual, or an individual and his or her spouse, who wholly own a trade or business, whether incorporated or unincorporated. In a ROBS arrangement, however, the plan, through its company stock investments, rather than the individual, owns the trade or business. Therefore, this filing exception does not apply to a ROBS plan, and the annual Form 5500 or 5500-EZ (5500-SF for filing electronically) is still required.
u. Specific Problems with ROBS
v. Some other areas the ROBS plan could run into trouble:
w. After the ROBS plan sponsor purchases the new company's employer stock with the rollover funds, the sponsor amends the plan to prevent other participants from purchasing stock.
x. If the sponsor amends the plan to prevent other employees from participating after the DL is issued, this may violate the Code qualification requirements. These types of amendments tend to result in problems with coverage, discrimination and potentially result in violations of benefits, rights, and features requirements.
y. Promoter fees
z. Valuation of assets
aa. Failure to issue a Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., when the assets are rolled over into the ROBS plan.

d. Chapter Summary.

The goal of every planner and client when drafting a trust instrument and estate plan for asset protection should be to both (a) protect the client's assets and (b) withstand a challenge. Planners should be well-versed in the modern methods of estate planning and stay up-to-date on case law and developments in legislation. Noting what provisions work and, perhaps more importantly, fail. Therefore, they are careful not to repeat the mistakes of others. A client's attorney should know that when a court finds a particular provision, it does not provide the intended protection. It may be advisable for planners to send their clients with trusts subject to new laws or court decisions a letter informing them of such a development that may affect their trust, including language allowing an estate planner to modify the trust in this situation.

PART VI: FUNDING AND ADMINISTRATION OF THE APT

11. Chapter 12: Before Funding the APT.

a. Introduction.

Before funding an APT, there are certain items to attend to. Maintaining a due diligence file, organizing financial statements and forecasts, obtaining solvency affidavits, and acquiring insurance coverage for the plan are all techniques that can be implemented, or at least considered, in the planning process. This chapter will discuss the tools that can be used to accomplish this.

b. Financial Data.

i. Financial Statement

The financial statement (or two if the client prepares an initial balance sheet that is then followed up by a more formal CPA or wealth adviser-prepared balance sheet) should be retained along with the solvency affidavit (discussed below), financial forecast and lien and judgment search in a due diligence file for the client.

1. Consider having a financial statement (balance sheet) prepared corroborating that the settlor/transferor has sufficient resources post-transfer to maintain his or her lifestyle, including through retirement.

2. Consider having the client sign the balance sheet with a statement that the client confirms the accuracy of the balance sheet so signed and understands that planning decisions will be made based on that balance sheet.

3. It may be preferable to have the client's CPA prepare a balance sheet to provide more professionalism and independence to the process.

4. Coordinate with CPAs, in-house accountants and, CFOs, and other advisors.

5. Coordination of counsel with the certified public accountant, and to assure that tax returns and financial statements are consistent with legal documents and intended circumstances and characterizations, is essential.

6. Write letters of guidance to CPAs, insurance agents, financial consultants, and other involved professionals, and follow up to be sure that the client's advisory team has all relevant information and the client's wishes are being followed.

Some clients will continue to list assets transferred to a trust or other structure on their personal financial statements. That is inappropriate, and it may behoove all advisers to review such statements to assure that they are consistent with any plan implemented. If a financial statement shows an asset or trust as owned by a debtor, then courts will be much more likely to give creditors access to such assets or trust, or to determine that the debtor committed fraud against a bank or other creditor by misrepresenting ownership or other information.

On the other hand, it can be important to disclose that such trusts exist for the benefit of family members, so that a bank, other lender, or any third party relying on the client's personal financial statements, is clearly not misled about their existence.

c. Financial Forecasts.

ii. Financial Forecasts.

Financial models can corroborate that the settlor/transferor/donor does not need the assets transferred to the trust, while providing support that the transaction as being viable and having economic substance. It may serve to deflect a later challenge that the transfer was a fraudulent conveyance. See the discussion of *Jackson v. Calone*[60] in chapter 3.

Evaluate the assumptions to be used in this analysis before the financial adviser creates the forecasts. In some instances, if a financial adviser misunderstands the analysis, the assumptions might be so conservative that the result is an inappropriate diminution of the amount that the forecasts might support transferring, thereby inhibiting the desired planning.

Example: A financial adviser prepares a financial forecast for a client to estimate the value of assets the client can transfer into an irrevocable trust. If the adviser misunderstands the assignment and assumes that the client can never access assets so transferred, the result that will ensue will be that less assets than reasonable (and less than may be desired) can be transferred in the proposed plan. Thus, the analysis may harm the planning goals instead of backstopping them.

When the financial adviser or CPA is preparing such forecasts, what age should be used in the analysis for life expectancy (i.e., how long financial resources must last)? Some financial advisers routinely use an age like 95 or 100 for financial models to assure that the client does not run out of resources. Is that really optimal for the analysis to support that the transfers can be made? Might a lower age be justifiably used? What rates of return might be assumed for client assets? Should different rates of return be assumed on different assets?

d. Solvency Affidavit.

An Affidavit of Solvency is a sworn statement indicating that the transfer of assets will not render the transferring entity or individual insolvent and unable

[60] *Jackson v. Calone*, No. 2:16-cv-00891-TLN-KJN (E.D. Cal. Sep. 30, 2019).

to pay debts and obligations. Consider having the donor/transferor sign a solvency affidavit before each material transfer to entities or trusts, even if state law does not require it. A solvency affidavit is a sworn statement stating that the donor will not be left bankrupt after the transfer of assets. Demonstrating that there are no known claims, liens, or debts prior to the transaction may avoid circumstances similar to some of the bad fact DAPT cases where the settlor/transferor appeared insolvent or faced significant financial issues before the transfer.[61]

Obtaining a client's signature on an affidavit or a confirmation of accuracy of a financial statement, however, may be an indication that the planner is concerned about solvency, and may actually harm the debtor, if and when the debtor later becomes insolvent and seeks to claim that there was no significant concern at the time of the transfer, and choosing a DAPT jurisdiction that requires affidavits could have the result of opening the debtor up to allegations of perjury, if it is not accurate. At present, the affidavit states include Alaska, Indiana, Michigan, Mississippi, Ohio, Tennessee, Utah, West Virginia, and Wyoming, so if trusts are created in such a state, an affidavit must be provided and should not indicate "extra" concern.

One factor worth considering when comparing the DAPT jurisdictions is the impact of the affidavit requirements in those states that have them. One should take into consideration what will happen if the client does not follow the affidavit requirements, or if it turns out that information provided on an affidavit is incorrect or unintentionally misleading.

e. Insurance Coverage for Risks of Plan.

Clients should also be encouraged to have adequate automobile, property ownership, specific liability, and umbrella coverages, not to mention product liability insurance, commercial insurance policies for operating businesses, and other coverage that may or may not be in place or sufficient.

Many clients believe that they can eliminate or reduce insurance coverages once a creditor protection structure is put into place, but this is rarely the case.

Suggesting that the client receive a second opinion on existing recommended coverages from another independent insurance consultant or agency that represents many carriers can be a very good way of helping to assure that gaps and issues of coverage can be spotted and resolved.

[61] *See* "Toni 1 Trust v. Wacker: Reports on the Death of DAPTs for non-DAPT Residents is Greatly Exaggerated."

A robust insurance plan, including disability, and long-term care, as well as liability and other coverages with umbrella liability coverage having high limits, can be valuable to support the position that a particular transfer is not a fraudulent conveyance, and practitioners might consider recommending an insurance review as part of any asset protection plan.

f. Chapter Summary.

Maintaining a due diligence file, organizing financial statements and forecasts, obtaining solvency affidavits, and acquiring insurance coverage for the plan are all techniques that should be implemented, or at least considered, in the planning process. All of these may, and probably should, be done before executing the asset protection plan and subsequently funding it. Once the plan is funded, it may be difficult (or even impossible) to undo without other externalities taking place, such as the death of a settlor. That is why it is important to have all your ducks in a row before implementing an asset protection plan.

12. Chapter 13: Funding the APT.

a. Introduction.

After taking advantage of the tools discussed in the previous chapter in the pre-funding phase, the APT is ready to be funded. The planner and client should work together to decide which assets are placed into the APT, and when, while considering the risks and benefits of each decision along the way. The following chapter will help with what to consider when funding the APT.

b. Risks to Consider.

i. Lien and Judgment Searches.

Consider having searches routinely completed prior to any large transfers to corroborate that there are no known claims affecting the client or key client businesses or assets.

For clients owning real estate, consider obtaining a title report that may list claims or liens.

A lien is a legal claim or encumbrance on a property, which serves as collateral for the payment of a debt or obligation. Liens can arise from various sources, including mortgages, UCC-1 filings, security agreements, car and boat title registrations, judgments, etc.

Consider whether it may be advantageous to retain an outside forensic firm to perform the analysis and provide a report. Might that independent report be more persuasive than one prepared by the client's advisers, if an issue arises in the future?

Consider checking for IRS liens, performing UCC searches, and vehicle lien searches to identify debt that a client may not even realize exists.

If any claims are identified that the client states are not against him or her but rather against someone with a similar name, or that have been resolved, have the client document that position on the reports. If there is a claim, consider requesting an opinion from the client's litigator as to the anticipated outcome of the case (e.g., that it is anticipated that the claim will settle under insurance limits). Save these annotated materials and any other supporting information in the due diligence materials for the client and the transaction involved.

ii. Relationship of Assets and Goals.

1. Annuities as an Alternative or Strategy in Conjunction.

In the *Rensin*[62] case discussed in Chapter 10, The Rensin Trustee's purchase of annuities that Mr.Rensin was the beneficiary of saved the day for him. Annuities can be an asset protection trust alternative for clients, in some states, like Florida, but not all states.[63]

As indicated, some states provide unlimited protection for annuity contracts, which can be purchased from low-cost providers such as Fidelity and TIAA, and will defer income tax on earnings until they are withdrawn, subject to the 10% of earnings excise tax, if withdrawn before age 59 ½.

A disadvantage is that the growth, when withdrawn, is ordinary income, instead of capital gains, and the capital gains tax is not eliminated on death because an annuity contract gets no step-up in basis at death as most assets do.

Nevertheless, the extra cost of approximately one-half of 1% per year, coupled with very low or no costs for underlying bond mutual funds, and no sales charge/surrender charges, can make variable annuities an attractive alternative to CDs and bonds or bond funds that might be held in a less protected manner.

Many states also have unlimited protection for the cash value of a life insurance policy. Life insurance policy costs can be much higher than annuity costs, but the death benefit eventually received will be income tax-free, thus sheltering the income tax that would otherwise be incurred upon policy growth, while the owner can borrow from the policy income tax-free, subject to interest rate differential charges.

The offshore annuity and life insurance industry offers U.S. tax compliant customized contracts and policies that can be competitive in cost and very effective creditor protection tools. A Bermuda, Cayman Island, or Swiss life insurance carrier may hold a portfolio managed by the client's U.S.-based financial advisor, and will not recognize a U.S. judgment, if a court in the U.S. decides that the policy is not exempt from creditor claims. Please be warned that some offshore annuity operations tell taxpayers that their contracts are U.S. tax compliant, as a blatant lie, or in a "wink-wink" situation.

The non-charitable statutory foundation is another entity that is available both offshore and now in New Hampshire and Wyoming, based upon 2019

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

[63] *Id.*

legislation. The foundation is similar to an LLC because it is chartered with the state, has low filing and annual report fees, and can be managed by the settlor, or anyone chosen by the settlor, without the need to reside in the jurisdiction where the foundation is formed. California residents may wish to consider using foundations instead of limited liability companies if this will avoid the need to pay the state of California $800 per year per LLC or other "corporate entity."

iii. Community Property Considerations.

Couples who reside in community property states should be apprised of the ability of a creditor of one spouse to reach all community property, and the advantages and disadvantages of transmuting from community property status to separate asset status. Bear in mind that transmutation might sacrifice the coveted full basis step-up on the entire asset (and not just half) on the death of the first spouse. However, there are proposals to eliminate basis step up on death that could significantly change that calculus. Consider informing the client that they must weigh the risks of loss of basis step-up versus the possibly enhanced asset protection if some or all of the community assets are transmuted to separate property and then transferred into protective structures. Also, be alert as to the step transaction doctrine: a common law principle and general tax concept indicating that substance should control over form.

Under community property laws, all property acquired by either spouse during the marriage (except for gifts and inheritances) is considered equally owned by both spouses, regardless of whose name is on the title. Income earned by either spouse during the marriage is considered to be community property, and debts incurred during the marriage are generally seen as community debts, for which both spouses are liable.

iv. Sequence of Funding.

a. Initial Gifts.

Consider having the settlor make a simple cash initial gift to the trust. Have a wire or check to open a bank account with the trustee so that it is certain that the trust exists before the more significant transfers are made. Once the bank account is opened, the trust's existence may be viewed as more certain. It may also avoid problems of the client trying to transfer more significant assets to the trust in advance of an account being opened.

Consider a minimum $20,000 deposit, as one case suggested negatively that $10,000 of assets was not sufficient.

Therefore, a meaningful balance in an account in the state where the trust is sitused may be advisable. Also, assure sufficient cash to cover trustee fees and basic trust expenses for several years to avoid the need for transfers in the near term. This is especially important if the law changes restricting future transfers.

In 2020, in particular, having a client set up an account with an initial deposit may assure that all components are in place should the client wish to make additional transfers shortly after the election or before year-end.

b. Secondary Gifts.

Structure additional transfers as secondary to assure that the trust exists by opening the initial account as above.

This might include a transfer of additional seed gifts in the form of marketable securities, private business interest, or securities.

c. Later Sales or Other Transfers.

Following the funding with seed gifts as above, even perhaps the sometimes allegedly mythical 10% supposedly required "seed" gift, sales, and further transfers might be planned.

d. Spaced or Timed Funding.

If transfers are made over time, might that make it more difficult to demonstrate that any particular transfer was a fraudulent conveyance? Having smaller dollar value transfers relative to the donor/transferor's overall net worth may make each such transfer less suspect as contrasted with instead having the donor make a single large transfer at one point in time.

Also, spacing transfers over time might facilitate assuring adequate cash flow to meet lifestyle expenses, note payments, etc. However, in 2023, in particular, this type of planning may not be feasible as clients might be advised to create trusts and open accounts as soon as possible in order to have the components in place for further gifts should the election results become known.[64]

v. Valuation Reports.

a. Defined Value Mechanisms.

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[64] *See* "Campbell v. Commissioner: Tax Court Concludes that the IRS Cannot Reach Assets in an Old and Cold Offshore Trust."

Interplay of Wandry[65] and Powell[66]. If a Wandry adjustment clause is respected might that leave equity interests in the transferor's estate, thereby exposing the transferor to a Powell "in conjunction with" challenge?

A possible solution to this issue may be the use of what might be called a double or two-tier Wandry approach. Consider a simultaneous sale of the retained equity at the gift tax value as finally determined as of the date of the original transaction.

Defined value spillover mechanisms on large transfers, etc. Consider using an independent escrow agent to assure that the adjustment is made. Consider including an economic adjustment mechanism.

vi. Transfer Financial Assets.

a. More states have adopted the Uniform Voidable Transactions Act (UVTA).

The Uniform Fraudulent Transfer Act (UFTA) had been adopted by almost every state, but is being succeeded by the UVTA in many states. The UVTA is virtually identical to the UFTA, but for changing the name of the act and the name of a transfer that may be set aside from being "fraudulent" to being "voidable".

The UVTA has now been enacted in twenty-one states, which include Alabama, Arkansas, California, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, New York, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia.

One change that New York made was to provide that recovery for a fraudulent transfer can be received from the debtor, the transferee and "anyone

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65 *Wandry v. Comm'r*, 103 T.C.M. (CCH) 1472 (March 26, 2012); The *Wandry* the tax court upheld the formula clause when the Donor parents' assets were transferred according to a specific dollar amount that would equate to a "sufficient number of..." their LLC units rather than specifying the number of gifted united to children and grandchildren. *Wandry* was the first case to permit such formula clause that did not involve a charitable remainder.
66 *Estate of Powell v. Comm'r*, 148 T. C. 18 (May 18, 2017); In the *Powell* case, Nancy Powell, the decedent, had a son Jeffery. Jeffery acted his a power of attorney for his mom. He transferred cash and securities to a limited partnership in exchange for Nancy's trust holding 99% interest and Jeffery holding 1% interest and acting as general partner. Jeffery then transferred the 99% interest to Nancy's CLAT. The CLAT was said to distribute to her foundation, and then upon her death, the CLAT was to be divided between Jeffery and his brother. The court held that since the transfer of securities was less than three years before her death, the value of the cash and securities can be included in the value of Nancy's gross estate.

who benefits from the transaction." The above quoted term has not yet been defined by case law. Will an estate planner who receives a fee for assisting to design or implement a transfer that turns out to have been subject to the act become responsible to the creditor as a result of this provision?

When the transfer to evade creditors was made to a person or entity, that person or entity may be held liable to the creditor for the asset received by the person or entity, or its value, as well as for the costs incurred by the creditor in seeking to recover the asset or its value, including legal fees. The transferee will also be subject to whatever discovery or other remedies may be imposed by a court of competent jurisdiction.

b. What if the Transferee Was Not Aware of the Nature of the Transfer, or Even the Transfer Itself?

In the 2019 case of *U.S. v. Lax*[67], the family of a diamond merchant, Chaim Lax, began a series of what were seen as sham transactions to shield assets from creditors. The son of Chaim Lax, Moshe, had his wife become the ostensible owner of LLCs, using her "previous names" (both first and last). Nevertheless, he was found to have used these LLCs to defraud creditors, including the IRS, while managing them.

The wife, Shaindy Lax, previously known as Chana Weisz, testified that she had no knowledge of what had occurred, and took the position that she should not have responsibility for these acts. The court found otherwise, indicating that:

> This argument, however, fails on both the facts and the law. It fails on the law because a mere lack of knowledge of the fraudulent conveyance is not a defense. Rather, New York Debt and Creditor Law ("DCL") §278 exempts from liability only those who are "purchaser[s] for fair consideration without knowledge of the fraud at the time of purchase." §278(1) (emphasis added). Obviously, the proviso that an acquirer of the transferred assets must pay "fair consideration" evinces a clear intent by the statute's drafters that creditors may recover against acquirers who have not paid fair consideration, regardless of their knowledge, vel non, of the fraudulent nature of the transfer. And while DCL §278, on its face, only addresses the traditional remedies of rescission and/or

[67] *United States v. Lax*, 414 F. Supp. 3d 359 (E.D.N.Y. 2019)

attachment, there is no reason why the rule should be different where "rescission is no longer practicable" and money damages are sought. Adelphia, 634 F.3d at 692. If the rule were otherwise, a debtor could easily circumvent the purposes and objectives of the DCL by giving the assets to a friend or relative, keeping them blissfully unaware of the fraud while retaining de facto control over the assets (or their proceeds, if the assets are later sold). Here, the Government alleges that the Schemes were affected without fair consideration, a point that Shaindy has not disputed for purposes of this motion. Therefore, her purported lack of awareness of the fraud is not a Defense.

c. As indicated above, the differences between the two acts are minimal, and the key takeaways are summarized as follows:

The use of the word "fraudulent" has been changed to "voidable" throughout the statute;

A transfer that can be set aside will be referred to as "voidable" instead of being "fraudulent." Neither act requires that there be "fraud" or deceit of any kind to apply. This will be beneficial for lawyers who practice in states where bar rules prohibit the engagement of lawyers in "fraudulent conduct." It will also reduce the risk of the lawyer being accused of engaging in fraudulent activity if bar officials mistake the legitimate assistance of assisting a client in engaging in an act that may be "voidable."

An example of such misinterpretation is seen in a Florida Supreme Court opinion that arose from a bar complaint filed against an attorney who transferred his law firm in order to avoid paying the amount owed to a client. The court-appointed referee found that the lawyer did not transfer tangible assets or accounts from the first professional association to the second, and that there was no transfer of goodwill to the second professional association. The referee also found that the lawyer's long-standing practice of paying personal expenses from the business operating account of the professional association "is more than normal for small business than the exception," and that every year this CPA sorted out personal and business expenses so that "Nothing was hidden, nothing was laundered." The referee further noted that the lawyer did not commit fraud, deceit, or misrepresentation.

It is noteworthy that it can be a crime and therefore against lawyer ethical rules to help a client avoid a creditor in some jurisdictions, such as California and Connecticut, and that some clients may be well advised to move to states where this conduct is not usually a crime, such as Florida.

d. Notwithstanding the overwhelming similarity between the UFTA and UVTA, many commentators have expressed concern because the commentary to §10 of the UVTA indicates that the law of the domicile of a debtor should apply in determining whether a Self-Settled Spendthrift Trust that may benefit the debtor should be accessible to creditors. This comment is not binding upon courts in any states that adopt the Act, but may be influential in decisions that follow.

Similar to the UFTA, the UVTA does not prevent an individual or family from placing assets into trusts or other entities, which will protect the assets and the family members if and when a future and normal creditor calamity might exist.

Like the UFTA, the UVTA will not apply unless there is a transfer that meets one of the following three tests, which include two situations where no intent to avoid creditors has to be shown to set aside a transfer:

e. Actual Intent.

This applies if it can be shown that the intent of the transferor was to avoid a known or expected creditor. The "badges of fraud" described below can be used by courts to determine that such intention existed, even if there is no direct evidence that the debtor knew that the transfer would protect the debtor's assets. When actual intent applies, by the law of most states, if the transfer was to a third party, the creditor has until the later of 4 years from when the act occurred or one year from when the creditor knew or should have known of the transfer, but the one year look back rule does not apply if the debtor files bankruptcy.

Some planners believe that this requirement will only be fulfilled when there is an actual creditor "on the scene." However, if creditors are eminent, such as when the transferor has been defrauding customers or business associates and anticipates being sued, then the intent requirement may be satisfied.

It is noteworthy that very few debtors will ever admit or share evidence to the effect that they intended to avoid a creditor when making a transfer. For this reason, the courts evaluate whether "badges of fraud" exist, which would help to "prove" that such intent must have existed.

In determining actual intent, consideration may be given to whether:

i. the transfer or obligation was to an insider;

ii. the debtor retained possession or control of the property transferred after the transfer;

iii. the transfer or obligation was disclosed or concealed;

iv. before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

v. the transfer was of substantially all the debtor's assets;

vi. the debtor absconded;

vii. the debtor removed or concealed assets;

viii. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

ix. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

x. the transfer occurred shortly before or shortly after a substantial debt was incurred; and

xi. the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

As a badge of fraud is potentially found in any circumstance that shows an intent to delay creditors, it is possible that frequent use of a law firm that provides creditor protection services may be used to show intent of the debtor.

One of the authors was involved in a case where a physician who had a judgment against him sold an interest in his personally-owned medical practice and placed the funds from the sale into a Family Limited Partnership that was primarily owned by himself and his spouse, as tenants by the entireties.

The creditor sued to set aside the deposit as being a transfer to avoid creditors under the Florida Uniform Fraudulent Transfer Act, and the doctor testified that he was aware that placing the monies in the account would make them unavailable to his creditors, but that the purpose of placing them in the account was that the author had informed him that it was best to place all income and assets into that account over 15 years before the creditor situation.

The court held that it could not ascertain that the transfer implicated the Florida Uniform Fraudulent Transfer Act, because there was no evidence that the initial transfer into a tenancy by entireties account was done with fraudulent intent to defraud the plaintiff because subsequent transfers of an interest in entireties property is not a fraudulent transfer.

f. Constructive Intent.

The second type of voidable/fraudulent transfer can be proven even if it is shown that the debtor did not intend to avoid creditors. This is a transfer that causes the transferor to become insolvent, or would have been reasonably expected to cause the transferor to become insolvent regardless of intention.

This is commonly referred to as a "constructive fraud" and can normally be set aside within four (4) years of when the transfer occurs, but not thereafter. When this type of transfer occurs, the creditor who does not have knowledge of it will not have additional time based upon the same "one (1) year after discovery of the transfer" exception that applies for an "intentional fraudulent transfer."

g. Insider Preferences.

The third type of fraudulent/voidable transfer occurs when a transfer is made by an insolvent debtor to an insider for an antecedent debt when the insider had reasonable cause to believe that the debtor was insolvent. This type of transfer is voidable as to a creditor whose claim arose before the transfer was made.

Under UVTA, an insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a general partner, or a person in control of a debtor.

Under this type of voidable transfer, creditors with a valid claim against debtor must bring suit no later than one year after the transfer was made.

vii. Avoidance Versus Spend what is Exposed.

It has been said that the Uniform Fraudulent Transfer Act and Uniform Voidable Transaction Acts do not require that a debtor put their assets on a table, wrap a bow around them, and deliver them to a creditor.

"Business as usual" that occurs after a creditor situation becomes apparent will not necessarily implicate the acts or cause a creditor to have rights against family members or otherwise protected assets.

For example, assets that would otherwise be exposed to a creditor situation may be spent in the ordinary course of living or business, while income and earnings that are protected from creditors might be set aside and kept, even after a bankruptcy.

Many debtors are well advised to have their affairs arranged so that they will fare as well as possible in the event of a bankruptcy.

viii. Preferential Transfer Surprises.

Many advisors are not aware that money passing through a lawyer's trust account could cause the law firm to be liable to a creditor for said money, if and when the law firm is aware of the creditor situation.

In *In re Harwell*[68], a well-respected lawyer permitted a debtor to have the proceeds from the sale of a business pass through the lawyer's trust account, and from there to several different individuals in an apparently attempt to avoid a judgment creditor's active attempts to collect on a judgment.

In *Jones v. Brand Law Firm, P.A.*[69], the Second Circuit Federal Court of Appeals ruled that the Bankruptcy Court and Federal Court properly allowed creditors to recover $250,000 that had been paid to attorney Brand and other attorneys from monies borrowed by a debtor during a bankruptcy proceeding.

In the 2019 Bankruptcy Appellate Panel of the Tenth Circuit decision of *In re Wagenknecht*[70], it was held that a law firm that received payment for legal fees that were past due had to repay the fees because they were received within ninety days preceding the debtor's filing of bankruptcy and thus constituted a preferential transfer. Even though the payment was made by the debtor's mother and the debtor was never in possession of the funds, the payment still constituted a preferential transfer because the debtor agreed to repay his mother for her payment.

Lawyers and other service providers must therefore, be careful when receiving or processing payments for a client who is or may become insolvent or is under bankruptcy proceedings.

ix. Updated Entity Documentation.

a. Documentation for underlying entities to support the plan and structure:

Minutes/unanimous consents may be used annually or at least periodically to demonstrate adherence to and respect for an entity's independence and formality.

b. Documentation for underlying entities to support the plan and structure:

Minutes/unanimous consents may be used annually or at least periodically to demonstrate adherence to and respect for an entity's independence and formality.

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[68] In re Harwell 439 B.R. 455 (Bankr. W.D. Mich. 2010)
[69] *Jones v. Brand Law Firm, P.A. (In re Belmonte)* 931 F.3d 147 (2nd Cit. 2019)
[70] *In re Wagenknecht* 2019 Bankr. LEXIS 1739

c. Chapter Summary.

The planner and client should work together to decide which assets are placed into the APT and when transfers should occur, while considering the risks and benefits of each decision along the way. The planner should be aware of the client's circumstances throughout the APT's life cycle. There are a number of pitfalls in funding an APT, and those pitfalls grow exponentially the more complex a client's estate plan is. Planners should carefully research and understand the implications of each transfer and distribution to and from the APT. Planners will often create a chart or some other document to track a client's asset protection plan and periodically update it to maintain a current and accurate picture of a client's estate plan.

13. Chapter 14: Tax Compliance.

a. Introduction.

Tax compliance is imperative when creating an estate plan. A planner should work with a CPA or tax professional to make sure the estate plan complies with all tax regulations. This chapter will discuss some things to consider regarding tax compliance. The transaction in question below is referring to the transaction of creating and funding the APT.

i. Reporting Consistency.

Be certain that all documentation that reflects the transaction is as consistent as possible. Ideally, any records reflecting the transfers to an irrevocable trust or other entity should be consistent throughout the spectrum of possible documents. Inconsistencies may raise challenges that the client, trusts, or entities did not respect formalities.

ii. Gift Tax Reporting of the Transfers.

1. Gift Tax Returns

The *Wandry*[71] court noted an inconsistency with the gift tax returns not reflecting the valuation adjustment. As illustrated above, if $10,000,000 Million worth of LLC interests were transferred, it should not be listed as 25% on the gift tax return, but rather as a transfer of $10,000,000 Million of LLC interests. That should be avoided if feasible.

Be certain that all exhibits are attached to the gift tax return and listed to meet the adequate disclosure requirements.

Do not overlook reporting charitable gifts to avoid not tolling of the statute of limitations.[72]

2. Income Tax Reporting

Be certain that reporting is consistent with the underlying transaction. The appropriate interests should be reflected. A dollar value interest, not a percentage, may need to be reflected, if the transfers were made pursuant to a valuation adjustment mechanism. (This complication might be largely avoided by having the transferee be a grantor trust created by the transferor, so that all income may be reported on the transferor's income tax return.) If the tax preparation software

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[71] **[No idea which case this is]**

[72] *See*: "Gift Tax Return Lessons: Common Mistakes and Tips for Your Gift Tax Return.

will not permit the disclosure desired and a percentage ownership must be listed when in fact the transfer was a fixed dollar amount, then attach an explanatory statement indicating that the ownership interest while listed, as a percentage is actually a fixed dollar amount pursuant to a valuation adjustment clause in the governing documents. Consider identifying the name and date of the documents, etc.

b. Tax Forms

Form 8832

Tax Form 8832 is used for limited liability companies and certain other domestic and foreign entities to elect how the entity will be classified for Federal income tax purposes. Entities can elect to be a corporation, partnership, or an entity disregarded as separate from its owner. The Form 8832 also lists various entities that can be formed in various countries and disregarded or treated as partnerships for U.S. Federal income tax purposes. The 2023 edition of the form and instructions are attached in Exhibit A and the IRS website for this form is listed below.[73] Please note that it is possible for a foreign entity to "dually domesticate" in Delaware and to be considered to be a U.S. company that can make an S selection for U.S. Federal income tax purposes, notwithstanding that the entity may also be formed in another jurisdiction.[74]

Form 3520

Tax Form 3520 is to be used to report transactions with a foreign trust, ownership of a foreign trust under the IRC sections 671 through 679, and large gifts or bequests from certain foreign persons.[75]

Form 3520 A

Tax Form 3520A is filed annually by a foreign trust with at least one U.S. owner. The form provides information about the trust, U.S. beneficiaries, and any U.S. person who is treated as an owner of any portion of the foreign trust.[76]

FBAR

Through the IRS and the Bank Secrecy Act, foreign financial accounts must be reported annually to the Treasury Department. U.S. persons (which includes: citizens, residents, corporations, partnerships, limited liability

[73] https://www.irs.gov/forms-pubs/about-form-8832
[74] http://publications.ruchelaw.com/news/2016-10/corpmat-domestication.pdf
[75] https://www.irs.gov/forms-pubs/about-form-8832
[76] *Id.*

companies, and trusts and estates) must file the FBAR to report financial interests in at least one financial account located outside of the US if the aggregate value of the account is over $10,000 at any time during the reported year.[77]

Others forms to consider

There are a few other forms to remember when creating an estate plan. Form 1040, Schedule B, Part III must be filed if you received a distribution from or were the grantor of or transferor to a foreign trust. Form 706 must be filed if you transfer money or property to a foreign trust. Form 8938 may be required depending on whether the value of foreign financial assets exceeds the reporting thresholds.[78]

c. Chapter Summary.

The worst thing to happen to a client's estate plan is to receive an audit and not have accurate, current, and consistent records with respect to their estate plan. Estate planning attorneys will either take it upon themselves to ensure accurate reporting, or work with another planner such as a CPA, to ensure their clients are compliant with IRS regarding proper reporting and payment of taxes.

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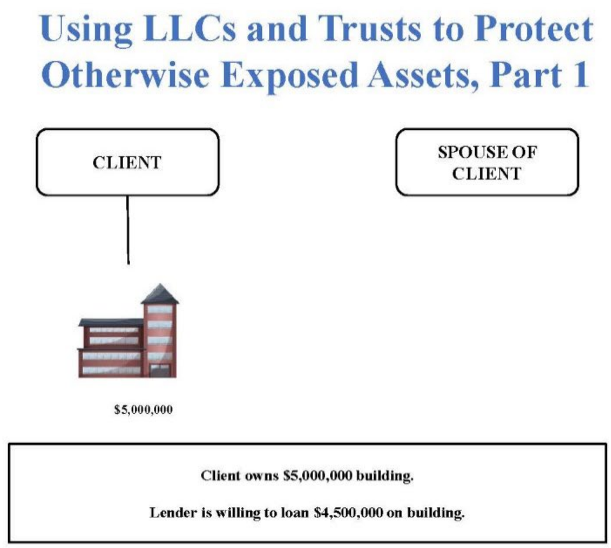
[77] https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar

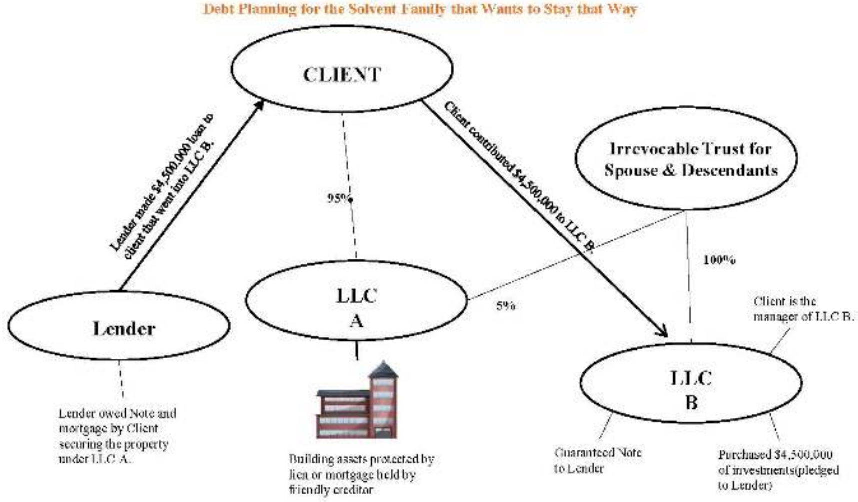
[78] https://www.irs.gov/businesses/international-businesses/foreign-trust-reporting-requirements-and-tax-consequences

PART VII: CHARTS



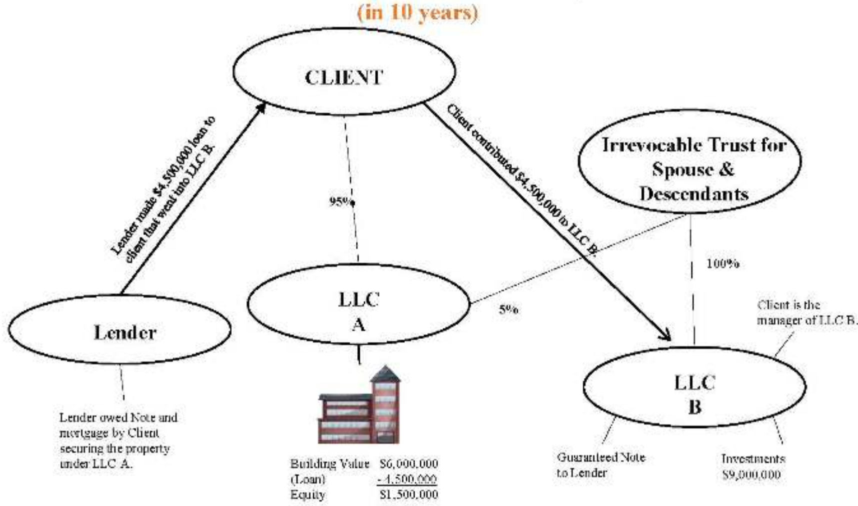
Using LLCs and Trusts to Protect Otherwise Exposed Assets, Part 2

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)



PART VIII: EXHIBITS

14. CHAPTER 15: SAMPLE FORMS AND RESOURCES FOR PRACTITIONERS

a. Exhibit A – Sample Forms.

iii. Practice/Administration Forms.

1. Estate Planning Questionnaire (New Client Intake Form), courtesy of Marty Shenkman.

__Note to Practitioner__: It is advisable when undertaking any asset protection planning to have a comprehensive questionnaire or organizer completed so that you have complete information about the client's overall goals and financial position. Goals may help support that there are family or tax reasons, not just asset protection reasons for certain transfers. Balance sheet information will be relevant to a determination that the client has retained adequate resources following any contemplated transfers. Listing of liabilities on the balance sheet may alert you to possible issues. An accurate and informative balance sheet will help advisers identify assets and activities that may cause risks (e.g., that perhaps should be restructured, transferred to an entity if held individually, divided into separate entities, etc.) Also, obtaining the broader information as contained in a general estate planning questionnaire, rather than merely collecting what is believed to be the information essential to take asset protection planning steps may help identify other issues to tend to.

Estate Planning Information Questionnaire

Your Name(s).	
Date.	

__Purpose__. This Questionnaire is to help you organize the information we need to assist you in estate planning. The objective is to help you endeavor to meet your planning goals. Therefore, if questions are unclear at any time or the templates provided do not fit your circumstances, call or email us, and we will help. Creating a single template for clients with a significant spectrum of circumstances is difficult, so do not hesitate to modify or add as you need. Blank templates are provided on the last page for you to communicate unique information that may not logically "fit" in other portions of the Questionnaire. Feel free to add additional pages or attach as many documents as necessary to provide complete information. Please complete the information requested as best as you can. Generally, the more information you provide, the more efficient and tailored the process can be. If any question or item is not relevant, it might be helpful for you to indicate why. Provide copies of any documents requested or that you feel will be helpful.

__Some tips on completing this Questionnaire__.

1. Please give each person's full legal name. If they have a nickname or other name they use, provide that parenthetically.
2. Indicate whether each person you list is a U.S. Citizen. If any are not, it could have significant tax and reporting consequences. We are not international tax counsel, and if you have any non-citizens named, specialized tax advice from your CPA or other counsel will be necessary. If you list anyone who is **__not__** a U.S. citizen, indicate their citizenship next to their name and be certain to discuss this with us.
3. Please return the revised, completed document to us via email as either a Word Document if you complete this electronically (which is preferable), or as a PDF. If you prefer, we can

set up secure ShareFile portal for you to use to upload the Questionnaire and other documents. If you prefer to mail physical documents to us, do not send any original signed documents, only send copies. Please contact us before sending any physical documents.

Contents

1. General and Contact Information

Topic/Item	You	Spouse/Partner
Name (Please list full legal name)		
Home Address		
Phone Number (home, if applicable, and cell)		
Email		
Business: Name/Description		
Business: Address		
Business: Telephone Number		
Additional Information		

2. Personal and Marital/Partnership Information

Topic/Item	You	Spouse/Partner
Date of Birth		
Place of Birth		
Social Security Number		
Citizenship		
Status (e.g., Married, partnership, living together, etc.)		
Date and Place of Marriage, or other arrangement, etc.		
Do you have a Prenuptial, Living Together, Post-nuptial, or other agreement? (if yes, provide us a copy)		
Prior Marriage - Prior Spouse(s) Name(s)		
Date(s) and place(s) of previous Marriage(s)		
Date(s) of termination/divorce		
Are there Separation, Divorce, or other agreement(s) in place? (if any, provide us with copies)		
Health issues or other points of importance		

Addiction or similar challenges		
Mental health challenges		
Lifestyle considerations that may affect planning		
Any additional concerns or comments		

Please endeavor to provide copies of all relevant documents listed above. If there are prior marriages or special circumstances, these matters should be addressed when formulating your plan. Feel free to provide letters or reports from a physician or other sources regarding any specific health or other circumstance. If helpful, elaborate any special circumstances in a letter that you can provide.

3. **Background Planning Information**

Please answer the following questions by indicating Yes or No. Explain all Yes answers. All responses will be held in strict confidence. This information is important to assist us in understanding your planning needs and assessing our involvement. The formation of irrevocable trusts, LLCs, or other entities, and the transfer of assets to them, must comply with legal and ethical requirements. Therefore, accurate answers to the following are necessary.

Question	Yes (Please Explain)	No
Have you ever consulted with an estate planner?		
Have you or any entity you controlled, ever filed for, or are you or an entity you control presently in, bankruptcy or been insolvent?		
Have you ever been, or are you presently, the subject of a lawsuit?		
Are there currently any outstanding claims against you?		
Have you ever been convicted of a crime?		

Are there any current conditions or medications that may impair your ability to understand and sign legal documents?		
If married, are you contemplating divorce? If in a partnership, are you contemplating dissolution?		
Have you filed personal income tax returns for each of the past 5 years?		
Have you ever had an IRS audit resulting in adjustments, or currently under audit?		
Do you own any foreign assets or accounts?		
If yes, have you complied with all reporting requirements?		
Are you a beneficiary of any trusts, or a future beneficiary under anyone's estate plan? Do you hold any powers of appointment?		

4. **Professional Adviser Information**

Indicate the names and contact information for your other advisers. It is essential that all your advisers be involved in the planning process. Please put your initials in the box to the right to authorize us to communicate with that adviser (understanding that it may waive attorney-client privilege). We have included several blank boxes for additional professionals that may be important to your planning. We cannot effectively represent you without open communication with advisers.

Professional's Role	Professional's Name/Company	Professional's Phone Number/Email	Professional's Physical Address	Type Initials Below to Authorize Communication
Accountant				
General Attorney				
Financial Planner				

Life Insurance Consultant				

5. **Emergency Contact Information**

Please provide the name of a trusted third party who lives outside of your home that can be contacted in an emergency or if we suspect financial exploitation. By providing us with this information you expressly authorize us to contact, or not, the persons below, in our sole discretion:

Name	Phone Number/Email	Physical Address

6. **Background Information on Parents**

Understanding your financial relationship with people important to you, including but not limited to family members, or other benefactors, is important. If parents, other family members, or benefactors, will coordinate their estate plans with yours, often everyone can benefit. If you have financial obligations, these might warrant addressing in your powers of attorney, wills, and/or trusts. If you anticipate a significant inheritance, it can affect your planning. Details on family members and other important people are necessary to interpret will and trust provisions in the event named heirs predecease you, disclaim, or others challenge a will. Powers of appointments should be addressed.

Parent/ Relationship	Your Father	Your Mother	Spouse/Partner's Father	Spouse/Partner's Mother
Name				

Date of Birth (if living)				
Physical Address				
Phone Number/Email				
Other Information				
Financial Status (i.e., do you or someone else financially support them?); Have they done Medicaid planning?				
How parent's estate plan affects you (provide documents if you have, e.g., trusts, 529 plans, etc.)				
Anticipated – Inheritance/Powers of Appointment, or Financial responsibility				
Are you named in any position to assist? (i.e., as an agent or executor)				
If not living, provide date of death				

Status of probate				
Additional information or comments				

7. **Background Information of Siblings**

Name and Relationship (i.e., indicate whose sibling the individual is)	Contact Information- Address, Telephone Number, and Email.	Date of Birth or Death	Family Status (please provide spouse's name if married and children's names if any)	Additional Comments and Points for your Planning

8. **Information About Your Children**

Please provide any details concerning special concerns or issues which might affect your planning. If any child is adopted, born through reproductive technologies, etc., please explain, and provide copies of any legal documents. If a child has special needs, addictions, lifestyle considerations that may affect planning, is wealthy, etc. please explain. If a child was naturalized as a United States citizen, please explain, and provide or email copies of any legal documents. Provide any additional documents or details which might be relevant.

Name and Relationship (i.e., indicate whose child)	Contact Information- Address, Telephone Number, and Email.	Date of Birth or Death	Marital Status (please provide spouse's name if married)	Any Special Needs or Considerations and Additional Comments

9. **Information About Your Grandchildren**

Please provide information. See instructions above under "children." Do you understand the implications of the generation skipping transfer ("GST") tax to your planning?

Name and Relationship (i.e., indicate whose child)	Contact Information- Address, Telephone Number, and Email.	Date of Birth or Death	Marital Status (please provide spouse's name if married)	Any Special Needs or Considerations and Additional Comments

10. Information About Other Possible Beneficiaries Including Final Takers and Charities

Please attach any details concerning special concerns or issues which might affect your planning for any additional, remainder, or contingent beneficiaries. If any charities are listed, attach a summary of your charitable goals. If you can, provide exact legal names, physical addresses, and tax identification numbers for charitable or other beneficiaries.

Name and Relationship (i.e.,	Contact Information- Address, Telephone	Date of Birth or Death (if individual) or	Marital Status (please provide	Any Special Considerations and Additional

friend, charity, why important to you, etc.)	Number, and Email.	Tax Identification Number (if charity)	spouse's name if married)	Comments (i.e., what will this individual or charity receive, and are they only to be named in one person's documents?)

11. Information on Additional Important Individuals

Try to list any individual or organization, not already listed above, that might be named to serve in a position in any of your estate planning documents.

Name and Relationship (i.e., friend, charity, why important to you, etc.)	Contact Information- Address, Telephone Number, and Email.	Citizenship (please confirm if U.S. Citizen)	Indicate Status (i.e., how will they be named in your documents?) Beneficiary, Remainder Beneficiary, Executor, Trustee Excluded Person, Other	Any Special Considerations and Additional Comments

12. Balance Sheet and Net Worth Considerations.

a. **Importance of the Snapshot Balance Sheet.**

i. The pages that follow will help you organize a Snap-Shot Balance Sheet. This provides a "snap-shot," or overview, of your current financial picture. This is vital to identify planning opportunities, or to update an older estate plan. The summary balance sheet serves a different purpose than a detailed financial report, which is typically used in the financial planning process (although this level of detail may be helpful for us to have as well). Detailed insurance schedules should be prepared to provide your insurance professional with the information necessary to evaluate your coverage and determine if changes are advisable. Detailed financial schedules should also be prepared to help your investment adviser review your investment allocation, asset location, account title, and other matters to determine if they are consistent with your goals. Finally, detailed information should be prepared for your retirement plans to help your accountant and pension consultant advise you as to the optimal beneficiary designations and withdrawal elections. Your preparing such detailed schedules will help you identify beneficiary designations (legal specification of who, or which trust, will inherit an asset), restrictions on transferring those assets (e.g., contract, divorce, or other arrangements), and potential liabilities (which might affect your transferring assets). Accurate information is important because proper planning requires full disclosure, as well as your follow-up on many of these matters.

ii. If you have foreign assets, you must consult a specialist about reporting requirements. We cannot assist with these issues.

iii. Tax basis information should be noted.

b. **Tips for Completing the Snapshot Balance Sheet.**

i. **Tailor it to Your Situation**. Tailor the Snap-Shot Balance Sheet to reflect your personal circumstances. Remember, a snapshot or overview is the goal. The objective is not to address every item of detail on one page. Too much detail can obscure more big picture issues. If the categories or columns do not work, modify them as you feel best. Call or email us for help if you have questions.

ii. **Issues**.

1. Any questions, assumptions, or important points should be noted in the margins of your Snap-Shot Balance Sheet (or in attachments).
2. Reference in the "Planning Comments" any additional information you attach.
3. Issues you might indicate include a range of personal issues such as: do you have adequate cash flow for retirement years, will you outlive your resources, can you afford to make the gifts you are considering, can you afford to make larger gifts (to reduce your estate, to family, charity or others), do you have adequate liability and property insurance for the assets listed, should assets with low basis be retained or brought into your estate or someone else's, and so forth, is essential to a comprehensive plan.

iii. **Non-Probate, Pension and Retirement Assets**. Identify pension, retirement assets, insurance, brokerage accounts, and other assets which pass outside of your estate (not pursuant to the terms of your will). Documentation for these assets may also include trust documents, beneficiary designations, or other documentation, which should be reviewed to determine how these assets will be transferred on your death. Provide copies of any such documents. Review pension and retirement plan beneficiary designations and withdrawal plans with your accountant and financial planner. If you have made gifts to irrevocable grantor trusts, it is important to monitor the assets in those trusts. If there are assets that have significantly appreciated, you should consider options to bring those assets back into your estate (by purchase or swap) so that the appreciated assets may qualify for a step up in tax basis on your death.

iv. **Real Estate**. For real estate assets, you may wish to note in the margin if they are located outside the state where you reside (ancillary probate) and ownership structure (by you, LLC, partnership, tenants in common, etc.) Provide a copy of each deed, operating agreement (or other governing document), and any other relevant documents. Ownership and proper use of entities is essential to tax minimization, asset protection, succession planning, and more. Basis information is vital. We will hold these documents in our file for informational purposes only unless you authorize further work in writing. You will have to discuss negative capital accounts, risks of gain realization, and other income tax issues with your CPA.

v. **Community Property**. If you ever lived in a community property state, or have community property assets, add information on community property. At minimum, identify (with an asterisk) any property which is, or could be, community property and the state under which that characterization may have occurred. A full basis step-up on the first death may be possible. Special rules may apply. Special counsel will be necessary.

vi. **Miscellaneous Points**. Note in the "Planning Comments" column any special or important considerations. These may include beneficiary designations (e.g., for insurance, IRA, other retirement assets, annuity, brokerage account, etc.); liabilities or contingencies (e.g., a tenant filed a suit because of an injury at your vacation home); location of an asset in another state or country; the name of a co-owner of an asset if it is not your spouse; the face value of insurance; etc. Disclose any powers of appointment.

c. **Plan and Update.**

i. **Update Regularly**. Accurate and current financial information is critical to estate, financial, asset protection, insurance, and other planning. At least once a year, and following any significant event, you should meet with all your advisers and analyze your assets, liabilities, and other key data, to be sure your estate plan will accomplish your objectives, and to take advantage of tax, asset protection, and other planning opportunities. Participation in an **<u>annual meeting is essential</u>** to review updated data, changes in law, new planning techniques and assess the impact on your planning. It is also essential to address the various loose ends that are inevitable after any documents or planning is implemented. That can be done by web meeting to make it efficient and less costly.

ii. **Consolidate**. If you have many accounts, evaluate consolidating them to simplify planning, make your estate more manageable in the event of disability, and minimize probate fees. If you consolidate, consider transfer costs, triggering taxable income or capital gains on having to sell certain funds or assets.

iii. **Plan to Use Your Temporary Exemption**.

1. You may wish to take advantage of the federal estate tax exemption (the amount you can bequeath without a federal gift and GST tax) before it is reduced by half in 2026. It may be advantageous to fund trusts or other planning before the end of 2025. The possible benefit of removing assets from an estate may be more than offset by the loss of basis step-up (the increase in capital gains tax from forgoing a basis step-up may be greater than any state or federal estate tax savings).

2. Many state estate tax systems do not follow the federal system, so your estate may owe state tax at a much lower level (For example, New York uses the $5,000,000 inflation-adjusted amount). New Jersey and a few other states have state inheritance taxes, and Connecticut assesses a gift tax. In other states, you may be able to avoid state estate tax by making gifts.

iv. **Is Maximum Use of Your Exemption Consistent with Your Personal Goals**? The maximum federal amount you can bequeath may trigger a significant state estate tax, depending on which state you were domiciled in at death. While portability is an option, it generally does not apply to state estate tax, or GST tax.

v. **Title (Own) Assets Properly**. Ownership of assets has to be considered as it impacts funding of trusts, asset protection, and other important planning matters. Title to assets can affect whether or not the asset is reachable by a co-owner's claimants or divorce, whether probate is necessary, if the assets will be usable to fund a bypass trust under your will, and a host of other vital matters.

13. Snapshot Balance Sheet

Asset Category	**Owned by You**	**Owned by Spouse or Partner**	**Jointly Owned**	**Non-Probate** (pass out outside will, included in Estate)	**Irrevocable Trust** (indicate: Grantor or Non-Grantor) Outside Estate	**Additional Points to Consider**
Cash						
CDs						
Marketable Securities						
Mutual Funds						
House (Net Mortgage)						
Vacation Home						
Other Real Estate Investments						
Annuities						
401k/IRAs						
Pension						

Business Interests						
Life Insurance						
Possible Inheritances						
Possible Losses						
Liabilities						
Net Worth	$	$	$	$	$	

Sign below indicating the accuracy and completeness of the above balance sheet. Your exposure to federal and/or state estate tax, the appropriateness of gift or asset protection strategies, the planning steps that may be recommended or taken, and other aspects of planning, will be based on this information. To achieve your goals, you must follow up on recommendations made and advise of changes.

______________________ ________ ____________________________ ______

Signature **Date** **Partner's/Spouse's Signature** **Date**

14. Documents to Send Us Prior To Our Initial Meeting.

Please endeavor to provide electronic copies of all existing estate and related planning documents before your initial web meeting to your meeting. The following is a list of some, but not all, of the documents that may be important to your planning. Some of these documents may not be applicable to you, and there may be other documents than these that should be considered regarding your planning.

a. Powers of Attorney.
b. Health care documents: Living Wills, Health Care Proxies, HIPAA Releases, POLST, etc.
c. Wills.
d. Revocable Trusts.
e. Letters of Instruction.
f. Family data, financial, and other background information not listed in the pages above.
g. Insurance policies: life, long-term, disability, and excess liability. Note that we do not review policies or advise on any coverage.
h. Irrevocable trusts (insurance trusts, child/children's trusts, GST/grandchildren trusts, defective grantor trusts, and other trusts).
i. Entity records and documents for any corporations, partnerships, LLCs, or other entities or arrangements. Partnership, operating, shareholder, and buy-out agreements, or other important governing documents for any entity.
j. Beneficiary designation forms.
k. Documents explaining any possible lawsuit, claim, or other debt.
l. Brokerage statements. A recent statement for every significant financial account and every account for any trust.
m. Prenuptial, Post-Nuptial, Divorce, and similar agreements.
n. Deeds.

o. Prior gift and estate tax returns. It is critical that we have a copy of any gift tax or estate tax return that reported the creation of any irrevocable trust, that confirms your exemption (including any portable exemption from a deceased spouse).
p. Any other relevant documents

15. **Your Signatures.**

Sign below indicating the accuracy and completeness of this Questionnaire, and that you have read and understood any planning or other comments noted by your advisers. Your advisors' work will be based on this information. You must inform all of your advisers of any changes that may be important to your planning. You must be certain to follow up on all items your advisers have indicated to you that you must address.

____________________________	____________________________
Signature	Signature
Name: _____________________	Name: _____________________
Date: ______________________	Date: ______________________

16. **Additional Comments, Questions, Etc.**

List any additional information, requests, questions, etc. in the boxes below.

2. Kovel Letter.

A sample Kovel letter follows:

[Date]

RE: Smith Family Matter

Dear Allison Accountant:

This will confirm the arrangement whereby your accounting firm will work for our law firm in conjunction with our representation of the Smith family.

In connection with the retention of your firm to render tax services to Law Firm, you have represented that your CPA firm is knowledgeable about federal, state, and local income tax issues to work under our direction and report directly to us in order to assist us in providing legal advice to the client. This work contemplates services of character and quality, which will be a necessary adjunct to our legal services as attorneys in providing legal advice to the above client.

You will hold all work papers, records, or other documents that you prepare or obtain pursuant to this arrangement solely for our convenience and subject to our unqualified right to instruct you with respect to possession and control. Any work papers prepared by you, shall be expressly under our direction, belong to Law Firm.

As part of the agreement to provide consulting services in this matter, you will immediately notify us of the happening of any one of the following events:

The exhibition or surrender of any documents or records covered by this arrangement, in a manner not expressly authorized.

A request by anyone to examine, inspect, or copy such documents or records covered by this arrangement.

Any attempt to serve, or the actual service of, any court order, subpoena, or summons upon you which requires the production of any documents or records covered by this arrangement.

We will immediately return all documents, records, and work papers covered by this arrangement to you at your request.

You will provide us with our monthly bills, and we will pay them from the funds in our attorney trust account for the Smith Family, so long as there are sufficient funds on deposit to cover your fees and disbursements.   You may also be paid directly by the Smith Family, but will not hold our law firm responsible if the family does not pay you or give us the money to pay you.

Please confirm your acceptance of the foregoing terms and conditions by signing the attached copies of this letter and returning it to us.

Sincerely,
Law Firm
By: ______________________________
Adam Attorney, Esq., Partner

Accepted and agreed to:
CPA Firm Name

By: ____________________________
Cindy, CPA, Partner

[Attach balance sheet for client to sign]

3. Solvency Affidavit, courteously from Marty Shenkman.

*DATE

<u>Via First-Class Mail and Electronic Mail</u>

*CLIENT NAME

*CLIENT ADDRESS

Re: <u>Affidavits of Solvency</u>

Dear [CLIENT NAME]:

Enclosed is an Affidavit of Solvency prepared for you. The Affidavit has been prepared regarding the upcoming transfer of property into the [TRUST NAME].

Please carefully read the entirety of the Affidavit and be certain that you understand each provision and that they are accurate, complete, and non-misleading. If there are any concerns about any of these points, please do not sign the Affidavit and instead contact us to discuss how the Affidavit may have to be modified so that you can sign it.

Please sign the Affidavit where indicated in the presence of a Notary Public, and provide me with copies of each, either in hard copy or PDF via email, whatever is most convenient for you.

If you have any questions, please call.

Sincerely,

[FIRM NAME]

By: *<u>/s/ Partner-Name</u>*_____

Partner-Name, Esq.

Enclosure

Affidavit of Solvency

of CLIENT NAME

State of STATE)
) ss.:
County of COUNTY)

The undersigned, [CLIENT NAME], who being first duly sworn upon oath, deposes and states as follows:

1. To the best of my knowledge and belief, the information provided as part of this Affidavit, and in conjunction with the planning and funding of the [TRUST NAME] ("Trust") for which I am the Settlor, and all attachments to this Affidavit and the Trust, are true, complete and not misleading.

2. I have read and understood the Trust document.

3. As the Settlor of the Trust, I contemplate making transfers of non-marital property thereto, [consider adding if there is community property] not property owned by my spouse, owned jointly by my spouse, or considered to be community property, in addition to my initial nominal contribution thereto. This includes the property listed on Schedule A of the Trust, various life insurance policies and [Do not include for GRATS] future cash contributions.

4. I have full right, title, and authority to transfer the property noted above to the Trust. I am not aware of any contractual or other adverse consequences to, or limitations on, the transfer of such assets, including but not limited to the possibility of accelerating or mortgage or other debt.

5. I understand that under the Corporate Transparency Act, there may be reporting requirements or implications to the above transfers that I must address and that [FIRM NAME] shall not be responsible for any such filings.

6. There are no liens or pledges against the above property that would affect my right to transfer it to the Trust.

7. No particular events and/or transactions have occurred prior to the date of this Affidavit, which I expect are likely to develop into significant challenges, controversies, or problems with any creditor.

8. There are no pending or threatened claims or proceedings that I reasonably anticipate may result in a material judgment against me, and I am not a presently a named defendant in any lawsuit, or involved in any administrative proceedings as of this date, or a judgment debtor.

9. Following the transfers of the above property to the Trust, I will remain solvent and able to pay my reasonably anticipated debts (including any claims or lawsuits against me) as they become due, with due consideration to be given to the extent to which I have otherwise provided for the payment of any such debts.

10. Following the transfers of the above property to the Trust, I will remain solvent and able to pay my reasonably anticipated living expenses as they become due, with due consideration to be given to the extent to which I have otherwise provided for the payment of any such expenses.

11. I am not engaged in, or about to become engaged in, a business or transaction for which my remaining assets will be unreasonable, insufficient, or inadequate.

12. I do not intend to incur, or reasonably believe that I will incur, debts beyond my ability to pay them as they become due.

13. [Confirm amount of transfer] This transfer represents less than one-third (1/3) [OTHER PERCENTAGE] of my net worth. [OR If transfer is greater than 1/3rd of net worth] I understand the risks of transferring a significant portion of my net worth to the Trust, and represent that I will remain solvent after the transfers are completed. **<u>Comment</u>**: Many transfers to use exemption are much more than this and this needs to be rewritten if that is the case and consideration should be given to what additional due diligence or precautionary steps should be taken. For example, it may be even more important as the percentage of wealth transferred increases that an insurance consultant review all types of insurance coverage and that financial modeling be done to help address both the viability of the plan and that the client/transferor is comfortable making such a transfer and that they understand the implications of such a transfer. Consider that the viability of the plan and the client/transferor's comfort level may require different models with different inputs.

14. I do not have the actual intent to hinder, delay, or defraud any present or expected future creditor of mine or of any entity in which I own any interests.

15. I do not contemplate filing for relief under the provisions of the U.S. Bankruptcy Code, nor am I involved in any situation that I reasonably anticipate would cause me to file for relief under any Chapter of the U.S. Bankruptcy Code in the future, nor do I own interests in any entities which have or are expected to file for relief or to be required to file under any Chapter of the U.S. Bankruptcy Code.

16. To the best of my knowledge, neither I nor any private entity that I have an ownership interest in, is or do I reasonably expect will be under investigation.

17. I am not, nor do I reasonably expect to be, under investigation by any Federal or State agency, or in violation of any statutes administered by, or empowering the Internal Revenue Service, the Federal Trade Commission, the Securities and Exchange Commission, the United States Postal Service, the Drug Enforcement Agency, the Federal Bureau of Investigation, or any other governmental agency or regulatory body.

18. I have read and understand the description of the Money Laundering Control Act attached hereto and confirm and represent that none of the property which I may transfer was derived from any of the activities specified in such Act and that none of the items of "financial misconduct" are applicable to me [Modify or delete if not private equity] or anyone else involved directly or indirectly with the intended transfer(s).

19. I am not in default whatsoever on any child support payments, and have no child support obligations.

20. The property being used to fund the Trust has been obtained by me legally, and any and all appropriate gift, estate, income of other tax reporting the receipt of those funds have either been made or are in the process of being made.

21. I have filed all personal income tax returns due any local, state, or federal tax authorities or have a valid extension for same.

22. If married, I am not contemplating divorce or expecting at any time to become divorced.

23. I have no interests in any foreign banks or other accounts or assets located outside the United States that have not been reported as required under applicable law as of the date of execution of this Affidavit and intend to continue to fully report any such accounts or assets to the full extent required by law.

____

[CLIENT NAME]

Signed, sworn to, and affirmed under penalties of perjury on this

_____ day of MONTH, YEAR.

Notary Public or Other Official

The Money Laundering Control Act

The Money Laundering Control Act (the "Act") makes it criminal for anyone to conduct or attempt to conduct certain financial activities that involve the proceeds of unlawful activities. As the transfer of assets into a limited partnership, trust, or other entity may constitute a financial activity within the scope of the Act, it is necessary that you swear under oath that none of the assets intended to be transferred to such entities were derived from any of the criminal activities specified in the Act.

The specified unlawful activities under the Act consist primarily of drug trafficking offences, financial misconduct, and environmental crimes. Drug-trafficking offences include the manufacture, importation, sale, or distribution of controlled substances; the commission of acts constituting a continuing criminal enterprise; and transportation of drug paraphernalia.

Covered financial misconduct includes the concealment of assets from a receiver, custodian, trustee, marshal, or other officer of the court, from creditors in a bankruptcy proceeding, or from the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or a similar agency or person; the making of a fraudulent conveyance in contemplation of a bankruptcy proceeding or with the intent to defeat the bankruptcy law; the giving of false oaths or claims in relation to a bankruptcy proceeding; bribery; the giving of commissions or gifts for the procurement of loans; theft embezzlement, or misapplication of bank funds or funds of other ending, credit, or insurance institutions; the making of fraudulent bank or credit institution entries or loan or credit applications; and mail, wire, or bank fraud or bank or postal robbery or theft.

Environmental crimes include violations of the Federal Water Pollution Control Act, the Ocean Dumping Act, the Safe Drinking Water Act, the Resources Conservation and Recovery Act, and similar federal statutes.

Other specified crimes include counterfeiting, espionage, kidnapping or hostage-taking, the copyright infringement, entry of goods by means of false statements, smuggling goods into the United States, removing goods from the custody of Customs, illegally exporting arms, and trading with United States enemies.

Client Letter to Accompany Irrevocable Trusts, courteously from Marty Shenkman.

Lawyer Letterhead

[*MONTH *DAY, *YEAR]

Via Email via ShareFile

[*CLIENT NAME]

[*ADDRESS]

Re: Draft Irrevocable Trusts.

Dear [*CLIENT NAME]:

Enclosed are drafts of the spousal lifetime access trusts ("SLATs") for each of you. A document summary is also enclosed, but be certain to defer to the actual provisions of the trust.

We have enclosed a memorandum discussing these draft documents. [General language for PDF only] We have sent these drafts to you via ShareFile email. If you would like us to send you hard copies via regular mail, please let us know and we would be happy to send them.

We are sending this communication only by email as we are working remotely and cannot readily print to send hard copies by regular mail. Should this be an inconvenience, please let us know, and we will try to send a printed copy to you by regular mail or Federal Express.

During this difficult period, we remain reachable by email or mail. My cell phone is listed above. We can arrange web meetings at your convenience. That provides a great way for meeting without the risks of closer contact. If you are not familiar with or comfortable with a web meeting, we'll talk you through it. Let us know how we can help.

Please consider the disclaimers and risk factors outlined in the "Risk Factors" memorandum attached OR in our prior communications. Should you have any questions about the risks noted in that memorandum or any other communications, or other concerns, please email or call us.

Sincerely,

Firm Name

By: /s/ [*Partner Name]*

[PARTNER NAME], Esq.

MMS/tt

Encl. – two SLATs, memorandum

CLIENT NAME

Draft Estate Planning Documents

Memorandum

Disclaimer Statements and Risks

Limitation to Client: This Planning Memorandum is solely for the benefit of the client named above and is not to be relied upon by anyone else without the written consent of Firm Name. We assume no responsibility for income tax, gift tax or estate tax, or any other consequences, to any other persons. Such persons should consult and rely upon their own counsel, accountant, tax advisor, or other advisors. Except for the information expressly stated herein (and **no statements herein are to be construed as legal opinions**), no other suggestions, information, or analysis is implied, and no other suggestions, information, or analysis should be inferred. Any tax consulting, advice, or correspondence received as part of this representation should not be construed or interpreted to be a "Tax Opinion," or any type of legal opinion, regarding this matter. A "Tax Opinion" for these purposes is written tax advice covered under Circular 230 about the tax treatment and consequences of a particular transaction, or a tax position that is going to be taken on a tax return. Any strategies suggested are intended solely for the use of the client named above, and cannot be relied upon by others. If you want a formal legal opinion on which to rely, you have to separately engage us to render such an opinion if it is feasible. Bear in mind that significant additional cost will be incurred regardless of whether or not a favorable opinion can be reached if you request one. If you are not clear on the distinction and import of the discussion in the memorandum following and a formal legal opinion, please call to discuss this. The following memorandum presents discussions of options and certain issues, **not** conclusions of law. The following memorandum outlining options may weigh various considerations and/or options, often when there is no single correct answer and the outcome is not fully predictable to any degree of certainty.

Matters in Purview of other Advisers: Although we may address certain income tax consequences, those matters are within the purview of your CPA and should be addressed as such. Although we may address certain insurance matters or investment matters, those matters are within the purview of your insurance and/or investment adviser, and should be addressed as such. Although we may address certain real estate or corporate (entity) matters, those matters are within the purview of your general counsel (or your specific real estate or corporate counsel) and should be addressed as such. Although we discuss cash flow and grantor trust and related considerations, we do not prepare cash or other financial forecasts, and you must rely on other advisers to do so (and you should do so before and periodically after creating any grantor trusts.

Information Will Not Suffice to Avoid Tax Penalties or Interest Charges: The information in this memorandum, in any attachment, or cover letter (including previous and subsequent correspondence during this engagement) are not intended or written to be used, and it cannot be used to: i) avoiding any penalties imposed by the IRS or any state tax authority; ii) to promote, market or recommend to any other party any tax-related matter such as an investment, product, service, advice or position.

Scope Limitations: The scope of this Planning Memorandum is expressly limited to the strategies or matters discussed herein. No other issues are considered and Firm Name assumes no responsibility beyond the issues to which this Planning Memorandum is devoted. Additionally, no analysis is provided on any of the following issues: (1) any impact of future legislation or other changes in the law, whether retroactive in nature or not; (2) any issues specifically excluded; (3) non-US taxes, or taxes in jurisdictions not specifically mentioned; and (4) any taxes not specifically mentioned; (4) life insurance or other insurance selection; (5) recommendations of investment products, securities or strategies; (6) Medicaid, elder law, supplemental needs or special needs planning; (7) qualified plan issues; (8) annuities; (9) valuation reports or issues; (10) any other matter excluded in the Billing Arrangement documents or other communications.

Law Changes: The suggestions and discussions in this Planning Memorandum are based upon the applicable federal, state and local tax and other laws as of the date of this Planning Memorandum. Such authority may change in the future, and such change may be applied retroactively. A change in state law may impact income, estate, or other tax consequences. Firm Name assumes no responsibility to update this memorandum, or notify you in any manner, if the applicable law changes. Federal and state taxing authorities, regulatory agencies, the IRS, and the courts are not bound by the analysis herein and may take very different views or interpretations of the law, the facts, or both. The analysis contained herein supersedes all prior oral and written discussions, if any, pertaining to the issues involved. But it may be modified by subsequent communications. We may have suggested a number of strategies the IRS or state tax authorities, other governmental agencies, regulatory bodies, or courts may challenge. While we have discussed a number of associated risks with you, possible challenges could be asserted which were or were not discussed or even contemplated. We are not responsible or liable, to any extent, for any gift tax, income tax or estate deficiencies or assessments, interest, or penalties that may arise, or the results of any court holding including the piercing or disregarding of entities, trusts or transactions. There may now be proposed Federal, state tax or other legislation which, if enacted, could modify or eliminate the benefits of many strategies if not grandfathered. The IRS, state tax authorities, plaintiff's counsel, and others have, and may continue to, attack various strategies and techniques that may be suggested in this Planning Memorandum.

Your Responsibilities: We have relied upon your assertion that the information provided, facts, and assumptions provided are true, correct, and complete. However, we have not independently audited or otherwise verified any of the information, facts, or assumptions, though we may have asked for clarification, done internet or other searches, or consulted with your other advisers. A misstatement or omission of any fact or a change or amendment in any of the assumptions we have relied upon may require a modification of all or a part of the discussions or suggestions contained in the Planning Memorandum. In addition, our suggestions and discussions are based on the facts and assumptions as asserted to us by you and are at best only current as of the date of this Planning Memorandum. We have no responsibility to update this Planning Memorandum, or otherwise notify you, for events, circumstances, or changes in any of the facts or assumptions occurring after the date of this Planning Memorandum or the date of any communication to you. It is the responsibility of the client to engage Firm Name or another adviser to revisit these matters from time to time especially if there is a change in: (i) your planning, (ii) the assumptions upon which these matters were based, (iii) your circumstances which impacts the discussions or suggestions contained in this Planning Memorandum; (vi) or, there is a notification via our general communications, or general media coverage that suggests a change in the law, planning approaches or perspectives that might affect you, your planning or the discussions or suggestions in this Planning Memorandum. It is your responsibility to consider all communications we disseminate as well as general media coverage of events and contact us should any perhaps apply to you, your planning, or this Planning Memorandum. You must understand the letters, memorandum, emails, general articles, footers on bills, and other communications we send to you. If you do not understand the meaning of any particular communication, or the implications of that communication to you, you must notify us and explain what is unclear to you so that we may explain it until it is understood. You should not sign any document or proceed with any step of any plan if you do not understand it. You must assure that your appraiser has complete, accurate, and current information about all material facts affecting any appraisal being completed.

Risks; No Guarantees: You understand and acknowledge that the results of any plan are never guaranteed. Numerous aspects of many, if not most, estate and related plans are not only uncertain, but subject to a wide spectrum of different views by other advisers, the courts, the IRS, and other authorities. Most strategies have negative consequences (e.g. save estate tax, lose basis step-up). Many common strategies, techniques, and transactions are subject to tax, legal, financial, and other risks and uncertainties. While we endeavor to identify some of the risks of a plan, all risks and issues with each component of a plan are not possible to identify or communicate. Creating a collaborative team may help identify more issues with your plan. Further, the fact that we communicate verbally or in writing certain risks should never be interpreted as an indication that any such listing or communication is a complete listing of every risk involved. The risks of any transaction can be further compounded by improper administration of the plan, failure to meet annually to review and update the plan, or changes in family dynamics, the tax and/or other laws may reduce (or eliminate) any projected benefits. Such risks may even result in more costly results than had no planning been pursued.

Audit and other Risks: Any company, family office, individual, estate, or transaction may be subjected to audit, which creates a risk of undesired or unintended consequences. Possible challenges may emanate from risks we communicated to you, while others may not have been discussed. Challenges by the government as part of the audit process might cause inclusion of assets previously transferred out of your estate in your estate. After audit, assets that had been transferred out of the estate as part of recommended strategies may be adjusted to their date of death value, which could result in tax-related liabilities such as those attendant to capital gains, depreciation recapture, and/or a negative capital account. You agree that we shall not be liable for any assessments of tax, interest, or penalties resulting from our recommendation or your decision to implement any strategy, to the extent permitted by applicable law.

Options; Your Decision: Although we aid you in the decision-making process, suggest alternative recommendations verbally or in writing to help you achieve your objectives, and assist you in determining how well each alternative meets your estate planning objectives, the responsibility for estate planning decisions is solely yours. These services are not designed, and should not be relied upon, as a substitute for your own judgment, nor are they meant to mitigate the necessity of ongoing review. These services are designed to supplement your own planning and analysis and aid you in achieving your objectives.

1. **General Caveats and Considerations**:
    a. In furtherance of our estate planning discussions (during which various options were discussed in an effort to address your estate planning goals), enclosed is a draft irrevocable trust. Please review it carefully so that you can confirm that it accurately reflects your estate planning desires.

    b. Please note that the trust has been drafted to take advantage of what is known as "grantor trust status" for income tax purposes during your lifetime. Once you transfer an asset to the trust, you will no longer own it, even though the income tax consequences attendant to that asset (and the sale thereof during your lifetime) will remain your personal responsibility during your lifetime and will need to be reported on your individual income tax return. Under the terms of the trust, you will lose control of the asset and when it is sold. While the trustee has the discretion to reimburse you for such income tax consequences, the trustee is not obligated to do so. Under current tax laws, the fact that you will be taxed for the income tax consequences attendant to the trust during your lifetime can help to reduce the estate taxable value of your estate without incurring additional gift or estate tax consequences. This is commonly referred to as the "tax burn." While this can be an effective estate planning consideration, the "tax burn" may, at some point, become a burden that is difficult for you to bear. Therefore, it is important that you discuss the potential income tax consequences with your accountant and request that your accountant and financial planner prepare a projection for you of the potential "tax burn" that may result from the grantor trust status afforded to the trust before you decide to execute and fund the trust. While it may be possible for grantor trust status to be turned off, this will require the elimination of various rights afforded to you (including, but not limited to the ability to swap assets of equal value). More importantly, you should not attempt to do so without obtaining tax advice, as eliminating grantor trust status during your lifetime may itself result in income tax consequences to you. (Option if DAPT or SLAT: If you or your spouse remain beneficiaries under the trust during your lifetime (even should you divorce and your ex-spouse remains a beneficiary), grantor trust status may not be eliminated.

c. If the formalities of administration are followed, based upon current tax laws, appreciation in the value of assets held by the trust are presently contemplated to avoid estate taxation upon your death. As a result, those assets will not be afforded a step-up in basis at the time of your death. The ability to swap assets of equal value may permit you to swap a low-basis asset with an asset having a higher basis in an effort to mitigate the income tax consequences that might be associated with a loss of the ability to obtain a step-up in basis for assets held by the trust at the time of your death. To avail yourself of such opportunities, it is important that you consult with your financial and tax advisors on a regular basis and, in particular, should you be diagnosed with a terminal illness or anticipate that death is on the horizon. Properly exercising the swap power requires analysis and can take time, so plan accordingly.

2. **<u>Read All Documents</u>**: We have highlighted certain provisions of the memorandum and certain documents. While these provisions deserve your careful attention, they should not be interpreted as implying that other aspects of these documents do not require attention. The entirety of all documents and communications should be read and understood.

3. **<u>Review</u>**: Because the documents are lengthy, and in some instances, complicated, we recommend that you let us "talk" you through these drafts before you begin your review, as that will make it much easier for you. This can be done as a conference call, web meeting, or in-person meeting, whichever is most convenient for you. Let us know how we can help.

4.

4. **<u>Process</u>**: If you have any questions or comments on the drafts as you review them, call or email us. Let us know when you would like to schedule a meeting to review the documents and your comments. Once we have all your comments, we will revise the documents and we can send you final documents for signing. If you would like to review the revised drafts

let us know and we can send you those (as PDFs via email) before the signing. Please let us know what will work best for you.

5. **<u>Thoughts to consider while reviewing both of the drafts include</u>**:
   a. [If SPAT or other provisions included] You should note that while we have referred to the irrevocable trust as a spousal lifetime access trust as your spouse is a named beneficiary, there are several other provisions incorporated into the trust that might warrant a different title then "SLAT."
   b. Some provisions in the trusts have been highlighted. However, the entirety of both trusts should be reviewed. Please contact our office to arrange a time for a web or in-person review at your convenience.
   c. Forecasts should be used to support and determine the values given to each trust. You should address this with your CPA and/or wealth adviser. Assets should not be transferred to the trusts that will likely be needed to support your lifestyle Assets should not be transferred to the trusts that will likely be needed to support your lifestyle. Your CPA or wealth adviser should assist with this, we cannot.
   d. Non-grantor or complex trusts face a compressed tax rate structure with income taxed at the maximum marginal rate from a very low level of income. Steps may be feasible to reduce that potentially negative tax impact. First, if you have any non-grantor trust (remember even a grantor trust becomes non-grantor on your death) you should meet before the end of the year each year with your tax and investment advisers to determine what steps might be taken (e.g., a distribution from the trust to beneficiaries to shift income to the beneficiaries who may be in lower tax brackets). You might opt to include additional beneficiaries in your trust. This could include trusts formed under your will, revocable trusts, and irrevocable trusts in order to provide additional flexibility for asset protection and income tax planning. See, Blattmachr D., Shenkman, and Blattmachr, "How to Reduce the Income Tax Burden on Non-Grantor Trusts", http; /www.leimbergservices.com, December 27, 2021, which suggests options to include additional beneficiaries (spouses of beneficiaries, charitable remainder trusts of which a beneficiary is the non-charitable recipient and S Corporations of which beneficiaries are shareholders or QSSTs for which beneficiaries are shareholders). You should consider the possible benefits of these approaches, and weigh that against possible additional costs and complexity (both in creating the trust but perhaps more so in the administration of the trust). Also, adding additional beneficiaries might affect your dispositive goals. If you would like a copy of the above article, or to discuss this further, let us know.
   e. While you have not indicated to us that any of your beneficiaries currently receive government benefits or have special needs, we have included "Special Needs Trust" language in each trust document, so that if in the future if there is a special needs beneficiary, a mechanism exists as a framework for planning that would be required for that beneficiary. Whether these provisions will successfully preclude counting as a beneficiary's available resources for Medicaid or other public support is a matter of the state law in the beneficiary's domicile, which cannot be determined at this time. We have included a provision where the Trust Protector can revise the SNT language as needed in the future to conform with state law.

f. You should please confirm that everyone you have named (beneficiaries, fiduciaries, powerholders, etc.) in the draft trusts are US Citizens. If any are not, it could have significant tax and reporting consequences. We are not international tax counsel, and if you have any non-citizens named, specialized tax advice from your CPA or other counsel will be necessary.

g. IF NO INCOMPLETE GIFT TRUST There is a mechanism referred to as an "incomplete gift trust" and an apportionment provision we could have included in each trust to provide a measure of protection if there is ever a sale to either trust. Because the funding you are intending to make to each trust is more limited (i.e. it is not planned that you will need to sell assets to either trust) we opted not to include these provisions in either trust because they would add additional complexity to the document, but also because if you ever make a gift without our involvement, the gift may not be treated as you would anticipate. So, this is a measure of flexibility we opted not to incorporate into your plan. IF INCOMPLETE GIFT TRUST INCLUDED There is a mechanism referred to as an "incomplete gift trust" and an apportionment provision we have included in CLIENT's trust, which provides a mechanism to endeavor to deflect a gift tax valuation challenge on a sale to the trust. There are notes in the trust explaining this further. Note that if this provision is included in either trust, if you ever make a gift without our involvement, the gift may not be treated as you would anticipate as there is specific language that needs to be included in transfer documents depending on how you wish the gift to be treated. While it is intended that no assets pass to this trust if there is a gift after the date specified in the trust, without the specific language we referenced above, those gifted assets would pass to the Trust for Grantor and therefore, be included in CLIENT's estate. However, that inclusion may avoid a current gift tax cost, which is the objective. This should only be relevant if you sell assets to the trust beyond your current exemption amount, and that occurs after the date indicated in the trust instrument. Please confirm if you would like this measure of flexibility included in your planning. Also, understand that this will delay the completion of the trust.

h. We have provided that the trust protector shall act in a fiduciary capacity. The fiduciary capacity may limit the trust protector's ability to take certain actions. There are pros and cons to having the trust protector serve as a fiduciary or instead in a non-fiduciary capacity. We can discuss this further if you wish.

i. We discussed one or both SLATs owning interest in a vacation home. An LLC should be formed in the state where the SLAT is being established to own that property, and then authorized to do business in the state in which the home is located. If two SLATS While it may be simpler to have one SLAT own the entirety of the vacation home LLC, better asset protection may be achieved by having each SLAT own 50%. The IRS may argue that you have retained an interest in such a property that supports estate inclusion.

j. The power of appointment given to each child is limited to your descendants. Would you want to make this broader?

k. Please confirm that the persons listed as final takers is agreeable to you. You might opt to name charities or other family members if you wish.

l. Language for Non-Reciprocal provisions built into trusts. Revise accordingly. If creating one trust, but building in differences for possible later trust While we are currently only drafting a trust created by Client for the benefit of Spouse and your descendants at this time, we have structured this trust with several provisions in it that would allow you to have Spouse create a trust at a later time and build differences into each of the trusts to endeavor to deflect a reciprocal trust doctrine challenge.

m. **NOTE TO USER - If two trusts being created now, use the following paragraph:** As you are both creating trusts where the other is named as a beneficiary (i.e. Client is creating a trust with Spouse as beneficiary, and Spouse is creating a trust with Client as beneficiary) we have structured these trusts with several provisions in them that are differences between the trusts to endeavor to deflect a reciprocal trust doctrine challenge This doctrine can result in the IRS or a creditor "uncrossing" two spousal trusts if the provisions and planning are too similar. What constitutes sufficient differences to deflect a reciprocal trust challenge is not clear. Therefore, there can be no assurance that the differences in the trust instruments and plan will suffice for this purpose.

n. **NOTE TO USER – If only one trust is being created at this time, use the following paragraph:** If you are certain that Spouse will not create a trust, the inclusion of these powers can be revisited and broader powers provided under the current trust. However, if there is any likelihood of Spouse creating a trust it might be preferable to leave the structure of the current trust intact. Some, but not all, of the provisions incorporated into the trusts for the differences discussed above include:

    i. We have included a "5 and 5 Power" for Spouse.

    ii. We did not give Spouse a lifetime power of appointment for assets held in the trust created by Client.

    iii. After Client passes away, if Spouse survives him/her, a "Family Trust" will be created in which only Spouse will be the beneficiary of the trust. This means that while the children and grandchildren will be beneficiaries during Client's life, after Client passes away they will no longer be beneficiaries until Spouse's later death.

    iv. You should be aware that the efforts made to differentiate irrevocable trusts to reduce the risk of the application of the reciprocal trust doctrine in several instances have substantive economic and legal implications. These provisions reduce the access to a particular trust to less than it might otherwise be. These limitations, e.g. the use of a health, education, maintenance, and support ("HEMS") distribution standard may also limit the ability to decant a trust in the future. There may be other ramifications as well. If you wish to review these in more detail, you should do so. If you wish further input from us, please advise.

o. If income tax reimbursement provision included As the trusts you are creating are "grantor trusts", each of you will be responsible for the income taxes attributable to the trust you have established. This "grantor trust burn" may allow you to grow the assets within the trust, and therefore potentially out of your estate, at a faster pace while the assets in your personal names are exhausted at a faster pace due to paying the income tax costs for growth within the corresponding trust. We have included a mechanism in each trust in which the Grantor may, but does not have to be, reimbursed by the trustee for any income taxes they personally pay that are attributed to income the trust generates. Several points:

i. This is an optional provision. The reimbursement is not automatic, it is in the sole discretion of the trustee.
ii. However, before the provision is used for reimbursement, you should discuss with your entire planning team your intention to request a reimbursement. If a reimbursement is made in excess of the amount paid by the Grantor due to income taxes attributed to the trust, that would be considered a distribution from the trust to the Grantor, potentially causing the trust to be classified as a self-settled trust, which could potentially have adverse tax consequences.
iii. Before any reimbursement is made the Trustee should have your CPA make a calculation of the amount of tax you incurred and that analysis should be saved in the trust records. A calculation would need to be prepared to determine the exact amount of income tax paid due to income generated by the trust, so the reimbursement amount can be corroborated and an inadvertent distribution to the grantor avoided.
iv. Even if this is handled appropriately if the IRS or a creditor can discern a pattern of reimbursements that might be used to argue that you had an implied agreement with the trustee to reimburse you.
v. Having an independent trustee, and preferably an institution, in place if reimbursements are made in the future is preferable.

p. We can have added a provision to PARTNER's trust giving an independent non-fiduciary the power to add the descendants of your grandparents (which would include PARTNER) as a beneficiary. Several points:
    i. This structure is sometimes called a "hybrid domestic asset protection trust." The purpose would be that if the estate tax is repealed that person at a future date could add you as a beneficiary. That could eliminate the mortality risk associated with the technique.
    ii. Some commentators are confident that this technique, if used in a trust in a self-settled trust jurisdiction, like AK and NV, should work. Other commentators have voiced concern that this technique does not work. The law is not clear.
    iii. There is greater risk for this technique (as well as the SPAT provision in CLIENT's trust) if you become domiciled in a US state that does not recognize self-settled trusts, e.g. NY, NJ, CA, etc..
q. As you requested, we have included a "Special Power of Appointment" provision in the trust under the "Lifetime Trust" article. You should confirm that this provision (and the entire trust) are in conformity with your wishes. Several points to consider:
    i. This provision should provide flexibility in allowing assets in the trust to be appointed to individuals that are the descendants of the Grantor's grandparents (which would include GRANTOR) by an individual during GRANTOR's lifetime.

ii. Please let us know someone who you would be comfortable named in this position (they should not be related or subordinate to GRANTOR, and cannot serve in any other fiduciary position in the trust).

iii. Note that while the goal of this provision is to endeavor to allow access to the trust in the event of SPOUSE's premature death, there is no case law supporting the use of this technique at this time, and there are no guarantees it will be upheld. If NY New York expressly does not permit so-called self-settled asset protection trusts (i.e., a trust that the individual who creates it is also a beneficiary). Thus, before this power is exercised, the trust should be in one of the jurisdictions that permit such trusts (CT, DE, AK, NV, etc.). While it does not appear that the mere existence of this power or right could taint the trust, there can be no such assurance.

iv. We have included in the provision that it cannot be used until 10 years after the trust has been established. This has been based upon the bankruptcy code in an attempt to defray arguments claimants may have against the assets in the trust, but there is no law supporting how much, if at all, including this prohibition, will help protect your assets. If you are concerned about this time delay and would prefer not to use it (we suggest that you do use it), please let us know, and it can be deleted.

v. We have included in the language the requirement that the use of this power be approved by a second individual that is a non-adverse party (i.e. not a beneficiary of the trust). This can be used as a safeguard against the use of this power in ways that you did not intend to use. Please let us know the name of an individual you would feel comfortable naming here. This addition is optional and can be removed if you do not wish to include it.

r. The trusts have a provision prohibiting the trust protector from removing [NAME] as trustee. It could be advantageous to have [NAME] removed, e.g., if there is a lawsuit.

s. We could give a person also acting in a non-fiduciary capacity the right to grant the settlor of each trust a power to control enjoyment of trust assets so that the exercise of the power could force any or all assets back into your estate under Code Section 2038 should estate inclusion become advisable under whatever new tax regime the Trump administration might enact.

t. If disclaimer provision is included. We have included a disclaimer provision, which can be exercised by your BENEFICIARY, in an attempt to provide a way to "unravel" any gifts or transactions to the gift within 9 months of the effective date of that gift or transaction. There is no case law supporting the use of a disclaimer in this manner, but we have added this for the potential flexibility it can afford and in hopes that if used, it will provide an effective means to unwind transfers to the trust. But there can be no assurance that it will succeed. You should assure that you are comfortable granting this power. Further, some commentators have suggested that this technique applied with naming one person as the powerholder in a "pot" or "sprinkle" trust does not work. They have suggested that you need a modified trust where only BENEFICIARY would be the sole beneficiary during the period a disclaimer can be exercised. There is no certainty that their position is correct or that it would be safer than what has been applied. If Primary Beneficiary

Trust is being used. As you indicated you were comfortable with creating an initial trust for a one-year period where BENEFICIARY is the only beneficiary, we have modified the trust so that assets initially pass into a “Primary Beneficiary Trust” before they automatically pass into the “Lifetime Trust” once the assets have been held within the Primary Beneficiary Trust for one year.

u. The reciprocal trust doctrine should be addressed with different trustees and for some of the legal differences in each trust instrument noted above. Ideally, different assets should be transferred to each trust as well. The trusts should each be administered in accordance with their respective terms.

v. Comment: Include the following language re: divorced and revise based upon circumstances for the client. There are several consequences if you divorce in the future after completing this type of planning. The following discussion mentions some of them. You should both be cognizant of these and other consequences if you proceed with the planning:

   i. The gifting of assets to an irrevocable trust removes those assets from the marital estate so that if there is a later divorce neither spouse can have those assets divided in a divorce.
   ii. That will impact a property settlement for each of you. If the assets are in a SLAT that lists PARTNER (not a floating spouse, i.e., whoever CLIENT is married to) then PARTNER remains a beneficiary post-divorce.
   iii. Since CLIENT is counting on primarily benefiting indirectly from trust assets through PARTNER, if you were to get divorced CLIENT would lose that access. So that is a significant disadvantage to CLIENT.
   iv. PARTNER however, will only be a discretionary beneficiary and that is less access and control than if the assets were in the marital estate, and with which she would get whatever share a divorce would result in solely within her total control.
   v. Also, if there is a divorce while PARTNER remains a beneficiary and presumably will get distributions out of the SLAT, CLIENT will remain liable for all the income taxes on the trust income under current law. That is a significant detriment to CLIENT.
   vi. Now some of the above may be offset if there is a special power of appointment and assets of the trust can be appointed to CLIENT. How that offset would work would depend on a myriad of factors and is unclear. That power, again depending on how it is exercised, could undermine PARTNER’s interest in the trust, which would be a material disadvantage to her.
   vii. We could take further steps to address the risk of divorce by providing that the trust divides in the event of divorce with PARTNER remaining the beneficiary of ½ of the trust and CLIENT’s spouse, whoever that is from time to time, as the beneficiary of the second half of the divided trust.
   viii. That would not resolve CLIENT’s liability for the taxes on the portion that PARTNER would remain beneficiary of. That might require a post-nuptial agreement wherein PARTNER would agree to reimburse CLIENT for the income taxes on the half of the trust that she remains a beneficiary of.

ix. We could revise each trust to incorporate the division of each trust in the event of divorce, but if you wish for us to do so, that will take some time. However, as explained above, it will not address all aspects and issues that might arise in the event of a divorce

w. Comment: The following is a discussion to use and modify if a spouse is serving as a distributions trustee. After some discussion, you decided that you wanted CLIENT to serve as Trustee of PARTNER's trust.

   i. While it is preferable to have an independent and institutional trustee, since you plan to transfer modest assets to PARTNER's trust now and have an asset perhaps be life insurance on PARTNER's life to protect CLIENT in the event of premature death of PARTNER, this may not be that problematic. If in the future, the trust will be used in a more robust manner, you can change trustees at that time to an independent individual or preferably to an independent institutional trustee.

   ii. A SLAT discretionary distribution standard is preferred to what is called an ascertainable standard (also known as health education support and maintenance ("HEMS") as it is more flexible and less reachable by creditors, but if CLIENT is a trustee the ascertainable standard (loosely, standard of living) must be used. We can provide the broader standard for independent trustees.

   iii. Can CLIENT similarly be given discretion, limited by HEMS, to make distributions to PARTNER? Is there an estate inclusion (Code Sec. 2036) issue? There is a risk that the fact that a husband and wife are living together and share the benefits of the distributions create a significant estate inclusion issue, or implied agreement of sharing issue?

x. If entities are going to be transferred into SLAT, consider including parts of the following points and suggested language. This should be modified for each individual client and their specific transactions. Some planning considerations to address the estate inclusion challenges to taxpayers under the Powell and Moore case.

   i. In these and other cases the IRS successfully challenged partnerships/LLCs as included in the transferor's estate. While these cases were classic "bad fact" cases, the risks may apply to all transactions. There is no way to determine how the IRS or courts will differentiate different fact patterns.

   ii. We discussed several of the approaches that might be considered:

      1. Business judgement standards in governing documentation.
      2. Prohibiting you from having any control over distributions, liquidations, or changing the operating agreement provisions that address these matters. The challenge of this is that if you and others can change these provisions a restriction will not be respected.
      3. Creating separate voting interests and your gifting the voting interests that address the above three matters to an irrevocable trust you have no control over.
      4. We discussed problems third-party lenders may have with these issues.

iii. You could form a partnership or disregarded entities (e.g., an LLC where the non-member manager, a person other than you) so that you never could participate in liquidation/distribution provisions. There cannot be a gift because no one else would have any ownership in the partnership. Although the others who do hold the power could change the deal and deal you in, that proves too much--e.g., like saying if I give you something, you can allow me to control it. In fact, you could have one party be a trustee and provide that the trustee would be violating its fiduciary duty if it rearranged things so that you, as the donor/grantor, received a Section 2036(a)(2) power.

iv. In addition, you should try to corroborate non-estate tax reasons for the transactions (such as that you've thought about the goal of helping your children avoid state income tax but allowing them to manage the assets and that the best way to do that is to make them the investment partners/managers of the entity through partnerships). You may not be able to accomplish this by making them trustees as the law of many states may then make the income of the trust subject to state income taxation--and we cannot be sure they will not live there. In some states (NY, PA, CT, NJ, and other states), the trust would be a resident trust and be subject to state income tax there if there is a resident trustee (e.g., one of the children).

y. Review this language and determine which, if any, should be included as suggested language in the memo. Possible language to consider incorporating into entity operating agreements.

i. There are a number of different options to consider addressing the issues raised in several court cases, such as Powell and Moore. Many practitioners believe that the donor should divest himself of any right to control distributions, liquidations and the ability to change those provisions in the operating agreement that governs these provisions.

ii. The following was added to the Trust:

1. Notwithstanding anything else herein to the contrary, in no event shall any power or authority granted hereunder permit any Investment Trustee to vote, directly or indirectly, the voting interests in any manner that modify distribution rights, liquidation rights, or the provisions of any governing document governing such rights, if the existence of such a power would result in the inclusion for Federal estate tax purposes of such stock in the gross estate of such Investment Trustee, the Grantor, or a beneficiary of any trust hereunder.

iii. One approach that some suggest may be effective is to apply a business judgement rule to all of these decisions. Possible language that may support that is provided below. Another approach is to restructure the governing documentation creating a separate class of voting interests that controls the vote for liquidation and distribution and sell (not gift) those interests to a trust or person who is independent. There is no certainty with any of these approaches. If third-party members of entities Also, the facts in the cases giving rise to these issues seem different than the facts as we understand them. Namely, you have real underlying business operations for every entity and other partners and outside lenders, all of whom exert control.

1. The distribution provisions might be defined so that the Manager of each LLC will decide the amount that can be distributed based upon the business judgment standard to help mitigate the implications of Powell and Moore. The ability of the Members to unanimously agree to dissolve the Company should be removed in light of the U.S. Tax Court opinion in Powell v. Commissioner, 148 T.C. 18 (2017). Ideally, the donor should not serve as sole manager.
2. Distributable Cash. Distributable Cash includes only that cash held by the Company at the end of a fiscal year after reasonable reserves of cash have been set aside by the Manager, subject to the duties imposed by Section [insert article reference here], for working capital and other cash requirements, including current and reasonably projected expenses, current and reasonably projected investment opportunities and reasonably anticipated contingencies. For purposes of this subsection, any of Company Property derived from Member contributions, borrowed funds, and any cash generated upon the sale of any of the Company Property, including Company Property which is purchased with borrowed funds, and including the cash attributable to appreciation in value, shall be considered as necessary for investment purposes. If the Manager determines that the Distributable Cash to be distributed to the Members will be insufficient to enable the Members to pay income taxes attributable to their respective interests in the Company, the Manager may distribute an amount reasonably necessary (as determined by the Manager) to cover any federal, state and local taxes on the Members' allocable share of taxable Company profits.
3. Operating Distributions. From time to time during each fiscal year, the Company may distribute any part or all of the Distributable Cash proportionately to each of the Members based on their Percentage Interests; provided that there shall be no Distributable Cash for a fiscal year unless the Manager has affirmatively decided how much cash is Distributable Cash for that fiscal year and, in addition, has affirmatively decided that a portion of such Distributable Cash for that fiscal year shall be distributed and the Manager's determination as to all of those matters shall be binding on all of the other Members; and provided further that no more than sixty days after each Fiscal Year, the Company shall distribute all of the Distributable Cash (as determined by the Manager in accordance with Section [insert article reference here],) proportionately to each of the Members based on their Percentage Interests. No distributions under this Section shall have the effect of changing any of the Percentage Interests.

4. Duty of Care; Business Judgment Rule. In exercising the powers granted by this Agreement and in performing the duties required by this Agreement, the Manager has a duty to act in good faith with the reasonable belief that the Manager's actions are in the Company's commercially reasonable best interests; provided that an error in judgment by itself shall not constitute a violation of this duty. Consistent with this duty, the Manager may act without liability to the Company, the Members, or any assignee in reliance upon any written instrument which is reasonably believed by the Manager to be genuine and to have been signed or presented by the proper parties. Also consistent with this duty, the Manager may act or refrain from acting without liability to the Company, the Members, or any assignee in reliance upon any opinion of any consultant or adviser with respect to matters which the Manager reasonably believes to be within the consultant's or adviser's professional competence.

6. **<u>CLIENT's Trust thoughts to consider</u>**:
   a. Add or move any points that are specific to this particular trust into this section.
7. **<u>SPOUSE's Trust thoughts to consider</u>**:
   a. Add or move any points that are specific to this particular trust into this section.
8. **<u>Trust Positions</u>**. Comment: This section should not be included if it was already included in the initial memorandum sent.
   a. CLIENT's Trust.
      i. Note: Adjust for specific facts. This is the trust established by CLIENT for the benefit of SPOUSE and your descendants.
      ii. Investment Trustee.
         1. The Investment Trustee will have the ability to direct the General and Administrative Trustee (the institution) to make investment decisions on behalf of the trust. The trust will be worded so that any actions the Investment Trustee directs the institution will have to take.

      i. This power will be held in a fiduciary capacity. This means anyone serving in a non-fiduciary position in the trust (i.e. the Loan Director, SPAT, Hybrid DAPT positions discussed below) cannot also serve in this position. While some commentators suggest that it may be possible for a person to serve in a fiduciary capacity and to separately act in another role in a non-fiduciary capacity we believe that is a risk that is best avoided. This is the only position in each of the trusts that CLIENT and SPOUSE can serve in since an investment trustee is not a tax-sensitive power. That being said, the role must be filled properly and with due regard to arm's length steps and fiduciary responsibilities.
         2. You indicated that this would initially be _______________.
      iii. Insurance Trustee.

1. The Insurance Trustee has the authority to purchase life insurance on behalf of the trust as well as take any actions regarding that life insurance.
2. This power will be held in a fiduciary position. CLIENT and SPOUSE cannot serve in this position. Individuals serving in other trustee positions can also serve in this trustee position.
3. You indicated this would initially be ________________.

iv. Trust Protector.

1. The Trust Protector is a position in the trust that has the ability to remove and replace any trustee (including individuals) as well as other powers that provide flexibility to the trust, such as the ability to move situs and governing law of the trust. You should review the powers listed in the draft trust once it is received and we can modify any if you wish.
2. This power is specified to be held in a fiduciary capacity. Some commentators suggest that if state law permits (it does in AK) a trust protector to serve in a non-fiduciary capacity if the trust so indicates. We are concerned with that approach due given the powers granted to the position. While an individual serving in a trustee position can also act as Trust Protector, we do recommend if you have someone you can name solely to this position that you do so. This is because as one of the powers of the Trust Protector is to remove and replace a trustee, having them also serve as a trustee "short circuits" one of the protections in the trust as they would not remove themselves from a position.
3. This power should not be held by someone who is related or subordinate to CLIENT or SPOUSE.
4. You indicated you will discuss and let us know who you would like to appoint in this position.

v. Loan Director.

1. This individual will hold the power to loan the grantor of the trust (i.e. CLIENT for the trust he creates, SPOUSE for her trust) cash from the trust without adequate security (but it will require adequate interest).
2. This is a "non-fiduciary" power. This means anyone you name in the trust as a trustee or the Trust Protector cannot also serve in this position.
3. This power should not be held by someone who is related or subordinate to CLIENT or SPOUSE.
4. One option if you cannot determine someone to name in this position at this time is we can draft each trust so the Trust Protector can name an individual at a later point to serve in this position. This would allow you to "punt" the decision until the power is needed. We recommend if you can, that you name someone now.
5. You indicated you will discuss and let us know who you would like to appoint in this position.

vi. SPAT.

1. The special power of appointment trust ("SPAT") provision would provide a mechanism in the trust CLIENT establishes where an individual you name can appoint assets from the trust to a class of individuals (we can use the grandparents of the Grantor, which will include CLIENT and his/her family in the class) but will not allow them to be added as beneficiaries of the trust. There is no requirement to do this (as mentioned there is no law on point) but the belief of some commentators is that you should not name CLIENT directly in his/her trust but a broader class that includes descendants of CLIENT's grandparents (or perhaps maternal grandparents), etc. Others do not agree. For example, the power could be held by a committee and not just one person. You could require unanimous consent of the committee or that only one committee member need approve the payment. This is a way that might allow CLIENT to access the assets in the trust without becoming a beneficiary of the trust. As discussed above in more detail, there is no case law regarding the use of a power of appointment in this manner and no assurance that the use of this power will be upheld if challenged. A risk with this technique is the IRS or a claimant might argue that you had an implied agreement with the person or persons holding the power (a similar argument may be advanced in a hybrid DAPT as is being done for SPOUSE).
2. This is a "non-fiduciary" power. This means anyone you name in the trust as a trustee or the Trust Protector cannot also serve in this position. If you wished to name the same person in both the Loan Director power and as one of the two possible individuals for the SPAT power, than can be done.
3. This power should not be held by someone who is related or subordinate to CLIENT or SPOUSE.
4. There may be two roles you can consider for this mechanism.
    a. The individual (or committee) with the power to appoint assets.
    b. A second individual, who is not adverse, that needs to agree in writing with any appointment made by the first individual (or committee). This would be a check and balance on the power to appoint. This is optional.
5. One option if you cannot determine someone to name in this position at this time is we can draft each trust so the Trust Protector can name an individual at a later point to serve in this position. This would allow you to "punt" the decision until the power is needed. However, if you choose to punt the decision, we would need to discuss whether the second approval individual indicated above could be included. We recommend that instead you name someone now.

6. You indicated you will discuss and let us know who you would like to appoint in the positions discussed above.

vii. Charitable Selector.

1. If you wish (we did not discuss this) to have the flexibility to add a charity to the trust beneficiaries you can empower a person to do so.
2. This is an individual who could be allowed to add charitable beneficiaries at a later point. We did not discuss this power during our call and have included this in case you would like to have the option to add charities in the future. This can be removed if you wish.
3. This is a "non-fiduciary" power. This means anyone you name in the trust as a trustee or the Trust Protector cannot also serve in this position. If you wished to name the same person that is serving as the Loan Director above, than can be done.
4. This position can be included in CLIENT's trust, but not SPOUSE's.
5. Please let us know if you would like this power included, and whom you would like to serve in the position.

b. SPOUSE's Trust.

i. Note: Adjust for specific facts. This is the trust established by SPOUSE for the benefit of CLIENT and your descendants

ii. Investment Trustee.

1. See comments above regarding the Investment Trustee position and who can serve in this position.
2. You indicated you will discuss and let us know who you would like to appoint in this position.

iii. Insurance Trustee.

1. See comments above regarding the Insurance Trustee position and who can serve in this position.
2. You indicated you will discuss and let us know who you would like to appoint in this position.

iv. Trust Protector.

1. See comments above regarding the Trust Protector position and who can serve in this position.
2. You indicated you will discuss and let us know who you would like to appoint in this position.

v. Loan Director.

1. See comments above regarding the Loan Director position and who can serve in this position.
2. You indicated you will discuss and let us know who you would like to appoint in this position.

vi. Hybrid DAPT.

1. This power can allow an individual (or a committee) who is named to add a person from a class of individuals (we can use the grandparents of the Grantor, which would include SPOUSE and his/her family. See comments above on the "SPAT" provision for CLIENT's trust regarding including just SPOUSE as a permissible

individual to add as a beneficiary) as an additional beneficiary of the trust. This will allow in the future if additional access is needed for SPOUSE (or other individuals) to be added as a beneficiary so she can receive distributions from the trust. See discussion above regarding concerns on self-settled trusts, which the trust would become if the power is exercised to add SPOUSE as a beneficiary.

2. This is a "non-fiduciary" power. This means anyone you name in the trust as a trustee or the Trust Protector cannot also serve in this position. If you wished to name the same person in both the Loan Director power and this power, than can be done.
3. One option if you cannot determine someone to name in this position at this time is we can draft each trust so the Trust Protector can name an individual at a later point to serve in this position. This would allow you to "punt" the decision until the power is needed. We recommend that instead you name someone now.
4. You indicated you will discuss and let us know who you would like to appoint in this position.

9. **Some of the ancillary documentation and steps for the SLAT plan may include**:
   a. MODIFY THIS FORM TO REFLECT THE SPECIFIC TYPE OF TRUST AND ANY UNIQUE ASSETS, APPLICATIONS OF THE TRUST, AND THE TRANSACTIONS INVOLVED.
   b. If Spouse A spousal waiver for both of you regarding the SLATs. This might support the avoidance of the rights either of you may have over assets given to the other's trust. Although this provision may have valuable estate tax benefits, it may have significant matrimonial implications. I am not a matrimonial attorney and cannot advise you as to the matrimonial implications to either of you of signing this document. If you have any questions, as these rights might be important, you should each consult with your own matrimonial counsel before signing.
   c. Counsel in each state in which each trust will be formed will have to provide an opinion of counsel that the trust is valid in that jurisdiction. We are not licensed to practice outside of New York, New Jersey and Washington, DC and it is imperative that counsel in the state where each trust will be formed be retained. The cost typically ranges from $1,500-$2,500 per trust. An opinion of local counsel as to the validity of the trust, a necessary prerequisite to implementation.
   d. Each of the institutional trust companies will have to review the trust for any changes necessary to their assuming the position of trustee, e.g. account opening documents, know your customer documentation, etc.
   e. A range of ancillary documents for each trust company will be necessary to complete and provide to them.
   f. You each should authorize your counsel to complete lien and judgment searches. The performance of this due diligence will help identify any issues that may suggest transfers to the trust should not be made. If none are identified, these steps should help deflect a later challenge by a claimant or the IRS based on a fraudulent conveyance, retained interest, and other theories. The cost of this work might be a few thousand dollars for a couple. There is obviously no assurance that these steps will deflect any challenge.

g. Other documentation may include:
    i. Crummey notices. These should be completed properly, signed and sent to the appropriate donees.
    ii. Solvency affidavit, which we will draft, you should review, correct, and then sign. This is to corroborate that you have no knowledge of any claims or suits, etc., that could make your transfers to the trusts fraudulent conveyances.
    iii. Declaration of Gift for gifts made to the trust.
    iv. Insurance for assets transferred in whole or part to the trusts may have to be revised to reflect the trusts as owners.
    v. Income tax returns, form 1041 (grantor or non-grantor, depending on how each trust was structured) may have to be filed.
    vi. ESBT or QSST elections if a non-grantor trust will be a transferee of shares of stock in an S corporation. This may require state as well as federal filings and these must be handled by your CPA. Note also that there are important administrative aspects and restrictions that apply to these trusts that will require regular monitoring by a collaborative team.
    vii. A gift tax return reporting gifts to the trusts may have to be filed with the IRS. This should be prepared and filed by your CPA but we recommend you have us review a draft before it is filed.
    viii. If entities are transferred to the trust appropriate entity documentation will have to be prepared.

10. **Complexity**: Estate planning is inherently complex, subject to varying interpretations, and the laws change frequently. Ongoing review and maintenance of every plan and document is essential. There is no assurance that any particular result will be realized. There are risks and negative consequences to every planning step and technique, all of which have not been enumerated in this letter or other communications. By proceeding with this planning, you accept these risks.
11. **Planning Uncertainty and Timing**.
    a. As we have discussed, there are numerous proposals that have been made by Democrats in Congress and President Biden regarding changes to the estate and gift taxation system that may adversely affect or completely prevent the ability to complete, planning that we may recommend that you complete. Some of the proposals include changes that would be made effective on date of enactment (i.e. when the bill is signed into law).
    b. This means we do not have any way to determine when (or if) changes will be made that will adversely affect proposed planning. After changes are enacted, it is possible that any planning we have not yet implemented would no longer be able to be completed due to adverse tax consequences post-enactment of any changes. You could potentially have planning 99% of the way completed, and if the Democrats in Congress reach an agreement and enact changes before planning is implemented, the work completed up until that time would become unable to be finished. There are also other unknowns. For example, if you consummate, before enactment, a note sale might repayment of interest and principal trigger gain? Might a pre-enactment GRAT trigger gain on the post-enactment payment of a

GRAT annuity with appreciated property trigger gain? You understand and accept this outcome is possible with the uncertainty we are planning under at this time.

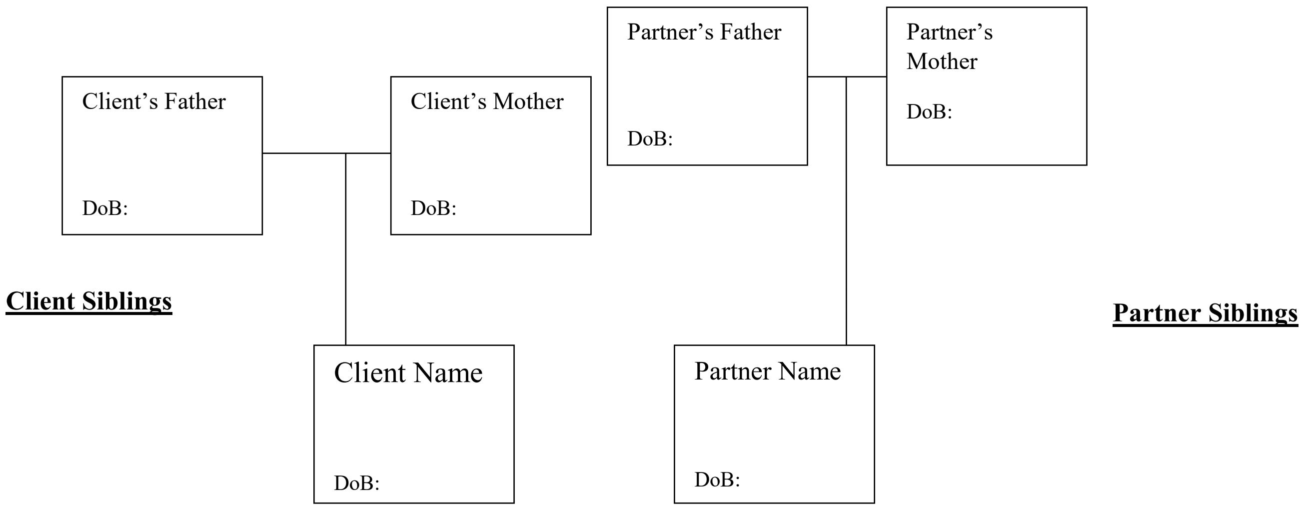
12. **Billing Arrangements**: Our current year Billing Arrangement forms which will govern our relationship. If you have any questions or concerns, please let us know.

4. PowerPoint to Educate/ Market Clients on APT Planning – To Be Added

5. **Family Tree, courteously from Marty Shenkman.**

FAMILY TREE

Client Last Name:
Client First Name(s):
Date:
Preparer:



How sign name:
Prenup/Postnup:
US Citizens:
Social Security No.:
Initial(s):

6. **Letter to Send with Originals of Recently Signed Documents, courteously from Marty Shenkman.**

Lawyer Letterhead

*DATE

Via Federal Express

Via Pick Up

*CLIENTNAME

*CLIENTADDRESS

Re: Return of Original Documents.

Dear *CLIENTNAME:

Original Documents. Enclosed are one each of the following original documents, dated, which are the only originals (we hold no original documents). Since these are the ONLY originals it is vitally important that you **safeguard** them:

1. Comprehensive Powers of Attorney (more comprehensive document designating agent to handle financial and legal matters).
2. Emergency Child Medical Authorization Form (emergency authorization to an agent to direct medical care for your child in your absence).
3. Living Wills (statement of health care wishes).
4. Health Care Proxies (designate person to make health care wishes).
5. HIPAA Releases (authorize named person to have access to medical records).
6. Last Wills and Testament (distribute assets, name executor).
7. *REVOCABLETRUSTS (To hold assets to protect you as you age or during disability).
8. *ANYIRREVTRUSTS (Intended to hold assets outside your estate).

YOU ARE RESPONSIBLE TO HAVE READ AND UNDERSTOOD EVERY DOCUMENT YOU SIGNED. YOU WERE EXPRESSLY ADVISED THAT IF YOU HAD NOT READ

OR UNDERSTOOD EACH DOCUMENT YOU SHOULD NOT HAVE SIGNED IT. IF ANY ASPECT OF YOUR PLAN, OR ANY PROVISION IN THE DOCUMENTS YOU SIGNED, DO NOT REFLECT YOUR WISHES, OR YOU DO NOT UNDERSTAND THEM, PLEASE COMMUNICATE THAT TO US IN WRITING OR BY EMAIL IMMEDIATELY. YOUR FAILURE TO RESPOND IMMEDIATELY IN WRITING WILL SERVE AS CONFIRMATION THAT YOU HAVE IN FACT READ AND UNDERSTOOD EVERY DOCUMENT YOU SIGNED AND THAT THEY REFLECT YOUR WISHES.

Follow up: If you do not follow up on the matters indicated herein and in the communications to you and which you were advised of at our meetings, your plan will not achieve your goals. We are not following up on any matters which we do not acknowledge in writing that we are addressing. You must advise us of any changes which might warrant review/revision of your plan or documents. Annual OR Periodic meetings to review the status of your documents, planning, and implementation are essential to enhance the likelihood of your plan succeeding. If you do not meet regularly with us and your other advisers, there is no assurance that the planning will be completed or implemented properly.

If sending documents for signing out of the office. Delete this section if signed in office.

Signing of Documents.

Several points to consider regarding the signing. It is very important that every place that requires your signature or initials, a witness name or signature, a notary name, signature or notary information, or a date be fully and properly completed. This will take focus and concentration. Missing a single item might invalidate that document.

1. During the signing:
    a. Each person signing should print the date when they sign where indicated.
    b. Each signature should be witnessed and notarized if indicated on the page where the signature line appears.
    c. Witnesses and the notary should all be independent. A person named in the documents should not be a witness. The Notary Public cannot be a witness. You can have a "traveling notary" come to your house to assist in the signing for a fee.
    d. Do not remove any staples from the documents.
2. Once the documents have been signed, please provide us with electronic copies for our files (do not send us paper copies nor the originals). If it is too difficult for you to get the documents scanned, you can send us paper copies, and we will scan them. But if needed, you should know that the UPS Store, Staples, and similar businesses offer inexpensive scanning services. When we receive PDF copies of the documents, we will prepare a ShareFile "client portal," which will contain electronic copies of the documents for you to access from your computer.
3. The originals should be stapled. Before you staple any document, you should flip through it to be certain every page is present (i.e., make sure no page has slipped out). Your wills

and revocable trusts should be kept in a fireproof and secure location (e.g., a 2-hour fire-rated home safe). The other documents, especially the health care related documents, should be accessible in an emergency.

4. If they are applying for EINs You indicated that you would apply for EINs for each of the revocable trusts after they are signed. You can apply for an EIN on the IRS website at https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online. If you would like our assistance, let us know. Please send us a copy of the forms the IRS issues with the tax ID number for each trust.

Memorandum. A memorandum of important points to consider at this juncture is attached.

MODIFY IF WORK ONGOING. **Scope of Engagement**. We welcome the opportunity to assist you on future matters. However, since we have completed all work you have presently requested of us, your file is closed. If we can help in any way in the future, please let us know and we would be pleased at that time to open a new file matter for you by your signing a new representation agreement.

Sincerely,

Law Firm Name

By: */s/*__________________________

Lawyer Name

IF PICK-UP Acknowledge: Receipt of original documents listed above, this letter and memorandum.

______________________ ______________________

*CLIENTNAME Date

______________________ ______________________

*PARTNERNAME Date

Memorandum Accompanying Return of Original Documents

*CLIENTNAME

Disclaimer Statements and Risks

Limitation to Client: This Planning Memorandum is solely for the benefit of the client named above and is not to be relied upon by anyone else without the written consent of Firm Name. We assume no responsibility for income tax, gift tax or estate tax, or any other consequences, to any other persons. Such persons should consult and rely upon their own counsel, accountant, tax advisor, or other advisors. Except for the information expressly stated herein (and **no statements herein are to be construed as legal opinions**), no other suggestions, information, or analysis is implied, and no other suggestions, information, or analysis should be inferred. Any tax consulting, advice, or correspondence received as part of this representation should not be construed or interpreted to be a "Tax Opinion," or any type of legal opinion, regarding this matter. A "Tax Opinion" for these purposes is written tax advice covered under Circular 230 about the tax treatment and consequences of a particular transaction, or a tax position that is going to be taken on a tax return. Any strategies suggested are intended solely for the use of the client named above and cannot be relied upon by others. If you want a formal legal opinion on which to rely you have to separately engage us to render such an opinion if it is feasible. Bear in mind that significant additional cost will be incurred regardless of whether or not a favorable opinion can be reached if you request one. If you are not clear on the distinction and import of the discussion in the memorandum following and a formal legal opinion please call to discuss this. The following memorandum presents discussions of options and certain issues, **not** conclusions of law. The following memorandum outlining options may weigh various considerations and/or options, often when there is no single correct answer, and the outcome is not fully predictable to any degree of certainty.

Matters in Purview of other Advisers: Although we may address certain income tax consequences, those matters are within the purview of your CPA and should be addressed as such. Although we may address certain insurance matters or investment matters, those matters are within the purview of your insurance and/or investment adviser and should be addressed as such. Although we may address certain real estate or corporate (entity) matters, those matters are within the purview of your general counsel (or your specific real estate or corporate counsel) and should be addressed as such. Although we discuss cash flow and grantor trust and related considerations, we do not prepare cash or other financial forecasts, and you must rely on other advisers to do so (and you should do so before and periodically after creating any grantor trusts.

Information Will Not Suffice to Avoid Tax Penalties or Interest Charges: The information in this memorandum, in any attachment, or cover letter (including previous and subsequent correspondence during this engagement) are not intended or written to be used, and it cannot be used to: i) avoiding any penalties imposed by the IRS or any state tax authority; ii) to promote, market or recommend to any other party any tax-related matter such as an investment, product, service, advice or position.

Scope Limitations: The scope of this Planning Memorandum is expressly limited to the strategies or matters discussed herein. No other issues are considered, and Firm Name assumes no responsibility beyond the issues to which this Planning Memorandum is devoted. Additionally, no analysis is provided on any of the following issues: (1) any impact of future legislation or other changes in the law, whether retroactive in nature or not; (2) any issues specifically excluded; (3) non-US taxes, or taxes in jurisdictions not specifically mentioned; and (4) any taxes not specifically mentioned; (4) life insurance or other insurance selection; (5) recommendations of investment products, securities or strategies; (6) Medicaid, elder law, supplemental needs or special needs planning; (7) qualified plan issues; (8) annuities; (9) valuation reports or issues; (10) any other matter excluded in the Billing Arrangement documents or other communications.

Law Changes: The suggestions and discussions in this Planning Memorandum are based upon the applicable federal, state and local tax and other laws as of the date of this Planning Memorandum. Such authority may change in the future, and such change may be applied retroactively. A change in state law may impact income, estate, or other tax consequences. Firm Name assumes no responsibility to update this memorandum, or notify you in any manner, if the applicable law changes. Federal and state taxing authorities, regulatory agencies, the IRS, and the courts are not bound by the analysis herein and may take very different views or interpretations of the law, the facts, or both. The analysis contained herein supersedes all prior oral and written discussions, if any, pertaining to the issues involved. But it may be modified by subsequent communications. We may have suggested a number of strategies the IRS or state tax authorities, other governmental agencies, regulatory bodies, or courts may challenge. While we have discussed a number of associated risks with you, possible challenges could be asserted, which were or were not discussed or even contemplated. We are not responsible or liable, to any extent, for any gift tax, income tax or estate deficiencies or assessments, interest, or penalties that may arise, or the results of any court holding including the piercing or disregarding of entities, trusts or transactions. There may now be proposed Federal, state tax or other legislation which, if enacted, could modify or eliminate the benefits of many strategies if not grandfathered. The IRS, state tax authorities, plaintiff's counsel, and others have, and may continue to, attack various strategies and techniques that may be suggested in this Planning Memorandum.

Your Responsibilities: We have relied upon your assertion that the information provided, facts, and assumptions provided are true, correct, and complete. However, we have not independently audited or otherwise verified any of the information, facts, or assumptions, though we may have asked for clarification, done internet or other searches, or consulted with your other advisers. A misstatement or omission of any fact or a change or amendment in any of the assumptions we have relied upon may require a modification of all or a part of the discussions or suggestions contained in the Planning Memorandum. In addition, our suggestions and discussions are based on the facts and assumptions as asserted to us by you and are at best only current as of the date of this Planning Memorandum. We have no responsibility to update this Planning Memorandum, or otherwise notify you, for events, circumstances, or changes in any of the facts or assumptions occurring after the date of this Planning Memorandum or the date of any communication to you. It is the responsibility of the client to engage Firm Name or another adviser to revisit these matters from time to time, especially if there is a change in: (i) your planning, (ii) the assumptions upon which these matters were based, (iii) your circumstances which impacts the discussions or suggestions contained in this Planning Memorandum; (vi) or, there is a notification via our general communications, or general media coverage that suggests a change in the law, planning approaches or perspectives that might affect you, your planning or the discussions or suggestions in this Planning Memorandum. It is your responsibility to consider all communications we disseminate as well as general media coverage of events and contact us should any perhaps apply to you, your planning, or this Planning Memorandum. You must understand the letters, memorandum, emails, general articles, footers on bills, and other communications we send to you. If you do not understand the meaning of any particular communication, or the implications of that communication to you, you must notify us and explain what is unclear to you so that we may explain it until it is understood. You should not sign any document or proceed with any step of any plan if you do not understand it. You must assure that your appraiser has complete, accurate, and current information about all material facts affecting any appraisal being completed.

Risks; No Guarantees: You understand and acknowledge that the results of any plan are never guaranteed. Numerous aspects of many, if not most, estate and related plans are not only uncertain, but subject to a wide spectrum of different views by other advisers, the courts, the IRS, and other authorities. Most strategies have negative consequences (e.g., save estate tax, lose basis step-up). Many common strategies, techniques, and transactions are subject to tax, legal, financial, and other risks and uncertainties. While we endeavor to identify some of the risks of a plan, all risks and issues with each component of a plan are not possible to identify or communicate. Creating a collaborative team may help identify more issues with your plan. Further, the fact that we communicate verbally or in writing certain risks should never be interpreted as an indication that any such listing or communication is a complete listing of every risk involved. The risks of any transaction can be further compounded by improper administration of the plan, failure to meet annually to review and update the plan, or changes in family dynamics, the tax and/or other laws may reduce (or eliminate) any projected benefits. Such risks may even result in more costly results than had no planning been pursued.

Audit and other Risks: Any company, family office, individual, estate, or transaction may be subjected to audit, which creates a risk of undesired or unintended consequences. Possible challenges may emanate from risks we communicated to you, while others may not have been discussed. Challenges by the government as part of the audit process might cause inclusion of assets previously transferred out of your estate in your estate. After audit, assets that had been transferred out of the estate as part of recommended strategies may be adjusted to their date of death value, which could result in tax-related liabilities such as those attendant to capital gains, depreciation recapture, and/or a negative capital account. You agree that we shall not be liable for any assessments of tax, interest, or penalties resulting from our recommendation or your decision to implement any strategy, to the extent permitted by applicable law.

Options; Your Decision: Although we aid you in the decision-making process, suggest alternative recommendations verbally or in writing to help you achieve your objectives, and assist you in determining how well each alternative meets your estate planning objectives, the responsibility for estate planning decisions is solely yours. These services are not designed, and should not be relied upon, as a substitute for your own judgment, nor are they meant to mitigate the necessity of ongoing review. These services are designed to supplement your own planning and analysis and aid you in achieving your objectives.

Open Items. There are a significant number of matters you have not yet addressed. We are pleased to assist if you wish. Many of these matters have been discussed in prior communications, and only some are noted below. Please call to discuss so we can help:

If open items, add additional paragraphs here to discuss

Beneficiary Designations. Be certain beneficiary designations are current. You have not requested us to review these. Similarly, you should confirm that if you have now or in the future beneficiary designations on financial accounts that they do not circumvent the planning and dispositive scheme.

Financial Information. Review and revise for client. We did not review financial account information (none was provided) or other documents of title to confirm whether assets pass under your wills, or revocable trusts (if you retitle them to the trust which you should consider for other than pension/retirement assets) to determine if there are beneficiary designations for non-retirement assets. If you wish us to review any documents to advise you on the probate or other implications please send us the documents.

Client File: In addition to the original documents listed above, we have previously provided you with copies of all documents we have retained in our file. Thus, you have been provided with the entirety of your client file. Any drafts of documents or internal notes regarding your estate planning that have not been previously provided to you are agreed to be our work product and shall not be provided. If you believe that there are any documents that comprise your file that you have not yet received, please contact our office and we would be happy to review the file to confirm whether any such documents exist.

Safeguard Originals: Be certain to safeguard these original documents, If documents sent previously along with all the original documents returned to you on *PREVIOUS DATE, **especially the two (2) wills and revocable trusts**. Original documents should be kept in a secure, fireproof location and your fiduciaries should be informed of the document's whereabouts.

Bear in mind that documents kept in a bank-safe deposit box may not be readily accessible. If you choose to hold your original documents in a safe deposit box, it is important for you to make clear arrangements with your bank now to allow your executor to access your safe deposit box when the time comes to get the original will to be filed with the surrogate's court. It is best to get a copy of the will to your executor beforehand, this might require that an agent or other person be a co-signer on the safe deposit box. You will need to let your executor, or someone you trust, know where you keep the original will and revocable trust, if it is in a safe deposit box or elsewhere. If an original will is lost the law may presume you intended to revoke it. The same issue might arise with respect to a revocable trust.

Inform Key Persons: You should consider whether and how to discuss your plan and goals with your children so that they, at least in broad terms, understand your decisions and their roles in your planning. If you would like our assistance please let us know. You may also consider providing key fiduciaries or people with copies of your documents (i.e., provide your agent under your power of attorney with a copy, provide your health care professionals with copies of your living will, health care proxy, HIPAA authorization and release, etc.) If key people cannot locate your documents in an emergency, they will not be able to assist you in the manner you wish. You can do this by giving them access through ShareFile portal, discussed below.

Receipt: IF PICK-UP - Please sign the cover letter to which this is attached acknowledging receipt of these documents and your acknowledgment of the recommendations in this letter. IF FED EX - The Federal Express receipt will confirm that you have received these documents.

ShareFile: ShareFile As you authorized, we will save copies of all your documents in a Share File cloud-based portal. Once your documents are uploaded to Share File, you will receive an email from Share File on our behalf, which includes instructions on how to set up your username and password to access the documents. If you need any assistance in preparing or accessing your cloud portal, please call.

Irrevocable Trusts: If you have irrevocable trusts, you were provided with a separate letter of instruction. If you did not receive that, please let us know immediately.

Revocable Trusts: FOR REVOCABLE TRUSTS

1. The enclosed trust counterpart needs to be signed if you named a trust protector in the document to confirm that the protector has read and reviewed the revocable trusts and confirm the protector's wishes to serve as trust protector. Please have the protector sign and date where indicated in the presence of two (2) witnesses and a notary public. If you did not name a protector in the documents, we can assist you in the future when you are ready to name one.
2. IF CHECK NOT DONE AT MEETING You should transfer cash to each of your respective your trusts (either via check or wire transfer) for the initial funding amount of $, as reflected on Schedule A of each trust, page in both the documents. IF SPOUSES/PARTNERS You should each transfer assets from separate accounts, not from joint accounts, if possible. If you have no choice but to use a joint account, be certain that SPOUSE/PARTNER signs her check to her trust and SPOUSE/PARTNER signs his check to his trust (or that you each authorize the wire transfer to your own trusts). Please provide us with electronic copies of the documents confirming opening revocable trust accounts, and the funding of those trusts.
3. IF CHECK DONE AT MEETING Enclosed with your original documents is the initial funding check for the Trustee to deposit when opening the bank account. The tax identification number for that account appears on the first page of the trust (not the cover page).

4. IF PREVIOUS REVOCABLE TRUSTAs you both previously signed revocable trusts in YEAR, the assets contained in any accounts in the name of each of your revocable trusts will now be held in the most recently signed revocable trusts. We drafted the documents indicating that the name of each of your revocable trusts did not change, which may avoid some of the administrative burdens of re-titling accounts to a new name of the trust. If you have not yet funded your revocable trusts, you should do so as discussed below.
5. You should consider transferring other assets (not your professional practice, retirement plans or your annuity) to the trust. At this juncture you should begin by the transfer of non-retirement bank and brokerage accounts to the trust.
6. Do **not** retitle your professional practice, any retirement assets, or annuities to the trusts. Whether or not annuities can or should be retitled should be discussed with your financial advisor. We cannot advise on annuities.
7. While it may be beneficial to transfer your house ½ to each revocable trust, that might taint the asset protection benefits of tenants by the entirety under New Jersey law. You have not requested that we research this issue, but we could if you wish. You should discuss any fees and any tax or transfer costs involved with the real estate attorney that assists you with the transfer.
8. You may want non-retirement marketable security accounts held in your trust's name so that in an emergency, the successor trustee will have immediate access to assets to deploy to assist you. IF SPOUSES/PARTNERS If you have joint assets that you wish to place in each trust, you should transfer them first to individual name, wait until you receive a statement for those accounts, and then each transfer the desired assets to his or her trust from his or her own account.
9. The trust should be operated consistent with its terms and in a manner that respects its independent legal existence. IF IRREV TRUST TOO It is important to bear in mind that the funding and operations of the revocable trust are quite different than for the irrevocable trust. Care must be exercised to handle each appropriately. If you are planning a transaction with respect to any trust, we suggest you email or call us to clarify the appropriate process in advance. Email might be the most efficient as you can save the email for future reference.
10. When you complete transfers of assets to each revocable trust please send us a copy of each trust account (brokerage, bank, etc.) so that we have pertinent information in the event of an emergency. We will not review or follow up on this, merely add these items to your electronic file.
11. If EIN Assigned before Rev Trust Signed A Taxpayer Identification Number ("TIN" or "EIN") has been assigned to each trust. We have enclosed a copy of the letters confirming the assignment of the EIN number to the trusts (which is listed on the first page of the trust document) through an "SS-4" letter. You should be sure that the trustee keeps a copy of the letter in a safe place. As part of their due diligence, a financial institution may ask you for documentation from the Internal Revenue Service confirming that the EIN has been properly assigned to the trust, which would require disclosure of the "SS-4" letter. You should also send us a PDF of this for our files. If Restated Rev Trust Already with EIN The Taxpayer Identification Number ("TIN" or "EIN") assigned to the trust has not changed. All assets should continue to be reported using the EIN assigned to the revocable trust. As part of their due diligence, a financial institution may ask you for documentation

from the Internal Revenue Service confirming that the EIN has been properly assigned to the trust, which would require disclosure of the "SS-4" letter, which has been previously provided to you.

12. You have not requested that we assist you with the funding of the trust. Should you wish assistance, please advise. We would hope that BANK INSTITUTION should be able to assist you in this regard. Your financial advisor or institution may request a copy of relevant documents (i.e., trust agreement, SS-4 assigning EIN to the trust, etc.) while establishing the accounts for your trust. You should provide them with copies of the documents, not the originals.
13. While there are different approaches and views on whether or not to file a tax return for a revocable living trust, our recommendation is that your CPA files a relatively simple grantor trust Form 1041 with a grantor trust statement attached. This is a statement confirming that the trust is a grantor trust and that all income and deductions are reported on your personal income tax return. IF SS NUMBER USED If you continue to use your Social Security numbers on each of your trusts you will not have any income tax filing requirement. That may be simpler and less costly for now. However, it might be advantageous to obtain a separate tax identification number.

Ongoing Administration: Trusts and entities must be properly administered, which generally require annual or more frequent actions, to achieve their intended goals. Periodic review meetings will enable us to help you with some of these matters.

Core Estate Planning Follow-Up: Your general estate planning documents (power of attorney, health care documents, will, and revocable trust) should be reviewed if there is any material change in the law or your circumstances. Those documents should be reviewed in all events every three to five years and updated. If you believe such a review is desirable, please let us know.

Important Information: You will receive communications which will contain information pertinent to your planning. If you believe a point made in an article applies to your situation, please call or email us. We will also send out planning tips and updates via email. Understand, however, that by sending this information, or responding to a phone call or email from you, we are not, and will not be, reopening your file and undertaking to maintain, operate or update your planning. That can only be accomplished by your signing a Billing Arrangement to open a new file matter at a meeting with us. If you have suggestions as to other information that would be useful to include in the newsletter or other mailings, please let us know. We appreciate all input.

Additional Points: A few of the many things discussed at our meeting that you may want to follow up on appear in the prior memorandum and other communications. You should review and follow up on all open items.

Caveats: Estate planning is inherently complex, subject to varying interpretations, and the laws change frequently. Ongoing review and maintenance of every plan and document is essential. We can schedule a review meeting either in person, by phone or web conference if that is more convenient for you.

There is no assurance that any particular result will be realized. There are risks and negative consequences to every planning step and technique, all of which have not been enumerated in this letter or other communications. By proceeding with this planning, you accept these risks.

"**We've Only Just Begun:**" was not only a hit single by The Carpenters, but the perspective you should now take concerning your planning. Estate planning is not merely about the completion of certain documents, but about regularly monitoring and updating an integrated, holistic plan addressing a myriad of personal, tax and legal considerations. We encourage you to have an annual meeting and proactively coordinate your planning. In some instances, a phone or web conference with you and your advisers (CPA, financial planner, insurance consultant, and other key advisers) may suffice. While assuring that your planning and documents reflect changes in economic circumstances, the law, family circumstances, etc., is an obvious benefit, there is much more. There are a myriad of issues and loose ends that affect almost everyone, law changes (not just tax laws) occur with considerable frequency, asset values change, and personal goals and objectives evolve. Accounts are often changed requiring review of new account titles and beneficiary designations (and if this was not done when your documents were signed this remains a vital item to address). Failing to regularly review and update your plan and documents will cost more in the short run, put you at greater risk for potential problems, and potentially jeopardize your estate planning goals. An annual review is also essential to assure that all of your professional advisers are acting in concert.

7. **Affidavit of Judgment and Lien, courteously from Marty Shenkman.**

Consider having the clients sign an affidavit, modified for their circumstances, to endeavor to corroborate that the transfers are not fraudulent conveyances, etc.

Affidavit of Judgment and Lien

of *CLIENTNAME

State of *STATENAME)

) ss.

County of *COUNTYNAME)

I, *CLIENTNAME, says under oath:

1. **<u>Transaction</u>**. I am creating an irrevocable trust *TRUST NAME limited liability company *LLC NAME and am planning to transfer assets to same, including *ASSET LIST cash, and life insurance policies, and investments ("Transaction").
2. **<u>Representation</u>**. The statements in this affidavit are true to the best of my knowledge, information and belief.
3. **<u>Name</u>**. My name is as listed above. My complete legal name is FULL NAME. I have never changed my name, or used any other names, other than ______________ [If blank I intend to mean None].
4. **<u>Citizenship</u>**. I am a citizen of the United States.
5. **<u>Competent Adult</u>**. I am at least Eighteen (18) years of age. There are no physical, psychological, or competency issues that affect my ability to execute this Affidavit, consummate the Transaction to which this Affidavit relates, or to understand the overall plan and Transaction.
6. **<u>Residence</u>**. I reside at *CLIENT ADDRESS and am both resident and domiciled in such state.
7. **<u>Taxes</u>**. I am current on all required tax filings and payments including but not limited to local, state, federal income taxes, gift taxes, and related or other taxes. Any entities controlled by me or my immediate family are similarly current on all local, state, federal income taxes, gift taxes, property taxes and payroll and related tax filings and payments. Neither I nor any entity controlled by me and my immediate family is currently subject to any tax audit. Review and revise for client gift tax status I have not previously filed any gift tax return, nor have I made any taxable gifts.
8. **<u>Judgments, Liens or Encumbrances</u>**. Other than as noted in this Affidavit:
    a. I have not allowed any interests (legal rights) to be created which affect my ownership of the assets being transferred pursuant to the Transaction, or which I have indicated I intend to transfer.

b. There are no pending lawsuits against me, or any entity controlled by me, or any entity interests in which are being transferred pursuant to the Transaction, or which I have indicated I intend to transfer.
c. Neither I, nor any or any entity controlled by me, has ever been declared bankrupt.
d. Modify as appropriate# No one has any security interest in any personal property or other assets which are being transferred pursuant to the Transaction, or which I have indicated I intend to transfer.

9. **No Fraudulent Conveyance**. No transfer as part of the Transaction is intended to be a fraudulent conveyance, or do I believe it will be. I understand that a fraudulent conveyance can include by way of example and not limitation any transfer of property or assets that is made to swindle, hinder, or delay a creditor, or to put such property beyond his or her reach.

10. **Exceptions and Additions**. The following is a complete list of exceptions and additions to the above statement [List any below. If blank I intend to mean None]:

Have client provide information to fill in here

11. **Reliance**. I make this affidavit in order to induce our legal representative and other advisers to assist me with the Transaction and to transfer assets as part of same.

____

*CLIENTNAME

Signed and sworn before me on

*MONTH *DAY, *YEAR.

____

Notary

8. Clarification of Declaration of Gift, courteously from Marty Shenkman.

Comment: If there is an error, lack of clarity or other issue with a gift transfer made to a trust it may be advisable to revisit the initial transfer and correct it. If that is done there is no assurance that a correction or clarification will succeed, but it may be advisable to endeavor to proactively correct a known issue rather than ignore it. A point of this form is to demonstrate the importance of reviewing significant transactions "when the dust settles" to be certain all appears to be in order.

Clarification of Declaration of Gift

By *CLIENT-NAME

To

*TRUST-NAME

I, *CLIENT-NAME, hereby state and declare that:

1. I am a resident of the State of *STATE.
2. If cash gift I transferred by way of gift, the sum of CASH-AMOUNT-WRITTEN Dollars ($CASH-NUMBER), a separate non-community property asset, through check number _____ OR wire transfer number _________ on *DATE-OF-GIFT, a copy of which is enclosed (the "Interest"). **Comment**: If there was a preliminary retitle of assets, e.g., as between spouses, be certain that is corroborated as well and consider reporting such intra-spousal transfers on a gift tax return even if not required to be reported by the Form 709 instructions.
3. If entity gift I transferred by way of gift the following assets:
   a. *ENTITY1-NAME - *ENTITY1-GIFT-AMOUNT of membership interests partnership interests shares through an assignment dated *ENTITY-GIFT1-DATE.
   b. *ENTITY2-NAME - *ENTITY2-GIFT-AMOUNT of membership interests partnership interests shares through an assignment dated *ENTITY-GIFT2-DATE.
   c. Add whatever other entity interests or other assets, may be needed to be included in the document to corroborate all transfers made correctly.
   d. Collectively, the above gifts are known as the "Interests".
   e. The "Effective Dates" of this Clarification of Declaration of Gift is the date of each assignment date referenced above.

4. This gift was made as of *DATE-OF-GIFT OR the above Effective Dates to *TRUSTEE1NAME and *TRUSTEE2NAME, Co-Trustees of the *TRUSTNAME, with a mailing address c/o *TRUSTEE1NAME, *TRUSTEEADDRESS.

5. **Comment**: Revise this language accordingly to comport with the incomplete gift trust provision in the trust, if any. Note that this mechanism may differ considerably depending on the format and approach of any such adjustment mechanism contained in an irrevocable trust. Also, consider any special valuation adjustment provisions that may have been incorporated in other transfer or entity documents. As contemplated as of *DATE-OF-GIFT above, the gift of the Interests shall not be subject to the Article, pages, Title of provision in Trust "Division of Property into Portion I and Portion II" stipulation contained in the *TRUST-NAME ("Trust"). This Clarification of Declaration of Gift shall constitute "written instructions to the contrary" as contemplated therein. The gift of the above Interests shall be held solely in the Lifetime Trust of the Trust.

6. **Comment**: Add any additional corrective measures that might be necessary or advisable to take.

7. If this clarification and correction is not retroactively effective as intended, I hereby give all rights and interests in the gift that could be subject to the above adjustment mechanism in the Trust effective as of today as a completed gift.

8. I declare under the penalties of perjury that the foregoing is true and correct and further declare that this Declaration of Gift is being executed to clarify such gift.

__________________________ Date: *DATE

*CLIENT-NAME, Grantor

9. Due Diligence Letter and Sample Checklist, courteously from Marty Shenkman.

Comment: Due diligence before any material transfers, no matter how motivated by asset protection planning objectives, may be advisable. Due diligence may protect the client from a future claim and it may help protect the advisers as well. Consider adapting and modifying the following general letter and checklist to fit the particular client circumstances.

*DATE
Via Email and Regular Mail
*CLIENTNAME
*CLIENT ADDRESS

RE: Due Diligence Checklist for Significant Transfers

You are contemplating transferring significant wealth, into FLPs, LLCs, irrevocable trusts, by gift.

From a tax, economic and an asset protection perspectives you want to have evidence prior to any actual transfers corroborating that you have made good faith efforts to identify any claims or issues that might have deterred or prevented your transfer (e.g., if you are in the midst of a lawsuit, divorce, recently had a financial setback, or any other situation of importance). If there are issues that arise at a future date, that could have been identified at the time of transfer, that might characterize the transfers in a negative light, e.g., as an imprudent financial step, or as a fraudulent conveyance. It might be preferable to avoid the consequences of such a characterization if feasible. It may not only undermine your planning objectives, but potentially result in penalties and other adverse results. The steps below, may constitute the nucleus of a checklist of prudent steps towards reducing those risks by corroborating your status now. The somewhat standard checklist should only be used as a starting point and it should be expanded and tailored as you and your other advisers believe reasonable to better reflect your circumstances, plan, etc. Further, from a tax perspective, one of the key attacks on many estate planning motivated transfers is that the client/transferor retained interests in the assets transferred, and therefore they should be included back in his or her estate. If, for example, you could not support yourself with the retained assets and cash flow sources then that would suggest you might have had an arrangement to access (i.e., a string or control over) the assets transferred, e.g. to a SLAT or other irrevocable trust. For example, in a tax context, the Levine case spoke about the taxpayer having only planned with "excess capital." Estate of Marion Levine v. Commr. 158 T.C. No. 2, February 28, 2022.

If you were the subject of a lawsuit, or there were factors that could be interpreted as suggesting that you should have known at the time of the transfer that the transfers could impede a creditor or claimant you should have known of, that too might taint the transfers. One of the ways that risk might be mitigated is to corroborate your financial position at the time of the transfer. The due diligence steps below may constitute a reasonable effort to do so. You might corroborate your status at the time of the transfer rather than waiting to see what happens in the future.

To that end:

1. You might have a balance sheet prepared by your CPA financial adviser to demonstrate your financial position (this is a use separate and independent of the need for a balance sheet to determine the title to assets and which assets should be used for which trust).
2. Your wealth adviser might prepare financial forecasts showing, if possible, with your remaining assets, you should not have a need to access the funds transferred by gift to the entities and/or irrevocable trusts under reasonable assumptions. You might structure your transfers and plan in a manner that corroborates that you should not need to access the assets transferred for many years. There are no bright-line tests or rules, perhaps the longer, the better.
3. You should sign a solvency affidavit corroborating that you believe that you are solvent at the time of any transfers and not aware of any issues.
4. You might perform, or have someone perform, a public records and other searches for and on yourself, your spouse/partner, and perhaps entities you own or control, to identify claims, liens, and other issues. These may include but not be limited to searches online, etc.
5.

A partial/tentative checklist is attached.

If you have other questions on this, let us know.

Sincerely,

Firm-Name

By: ____________________________
Partner-Name, Esq.

Preliminary/Tentative Due Diligence Checklist

1. Internet web searches.
    a. Your name.
    b. Former names.
    c. Also known as, and maiden names as applicable.
    d. Spouse/partner name.
    e. Entity names if applicable.
2. Solvency affidavit.
3. Money laundering affidavit.
4. Balance sheet
    a. Summary balance sheet completed and signed.
    b. A more comprehensive balance sheet, if available.
    c. Online data (e.g., Zillow.com) on the value of your residence and other identifiable real estate to support balance sheet when there are no recent formal appraisals.
    d. Other appraisals and support for key assets.
5. Authorization for lien, judgement, and other searches by third party.
6. Lien, judgement, and other searches report by third party.
7. Sign off by client addressing any issues identified in any searches that identified possible issues (e.g., claims against a person with a similar name).
8. Title run downs on real estate.
9. UCC searches on business and other assets.
10. Financial forecasts demonstrating sufficient resources after transfers by wealth advisor and/or CPA.
11. Divorce agreement reflecting obligations or lack thereof.
12. Other steps particular to each client or client matter
13.

iv. Entity Forms.

a. Corporate Annual Minutes – To Be Added

b. **LLC Unanimous Consent, courteously from Marty Shenkman.**

Unanimous Consent of Members and Managers.

*LLCNAME

Unanimous Consent of All Members and Managers

of *LLCNAME In Lieu of Meeting

The undersigned, being all of the Members and Managers of the limited liability company ("LLC"), hereby take the following actions:

RESOLVED, a certified copy of the Certificate of Formation/Articles of Organization, the original of which has been filed in the State of *STATENAME on the *FILEDATE, was ordered kept in the company kit.

RESOLVED, that the Operating Agreement, substantially in the form attached hereto, is adopted as the Operating Agreement of the LLC, and that a copy be kept permanently in the company kit attached to this Unanimous Consent.

If Used RESOLVED, that the seal of this LLC is circular in form, and has the name of the LLC around the circumference, and the words and figures, "Limited Liability Company Seal, *STATENAME, *FORMYEAR", in the center. This Seal is impressed on this page, below, and is adopted as the Seal of the LLC:

If Used. Note that some had believed using certificates and physically sending the certificate to an institutional trustee in the jurisdiction where the trust owning it has situs is a worthwhile effort. If certificates are used consider UCC implications in a note sale, etc. RESOLVED, that the form of share certificate attached to this Unanimous Consent is adopted as the share certificate of the LLC.

RESOLVED, that the Managers is authorized and directed to issue the membership interests of the LLC for cash or property to such persons and in such manner as they from time to time may determine.

RESOLVED, the following persons, each of whom is a Manager, are elected to serve as Directors of the company until their successors are elected and qualified:

*MANAGER1-NAME

*MANAGER2-NAME

*MANAGER3-NAME

If Used, this may require appropriate provisions in the Operating Agreement as state law default LLC provisions are unlikely to provide for such a structure RESOLVED, the following persons are elected to serve as officers of the company, each reporting to and subordinate to the Directors, until their successors are elected and qualified:

President	- *PRESIDENT
Vice President	- *VICEPRESIDENT
Secretary	- *SECRETARY
Assistant Secretary	- *ASSTSECTY
Treasurer	- *TREASURER
Assistant Treasurer	- *ASSTTREAS

RESOLVED, the Company hereby adopts any and all acts

heretofore done or undertaken by the Organizer as an authorized person, *ORGANIZER-NAME. The LLC hereby agrees to indemnify and hold harmless the Organizer for any acts done or undertaken on behalf of the LLC. The Organizer hereby tenders his or her resignation and the LLC hereby accepts the resignation of the Organizer.

This depends on the decision made as to the tax status of the LLC. As a general matter if multiple owners exist there may be the potential for charging order protection in some states. Only a few states permit charging order protection for a single-member

LLC, and this protection may only apply if the debtor who owns a membership interest resides in a state that has laws that protect single-member LLCs. This is further discussed in this book at Chapter 3 Section i. How Assets Should Be Allocated. RESOLVED, That the LLC shall elect not to be taxed as a partnership for income tax purposes by electing out of Subchapter K of the Internal Revenue Code of 1986, as amended, and that the necessary tax filings and elections be made to obtain this status. OR RESOLVED, That the LLC shall elect to be taxed as a partnership for income tax purposes, and that the necessary tax filings and elections be made to obtain this status.

RESOLVED, That *ACCOUNTANT shall be retained by the LLC to audit review compile financial statements for the LLC for the fiscal year next ending.

RESOLVED, that the Managers, Directors, Officers are directed and authorized to undertake any acts necessary to carry out the above resolutions.

Dated: *DAY *MONTH, *YEAR COMPANY SEAL:

____

*MEMBER1-NAME

____

*MEMBER2-NAME

c. Operating Agreement, courteously from Marty Shenkman.

Sample Simple LLC Operating Agreement Single Member LLC (e.g., wholly owned by Irrevocable Trust) with Individual Manager Named

1st Amended and Restated Operating Agreement for *ENTITYNAME

A *STATE-NAME Limited Liability Company

This Limited Liability Company Operating Agreement ("Agreement") is made this *DATE, for *ENTITYNAME, a *STATE-NAME limited liability company doing business at *LLCADDRESS ("Company"), by its sole Member:

If Member is LLC# *MEMBERNAME, a *STATE-NAME Limited Liability Company licensed to do business in *STATE-NAME, with a business address of *MEMBERADDRESS, as the sole member ("Member").

If Member is Trust# *MEMBERNAME, u/a/d *TRUSTDATE, *TRUSTEES, Trustees, with a business address of *MEMBERADDRESS, as the sole member ("Member").

If Member is Individual# *MEMBERNAME, an individual who resides at *MEMBERADDRESS, as the sole member ("Member").

The Company and the Member may be referred to individually as a "Party" and, collectively, as "Parties" to this Agreement.

WITNESSETH:

WHEREAS, this Agreement is entered into for the purposes of governing the business of the Company including all activities incident thereto, investing its funds or other such related activities necessary to further its business purpose.

WHEREAS, the Member intends that this Operating Agreement shall supersede and replaces any prior agreements, arrangements, and understandings, whether written or oral.

WHEREAS, the Member intends to operate the Company to manage and operate the Company's real estate investment and other associated activities ("Investment").

WHEREAS, the Member designates *CLIENTNAME as Manager to Manage the Investment of the Company, all of the Manager's duties and responsibilities shall be carried out with due regard to the Manager's fiduciary duty to the Company and Member ("Manager").

NOW, THEREFORE, upon the mutual premises contained here and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby declare and agree as follows:

A. **Organization**

1. **Formation**. The Company was formed on Formation-Date, by filing the appropriate Articles of Organization/Certificate of Formation with the State of *STATE-NAME and shall continue as a limited liability company pursuant to the *STATE-NAME Limited Liability Company Act (the "Act"). Whenever the terms of this Agreement conflict with any provision of the Act, the terms of this Agreement shall control except to the extent any provision of the Act cannot be waived or altered by a limited liability company operating agreement.

2. **Name**. The name of the Company is set forth in the preamble. The Company may do business under that name and, as permitted by applicable law, under any other name as determined, from time to time, by the Member.

3. **Purpose**. The Company shall have the power and authority to carry on any lawful business, purpose or activity not prohibited under the Act and shall possess and exercise all the privileges granted by the Act or by any other law of by this Agreement, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct or advancement of the Investment, purposes or activities of the Company described above including, without limitation, the power to:
    a. Engage independent counsel, accountants, appraisers, real estate brokers, property managers, maintenance personnel, consultants, and such other persons as the Member may deem necessary or advisable.

b. Purchase real estate of any kind or nature and take all actions incident thereto, including but not limited to purchasing, insurance, buying title insurance, renting, improving, maintaining, such property.

c. Open, maintain and close bank accounts and draw checks and other orders for the payment of monies.

d. Enter into, make and perform all loans, contracts, agreements or other undertakings as may be necessary, advisable or incidental to carry out its Investment and purposes as described above.

4. **Offices**. The Company shall maintain places of business at such places as determined from time to time by the Member.

5. **Registered Agent**. The name and the address of the Company's registered agent in the state of *STATE-NAME is as designated in the State filings and may be changed, from time to time, by the Member by filing the appropriate and required documents with the State of *STATE-NAME.

6. **Duration and Term**. The term of the Company commenced on the date of the filing of the Certificate of Formation with the State and shall continue in perpetuity unless Company is dissolved in accordance with the provisions of this Agreement and the Act.

7. **Assets**. Company assets shall be titled in the name of the Company only. Custody of any Company assets may be delegated by the Member to an investment advisor, money manager, trust company, or other person in the reasonable discretion of the Member.

8. **Bank Accounts**.

a. The Manager may, from time to time, open bank accounts in the name of the Company, and the funds of the Company shall be deposited therein. However, such funds shall only be used solely for the Investment of the Company and no funds of the Company shall be commingled with the funds or accounts of any individual Member or Manager or any person related to any such Member or Manager.

b. The Manager is designated, by this Agreement, as an authorized signatory on any Company accounts.

c. The Manager may determine to conduct banking transactions on behalf of the Company as a nominee for and on behalf of the Company for economic and administrative convenience, but if such shall occur the Certified Public Accountant for the Company shall fully account for all such transactions to assure that the Company's independent economic and tax status is respected.

9. **<u>Books and Records</u>**. The Company shall maintain complete and accurate books and records of the Company's Investment and affairs as required by the Act and such books and records shall be kept at the Company's Registered Office or such other place as designated by the Manager and shall in all respects be independent of the books, records and transactions of the sole Member or Manager.

10. **<u>Fiscal Year</u>.** The fiscal year of the Company shall end on the same day as the last day of the fiscal year of the Member.

11. **<u>Tax Status</u>**. The Company shall be treated as a single member disregarded entity for federal income tax purposes, in accordance with Treasury Regulation Section 301.7701-3(b)(ii).

12. **<u>Reimbursement</u>**. The Company shall pay or reimburse all reasonable out-of-pocket expenses incurred by the Manger or the Member on behalf of the Investment; however, reimbursement shall only be made where the expense is a reasonable, ordinary and necessary expense of the Company incurred in the furtherance of its Investment and purposes.

B. **<u>Capital Contributions And Capital Accounts</u>**

1. **<u>Capital Accounts</u>**. There shall only be a single class of Membership Interest. The Company shall establish and maintain a separate capital account for the Member. The account shall reflect the Member's capital contributions and increases for the Member's share of any net income or gain of the Company as well as decreases for distributions made and the Member's share of any losses or deductions of the Company ("Capital Account"). The manner in which Capital Accounts are maintained pursuant to this Agreement shall comply with the requirements of the Internal Revenue Code of 1986, as amended ("Code"), section 704(b) and, notwithstanding anything to the contrary contained herein, the method by which Capital Accounts are maintained shall be interpreted and applied in a manner, or so modified, in order to comply.

2. **<u>Contributions</u>**. The Member has made such capital contributions to the Company as are set forth in the Company's books and records and holds a One Hundred percent (100%) Percentage Interest in the Company. The Member is not required to make any additional capital contributions to the Company but may do so in his sole discretion.

3. **Note to Reader:**

If an LLC member files bankruptcy, the Bankruptcy Court may be able to disregard that state law provides that the charging order is the sole remedy of a judgement creditor in certain states unless the Operating Agreement or some other aspect of the LLC constitutes what is known as an "Executory Contract" under the bankruptcy law.

Requiring members to make significant capital contributions, to attend meetings or have designated professionals attend meetings, to guarantee obligations, and otherwise can make an LLC agreement an Executory Contract for this purpose.

A provision used by one of the authors in most Operating Agreements is as follows:

> Each Member may make additional Capital Contributions to the capital of the Company in cash or in property subject to the approval of the Manager. During any five-year period, each Member shall be required to make additional Capital Contributions to the capital of the Company in cash or in property in amounts as decided by a majority vote of both the Manager and Members, which may be for up to one-third of the gross value of the Company assets, as valued in good faith by a Majority of Voting Interests of the Managers, multiplied by the pro rata ownership interests of such Member. In no event shall a Member be personally liable for any losses, obligations, or debts of the Company in excess of his or her respective initial Capital Contribution. The first applicable five-year period described above shall begin when the Company has been formed, and shall continue until this Operating Agreement has been executed by each party hereto, and shall continue until the fifth anniversary date thereof, after which there shall be subsequent consecutive five-year terms applicable under this Section 5.02 so long as this Operating Agreement is in effect.

C. **Allocations And Distributions**

1. **Allocations**. Except as may be required by the Code as amended net profits, net losses, and other items of income, gain, loss, deduction, and credit of the Company shall be reported by the sole Member on said Member's income tax return. The sole Member may make distributions from time to time after the Member determines that the Company has sufficient funds available.

2. **Distributions**. The Member may make distributions from time to time of net cash flow, defined as all revenues to the Company during any fiscal period decreased by (i) cash expenditures for operating expenses, (ii) capital expenditures to the extent not made from reserves, (iii) reserves for contingencies, expenses and obligations, (iv) debt service, and (v) any other expenses associated with operating the Investment ("Net Revenue"), so long as, after giving effect to such distribution, the assets of the Company exceed the liabilities and the Company has sufficient funds

available to make such distributions.

D. **Membership Interests**

1. **Liability**. The sole Member shall not be liable for any monetary damages to the Company, or in any other manner, for any breach of such duties except:
   a. If the sole Member receives a financial benefit to which the sole Member is not entitled.
   b. Takes an action, or refuses to act, in violation of this Agreement or the Act or which is a knowing violation of the law.
   c. Acts in a manner which is grossly negligent of which constitutes intentional and willful misconduct.
   d. A person serving as a substitute Member, even temporarily as set forth below, but who is not the sole Member, shall also be liable for any breach of this Agreement or violation of any terms of the Act as well as any act or omission including, without limitation, acts of fraud, negligence or misconduct of any type.

2. **Other Activities**. The sole Member may engage in other business ventures of every nature, including, without limitation by specification, the ownership of another business similar to that operated by the Company. The Company shall not have any right or interest in any such independent ventures or to the income and profits derived there from.

3. **Transfer of Membership Interest**. The Member may transfer (including without limitation any sale, transfer, assignment, pledge, creation of a security interest or other disposition), in part or in whole, in its Membership Interest in the Company.

4. **Substitute Member**. If an assignment of a Membership Interest, in whole or in part, is permitted herein, such assignee shall only be entitled to the distributions and allocation of profits and losses the assigning Member would have been entitled to absent such assignment in accordance with such Member's Percentage Interest. Such assignee shall not be entitled to participate in the management and affairs of the Company unless or until he or she is admitted by the Member as a substitute Member as expressly set forth in writing.

E. **Manager's Duties and Rights**.

6.

1. The Manager shall be responsible for the daily management and operations of the Business. Daily affairs shall mean only the ongoing, regular, routine affairs of the

Company. The Manager shall be permitted to exercise the following powers with due regard for the Manager's fiduciary obligations to the Company and Members:

a. Have such powers and duties as may from time to time be specifically conferred or imposed by the Members.

b. To do all things necessary or convenient to carry out the Business and affairs of the Company so long as they are in accordance with any applicable licenses or permits.

c. To purchase, lease, or otherwise acquire any real, personal, tangible, or intangible property but only if held in the form of a limited liability company or other entity.

d. Purchase, Sell, convey, mortgage, grant a security interest in, pledge, lease, license, exchange, or otherwise dispose of or encumber any real, personal, tangible, or intangible property.

e. To open bank accounts and make deposits into or checks and withdrawals against such accounts and to designate and authorize additional signatories on such accounts as set forth above.

f. To borrow money, incur liabilities, and other obligations, establish lines of credit, mortgages, and other credit and financing facilities relating to the Business or property.

g. To guarantee letters of credit and other financing arrangements.

h. To purchase liability, property, casualty, title, and other insurance to protect the Business and property of the Company.

i. To commence, prosecute or defend any proceeding in the Company's name or relating to the Business.

j. To enter into any arrangements or agreements, and execute any contracts, documents or instruments on behalf of the Company in such forms as the Manager may approve in his reasonable discretion.

k. To engage consultants and agents, define their respective duties and establish their compensation or remuneration and to compensate them from Company funds.

l. To conduct routine banking and investment transactions.

m. To execute, subject to the discretion of the Members, on behalf of the Company all instruments and documents such as checks, drafts, patent applications and documents to perfect any patent, trademark or copyright in the name of the Company, financing statements, but not documents providing for the acquisition, mortgage or disposition of the Company property, material leases, material licenses, partnership agreements, and any other instruments or documents material in nature (materiality determined in the discretion of the Members).

n. To invest any Company funds temporarily (by way of example, but not by limitation) in time deposits, short-term governmental obligations, commercial paper and other investments. This investment power shall not in any manner limit the investment related powers set forth hereinabove.

o. The Manager or an authorized Person shall file such other certificates and documents as are necessary to qualify the Company to conduct business in any jurisdiction in which the Company conducts business.

p. To do and perform all other acts as may be necessary or appropriate to the operation, maintenance and the conduct of the Company and the Business.

2. **Other Activities**. The Manager may engage in other business ventures of every nature, including, without limitation by specification, the ownership and management of another business similar to that operated by the Company. The Company shall not have any right or interest in any such independent ventures or to the income and profits derived therefrom.

3. **Resignation of Manager**.

a. The Manager may resign at any time by giving Sixty (60) days advance written notice (except in the case of disability or death) to the Members of the Company, and such resignation shall take effect upon receipt of the notice or such later date as specified in such notice, but in no event less than Sixty (60) days after delivery. Acceptance of such resignation by the Members is not necessary to make it effective; however, a successor Manager must be named and must assume the responsibilities of the Manager upon the effective date of the first Manager's resignation.

b. The resignation of a Manager who is also a Member at the time of such notice specified above shall not constitute a resignation as a Member. For a Manager to also resign as a Member, he or she must comply with the provisions in this Agreement to do so.

4. **Incapacity or Death of Manager**.

a. For purposes of this Agreement, an individual Manager shall be treated as being incapacitated if (i) two physicians licensed to practice medicine in the state in which an individual Manager resides, having evaluated Manager, conclude that he or she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the management of the Company as a result of any physical, mental or emotional illness, disability, ailment or accident or any deficiency or disorder, including chronic use of drugs or alcohol or other similar cause; or (ii) such condition is conclusively established by a determination of a court having jurisdiction over such matters; or (iii) Manager is unable, due to such condition described herein, to effectively discharge his or her duties and operate the Business for a period of Ninety (90) consecutive days. The aforementioned shall be deemed "Disabled." If a Manager is determined to be incapacitated, the Manager's economic interests, if any, shall be treated as set forth above as for Members Interests.

b. If the Manager dies, then the successor Manager, who shall be

*CLIENT2NAME, shall take over the duties and obligations of the Manager set forth herein. If there is no Manager serving, then by a majority vote of Membership Interests the Members shall designate a new Manager to serve. During any period during which no Manager is serving, the decisions of the Manager shall be made by majority vote of the Membership Interests.

c. If the Manager is permanently disabled, then the successor Manager shall take over the duties and obligations of the Manager set forth herein until the Manager is able to resume his duties.

5. **Transactions Between Manager and Company**. Except as otherwise provided herein, a Manager may lend money to borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more specific obligations of, provide collateral for and transact other business with the Company and, subject to applicable law, shall have the same rights and obligations with respect to any matter as a person who is not a Manager.

F. Dissolution And Termination

1. **Events Causing Dissolution and Winding Up**. The Company shall be dissolved, and its affairs wound up upon the first to occur of the following events:
   a. the written consent of the Member.
   b. the entry of a decree of judicial dissolution under the Act; or
   c. upon the death of the Member or such other event as specified in this Agreement.

2. **Effect of Dissolution**. The Company may not be terminated until all of its affairs are wound up and a certificate of dissolution is issued by the state in which the Company was formed.

3. **Distribution of Assets and Termination**. Upon the winding up of the Company's affairs, a full account of the assets and liabilities of the Company shall be taken, and the assets shall be liquidated and distributed, first, to the extent permitted by law, to creditors and in satisfaction of Company debts and liabilities, and then to the Member. Upon completion of the liquidation of the Company and the distribution of assets, the Company shall terminate, and the Member shall have the authority to execute and record any and all documents necessary to affect the dissolution and termination of the Company.

G. General Provisions

1. **Governing Law and Jurisdiction**. This Agreement shall be governed by and construed in accordance with the laws of the State of *STATE-NAME and all Parties hereto consent to the jurisdiction of the courts located therein and agree that all claims, actions or proceedings related to this Agreement be heard and determined by such courts.

2. **Successors and Assigns**. This Agreement shall be binding upon and shall inure to the benefit of the Member hereto, their respective heirs, legal representatives, successors, and assigns.

3. **No Third-Party Beneficiaries**. This Agreement is made and entered into between the Parties for the exclusive benefit of the Company, its Member, and their successors or assigns. Except as otherwise expressly stated herein, this Agreement is not intended for the benefit of any creditor of the Company or any third person, and no such creditor or other third person shall have any rights under the Agreement or any agreement between the Company and its Member.

4. **Accounting and Tax Matters**. All required federal, state, and local tax income returns and financial and accounting books and records of the Company, which shall be completely and accurately maintained as required by the Act, shall be prepared under the direction of the Manager by the Certified Public Accountant so designated by the Company.

5. **Notice**. All notices required or permitted hereunder shall be in writing and shall be sent to the address set forth above for the Member ("Notice"). Such Notice shall be deemed effectively given (1) upon personal delivery to the Member to be notified; (2) when sent by confirmed facsimile if sent during normal business hours of the recipient or, if not, on the next business day; (3) Three (3) days after having been sent by registered or certified mail, return receipt requested; or (4) upon the first business day after being sent by recognized overnight carrier. A copy of any Notice to Company shall be sent to:

    Lawyer Name

    Lawyer Contact Information

6. **Interpretation**. The captions, section headings, designations and numbers are inserted for convenience only and shall not affect the interpretation of any provision. The use of any particular gender, or neuter, or the use of singular or plural, shall be interpreted as appropriate to the specific provision involved.

7. **Waiver**. The failure of any Party to give notice of default or enforce compliance of the terms of this Agreement or its rights hereunder, or the granting in writing of any extension of time for performance, shall not constitute a waiver by such Party of any term or condition of this Agreement. Any waiver of such Party's right to the strict adherence to any term of this Agreement by any other Party on any occasion must be clearly expressed in a writing signed by the Party waiving such right.

8. **Severability**. In the event that a court of competent jurisdiction determines that any part or provision of this Agreement is invalid or unenforceable, such determination shall not affect the validity or enforceability of any other term or provision contained herein.

9. **Entire Agreement**. This Agreement sets forth the entire agreement and understanding of the Member and supersedes any and all prior proposals, negotiations, representations, agreements, or understandings relating to the Company.

10. **Amendment and Modification**. This Agreement may not be modified, amended, or changed unless in writing and signed by the Member.

11. **Counterparts**. This Agreement may be executed in one or more counterparts, each of which shall be deemed to constitute an original and both of which together shall constitute one and the same instrument and shall become effective when one or more counterparts have been signed by each of the Parties hereto. A PDF, facsimile, photocopy or other electronic reproduction shall be as valid as an original.

7.

IN WITNESS WHEREOF, the sole Member has executed this Agreement effective as of the day and year written below.

*MEMBERNAME, Sole Member (if member is entity)

By:______________________________ Dated: *DATE

*CLIENTNAME, Manager

Or, if sole member is trust:

***TRUSTNAME**, Sole Member (if member is a trust)

Investment Adviser hereby DIRECTS *TRUSTEENAME as Directed Trustee to execute this Agreement and any ancillary documentation necessary or advisable to implement its terms:

By:____________________________ Dated: *DATE

*INVTRUSTEE, Investment Trustee

By: *TRUSTEENAME, Trustee

as DIRECTED Trustee

By:____________________________ Dated: *DATE

Officer Name:

Officer Title:

*ENTITYNAME

By:____________________________ Dated: *DATE

*CLIENTNAME, Manager

v. Comprehensive Declaration of Gift, courteously from Marty Shenkman.

Comment: Yellow highlights are comments for clients to consider.

Comment: The following is a generic cover letter that has a number of recommendations that should be considered to provide to a client along with sample documents if they are going to prepare their own transfer documents, as well as a sample declaration of gift letter, and a sample assignment of entity interests. This approach may be used when the client has a family office or equivalent expertise and can more efficiently collect detailed information in this format to facilitate the practitioner's review and finalization of documents. Practitioners should be cautious and realistic as to what capabilities a client and client's staff may have to address completing any documentation or transactions, and the risk that a particular client may opt to use forms provided to complete transactions without review by counsel. The range of ability may be from dangerous to quite sophisticated when the client has a family office with staff including professionals, etc. If the practitioner is concerned then perhaps the better approach would be not to provide sample forms or guidance and recommend that the practitioner handle all matters.

Comment: Consider whether witnesses and/or notary blocks should be added to some or all forms.

*DATE

Via Email

*CLIENT NAME

*ADDRESS

Re: Sample Transfer Documents for Entities and Considerations.

Dear *CLIENT NAME:

As requested, we have prepared a generic "sample" declaration of gift, assignment of entity interests and direction letter that you can consider adapting for various transfers via gift of entities that you have indicated you wish to transfer to your trust(s). If you complete and sign any of these documents without being afforded an opportunity to review all relevant documents before signature, we cannot be responsible for any of the myriad of potential negative implications of using these samples. **These samples are intended only as general guidance for you to prepare draft documentation for our review. Any other application is made at your own risk.** Several considerations regarding adapting these sample forms:

1. **Adaptation of Sample Forms Provided**. While we have provided sample documents with comments to consider, every transaction is different and there are often numerous nuances to any transactions that cannot be anticipated in any sample documents provided. We recommend that if you as the client adapt these forms to complete transactions on your own that you send the proposed transfer documents to us to review before consummating the transaction, as each transaction is complex and every situation is different. There may be specific language or changes that should be made to the documents based upon that situation that cannot be anticipated at this time.
2. **Individual Transferor**. Each person assigning interests they own to their trust should sign separate gift letters, assignments and other documents. Do not have multiple transferors effectuating gifts under a single document. One reason for this is so that each transferor has to file their own separate gift tax return and you should not have names of other transferors listed in the same documentation to raise similar questions on their audit.
3. **Interim Spousal Gift**.
    i. If as part of the transfers there is a retiling of assets from one spouse to another, and the subsequent gift by the second spouse of those assets to a trust established by the second spouse, the IRS might argue under the "step-transaction" doctrine that the transfers should be recharacterized so that the second spouse's later gift was in fact a gift by the original owner/spouse.
    ii. If the IRS were to successfully challenge a transaction under the step-transaction doctrine it would have adverse tax consequences for the family.
    iii. It is important that such interim gift assets be held by the second spouse for as long as possible before any subsequent transfers are made. Preferably this holding period should be longer than 60 days and during such period there is real risk of loss and economic and legal consequences to the spouse holding the interest.
    iv. **Comment**: Add any specifics based upon knowledge of the kinds of transactions the client is involved in. For example, for real estate clients who have numerous speculative deals and contractual rights if the deal is new and they intend to transfer only the contractual rights, it technically may not be owned by a specific spouse. However, if the contract right were entered into an entity, even a "shelf company", that entity could be owned by one of the spouses, and therefore needs to consider the step-transaction issues discussed above. Note for shelf entities considering any prior reporting obligations under the Corporate Transparency Act.

4. **<u>Ancillary Documentation</u>**. Be certain to review any ancillary documentation, third party contractual arrangements, etc. before you complete transfers. If there are any third-party approvals required (e.g., a lender, tenant with a lease that has approval rights over transfers, a person who granted an option that has restrictions on assignment, etc.) be certain to comply with those provisions and corroborate compliance. Even if it is, for example, a transfer restriction in an LLC operating agreement that the same person making the transfer is manager of, there should be a legal document prepared in which that same person in their capacity as a manager approves the transfer pursuant to the terms of the operating agreement. Any failure to comply with contractual requirements may have repercussions with the third party involved, and may be argued by the IRS or another third-party creditor to be evidence that the formalities of the entity or transaction were ignored so that the entity or transaction should be disregarded.
5. **<u>Valuation and Appraisal.</u>**
    i. A valuation report from a qualified appraiser should be obtained establishing the value of the interest being transferred is (e.g., membership interest in an LLC that holds certain contract rights) and value should not be zero. We would prefer some value to be established for the entity interests being transferred as that is clearer to report on a gift tax return than a zero-dollar value transfer.
    ii. As noted elsewhere, a zero-dollar value transfer may not work for Generation Skipping Transfer ("GST") tax allocation or a "Wandry" defined value clause. For example, if a valuation adjustment clause is employed as part of the transfer and the amount being transferred is listed as zero, if the IRS successfully argues on an audit for a valuation adjustment that there is in fact a value to entity interest on the date of transfer, then no gift was made to the trust under the transfer documents.
6. **<u>Valuation Adjustment Clause</u>**.
    i. You might consider the use of a valuation adjustment clause in the transfer documents to endeavor to deflect a valuation challenge by the IRS.
    ii. One approach, and there are others that should be considered as well, is to use a so-called Wandry clause that transfers a dollar value of equity interests to the trust, rather than a percentage of the entity interests. There are other alternative mechanisms that might be used.
    iii. If the value of the asset is appraised as zero, a transfer of zero dollars' worth of equity interest may not be effective under a defined value clause, there must be a value established in the transfer documents.
    iv. The IRS is not assuredly bound by any of these adjustment mechanisms. Note that the IRS has "Non-Acquiesced" to the use of the Wandry defined value adjustment clause, and the incorporation of such a mechanism may potentially increase the chances of an audit of the gift tax return.
    v. If the transfers are of modest amounts and you have sufficient estate and gift tax exemption to avoid the risk of exceeding the exemption, you might determine to skip (delete) the Wandry defined value clause language (valuation adjustment) and use a simple "straight" gift.

7. #**Comment**: Only include the following if there is an incomplete gift trust provision in one of the trusts. **Apportionment Language and Incomplete Gift Trust As Part of Trust Valuation Adjustment Mechanism**.
    i. We have discussed in previous letters and memoranda provided to you considerations regarding the apportionment clause and incomplete gift trust provisions included in the TRUST-NAME. This language appears in Article, page of the trust.
    ii. For this trust, any gifts made to the trust after APPORTIONMENT-DATE-FROM-TRUST will be made 90% to the incomplete gift trust, and 10% to the completed gift "Lifetime Trust." This was included as a provision to attempt to defray a successful valuation challenge by the IRS for any sale transactions between the grantor and the trust.
    iii. In order to avoid the triggering of the apportionment language and the treatment discussed above, so that 100% of the gift made is included in the completed gift Lifetime Trust as intended, you must include the appropriate valuation adjustment language for any transactions assigned after the date specified above in the transfer documents (i.e., the declaration of gift and the assignment).
    iv. If the date in the trust is close. If it is too close to date indicated above you might incorporate the sample language provided in the transfer documents into any transfer documentation for the trust indicated above and indicate that if for any reason the transfer is not consummated before the date provided in the apportionment clause, the language avoiding application of the trust's defined value mechanism shall apply. That way, if you start a transfer of entity interests to a trust now, but there is some legal impediment that slows the process, the transfer may still accomplish your intent even if not concluded until after the date provided in the trust.
8. **Gift Tax Return**. You should consider reporting each and every transfer on a gift tax return, even non-gift transfers (e.g., sales, transfers between spouses that do not require election of qualifying marital trust treatment) so you may toll the statute of limitations as to the transfers made to the trust. This requires that the return include "adequate disclosure" of the transfers. If the asset transferred does not have a "qualified appraisal" (a defined term in the law) then the statute of limitations may not toll (run) unless there are additional detailed disclosures.
9. **Entity Governing Documents**. The governing documents for each entity in which an interest is transferred should updated so that there are governing documents reflecting the ownership interests prior to any transfers, and governing documents reflecting the post-transfer ownership interests, e.g., an irrevocable trust as owner of part of the equity interests. Note that there have been several recent high profile tax cases that have emphasized the importance of respecting entity and other formalities.
10. **Comment**: The following should be revised based upon the specific situation of the client and if they have indicated any considerations for their entity structure and how they will fund the trusts. **Assignment of Contract Rights Instead of Entity Interests**.
    i. If the transfer you intend to make to the trust(s) is an assignment of contract rights to the trust, rather than an interest in an entity, you can do that by

using appropriate assignment documentation, e.g., a bill of sale for the right involved by way of gift.

ii. If you are only transferring the contract rights to the trust, then you would assign that as you indicated with an assignment and assumption document instead of an LLC assignment. The sample assignment provided should not be used for the assignment of contract rights. We can provide an additional document for the transfer of contract rights if needed.

iii. Regarding the valuation adjustment clause discussed above, it may be that the Wandry valuation adjustment mechanism might have a better likelihood of succeeding if the asset were transferred to the LLC so that the actual asset transferred is an interest in an LLC that holds the contract right instead of the "raw" contract right.

If you have any questions regarding the above or the sample documents provided, please let us know.

Sincerely,

Firm-Name

By: /s/ *Partner-Name*

Partner-Name, Esq.

Enclosures.

Declaration of Gift

By TRANSFEROR

To

Irrevocable-Trust

I, TRANSFEROR, hereby state and declare that: **Comment**: We recommend a gift letter even if there is an actual value of the interest of zero to confirm that you intend a transfer. We would recommend it best to have at least a nominal value in all instances (e.g., the formation cost of the entity) so that some dollar figure can be reported on a gift tax return. An actual value of zero just looks odd in estate planning and might itself invite scrutiny. If you have an actual value of zero, it may be impossible to allocate generation skipping transfer ("GST") tax exemption to the gift which could be quite problematic. Further, the valuation adjustment mechanisms, e.g., a so-called Wandry clause, may not function properly with a zero value (e.g., you cannot transfer the interest in the entity using a dollar value valuation transfer if there is no value).

9. I am a resident of the State of *STATENAME.
10. If cash gift I have transferred by way of gift, the sum of ___________ Dollars ($______) (the "Interest").
11. If gift of LLC to spouse. I have this day executed an Assignment of Membership Interests concerning limited liability company Membership interests to transfer Percent (%)/any and all of my Membership Interests in *LLC1NAME, *LLC2NAME, and *LLC3NAME to *SPOUSE NAME. **Comment**: We recommend that if a gift is being made to a spouse and that spouse will thereafter re-gift the same interest to that spouse's trust that you call to discuss issues that may arise. That interest should remain in the donee spouse's name for at least 60-days and preferably longer. Remember that there is no bright line test of any particular number of days being enough, or not enough. Also, while the donee spouse owns the asset, steps should be taken to demonstrate that the donee spouse has control over the asset. This might include receiving a pro-rata distribution from the entity, having Form K-1 reflect the period of ownership, updating amended and restated governing documentation to govern the period of ownership, and more. No Wandry or other valuation adjustment mechanism is used on a gift to a U.S. citizen spouse, as it should qualify for the unlimited gift tax marital deduction if it is a respected transfer.
12. **Comment**: If you have (or are) making a gift of cash from a joint account to an irrevocable trust, the following language attempts to clarify that the gift was made just by the spouse that established the irrevocable trust. However, for any future gifts, you should consider making gifts from an account held in the individual name of the spouse that established the irrevocable trust. There is no assurance that this clarification will be respected, and the IRS may attempt to argue that a gift made from a joint account was made partially by both spouses, which could have adverse tax consequences. I have transferred any rights or interests I may have in or to the assets transferred from *ACCOUNT-NAME-NUMBER in the amount of AMOUNT Dollars ($), from an account held by

myself and *SPOUSE-MAKING-GIFT-TO TRUST, to my spouse, effective the day before *SPOUSE-MAKING-GIFT-TO TRUST transfer of such assets to an irrevocable trust, *TRUST-DATE. It is my express intent that this gift qualifies for the unlimited gift tax marital deduction. This gift shall be deemed effective immediately as of the effective date (defined above) without any requirement to segregate these assets from any joint account title.

13. **Comment**: If you are making a gift of entity interests to irrevocable trust without a defined value mechanism, the following language can be used to reflect that gift. This language should be revised accordingly if the entity interest being transferred is an LLC, corporation, or Partnership. I have this day executed a Stock Power Assignment transferring certain Shares membership interests partnership interests in *ENTITYNAME transferring Shares, representing __% of the Shares OR ___% of the membership partnership interests in *ENTITYNAME to Irrevocable-Trust.

14. Wandry defined value gift.

    a. **Comment**: The following is language that might be considered for a gift of entity interests to irrevocable trust with a Wandry defined value clause. This is to be used for the transfer of a dollar value, not a percentage interest, in an assets, such as an interest in an LLC, to endeavor to deflect an IRS valuation challenge. Note that the IRS has non-acquiesced in the Wandry case so a challenge on audit should be assumed.

    b. I have this day executed this Declaration of Gift and separate Assignment of Entity Interests (the "Assignment") transferring (the "Transfer") the dollar value of shares of stock membership interests partnership interests (the "Gift Interests") with the following dollar value in each entity listed below to the Irrevocable-Trust Name ("Trust"):

        i. VALUE1-OF-GIFT Dollars ($_____) in value of the shares of Common Stock, no par value, membership interests partnership interests of ENTITY1-NAME, a STATE corporation limited partnership limited liability company ("*ENTITY1-DEFINED-TERM"). For administrative convenience, the value of this gift is estimated as ENTITY1-PERCENT Percent (%) of the stock membership interests partnership interests of *ENTITY1-DEFINED-TERM.

        ii. VALUE2-OF-GIFT Dollars ($_____) in value of the shares of Common Stock, no par value membership interests partnership interests of ENTITY2-NAME, a STATE corporation limited partnership limited liability company ("*ENTITY2-DEFINED-TERM"). For administrative convenience, the value of this gift is estimated as ENTITY2-PERCENT Percent (%) of the stock membership interests partnership interests of *ENTITY2-DEFINED-TERM.

        iii. add others as needed.

    c. The Transfer of the Gift Interests to the Trust is intended to constitute, and shall constitute, the complete and irrevocable gift of the aforementioned Gift Interests.

    d. I have had a good-faith determination of such values made by an independent third-party professional experienced in such matters and appropriately qualified to make such a determination. Based on such determination, the number of shares and/or percentage of interests constituting the Gift Interests is estimated to be the entity interests indicated above. Nevertheless, if the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of shares and/or percentage of interests gifted shall be adjusted accordingly so that the number of shares and/or percentage of interests of the entities listed above gifted to the Trust equals the dollar amount set forth above, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law.

15. Gift to trust with self-adjustment Mechanism/Incomplete Gift Trust in donee trust document.

    a. **Comment**: An incomplete gift trust with an apportionment mechanism included in the trust endeavors to deflect some percentage (e.g., 90%) of a gift to an irrevocable trust that could be taxable (i.e., exceeds the donors gift tax exemption) to an incomplete gift trust formed under the same instrument. This provision may be used and adapted if there is an incomplete gift trust as part of the trust instrument, a mechanism that allocates taxable gifts to the trust after a date specified in the provision in the trust that would be violated. Review the trust to confirm the existence and application of this mechanism, and if appropriate, add the proper article and page references.

    b. The gift of the Gift Interests shall not be subject to the valuation adjustment article, Article , page, "TITLE OF ARTICLE," OR "Division of Property into Portion I and Portion II" stipulation contained in the Irrevocable-Trust ("Trust").

    c. This Declaration of Gift shall constitute "written instructions to the contrary" as contemplated therein. The gift of the above Gift Interests shall be held solely in the Lifetime Trust of the Trust.

16. This gift has been made to *TRUSTEE1NAME and *TRUSTEE2NAME, Co-Trustees of the Irrevocable-Trust, with a mailing address c/o *TRUSTEE1NAME, Investment-Trustee-Address.

17. The Transfer is made by way of gift and without any consideration.

18. I declare under the penalties of perjury that the foregoing is true and correct and further declare that this Declaration of Gift is being executed to confirm such gift.

__________________________ Date: _____________

TRANSFEROR, Grantor

If Notary needed or desired

STATE OF STATE §

§

COUNTY OF ___________ §

This instrument was acknowledged before me on ______________, *YEAR, by TRANSFEROR, to me known, and known to me by the provision of adequate identification to be the person aforesaid who executed this instrument.

____

Notary Public, State of STATE

Assignment of Entity Interests
by TRANSFEROR to
Irrevocable-Trust
by Way of Gift

1. **<u>Comment</u>**: If you are gifting all interests in entity to the trust, without including a defined value mechanism, then consider the use/adaption of this paragraph instead of the following provision. TRANSFEROR, the undersigned donor ("Donor") hereby assigns by way of gift, and for no consideration, the following membership interests, which constitutes all of Donor's right title and interest in the entity herein named, Percent (____%) membership interests (the "Transferred Interests") in *NAME, LLC, a ENTITY-STATE limited liability company formed on DATE ("Company"), to Irrevocable-Trust, a TRUST-STATE trust ("Assignee"). The Transferred Interests represent Donor's entire Interest in the Company. Pursuant to the Assignment, Assignee shall succeed to all of Donor's Interest as a Member of the Company. OR
2. Wandry defined value gift.
    a. **<u>Comment</u>**: Gift of entity interests to an irrevocable trust with a Wandry (or other type) of defined value clause should be addressed. This will generally entail the transfer of a dollar value, not a percentage interest, in an asset, such as an interest in an LLC, to endeavor to deflect an IRS valuation challenge. Note that the IRS has non-acquiesced in the Wandry case so a challenge on audit should be assumed.
    b. I have this day executed this Assignment (the "Assignment") transferring (the "Transfer") the following dollar value of the shares of stock membership interests partnership interests (the "Gift Interests") in each entity listed below to the Irrevocable-Trust ("Trust"):
        i. VALUE1-OF-GIFT Dollars ($_____) in value of the shares of Common Stock, no par value, membership interests partnership interests of ENTITY1-NAME, a STATE corporation limited partnership limited liability company ("*ENTITY1-DEFINED-TERM"). For administrative convenience, the value of this gift is estimated as ENTITY1-PERCENT Percent (%) of the stock membership interests partnership interests of *ENTITY1-DEFINED-TERM.
        ii. VALUE2-OF-GIFT Dollars ($_____) in value of the shares of Common Stock, no par value membership interests partnership interests of ENTITY2-NAME, a STATE corporation limited partnership limited liability company ("*ENTITY2-DEFINED-TERM"). For administrative convenience, the value of this gift is estimated as ENTITY2-PERCENT Percent (%) of the stock membership interests partnership interests of *ENTITY2-DEFINED-TERM.
        iii. add others as needed.
    c. This Assignment of the Gift Interests to the Trust is intended to constitute, and shall constitute, the complete and irrevocable gift of the aforementioned Gift Interests.

d. I have had a good-faith determination of such values made by an independent third-party professional experienced in such matters and appropriately qualified to make such a determination APPRAISER NAME. Based on such determination, the number of shares and/or percentage of interests constituting the Gift Interests is estimated to be the entity interests indicated above. Nevertheless, if the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of shares and/or percentage of interests gifted shall be adjusted accordingly so that the number of shares and/or percentage of interests of the entities listed above, gifted to the Trust equals the dollar amount set forth above, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law.

3. Gift to trust with self-adjustment Mechanism/Incomplete Gift Trust in donee trust document.

    a. **Comment**: An incomplete gift trust with this apportionment mechanism included in the trust endeavors to deflect some percentage, e.g., 90% of a gift that could be taxable to an incomplete gift trust formed under the same instrument. This provision may be used and adapted if there is an incomplete gift trust as part of the trust instrument, and a mechanism that allocates taxable gifts to the trust after the date specified in the provision in the trust that would be violated. Review the trust to confirm the existence and application of this mechanism, and if appropriate, add the proper article and page references.

    b. The gift of the Gift Interests shall not be subject to the valuation adjustment provision contained in Article, page, "PROVISION NAME," "Division of Property into Portion I and Portion II" stipulation contained in the Irrevocable-Trust ("Trust").

    c. This Assignment shall constitute "written instructions to the contrary" as contemplated therein. The gift of the above Gift Interests shall be held solely in the Lifetime Trust of the Trust.

4. This Assignment shall expressly be deemed effective as of the date of execution by Donor unless a different effective date is specified herein.

5. Each of the parties hereto covenants and agrees to execute and deliver, at the request of any other party hereto, such further instruments of transfer and assignment and to take such other action as such other party may reasonably request, including execution of an operating agreement MODIFY to partnership agreement shareholders' agreement as appropriate effective of even date, to more effectively consummate the assignments and assumptions contemplated by this Assignment.

6. This Assignment may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Assignment and all of which, when taken together, will be deemed to constitute the same agreement. The exchange of copies of this Assignment and of signature pages by facsimile transmission (including in .PDF format) shall constitute effective execution and delivery of this Assignment as to the parties and may be used in lieu of the original Assignment for all purposes. Electronic signatures shall be as binding as an original or "wet" signature. Signatures of the parties transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

Assignor:

__________________________ Date: _______________, *YEAR

TRANSFEROR

Witness:

__________________________ Date: _______________, *YEAR

If Notary needed or desired

STATE OF STATE §

§

COUNTY OF ____________ §

This instrument was acknowledged before me on _______________, *YEAR, by TRANSFEROR, to me known, and known to me by the provision of adequate identification to be the person aforesaid who executed this instrument.

____

Notary Public, State of STATE

Assignee:

Investment Trustee of Irrevocable-Trust

Hereby DIRECTS the Trustee to Accept the Above

Gift:

___________________________ Date: _______________, *YEAR

NAME, Investment Trustee

Comment: A direction letter for an institutional trustee to accept the gift transfer might be necessary, or perhaps advisable.

Accepted and Agree to be bound by Operating Agreement
governing each Company, if any, and to execute the next
Amended and Restated Operating Agreement:

Irrevocable-Trust, Member

TRUST-COMPANY, **DIRECTED** as General, Administrative and Distributions Trustee

By:______________________ Date: ______________, *YEAR

Name: ____________

Title: _____________

Investment-Trustee-Name, Investment Trustee

Irrevocable-Trust

Investment-Trustee-Address

Comment: The following is a sample direction letter that can be provided to the institution to direct them to sign the transfer documents as well as to accept the interest in the entity being gifted to the trust. A common issue to be alerted to is a trustee, even an institutional trustee, listing a percentage interest in an entity on the trust records when in fact a dollar value subject to a valuation adjustment mechanism should be listed to be consistent with the plan.

Date: __________

OFFICER-NAME

TRUST-COMPANY

ADDRESS-TRUST-COMPANY

RE: Irrevocable-Trust.

Dear OFFICER-NAME:

Comment: Add information from trust, or from the corresponding actions, for all positions required in the direction letter. I am named as the Investment Trustee pursuant to Article, page of the Irrevocable-Trust (the "Trust"). OR Pursuant to Actionname, Actiondate for the Irrevocable-Trust (the "Trust"), I was named as successor Investment Trustee pursuant to Article , page .

Pursuant to my authority as the sole Investment Trustee under Article of the Trust, I hereby direct *BANKTRUSTEENAME, in its capacity as trustee of the Trust (in such capacity, the "Trustee"), to:

1. **Comment**: The following language can be used if there is no defined value clause being included as part of the gift. Accept __% membership interest in *LLC-NAME, a *LLC-STATE limited liability company ("Gift Interests"). OR
2. Wandry defined value gift.
   a. #**Comment**: Gift of entity interests to irrevocable trust with a Wandry defined value clause. This sample language is similar to the language used in the declaration of gift and assignment of entity interests above.
   b. Accept the following dollar value of the shares of stock membership interests partnership interests (the "Gift Interests") in each entity listed below:
      i. VALUE1-OF-GIFT Dollars ($_____) in value of the shares of Common Stock, no par value, membership interests partnership interests of ENTITY1-NAME, a STATE corporation limited partnership #\limited liability company ("*ENTITY1-DEFINED-TERM"). For administrative convenience, the value of this gift is estimated as ENTITY1-PERCENT Percent (%) of the stock membership interests partnership interests of *ENTITY1-DEFINED-TERM.
      ii. VALUE2-OF-GIFT Dollars ($_____) in value of the shares of Common Stock, no par value membership interests partnership interests of ENTITY2-NAME, a STATE corporation limited partnership limited liability company ("*ENTITY2-DEFINED-TERM"). For administrative convenience, the value of this gift is estimated as ENTITY2-PERCENT Percent (%) of the stock membership interests partnership interests of *ENTITY2-DEFINED-TERM.
      iii. add others as needed.
3. Execute all documents necessary to finalize the Trust's receipt of the Gift Interests as described above, including, but not limited to:
   a. **Comment**: List any specific documents that you know need to be signed by the institution for the transfer. This can include, for example, the assignment of entity interests, an amended and restated operating agreement, unanimous consents, etc.

The Trustee is directed to retain the Gift Interests until further written direction from me.

As Investment Trustee, I realize I have exclusive management responsibility and authority over these investments and will provide direction relating to all actions and investment decisions associated with these investments and their related accounts. **Comment**: The following language might be incorporated for Delaware Trusts. Comparable language might be used in other jurisdictions depending on state law and local counsel recommendations. Also, it is generally assumed that the client/transferor can serve as an investment trustee or director. That conclusion may be affected by how that person is compensated and what direct or indirect actions might be taken. This letter is intended as a direction in accordance with 12 Del.C. §3313 and shall remain in effect until revised or revoked by me as Investment Trustee.

Sincerely,

Irrevocable-Trust

By: ________________________________

Investment-Trustee-Name, Investment Trustee

Caution to powerholder giving direction: This letter was drafted for the specific transaction indicated above and should not be used as a form for any other kind of transaction regarding the trust. If there are additional transactions that you wish to make regarding the trust, you should contact your attorney to discuss the steps to be taken, and the corresponding direction letter to be prepared.

vi. Trust Forms.

a. Irrevocable Trust Checklist, courteously from Marty Shenkman.

Note to Practitioner: In order for any trust or trust plan to be respected by creditors, the trust must be properly administered. Too often, once a trust plan is created, the clients, trustees and others involved are loath to spend the time or money necessary to have professional assistance in administering the trust plan. The purpose of this checklist is to provide a framework to increase the likelihood that all key documents for the creation and funding of the trusts were obtained, and that thereafter the trust is administered properly.

#Comment: Understand whether the trust is an IDIT, BDIT, DAPT, dynasty trust, etc. before completing this document. Tailor the document to properly reflect the actual nature of assets being transferred to the trust. Consider whether multiple binders should be set up and if so how to organize them. For example, if there are many assets/entity interests being transferred it may be sensible to have a separate entity binder. Remember EVERY deal is unique and this must be structured in a manner that is logical, sequential and complete for the specific transaction and client.

Irrevocable Trust Checklist for Table of Contents and Provisions

*TRUSTNAME ("Trust")

Table of Contents

Summary

Add a succinct statement regarding the trust. As an example: This trust was established by Client on Trust-Date, as an irrevocable, completed gift non-grantor spousal lifetime access trust for the benefit of Partner-Name (only with approval of adverse parties) and your descendants. Gifts of entity interests were made to the trust.

Overview

1. Schematics.
2. Memoranda and other relevant communications.
3. Reserved.

Due Diligence

4. Financial Data.
    a. Balance sheet.
    b. Accountant's projections.
5. Internet Web Searches.
    a. Client Name.
    b. Also known as and maiden names.

    c. Entity names, if applicable.
6. Authorization to Perform Judgment and Lien Searches.
7. Lien and Judgment Searches.
    a. *CLIENTNAME, individually.
    b. *ENTITYNAME.
8. Affidavits.
    a. Judgment and Lien.
    b. Solvency.
9. Waiver of Elective Share and Community Property Rights.
10. Opinion of Counsel.
11. Reserved.

Trust and Trustee Documentation

12. Executed Trust.
    a. Comment: Be certain that the executed trust document is complete. For example, some persons, such as a trust protector, may sign a counterpart to the trust rather than the actual trust document. Consider creating a list of basic information for the trust under this heading so that both the practitioner and the client can have this information at hand.
    b. Name of Trust:
    c. EIN:
    d. General, Administrative and Distributions Trustee:
    e. Investment Trustee:
    f. Insurance Trustee:
    g. Trust Protector:
    h. Loan Director:
        i. Comment: Indicate general requirements for the person holding a power to substitute assets held in the trust with assets held by the settlor of equal value. Note the trust provision containing this provision and the name of the person.
    i. Substitution Power:
        i. Comment: Indicate general requirements for the person holding a power to loan to the settlor to direct such a loan. Note the trust provision containing this provision and the name of the person.
    j. Power of appointments:
        i. Comment: Indicate general requirements and parameters for the person holding a power of appointment, whether it is general or limited, and other pertinent facts. Note the trust provision containing this provision and the name of the person. Consider whether the powerholder should be separately advised of the existence of the power so that they can affirmatively determine whether or not to exercise it.
    k. Power to add a charitable or other beneficiary:
        i. Comment: Indicate general requirements and parameters for the person holding a power to add beneficiaries, and other pertinent facts (e.g., is the settlor potentially included). Note the trust provision containing this provision and the name of the person. Consider whether the powerholder

should be separately advised of the existence of the power so that they can affirmatively determine whether or not to exercise it.

l. Powers of Appointment.
    i. Comment: Reference the article and page of any powers of appointment in the trust, and who holds that power.

13. Trust/Bank Ancillary Documents.
14. Fiduciary and Non-Fiduciary/Powerholder Actions.
    a. None provided as of ____, 20__. **Comment**: If any actions have been taken by any persons regarding the trust please provide copies
15. Reserved.

Initial Funding

16. Declaration of Initial Gift to Trust.
17. Initial Funding
    a. Check in the amount of $____.
    b. Wire Transfer in the amount of $____.
    c. *Reserved.
18. Reserved.

Comment: If interests in entities are transferred then copy or move, as the facts require, information from the “Secondary Funding” below. Also, the listings below for secondary funding may have to be modified to reflect whether the funding is accomplished by gift, sale, or a combination of both.

Secondary Gift Funding - *ENTITYNAME

19. Formation/Standing
    a. Certificate of Formation Articles of Organization.
    b. Certificate of Good Standing.
    c. Authorization to do business in other states.
20. Initial Operating Agreement.
21. Old membership interest certificates:
    a. Certificate No. for ___% - *DATE.
    b. Certificate No. for ___% - *DATE.
22. Appraisal.
23. Direction Letter.
24. Assignment of Membership Interests.
25. Unanimous Consent.
26. Amended and Restated Operating Agreement.
27. New membership interest certificates.
    a. Certificate No., *CLIENTNAME, for ___%.
    b. Certificate No., *TRUSTNAME for ___%.
28. Reserved.
29. Reserved.

Sale to Trust - *ENTITYNAME

30. Formation/Standing
    a. Certificate of Formation Articles of Organization.
    b. Certificate of Good Standing.
31. Corporate Due Diligence.
    a. **<u>Comment:</u>** Consider having corporate due diligence performed before a transaction is completed. These steps may assist in showing that the terms of both the trust and the transactions are being respected.
    b. Tax liens.
    c. UCC search.
    d. Litigation search.
32. Initial Operating Agreement.
33. Old membership interest certificates:
    a. Certificate No. for ___% - *DATE.
    b. Certificate No. for ___% - *DATE.
34. Appraisal.
35. Membership Interest Sale Agreement.
36. Loan Documentation.
    a. Promissory Note.
    b. Amortization Schedule.
    c. Pledge Agreement.
    d. Split-Dollar Loan Documentation.
37. Guarantee.
    a. Financial Data on Guarantor.
    b. Guarantee Agreement.
    c. Guarantee Fee Agreement.
38. Direction Letter.
39. Assignment of Membership Interests.
40. Unanimous Consent.
41. Amended and Restated Operating Agreement.
    a. New membership interest certificates.
        i. Certificate No., *CLIENTNAME, for ___%.
        ii. Certificate No., *TRUSTNAME for ___%.
42. Trust Company Reporting/Personal Financial Statements.
    a. Comment: Sample language should be drafted to provide to the client and the client's professional team that addresses how the transaction, and any defined value mechanism employed in the transaction, may be reflected on the books for the trust so that the terms of the transaction are respected. As discussed above, recent cases such as Smaldino and Sorenson have emphasized that these ancillary documents should reflect the transaction. The sample language provided should be tailored to the specifics of the client's transaction. Below is sample language regarding the use of a Wandry defined value clause.
    b. The booking of the assets in the entity should reflect the following language: "Common Stock [or membership] interests in Entity-Name are as determined under the share membership determination provision of the Gift Assignment and under the Purchase and Transfer Agreement dated Date and represent the fixed dollar amount therein as transferred. Any indication of the number of shares [percentage

of membership interests] is an estimate based on appraisal that will be adjusted to reflect the gift tax value as finally determined."

c.

43. Reserved.
44. Reserved.

Life Insurance

45. Insurance Summary.
46. Life Insurance Projections.
47. Life Insurance Policy.
48. Reserved.
49. Reserved.

Post-Transaction Tax Filings

50. Gift Tax Return.
    a. Comment: A gift tax return may have to be filed by clients to report gifts, allocate GST exemption, and perhaps report certain non-gift transactions (e.g., a sale to a trust). When completing the initial draft of the checklist practitioners might note here some of the suggestions of points for consideration when the gift tax return is later prepared. For example, if assets are transmuted from community property to separate property, perhaps indicate here that the return preparer should consider the reporting of that transfer even if not required. The checklist being assembled can provide a roadmap to the return preparer of documents that might be included in the Exhibit list to the gift tax return. The process of creating this checklist and the accompanying compilation of all documents could save considerable time in the gift tax return preparation process. This groundwork can also enhance the ability to use the gift tax return preparation and review process as a second look at the transaction to identify documents or steps that might have been missed or not completed, so that the entire transaction can be further enhanced by the gift tax return preparation. Practitioners should consider, from a broad perspective, who should file gift tax returns and discuss this topic with both the client and the client's entire advisory team.
51. Trust Income Tax Returns.
    a. Comment: Even the grantor trusts with no income tax implications may choose to file an annual informational return with the IRS. If the client completed split-dollar life insurance planning, the trust may have to file a required disclosure statement.
    b. 2023 Tax Year.
        i. Grantor Trust Non-Grantor Trust.
        ii. Confirm state income taxation with Accountant.
        iii. Coordinate distributions with Accountant and Financial-Advisor to minimize income taxed at highest compressed trust tax rates.
    c. 2024 Tax Year.
    d. 2025 Tax Year.

e. 2026 Tax Year.
f. List remaining years.

52. Individual Income Tax Returns.
    a. Comment: Clients may have certain aspects of their planning that should be reflected on their individual income tax return. For example, if the client engaged in a split dollar life insurance plan, as referenced above, a mandated statement may need to be appended to their individual income tax return as well as the trust income tax return. If there are relevant aspects of the plan that may be reflected on Form 1040, list those particular points here and which schedules should be attached to confirm that has been handled. Then list the years following.
53. Entity Income Tax Returns.
    a. Comment: Certain aspects of a client's trust plan might warrant disclosure on entity income tax returns. If the client sold or gave assets to one or more trusts subject to a valuation adjustment mechanism, the entity income tax returns Forms K-1 might need to indicate that the ownership percentages for certain members or partners, or S corporation shareholders are estimated and may be adjusted in the future based on the valuation adjustment mechanism
    a. For Non-Grantor Trusts Installment sale election – should not be relevant as sale is to a grantor trust, confirm with your CPA whether any disclosure is even warranted.
    b. Forms K-1 from Entity, if applicable, to the Trust should have an attached statement that reflects that the percentage ownership is "Actual interest is a fixed dollar interest and the percentage is subject to adjustment under transfer documentation."
54. Reserved.
55. Reserved.

Trust Administration.

56. Post Funding 202 Gift Tax Return
57. Annual Review.
    a. Annual meetings and minutes/consents for LLC.
        i. Corporate counsel should prepare annual minutes for each entity held in the Trust and be certain that the signature blocks correctly reflect the correct Trust signers. #**Comment**: Have any minutes been completed for entities? Please provide us with copies if they have been.
        ii. 20__.
        iii. 20__.
        iv. Firm-Name cannot monitor or administer annual minutes or consents. This must be handled by corporate counsel.
    b. Annual meetings/consents for the Trust.
    c. Actions/Consents by Various Persons.
        i. Removal and appointment of trustees.
        ii. Loan Director direction of loan to settlor.
        iii. Certificate of grantor with power to substitute.

iv. Certificate of person holding power to loan grantor funds without adequate security.

v. Certificate of person holding power to add a charitable or other beneficiary.

vi. Documentation of any actions taken by Trust Protector.

vii. Investment Trustee or Adviser direction letters to Institutional Administrative Trustee to continue holding specific assets.

viii. Certificate of actions taken by the Insurance Trustee regarding any insurance policies held in the trust.

ix. Certificate of actions taken by the Charitable Trustee regarding how assets distributed to charitable beneficiaries of the trust should be allocated.

x. Documentation regarding the exercise of a power of appointment.

d. 20__ Investment Policy Statement for Trust.
e. 20__ Investment Policy Statement for LLC.
f. Reserved.

58. Reserved.
59. Reserved.
60. Reserved.

Sale Transaction Administration

61. Note Payments.
    a. Note Payment Amortization Schedule. **Comment**: It is vital that interest be paid as required pursuant to each of the various notes in this and other transactions. Failure to pay interest on a timely basis may be argued by the IRS (or a creditor) to unravel the transaction based on an invalid note. As noted elsewhere and as previously advised, we cannot monitor any periodic payments including but not limited to interest on notes. We can hold proof of payments in our files if you provide them and have reflected information on payments you have previously provided us with below.
    a. Interest Payments on Note by year.
        i. 20__.
        ii. 20__.
        iii. List and address future years and revise the amortization schedule when any additional principal payments are made (which is recommended).
        iv. Firm-Name cannot monitor or administer any note payments.
    b. Principal Payments before Maturity.
        i. Date principal payment of $________.
            1. Direction Letter re: principal payment to be made.
            2. Account Statement or other documentation reflecting receipt of principal payment.
    c. Satisfaction.
        i. ____, Maturity Date.
62. GRAT Annuity Payments.

a. Comment: If a Grantor Retained Annuity Trust ("GRAT") is used as part of the client's planning, e.g., as a spillover for a defined value mechanism, it is imperative that the periodic annuity be paid in accordance with the terms of the trust. The practitioner should list each year below and update it reflecting the wire or check information to effectuate each annuity payment. Including this information may assist in the proper administration of the GRAT and it will be easier to obtain corroboration of each payment as the trust is administered then in the future in response to an audit.

63. Guarantee Fee Payments.
    a. Comment: If a guarantee is used in the transaction and a fee is required to be paid periodically, someone should be charged with the responsibility to track each fee and the documentation reflecting the payment was made.
64. Reserved.
65. Reserved.

Entity Ownership and Gift Exemption Used

66. **Comment**: Consider including at the end of the checklist a synopsis of the ownership of the various entities involved in transactions, as well as the Federal gift tax exemption used by the clients. This section will need to be tailored based upon each particular client's transactions, and the valuation adjustment mechanism used. The following example involves the use of a Wandry valuation adjustment clause in gifts to the trust. The example also involves several trusts and several entities.

67. Entity Ownership and Values after 2023 Gifts:
    a. 20__ Gifts.
        i. Trust 1- Alaska.
            1. LLC 1 – Total gift of $_______, estimated at 100% of membership interests.
            2. LLC 2 – Total gift of $_______, estimated at 100% of membership interests.
            3. Corporation 1- Total gift of $_______, estimated as 19% of stock, 38 shares.
            4. Total Gift: $_______
        ii. Trust 2- South Dakota.
            1. Corporation 2- Total gift of $__________, estimated at 100% of stock, 200 shares.
            2. Corporation 1- Total gift of $_______, estimated as 17% of stock, 34 shares.
            3. Total Gift: $_______
        iii. Client remaining interests after transactions.

1. LLC 1- estimated at 0% of membership interests.
2. LLC 2- estimated at 0% of membership interests.
3. LLC 3- estimated at 0% of membership interests.
4. Corporation 1- estimated minimum of 64% of stock, 128 shares, after transactions, subject to valuation adjustment mechanisms.

iv. **Exemption used as of 20__**: $___________ (Exemption used before 20__) + $________ (Trust 1 gifts) + $__________ (Trust 2 Gifts) = $_________________.

b. 20 Gift and Sales.

i. Trust 1- Alaska.

1. Corporation 1- Total gift of $_______, estimated as 5% of stock, 10 shares.
2. Corporation 1- Total sale of $_______, estimated as 40% of stock, 80 shares.
3. Total Gift: $_______

ii. Trust 2- South Dakota.

1. Corporation 1- Total sale of $_______, estimated a 19% of stock, 38 shares.
2. Total Gift: $0

iii. Client remaining interests after transaction.

1. Corporation 1- estimated 0% of stock after transactions, subject to valuation adjustment mechanisms.

iv. **Exemption used as of 20__**: $___________ (Exemption used as of 20__) + $________ (Trust 1 gifts) = $______________.

68. Reserved.
69. Reserved.

b. Life Insurance Trust – To Be Added
c. Domestic Asset Protection Trust – To Be Added
d. Sample Hybrid DAPT Provision – To Be Added

a. Agreement for Disposition of Marital Assets.

The following Agreement contemplates that a married couple residing in a non-community property state may agree to have a high percentage of their net worth held under one or more irrevocable trusts after the death of the first dying spouse to safeguard the inheritance and financial well-being of the surviving spouse and descendants.

Typically, this will be funded in part by a credit shelter trust provided for in the Last Will and Testament or Revocable Trust of the first dying spouse, and by the contribution of assets to an asset protection trust established in an asset protection jurisdiction. This gives the surviving spouse a good business reason to fund an asset protection trust, and to maintain it diligently, particularly upon remarriage.

The Agreement can require that the surviving spouse will not be able to receive more than a small amount per year from the Trusts if and when the surviving spouse remarries or cohabitates in a romantic relationship and the new spouse or significant other refuses to agree not to ever pursue such Trusts for support, alimony, or property right purposes.

THIS AGREEMENT FOR DISPOSITION OF MARITAL ASSETS is made this ____ day of ____________, 2020, by and between JOHN DOE ("Husband"), and JANE DOE ("Wife"), and individually or collectively, the "Party" or "Parties."

WHEREAS, Husband and Wife are married and currently reside in the State of Florida.

WHEREAS, Husband and Wife own individually and jointly held assets.

WHEREAS, Husband and Wife wish to provide for the distribution of their interest in OLDCO, LLC and all affiliated entities (hereinafter collectively referred to as "DOE PRODUCTS") in order to help assure protection of such interest for the surviving spouse and for the Husband and Wife's family and charitable intentions;

WHEREAS, Husband and Wife wish to have one hundred percent (100%) of their ownership interest in OLDCO, LLC held in a protective trust after the death of one of them; and

WHEREAS, Husband and Wife acknowledge that upon execution, this Agreement for Disposition of Marital Assets will be binding upon Husband and Wife with respect to the disposition of their assets, during their lifetimes and upon their respective deaths and that they have been strongly advised to have this Agreement reviewed by independent legal counsel that they can each hire separately to protect their independent interests in that the law firm that has drafted this Agreement is representing both Parties and would therefore have a "conflict of interest" in the event of a dispute with respect hereto.

NOW THEREFORE, Husband and Wife agree that upon the first dying spouse's death, the surviving spouse will fund a trust or trusts substantially similar to the DOE FAMILY TRUST that will be established under the Living Trust of the first dying spouse, with all ownership of DOE PRODUCTS in order to safeguard such assets for the surviving spouse, their descendants, and charities that may benefit under the DOE FAMILY TRUST.

ARTICLE ONE

(a) Awareness of Assets and Liabilities. Each Party acknowledges that they have reviewed the chart entitled "DOE PLANNING SCHEMATIC," which is attached hereto as Exhibit "A," and each believes that the chart is correct and accurate as a disclosure of assets, liabilities, and life insurances existing as of the date of execution of this Agreement. Each Party is also completely familiar with all assets of the Parties. The Parties acknowledge that one requirement for enforceability of this Agreement may be a complete and accurate summary of assets and financial circumstances, and each Party hereby confirms that to the best of his or her knowledge, the financial summary chart is accurate, and that any and all questions or requests for clarification by such Party have been answered satisfactorily.

Each Party further acknowledges that this Exhibit A contains real estate and other asset values which are based upon estimates, and that these real estate values may differ from the actual value of such property.

ARTICLE TWO

(a) Additional Documentation Required. Full compliance with this Agreement requires that each of Husband and Wife execute a new or updated LAST WILL AND TESTAMENT and REVOCABLE TRUST, or amendment or amendments thereto, with agreeable terms based substantially upon the drafts thereof that were sent to the Parties by attorney ANGEL PASTA. These documents provide that upon the death of the first dying spouse, assets will be held in the REVOCABLE TRUST of such deceased spouse or as otherwise set forth herein for the benefit of the surviving spouse and their descendants, with any assets remaining under such REVOCABLE TRUST after the death of the surviving spouse to be passed as set forth herein or under the applicable REVOCABLE TRUST documents.

(b) Notice in the Event of Modifications to Estate Planning Documents. Unless otherwise agreed, Husband and Wife are hereby required to provide one another with twenty (20) days' advanced written notice before making any material change to his or her respective estate planning documents in any manner that would detrimentally affect his or her spouse or any descendant of either Party. A change that would detrimentally affect either Party or a descendant of either Party is defined as any change to the disposition of a Party's assets that would or could have a material impact upon the surviving spouse and/or the descendants of either spouse, or THE DOE CHARITABLE FOUNDATION. Notwithstanding the above, if Husband or Wife is incapacitated, then the non-incapacitated spouse may make changes for the benefit of the family with the written consent of ____________________ and ______________________ (or if left blank, the majority of the children of Husband and Wife.)

(c) Divorce. This Agreement shall not prevent either Party from filing a Petition for Divorce or Dissolution of Marriage in an applicable court of competent jurisdiction, and if and when one Party has filed a Petition for Divorce in a court believed in good faith to be the court of competent jurisdiction, and the other Party has received written notice thereof and has been formally served with such notice, or such Party or the Party's lawyer or lawyers has acknowledged receipt of such notice, then the terms and conditions of this Agreement shall no longer have any force or effect unless or until the divorce proceeding is withdrawn and the Parties have remained married, in which event, the terms of this Agreement shall be fully applicable as if no divorce petition had been filed, and any changes made to estate planning documents during the pendency of a divorce proceeding shall be eliminated with full disclosure by each Party so that the terms and conditions of this Agreement can thereafter continue in full force and effect.

ARTICLE THREE

Gifts. The Parties understand that this Agreement prevents them from making any material gifts of significant assets to third parties, future spouses or others, without the written consent of the specified individuals as described herein, and that this may significantly affect the Parties' financial freedom after the death of the first dying spouse.

ARTICLE FOUR

Asset Protection Jurisdictions. The Parties recognize that certain jurisdictions, such as Alaska, South Dakota, Tennessee, Delaware, Nevada, Jersey (Channel Islands), Gibraltar, Isle of Man, Belize, and Nevis, have creditor protection rules which may help to preserve trust assets if a surviving spouse were subject to a creditor claim situation. The surviving spouse agrees to accept and follow the advice of a competent AV-rated, board-certified legal counsel in order to confirm that the trust established by the surviving spouse is located in one of such jurisdictions or a comparable jurisdiction to assure proper compliance with this Agreement.

ARTICLE FIVE

(a) Court of Competent Jurisdiction. Any dispute over potential changes to this Agreement, or any entity or documentation incorporated by reference herein, shall be resolved by mediation and arbitration pursuant to the terms of Section (c) below, provided that any dispute that must be brought in court by reason of state or federal law shall be presided over by a judge, without jury, AND EACH PARTY WAIVES ANY RIGHT TO A JURY TRIAL WITH REFERENCE TO THIS AGREEMENT AND THE ENFORCEMENT HEREOF.

(b) Notice. EACH PARTY HERETO HAS BEEN ADVISED THAT THEY HAVE THE RIGHT TO CONFER WITH AN INDEPENDENT ATTORNEY WITH RESPECT TO THEIR RIGHTS AND OBLIGATIONS UNDER THIS AGREEMENT AND HAS BEEN ENCOURAGED TO DO SO. EACH PARTY HAS EITHER SOUGHT SAID CONSULTATION AND ADVICE OR HEREBY WAIVES SAID RIGHT. EACH PARTY HAS BEEN ADVISED THAT GASSMAN, CROTTY & DENICOLO, P.A. HAS NOT PURPORTED TO INDEPENDENTLY REPRESENT EITHER PARTY AND HAS DISCLOSED THE POTENTIALITY OF A CONFLICT OF INTEREST BETWEEN THE PARTIES HERETO.

(c) Mediation and Arbitration. It is the intention of the Parties that no dispute under this Agreement, except as expressly provided in this Section, will be the subject of any court action or litigation in the court system. The Parties recognize that the problem resolution processes of mediation and arbitration are proper to resolve most issues between the Parties. It is the intention of the Parties that this Agreement shall be construed and interpreted in a fair and equitable manner based upon the facts and circumstances of the Parties taking into account the present intention of the Parties to have a fair and equitable agreement under the terms and conditions set forth herein. Expressly excluded from mediation and arbitration are disputes relating to injunctions, writs of possession, recovery of property under a security agreement, and other equitable relief.

(i) Mediation. If any Party hereto wishes to resolve an issue arising out of or relating to this Agreement, then such Party must first give notice of a request for mediation to the other Party which notice shall set forth the names of not less than four (4) court-approved mediators from the lists available from the Circuit Court of _______ County or such other mediators on whom the Parties may agree. The Party receiving such notice shall choose one or more of such mediators within seven (7) days of receipt of such notice, and a mediation conference will be scheduled as soon as feasible between the Parties and their respective advisors, and the Parties and their advisors will cooperate fully with respect to sharing of information and attendance at meetings in order to seek resolution. If the Party receiving notice does not choose a mediator within seven (7) days of receipt of such notice, then the Party who has sent such notice may choose the applicable mediator or mediators and may schedule the mediation conference. If resolution of the issues between the Parties cannot be resolved in mediation within twenty (20) days of the selection of a mediator, then the matter shall be presented to formal arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association as provided below.

(ii) Arbitration. If mediation is unsuccessful, then the Parties shall resolve the issue in arbitration. The arbitration shall be conducted in accordance with the provisions of the Commercial Arbitration Rules of the American Arbitration Association, except as provided herein. The arbitration shall be conducted with a panel of three (3) arbitrators to be retained by the Parties, or to be appointed by the American Arbitration Association if the Parties cannot agree, provided that there will be a panel of only one arbitrator if the amount in dispute is $150,000 or less. Any arbitrator chosen must be a board will and trust lawyer with at least fifteen (15) years' experience. Arbitration shall take place within thirty (30) days after the completion of discovery as provided below and the decision of the arbitration panel shall be binding upon the Parties for all purposes. The arbitration panel is expressly authorized to award all reasonable fees and costs, including attorney's fees, to the prevailing Party against any Party who has violated this Agreement.

(iii) Discovery in Arbitration. Each Party will cooperate fully with respect to sharing of information in all arbitration proceedings. Within ten (10) days of the appointment of the panel of arbitrators, each Party shall send to each other Party copies of all documents, agreements, contracts, reports, charts, correspondence, notes, files, photographs, videotapes, audiotapes, and any other tangible thing that might be relevant to the issues pending in arbitration. Additionally, within ten (10) days of the appointment of the panel of arbitrators, each Party shall send to each other Party a list of the names, addresses, and telephone numbers of fact witnesses and expert witnesses who have information that might be relevant to the issues pending in arbitration. The Party preparing the list shall also indicate which witnesses it plans to call in the arbitration hearing. Any documents claimed by a Party to be privileged and exempt from discovery (as provided under the Florida Rules of Civil Procedure) must be identified by the Party claiming the privilege. Any document not so identified shall be considered to be not exempt and shall be provided to each other Party as provided above. Each Party shall be required to update its automatic disclosure as new information that might be relevant to the issues in arbitration is learned by that Party. In addition to the initial and updated automatic disclosure, each Party may engage in discovery in the form of written interrogatories, depositions of witnesses, and requests for the production, inspection, and copying of documents to the same extent as allowed by the Florida Rules of Civil Procedure, as modified herein. The time for responding to discovery requests shall be ten (10) days. All discovery shall be completed within two (2) months after the appointment of the panel of arbitrators, unless the time for discovery is extended for good cause by the panel. The costs, including attorneys' fees, of obtaining any information by way of interrogatory, deposition, or request for production that should have been provided by the other Party by way of automatic disclosure shall be borne by the Party who failed to make full automatic disclosure as provided above. The arbitration panel shall decide any disputes regarding discovery.

(d) Scrivener Protector. The law firm of PASTA AND CORN has drafted this Agreement and it is expected that the law firm will be available in the event of the Parties' death or incapacity in order to help to assure that the intentions of the Parties are followed. It is recognized that in the course of drafting and administering agreements there can be ambiguities, inconsistencies, and changes in circumstances which can cause inconvenience, disputes, and hardships for trustees and one or more beneficiaries. The Parties hereby empower the law firm of PASTA AND CORN or its successor, to make changes to this Agreement, by providing written notice confirming such change, in order to comport with the Parties' intentions and to avoid potential uncertainty, litigation, or arbitration. Any such changes will be consistent with a fiduciary duty to follow the Parties' intentions. Such power granted to the law firm of PASTA AND CORN shall only apply so long as a member of the firm is a Martindale-Hubbell AV-rated and Florida board-certified trust and estate lawyer who approves such action, and the exercise of such power shall be limited as to not cause loss of the federal estate tax marital deduction or the federal estate tax charitable deduction with respect to any transfer to any trust established hereunder or under the Parties' applicable REVOCABLE TRUSTS. Further, no such action may be taken without having written notice of the proposed action provided to each Party and their children. Such power shall be subject to the following limitations:

(1) Notwithstanding anything in this Agreement to the contrary, no power exercisable hereunder shall be exercisable in any way to detrimentally affect the surviving Party in any material way, and in any way not explicitly consented to by either Parties, if living and able to deliberate, or the surviving Party if one Party has deceased or is unable to deliberate. If either Parties, or the Surviving Party is unable to deliberate, then the approval of one or more of the Parties' adult children shall be required.

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

(e) Agreement Construction. This instrument contains the entire agreement of the Parties, and each Party is aware of all of the rights that are being waived pursuant to this Agreement, and has been advised by independent legal counsel with respect thereto. No representations or promises have been made except those that are set out in this Agreement. This Agreement shall not be modified except in writing signed by the Parties. The descendants of the Parties are third-party beneficiaries of this Agreement, and may therefore file suit to enforce the provisions hereof, provided that any such proceeding is an arbitration if Florida law permits requiring arbitration where a third-party beneficiary would otherwise file suit in public court.

(f) Severability. If any one or more of the provisions contained in this Agreement for any reason are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

(g) Further Assurance. Each Party shall execute any instruments or documents at any time requested by the other Party that are necessary or proper to effectuate this Agreement.

IN WITNESS WHEREOF, the Parties hereto have hereunder set their hands and seals this ____ day of ____________, 2020.

Signed, sealed, and delivered
In the presence of:

____

____
Witness
JOHN DOE

____
Witness

____

____
Witness
JANE DOE

____
Witness

ATTESTATION CLAUSE

On the above-written date, JOHN DOE and JANE DOE known to us to be the persons whose signatures appear at the end of the foregoing Agreement, signed the Agreement in our presence and, at their request, and in their presence and in the presence of each other we now sign our names as attesting witnesses.

____________________________________ Witness

____________________________________ Witness

STATE OF ________)
COUNTY OF __________)

ON THIS _____ day of _________________, 2020, by means of physical presence before me, ______________________, the undersigned notary, personally appeared JOHN DOE and JANE DOE, known to me, or who produced __________ as identification, and who did take an oath, to be the persons whose names are subscribed to the above instrument, and being informed of the contents of said instrument, acknowledged that such persons voluntarily executed the same for the uses and purposes herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

____
Notary Public

My Commission Expires:

vii. Exhibits B – Articles Resources.

Rush University case - LISI article by Shenkman and Gideon Rothschild.

Raia v. Lowenstein Sandler LLP and Eric D. Weinstock, No. A-1365-19T1, 2020 BL 230787 (N.J. Super. Ct. App. Div. June 22, 2020).

Thoughts on a Recent Malpractice Case, LISI Estate Planning Newsletter #2724 (May 16, 2019). Martin Shenkman, Sandra Glazier and Howard Zaritsky, Raia Lowenstein Sandler LLP.

Wellin v. Nixon, Peabody, LLP — Case Lessons on Defensive Practice, LISI Estate Planning Newsletter #2934 (Jan. 20, 2022).

viii. Exhibit C – Summaries of Selected Statutes.

Uniform Voidable Transactions Act. – To Be Added

Alaska DAPT Statue. – To Be Added

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*kjw 7/3/2024