

# Creditor Protection Strategies

Tuesday, July 29, 2025  
12:00 PM to 1:00 PM EST  
(60 minutes)

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(Distinguished)  
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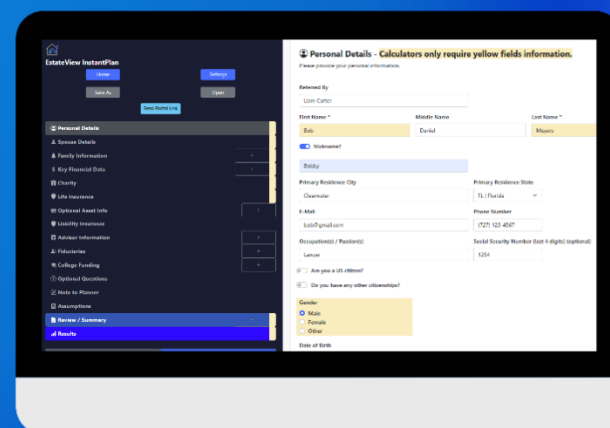
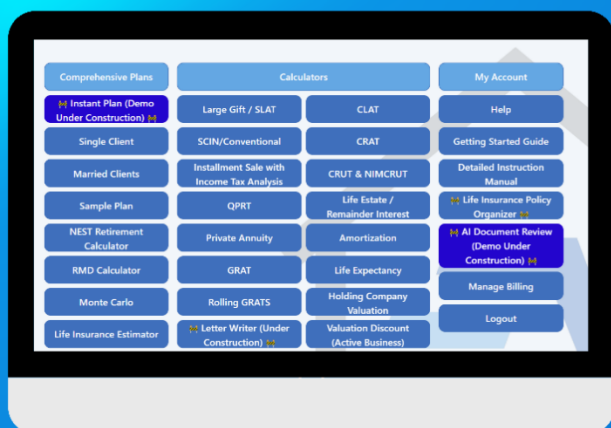
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# ESTATEVIEW MASTERCLASSES

In these masterclasses, we will be walking you through the features and benefits of EstateView to help you measure, design, and illustrate estate planning techniques for your clients.



Wednesday, July 30<sup>th</sup>  
12:00 PM ET

Friday, August 1<sup>st</sup>  
12:00 PM ET

Monday, August 4<sup>th</sup>  
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**EstateView**  
Estate planning software

Creditor Protection Strategies |  
Tuesday, July 29, 2025 |



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| Comprehensive Plans        | Calculators                               |                                      | My Account                  |
|----------------------------|---|--------------------------------------|-----------------------------|
| Single Client              | Large Gift/SLAT                           | CLAT                                 | Help                        |
| Married Clients            | SCIN/Conventional                         | CRAT                                 | Detailed Instruction Manual |
| Sample Plan                | Installment Sale with Income Tax Analysis | CRUT & NIMCRUT                       |                             |
| NEST Retirement Calculator | QPRT                                      | Life Estate / Remainder Interest     |                             |
| RMD Calculator             | Private Annuity                           | Amortization                         |                             |
| Monte Carlo                | GRAT                                      | Life Expectancy                      |                             |
| Life Insurance Estimator   | Rolling GRATs                             | Holding Company Valuation            |                             |
| §7520 & AFR Table          | Letter Writer (Under Construction)        | Valuation Discount (Active Business) |                             |



# The Goals

## 1. Know What We Have

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## 2. Creditor Protection

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## 3. Estate Tax Protection

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## 4. Protected From Subsequent Spouses

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## 5. Protected for Lifetime of Children and Subsequent Descendants

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## 6. Special Concerns

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# The Process

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|---|--|---|
| <b>Gathering &amp; Organizing Information:</b><br><br>1. Assets<br><br>2. Titling<br><br>3. Entity documents<br><br>4. Agreements | <b>Work with the Right Advisors:</b><br><br>1. Qualified<br><br>2. Independent Fiduciaries<br><br>3. Checks & Balances | <b>Educate &amp; Design:</b><br><br>One size does <u>not</u> fit all...<br><br>Even 5 or 10 sizes <u>never</u> fit all. |
| <b>Further customize for your unique situation.</b>   | 1. Draft<br><br>2. Review<br><br>3. Implement  | <b>Maintain, Update and Modify as Appropriate</b>   |



# Team of Advisors

**Have qualified advisors that includes a good accountant, lawyers of the specialties you need who are honest enough to tell you who you need and when you need them, a good personality and casualty carrier, and a competent, caring and ethical financial planner.**



# Smith V. MV Transportation

NEWS > CRIME AND PUBLIC SAFETY • News

## Parents of 13-year-old bicyclist killed by bus in Redondo Beach awarded \$32.1 million

A jury has awarded \$21.6 million to the parents of a 13-year-old girl who was struck and killed by a Metro bus in Redondo Beach while riding her bicycle in 2017, authorities said.

In total, Barry and Rose Smith were awarded \$32.1 million as a result of the jury's decision and a pair of settlements with the City of Redondo Beach and Caltrans for \$4.9 million each, prosecutor Garo Mardirossian said Friday, Nov. 12. Attorneys fees made up the rest of the monetary award, he said.

MV Transportation Inc., which owned and operated the bus, was the lone remaining defendant. The verdict came after a nine-day trial at the Spring Street Courthouse in downtown Los Angeles, Mardirossian said.

Jurors, on a special verdict form, decided that 75 percent of the responsibility for Smith's death fell on MV Transportation Inc., while 15 percent fell on the City of Redondo Beach and 10 percent on the State of California.

They ruled that Ciara Smith bore no responsibility for her death.

"This family, especially the mom and dad, are just devastated," he said. "Their lives will never be the same, they think of their little girl every day. She had talents in so many areas and was loved by so many."

Attorneys representing MV Transportation Inc. did not return requests for comment. Representatives for MV Transportation Inc., Caltrans and the City of Redondo Beach also did not immediately return requests for comment.





# *Giacalone v. Medic West Ambulance Inc.*

## **Actress' family awarded \$29.5M after allergic reaction to peanut butter pretzel caused brain damage**

**LAS VEGAS** - The family of an aspiring actress and model who was left brain-damaged after suffering a serious allergic reaction to a pretzel infused with peanut butter was awarded nearly \$30 million by a Las Vegas jury.

On Feb. 20, 2013, then-27-year-old Chantel Giacalone went into anaphylactic shock after biting into the peanut butter pretzel while modeling clothes at a fashion trade show at the Mandalay Bay South Convention Center, the [Las Vegas Review-Journal](#) reported.

The paper reported that Giacalone's friend brought her a frozen yogurt and put the bite-sized pretzel on top. Giacalone, unaware it contained peanut butter, went into anaphylactic shock after taking a bite.

In a three-week civil trial, her family was awarded \$29.5 million when the jury found that the responding ambulance service negligently treated her allergic reaction.



# Texas jury awards \$730 million in oversized load fatality case

By The Trucker News Staff - November 30, 2021



MOUNT PLEASANT, Texas — A Texas jury on Nov. 22 awarded \$730 million to the surviving children of a 73-year-old woman who was killed after a collision with an over-sized load on a rural highway.

According to court documents, Toni Combest was killed on Feb. 21, 2016, on the White Oak bridge in Titus County, Texas, by a nearly 200,000-pound big rig load that was being escorted by front and back pilot escort vehicles.

*This image still from a dashboard video recorder shows a white Buick driven by Toni Combest being obliterated after striking an over-sized load on a rural Texas highway. She was killed on impact. (Courtesy: Attorney Brent Goudarzi's office)*



# Monsanto must pay WA teachers \$185M in fluorescent light 'poisoning' suit, jury finds

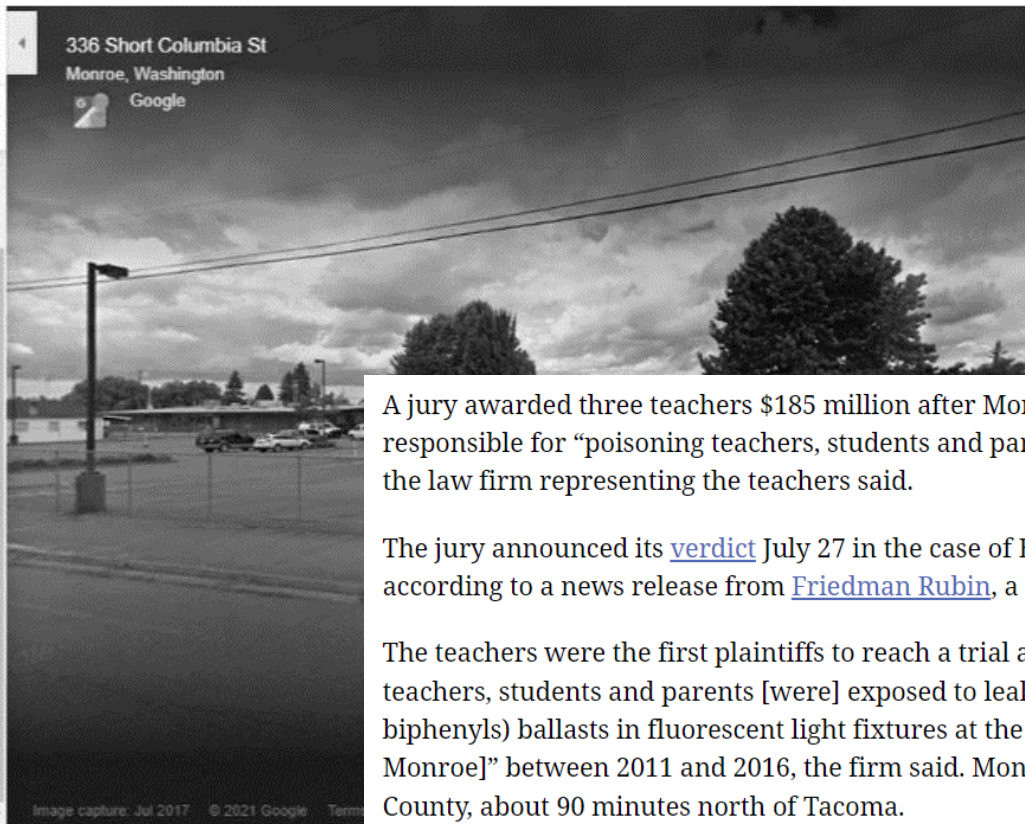
BY BROOKE WOLFORD

JULY 29, 2021 4:28 PM



SKY VALLEY EDUCATION CEN...

Street View & 360°



A jury awarded three teachers \$185 million after Monsanto was found to be responsible for “poisoning teachers, students and parents” at a Washington school, the law firm representing the teachers said.

The jury announced its [verdict](#) July 27 in the case of Erickson et. al. v. Monsanto, according to a news release from [Friedman Rubin](#), a Seattle-based law firm.

The teachers were the first plaintiffs to reach a trial after “a group of over 200 teachers, students and parents [were] exposed to leaking PCB (Polychlorinated biphenyls) ballasts in fluorescent light fixtures at the [Sky Valley Education Center in Monroe]” between 2011 and 2016, the firm said. Monroe is located in Snohomish County, about 90 minutes north of Tacoma.

Three teachers were awarded \$185 million in a suit against Monsanto for “decisions which led to the poisoning of hundreds of teachers, students and parents” at a school in Monroe, Washington. *Google Maps*





# Jury awards family of girl killed by garbage truck \$38.8M in wrongful death lawsuit

by: **Caroline Bleakley**  
Posted: Aug 24, 2021 / 11:52 AM PDT  
Updated: Aug 24, 2021 / 04:49 PM PDT



LAS VEGAS (AP) — A jury in Las Vegas has awarded \$38.8 million in damages to the family of an 11-year-old girl who was struck and killed by a trash truck as she walked home from school in February 2017.

The Clark County District Court jury on Tuesday found the region’s contract waste hauler, Republic Services, liable for the death of Jazmin Espana following a two-week trial that the judge called difficult and full of sadness.

In a statement, Republic Services expressed condolences to the girl's family and friends, called her death a tragic accident and maintained that the company has “a strong culture committed to safety.”



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

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

POSTED SEPTEMBER 12, 2016, 4:00 PM CDT



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

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

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

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





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



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

By **Steve Schmadeke**  
Chicago Tribune

AUGUST 25, 2017, 6:10 AM

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



## *Ikea Will Pay \$46 Million to Parents of Toddler Crushed to Death by a Dresser*

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



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



By Neil Vigdor

Published Jan. 6, 2020 Updated April 7, 2021

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

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

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



## Pizza Hut loses suit, must pay millions

By GREG MORAN

JULY 28, 2010 10:10 PM PT

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

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

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

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



# “It Wasn’t Raining When Noah Built The Ark.”



# Checklist

1. Will and Revocable Trust
2. Powers of Attorney
3. The Above for my Parents
4. Asset Protection for People
  - Never Leave Anything Outright to Anyone You Like
5. Confidentiality
6. Asset Protection for Businesses and Investments
7. Coordinate with Income Tax Planning
8. Income Tax Planning
9. Spousal Limited Access Trust (“SLAT”)





# Checklist

10. Stepped-Up Basis Planning and New Depreciation Basis Planning
11. LLC Formalities and Procedures
12. Signing Process
13. Review Customer and Supplier Agreements and Insurances and Buy/Sell Agreements for Chinks in the Armor.



# Absolute Basics – Revocable Trust

**A Revocable Trust directs where your personal assets could pass on death –**

- Can avoid probate – the court process of transferring assets on death.**
- Can avoid guardianship.**
- No creditor protection or tax advantages whatsoever.**
- Estate plan can be baked into this document.**
- Almost never leave assets outright on death.**



# Absolute Basics – Irrevocable Trust

**An Irrevocable Trust cannot be amended, except by Trust Protectors.**

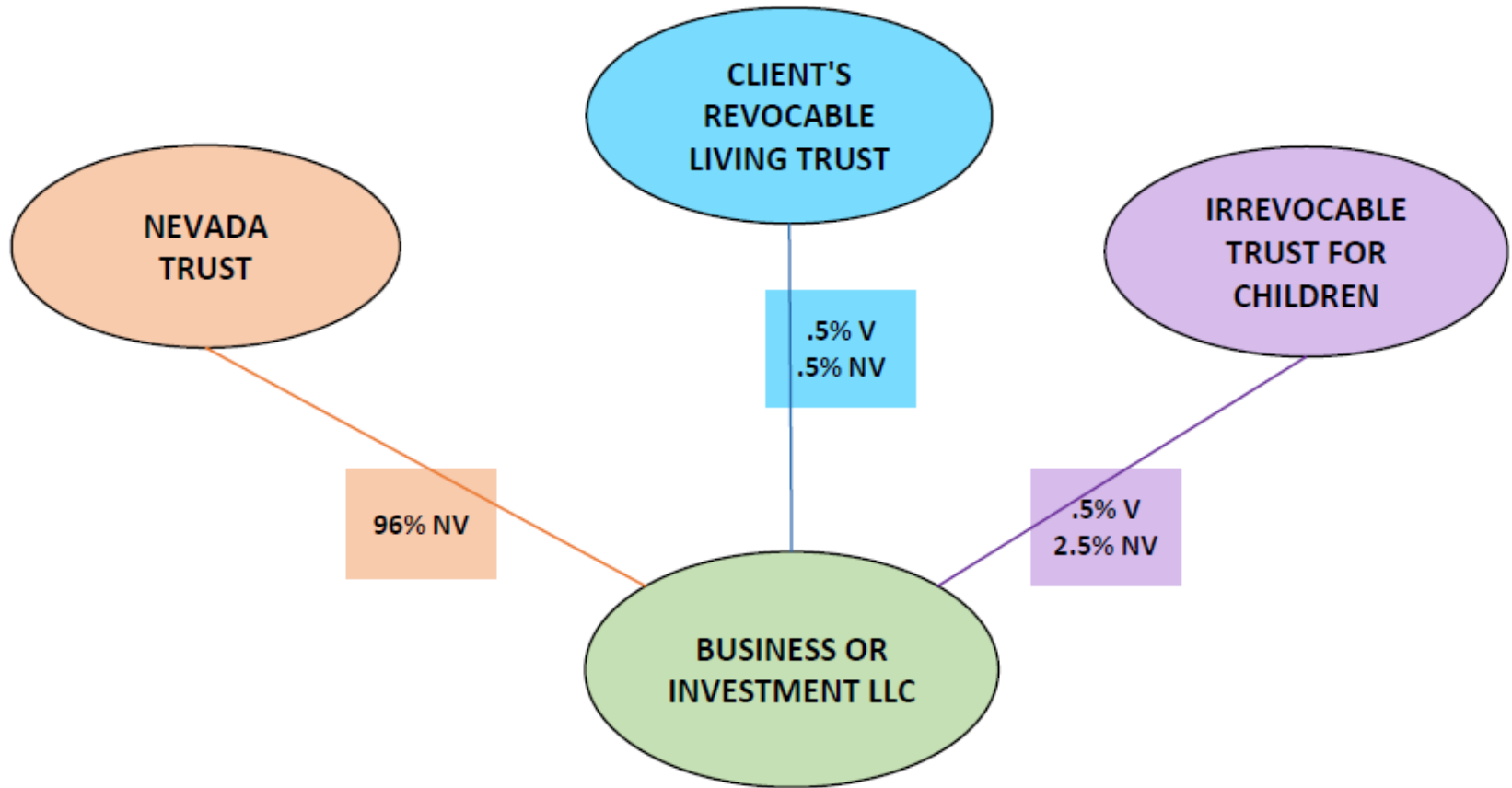
**If I cannot benefit from the Trust, then neither can my creditors.**

**A trust funded by one person can benefit other people and be creditor proof.**

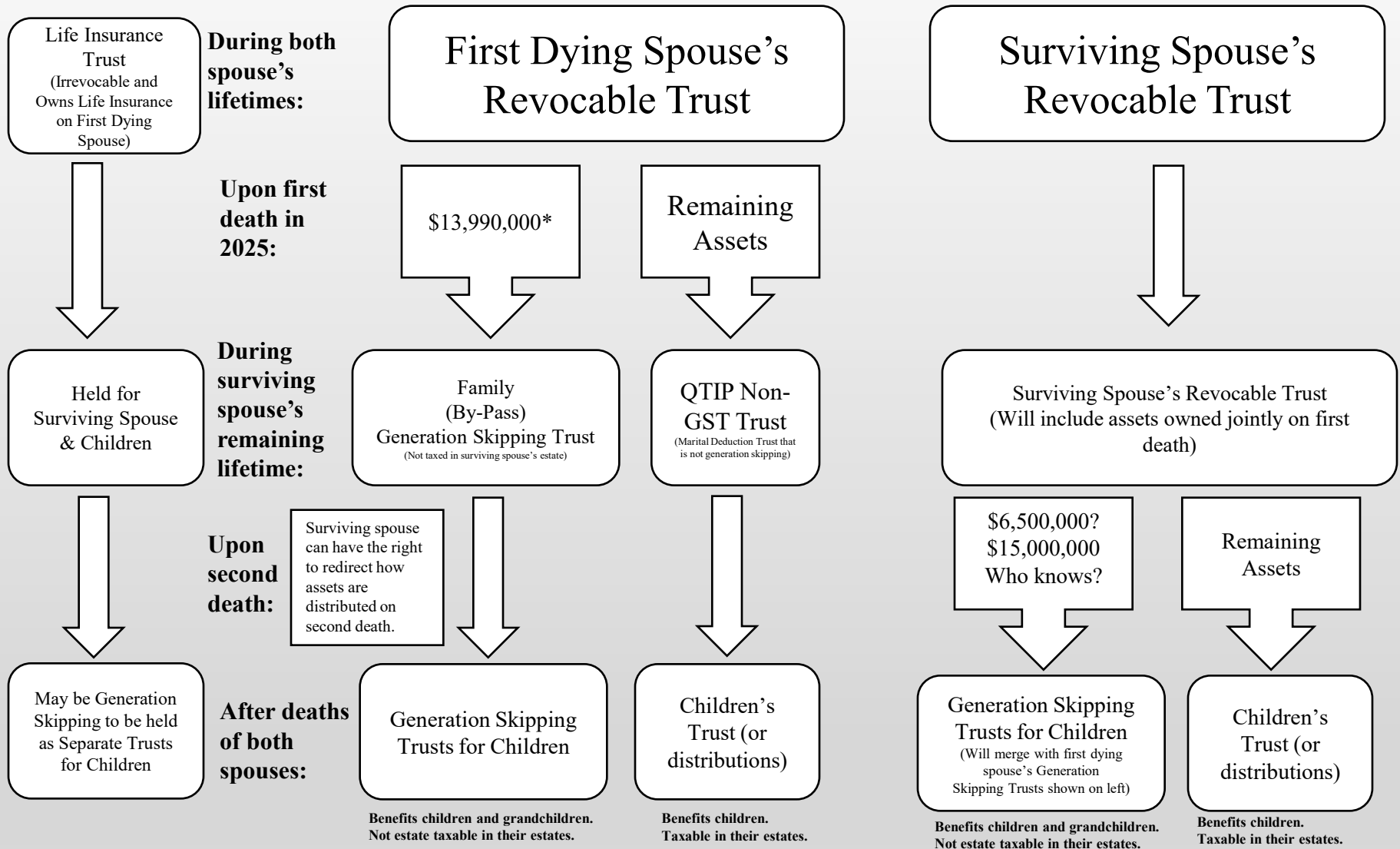
- **“SLAT” – Spousal Limited Access Trust**
- **A Spousal Limited Uni-Trust would be a “\_\_\_\_”**
- **Nevada SLAT –**
  - **For my spouse and descendants, but I can be added back in under certain circumstances.**
  - **Creditor proof.**
  - **Estate tax proof.**
  - **Also cures the common cold.**



# Absolute Basics – Combine an Asset Protection Trust (“APT”) With Charging Order Protection



# Protective Trust Logistical Chart



\*Assumes first spouse dies in 2025 when the exemption is \$13,990,000, and that the surviving spouse dies in a later year when the estate tax exemption has gone up to \$6,500,000 (based upon CPI increases). The estate tax exemption is \$13,990,000, less any prior reportable gifts, for those that die in 2025, and increases with the Consumer Price Index in \$10,000 increments.

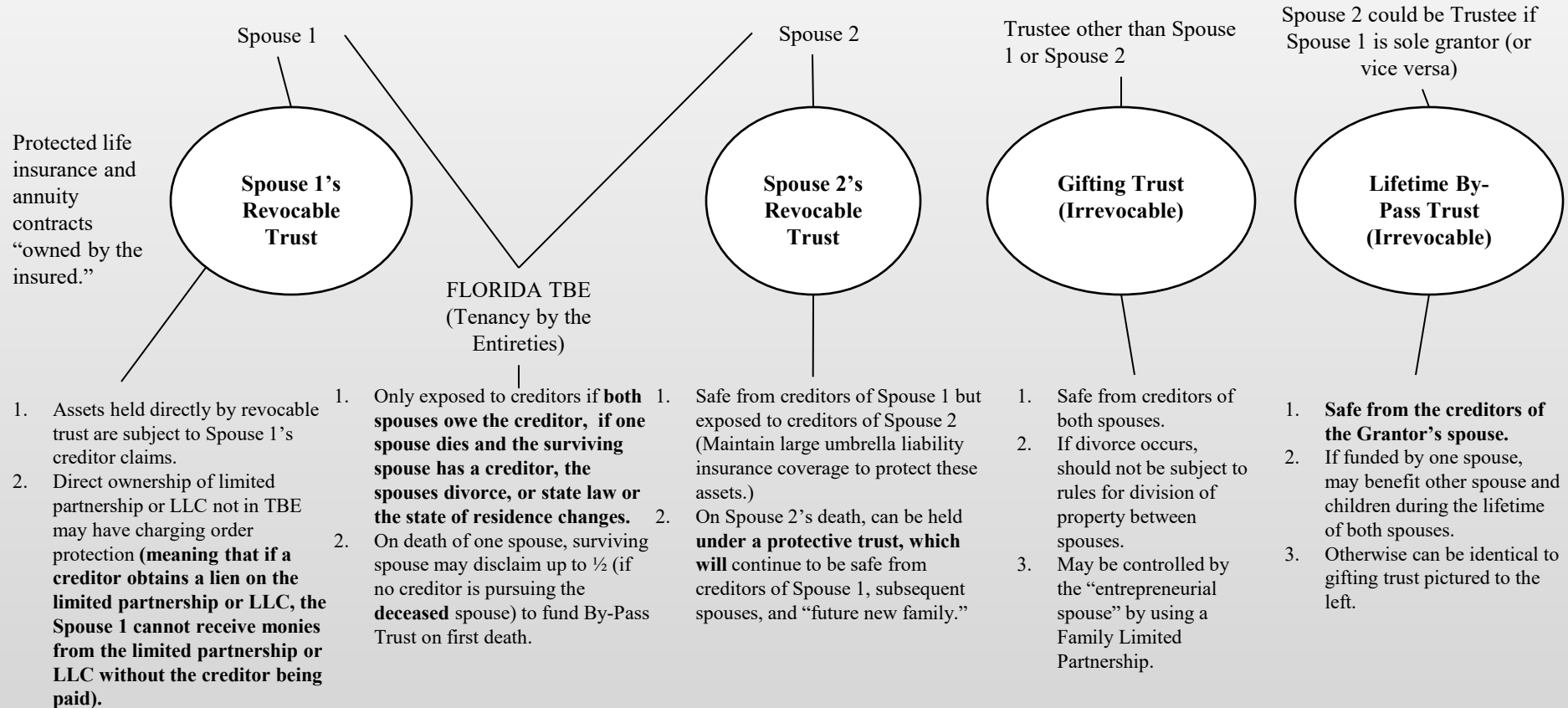
If the first spouse does not use the entire exemption amount, what remains may be added to the surviving spouse's allowance under the "portability rules" but will not grow with inflation, and will be lost if the surviving spouse remarries and the new spouse dies first, leaving no exemption.



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

## General Rules:

- Typically want each trust funded with at least \$11,200,000 worth of assets on death for estate tax planning.
- May be funded from ½ of tenancy by the entireties assets via disclaimer and probate or by life insurance/pension/IRA assets.



SEE NEXT PAGE FOR SECOND TIER PLANNING

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

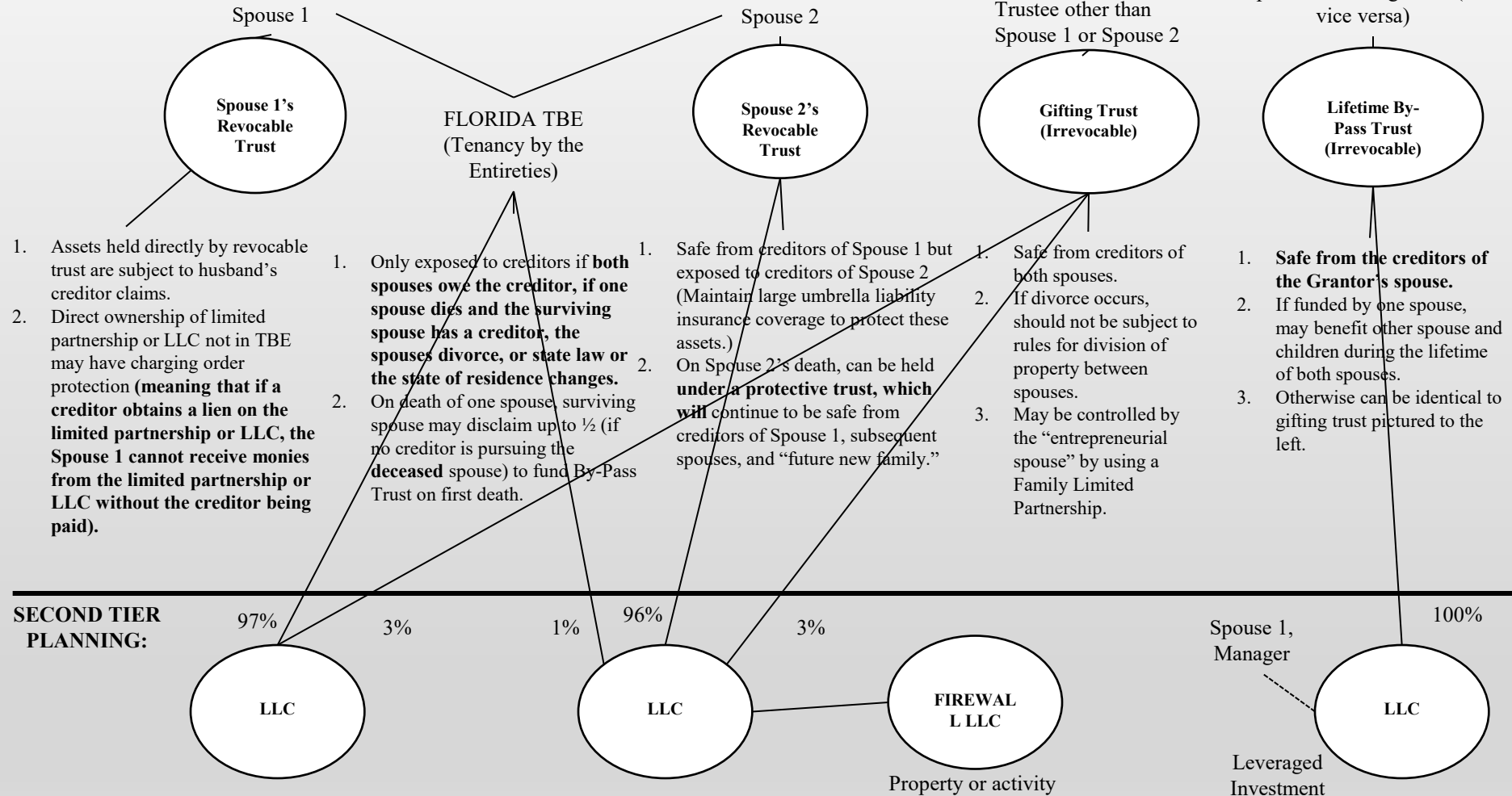


# DETERMINING HOW TO BEST ALLOCATE ASSETS AS BETWEEN A MARRIED COUPLE - PART II

## Subsidiary Entity Techniques:

-Limited partnerships and LLCs can be used to facilitate discounts, for estate tax purposes, and for charging order protection.

-Limited partnerships and LLCs can also be used to provide “firewall protection” from activities or properties owned.



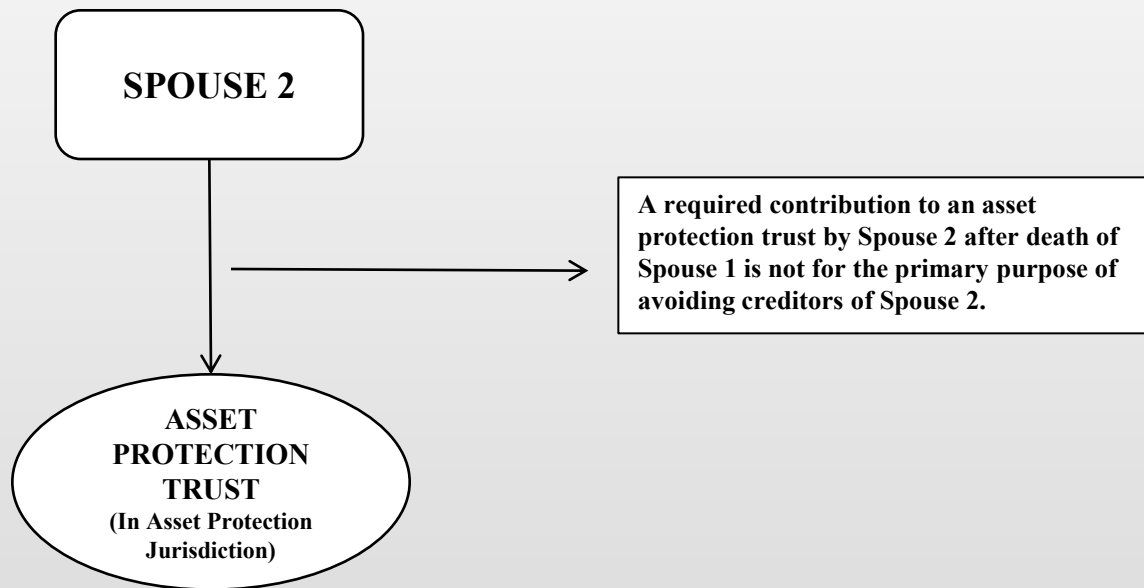
**A COMMON SOLUTION** - to use a limited partnership or similar mechanisms and have no assets directly in the “high risk” spouse’s trust, half to two-thirds of the assets held as tenants by the entireties, and half to two-thirds of the assets directly in the “low risk” spouse’s trust.



# Brief Discussion Of Community Property



# Marital Asset Preservation System (MAPS)



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



# Marital Asset Preservation System (MAPS)

One of the primary purposes for utilizing the Marital Asset Preservation System (“MAPS”) is to ensure that married couples keep their marital assets in the family for generations to come. In general, conscientious estate and tax planners will do their very best to meticulously plan and preserve assets for a surviving spouse, while also enabling the surviving spouse to leave assets to common descendants of the decedent, and with the minimal amount of taxes and probate expenses.

However, there is one question that is routinely left out of the discussions between married couples and estate planners during the planning process:

Would you like some assurance that your marital assets will only pass to your common descendants upon the death of the survivor of you?

The answer to this question is usually a resounding “yes”, and as such, requires the surviving spouse to protect the marital assets by not allowing them to be left to a subsequent spouse or some other future significant other.

That answer leaves the estate planner with some rather intricate issues and challenges, not to mention more work and an added layer of complexity to design and implement the various trust systems and strategies to be used.

Once the clients have decided that this is the right strategy for them, the planner must explain that upon the death of one spouse, the surviving spouse may serve as Trustee or Co-Trustee of one or more irrevocable trusts, with the power to change the trusteeship within pre-agreed parameters. These irrevocable trusts may only allow the surviving spouse to have access to assets and monies as needed for the spouse to maintain the standard of living that has been enjoyed during the marriage, and to provide support for common descendants. There are several restrictions that can be placed on a surviving spouse, one of which is to allow them to only make distributions outside of the family based upon an annual allowance that might be used for charity, religious organization dues and donations and gifts to friends based upon guidelines that can be set forth in the documents.

There can also be limitations placed on how much compensation might be paid to third parties for services like housekeeping, nursing, private lessons, personal trainers and otherwise. There can also be limited access for charity, church or synagogue donations, and other defined causes.

## An Ability to Provide Limited Benefits and Compensation to a Subsequent Spouse.

While it is commonly assumed that the “next spouse” might threaten to deprive descendants of marital wealth, and might place the surviving spouse in jeopardy of losing assets that would be needed for his or her well-being, there is also the possibility that the subsequent spouse will contribute meaningfully both to the preservation and enhancement of marital assets, and with respect to providing care and support for the surviving spouse. It could be both unfair and counterproductive for the surviving spouse to not be able to allow a subsequent spouse to contribute meaningfully to marital assets, and to be compensated for providing necessary services, whether personal, nursing, or managerial, where this is clearly in the best interests of the surviving spouse, and possibly one or more of the descendants of the original marriage.

For this reason, the authors also provide that the MAPS Agreement or system may be amended by one or more of the adult descendants of the original couple, and/or an independent Trust Protectors or other advisors, to take into account appropriate circumstances and formal requests for changes.

The above normally fits well and naturally under a credit shelter/marital deduction trust arrangement that will typically be established on the death of a first dying spouse where federal estate tax is a possible concern, but quite often a good many assets will be owned outright by the surviving spouse or jointly with right of survivorship, and IRA and qualified retirement plans are typically best left to a surviving spouse to enable postponement of having to take taxable distributions.

The planner must therefore explain that those assets that are not naturally captured under a trust system on the first death of a spouse will need to be either: (1) contributed to a trust system by the surviving spouse, as encouraged or required by planning documents, and possibly a Marital Asset Preservation System (MAPS) Agreement; or (2) have the surviving spouse contractually bound by a MAPS Agreement requiring them to maintain existing marital assets, and any income derived from those assets for the surviving spouses life, and also direct that those assets be left for only common descendants upon the surviving spouse’s death.

The author commonly uses one or both of these alternatives. These techniques are often coupled with carefully drafted trust provisions, as well as an explanation in the trust document to ensure that every possible step is satisfied and that the MAPS objectives are met.

One issue for couples having more than the \$10,860,000 exemption level situation, or expectation thereof, is whether limitations placed on inherited assets would cause loss of the federal estate tax marital deduction and consequent income tax to be paid on the first death. Each individual presently only has a \$5,430,000 estate and gift tax exemption amount, which must be considered. This issue is especially important when the surviving spouse is contractually bound to preserve and leave the assets for subsequent descendants, as opposed to receiving the assets as the sole owner without any legal entanglements.

Generally, there is no marital deduction allowed for dispositions that do not at least allow the surviving spouse to have all income from marital deduction trust property and to be the sole beneficiary of a trust holding such property for his or her lifetime. A marital deduction may also not be received for assets that are paid outright to a surviving spouse who has significant contractual limitations on what he or she is able to do with the property.



# Marital Asset Preservation System (MAPS)

In states that do not recognize community property, most planners will use separate revocable trusts for affluent husbands and wives for estate planning, because of established customs and the complexities associated with using joint trusts. In such situations, it is possible to have the revocable trust of the surviving spouse become irrevocable upon the death of the first surviving spouse. For purposes of federal estate and gift taxes, this event will be considered an incomplete gift because it provides the surviving spouse with the right to veto payments to any person other than the surviving spouse during their remaining lifetime, and the power to appoint trust assets to common descendants of the married couple.

Alternatively, in states that do recognize community property, we find that joint trusts are becoming more prevalent.

An objective for many estate and tax planners, regardless of the state in which they live, is to have the first dying spouse's death cause a step-up in the income tax basis to a fair market value for any and all family assets. This strategy should be utilized to the extent that the family would benefit from having an increased basis, which would essentially take any property that appreciated during the decedent's lifetime and provide the surviving spouse with the ability to not recognize any gain on such property when they come into possession.

Many planners in non-community property states are using Joint Exempt Step-Up Trusts ("JEST"), which may enable clients to receive this stepped-up basis on all joint trust assets upon the death of the first dying spouse. When the first spouse dies, assets held by the joint trust are used to fund a credit shelter trust for the benefit of the surviving spouse and descendants. These assets now held by the credit shelter trust will receive a full step-up in basis, and escape tax liability upon the surviving spouse's death.

Life insurance can also be integrated into the arrangement by having the death benefit payable to an irrevocable trust, which may be a separate trust that owns the policy so as not to be subject to federal estate tax on the death of the first dying spouse.

## Waiver of Marital Rights.

Most states have statutes which provide a surviving spouse with a minimal outright disposition, most commonly known as the Elective Share. In addition, some states provide a surviving spouse with homestead inheritance and other rights which may be waived during the estate planning process while both spouses are living.

The estate planner will have to be very careful with respect to disclosing conflict of interest issues and evaluating whether one or both spouses should be required, or at least strongly urged, to seek independent legal counsel before being legally bound to have limited access and control to marital and inherited assets after the death of one spouse. In the event that a conflict of interest does arise, the estate planner should withdraw and require the spouses to retain separate counsel. Furthermore, because the planner represented both spouses, they are prohibited from representing either one of them against the other, even with informed consent.

ABA-Model Rule 1.7 addresses the rules for Current Client Conflicts of Interest. In essence Rule 1.7(a)(1) states that, a lawyer shall not represent a client if representing one client will be directly adverse to another client. However, this Rule is not an absolute bar to representing a client when there is a conflict. Subsection (b) provides that a lawyer may represent a conflicted client if (1) they believe they can provide competent representation; (2) it is not prohibited by law; (3) it does not involve one client asserting a claim against another client, both of whom are represented by the lawyer; and (4) each client gives informed consent. In the context of marital inheritance, subsection (b)(3) will almost always bar the attorney from representing one client over another, even with informed consent.



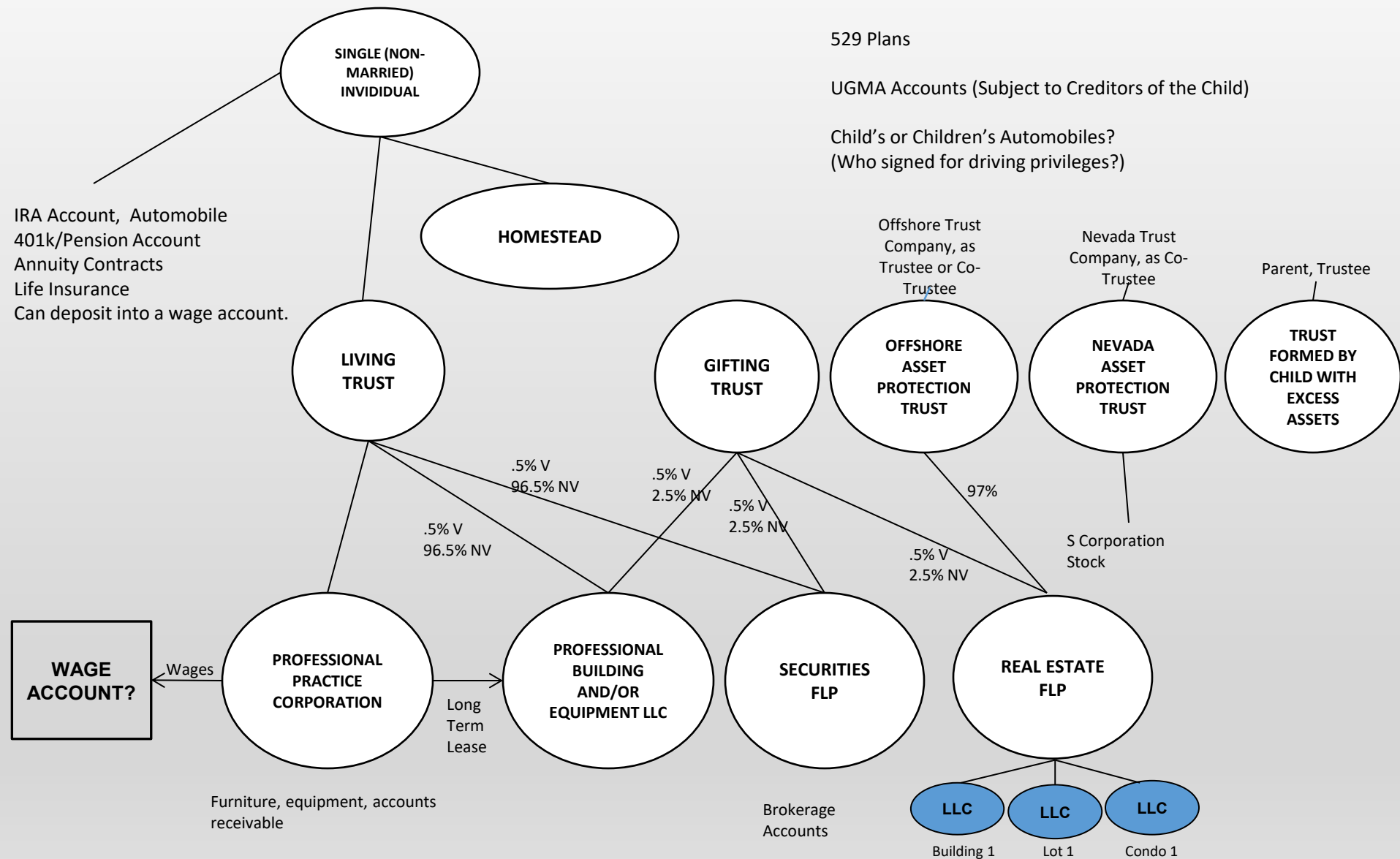
# Estate and Asset Protection Planning for the Single Professional

Child or Children

529 Plans

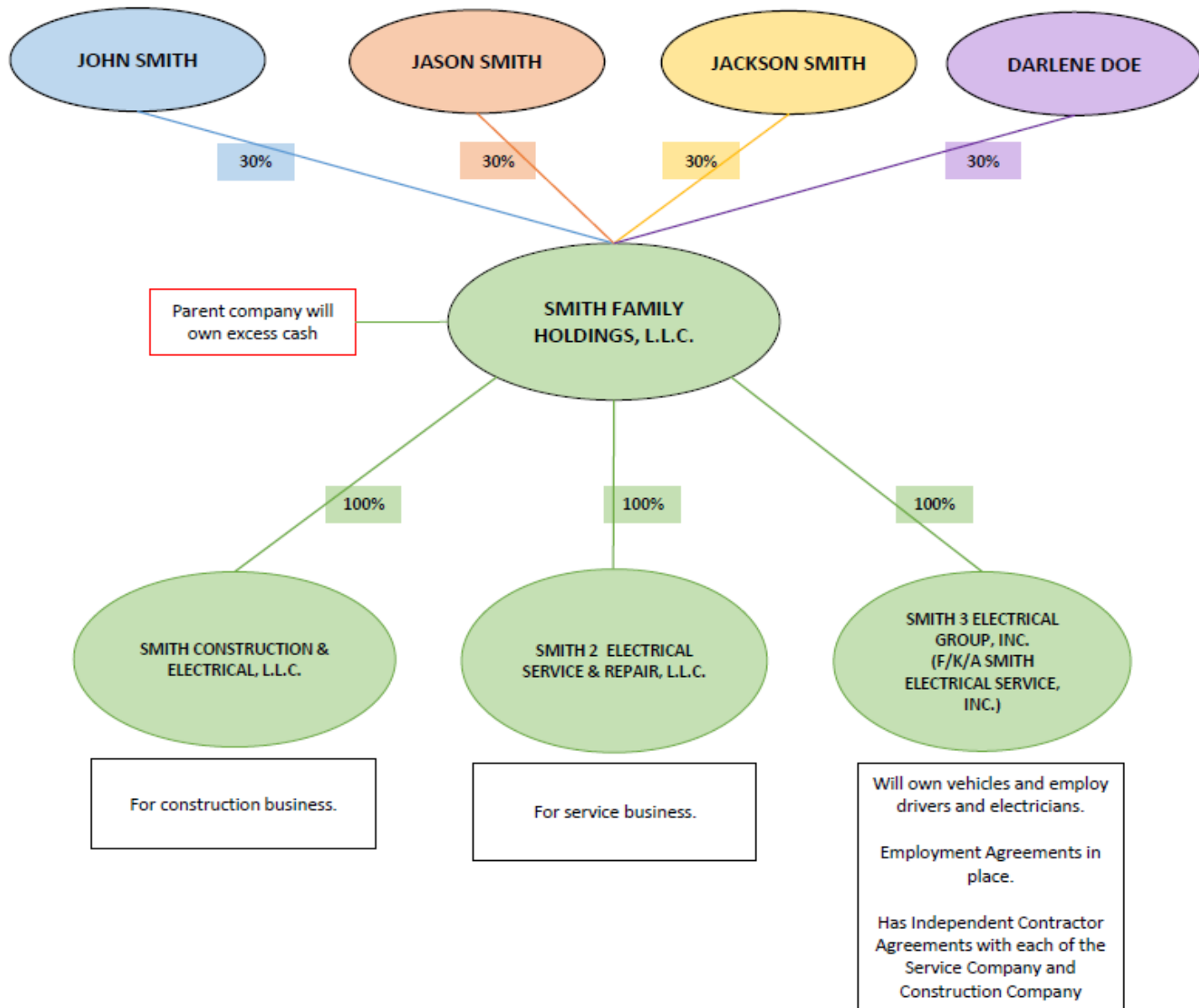
UGMA Accounts (Subject to Creditors of the Child)

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

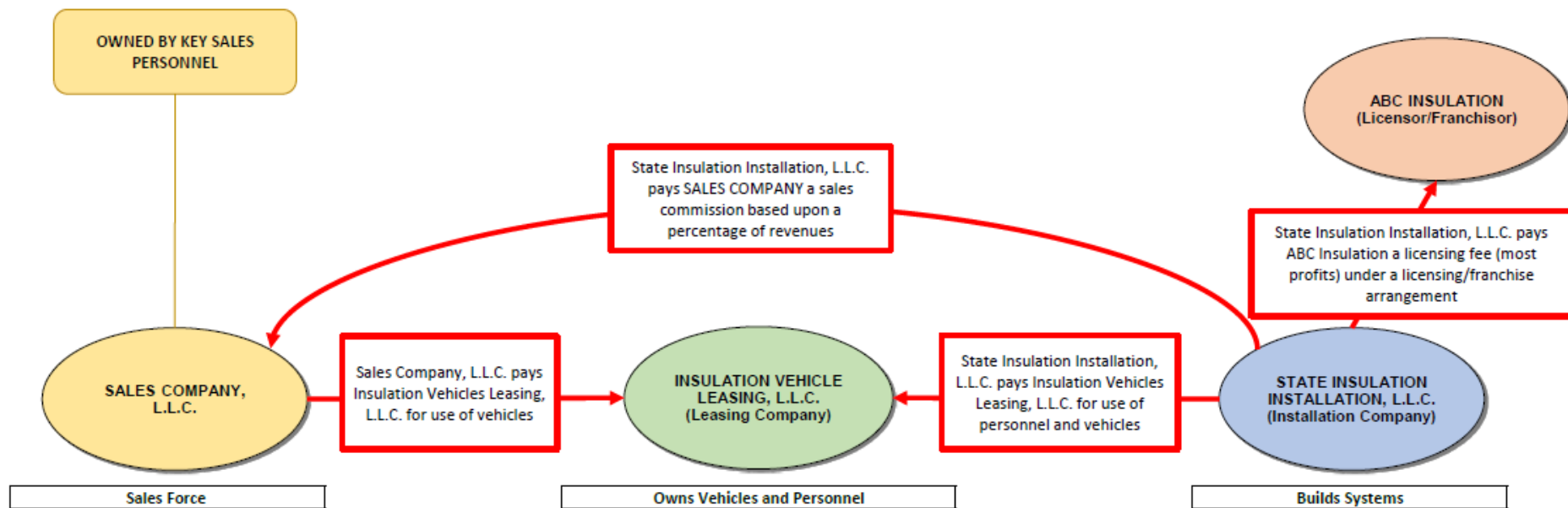




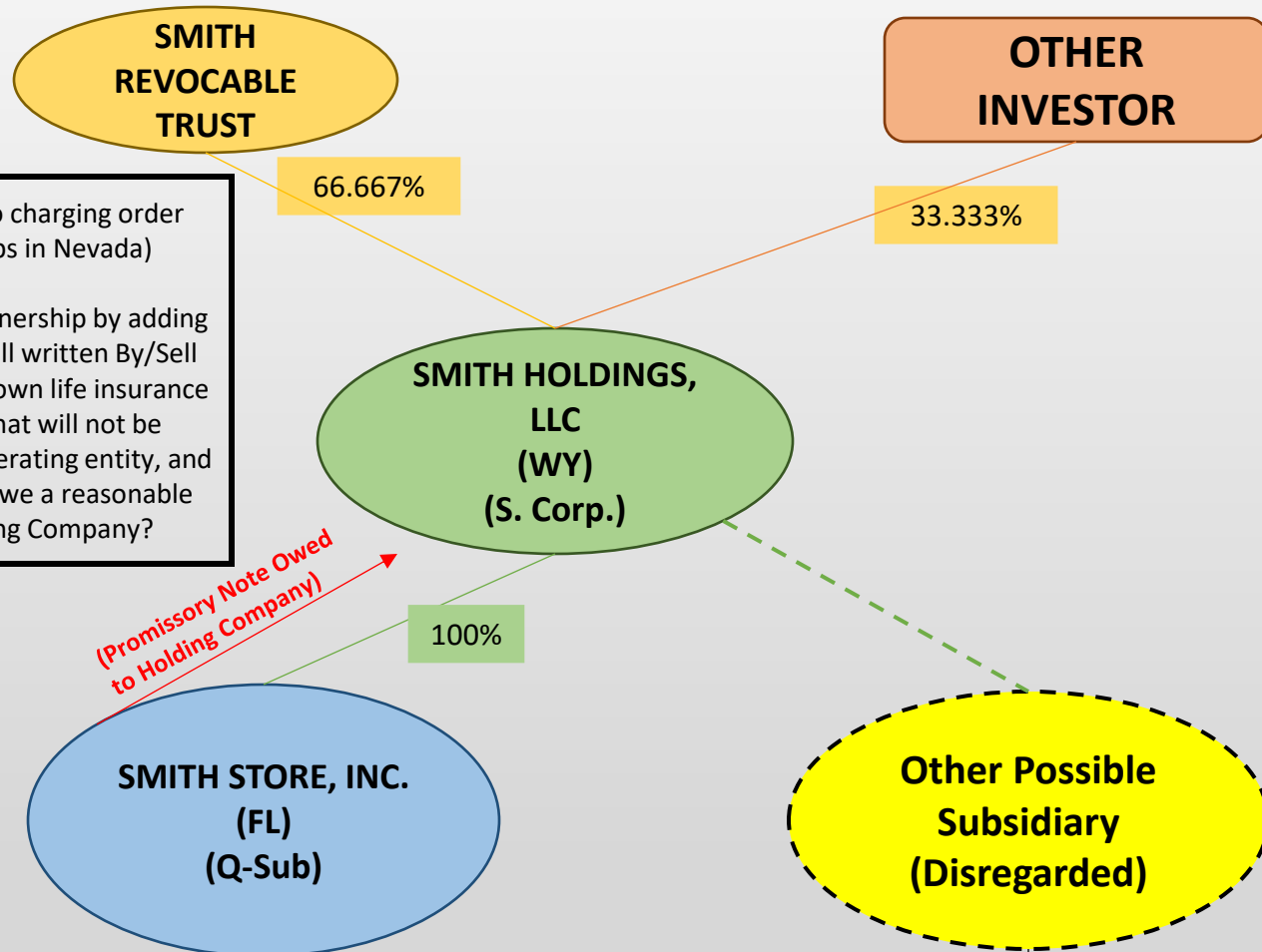
# Separating Assets and Functions - 1



## Separating Assets and Functions - 2



# Charging Orders and an “Over Easy LLC Parent”



A regular corporation has no charging order protection (except perhaps in Nevada)

Why not update the entity ownership by adding a Parent LLC to facilitate a well written By/Sell Agreement between owners, own life insurance for Buy/Sell Agreements that will not be exposed to creditors of the operating entity, and having the operating entity owe a reasonable amount to the new Holding Company?

(Valuable assets may be transferred out of Smith Store, Inc.)



# Advantages of Over Easy LLC Arrangement

1. No need to change the name or Tax Identification Number of subsidiary entity.
2. The new parent company LLC entity can loan money to the subsidiary entity, and receive a lien on the assets.
3. The new parent company LLC can own life insurance used for buy/sell purposes that is not exposed to creditors of the subsidiary.
4. The parent company LLC can be formed in another jurisdiction that has better creditor protection and/or tax features without registering to do business where the subsidiary operates.
5. This is a tactful way to eliminate present ownership agreements or arrangements under the subsidiary in an indirect manner.



# *Disadvantages* of Over Easy LLC Arrangement

1. The cost of forming a new LLC, and explaining the arrangement.
2. The cost of maintaining a separate LLC, which does not have to file federal income tax returns.
3. Coordination of transition.



# 11 Common LLC Planning Errors

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

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

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

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

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

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





# 11 Common LLC Planning Errors, Cont'd.

## 2.) Entity Documents Can Disqualify S Election

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

Common causes of this catastrophic treatment are as follows:

(a) An operating agreement does not provide for all income to be distributed pro rata to ownership. Commonly, “partnership style” clauses assure members that they will recapture their original investment or have some sort of an income sharing that would reflect a “second class of stock,” which is not permitted under the S Corporation Rules.

(b) Although state law permits a limited liability company to have non-citizens, corporations, and other entities own LLC interests, these and certain other entities are not permitted owners of S Corporation stock and will, thus, cause disqualification.

(c) Too high of a debt equity ration could cause disqualification from S Corporation status.



# 11 Common LLC Planning Errors, Cont'd.

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

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

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

## 4.) Forced Sale Provisions

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



# 11 Common LLC Planning Errors, Cont'd.

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

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

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

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



# 11 Common LLC Planning Errors, Cont'd.

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

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

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

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

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



# 11 Common LLC Planning Errors, Cont'd.

**9.) Having the tax returns reflect different ownership than the LLC operating agreement and other ownership documents.**

**10.) Failure to warn Canadians that they will be taxed by Canada as if they had invested in a C corporation -**

Florida has many Canadian investors who invest in Florida LLCs and expect disregarded entity characterization to apply in their Canada tax filing. Unfortunately, Canada treats LLCs like C corporations instead of pass-through entities, exposing Canadian taxpayers to double taxation.

One way to prevent double taxation for Canadians is to use a Limited Partnership or a Limited Liability Limited Partnership in lieu of an LLC, and many LLCs have converted to Limited Liability Limited Partnerships upon realization of the above.

***P.S. Canada entered World War I almost 3 years before the United States and lost 67,000 soldiers. Canada entered into World War II over 2 years before the United States and lost 44,000 soldiers.***



# 11 Common LLC Planning Errors, Cont'd.

## **11.) Failure to address buy-sell provisions or what happens on certain contingencies**

We strongly favor having a separate entity taxed as a partnership own life insurance policies on the shareholders with trustees appointed to receive the policy proceeds on behalf of the entity so that they must be held for the sole purpose of purchasing the ownership interest of the deceased shareholder. The entity taxed as a partnership can own the policy and have limited other activities so as not to risk the loss of policy proceeds to creditors of an operating company or an individual shareholder while qualifying for advantageous tax treatment as explained in in the following pages.





# Key Estate Planning Definitions

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



# Key Estate Planning Definitions

5. **Trust or Trust Agreement** - an arrangement whereby a Trustee holds or will receive assets for a Beneficiary or Beneficiaries pursuant to the terms of a Trust Agreement entered into between the Settlor/Grantor and the Trustee. The Beneficiaries have legal rights associated therewith. The property held by the Trustee does not belong to him or her personally, but is held for the sole benefit of the Beneficiaries.
6. **Revocable Trust** - a Trust that can be changed by the Settlor, often commonly known as a Living Trust.
7. **Irrevocable Trust** – a Trust that cannot be changed by the Settlor; a Testamentary Irrevocable Trust may be formed under the Last Will & Testament of the Settlor to hold assets for Beneficiaries pursuant to the terms thereof. It will, therefore, typically require a probate for the assets to come from the name of the individual to the Testamentary Trust. Other Irrevocable Trusts are formed during the lifetime of the Settlor for tax or other purposes, or may be formed pursuant to the terms of a Revocable/Living Trust. For example:

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



# Key Estate Planning Definitions

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



# Key Estate Planning Definitions

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



# Special Clauses for Trust Agreements

## Not all trusts are created equal.

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

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



# Special Clauses for Trust Agreements

**Not all trusts are created equal.**

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





# Questions for the Estate Planning Lawyer

1. Are your clients getting the best estate plan you can put together for them? Or is it just the same old form time after time built on a low budget?
2. Do your clients understand what they need to know to appreciate the plan you design for them? Or are you rushed through a free consult to try to land them in an economy plus estate plan?
3. Do you have a clear understanding of the client's assets, liabilities, titling, income, plans and aspirations?
4. Have you run the numbers on estate tax and capital gains tax exposures, taking the time value of money into account? What about the Medicare 3.8% tax?
5. Are you also planning for the client's parents as to inheritances that might be received, or assistance that may be needed?
6. Have you taken into account the possibility of an ugly divorce, incapacity, lawsuits against each person involved?
7. Have you looked at creditor protection for each person in the plan and after each event in the plan? TBE might work great, but not after one spouse dies.

Inheritances might pass in a creditor-proof manner to an irrevocable trust, but what if a beneficiary's ex-spouse or the parent of a beneficiary's child tries to invade the trust which is permitted under Florida Statute Section 736.0503 (exception creditors).



# Questions for the Estate Planning Lawyer

8. Have you coordinated with the other professionals on the team, including the CPA, financial planners, liability insurance people and others?
9. Have you made sure that the client has plenty of insurance for life, health, casualty, disability and umbrella coverage and that gaps are plugged?
10. Have you covered the common mistakes, like:
  - a. Joint accounts that are not TBE.
  - b. Joint assets that are not TBE.
  - c. Operating Agreements with provisions that obliterate an S election or charging order protection.
  - d. Thinking that revocable trusts shield from creditors or Medicaid.
  - e. Thinking that S corporations do not shield from liability.
  - f. Thinking that professional practices have to be owned by licensed professionals (except dentists, optometrists, chiropractors and lawyers).
  - g. Thinking that you cannot get a full step-up for joint assets owned by a married couple or under one spouse's revocable trust?



# Questions for the Estate Planning Lawyer

10. Have you covered the common mistakes, like:

- h. Thinking that the client has charging order protection when they do not.
- i. Thinking that charging order protection is great protection.
- j. The always forgotten beneficiary designation.
- k. Titling mistakes - a great reason to have a family limited partnership or an LLC and then put the right things in it.
- l. Do not put a liability causing asset into an LLC or family limited partnership that has other valuable assets - watch the capital call and indemnification provisions.
- m. How do you prevent an offshore depository or even a U.S. depository from stealing or being the next Bernie Madoff?
- n. Is the client being overcharged or churned in their investments? Do they know what their investment costs are?
- o. TBE is not a panacea or paregoric.

The repairman who fell down because he was scared by the joint dog.  
The motorcycle rider killed by the dog.



# Questions for the Estate Planning Lawyer

10. Have you covered the common mistakes, like:

p. Liability, liability, liability

How are we situated if Grandpa gives son half ownership of the car and then backs it up over a neighbor?

You are responsible for anything your partners do. You are responsible for anything your employees do. Most dangerously of all, you are responsible for anything you do.

The \$41 million dollar tick.

11. Using special techniques for special clients, like:

a. Annuities and life insurance private placement.

b. Stretch IRA's.

c. QPRT's.

d. GRAT's.



# Questions for the Estate Planning Lawyer

## 11. Using special techniques for special clients, like:

- e. Installment sales and private annuity sales.

The missed Self-Cancelling Installment Note or Private Annuity opportunity.

Being assertive and not beating around the bush with clients who have serious illnesses.

- f. FLP's.

- g. Out of state trusts.

- h. Offshore trusts

- i. Lifetime QPRT's

- j. Irrevocable Life Insurance Trusts

- k. The right type of Buy-Sell Agreement

## 12. Are you customizing trust documents like you would customize your own?



# Basic Income Tax Operation of Each Type of Trust

## Grantor Trust

Grantor treated as the owner for federal income tax purposes.

Can make protective ESBT election.

If anyone but the Grantor makes a contribution, it is no longer a Grantor Trust!

## Beneficiary Defective Trust (aka BDIT or 678 Trust)

Beneficiary treated as owner for federal income tax purposes.

## 678 Income Trust

If beneficiary has the right to withdraw all income then all income will pass by K-1 to beneficiary regardless of whether it is distributed.

## Complex Trust

1. Taxed as a separate entity to the extent that income is not distributed
2. "Distributable Net Income" paid out can carry the income to lower bracket taxpayers
3. The trust has an effective tax rate of 24.1% on the first \$12,500 of income and 37% above that.
4. Distributions made within 65 days of the next tax year can be considered to have been made in the previous tax year.
5. Distributions made to charity can carry income to the charity to in effect give a tax deduction without a 60% adjusted gross income limitation or itemized deduction considerations.
6. 3.8% Medicare tax begins to apply at \$12,500+ of AGI.
7. Unlike a C Corporation - No tax upon liquidation of the trust.
8. Can shield Trustee and Beneficiaries from operational liability similar to a corporation depending upon state law.
9. No 179 Deduction
10. Separate \$10,000 SALT deduction.

## Complex Electing Small Business Trust "ESBT"

1. Can be owner of an S-Corporation.
2. Can allow a non-resident alien beneficiary to effectively be a member of an S-Corporation.
3. S-Corporation income taxed at the highest rate bracket, regardless of whether income is distributed to beneficiaries.
4. ESBTs may have multiple beneficiaries, and mandatory distributions of income are not required.
5. Distributions made to charity will be subject to the same rules that apply to individuals.
6. 3.8% Medicare tax begins to apply at \$12,500+ of AGI.

## Qualified Subchapter S Trust "QSST"

1. Can be owner of an S-Corporation.
2. Can have only one named beneficiary.
3. Must pay all "fiduciary accounting income" to trust beneficiary each year.
4. All S-Corporation K-1 income taxed to beneficiary of trust.



**Planners may recommend  
separating community property to  
avoid all assets being subject to the  
claims of the creditors of either  
spouse, or possible use of Alaska or  
Tennessee Community Property  
Asset Protection Trusts**

**(If couple resides in a Community  
Property State)**





# Community Property States

✓ Arizona

✓ California

✓ Idaho

✓ Louisiana

✓ Nevada

✓ New Mexico

✓ Texas

✓ Washington

✓ Wisconsin

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



# Planning In Advance For Inheritances & Fair Market Value Income Tax Basis



# Features Of An Inheritance Trust

1. Child can sign on behalf of parents and as nominal Grantor.
2. Child may want the right to amend the trust at any time before it is funded by parents.
3. Child can make distributions for her descendants, but what about for her spouse?
4. Allow Child to transfer situs to state that will not permit exception creditors (ex-spouses, child support, etc.) to reach into the trust.
5. Have overflow provision so that if funding would exceed Parent's available GST exemption a Non-GST Exempt Trust will be formed the Child can appoint to creditors of Child's estate from.
6. Independent Fiduciaries clause to allow bestowing a general power of appointment upon the child if estate tax is not a concern and capital gains tax will be.
7. Ability to deem capital gains out.



# Not All Inheritance Trusts Are Created Equally



**Alan Gassman** Contributor ⓘ

Retirement

*I write about tax, estate and legal strategies and opportunities.*

When it comes to inheritance, some clients are convinced that their parents have made proper arrangements on their behalf. Even when parents have used qualified lawyers and other advisors to do this, we always recommend “double checking” to make sure that any inheritance that might be received will be under an appropriately-drafted trust to protect the client and his or her descendants from creditors, federal estate tax, divorce, and undue influence in the event of incompetency. Although many clients respond by saying that this type of planning is already in place, we often find that one or more elements of proper inheritance trust planning is missing or deficient.

The list below provides the components that we would hope to see in a properly drafted “inheritance trust,” which would provide the client with many of the rights and powers that he or she would have if the inheritance was received outright, while affording protection offered by the inheritance being held under a trust structure:

type of planning is already in place, we often find that one or more elements of proper inheritance trust planning is missing or deficient.

The list below provides the components that we would hope to see in a properly drafted “inheritance trust,” which would provide the client with many of the rights and powers that he or she would have if the inheritance was received outright, while affording protection offered by the inheritance being held under a trust structure:



**1. The client (the person who is receiving the inheritance) is named as a trustee of the trust, and has the right to designate the successor trusteeship to apply in the event of his or her resignation, death or incapacity.**

An inheritance trust will likely be a trust that can benefit a client for his or her lifetime, and can then be passed into separate trusts for his or her children after the client's death. There might be a period of time during the client's lifetime that he or she cannot serve as trustee, so the trust document will permit the client to name co-trustees or successor trustees. These trustees are subject to all limitations that are deemed appropriate, such as limiting the client's prospective successor trustees to his or her spouse, children, or a trust company, to ensure that no one outside of the family would be able to overtake the trust.

**2. Typically, the client will have the power to direct how the trust assets will pass upon his or her death.**

An inheritance trust likely provides that, on the client's death, the trust will divide into separate trusts for his or her children, or will go outright to his or her children. Typically, the client will be given a "testamentary power of appointment," which gives the client the ability to direct how the trust assets will pass upon his or her death. Most often, this will be exercisable solely in favor of descendants or his or her parents, but, to some extent, there are instances where it may also be used in favor of charity, or in favor of any individual deemed appropriate by the client (other than the client, the client's estate, the client's creditors, or the creditors of the client's estate). Nevertheless, a well-drafted inheritance trust might also provide for a committee of independent persons (i.e., non-beneficiaries) to have the ability to give the client the power to appoint assets to the creditors of his or her estate upon his or her death to allow for a step-up in income tax basis (i.e., the assets under the trust would receive income tax basis equal to their fair market value upon the client's death) of the assets held under the trust, if the client does not have federal estate tax concerns.



### **3.The client is given a “lifetime power of appointment.”**

In addition to a "testamentary power of appointment," which would be exercisable only at the time of the client's death, an inheritance trust can give the client a "lifetime power of appointment." This allows you to transfer assets to trusts for the client's children and other descendants while you are living.

### **4.Provide for Trust Protectors when drafting inheritance trusts.**

The inheritance trust should provide for Trust Protectors to be appointed, who are individuals that are not beneficiaries of the trust, that may alter the trust if there are significant changes with respect to family circumstances, the tax law, or applicable state law. Trust Protectors are typically given the authority to make changes to the trust document for the benefit of the beneficiaries, which might include the ability to modify the trusteeship, the ability to modify the dispositive terms of the trust, and the ability to change the situs of the trust.





**5. Request that the exact language used for the client's children's trusts be provided for under the inheritance trust in case the client does not survive his or her parents.**

The parents of many clients find the process of drafting the inheritance trust to be too burdensome or complicated, and sometimes the lawyers for the parents are not fluent in all aspects associated therewith. For those clients, we commonly draft a separate irrevocable trust that our client signs, and then the parents make that separate irrevocable trust the beneficiary of their plan instead of the child. A separate irrevocable trust will contain provisions which benefit the client's children, which will apply on the client's death if he or she did not exercise his or her power of appointment, or the client does not survive his or her parents.

Once a client signs an inheritance trust, which covers everything he wanted, his parents now only have to change their will or living trust to provide that the client's inheritance will pass to the irrevocable inheritance trust, rather than to the client directly or otherwise under the parents' last will and testament or living trusts.

These tips are useful for anyone to consider, and can help assure that whatever inheritance the client might receive will not be subject to federal estate tax at his or her level. While many trusts achieve this objective, some have more desirable features than others. There certainly is a great amount of detail to review here, but it is worthwhile to do everything reasonably possible to assure that all bases are covered where assets values are appreciable, and in light of potential creditor claims and detrimental tax consequences that might result from neglecting proper planning.

While the above items and methodology may seem inconvenient and expensive to implement, lawyers who specialize in this type of work will have forms and knowledge that can make this process easy and protective. Shortcuts can result in lost assets, adverse tax consequences, and significant inconvenience.

For more ideas and information, see our Forbes article entitled: *The Most Valuable Gift You Can Give: A Good Estate Plan*. Do not give up until your estate planning is done correctly!





# Planning Strategies



# Underutilized Basis Planning Strategies

Individuals and families who seek advice from estate, financial and tax planning advisors can receive significantly different advice and information on recommended and possible planning strategies.

This is not the fault of the tax, financial or legal advisor, given the significant complexity of various strategies, and time and effort that it can take to be well versed with respect thereto.

We were recently asked to provide a list and discussion of strategies that may be underused or unknown to many advisors.

The list that we provided is as follows, and not necessarily in order of prevalence, impact or importance:

1. FMV Income Taxes On Death.

Estate planning and receiving a new fair market value income tax basis for appreciated assets.

The U.S. income tax system provides for elimination of the capital gain element that exists to the extent of the difference of the value of property owned or considered as owned by a deceased person, and the original cost or lower depreciated income tax basis thereof.

This can be a challenging area, given that married couples would ideally have all assets owned by the first dying spouse in non-community property states in order to get a new fair market value income tax basis on the death of the first dying spouse.



# Underutilized Basis Planning Strategies

Married couples who live in community property states, which include California, Texas, Nevada, Wisconsin, Louisiana . . . can receive a new fair market value income tax basis on community property assets on the death of one spouse, but couples in most of these states also face the risk of using community property assets if either spouse is sued, because of the way that creditor rights work in these states.

A typical married couple living outside of a community property state does not know to ask their estate and tax planners how they can receive a new income tax basis on marital assets on the first death, but strategies for this exist, and can facilitate allowing the surviving spouse to sell assets in order to diversify after the first death without loss of significant value to capital gains taxes.

When rental and business property is involved, the stakes are even higher because the surviving spouse can have the benefit of new depreciation deductions, to save significant income taxes after the first death.

## 2. Joint Exempt Step-Up Trust (“JEST”).

The strategies that are available to assist a married couple who do not live in a community property state, or a married couple living in a community property state that would like a greater degree of creditor protection include the Joint Exempt Step-Up Trust (“JEST”), which can allow the first dying spouse to have what is known as a “general power of appointment” over the Trust assets, and to have the assets subject to such power held in a separate trust for the primary benefit of descendants that can also benefit the surviving spouse, if certain requirements are met.

Literature on how the JEST Trust works can be found at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://gassmanlaw.com/wp-content/uploads/2019/10/Florida-Revocable-Trust-Debate.1d.pdf](https://efaidnbmnnnibpcajpcglclefindmkaj/https://gassmanlaw.com/wp-content/uploads/2019/10/Florida-Revocable-Trust-Debate.1d.pdf)



# Underutilized Basis Planning Strategies

The JEST Trust can also be used to assure that a married couple funds a Credit Shelter Trust that can benefit the surviving spouse without being subject to federal estate tax on the death of such spouse.

For example, most married couples will fund a Credit Shelter Trust on the first death, only to the extent of assets owned by the first dying spouse, or one-half of community property assets, but Private Letter Rulings and Technical Advisory Memoranda exist, which provide a roadmap for how to have the assets of the first dying spouse, or assets in the JEST Trust fund a Credit Shelter Trust on the first death.

For example, a married couple with high earnings and a healthy savings rate may be relatively young and have \$14,000,000 worth of joint assets, with each spouse having \$12,000,000 of estate tax exemption.

With proper drafting and situation of assets, the full \$12,000,000 of exemption of the first dying spouse may be used by the funding of a Credit Shelter Trust, or Credit Shelter Trusts, with a full step-up in income tax basis for such assets.

### 3. Stepped up basis on the death of an older relative.

Suppose that a married couple in their 60's have parents in their 80s with relatively short life expectancies.

Assume that the married couple owns an apartment complex worth \$10,000,000 that has an income tax basis of \$2,000,000.

Assume that each spouse has one parent and that each parent has a net worth of less than \$2,000,000.



# Underutilized Basis Planning Strategies

Spouse 1 may transfer the apartment complex to Spouse 2, as Trustee of a Spousal Limited Access Trust that would benefit Spouse 2, the descendants of Spouse 1 and Spouse 2 and their parents, as reasonably needed for health, education, maintenance and support.

Each parent is additionally given the power to appoint Trust assets to creditors of the parent's estate.

The power of appointment is limited to not exceed the value of assets that the parent can own without being subject to federal estate tax, and provides that it will apply to the assets in the Trust that have the highest excess of fair market value over income tax basis, if limited to not include all assets in the Trust.

Under the Treasury Regulations, the power may be limited to being exercisable only with the consent of individuals named in the Trust document who are not considered to be fiduciaries or beneficiaries for purposes of determining if the power can be exercised.

One parent dies and the assets receive a new fair market value income tax basis, so that depreciation restarts until the death of the second parent, at which time the assets go to a fair market value basis and depreciation restarts again.



# ESTATE TAX PLANNING DISCUSSION

## Dynasty Wealth Protection Trust

Trustee



Assets gifted to trust and growth thereon.

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

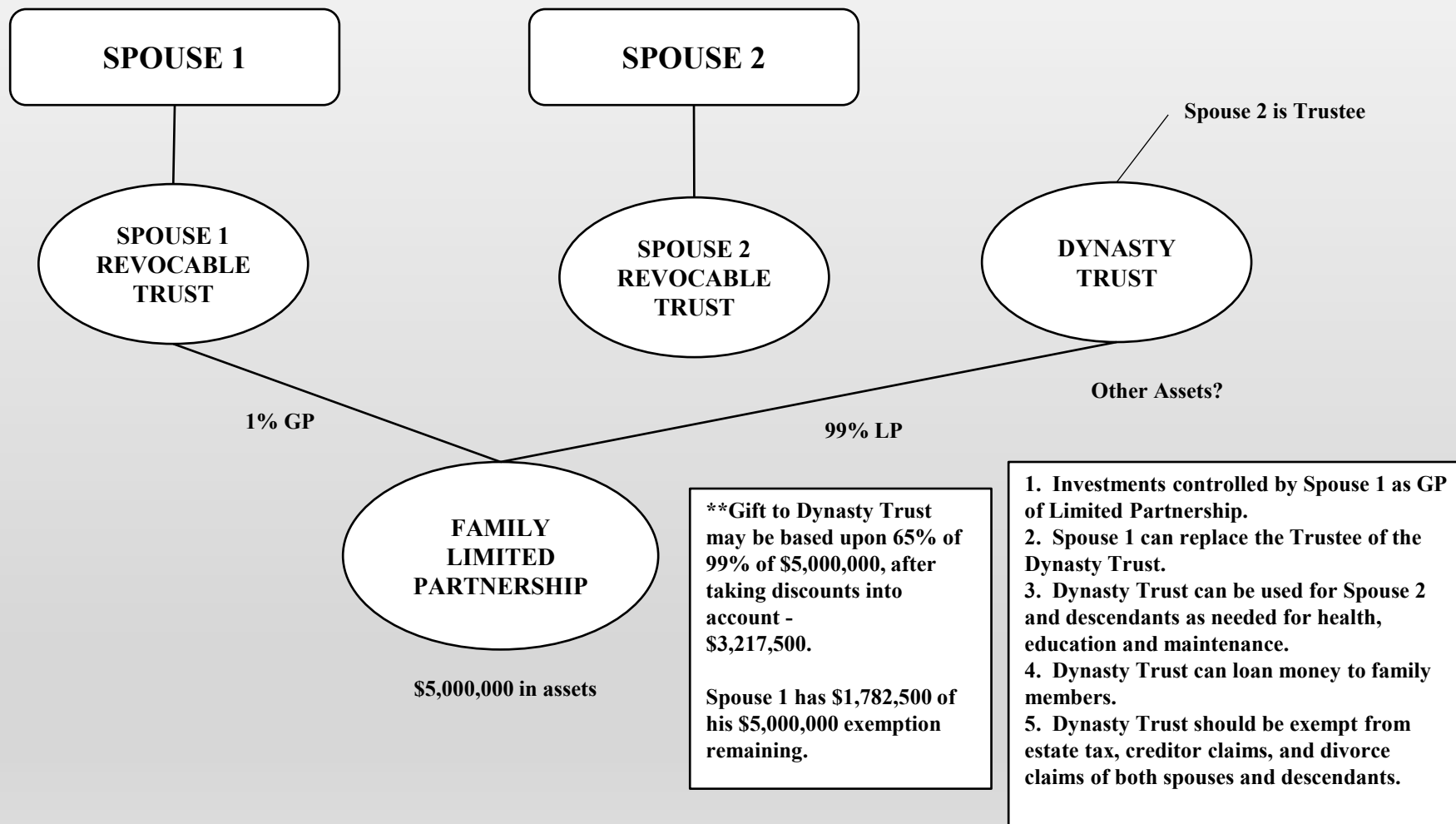
1. Grantor can replace the Trustee at any time and for any reason.
2. Protected from creditors of Grantor and family members.
3. Can benefit spouse and descendants as needed for health, education and maintenance.
4. Per Private Letter Ruling 200944002 the Grantor may be a discretionary beneficiary of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



# Estate Tax Planning Discussion

## Example of Spouse 1/Spouse 2

### Dynasty Trust Arrangement





# Estate Tax Planning Discussion

## Spousal Lifetime Access Trust Discussion

- Clients will often express concern about the surviving spouse running out of wealth to continue supporting themselves after the death of their spouse. We have found that such clients prefer to have the husband fund a reasonably sized Irrevocable Trust for the wife and his descendants with a Spousal Lifetime Access Trust (“SLAT”).
- A SLAT will use a small portion of the husband’s exemption, and the assets held by the trust grow income tax free as they are disregarded for income tax purposes during the husband’s lifetime.
- The husband may even be includable as a beneficiary by Trust Protectors if the Trust is funded in an Asset Protection Trust (“APT”) jurisdiction, and the husband’s net worth goes below a certain specified level that is less than expected to occur.
- If 20% to 30% of a couple’s investment assets are held in this manner, then they can be estate tax proof, and also have enhanced creditor protection, and protection of the family assets if the surviving spouse remarries.
- See our article entitled *Safe Trust Guide – Why Your Family Needs a Safe Trust and What to Do to Implement One by the End of 2012 (the Spouse and Family Exempt (“Safe”) Trust)*, Bloomberg BNA: Estates, Gifts and Trusts Journal (2012).



# Estate Tax Planning Discussion

## Planning for a Dynasty Trust Where the Spouse of the Settlor/Contributor is a Beneficiary – Special Considerations

1. The settlor's spouse may be a trustee of the trust. As with all irrevocable trusts, administration should be well documented and according to the trust document.
2. The settlor's spouse can have the right to receive amounts as reasonably needed for health, education, maintenance, and support. It is best to provide that any such distributions for the spouse will be made only after taking into account the spouse's other assets and resources. Otherwise, consider whether the spouse might be considered to be gifting to the trust if he or she had the right to receive distributions and did not take them.

Alternatively, limit distributions to the spouse by requiring an independent fiduciary to approve them.

3. Marital Deduction Savings Clause - The settlor's spouse may be the beneficiary of an outright disposition or General Power of Appointment Marital Trust provision to be funded if total contributions to the trust would otherwise cause gift tax responsibility. Do not use a QTIP trust for this because of the harsh regulations requiring a marital deduction election to be filed for a lifetime QTIP trust gift.
4. Typically the trust will be disregarded for income tax purposes, so that the settlor can pay the income tax attributable to the trust's income.

In case the settlor may want to “toggle off” defective grantor trust status (such as by reserving the right to replace trust assets with assets of equal value, and then releasing that right) an adverse party (another substantive beneficiary under the trust) must have the right to approve any distributions to the spouse.

Otherwise the trust will be a defective grantor trust under Internal Revenue Code Section 677, and the settlor will not be able to toggle that off (except by getting divorced!).

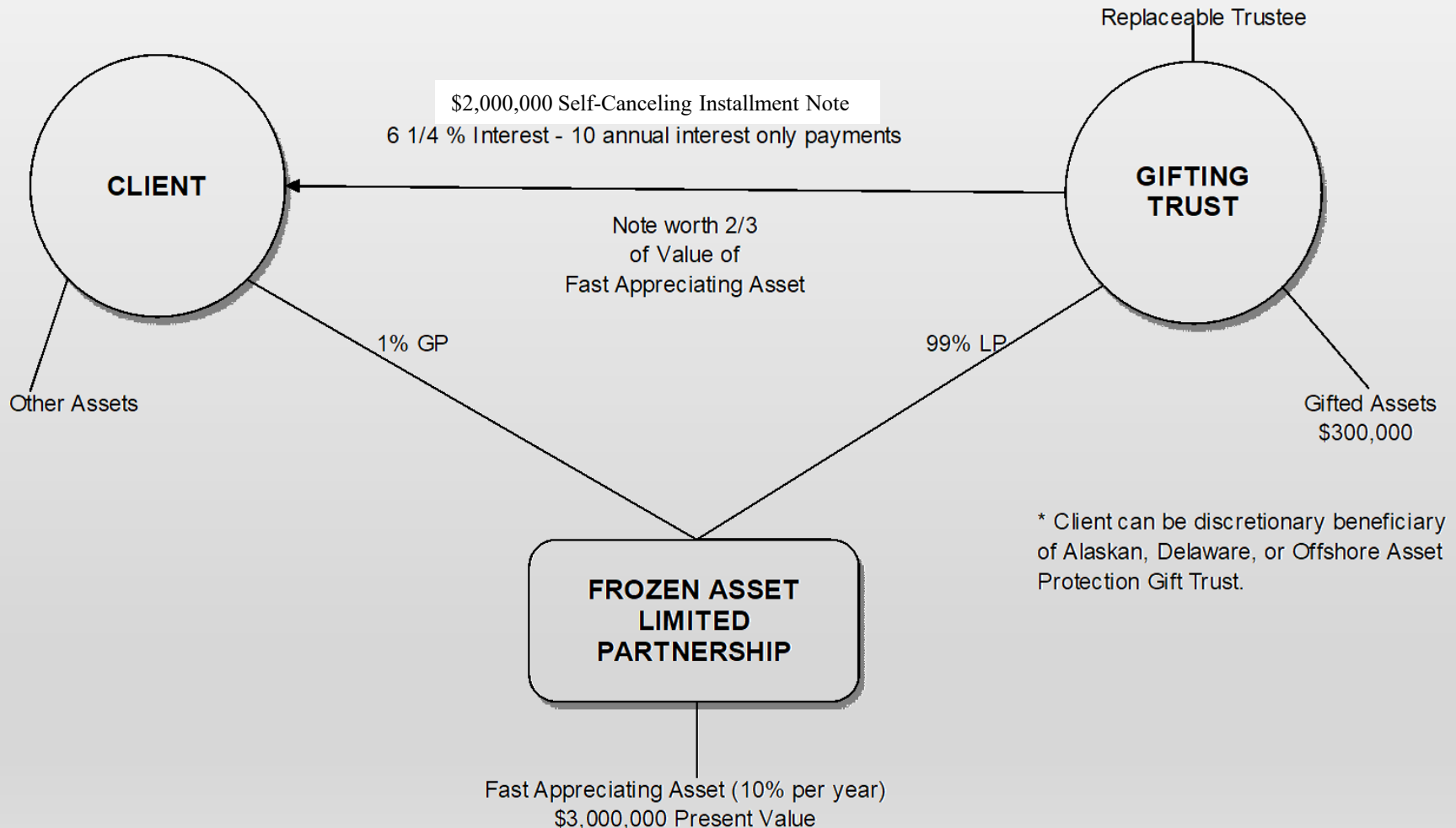


# Estate Tax Planning Discussion

## Mechanics of an Installment Sale to Gifting Trust - Page 1

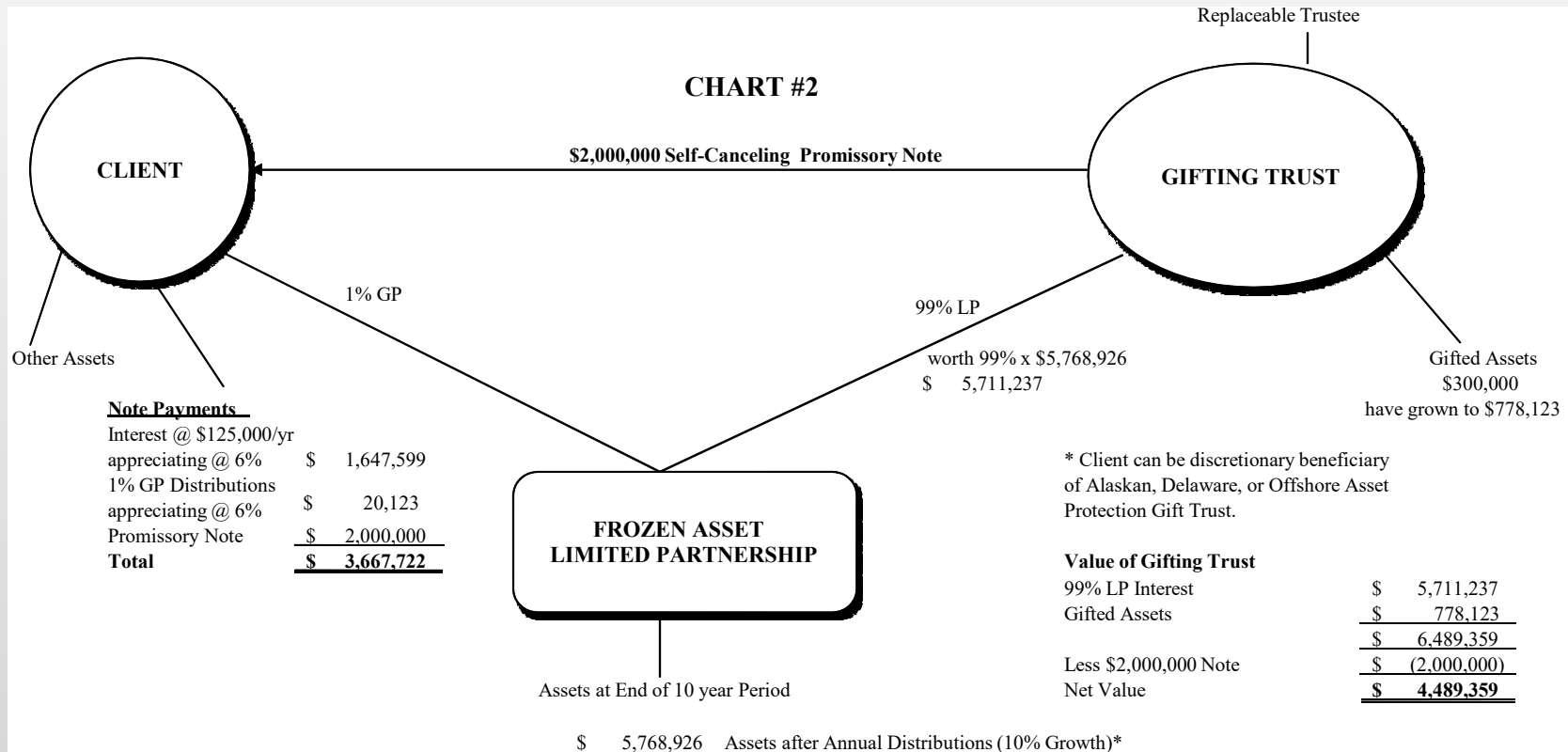
CHART #1

2011



# Estate Tax Planning Discussion

## Mechanics of an Installment Sale to Gifting Trust - Page 2 (2021)



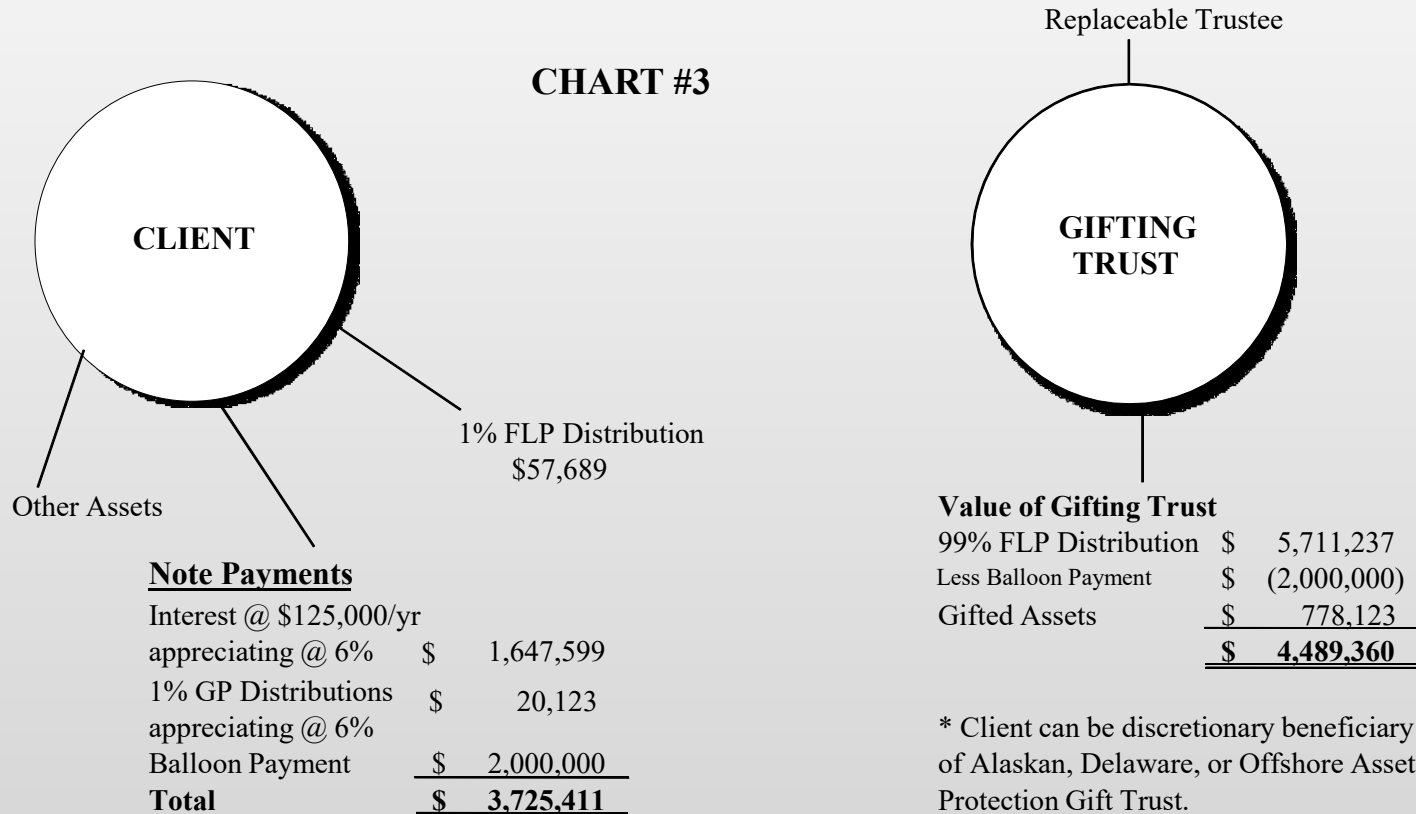
\* Assuming assets in Partnership grow at 10% per year for 10 years, \$5,768,926 is value of partnership after 10 years. The client derives \$1,250,000 in "interest" during the 10 years, \$12,626 in partnership distributions and is still owed \$2,000,000. Client has therefore received \$3,262,626, plus growth, and the "real value" of the assets in the Gifting Trust have grown to \$4,489,359.



# Estate Tax Planning Discussion

## Mechanics of an Installment Sale to Gifting Trust - Page 3 (2021)

CHART #3



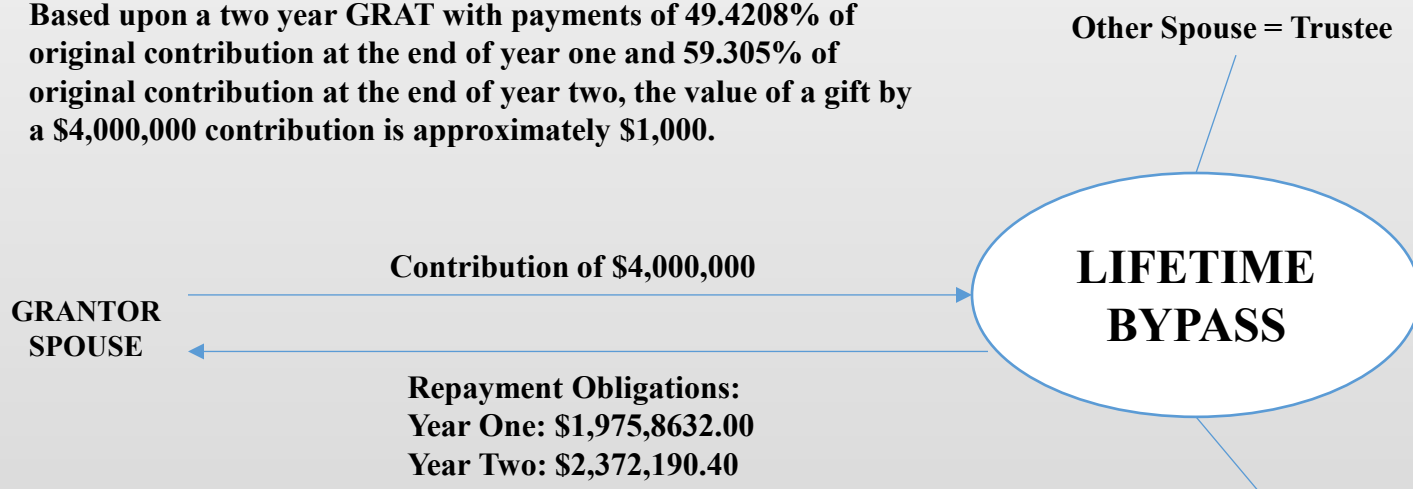
# Estate Tax Planning Discussion

## Lifetime Bypass GRAT

### (Grantor Retained Annuity Trust)

One spouse can fund a trust on a tax advantaged basis to benefit the other spouse and their descendants.

Based upon a two year GRAT with payments of 49.4208% of original contribution at the end of year one and 59.305% of original contribution at the end of year two, the value of a gift by a \$4,000,000 contribution is approximately \$1,000.



Assuming 10% per year growth in assets, the GRAT Trust will have \$293,286.40 after two years.

Assuming 15% per year growth in assets, the GRAT Trust will have \$644,444.80 after two years.

After the second year, trust assets can be held for the lifetime benefit of Trustee Spouse and Descendants.

Assets not accessible to creditors of the Trustee/Beneficiary Spouse or the descendants.

Annuity payments payable to the Grantor/Spouse who is a Florida resident should be protected from creditors under Florida Statute Section 222.



# Estate Tax Planning Discussion

## Spouse 1 QPRT Discounted Value

|  |             |
|--|-------------|
| VALUE OF HOME                          | \$2,140,000 |
| VALUE OF 50% OF HOME                   | \$1,070,000 |
| VALUE OF 50% OF HOME WITH 15% DISCOUNT | \$909,500   |

|              | REPORTED GIFT AMOUNT |           | VALUE OF 1/2 OF RESIDENCE AT END OF TERM ASSUMING 7% GROWTH | ESTATE TAX ON VALUE AT END OF TERM ASSUMING 40% ESTATE TAX RATE | ESTATE TAX SAVINGS ON 1/2 OF RESIDENCE AT END OF QPRT | ESTATE TAX SAVINGS AFTER 25 YEARS ASSUMING 7% GROWTH ON 1/2 OF RESIDENCE | TOTAL AMOUNT OF RENT PAID (8% OF VALUE OF RESIDENCE PER YEAR) FROM END OF QPRT THROUGH END OF YEAR 25 | ESTATE TAX SAVINGS ON RENT PAID | TOTAL ESTATE TAX SAVINGS AFTER 25 YEARS |
|--------------|----------------------|-----------|---|---|---|--|---|---------------------------------|---|
| 10 YEAR QPRT | GIFT %               | 72.517%   | \$1,789,124   | \$715,650   | \$451,833   | \$1,710,683  | \$4,527,630   | \$1,811,052                     | \$3,521,735                             |
|              | VALUE OF GIFT        | \$659,542 |   |   |   |  |   |                                 |   |
| 15 YEAR QPRT | GIFT %               | 59.164%   | \$2,509,339   | \$1,003,736   | \$788,497   | \$1,759,261  | \$3,491,488   | \$1,396,595                     | \$3,155,857                             |
|              | VALUE OF GIFT        | \$538,097 |   |   |   |  |   |                                 |   |
| 20 YEAR QPRT | GIFT %               | 45.804%   | \$3,519,478   | \$1,407,791   | \$1,241,156   | \$1,807,865  | \$2,038,247   | \$815,299                       | \$2,623,164                             |
|              | VALUE OF GIFT        | \$416,587 |   |   |   |  |   |                                 |   |
| 25 YEAR QPRT | GIFT %               | 32.337%   | \$4,936,250   | \$1,974,500   | \$1,856,858   | \$1,856,858  | \$0   | \$0                             | \$1,856,858                             |
|              | VALUE OF GIFT        | \$294,105 |   |   |   |  |   |                                 |   |

Probability of Death Before Certain Age

Current Age: 55

|               |        |
|---------------|--------|
| 10 years (65) | 9.85%  |
| 15 years (70) | 18.00% |
| 20 years (75) | 29.22% |
| 25 years (80) | 44.28% |

### Explanation of 15 year QPRT numbers -

A gift of a 50% interest in a \$2,140,000 home to the QPRT is reported to be a \$538,097 gift. 50% of the home grows to \$2,509,339 in value over fifteen years. The estate tax on a \$2,509,339 asset would be \$1,003,736. The gift tax exemption used on a \$538,097 gift at 40% is equal to \$215,239. Assuming no further growth in the house the estate tax savings at that point would be \$788,497 (\$1,003,736 - \$215,239 = \$788,497). If the value of the home continues to grow at 7% a year for another 10 years, the total estate tax savings will be \$1,759,261.

If rent is paid for Years 16 through 25 equal to 8% of the value of 1/2 of the residence, then \$3,491,488 of rent will be paid. The rent paid will not be subject to estate tax. The estate tax saved on this amount is equal to \$1,396,595 (\$3,491,488 x 40% = \$1,396,595).

The total estate tax savings including the rent paid would be equal to \$3,155,857 (\$1,759,261 + \$1,396,595 = \$3,155,857).



# \$1,000,000 PROMISSORY NOTE/SCIN/PRIVATE ANNUITY ALTERNATIVES

JANUARY 2021

FRED and WILMA FLINSTONE

**ALTERNATIVES: (USING JANUARY 2021 APPLICABLE FEDERAL RATE AND 7520 RATE)**

All Notes and the Private Annuity are based on an initial sale amount of \$10,000,000

|  |   |                             |
|--|---|-----------------------------|
| <b>FRED</b><br>(AGE 66 for Tax Purposes) | 3 Year Interest Only Installment Note @ .14% - Payment = \$14,000 per year*   | <b>TRUST</b><br>(PURCHASER) |
|  | 9 Year Interest Only Installment Note @ .52% - Payment = \$52,000 per year*   |                             |
|  | 10+ Yr. Interest Only Installment Note @ 1.35% - Payment = \$135,000 per yr.* |                             |
|  | 17 Year Interest Only SCIN @ 4.210% - Payment = \$421,000 per year*           |                             |
|  | Private Annuity Level Annual Payments - Payment = \$626,532 per year          |                             |

\* Notes would have no penalty for prepayment - minimum payments are shown above.  
Self-Canceling Installment Notes (SCINs) must balloon before life expectancy as measured at time of Note being made. Fred's life expectancy is 17.05 years under IRS tables.  
The SCIN calculation above is based on a 17-year note term.

Note: January 2021 rates are:

Short-Term -- .14%

Mid-Term -- .52%

Long-Term -- 1.35%

Section 7520 Rate -- .6%

Usable through March 31, 2021

**ALTERNATIVES: (USING JANUARY 2021 APPLICABLE FEDERAL RATE AND 7520 RATE)**

All Notes and the Private Annuity are based on an initial sale amount of \$10,000,000

|   |   |                             |
|---|---|-----------------------------|
| <b>WILMA</b><br>(AGE 66 for Tax Purposes) | 3 Year Interest Only Installment Note @ .14% - Payment = \$14,000 per year*   | <b>TRUST</b><br>(PURCHASER) |
|   | 9 Year Interest Only Installment Note @ .52% - Payment = \$52,000 per year*   |                             |
|   | 10+ Yr. Interest Only Installment Note @ 1.35% - Payment = \$135,000 per yr.* |                             |
|   | 15 Year Interest Only SCIN @ 4.533% - Payment = \$421,000 per year*           |                             |
|   | Private Annuity Level Annual Payments - Payment = \$626,532 per year          |                             |

\* Notes would have no penalty for prepayment - minimum payments are shown above.  
Self-Canceling Installment Notes (SCINs) must balloon before life expectancy as measured at time of Note being made. Wilma's life expectancy is 17.05 years under IRS tables.  
The SCIN calculation above is based on a 17-year note term.

Note: January 2021 rates are:

Short-Term -- .14%

Mid-Term -- .52%

Long-Term -- 1.35%

Section 7520 Rate -- .6%

Usable through March 31, 2021

**ALTERNATIVES: (USING JANUARY 2021 APPLICABLE FEDERAL RATE AND 7520 RATE)**

All Notes and the Private Annuity are based on an initial sale amount of \$10,000,000

|                                |  |                             |
|--------------------------------|--|-----------------------------|
| <b>Fred and Wilma, jointly</b> | 3 Year Interest Only Installment Note @ .14% - Payment = \$14,000 per year*    | <b>TRUST</b><br>(PURCHASER) |
|                                | 9 Year Interest Only Installment Note @ .52% - Payment = \$52,000 per year*    |                             |
|                                | 10+ Year Interest Only Installment Note @ 1.35% - Payment = \$13,500 per year* |                             |
|                                | 21 Year Interest Only SCIN @ 3.205% - Payment = \$320,500 per year*            |                             |
|                                | Private Annuity Level Annual Payments - Payment = \$502,690 per year           |                             |

\* Notes would have no penalty for prepayment - minimum payments are shown above.  
Self-Canceling Installment Notes (SCINs) must balloon before life expectancy as measured at time of Note being made. Fred and Wilma's joint life expectancy is 21.98 years under IRS tables.  
The SCIN calculation above is based on a 21-year note term.

Note: January 2021 rates are:

Short-Term -- .14%

Mid-Term -- .52%

Long-Term -- 1.35%

Section 7520 Rate -- .6%

Usable through March 31, 2021



# \$1,000,000 Promissory Note/SCIN/Private Annuity/ GRAT Alternatives

June 2025/ CLIENT AGE 70

Alternatives: (Using January 2023 Applicable Federal Rates and January 2023 7520 Rate of 4.6%)

|                           |   |                             |
|---------------------------|---|-----------------------------|
| <b>CLIENT</b><br>(AGE 55) | <3 Year Interest Only Installment Note @ 3.96% - <b>Payment = \$39,600 per year*</b>          | <b>TRUST</b><br>(PURCHASER) |
|                           | 9 Year Interest Only Installment Note @ 4.03% - <b>Payment = \$40,300 per year*</b>           |                             |
|                           | >9 Year Interest Only Installment Note @ 4.56% - <b>Payment = \$45,600 per year*</b>          |                             |
|                           | 27 Year Interest Only SCIN @ 6.5738% (w/30% discount) - <b>Payment = \$46,017 per year*</b>   |                             |
|                           | Private Annuity Level Annual Payment – <b>Payment (w/30% discount) = \$50,563.79 per year</b> |                             |
|                           | 3 Year Level Payment GRAT @ 5.0% - <b>Payment = \$367,215 per year</b>                        |                             |
|                           | 3 Year GRAT @ 5.0% - <b>Initial Payment = \$304,442 and Increases Annually by 20%**</b>       |                             |

\* Notes would have no penalty for prepayment – minimum payments are shown above.

Self-Cancelling Installment Note (“SCIN”) must balloon before life expectancy as measured at time of Note being made. Client’s life expectancy is 27.1 years under IRS tables. The SCIN calculations above are based on a 27-year note term.

\*\* This GRAT assumes that each annuity payment will increase by 20% each year. All GRATs assume no taxable gift on funding

*If interest rates increase in the future, consider the use of a 20-year interest only note at the 4.56% long-term AFR, locking in 4 3.56% rate for the next 20 years.*

Note: Lowest allowable semi-annual compounding Applicable Federal Rates for March 2025 are:

Short-Term – 3.96%

Mid-Term – 4.03%

Long-Term – 4.56%

Usable through June 30, 2025 for a “sale or exchange”



# Current and Recent Applicable Federal Rates (2024-2025)

| MONTH          | SHORT TERM | MID-TERM | LONG-TERM |
|----------------|------------|----------|-----------|
| July 2024      | 5.00%      | 4.44%    | 4.56%     |
| August 2024    | 4.89%      | 4.29%    | 4.47%     |
| September 2024 | 4.52%      | 3.98%    | 4.32%     |
| October 2024   | 4.17%      | 3.67%    | 4.06%     |
| November 2024  | 3.96%      | 3.67%    | 4.11%     |
| December 2024  | 4.25%      | 4.14%    | 4.48%     |
| January 2025   | 4.28%      | 4.20%    | 4.48%     |
| February 2025  | 4.29%      | 4.47%    | 4.80%     |
| March 2025     | 4.26%      | 4.41%    | 4.76%     |
| April 2025     | 4.12%      | 4.17%    | 4.26%     |
| May 2025       | 4.01%      | 4.06%    | 4.57%     |
| June 2025      | 3.96%      | 4.03%    | 4.71%     |
| July 2025      | 4.08%      | 4.15%    | 4.84%     |

**Can use lowest of last three months on a “sale or exchange” under IRC Section 1274(d)(2).  
See IRC Section 7872(f)(2)**



# Asset Protection Definitions

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

**Debtor** - A party who owes money.

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

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

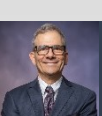
**Plaintiff** - A party suing to get a judgment against a defendant.

**Defendant** - A party being sued by a plaintiff.

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

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

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



# Asset Protection Definitions

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

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

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

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

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

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

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



# Asset Protection Definitions

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

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

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

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

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

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

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



# The Anatomy of an Asset Protection Trust

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





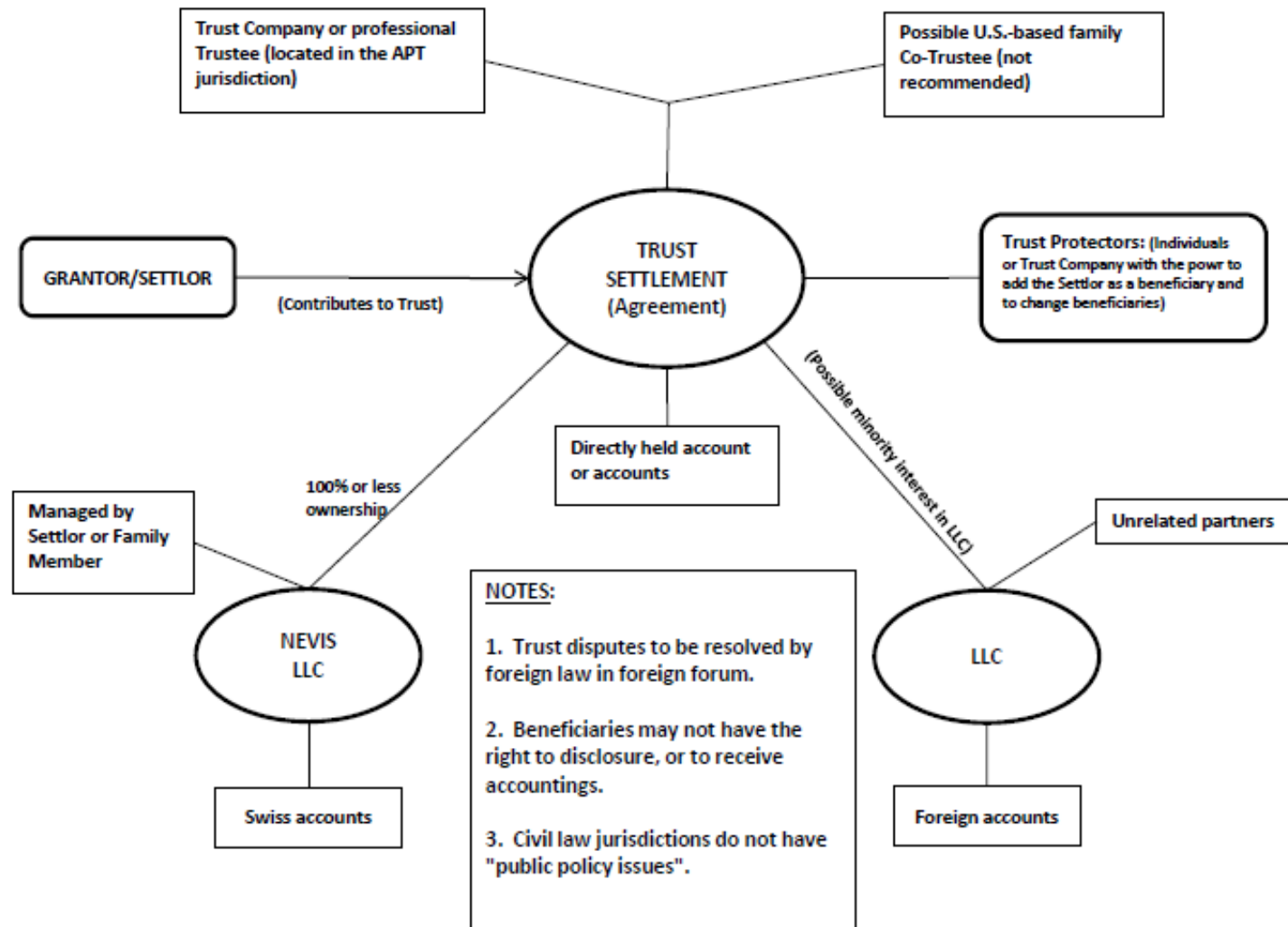
# The Anatomy of an Asset Protection Trust

7. APT Legislation – Special laws passed in a number of offshore jurisdictions which make it extremely difficult, if not impossible, for a creditor to pierce an APT:
8. Contingency Fees Not Permitted – In most asset protection jurisdictions, lawyers must charge their clients by the hour, and not on a contingency fee basis.
  - a) Belize has no statute of limitations – unless there is a judgment against the settlor in Belize on the day the trust is formed, Belize law will protect the trust.
  - b) Court Registry deposit requirement – Nevis requires a 100,000 Nevis dollars (\$37,037.04) deposit into the Court Registry before a trust can be challenged. A 100,000 Nevis dollars (\$37,037.04) deposit is also required to challenge an LLC. A Nevis trust and LLC challenge will therefore require a 200,000 Nevis dollars (\$74,074.07) deposit.
9. Conflict of Interest Considerations – Typically, there are between two to six dozen practicing lawyers in a popular asset protection trust jurisdiction. Most or all of these lawyers have done work for the more popular trust companies, and would therefore have a conflict of interest in pursuing a trust for a creditor – lawyers from outside of the country must therefore come in as “foreigners before the court” to be admitted to practice law there to challenge the trust.
10. Judicial Bias - The asset protection trust jurisdictions derive significant income and lawyer work, not too mention governmental fees that support the local economy. The last thing an asset protection trust jurisdiction economy needs would be a judicial decision that lets creditors into a well intended asset protection trust that was structured in advance.
11. Having Your Cake and Protecting it, Too - The Trustee of the APT can own a 99% limited partnership interest or the ownership of an LLC, with the entity being managed responsibly and transparently by the general partner or manager, which may be the settlor. If and when a challenge might occur, the settlor may transfer control of the subsidiary entity to the Trustee of the trust.





# The Typical Offshore or APT State Trust Arrangement



# Do Domestic Asset Protection Trusts Work?

- Nevada, Alaska, Delaware, South Dakota and other states have asset protection trust statutes. But the Full Faith and Credit Clause of the U.S. Constitution provides that a judgment issued by the court in one state will be respected by the court in other states.
- There are many questions regarding the effectiveness of domestic APTs. The case law is not yet fully developed on the question of whether the law of a foreign jurisdiction will apply for the determination of whether a creditor protection trust will shield trust assets from creditors of the grantor who is also a beneficiary.
  - *Hanson v. Denckla*, 357 U.S. 235 1958 – the law of the state where the trust administration occurs will be determinative.
  - *In re Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996) and *In re Brooks*, 217 B.R. 98 (Bankr. D. Conn. 1998) – assets placed in offshore APTs were not excluded from the debtor's Bankruptcy estates.
  - *Dahl v. Dahl*, 2015 UT 23, Supreme Court of the State of Utah (January 30, 2015) – Under Utah law, wife had an enforceable interest in a NV APT that husband created because the trust was revocable regardless of stating in the trust language that the trust is irrevocable. The language that the Court based its reversal upon stated that, "Settlor reserves any power whatsoever to alter or amend any of the terms or provisions hereon."
  - *In re Mortensen, Battley v. Mortensen*, (Adv. D.Alaska, No. A09-90036-DMD, May 26, 2011) – assets situated in Alaska were placed in an Alaska APT. The Court held that the exemptions would be determined under state law rather than federal law because the state law is applied to determine if the trust was established correctly.



# Consider the Offshore Foundation

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



# Asset Protection Checklist – Page 1

|      | PROTECTED OWNERSHIP CATEGORIES   | NOTES |
|------|--|-------|
| 1    | Assets exempt by Florida Constitution, Statute, Common Law or Federal Law. <i>(Note: The above exceptions do not apply to the IRS, FTC, SEC, or other “Super Creditors”, such as the Department of Justice when pursuing RICO perpetrators.)</i> |       |
| 1(a) | Homestead.   |       |
| 1(b) | Tenancy by the entireties.   |       |
| 1(c) | Pension and IRA.   |       |
| 1(d) | Life insurance policies.   |       |
| 1(e) | Annuities.   |       |
| 1(f) | 529 Plans.   |       |
| 1(g) | Disability and Social Security Benefits.   |       |
| 1(h) | Others.  |       |
| 2    | Charging Order Protection.   |       |
| 3    | Property owned by others.  |       |
| 4    | Property sold for Note or annuity payment rights.  |       |
| 5    | Third Party Settled Trusts.  |       |
| 6    | Self-Settled Trusts in Asset Protection Trust jurisdiction.  |       |
| 7    | Foreign assets, entities and accounts in jurisdictions that do not recognize U.S. judgments.   |       |



# Asset Protection Checklist – Page 2

|    | LIABILITY INSULATION  | NOTES |
|----|---|-------|
| 1  | Make sure housekeeper, in-laws, and all others are covered if they drive your cars or reside in your residence.   |       |
| 2  | Car ownership, and which parent signed to be responsible for the driving of a minor.  |       |
| 3  | Car driving by children, spouses, employees and others.   |       |
| 4  | Firewall protection provided by LLC's, companies and various partnerships (LLP's, LP's and LLLP's).   |       |
| 5  | Triple Net Lease language to protect landlord – must give tenant total control of property.   |       |
| 6  | Managers may get sued.  |       |
| 7  | Delegate to management company.   |       |
| 8  | Guests may sign releases.   |       |
| 9  | Independent contractor arrangements.  |       |
| 10 | Bartenders for personal parties.  |       |
| 11 | No guests on wave runners.  |       |
| 12 | No alcohol served to anyone under the age of 21.  |       |
| 13 | Appropriate underlying and umbrella liability insurance – for each property, car, 4-wheeler, etc. But beware of exceptions and illegal situations that will not be covered. |       |



# Asset Protection Checklist – Page 3

|    | <b>BUSINESS AND INVESTMENT CONSIDERATIONS</b>  | <b>NOTES</b> |
|----|--|--------------|
| 1  | Liability and casualty insurance review, with personal use interaction and business umbrella to be considered. |              |
| 2  | Friendly lenders.  |              |
| 3  | Separate activities and exposures.   |              |
| 4  | Leasing arrangements with landlord rent right secured by UCC-1 on tenant's property.                           |              |
| 5  | Car use.   |              |
| 6  | Car ownership.   |              |
| 7  | Delegate to offshore employees.  |              |
| 8  | Employee causes of action – make sure they have Workers' Compensation.   |              |
| 9  | Separate intellectual property rights.   |              |
| 10 | Alcohol at events.   |              |
| 11 | Using independent contractors.   |              |
| 12 | Client/Patient/Supplier Arbitration Agreements.  |              |
| 13 | Consider New Parent F Reorganization to separate assets within a company without triggering capital gains.     |              |
| 14 | Consider factoring accounts receivable to a related company that may be held for descendants.                  |              |
| 15 | Trusted or Partnership/LLC based Buy/Sell Life Insurance Arrangement.  |              |
| 16 | Consider leasing use of equipment on a triple net basis – be sure all activities are insured.                  |              |
| 17 | Pension contributions.   |              |



# Asset Protection Checklist – Page 4

|    | OTHER CONSIDERATIONS  | NOTES |
|----|---|-------|
| 1  | Income and estate tax avoidance – buy a felony to avoid paying IRS taxes or to conspire to help someone avoid such payment – same applies as to debt owed directly to the FDIC and certain other governmental creditors.                        |       |
| 2  | Marriage and divorce – ex-spouse cannot invade TBE assets held with new spouse or invade new spouse's interest in a homestead or TBE homestead.   |       |
| 3  | Impact on an estate plan.   |       |
| 4  | Federal and state criminal law.   |       |
| 5  | Exposure of the advisor.  |       |
| 6  | Exemptions that apply on death – do not make life insurance or annuities payable to an estate or to a trust that provides that estate obligations must be paid.   |       |
| 7  | Client guarantee.   |       |
| 8  | Confidentiality – use an anonymously owned LLC from Wyoming, Delaware or Colorado to serve as manager of operational LLC's and Trustee of Homestead Land Trust, and file Certificates of Authority in each county where real estate is located. |       |
| 9  | Equity Stripping – debt secured by a mortgage or lien on valuable assets at risk may be payable to arm's-length lenders or related party lenders under a number of various arrangements.  |       |
| 10 | Make your children self-supporting.   |       |
| 11 | Get divorced soon, or not at all.   |       |

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# The CPA's Checklist for Florida Creditor Protection Planning and Maintenance - 1

|    |   |  |
|----|---|--|
| 1. | Do the clients know about tenancy by the entireties protection?   |  |
| 2. | <p>Are the clients' assets held as tenants by the entireties?</p> <ul style="list-style-type: none"> <li>a. Were the right boxes checked when they opened an account?</li> <li>b. Do they have out of state real estate that needs to be placed under a Florida LLC?</li> <li>c. How will the client's fund a bypass trust on the 1<sup>st</sup> death if everything is owned jointly? – Disclaimer planning.</li> <li>d. Are K-1's being issued to both spouses or to the correct spouse or entity? If a husband and wife own S-Corporation stock or a partnership interest as tenants by the entireties is it proper to be issuing separate K-1's to them for 50% each of the interest?<br/>Often the CPA's file is the only place to find documentation on how stock and LLC interests are owned.</li> <li>e. How do stock certificates read?</li> <li>f. What names are on contracts?</li> <li>g. Is property held in a state that allows for tenancy by the entireties?</li> <li>h. Have the clients considered a TBE owned LLC or family limited partnership.</li> <li>i. Do their LLC's have proper operative language?</li> </ul> |  |
| 3. | <p>Is the homestead more than ½ an acre within the city limits or more than 160 acres in the county?</p> <p>Homestead is owned as tenants by the entireties as well?</p>  |  |
| 4. | Do they understand that the cash value of a life insurance policy is only protected when it is owned by the insured individual?   |  |
| 5. | <p>Is life insurance payable to protective trusts that can benefit the surviving spouse and descendants without being subject to their creditor claims?</p> <p>Does the client own life insurance policies on any other person - if so, it will not be creditor protected.</p>  |  |
| 6. | Is there an inherited IRA - inherited IRAs are not protected from creditors under recent Florida case law.  |  |





# The CPA's Checklist for Florida Creditor Protection Planning and Maintenance - 2

|   |  |
|---|--|
| <p>7. Who is responsible for making sure that LLCs are properly established and maintained? An improperly drafted LLC will not provide a Florida client with charging order protection or tenancy by the entirety status, even if intended to do so. Many lawyer do not know how to do this properly, so how can accountants and clients themselves even attempt this?</p> <p>Single member LLC's do not have charging order protection.</p> <p>WARNING - It violates the unauthorized practice of law rules to set up LLC's and to provide legal documents for LLC's. This puts the CPA firm at risk for malpractice and licensing purposes.</p>             |  |
| <p>8. Do the clients own assets that may cause liability, such as investment real estate, a business or even a charitable activity? Should these be placed in separate LLCs for liability insurance insulation purposes?</p> <p>a. Some clients think that a flow-through tax entity allows creditor claims to flow through, which is not of the case.</p> <p>b. Many clients think that revocable trusts will shield them from creditor claims. There is a big difference between avoiding probate and avoiding creditors.</p> <p>c. Who is the manager? Exposure of the manager?</p> <p>d. Do insurance carriers on agencies know how assets are owned?</p> |  |
| <p>9. Are proper formalities being followed so that one company or person is not considered an alter ego of the other for liability insurance insulation purposes.</p> <p>Are financial statements being prepared? For example, many CPA firms prepare a form 1065 for an entity taxes as disregarded simply to help confirm appropriate fiscal conduct and accountability.</p>   |  |
| <p>10. Is the client being realistic about what their risks and exposures are with respect to potential upside down loan situations, guaranties, and real estate debt that may not be renewed. Why do some clients wait until it is too late? A nudge here and there can save significant problems.</p>   |  |
| <p>11. How much should the CPA know? Will communications with the CPA and other parties become discoverable?</p> <p>Understand CPA client Florida litigation privilege – copies of letters or information given to third parties will be discoverable.</p>  |  |



# The CPA's Checklist for Florida Creditor Protection Planning and Maintenance - 3

|     |   |  |
|-----|---|--|
| 13. | Is the client being accurate and truthful on financial statements provided to lending institutions? How specific do these statements need to be on issues such as joint assets and changes thereto.<br><br>Proper footnoting is crucial.  |  |
| 14. | Are insurance agencies and carriers aware of exactly what is being insured? Is the client telling the insurance carrier that the car is personal and not for business, while telling the IRS that the car is 90% business and is owned by a company?<br><br>Can someone working for the CPA firm call the applicable insurance agencies to make sure that everything is coordinated?<br><br>Make sure client understands exclusions, such as animals, pools, civic activities, church or synagogue activities, etc. |  |
| 15. | What is the client's cash-burn rate? Are they waiting for the economy to turn around, and what if it does not and when do they run out of cash?   |  |
| 16. | Schedule an annual review?  |  |
| 17. | Consider new entities and trusts, including protective trust systems and limited liability entities. Segregate voting from non-voting under entities.   |  |
| 18. | Annual input from and participation with qualified lawyer.  |  |
| 19. | Debt at the Debtor's Best Friend <ul style="list-style-type: none"> <li>a. Is there one creditor who should be ahead of the others?</li> <li>b. Are all loans documented by promissory notes and secured by mortgages and/or security agreements?</li> <li>c. Review various debt-associated strategies, such as cross-collateralization and sale lease backs.</li> </ul>   |  |



# Foreign Charitable Foundation

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



# The Very Best Creditor Protection Technique

## (Give Significant Assets to a 501(c)(3) Charitable Foundation)



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



# Practice and Business Entities and How They Can be Taxed

## REGULAR CORPORATION OR PROFESSIONAL ASSOCIATION

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

\$35 filing fee

\$150 annual report fee

## LLC OR PL OR LIMITED PARTNERSHIP OR LLLP

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

\$125 LLC filing fee

\$138.75 LLC annual report fee

\$1,000 LP/LLLP filing fee

\$500 LP/LLLP annual report fee

(other state filing fees are much lower for L.L.L.P.'s)

## GENERAL PARTNERSHIP OR LIMITED LIABILITY PARTNERSHIP (LLP)

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

No filing required for general partnership.

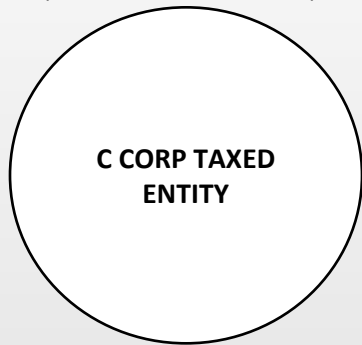
\$50 LLP filing fee

\$25 LLP annual report fee

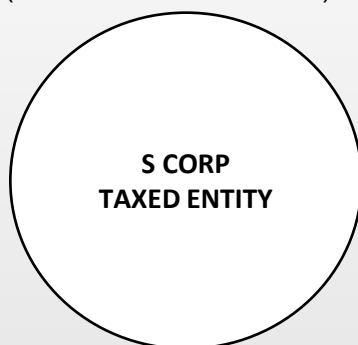


# Basic Income Tax Operation of Each Type of Entity

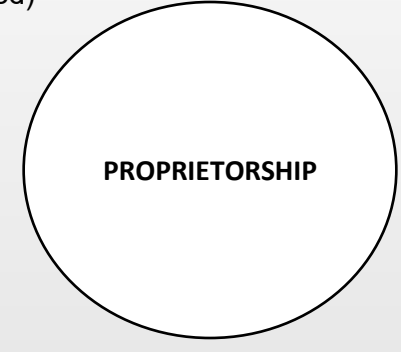
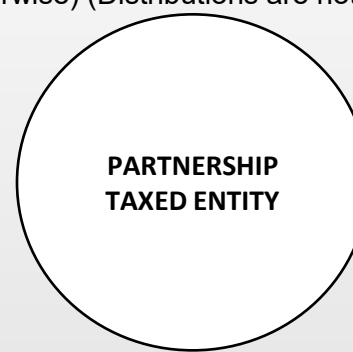
Shareholder  
(Dividends are taxed)



Shareholder  
(Dividends are not taxed)



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



Corporate level tax – revenues minus deductible expenses.

Dividends are not deductible expenses.

May deduct healthcare and disability insurance expenses under certain circumstances.

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

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

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

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

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

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

Shareholder might be afforded the benefit of the 20% Section 199A deduction.

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

Distributions to partners are usually subject to employment taxes

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

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

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

Partner might be afforded the benefit of the 20% Section 199A deduction.

All income and deductions are shown on individual's Form 1040 Schedule C – subject to employment taxes of 12.4% on the first \$128,400 of income, plus the 2.9% Medicare tax, making for a 15.3% tax thereon, plus the 2.9% Medicare tax on income from \$128,400 and an additional 0.9% Medicare tax to the extent of self-employment income that exceeds \$200,000 for a single taxpayer and \$250,000 for a married taxpayer.

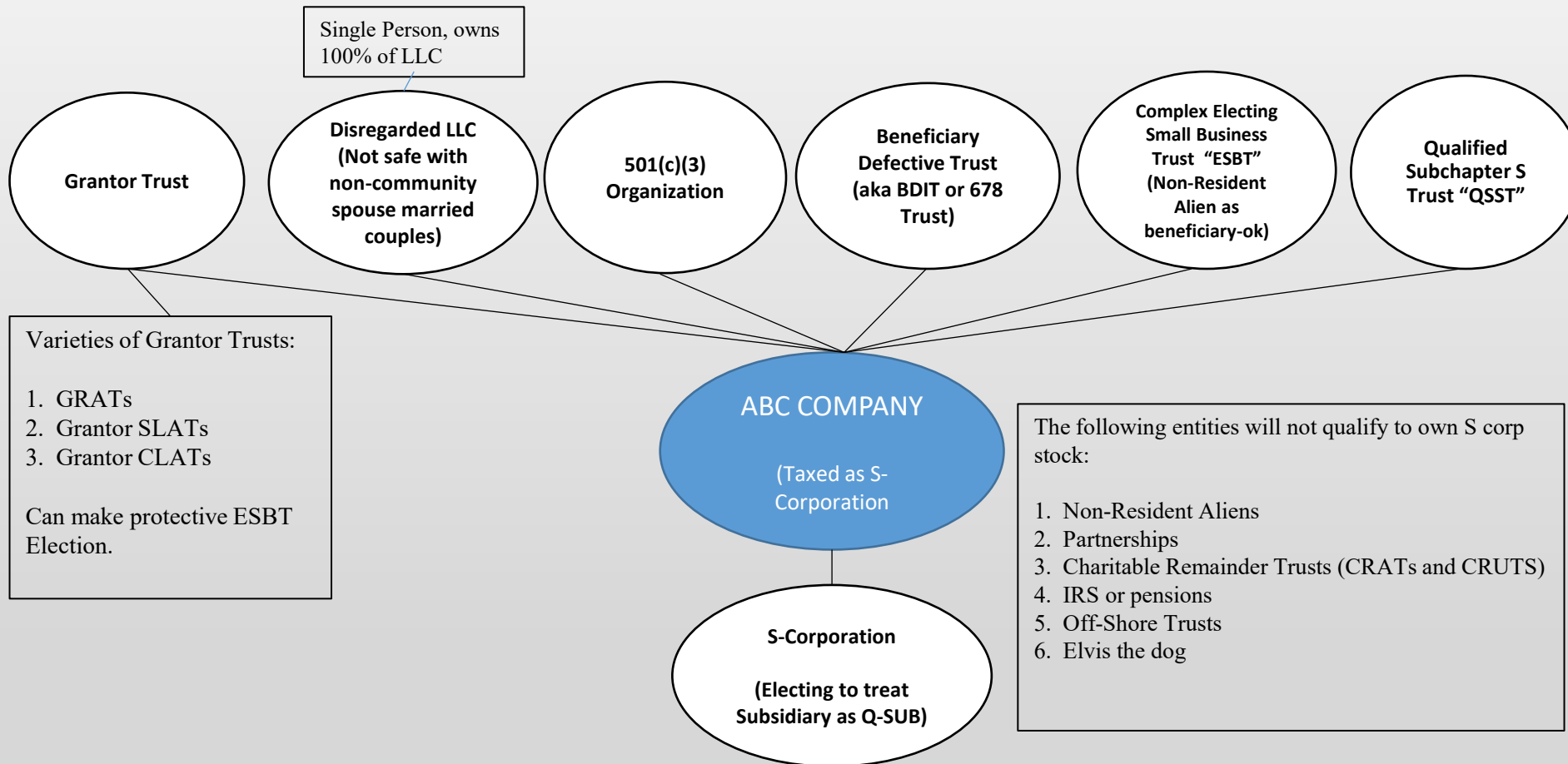
Owner might be afforded the benefit of the 20% Section 199A deduction.



# Choices and Factors with Respect to Allocation & Payment of Medical Practice Income for the Practitioner

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

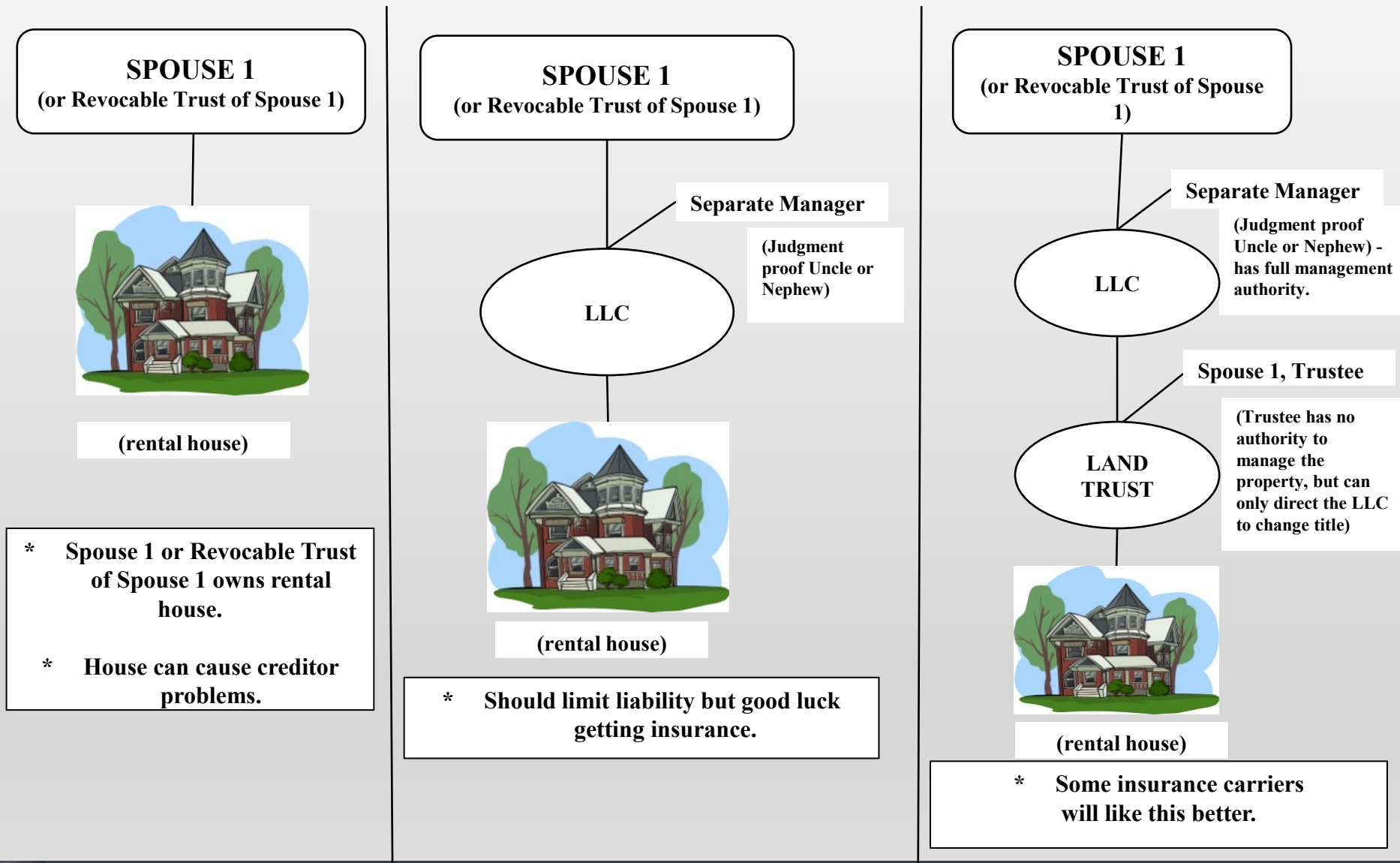
# Refresher on Types of Entities That Can Hold S-Corporation Stock





# Confidential Rental House Ownership Strategies

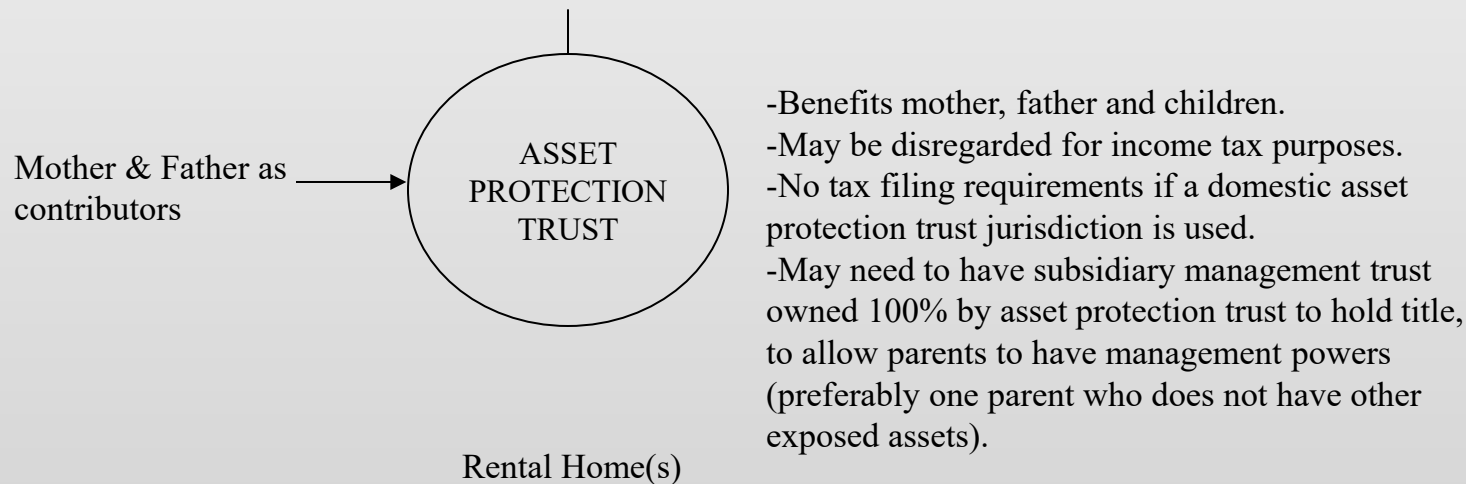
**\*Rental houses - limiting liability while also qualifying for appropriate insurances.**



# Limited Liability Trust – Asset Protection Trust

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

Trust Company in proper jurisdiction = Trustee or Co-Trustee



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



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

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



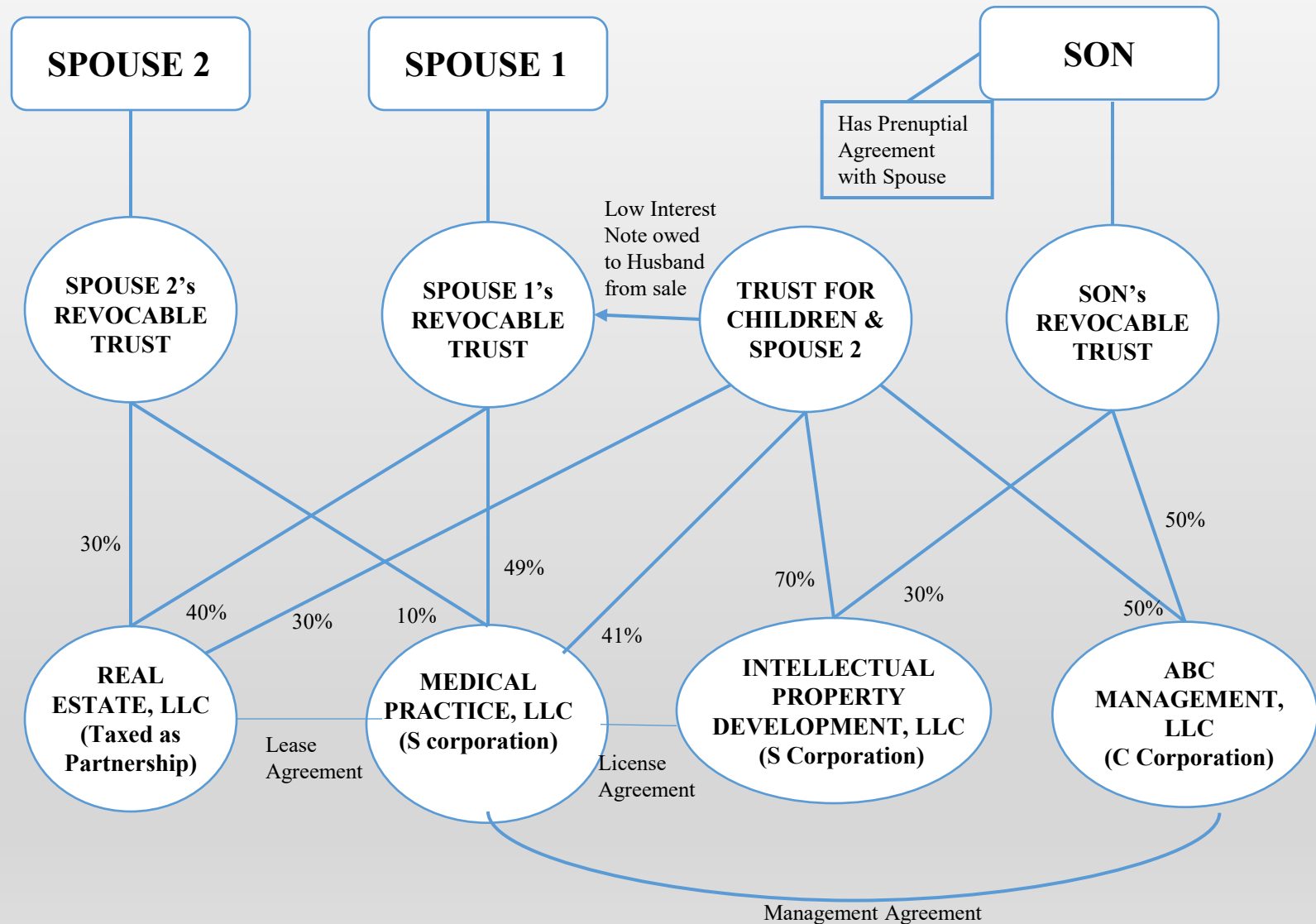
# Using a Confidential Management Agreement

**Managers and officers of a company can be held personally responsible for their personal acts if someone is injured or harmed.**

**Often a “management company” will be the manager, but who manages the management company?**



# Possible Family Logistics for a Successful Business and Estate Plan



# A Logical Guide to Selecting Buy/Sell Agreement Arrangements-Traditional Choices are Not Always the Best

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

A. Entity Redemption Arrangements. The company owns the life insurance policy and is the beneficiary thereof. Upon receipt of the life insurance proceeds, the company is to use such proceeds to buy out the deceased owner.

Will there be enough money to (A) buy out the deceased owner and (B) have the deceased owner released from any and all guarantees and obligations associated with the business?

1. If it is not practical to have the deceased owner released for contractual or other reasons, should the part of the life insurance proceeds that would otherwise be kept by the company as key man insurance be escrowed pending satisfaction of all releases that the deceased owner may have responsibility for.
2. How can the deceased owner's family be sure that the monies received from the life insurance policy will actually be used to satisfy contractual buy-out agreements?
3. What if the company claims that for some reason the agreement is not enforceable or that there are claims against the deceased owner that offset what would be paid to him or her.
4. What if the company has a major creditor claim against it (what if the deceased owner died in a car accident that he or she caused while driving a company vehicle and the company is now being sued by others who died in the accident?)
5. What if the company goes into bankruptcy and the family of the deceased owner becomes just another creditor in a bankruptcy proceeding?
6. For income tax purposes the remaining shareholders do not get a stepped up basis for the stock purchased.. The stock simply becomes treasury stock.





# A Logical Guide to Selecting Buy/Sell Agreement Arrangements-Traditional Choices are Not Always the Best

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B. To avoid the above potential problems consider a cross-purchase agreement?

Each owner may own the policy or policies on the other owners. Thus the policy proceeds should be protected from creditors of the company.

Also, each purchasing shareholder will get a tax basis in the purchased stock equal to the purchase price thereof.

1. However, policy proceeds will not be protected from creditors of the surviving owner who would receive policy proceeds.
2. Also, contractual disputes could result in the surviving owner using the funds for other purposes while litigating over the obligation to pay and becoming insolvent.
3. Further if there are more than 2 shareholders, the on the death of one the policies owned on the others would need to be transferred to rebalance between them, thus causing issues under the transfer for value rules. For example, if there are 4 equal shareholders there have to be 4 policies each owned 1/3rd each by each 3 shareholders on the fourth, and if one leaves the company the remaining 3 policies have to be readjusted as to ownership.



# A Logical Guide to Selecting Buy/Sell Agreement Arrangements-Traditional Choices are Not Always the Best

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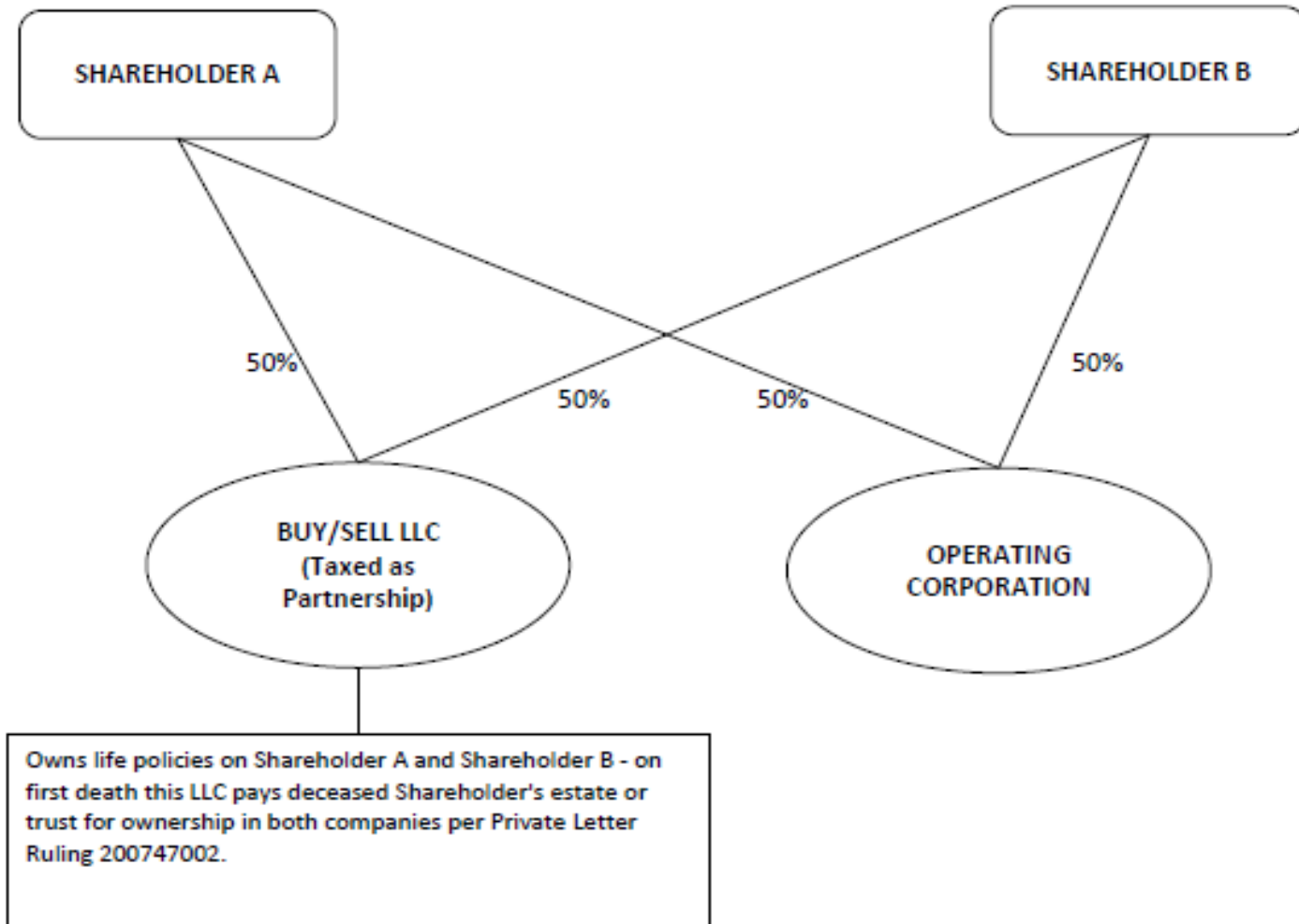
### C. Hybrids of the Above:

1. Consider a Trusteed Corporate or Cross-Purchase Agreement. Under these arrangements the owner and beneficiary of the policy can be a trust company, a law firm, or another trusted institution as trustee for the benefit of the company in a Trusteed Redemption arrangement, or for the benefit of the other shareholder or shareholders in a Trusteed Cross Purchase arrangement. . The trust agreement can require that the policy proceeds be held safely until sale and used solely for redemption or cross-purchase purposes.
2. This at least assures the surviving family that the life insurance proceeds will not be absconded with.
3. Generally for tax purposes the policy needs to be considered as owned and payable to the company in a redemption arrangement or the surviving owner or owners in a cross-purchase agreement. Could a state court or a bankruptcy court override the trust agreement where there are creditors of the entity in a redemption arrangement or creditors of the remaining shareholders in a cross-purchase arrangement?
4. There would be a purchase price tax basis for the other shareholders if the Trustee appropriately characterized as an agent for the other shareholders.





# Cross-Purchase Arrangement



# Charging Order Entities and Other Porcupines

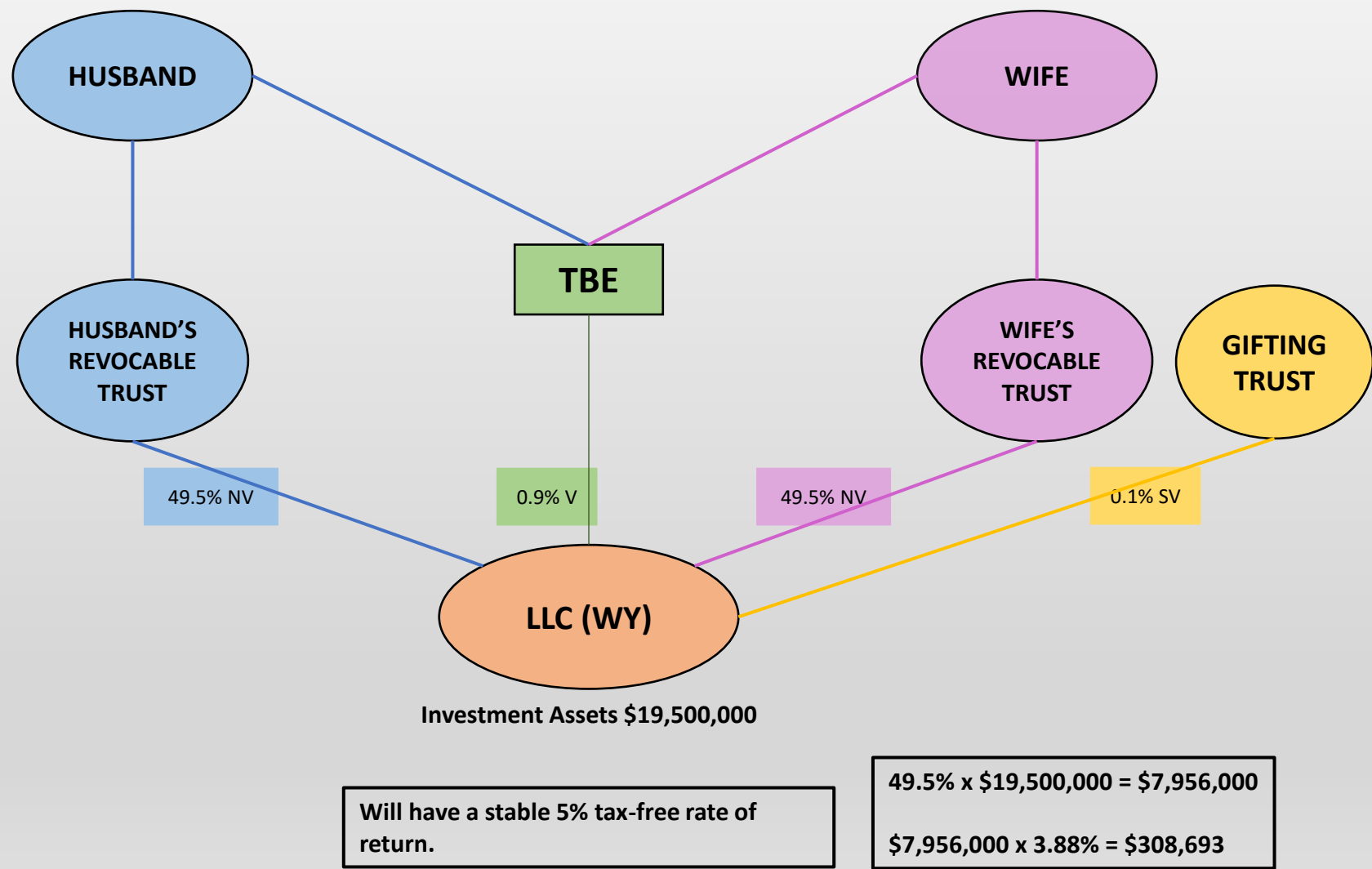


# Charging Order: Traps for the Unwary

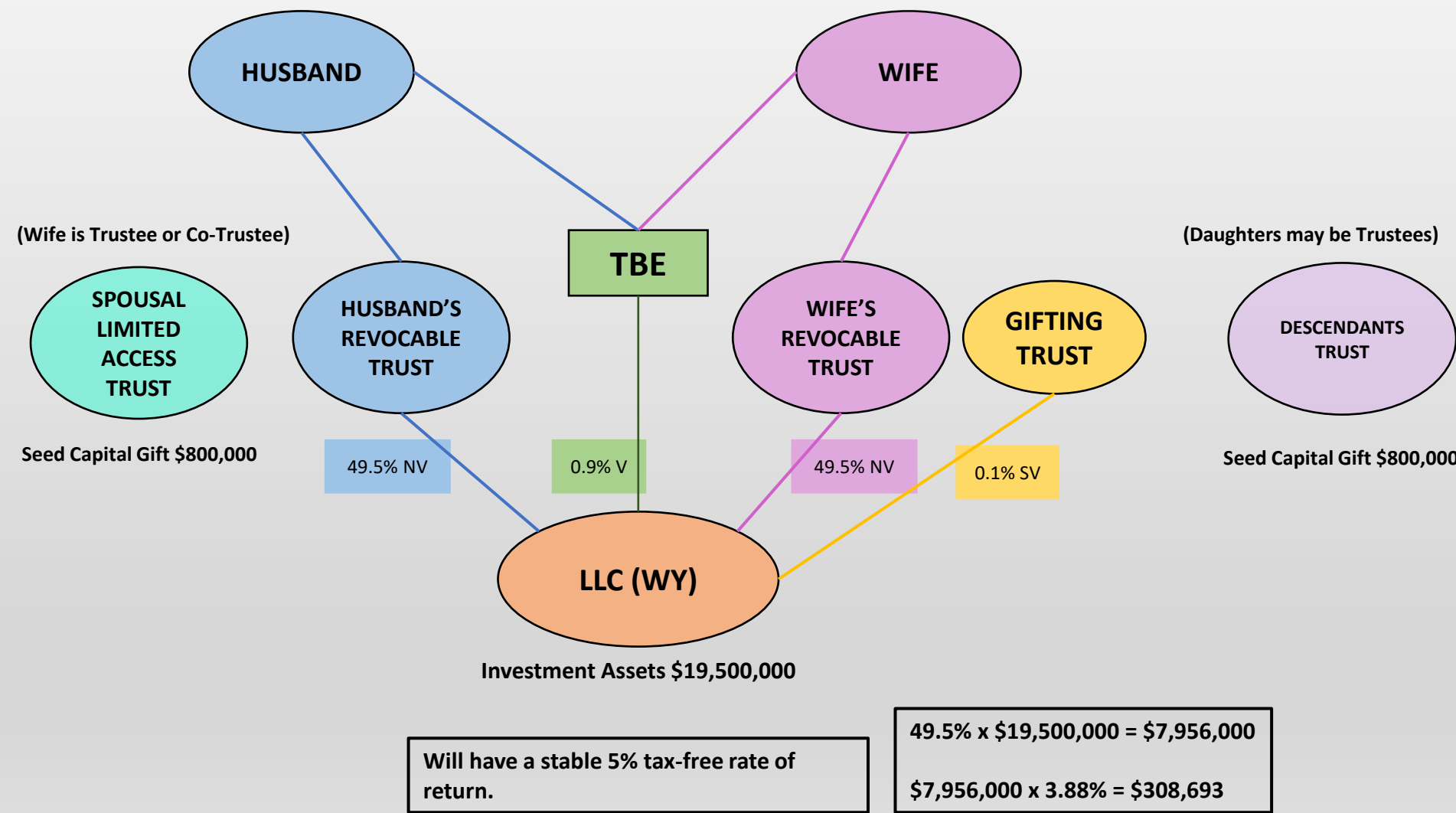
1. Not all states recognize charging order protection.
2. A court in the state of residency may apply the law of that state, and not the law of another U.S. or foreign jurisdiction to determine if charging order protection applies.
3. If the non-debtor member has at least one-half of the voting rights (voting stock or member interests), then a judgment creditor may not be able to seize control or force distributions from an LLC or corporation.
4. Charging order protection will not apply if the debtor is in bankruptcy and the Operating Agreement/arrangement is not an Executory Contract (where each member, including the “Trustee in Bankruptcy” or “Debtor in Possession” has affirmative duties).



# Initial Setup for LLC to Receive Annuities and Cash



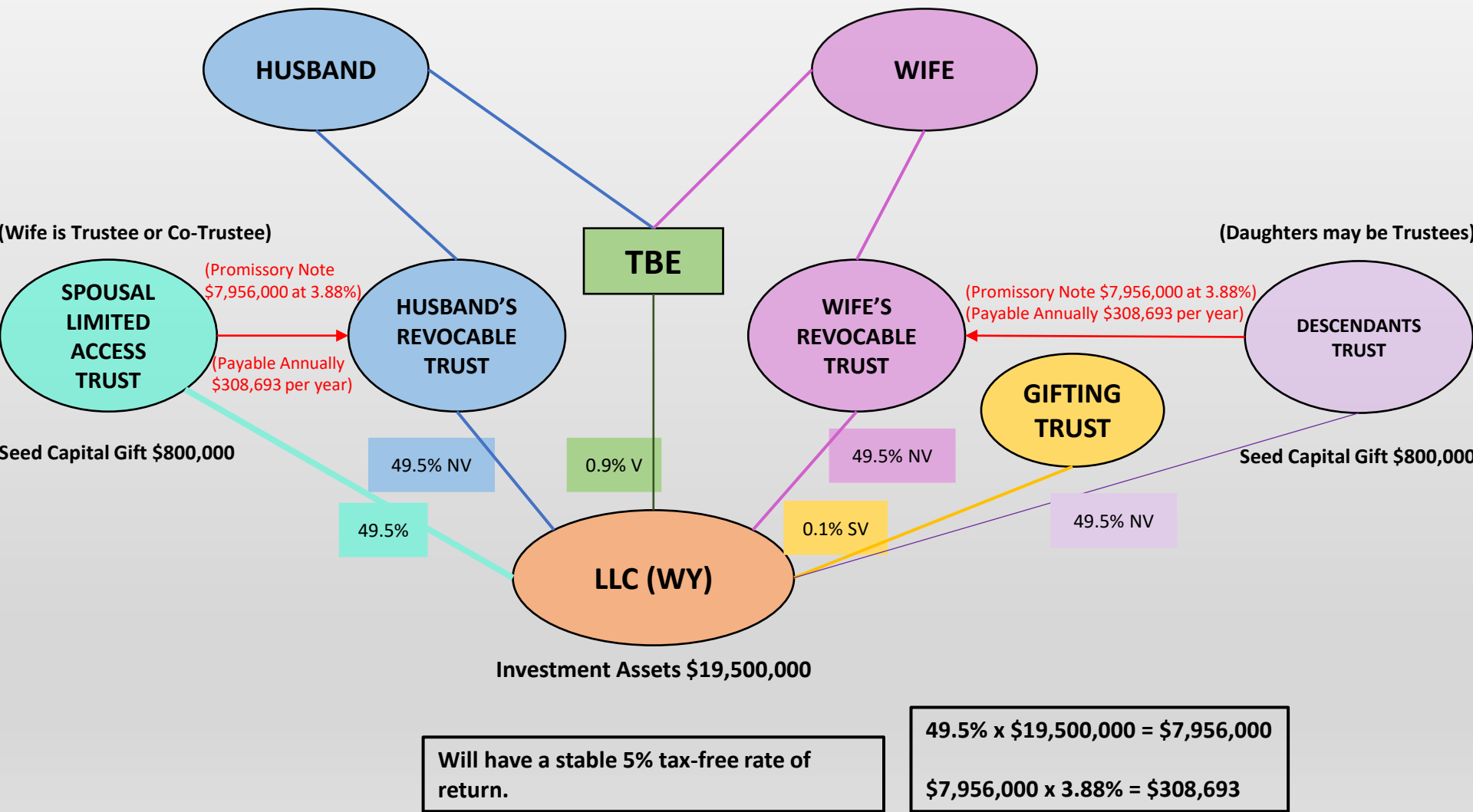
# Establish Irrevocable Trusts and Make Seed Capital Gifts



Alan Gassman, JD, LL.M. (Taxation), AEP® (Distinguished)  
agassman@gassmanpa.com

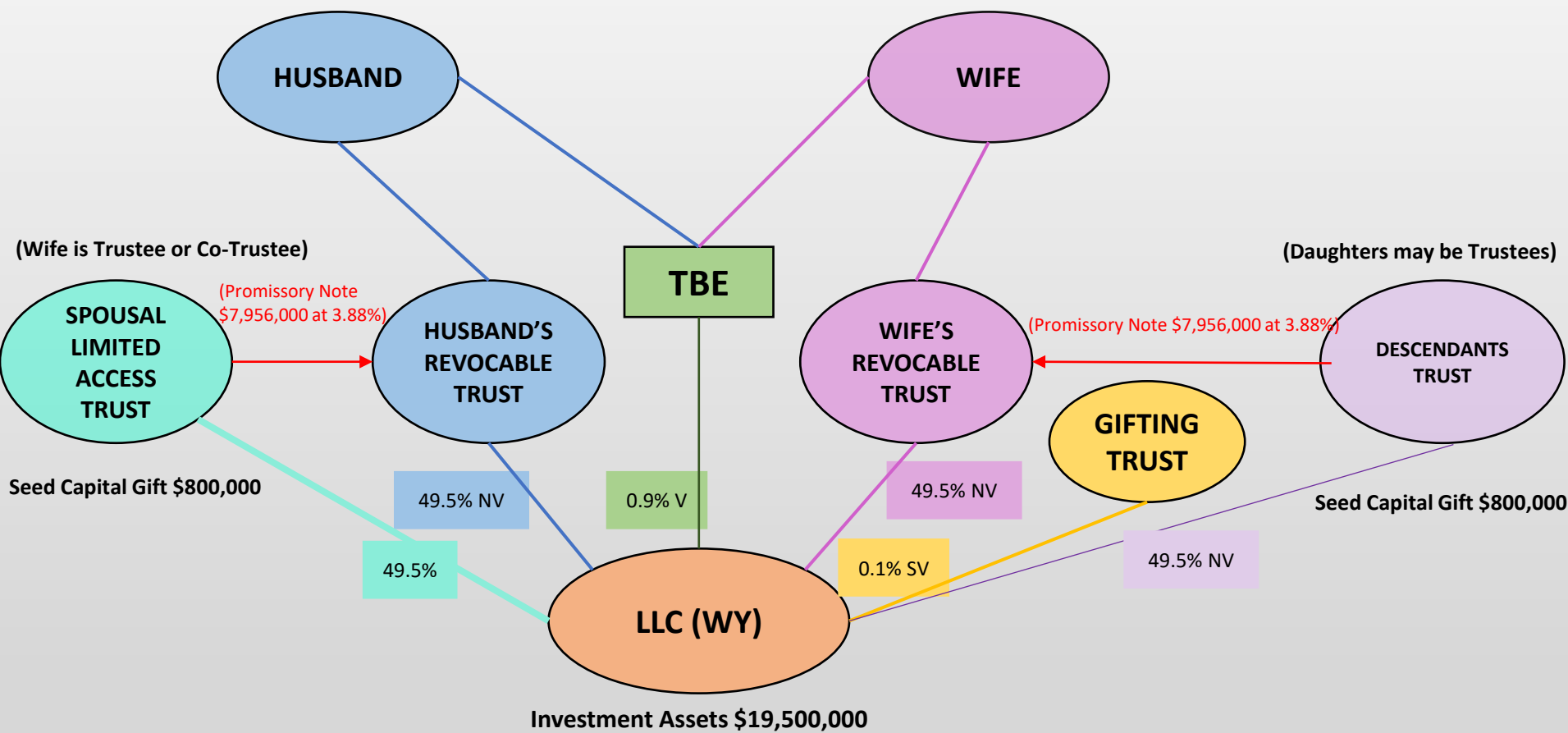


# Annual Maintenance – Trusts Make Annual Payments / LLC Makes Distributions to Trusts, If and When Necessary





# After 10 Years / 20 Years / 30 Years



|   |              |
|---|--------------|
| Value after 10 years (Assuming 5% Growth and \$308,693 Interest Only Pym'ts on each Note) | \$23,998,030 |
| Value after 20 years (Assuming 5% Growth and \$308,693 Interest Only Pym'ts on each Note) | \$31,324,848 |
| Value after 30 years (Assuming 5% Growth and \$308,693 Interest Only Pym'ts on each Note) | \$43,259,462 |

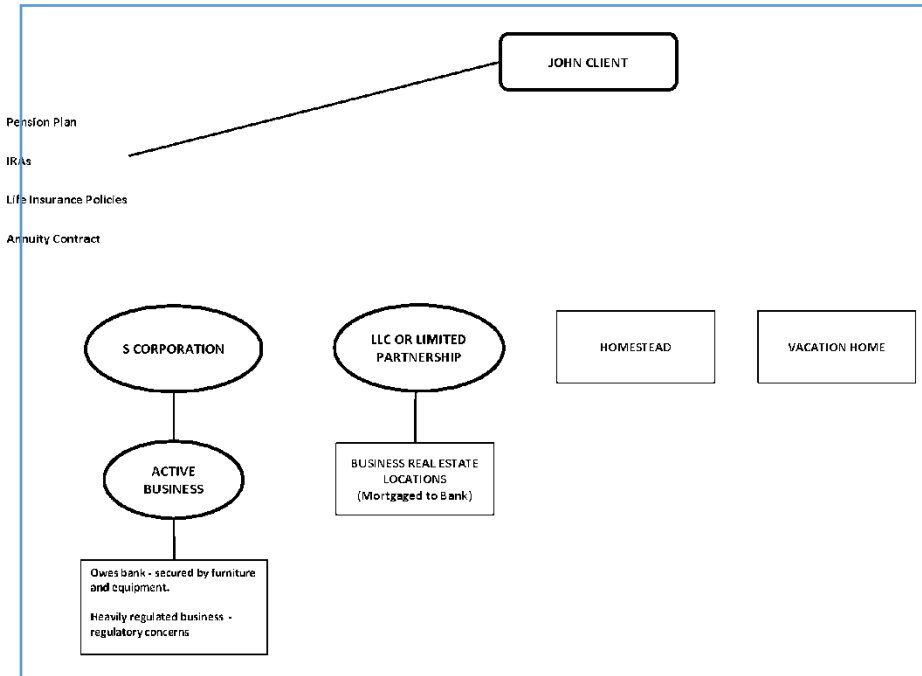
Promissory notes held by the Revocable Trusts will still be \$7,956,000 each.



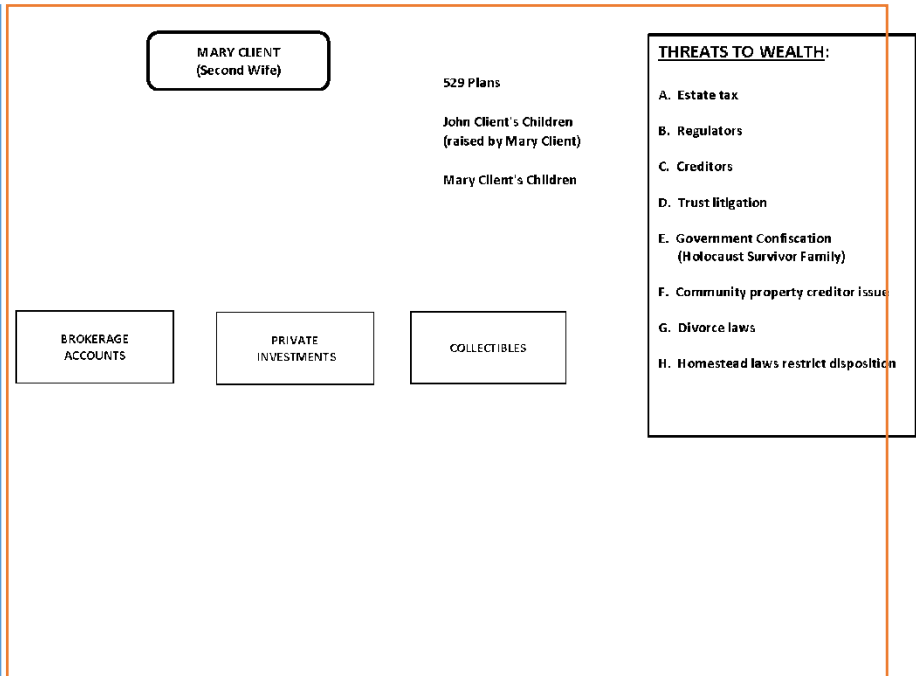
# HYPOTHETICAL FAMILY PLAN

## Chart 1 - complete

1 - A

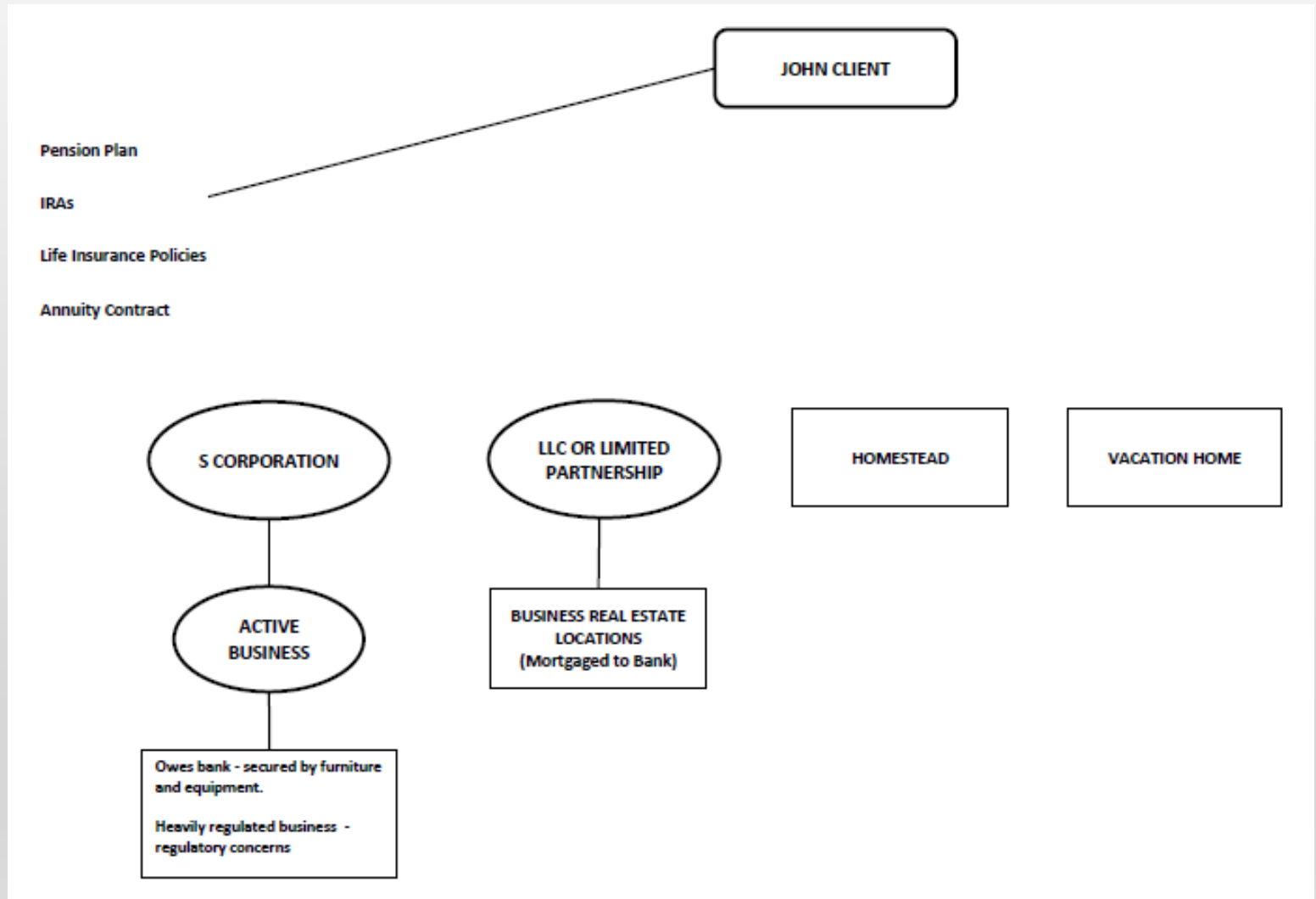


1 - B



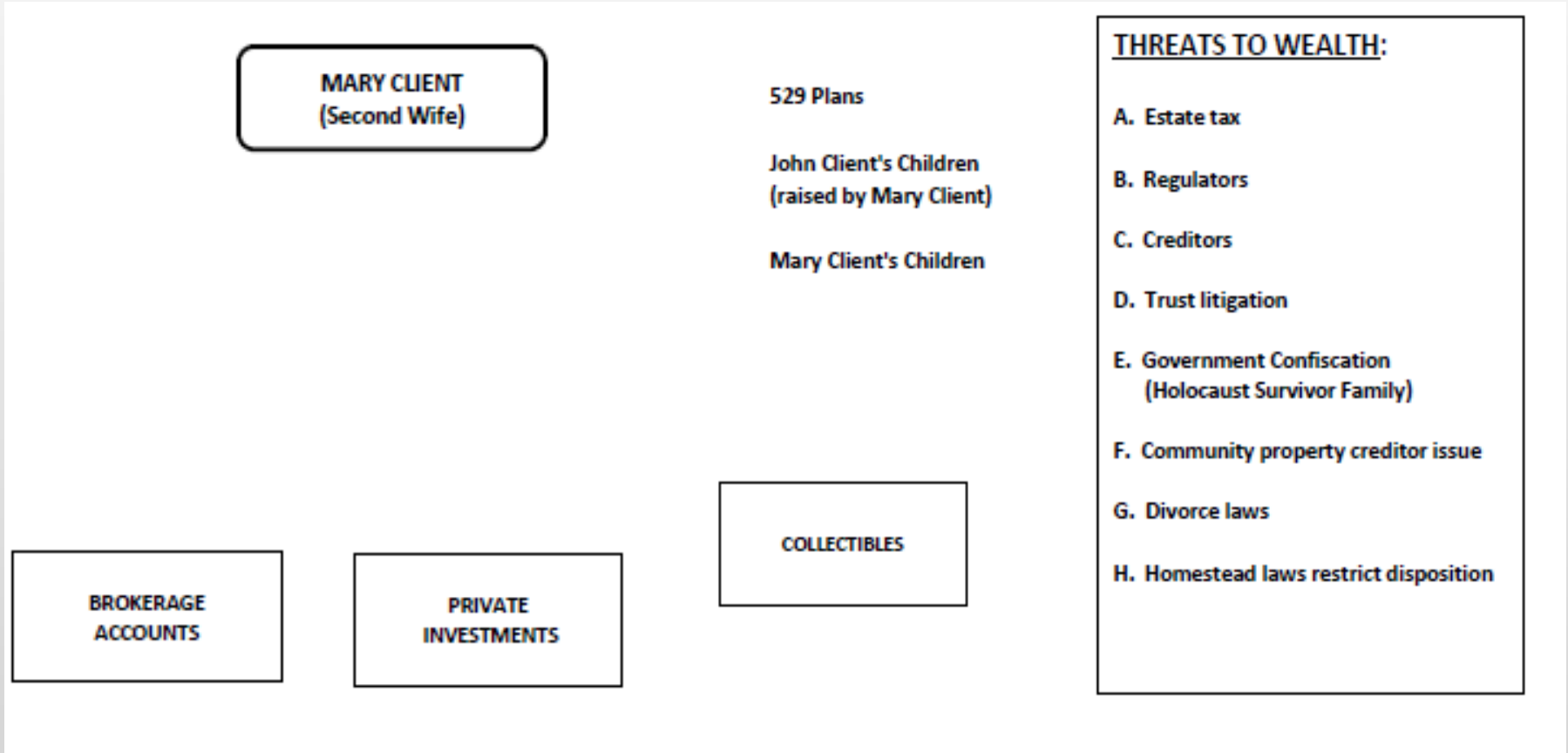
# HYPOTHETICAL FAMILY PLAN

## Chart 1 - A



# HYPOTHETICAL FAMILY PLAN

## Chart 1 - B



# HYPOTHETICAL FAMILY PLAN

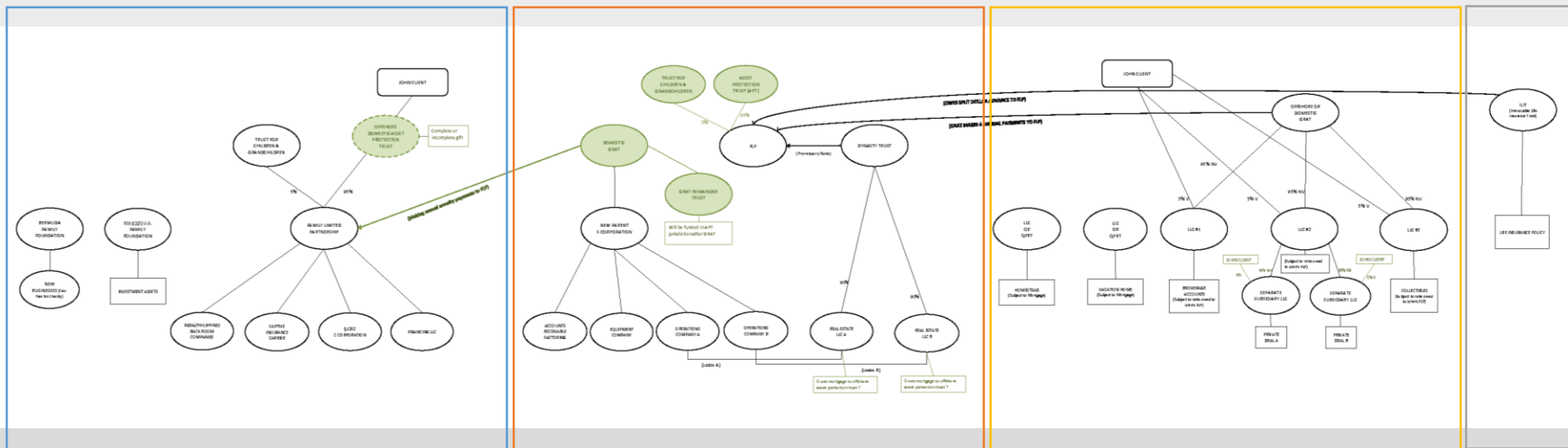
## Chart 2

2 - A

2 - B

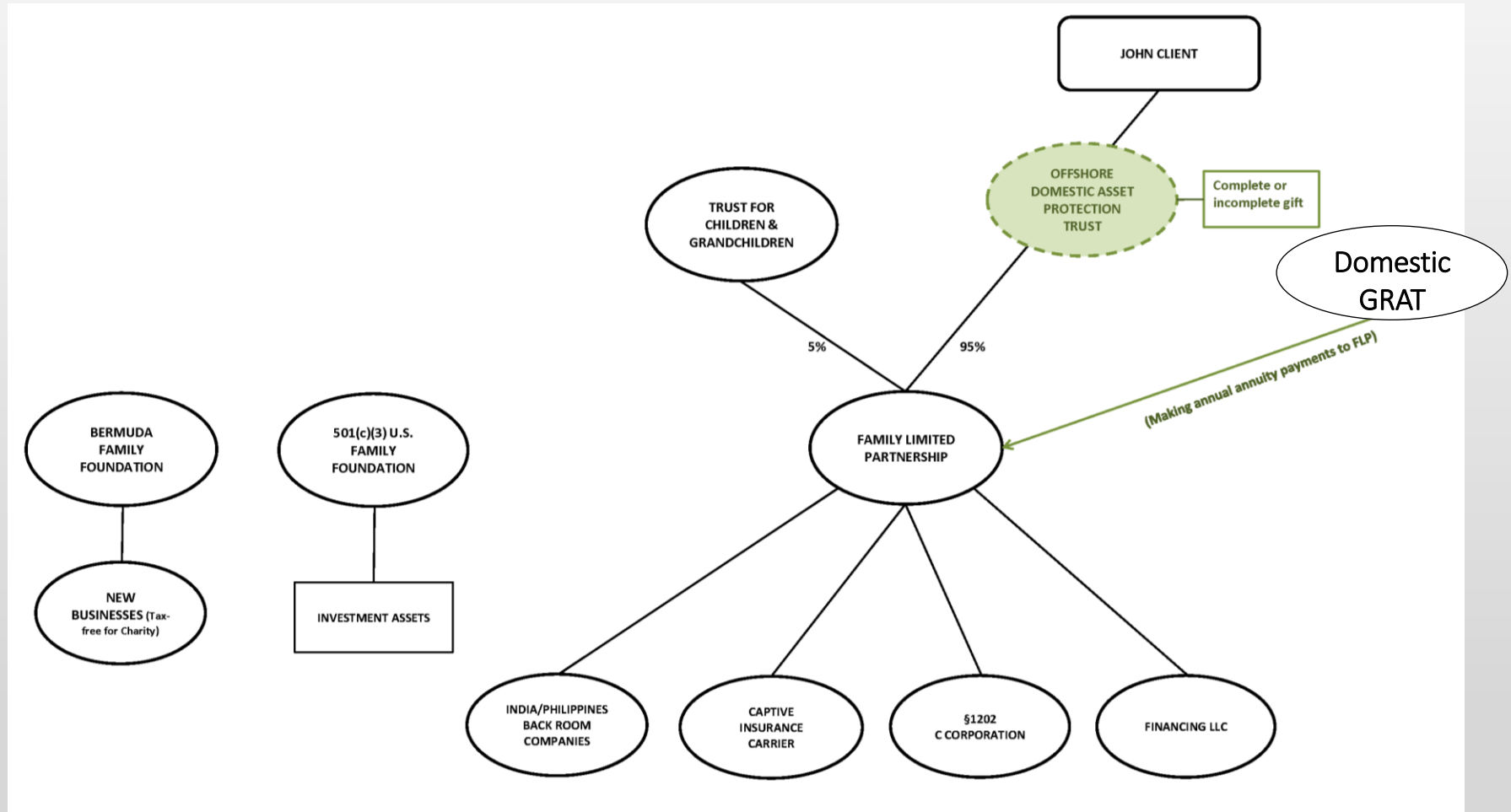
2 - C

2 - D

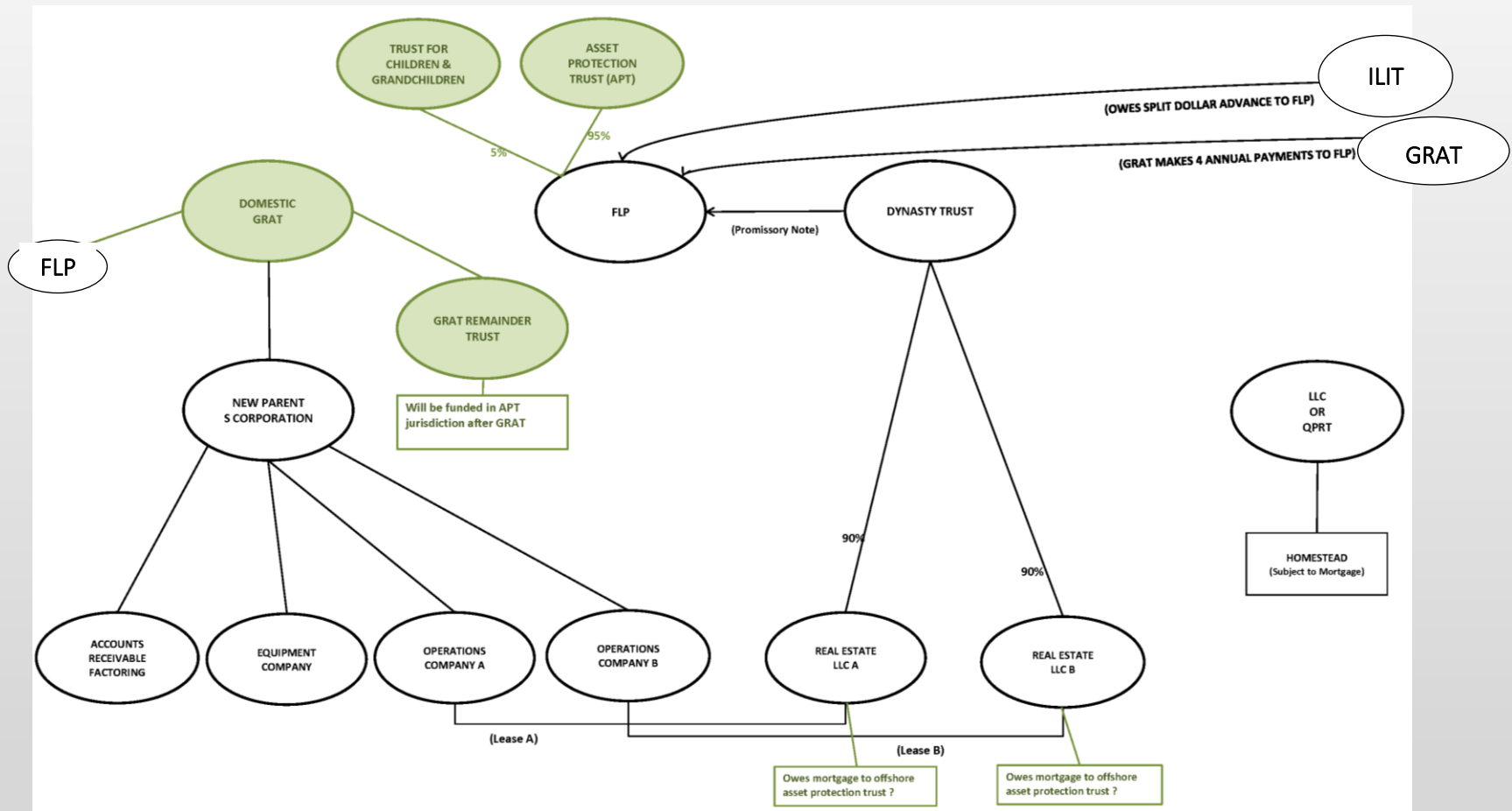


# HYPOTHETICAL FAMILY PLAN

## Chart 2 - A



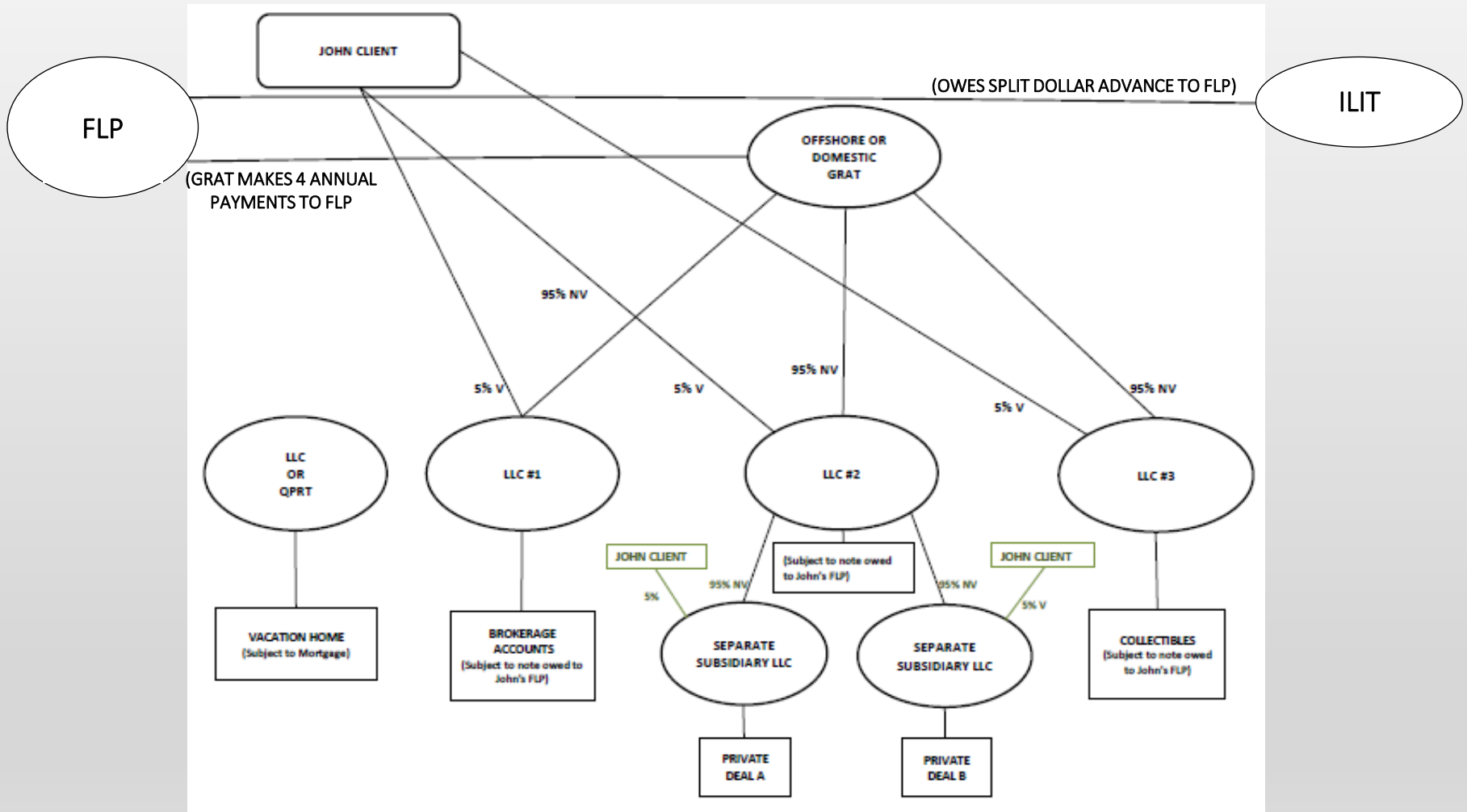
## Chart 2 - B





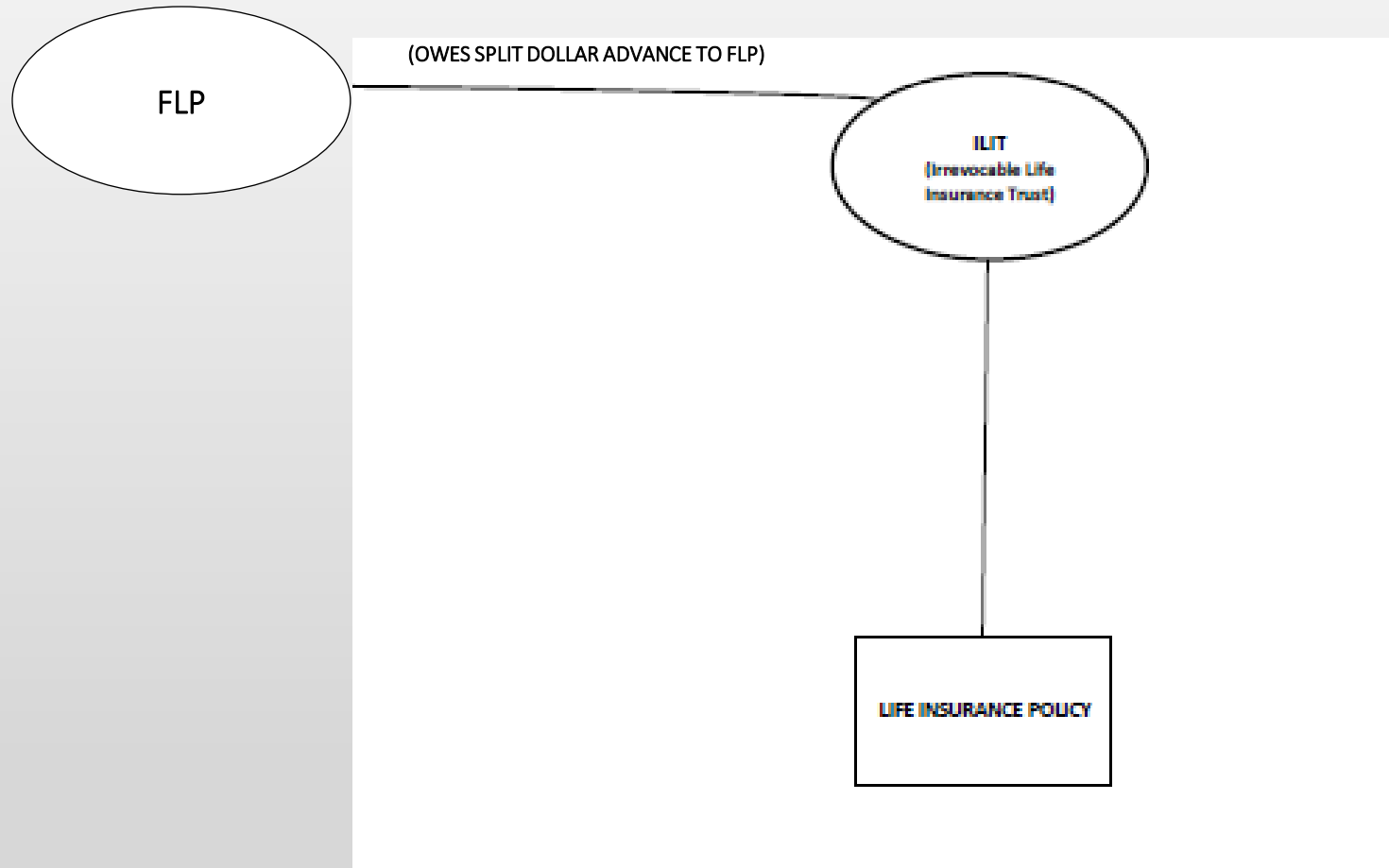
# HYPOTHETICAL FAMILY PLAN

## Chart 2 - C



# HYPOTHETICAL FAMILY PLAN

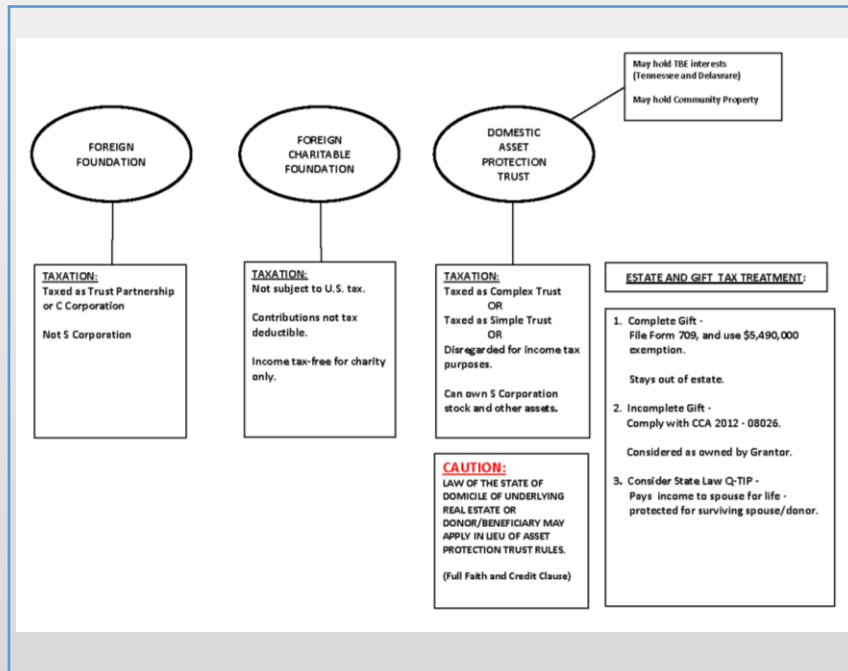
## Chart 2 - D



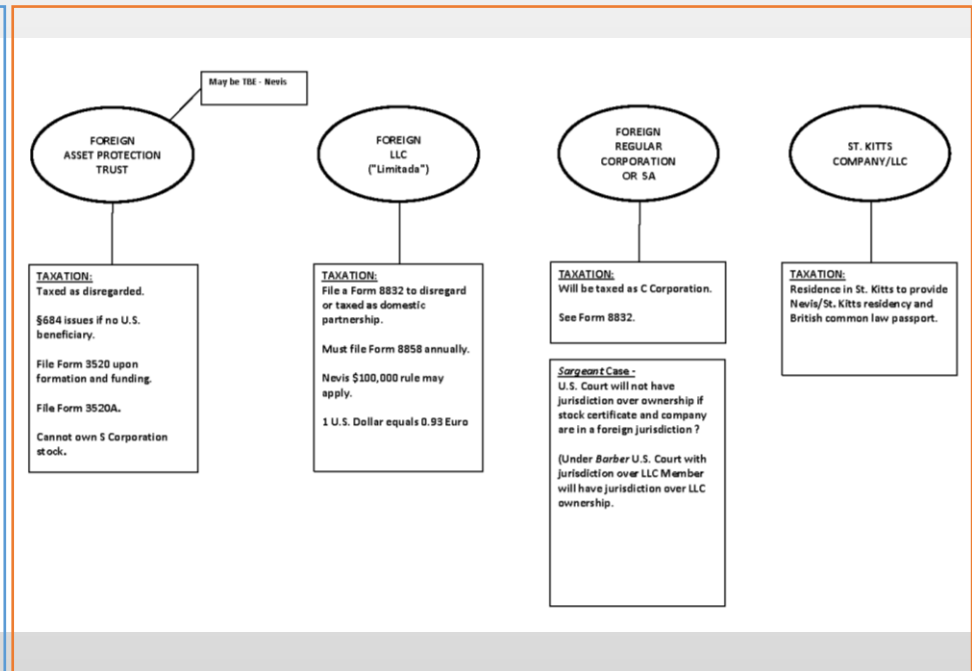
# HYPOTHETICAL FAMILY PLAN

## Chart 3

### 3 - A

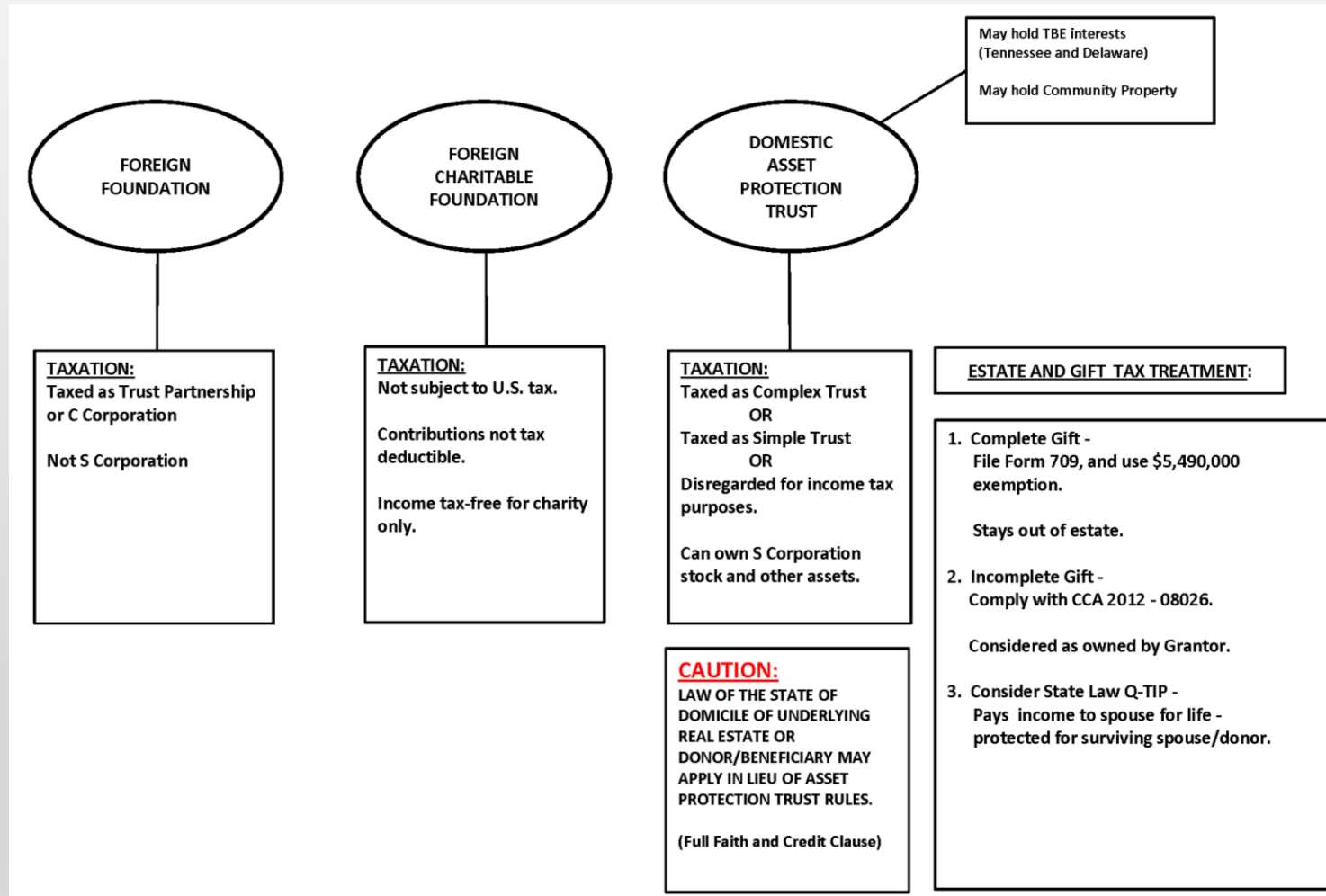


### 3 - B



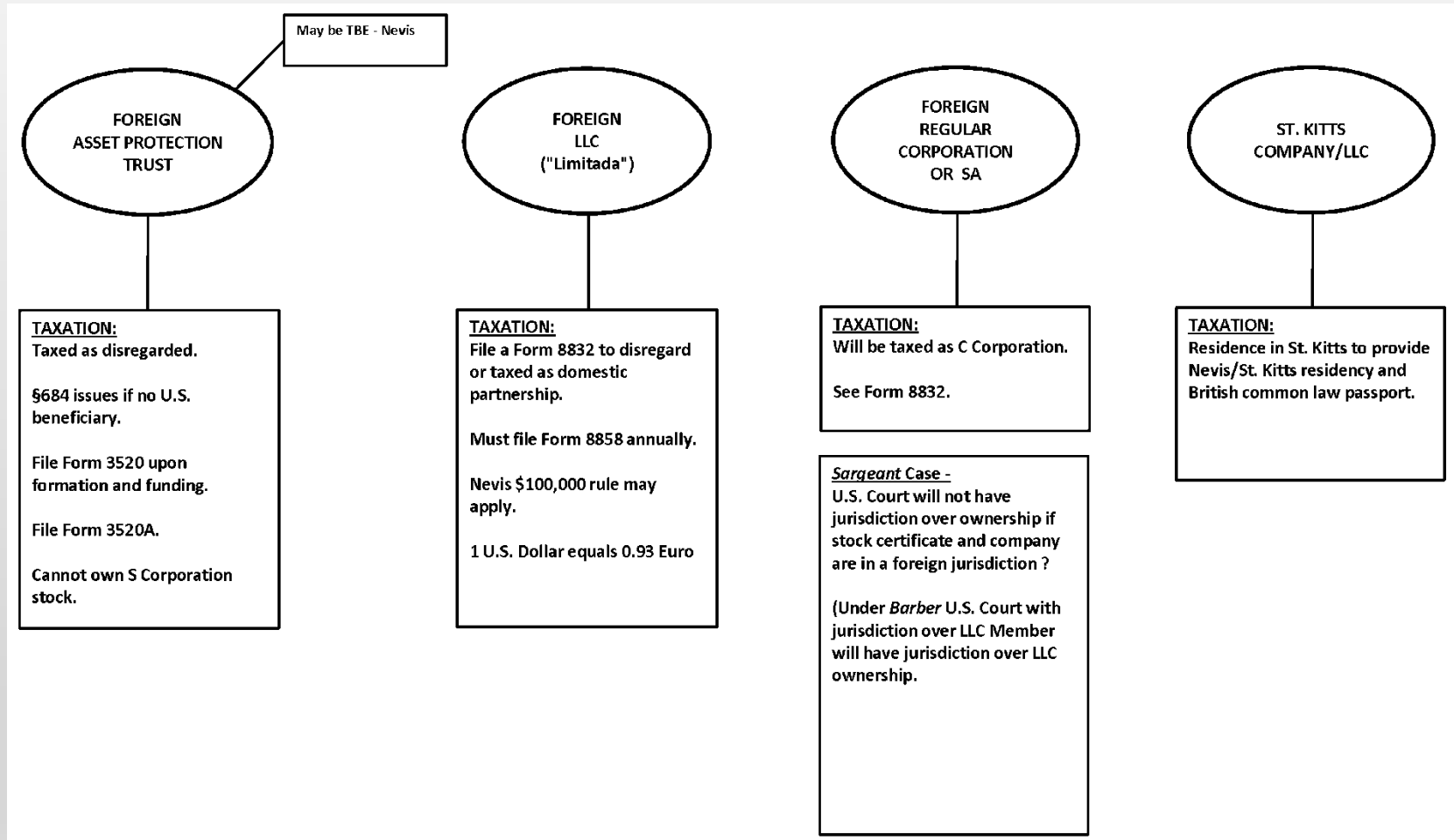
# HYPOTHETICAL FAMILY PLAN

## Chart 3 - A



# HYPOTHETICAL FAMILY PLAN

## Chart 3 - B



# For Children and Grandchildren



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

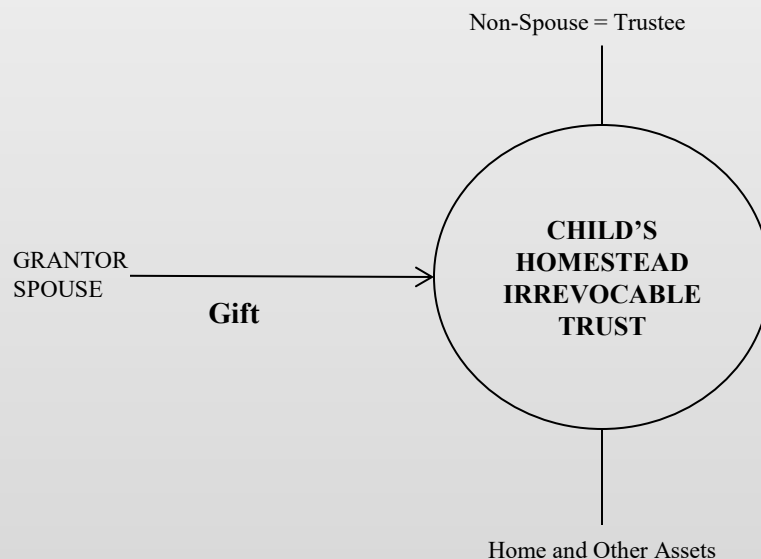
- A. Trusts for others that you can borrow from.
- B. 529 plans.
- C. Uniform Transfers to Minors Act
- D. Managed LLCs
- E. Limited Partnerships and LLCs controlled by the parent, but owned for the children and descendants and/or spouse
- F. Asset protection trust jurisdiction mechanisms that allow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



# Child's 678 Homestead Irrevocable Trust

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

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



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

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

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

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

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





# Creditor Protection Strategies

**THANK YOU FOR PARTICIPATING!**

Tuesday, July 29, 2025  
12:00 PM to 1:00 PM EST  
(60 minutes)

Alan Gassman, JD, LL.M. (Taxation), AEP®  
(Distinguished)  
[agassman@gassmanpa.com](mailto:agassman@gassmanpa.com)

