The Florida Bar Continuing Legal Education Committee and the
Real Property, Probate and Trust Law Section

An In Depth Look At Current Strategies in Asset Protection & Tax Planning for the Modern Estate Plan

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

November 30, 2017

Live and Webcast Presentation:
Hyatt Regency International Airport
9300 Jeff Faqua Boulevard
Orlando, FL 32827

Course No. 2583R

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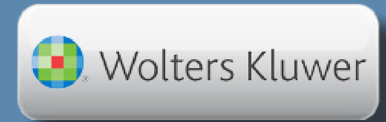

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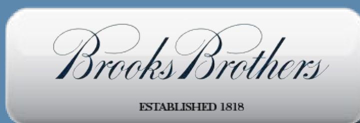

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Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org/rules.

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at member.floridabar.org.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Four months prior to the end of your reporting cycle, you will receive a CLER Reporting Affidavit, if you still lack hours.

7. **What happens if I am late or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

8. **Will I receive any other information about my reporting cycle?**
   Yes, you will receive reminders prior to the end of your reporting cycle, if you have not yet completed your hours.

9. **Are there any exemptions from CLER?**
   Rule 6-10.3(c) lists all valid exemptions. They are:
   1) Active military service
   2) Undue hardship (upon approval by the BLSE)
   3) Nonresident membership (see rule for details)
   4) Full-time federal judiciary
   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
   6) Inactive members of The Florida Bar

10. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

11. How do I submit various activities for credit evaluation?

Applications for credit may be found on our website, www.floridabar.org.

12. How are attendance hours posted on my CLER record?

You must post your credits online by logging in to your member portal at member.floridabar.org.

13. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

> ... CLER credit may not be counted for more than one reporting period
> and may not be carried forward to subsequent reporting periods.

16. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

17. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

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PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 7.5 hours)

General...7.5 hours

CERTIFICATION CREDIT

(Maximum 7.5 hours)

Tax Law..7.5 hours
Wills, Trusts and Estates...7.5 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be INTERMEDIATE.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION

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For a complete list of Member Services visit our web site at www.floridabar.org.

LECTURE PROGRAM

8:30 a.m. - 9:20 a.m.	**Core Concepts in Asset Protection** *Paul E. Roman, Esq., Boca Raton*
9:20 a.m. - 10:10 a.m.	**Lifetime Gifts vs. Inclusion in the Gross Estate** *Lester B. Law, Esq., Naples*
10:10 a.m. - 10:20 a.m.	**Break**
10:20 a.m.- 11:10 a.m.	**Lifetime QTIP for Basis Adjustment & Asset Protection** *George D. Karibjanian, Esq., Boca Raton*
11:10 a.m.- 12:00 p.m.	**Trust Protector: The Practical and Legal Nuances** *Jeffrey S. Goethe, Esq., Bradenton*
12:00 p.m. - 1:15 p.m.	**Lunch** (On Your Own)
1:15 p.m. - 2:05 p.m.	**The Use of Out of State & International Entities/Trusts for Florida Residents** *Michael A. Sneeringer, Esq., Naples*
2:05 p.m. - 2:55 p.m.	**The Use of Estate Planning and Asset Protection to Protect in Cases of Divorce** *Andrew R. Comiter, Esq., Palm Beach Gardens*
2:55 p.m. - 3:05 p.m.	**Break**
3:05 p.m.- 4:20 p.m.	**Speaker Panel Discussion** *Paul E. Roman, Esq., Boca Raton* *Lester B. Law, Esq., Naples* *George D. Karibjanian, Esq., Boca Raton* *Jeffrey S. Goethe, Esq., Bradenton* *Michael A. Sneeringer, Esq., Naples* *Andrew R. Comiter, Esq., Palm Beach Gardens*

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SPEAKER PANEL DISCUSSION

Paul E. Roman, Boca Raton; Lester B. Law, Naples; George D. Karibjanian, Boca Raton; Jeffrey S. Goethe, Bradenton; Michael A. Sneeringer, Naples; Andrew R. Comiter, Palm Beach Gardens

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LESTER B. LAW focuses on estate and trust planning, business succession planning, estate and trust administration, beneficiary and fiduciary administration and income tax matters. Lester spent the early part of his career practicing law as a trusts and estates attorney. He then switched to an advisory role working predominately with ultra-high net worth clients in two national trust companies. He has worked with many entrepreneurs and their families advising them on business succession planning, including dealing not only with the transactional and tax matters, but also with family dynamics and other related issues. With that experience, combined with his background as a certified public accountant, he brings his unique experience in understanding both the income tax, transfer tax and the family dynamic side of planning. Lester divides his time between the Naples and Washington offices, spending the majority of his time in Naples. Lester is only licensed to practice law in Florida; he has submitted an application to practice law in the District of Columbia, and his current practice in D.C. is supervised by D.C. Bar members. Lester is a Fellow of the American College of Trusts and Estates Counsel (ACTEC), and serves on the Fiduciary Income Tax and Transfer Tax Study committees. He is also an active member of the American Bar Association's Real Property Trusts and Estate (ABA RPTE) Section, serving as co-chair of the ABA RPTE's Income and Transfer Tax Planning Group, as well as being a member of other committees. An active member of and board certified in Wills Trusts and Estates law by The Florida Bar, Lester has held many leadership roles at The Florida Bar's Real Property Probate and Trust Law Section, including chairing committees, being an editor of the Tax Notes for *The Florida Bar Journal* and currently co-chairing a subcommittee exploring the utility of Community Property Trusts in Florida. Lester is a nationally recognized speaker and author. Recent presentations and venues include, University of Miami Heckerling Institute on Estate Planning, the Notre Dame Tax & Estate Planning Institute, ABA-RPTE meetings, Washington School of Law – Annual Estate Planning Council, Portland Estate Planning Council, Ave Maria School of Law Estate Planning Symposia, and Florida Attorney / Trust Officer Liaison Conference. He has lectured for the past decade at the Florida Banker's Trust School, was an adjunct professor at the Ave Maria School of Law, and will also serve as an adjunct professor at the University of Miami School of Law, Graduate Estate Planning Program. Lester's writings have been published in many national journals and publications, including Trusts & Estates, The Florida Bar Journal, Probate and Property, Bloomberg/BNA Estates, Gifts & Trusts Journal, Estate Planning, and Steve Leimberg's – LISI's Newsletters. He has been quoted in the Wall Street Journal, Bloomberg/BNA, and other national media. Lester is also a co-author of a book on estate planning titled, Tools and Techniques of Trust Planning. Lester is rated AV® Preeminent™ by Martindale Hubbell. Prior to joining Franklin Karibjanian & Law, Lester was a managing director at US Trust and Abbot Downing (Wells Fargo's ultra-high net worth boutique) focusing on planning for the ultra-high net worth clients for a dozen years. He also practiced law for more than a dozen years in Florida. Prior to law school, Lester was a CPA in Florida with PriceWaterhouseCoopers (formerly Price Waterhouse) for several years.

PAUL ROMAN concentrates his practice in Wills, trusts, and estates, including estate and fiduciary tax planning, estate planning and administration, and planning for distributions from qualified plans and IRAs. He is a two-time (20 years apart!) past president and current board member of the Greater Boca Raton Estate Planning Council; a past president of the East Coast Estate Planning Council, and a member of the Executive Council of the Real Property, Probate and Trust Law Section, where, in addition to serving on several ad hoc committees, he has chaired or co-chaired the Probate Law and Procedure Committee, the Professionalism and Ethics Committee, the Ad Hoc Study Committee on Estate Planning Conflicts of Interest, and the CLE Seminar Coordination Committee. Paul also chaired the Attorney/Trust Officer Liaison Conference and is a member of that committee. Paul is admitted to practice in Florida; New York; Massachusetts and before the U.S. Tax Court. A graduate of the Syracuse University College of Law, Paul received an LL.M. in taxation from the Boston University College of Law

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Core Concepts in Asset Protection

By

Paul E. Roman, Boca Raton

Core Concepts in Asset Protection

Welcome to *Room 222*

Paul Roman, Boca Raton, Florida

I. The Set-up

Once a need (or insatiable craving) for asset protection has been identified, there is a wide range of planning opportunities, from the erroneous to the felonious, with many options in between. The material hopes to steer clear of the felonious, emphasize the harmonious, and point out some of the erroneous.

II. Clunkers and Quirks - § 222.25

A. Up to $1,000 of an individual's interest in a motor vehicle is exempt.

B. An individual's prescribed heal aids (not aides) are exempt.

C. A tax refund attributable to the earned income credit under IRC § 32 is exempt (except from a claim for child or spousal support).

III. Tax-Advantaged Savings Accounts - § 222.22.

A. Amounts in Section 529 plans (and Cloverdell Education Savings Accounts) are exempt in the case of both the person who funded the account as well as the beneficiary.

B. Amounts in Health Savings Accounts (HSAs) and Archer Medical Savings Accounts (MSAs) are exempt.

IV. Disability Benefits - § 222.18

A. Disability income benefits <u>from a policy or contract of life, health, accident, or other insurance</u> in any form cannot be attached, garnished, or subject to legal process in Florida in favor of any creditor of the recipient of such benefits.

B. However, the exemption does not apply if the policy or contract was obtained for the benefit of the creditor seeking to garnish or attach the benefits.

V. Workers' Compensation Benefits - § 440.22

A. Compensation or benefits due or payable under Florida's workers' compensation statute are exempt from all claims of creditors, and from levy, execution and attachments or other remedy for recovery or collection of a debt, which exemption may not be waived (except for claims for child support or alimony).

B. These benefits are also not subject to assignment, release, or commutation, except under limited circumstances.

C. Like the wage exemption, the exemption survives after being deposited into an account at a financial institution (*i.e.*, "due and payable" also means "paid').

VI. Wages

A. Compensation for personal services or labor paid in money are subject to attachment or garnishment if the "disposable earnings" of a "head of family" are

less than or equal to $750 a week are exempt from attachment or garnishment. § 222.11(2)(a).

1. "Earnings" includes compensation for personal services or labor paid in money, whether denominated as wages, salary, commission, or bonus.

2. "Disposable earnings" are earnings reduced by any amount required by law to be withheld.

3. The "head of family" is an individual who provides more than half of the support for a child or other dependent.

B. If the disposable earnings of a head of a family are greater than $750 a week, they can be attached or garnished, but only with the written permission of the individual.

C. After deposit in a financial institution, the exemption is retained for six months.

Although maintaining a separate account for exempt wages is wise, tracing is available.

D. Calling payments "earnings" does not make them so.

1. Small businesses must be careful and keep accurate records.

2. Written employment agreements can be important, but must be followed. In the *Kane* (2016) case the court found:

> [T]he Kanes operated under contracts that were negotiated only between themselves. They controlled the firm, were not able to be terminated except by themselves, and were not paid in accordance with their purported contracts, but rather received payment when the firm could afford to do so. One Appellant testified that since the contracts were formed, he had yet to receive the amounts of money the contract promised. These facts lead to the conclusion that the payments flowing from the firm to the Kanes were not salary, in the ordinary sense of the word, but were actually akin to shareholder distributions that were outside the scope of the exemption.

3. See *Brock* (2009) for a debtor who (at least temporarily) creatively used this argument to his advantage.

4. Independent contractors would be well-served to create an intervening entity with which it can enter into a compensation arrangement.

VII. Life Insurance Proceeds (§ 222.13) - Love It and Leave It

A. Proceeds from life insurance on the life of a Florida resident payable to another are exempt from the claims of the insured's creditors unless the policy or a valid assignment of the policy provides it is for the benefit of a creditor.

1. There is no exemption from the <u>beneficiary's</u> creditors.

2. Can you spell ILIT?

B. Private placement life insurance is life insurance.

C. Proceeds from life insurance on the life of a Florida resident payable to the insured or his or her estate (whether by direct designation or otherwise) are part of the insured's estate and treated as any other non-exempt asset.

D. Possible constructive trust where insured owner changes beneficiary in violation of divorce decree (and 3-month claim period does not apply.

VIII. Life Insurance Cash Surrender Value (§ 222.14)

A. The cash surrender value of a life insurance policy issued on the life of a Florida resident or citizen is not subject to the claims of the insured's creditors.

B. The exemption does not extend to the owner's creditors

C. The statute does not require that the cash surrender value be monetized by surrender of the policy to the insurance company, so the proceeds from the sale of a life insurance policy to a third party (including a trust) should be exempt.

D. The exemption extends to the proceeds of partial withdrawals or loans. *Faro* (2001).

IX. Annuity Proceeds (§ 222.14)

A. Proceeds of an annuity contract issued to a citizen or resident of Florida (in whatever form) cannot be attached, garnished or become subject to legal process in favor of any creditor of the insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the policy or annuity was effected for the benefit of such creditor.

B. Single premium deferred annuities are protected

C. Private Annuities

1. Held protected in one bankruptcy case

2. But getting around the term "issued" again is likely to be difficult

D. Not all periodic Payments are Annuities

1. Lottery payments are not usually exempt, even if backed by an annuity contract taken out by the state to secure the payments; but have been held to be exempt if the individual is named as the beneficiary of the contract

2. A stream of payments pursuant to a divorce settlement is not under an annuity

3. Even a stream of payments from an insurance company (in settlement of litigation against it) that were required to be secured by an annuity contract were not protected where the insurance company was named as the beneficiary of the payments.

X. Retirement Accounts. § 222.21

A. An individual's interest in a retirement account is exempt from the claims of the individual's creditors (other than the IRS under IRC § 6334). *Lawler*.

B. Amounts payable from a retirement account to an owner, a participant, or a beneficiary from are exempt from the claims of creditors of the beneficiary or participant (other than the IRS. IRC § 6334).

C. For this purpose a retirement account is one which is held under a plan covered by IRC §§ 401(a), 403(a), 403(b), 408, 408A, or 409, as well as governmental and church plans under IRC §§ 414, 457, and 501(a).

D. The protection does not extend to an action instituted by a former spouse asserting an interest in the portion of the account which is subject to a qualified domestic relations order (QDRO). § 222.21(2) (d)

E. The protection does not extend to elective share proceedings - claim and contribution

F. Once again, a divorce case provides offers an interesting twist on the typical.

The court denied an equitable lien to the former husband on the portion of his retirement benefits that had been awarded to the former wife under a QDRO, even though the former wife had not made an equalizing payment to the husband that was required under the marital settlement agreement. Essentially, he wanted his own money back to offset what he was supposed to have received from his former wife. *Garcia-Lawson* (2017).

G. ERISA also provides protection for plans which are subject to it.

H. Florida specifically protects inherited IRAs.

1. *Robertson* (2009) had held that inherited IRAs were not exempted by the statute. So in 2010 the RPPTL Section proposed an amendment to the statute that added the following language to § 222.21(c)(2):

   "including, but not limited to, a direct transfer or eligible rollover to an inherited individual retirement account as defined in s. 408(d)(3) of the Internal Revenue Code of 1986, as amended. This paragraph is intended to clarify existing law, is remedial in nature, and shall have retroactive application to all inherited individual retirement accounts without regard to the date an account was created."

2. The United States Supreme Court subsequently ruled in *Clark* (2014-F) that inherited IRAs are not protected retirement plans in bankruptcy, but since Florida is an opt-out state, Florida law controls.

3. Protection applies to beneficiaries who are Florida residents

   If asset protection is an important concern an under $59^1/_2$ surviving spouse who might otherwise consider maintaining an inherited IRA to avoid the 10% early withdrawal penalty should instead consider a rollover if he or she might not remain a Florida resident.

4. Consider trusts for non-Florida beneficiaries

I. Federal Bankruptcy law caps IRA protection at $1,283,025

1. Limit applies to contributory IRAs

2. Rollover IRAs are not subject to the cap, so they should never be comingled with contributory IRAs.

3. Roll-ups to plans under IRC §§ 403(b) and 457 avoid the cap

4. Distributions that are rolled over carry the applicable protection

XI. Tenancy by the Entireties.

A. Property owned as tenants by the entireties cannot be reached by a creditor of only one of the spouses.

B. Tenancy by the entireties is a form of ownership of property that available only to a married couple where there is a unity of

1. Time - the interests must have commenced simultaneously.

a. But § 689.11 allows one spouse to create a tenancy by the entireties interest in real property by deeding the property into the names of both spouses. No “straw man” is needed.

b. There is no corresponding provision applicable to personal property.

2. Title - the interests must have originated in the same instrument.

3. Interest - the interests of each spouse must be identical.

4. Possession - joint ownership and control.

5. Survivorship.

6. Marriage - at the time the property became titled in their joint names.

C. In the case of real property, title taken by a married couple is presumed to be held as tenants by the entireties unless the deed indicates otherwise. Applies to both residents and non-residents. *Holland* (2009)

D. In the case of personal property, the presumption is not uniform

a. For bank accounts, the presumption applies for accounts having provisions for survivorship. *Beal Bank* (2001)

b. *Beal Bank* has been extended to other financial accounts.

c. But account cards signed when accounts are open can rebut that presumption.

i. The financial institution offers a tenancy by the entireties option and that option is not selected.

ii. The wrong box is checked.

d. Other forms of personal property also can be held as tenants by the entireties.

i. Stock certificates. *Cacciatore* (2002)

ii. Household furnishings. *Kossow* (2005-B)

iii. Joint federal tax refund. *Freeman* (2008-B)

iv. Vessels (including jet skis), but only if Boats, but only if the registrations uses “and,” the use of “or” creates a joint tenancy, not a tenancy by the entireties. *Caliri* (2006-B), § 328.01.

v. Cars, but same "and"/"or" rule. *Sunny Gifts* (2004-B), § 319.22

e. But in the absence of title documents, the burden of proof may be hard to meet. For example, in the *Connell* case, the court stated:

> [T]he fact that the decedent purchased the watch and ring with funds from the joint checking account (and a small contribution of cash from [wife]) while they were shopping together does not make the watch and ring the joint property of the Connells. Rather, it is for whom the watch and ring were purchased rather than how they were purchased that is important.

f. For accounts, the law of the situs of the account controls. *Gillette* (1999-B).

g. It is possible to establish the existence of a tenancy by the entireties even when the documentation (corporate records) states otherwise. *Berlin* (2007).

E. Problems with relying on tenancy by the entireties.

1. It ends upon the death of one of the spouses and the survivor owns the entire property.

2. It ends upon the divorce of the spouses.

3. Even if only one spouse files, it is not effective in bankruptcy to the extent the spouses have joint debt.

4. Although not permitted to foreclose on its lien, the IRS can place a lien on the interest of one spouse. If that spouse dies first, the IRS gets nothing; but if that spouse survives, the lien can then be foreclosed.

5. Despite these problems, ownership as tenants by the entireties may provide opportunities to re-align ownership without tripping fraudulent transfer alarms.

XII. Homestead on Paper

A. Section 4 of Article X of the Florida Constitution provides that a portion of an individual's homestead is exempt from forced sale by process of any court. Furthermore, no judgment, decree or execution is permitted to constitute a lien on a homestead other than for the payment of:

1. Taxes and assessments related to such property;

2. Obligations contracted for the purchase, improvement or repair of such property; or

3. Obligations contracted for house, field or other labor performed on such property.

B. Limited in Area

1. Residence and up to one half of an acre of contiguous land if located within a municipality

2. Any portion of the residence that is rented out is not exempt

3. 160 contiguous acres if located in an unincorporated area

4. If a homestead is in an unincorporated area that later forms or becomes part of a municipality, the protected acreage cannot be reduced without the owner's consent

5. Except as previously mentioned, if the homestead is located within a municipality the exemption will only protect up to one half of an acre of contiguous land and the exemption is limited to the residence of the owner or the owner's family.

C. Unlimited (in value) and Available Immediately to Every Florida Domiciliary

D. Leasehold interests qualify - § 222.05

E. Length of Ownership Matters in Bankruptcy Context

1. Two-year (730-day) test

a. The domicile of an individual who moves to Florida and files a bankruptcy petition within two years of the move is based on the individual's domicile during the six-month period immediately preceding the two-year period.

b. Important for those moving in from states which also have homestead protections that are broader than what the Bankruptcy Act offers ($125,000 indexed -- presently $160,395).

c. *In re Jevne* (2008-B) involved a couple who moved from Rhode Island and filed within two years of the move. Rhode Island has a $300,000 homestead exemption, which the court found applied (and which was adequate to protect the couple's home).

2. Three-year-and-four-month (1,215-day) test

a. Since Florida is an opt-out state (§ 222.20), the value of the homestead of a debtor (other than a farmer) in excess of $160,375 is not exempt until 1,215 days after the debtor acquired an interest in the home.

b. Carryover from prior residence in same state expands protection.

F. Abandonment

1. Once homestead, status continues until permanently abandoned.

2. Occupancy does not have to be continuous, but extended period of absence raises question of fact.

3. The keys are the intent (and ability) to return.

G. The homestead must be owned by a "natural person."

H. The homestead exemption also protects the value of up to one thousand dollars ($1,000) of personal property.

I. The homestead exemption also inures to the benefit of a surviving spouse or heirs of the owner.

J. Cooperative Apartments

a. Yes for protection from creditors

b. No for descent and devise

XIII. Homestead in the Courts

A. *Colwell* (1998-B) - Separate Homesteads of Spouses

Married couple living apart can each maintain a separate homestead exemption.

B. *Havoco* (2001) - Debtor's Use of Non-exempt Funds to Acquire Homestead

The Florida Supreme Court received the following certified question from a U.S. appellate court:

Does Article X, Section 4 of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying or defrauding creditors in violation of Fla. Stat. § 726.105 [Florida's Fraudulent Transfer Act] and Fla. Stat. § 222.29 [related to Florida's Fraudulent Transfer Act] and 222.30 [Florida's Fraudulent Conversion Statute]?

After a substantial judgment had been entered against him, the debtor used non-exempt assets to purchase a home in Florida, which he declared as his homestead. The court recognized that the homestead exemption should be liberally construed and concluded:

> Accordingly, we answer the certified question in the affirmative, holding that a homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors is not excepted from the protection of article X, section 4.

C. *Conseco* (2005) - *Havoco* on Steroids?

Non-exempt funds (including the proceeds of a mortgage on a residence in another state) were used by debtors to relocate to a $10 million Florida residence. Homestead protection confirmed.

D. *Jones* (1925) - Dirty Money

Trustee entitled to equitable lien against homestead for amount of embezzled funds used to improve homestead.

E. *Fishbein* (1992) - More Dirty Money

Equitable lien granted on homestead where funds used to extinguish mortgages on the homestead were obtained by fraud and forgery)

F. *Flinn* (2017) - Most Dirty Money

Creditor permitted to foreclose lien.

G. *Randazzo* (2008) - Post-Divorce Fraud

The issue before Florida's Third District Court of Appeals was whether the equitable lien imposed by the trial court against the former wife's homestead was precluded by *Havoco*. Equitable lien permitted where funds obtained through fraud or egregious conduct were used to invest in, purchase or improve homestead.

H. *Daniels* (1970) - More Divorce

The appellate court held based on public policy that a former husband cannot create an enforceable lien on his undivided one-half interest in the homestead by giving his attorney notes secured by mortgages. However, the appellate court noted that when the homestead loses its status as homestead property the liens would be subject to enforcement.

I. *Tullis* (1978) - But as Between Co-Owners

The Florida Supreme Court held homestead interests should be protected from forced sale wherever possible, but not at the expense of co-owners.

J. *Willis* (2006) - Dirty Mind, but not Dirty Money

Even though the debtors fraudulently transferred the sale proceeds to their own personal account, this is not the type of "fraud or egregious conduct" that allows a court to impose an equitable lien on a homestead. The creditor was not the one who was defrauded.

K. *Engelke* (2006) - Homestead Held in Revocable Trust

The assets in Paul Engelke's estate were insufficient to pay all of the claims against the estate (or the family allowance to the widow). The trustee appealed an order compelling the trust to cover the shortfall documented by the personal representative (son from first marriage) by using (by sale or borrowing) the trust's one-half interest in the homestead.

Paul's wife, Judy, (who owned the other half of the homestead) had waived her interest in Paul's half in a prenuptial agreement. This made Paul's interest freely devisable. And although the trust provided for life use by Judy (subject to payment of expenses) and therefore the remainder beneficiary heirs had no present interest in the homestead, the court held that their remainder interest was protected

> We note that in this case while Paul's residence was held in a revocable trust, it was owned by a "natural person" for purposes of the constitutional homestead exemption. Because Paul retained a right of revocation, he was free to revoke the trust at any point in time. Accordingly, he maintained an ownership interest in his residence, even though a revocable trust held title to the property. We therefore conclude that Paul's interest in his residence as beneficiary of his own revocable trust would entitle him to constitutional homestead protections.
>
> * * *
>
> It is only when the testator directs that a freely devisable homestead be sold and [the proceeds of such sale] distributed to a

> devisee that the constitutional protection from creditors is disregarded…In such a case, the decedent has devised money and not the homestead itself. Otherwise, the homestead protections against forced sale attach upon the moment of the owner's death.
>
> * * *
>
> Here, the provisions of the revocable trust effective upon Paul's death provided generally that the trustee would pay any expenses that the estate could not pay. Yet the trust also specifically directed that the homestead be available to Judy during her lifetime with Paul's children to receive it following the termination of Judy's interest. The trust cannot be read as requiring the sale of the homestead. In fact, the opposite conclusion must be drawn.

L. *Bosonetto* (2001-B) - *Havoco*, but…

In this roundly and soundly criticized, the U.S. Bankruptcy Court for the Middle District of Florida court held that the debtor's homestead owned by her revocable trust was not owned by a "natural person," and therefore the debtor could not claim the benefit of the homestead exemption.

M. *Alexander* (2006) - Bosonetto Redux

"As a general rule, the individual claiming the exemption need not hold fee simple title to the property. Rather, in order to claim the property in which the individual resides as exempt, it is sufficient that: (1) the individual has a legal or equitable interest which gives the individual the legal right to use and possess the property as a residence; (2) the individual have the intention to make the property his or her homestead; and (3) the individual actually maintain the property as his or her principal residence."

N. *Callava* (2003) - Another Revocable Trust

"[L]ong and tortured" divorce cases often spawn multiple appeals and raise interesting issues. In this case, the wife was awarded a non-marital residence in satisfaction of the husband's support obligations. The wife later sold that property and bought (as her homestead) another expensive property, taking title is a trust of which she was not the trustee. One of her attorneys obtained a judgment against the wife for unpaid fees and obtained a lien on the wife's new homestead property. The wife did not appeal this decision. The court subsequently entered a judgment of foreclosure.

The appellate court reversed, finding that, even though titled in the name of a trust, the property was the wife's homestead and therefore protected from forced sale. "[The Florida Constitution "does not designate how title to the property is to be held and it does not limit the estate that must be owned…[T]he individual claiming homestead exemption need not hold fee simple title to the property."

O. *Cocke* (2007-B) - *Alexander*, but Irrevocable Trust

Homestead held in irrevocable realty trust created by children and grandchild. Beneficiaries' interest described as "personal property."

No problem.

> …in conjunction with the fact that "Florida courts have consistently emphasized that the homestead exemption is to be liberally construed," the Court finds that the Debtors hold a sufficient equitable interest in the Real Property, permitting them to claim it as exempt homestead.

P. *Cutler* (2007) - Provision in Will Trumps Irrevocable Trust

Florida homestead protection applied to a residence that was held in an irrevocable land trust in this case involving a personal representative's attempt to charge the homestead with a share of the estates claims and expenses. However, the court held that the language in the decedent's Will concerning the payment of debts and the equal distribution of her estate controlled to allow the personal representative to ding the homestead for the beneficiary's share of the expenses.

Q. *Spector* (2017) - Alimony Creditor

Former spouse acting "egregiously, reprehensibly, or fraudulently."

R. *Englander* (1996-F)- McMansions

If a homestead is situated on a tract of land that is greater than the acreage protected by the exemption, a debtor may claim any contiguous part of the land as exempt, provided the remainder of the land has "legal and practical use."

If the property cannot be divided because of legal restrictions (zoning, for example) or the remainder has no practical use, the property must be sold and the proceeds apportioned between the creditor and the debtor.

> A sale and apportionment of the proceeds is an equitable solution, allows for an appropriate recognition of the debtors' homestead exemption, and will afford the creditors some satisfaction of their rightful claims.

XIV. Claiming the Benefit of the Homestead Exemption.

As a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law. [Citations omitted.] That being so, the defense of homestead exemption may first be offered at the time that a creditor attempts foreclose on the homestead. *Callava* (2003).

B. File a declaration of homestead. § 222.01

C. Notify creditor. § 222.02

1. Under oath

2. Legal description

D. Creditor can dispute claim § 222.03

1. Quantity

2. Carve out

3. Contiguity

XV. Proceeds from Sale of Homestead.

A. The homestead exemption can protect the proceeds of the sale of a residence in the same manner it protects the homestead provided the seller demonstrates by a preponderance of the evidence a good faith intention just prior to or at the sale to invest the sale proceeds in a successor residence within a reasonable time.

1. How long is a reasonable time?

2. What is a reasonable amount?

a. Only what is intended for reinvestment

b. Excess proceeds from the sale of homestead property, that is, funds not reinvested in a successor residence, will not retain the exemption.

B. Sale proceeds should not be commingled with other funds belonging to the debtor. Instead, sale proceeds should be held in a segregated account.

XVI. Homestead and the IRS

A. Claims by Federal Government

B. Supremacy clause (Article VI of the Constitution of the United States of America)

1. IRC § 6321 creates a lien on "all property" of a person who neglects or refuses to pay any tax after demand

2. But homestead may only be seized as a last resort if a district court judge or magistrate approves the levy in writing.

XVII. Waiver of Homestead

A. A general waiver is not sufficient. In *Chames* (2007), F/K/A *DeMayo* (2006) the waiver read:

> "It is specifically agreed that [law firm] shall have and is hereby granted all general, possessory and retaining liens and all equitable, special and attorney's charging liens upon the client's interests in any and all real and personal property within the jurisdiction of the court for any balance due, owing and unpaid as well as a lien in any recovery whether by settlement or trial; and such lien or liens shall be superior to any other lien subsequent to the date hereof and that the client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs. "

The law firm had argued, among other things, that permitting a waiver of homestead protection is consistent with waivers of other constitutional rights. The Florida Supreme Court acknowledged the trend but noted that the homestead exemption is a right that protects both the individual and the public, which includes the debtor's family and the State. The constitutionally prescribed means to waive the homestead exemption, by "mortgage, sale, or gift," guarantees such waiver is knowing, voluntary, and intelligent.

B. As noted by the Florida Supreme Court, the only way to waive homestead creditor protection is by:

1. Mortgage
2. Sale
3. Gift

XVIII. Fraudulent Asset Conversions - § 222.30

A. Changing or disposing of an asset by a debtor in a way that makes the asset or the proceeds of the asset <u>become</u> exempt from claims, while retaining the benefit of the asset.

B. Remedies available to an affected creditor include:

1. Voiding the transfer to the extent necessary
2. Attaching the asset
3. Enjoining further conversions
4. Obtaining any other relief the circumstances may require.

C. The conversion of a non-exempt to homestead is not a fraudulent asset conversion. *Havoco*.

XIX. Florida's Uniform Fraudulent Transfers Act - Chapter 726

A. The question certified by the 11th Circuit Court of Appeals to the Florida Supreme Court included a FUFTA component:

> Does Article X, Section 4 of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying or defrauding creditors in violation of Fla. Stat. § 726.105 [Florida's Fraudulent Transfer Act] and Fla. Stat. § 222.29 [related to Florida's Fraudulent Transfer Act] and § 222.30 [Florida's Fraudulent Conversion Statute]?

B. Under the Florida Supreme Court's decision in *Freeman* (2004), FUFTA does not create a cause of action against a third party (you?) who is not the transferee.

Lifetime Gifts vs. Inclusion in the Gross Estate

By

Lester B. Law, Naples

Lifetime Gifts vs. Inclusion in the Gross Estate

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Disclosures

To ensure compliance with IRS requirements, please be advised that any discussion of U.S. tax matters contained in or attached to these materials is not intended or written to be used, and cannot be used, for the purposes of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter discussed herein.

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I. Introduction

A. In General

The Annual Taxable Gifts (ATGs) Approach is a strategy that eliminates the payment of estate taxes. The ATGs Approach utilizes the strategy of making lifetime gifts to irrevocable grantor trusts (IGTs) that sometimes triggers a gift tax liability. Many articles have compared the benefits of a large gift that triggers gift tax liability to a transfer upon death. These articles typically focus on the donated asset and compare the tax exclusive structure of the gift tax coupled with the post-gift appreciation escaping estate taxes to the status quo of estate taxes being applicable with an automatic basis adjustment upon death. The ATGs Approach takes it to the next level, by looking not only solely at the donated assets, but rather taking a holistic approach of examining the impact of the gift to the donor's entire estate, not only through the donor's date of death, but also through the next generation, taking into consideration income, gift, estate and generation-skipping transfer (GST) tax implications.

The ATGs Approach allows even the wealthiest of families to efficiently transfer their wealth during lifetime through the gift tax regime not only to GST and non-GST IGTs, but to also use a zeroed-out charitable lead annuity trust (CLAT) during life and/or upon death to eliminate estate taxes. The beauty of the ATGs Approach is that it uses a combination of "low tech" planning ideas to produce elegantly efficient results.

B. The Idea

The idea is to move a target amount (the "target amount") of wealth using ATGs to IGTs during the clients' (the "G1s") lifetime.[1] The ATGs would be over the projected life expectancy (LE) of the G1s in an amount to reach the target amount, which is based on modeling with the assumptions the G1s determine is realistic. The target amount could be a set amount the G1s desire to set aside for the benefit of the G2s and lower descendants, or perhaps the projected net amount passing free of estate taxes if the status quo persisted, or perhaps some percentage of that amount, say 85% of that amount.

Upon the deaths of the G1s, their remaining taxable estates could pass to a zeroed-out CLAT, which would eliminate all federal and state estates taxes, endow the family's private foundation (or donor advised fund) and set the stage for a reinfusion of wealth back to the family after 20 years or so with no transfer tax costs

C. Why Does the ATGs Approach Work?

The ATGs Approach uses the more efficient nature of the federal gift tax system, removes the future appreciation from the taxable estate, and utilizes the transfer tax benefits of grantor trust status. Sophisticated modeling illustrates that reaching the target amount can be accomplished much more efficiently than most would have thought possible using the ATGs Approach. Additionally, in effect, after leaving the G1s' estates, the family would continue to control all the wealth through the IGTs, the CLAT or family foundation, other than a relatively small, if any, amount paid in federal gift taxes.

D. How Does the ATGs Approach Work?

This paper outlines the benefits of the ATGs Approach and provides background on lifetime taxable gifts.

E. Modeling Software

The illustrations used with the paper (Appendix A, B & C) were prepared using Excel. However, Howard L. Eisenberg, the developer of WealthTec®, a comprehensive financial and estate planning software package, has made adjustments to WealthTec® to accommodate using the ATGs Approach. Appendix E is an example of WealthTec® modeling the ATGs Approach (loosely tracking the scenario illustrated in Appendix B). The last page of Appendix E is a summary of WealthTec® and information regarding how to acquire it. Note that we have no financial or other interest in WealthTec® and are merely pointing to this program as a source for modeling the ATGs Approach.

II. ATGs Illustrated

Explaining the ATGs Approach is best done by illustration. For purposes of providing an overview, three scenarios are used, a $250 million estate, a $30 million estate, and a $10 million estate, to illustrate the idea. Please understand, however, that the ATGs Approach has utility for virtually any size estate that will have the potential for exposure to federal or state death taxes. The illustrations are in Appendix A, B and C. In Appendix A and B, the remaining taxable estate in the ATGs Approach scenarios passes to a CLAT and in Appendix C the remaining taxable estate passes to the IGT for the family.

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[1] For purposes of this outline, the clients will be referred to as the G1s, the children's generation as the G2s, and grandchildren's generation as the G3s, and so on.

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- $250 Million Estate -- Appendix A. This is an illustration of the G1s having a $250 million estate. Each G1 is assumed to have already made gifts to an IGT of $5 million and allocated $5 million of GST exemption. The G1s are residents of a state without a state estate tax.

  Appendix A consist of three pages, (i) page A-1, Status Quo, (ii) page A-2, the ATGs Approach, and (iii) page A-3, the Data. The assets consist of $10 million of cash, $10 million of personal assets and $230 million of investment assets. The desired year-end cash is $10 million. The G1s cash flow for living expenses starts at $3,000,000 (indexed for inflation), and beneficiaries (i.e., descendants after G1s' deaths) starting at $2,250,000 (split $250,000 from the exempt trusts and $2,000,000 from the nonexempt trusts)(also indexed for inflation).

  In the Status Quo scenario, illustrated on page A-1, other than three outright annual exclusion gifts of $14,000 made by each spouse, the G1s are not making any other gifts and not implementing any other estate planning strategies (e.g., no GRATs or SDGTs).

  In the ATGs Approach scenario, illustrated on page A-2, the following gifts are made: (i) three outright annual exclusions made by each spouse, (ii) the balance of the gift exclusions in 2016 by each G1, (iii) the annual indexed adjustment to the gift exclusion in 2017 and each year thereafter through LE by each G1, and (iv) an additional $6.1 million taxable gift from the husband in 2017 and each year thereafter through LE to a SLAT in which wife is a discretionary beneficiary. The target amount in this scenario is set at 85% of the projected net amount passing free of estate taxes in the Status Quo scenario (i.e., column K, year 2036).

  The other assumptions used in this illustration are detailed on page A-3.

- $30 Million Estate -- Appendix B. This is an illustration of the G1s having a $30 million estate. Appendix B consist of three pages, (i) page B-1, Status Quo, (ii) page B-2, the ATGs Approach, and (iii) page B-3, the Data. G1s are residents of a state with a state estate tax equal to the old state death tax credit table and with an exemption amount equal to $2 million (not adjusted for inflation).

  The assets consist of $1 million of cash, $3 million of personal assets and $26 million of investment assets. The desired year-end cash is $1 million. The G1s cash flow for living expenses starts at $750,000 (indexed for inflation), and beneficiaries (i.e., descendants after G1s' deaths) starting at $500,000 (in Status Quo split equally between exempt and nonexempt trusts, in ATGs all from exempt trusts)(also indexed for inflation). There has been no prior use of the gift exclusion or GST exemption.

  In the Status Quo scenario, illustrated on page B-1, other than three outright annual exclusion gifts of $14,000 made by each spouse, the G1s are not making any other gifts and not implementing any other estate planning strategies (e.g., no GRATs or SDGTs).

  In the ATGs Approach scenario, illustrated on page B-2, the following gifts are made: (i) three outright annual exclusions made by each spouse, (ii) the annual indexed adjustment to the gift exclusion in 2017 and each year thereafter through LE by each G1, and (iv) an additional $250,000 taxable gift from each of the husband and wife in 2016 and $220,000 from of the husband and wife in 2017 and each year thereafter through LE, the husband's gifts to a SLAT in which wife is a discretionary beneficiary and the wife's gifts to a GST exempt IGT for descendants (i.e., not a SLAT). The target amount in this scenario is set at 100% of the projected net amount passing free of estate taxes in the Status Quo scenario (i.e., column K, year 2036).

  The other assumptions used in this illustration are detailed on page B-3.

- $10 Million Estate -- Appendix C. This is an illustration of a surviving husband (the G1) having a $10 million estate. Appendix C consist of three pages, (i) page C-1, Status Quo, (ii) page C-2, the ATGs Approach, and (iii) page C-3, the Data. The G1 is a resident of a state without a state estate tax. Suppose that a traditional by-pass trust was funded with approximately $5 million upon the wife's death in 2011.

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The assets consist of $300,000 of cash, $700,000 of personal assets and $9 million of investment assets. The desired year-end cash is $300,000. The G1's cash flow for living expenses starts at $350,000 (indexed for inflation), and beneficiaries (i.e., descendants after G1's death) starting at $250,000 (in Status Quo split equally between exempt and nonexempt, in ATGs all from exempt). No prior use of gift exclusion or GST exemption. No deceased spousal unused exclusion (DSUE) amount is available.

In the Status Quo scenario, illustrated on page C-1, other than three outright annual exclusion gifts of $14,000, G1 is not making any other gifts and not implementing any other estate planning strategies (e.g., no GRATs or SDGTs).

In the ATGs Approach scenario, illustrated on page C-2, the following gifts are made: (i) three outright annual exclusions, (ii) the annual indexed adjustment to the gift exclusion in 2017 and each year thereafter through LE, and (iii) an additional $175,000 taxable gift in 2016 and each year thereafter through LE.

The other assumptions used in this illustration are detailed on page C-3.

A. Slow Takedown

The pool of assets established outside the taxable estate, in the IGTs, is established slowly over time. In most cases, the aggregate of the ATG plus the applicable gift taxes is approximately 2% to 4% of the G1s' assets remaining subject to estate taxes.

- $250 Million Estate -- Appendix A. On page A-2, column R shows the gifts each year and column S shows the gift taxes applicable for that year's gifts. Column U shows the aggregate of the gift and gift taxes as a percentage of the Total Estate Value in column P. For the entire 20-year period of the G1s' LEs, the aggregate of the gift and gift taxes ranges from a low of 3.34% to a high of 3.99%.
- $30 Million Estate -- Appendix B. On page B-2, column R shows the gifts each year and column S shows no gift taxes are applicable in this scenario. Referring to column U, the gifts to the Total Estate Value do not exceed 3% until the last two years.
- $10 Million Estate -- Appendix C. On page C-2, column P shows the gifts each year and column Q shows no gift taxes are applicable in this scenario. Referring to column R, the gifts to the Total Estate Value only reach 4% in the 11th year. In the last year of this illustration, the remaining Total Estate Value is less than the amount the husband can pass free of estate taxes. While the husband's estate declines substantially in this illustration, he could stop the gifts once his remaining estate value is less than his remaining estate tax exemption. Additionally, the idea is that the husband is a discretionary beneficiary of the bypass trust created upon the spouse's death. Therefore, the husband can be more aggressive with the ATGs Approach knowing that other assets are available for his support.

Therefore, in each year, the gifts and gift taxes are modest to the total estate value. This is a significant advantage in allowing the G1s to maintain most of their wealth at younger ages. Gradually over the LE of the G1s, their assets will either decline in value as they age or not appreciate as much as would have occurred without the ATGs. This allows the G1s to feel more secure as their individual wealth would be slowly declining (or growing more slowly) over their LEs. A general trend with aging is that the need for income declines as age takes its toll on physical and mental abilities – but health care expenses also tend to increase with aging. Moreover, the pool of needed resources declines in correlation to reaching LE. Of course, caution is warranted given that one's LE cannot be known with certainty and medical advances tend to push one's LE outward over time.

Whether the asset pool actually declines, rather than just grows more slowly, will turn on the level of annual giving determined by the selected target amount for funding the IGTs based on the LE horizon, as well as other factors, such as investment performance. In the $250 million illustration – Appendix A, the target amount is set at 85% of the projected net amount passing free of estate taxes in the Status Quo scenario, in the $30 million illustration – Appendix B, the target amount is 100% of the projected net amount passing free of estate taxes in the Status Quo scenario.

B. Efficient Transfer Tax Costs

Using the ATGs Approach, the amount paid in gift taxes, if any, would be a small fraction of the projected estate tax costs. Being that the gift tax is tax exclusive, the wealth transfer cost is less in the gift tax setting than in the estate tax setting (see Section III.B below). Moreover, only Connecticut imposes a state gift tax and therefore transferring assets during lifetime also avoids state death taxes in all other states and the District of Columbia.

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- $250 Million Estate -- Appendix A. On page A-1, column G, in year 2036, shows the estate taxes and administration expenses to be approximately $251 million. Net of administration expenses, the net estate tax is $233 million. On page A-2, Column T shows the aggregate gift taxes paid in the ATGs Approach scenario as $48.8 million. That's about 21% of the net estate tax in the Status Quo scenario. Therefore, in this illustration transfer taxes are reduced by approximately 79%.[2]
- $30 Million Estate -- Appendix B. On page B-1, column G, in year 2036, shows the estate taxes and administration expenses to be approximately $18.8 million. Net of administration expenses, the net estate tax is approximately $17.4 million. On page B-2, Column T shows no gift taxes are paid in the ATGs Approach scenario. The ATGs Approach saves the entire $17.4 million in estate tax in the Status Quo scenario. Therefore, in this illustration transfer taxes are reduced by 100%.[3]
- $10 Million Estate -- Appendix C. On page C-2, the illustrated gifts result in reducing the husband's estate below his remaining applicable exclusion amount – i.e., no gift or estate taxes are paid!

C. Annual Adjustments

The actual amount given in each ATG could be determined annually, after reanalyzing the assets remaining in the taxable estate and in the IGTs. Actual investment performance, health of the G1s and other factors could be considered and the gift amount adjusted accordingly to reach the target goal over the then remaining LE. The G1s are not locked into any particular level of giving.

D. Spousal Benefits

In many cases, the vast majority of the ATGs could be transferred to trusts in which one of the G1 spouses is a discretionary beneficiary, along with the descendants (i.e., a so-called "spousal lifetime access trust" or "SLAT"). This allows the G1s to feel more comfortable making the gifts knowing that most of the wealth could be available to benefit the G1s directly or indirectly.

- $250 Million Estate -- Appendix A. On page A-2, column R shows the lifetime gifts. In this scenario, the G1s had already made gifts of $5 million each to GST trusts before the analysis began. The husband's earlier gifts were made to a GST exempt SLAT. The husband's remaining gift exclusion in 2016 and future indexed amounts are also given to the GST exempt SLAT. The gifts by the wife (her original $5 million gift and the gifts of her remaining gift exclusion in 2016 and the indexed amounts thereafter) were made to an irrevocable GST exempt grantor trust for descendants (i.e., not a SLAT to avoid the reciprocal trust doctrine).

  The ATGs triggering gift taxes could be from the husband or wife, or a combination of them. In this case, the assumption is that the wife has a longer LE. Therefore, the entire amount of ATGs triggering the gift taxes are made by the husband to a nonexempt SLAT (i.e., that includes the wife as a possible beneficiary). If the wife is the surviving spouse, this approach preserves the greatest direct access to the given funds.[4]

  In the ATGs Approach scenario, the aggregate of the exempt and nonexempt SLATs is approximately $315 million. The total amount in the IGTs at the end of the 20 years is approximately $351 million. The remaining $36 million represents the gifts by the wife to non-SLAT irrevocable GST exempt grantor trust for descendants. Therefore, in this illustration approximately 90% of the assets transferred to the IGTs can be in SLATs in which the wife can be a discretionary beneficiary. This provides an extraordinary degree of security against the risk of financial reversals in the G1s remaining personal assets. Therefore, while in the ATGs Approach scenario the G1s' estates are declining, the vast majority of the transferred assets remain available for support.

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[2] If the target amount is increased 100% at year 2036, the ATGs subject to gift taxes would need to be increased from $6.1 million to $7.45 million and total gift taxes paid by the year 2036 would be increased to $59.6 million. Even with this increased funding of the IGTs, transfer taxes are reduced by 74%. Setting the target amount is a client decision. The possible CLAT pour-over in year 2057 might influence the decision.

[3] In this ATGs Approach scenario, all of the G1s projected federal gift exclusions have not been used by year 2036. If the G1s increased their taxable gifts in 2017 through 2036 from $220,000 per year to $261,000 per year, they would use all of their projected gift exclusions and trigger a small gift in year 2036. At that point in time, with that level of gifts, the IGTs would have assets of $34 million and they would be at 113% of the Status Quo scenario, and the remaining taxable estates of the G1s would be reduced to approximately $14.8 million.

[4] Of course, other alternatives could be explored to hedge against the contingency that the husband is the surviving spouse.

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- $30 Million Estate -- Appendix B. On page B-2, column R shows the lifetime gifts. In this scenario, the G1s had not made any taxable gifts before the analysis began. The husband's gifts in the ATGs Approach scenario are to a GST exempt SLAT. The gifts by the wife in the ATGs Approach scenario are made to a GST exempt IGT for descendants (i.e., not a SLAT to avoid the reciprocal trust doctrine).

  The ATGs in years 2017 - 2036 are split $220,000 from each spouse for a total of $440,000 (plus, they are giving the annual indexed inflation adjustment to the gift exclusion amount). The assumption is that the wife has the longer LE. Therefore the husband's ATGs are to the SLAT. If the wife is the surviving spouse, this approach preserves direct access to the given funds by the husband.

  The aggregate of assets in the IGTs is approximately $30.2 million. Since the gifts by the husband and wife are exactly the same, these funds are split between the exempt SLAT funded by the husband and the non-SLAT irrevocable GST exempt grantor trust for descendants funded by the wife. Each trust has approximately $15.1 million and both trusts are GST exempt. Therefore, in this illustration 50% of the assets transferred to the IGTs are in a SLAT in which the wife can be a discretionary beneficiary. This provides a substantial degree of security against the risk of financial reversals in the G1s remaining personal assets.
- $10 Million Estate -- Appendix C. On page C-2, the gifts under the ATGs Approach would typically be made to a GST exempt grantor trust in which the husband is not a beneficiary. In this example, the husband has access as a beneficiary to the bypass trust created upon the wife's death. Options may exist if the husband felt that it would also be prudent to be a possible beneficiary of the assets given if financial reversals occurred with his other assets.[5]

E. Family Control of Wealth

Other than the amount paid in gift taxes, the family maintains control over all of the family wealth -- i.e., in the IGTs, the CLAT, and the family foundation.

- $250 Million Estate -- Appendix A. In the ATGs Approach depicted on page A-2, the family only loses control over the $48.8 million paid in gift taxes at LE to reach 85% of the target amount. The family keeps control of all remaining assets over expenses.
- $30 Million Estate -- Appendix B. In the ATGs Approach depicted on page B-2, the family keeps control of all remaining assets over expenses. In this scenario, transfer taxes are reduced to zero!
- $10 Million Estate -- Appendix C. Ditto – in the ATGs Approach depicted on page C-2, the family keeps control of all remaining assets over expenses. In this scenario, transfer taxes are reduced to zero!

F. Clients Will Not Pay Gift Taxes – False!

An often repeated sentiment is the clients are unwilling to pay gift taxes. The data, however, show that this sentiment is false! The history of federal gift tax payments, demonstrates that clients are willing to pay gift taxes ***if given sufficient reason***. Using information from the Internal Revenue Service (IRS), the chart below reflects gift taxes paid for years 2008 – 2014. In years 2010 and 2012, gifts spiked, resulting in greater gift tax payments in 2011 and 2013, respectively, because the thought was that the federal transfer taxes might increase in the following years and the donors wanted to take advantage of the relative lower existing gift tax rates in 2010 and 2012.

[5] *See e.g.*, PLR 200944002 (July 15, 2009) (approved DAPT based on Alaskan law).

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(a)	(b)	(c)	(d)*	(e)	(f)	(g)**	(h)
Gift Tax Returns Filed in Year	Number of Returns Filed	Gross Gifts Reported (in Billions)	Amounts of Gift Tax Paid (in Billions) for Year in Column (a)	Gift Tax Returns Year for Year in Column (a) Mostly Related to Gifts in Year	Applicable Rate for Gifts in Year in Column (e)	Estate Tax Paid (in Billions) for Returns filed for Year in Column (a)	Ratio of (d) to (g)
2004	224,987	34.6	1.2	2003	49%	21.6	6%
2005	261,370	36.7	1.6	2004	48%	21.6	7%
2006	261,104	38.5	1.7	2005	47%	24.7	7%
2007	243,686	39.7	2.1	2006	46%	22.5	9%
2008	257,485	45.2	2.9	2007	45%	24.8	12%
2009	234,714	40.2	2.7	2008	45%	20.6	13%
2010	223,093	37.9	2.5	2009	45%	13.2	19%
2011	219,544	50.9	**6.2**	2010	35%	3	**207%**
2012	258,393	**134.8**	1.8	2011	40%	8.5	21%
2013	**369,063**	**421.3**	**4.7**	2012	40%	12.7	**37%**
2014	264,968	**110.4**	1.7	2013	40%	16.4	10%

*The data in Column (d) is from the gift tax return statistical data by year of filing (not year of actual gift) compiled by the IRS.

**The data in Column (g) is from the estate tax return statistical data by year of filing (not year of death) compiled by the IRS.

In 2010, when the gift tax rate was 35% and many believed the gift and estate tax rates may return to as much as 55% in 2011, many wealthy taxpayers made large taxable gifts. The 2010 gifts are reported on returns actually filed in 2011. In 2011, there were 219,544 gift tax returns filed reporting gifts of approximately $51 billion. Gross gifts were up by 25% and gift taxes paid by 2.6 times the average of the prior five years. This was the only year since the re-enactment of the gift tax in 1932 that the gift tax raised more than the estate tax.[6]

In 2012, again the estate tax world was on the precipice of dramatic changes. The fear then was both the loss of the large $5 million exclusion amount and a significant rise in rates. Based on the gift tax returns filed in 2013, a dramatic spike occurred in the number of returns filed and gross gifts made in 2012. The data shows that many families made large gifts in 2012 using some portion of the $5 million gift exclusion. But the statistics also show that gift taxes paid in 2013 (i.e., primarily relating to 2012 gifts) shot up to $4.7 billion.

Years 2010 and 2012 prove that, with sufficient justification, taxpayers are willing to implement taxable gifts, including taxable gifts that require the payment of gift taxes![7] This impugns the repeated sentiment – "clients are unwilling to pay gift taxes." It is simply false. Perhaps the real story is that clients are not willing to pay gift taxes unless presented with a compelling reason to do so and likely only when presented by advisors who believe doing so will produce far better results with manageable downside risks.

The elegantly efficient ATGs Approach ***is*** sufficient reason to pay gift taxes!

G. IGTs are Grantor Trusts

In addition to the benefits of the tax exclusive gift tax, the IGTs would be structured as "grantor" trusts for federal income tax purposes, which mean that all items of income, deduction and credit of the IGTs are taxed to the G1s.[8] As grantor trusts for income tax purposes, the tax laws require the G1s to pay the income taxes on the IGTs income, which allows the IGTs to grow in value free from income taxation. This turbo charges the power of compounding in the IGTs!

In the illustrations, the G1s, the trusts, and the beneficiary's tax rates are assumed to be identical (i.e., flat federal rates of 25% for ordinary income and 24% for capital gains, and state rates of 5% for all income).[9]

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[6] Joulfaian, The Federal Gift Tax: History, Law, and Economics, Table 6 (Nov. 2007) (hereinafter "Joulfaian"). This paper has a wealth of information regarding the gift tax.

[7] Similarly, in 1977, which reflects gifts in 1976, approximately $2 billion was paid in gift tax, which collections amounted to about five times receipts 1976. The increase was attributed to the expectation of higher gift tax rates in 1977 brought about by Tax Reform Act of 1976. There were other years that rate differentials prompted greater gifts than the prevailing trends. Joulfaian, *supra* note 6.

[8] IRC § 671, *et seq*.

[9] Because some of the taxable income that would be passed out to the beneficiaries may be taxed at lower rates and some that is taxed to the trust may be at higher rates by comparison to the G1s, using the same rate is roughly equivalent. A flat rate is used for ordinary income

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- $250 Million Estate – Appendix A. The ATGs Approach, on page A-2, illustrates that in the 20th year, the GST exempt and non-GST exempt trusts have assets of approximately $351.2 million. If the IGTs were non-grantor trusts, or if the G1s were reimbursed for income taxes, the assets accumulated in the IGTs would be approximately $284.7 million. Thus, the net benefit of having grantor trusts in this scenario is roughly $66.5 million (over the 20-year LE).
- $30 Million Estate – Appendix B. The ATGs Approach, on page B-2, illustrates that in the 20th year, the GST exempt trusts have assets of approximately $30.2 million. In this case, the G1s only funded GST exempt trusts. If the IGTs were non-grantor trusts, or if the G1s were reimbursed for income taxes, the assets accumulated in the IGTs would be approximately $25.4 million. Thus, the net benefit of having grantor trusts in this scenario is roughly $4.8 million (over the 20-year LE).
- $10 Million Estate – Appendix C. The ATGs Approach, on page C-2, illustrates that in the 17th year, the GST exempt trusts have assets of approximately $10.804 million. In this case, the G1 only funded GST exempt trusts. If the IGTs were non-grantor trusts, or if the G1 was reimbursed for income taxes, the assets accumulated in the IGTs would be approximately $10.765 million. Thus, the net benefit of having grantor trusts in this scenario is roughly $40,000 (over the 17-year LE).

Even with the smallest estates, where there is minimal giving, there is a net-after-all-taxes benefit of using grantor trusts. Inherently, estate planners understand that grantor trust status is beneficial, but the dramatic nature of the benefit can be seen in a quantitative analysis that considers both income and estate and gift taxes. Moreover, by having the G1s pay the income taxes, there is not only an estate and gift tax benefit, when the IGTs are GST exempt, the benefit is leveraged for successive generations to come.

There is a risk that the effect of having grantor status will be "too successful" by depleting the G1s' assets below the desired level.[10] However, the ability to annually adjust the gifts to the IGTs as explained in Section II.C, and to use SLATs as explained in Section II.D, both mitigate against such concern. Additionally, adding a clause to the trust allowing the trustee may make distributions to the grantor for taxes attributable to the grantor trust could also ameliorate the situation.

There are other benefits to structuring IGTs as grantor trusts (i.e., other than the benefit of allowing the IGTs to grow income tax free):

> (1) The IGTs could purchase assets from the G1s without the purchase being treated as a sale for income tax purposes (i.e., the so-called sale to a defective grantor trust).[11] The G1s could also reacquire appreciated trust assets in exchange for higher basis assets, and do this income and transfer tax-free. The ability to reacquire assets and substitute assets without triggering gain has many benefits. If G1 dies with the appreciated asset as part of his/her estate, the income tax basis of the asset will be increased to fair market value upon the G1's death, and the potential capital gain is avoided;
>
> (2) the interest paid on a loan between a G1 and the IGT is ignored for income tax purposes;[12]
>
> (3) the IGT would be automatically qualified to own stock in an S Corporation;[13] and
>
> (4) as a grantor trust, the IGT can use the G1's social security number for tax reporting purposes, and no separate income tax return is needed for the irrevocable grantor trust.[14]
>
> For more on grantor trust status, see Section III.F below.

H. No Estate Taxes

In larger estates, the idea of the ATGs Approach, in full form, involves devising the remaining taxable estate to a zeroed-out CLAT and obtaining a 100% estate tax charitable deduction.[15] Completely eliminating the need to pay federal and state estate

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because if taxable bonds were used, that the rate would be higher, however, there would generally be a mix of tax-free bonds and taxable bonds. Further, depending on the particular taxpayer, the alternative minimum tax may be applicable, which complicates the income tax issues further. To avoid all of these complications, because the purpose of this analysis was to develop a tool that would provide a 'directional' result, using the same rates seems a reasonable approach.

[10] *See*, Hesch, *The Financial Danger of Maximizing Taxable Gifts in 2012*, LISI Estate Planning Newsletter #2035 (December 5, 2012).

[11] Rev. Rul. 85-13, 1985-1 C.B. 184.

[12] The interest payments are not included in the lender's income and are not deductible by the borrower. Notwithstanding this income tax non-recognition of interest, interest should be paid on any promissory notes to avoid gift tax implications.

[13] G1 would report on his/her income tax return any tax attributes of the S stock owned by the IGT.

[14] Treasury Regulations § 1.671-4(b). Reference to Treasury Regulations shall be to "Treas. Regs."

[15] *See infra* note 19. Inter vivos CLATs may add benefits.

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taxes is good reason to ease the G1s' concerns with paying gift taxes. The $250 Million Estate, Appendix A, and $30 Million Estate, Appendix B, illustrate this approach.[16]

In smaller estates, the ATGs Approach can be used without the CLAT component. In these estates, the annual gifts can be implemented using the applicable exclusion amount, without actually triggering gift taxes. Frequently, the balance of the estate remaining can be reduced below the remaining applicable exclusion amount upon death. In effect, removing future appreciation from the estate on the annual gifts to the IGTs and the effect of grantor trust status eliminates all gift and estate tax implications. Appendix C - $10 Million Estate illustrates this approach.

Among other advantages of this approach is that clients need not select their domicile based on state estate taxes. By using the ATGs Approach the taxpayer(s) can avoid all estate taxes including state estate taxes!

I. Section 2035 and the 3-Year Rule

The ATGs Approach involves making taxable gifts every year through the G1's LE. Based upon this, it is likely that the G1 made a gift within three years of death, and if a gift tax is paid with respect to such gifts, section 2035(b)[17] would cause inclusion of such gift taxes in the G1's gross estate. Thus, even if the G1 leaves the balance of his or her estate to charity, the G1's estate owes estate taxes because of section 2035(b) inclusion. This creates an interrelated estate tax calculation, because the set aside to pay the estate tax causes an estate tax to be paid on the tax itself.

- $250 Million Estate -- Appendix A. In Appendix A, where 100% of the remaining estate in the ATGs Approach scenario depicted on page A-2 is given to the zeroed-out CLAT, an estate tax liability is applicable pursuant to section 2035(b) for gift taxes paid with respect to gifts made within three years of G1s' deaths. The amount of gift taxes added to the estate value is $7.32 million. Because of the inter-related computation, the tentative taxable estate becomes $12.2 million and the estate tax liability is $4.88 million ($12.2 million x 40% = $4.88 million).
- $30 Million Estate -- Appendix B. In the ATGs Approach depicted on page B-2, the ATGs are sufficient to reach 100% of the target amount without ever triggering an actual gift tax liability. Therefore, there is nothing to include under section 2035(b)! The entire remaining estate, less illustrated estate settlement expenses passes to the CLAT.
- $10 Million Estate -- Appendix C. In the ATGs Approach depicted on page C-2, the ATGs are sufficient to reach 100% of the target amount without ever triggering an actual gift tax liability. Therefore, there is nothing to include under section 2035(b)!

As an alternative, which should allow a 100% estate tax charitable deduction in all situations, including those like that illustrated in Appendix A, consider using a "estate tax net gift" agreement that would require the IGTs to pay any estate tax caused by a section 2035(b) inclusion. The idea would be that the G1 pay any gift taxes, but any estate tax that is triggered on any of the gift taxes paid would be paid by the IGTs. Appendix D is a sample of such an estate tax net gift agreement.[18]

For more on section 2035(b) and the 3-year rule, see Section III.D below. Also consider that some of the states that impose an estate tax also have a similar pull-back rule (NY for example).

J. CLAT

A common plan among wealthy individuals is to leave the remaining estate to charity, usually a pre-established private family foundation. This "remainder to foundation" plan is particularly employed when the G1s have made lifetime transfers thought to be sufficient to provide for their family. This is, in effect, the Warren Buffett plan as reported in the press and that of many other wealthy families.

While these remainder-to-foundation plans mitigate estate taxes, they may not eliminate all concerns or tax issues for the family, the family company, or the family foundation. There is a better approach for the remainder-to-foundation plan or any large testamentary gift to charity. Rather than leaving the remainder of the estate directly to the family foundation, co-authors Richard Franklin and Jennifer Birchfield, in their article *The Intermediary CLAT Alternative to the Residuary Estate Family Foundation Gift,*[19] (copy attached as Appendix F) suggest using an intermediary charitable lead annuity trust, which will pay the estate remainder to the family foundation over a number of years, yet have the same federal estate tax benefit as a direct

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[16] *See* Section II.I. below for a discussion of the impact of Internal Revenue Code § 2035(b) on gift taxes paid on gifts made within three years of death. All references to sections of the Internal Revenue Code are to the Internal Revenue Code of 1986, as amended (hereinafter "IRC" or "IRC §", as the case may be).

[17] References to "section" or "sections" are to the Internal Revenue Code of 1986, as amended.

[18] For a general discussion of net gifts, *see* Zaritsky, TAX PLANNING FOR FAMILY WEALTH TRANSFERS DURING LIFE: ANALYSIS WITH FORMS, ¶ 8.03[3] (Thomson Reuters, 2013)(a sample net gift agreement is provided therein as Form 8-1).

[19] Vol. 39, No. 3, ACTEC Law Journal, 355 (winter 2013 [actually published Jan. '15])(hereinafter "Intermediary CLAT").

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bequest. Rather than flooding the foundation with a large bequest that may overwhelm its existing operation, staging the large charitable bequest over a period of years allows the family foundation time to grow its operation to match its larger endowment. The authors illustrate through Monte Carlo simulations that this approach also enables the family foundation's endowment to be larger at the end of the CLAT term than the endowment would be with a direct bequest.

For the individual's family, the Intermediary CLAT allows for the possibility of a reinfusion of wealth to counteract the succeeding generation's wealth depletion to estate taxes or their own large charitable bequests. The possibility of this reinfusion may soften the blow for the wealthy individual's children who are being skipped as direct beneficiaries of this charitable gift from the parent's estate, and do so at no estate tax costs. The transfer to a CLAT also provides a framework in which the children could purchase private company interests or other illiquid assets from the parent's estate without running afoul of the self-dealing rules and perhaps provide a little more privacy.

The CLAT would receive G1s' remaining assets and pay an annuity to the family foundation over a period of time, say 20 years, as used in the illustration. The annuity payment is determined as a fixed percentage of the fair market value of the property transferred into the CLAT on the survivor G1's death. The annuity payments would be designed to have an aggregate present value (based on the section 7520 rate) equal to the fair market value of the remaining G1s' estates. A charitable estate tax deduction is available for the aggregate present value of the annuity payments. After the annuity payments end, upon conclusion of the 20-year term, the CLAT remainder passes to the G2s or for their benefit. The remainder interest held by G2s would have a zero value upon G1s' deaths and therefore cause no transfer tax (i.e., no gift, estate or GST tax). This allows for a reinfusion of wealth to the family in 20 years or so at no transfer tax costs. Moreover, the G2s could control and administer the CLAT and could take a reasonable trustee's fee for doing so.

- $250 Million Estate -- Appendix A. In the ATGs Approach depicted on page A-2, the CLAT receives the balance of the taxable estate of approximately $200 million, net of expenses of approximately $12 million. The CLAT will pay the family's foundation an annuity of roughly $12.7 million for 20 years. During this period of time the family keeps control of the CLAT and the growing family foundation. During these 20 years, the family can build the foundation's operations to match the building endowment.
- $30 Million Estate -- Appendix B. In the ATGs Approach depicted on page B-2, the CLAT receives the balance of the taxable estate of approximately $18 million, net of expenses of approximately $600,000. The CLAT will pay the family's foundation an annuity of roughly $1.1 million for 20 years. During this period of time the family keeps control of the CLAT and the growing family foundation.
- $10 Million Estate -- Appendix C. In this scenario, the CLAT and foundation are not needed to eliminate estate taxes. This scenario illustrates that in smaller estates the ATGs Approach uses the benefit of grantor trust status and removal of post-gift future appreciation from the taxable estate to eliminate all transfer taxes without using the CLAT.

K. Funding Family Foundation

The ATGs Approach funds the family foundation with a large portion of the value that otherwise would have been paid to the federal and state governments in estate taxes. The use of the CLAT allows the foundation's endowment to be larger at the end of the CLAT term than it would be without using CLAT,[20] while allowing for a possible reinfusion of wealth to the family upon the expiration of the 20-year term.

- $250 Million Estate -- Appendix A. In the ATGs Approach depicted on page A-2, the family's foundation receives approximately $254 million in total annuity payments and at year 2056, when the CLAT ends, the foundation's endowment is approximately $290 million. Amazingly, this funding of the foundation is done while providing more assets to the family! In the year 2057, after the CLAT remainder pours over to the IGTs, the IGTs have 102.80% (see column Y, in year 2057) of the IGTs in the Status Quo scenario.
- $30 Million Estate -- Appendix B. In the ATGs Approach depicted on page B-2, the family's foundation receives roughly $22 million in total annuity payments and at year 2056, when the CLAT ends, the foundation's endowment is a bit more than $25 million. Amazingly, this funding of the foundation is done while providing substantially more assets to the family! In year 2057, the IGTs have 123.39% (see column Y, in year 2057) of the IGTs in the Status Quo scenario.
- $10 Million Estate -- Appendix C. In this scenario, the CLAT and foundation are not used.

[20] *See* Intermediary CLAT, *supra* note 19, at 372.

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L. GST

1. Benefit of Early Use

By using the gift exclusions and GST exemptions first and the increases to the gift exclusions and GST exemptions though indexing over time, the GST trusts are maximized.

- $250 Million Estate -- Appendix A. In the ATGs Approach depicted on page A-2, in year 2036 at the G1s' LE, the GST trusts have approximately $72 million (column V, year 2036) compared to approximately $65 million in the Status Quo scenario (column I, year 2036).
- $30 Million Estate -- Appendix B. In the ATGs Approach depicted on page B-2, in year 2036 at the G1s' LE, the GST trusts have approximately $30.2 million (column V, year 2036) compared to approximately $14.4 million in the Status Quo scenario (column I, year 2036). Amazingly, in the ATGs Approach scenario, the entire amount transferred in the IGTs is exempt from the GST tax. This is a dramatic advantage compared to the Status Quo scenario where less than half of the IGTs are GST exempt.
- $10 Million Estate -- Appendix C. In the ATGs Approach depicted on page C-2, in the year 2033 at the G1's LE, the GST trust has approximately $10.8 million (column W, year 2033) compared to approximately $6.9 million in the Status Quo scenario (column H, year 2033). Amazingly, as in the $30 Million Estate example, in this $10 Million Estate example, the ATGs Approach scenario, the entire amount transferred in the IGT is exempt from the GST tax. This is a dramatic advantage compared to the Status Quo scenario where about 26% of the IGTs are GST nonexempt.

2. Planning: Sale of CLAT Remainder to Increase GST Benefit

The ATGs Approach also allows some of what would be nonexempt assets for GST tax purposes to be represented in the value of the CLAT remainder, which early in the CLAT term could be sold by the G2 to a trust for the next generation (i.e., the G3 and G4). In effect, this may allow a push down of value to lower generations at a minimal transfer tax cost.[21]

M. Diversification

By investing in a diversified portfolio inside the IGTs, the funds moved out of the taxable estate are better protected from declines in value, which is advisable given that gift exclusion will be used and in some cases gift taxes have been paid to fund the IGTs. Preventing a decline in the IGTs' value may be the most significant risk associated with the ATGs Approach, more than that associated with a possible repeal of the estate tax. A component of such a prudent investment strategy would involve adjusting (generally through sales and/or exchanges) a portion of the investments periodically to prevent concentrations from occurring. This, in turn, causes capital gains or losses to be recognized, thereby keeping the basis of the IGTs' assets higher. Since the IGTs are grantor trusts, as explained above, the G1s pay the income taxes associated with the sales. Keeping the income tax basis higher in the IGTs mitigates concerns with the assets of the IGTs not being entitled to an automatic basis adjustment upon the G1s' deaths. Of course, the G1s swapping assets with the IGTs should also be considered as a means to achieve a higher basis in the IGTs' assets.

N. Risk with LE

The ATGs Approach is designed to reach the target goal upon G1s' LE. The family could hedge against the risk that the expected LE horizon may not be realized by having the IGTs invest a portion of their assets in life insurance on the G1s. Alternatively, or in combination with the life insurance strategy, the amount of the remaining G1s' estates (i.e., in the ATGs Approach) that passes to the CLAT could be on a sliding scale: as the value of the IGTs increase over the years the portion of the remaining G1s' estates passing to the CLAT increases. The CLAT could receive 100% of the G1s' remaining estates when the G1s reach LE or, if earlier, when the IGTs have amassed a value at least equal to the target amount.

O. Possible Repeal of Estate Taxes

1. The Impact of ATGs Approach

As we have seen, using the ATGs Approach to transfer the G1s' estates to the IGTs carries a low transfer tax cost – e.g., in most cases 20% or less in relation to the Status Quo scenarios. Since the ATGs Approach contemplates that the gifts would occur over the G1s' LE at a relatively modest pace, if the possibility of repeal becomes a reality the amounts actually paid in gift taxes would be proportionally modest and at the time of repeal the G1s could consider merits of alternative approaches.

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[21] *See* Intermediary CLAT, *supra* note 19, at 370. *Cf.* Austin Bramwell and Sean Weissbart, *The Dueling Transferors Problem in Generation-Skipping Transfers*, Taxation, 41 ACTEC L. JR. 95 (Spring 2015).

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The gift taxes paid could be lower than any state death tax that would be applicable if the G1s live in one of the 20 states that have a separate estate tax.

- $250 Million Estate -- Appendix A. In the ATGs Approach depicted on page A-2, $48.8 million is paid in gift taxes at LE to reach 85% of the target amount. Suppose that in year 2037, the 21st year of the ATG's Approach, the federal estate tax is repealed. At the end of 2036, the IGTs funded with the ATGs have a total of $351 million. If the G1s live in a state with a state death tax using the credit table under old section 2011, the state estate tax on this $351 million, which would still be part of the G1s taxable estate if the ATGs Approach had not been used, would be approximately $56 million. This is more than the gift taxes paid! Therefore, in this example, the ATGs Approach is beneficial by reducing the applicable transfer taxes if the G1s live in a state or jurisdiction with a separate estate tax.

  Carrying this analysis a bit further, suppose the remaining estate in the ATGs Approach scenario is not given to the CLAT (i.e., the family changes their mind on the CLAT after the estate tax repeal) and the remaining estate is given to the IGTs upon death. Assume this remaining estate of approximately $220 million is reduced by 3% settlement expense to roughly $213 million and then by 16% state death tax to roughly $179 million. The amount after tax total, including the IGTs funded during lifetime for the family would be approximately $530 million. In the Status Quo, assume the remaining estate of approximately $605 million is also reduced by 3% settlement expense to roughly $587 million and then by 16% state death tax to roughly $493 million. Therefore, the ATGs Approach still saves approximately $37 million!

- $30 Million Estate -- Appendix B. In the ATG's Approach depicted on page B-2, no gift taxes are ever paid to reach 100% of the target amount. Suppose again that in year 2037, the 21st year of the ATG's Approach, the federal estate tax is repealed. At the end of 2036, the IGTs have a total of approximately $30.2 million. If the G1s live in a state with a state death tax using the credit table under old section 2011, the state estate tax on this $30.2 million, which would still be part of the G1s taxable estate if the ATGs Approach had not been used, would be approximately $4.3 million. Therefore, in this example too, the ATGs Approach is beneficial by substantially reducing the transfer taxes that would be applicable if the G1s live in a state or jurisdiction with a separate estate tax.

- $10 Million Estate -- Appendix C. In the ATG's Approach depicted on page C-2, no gift or estate taxes are ever paid. Suppose that in year 2033, the 17th year of the ATG's Approach, the federal estate tax is repealed and the husband dies immediately after repeal. At the end of 2036, the IGT has approximately $10.80 million (net of settlement expenses). In the Status Quo, the remaining taxable estate is roughly $11.2 million, before any estate settlement expenses. If settlement expenses are consistently at 3% of the remaining estate, the net would be roughly $10.86 million. Therefore, even in this example too, the risk of pursuing the ATGs Approach is modest notwithstanding the possibility of repeal.

2. Repeal is Alluring but Ephemeral

More critically, however, if the federal estate tax were repealed, wealthy families would likely fear it returning if the political tides shifted again. For example, it is apparent that Senator Sanders hit a nerve. Moreover, the estate tax has been around since 1916 – 100 years! If repeal of the estate tax is enacted, many planners advice would be to immediately move assets to irrevocable trusts to protect against the possibility of it returning. Imagine counting on the repeal to hold, not implementing estate tax planning strategies in reliance on the repeal holding, and then when it's too late for estate tax planning to mitigate the estate tax result, Congress re-enacts the estate tax shortly before death. Repeal is alluring, but too ephemeral to warrant serious reliance.

3. Continuing Planning

Given this landscape, and at the risk of sounding self-serving, our suggestion is that thoughtfully planning to mitigate the effect of estate taxes is the most assured and responsible way to accomplish this goal. For these reasons, the possibility of repeal seems an insufficient reason to not adopt the ATGs Approach.

P. Statute of Limitations

With the ATGs Approach, each year a statute of limitations would expire. The first statute of limitations would expire three years from the due date for of the gift tax return reporting the first ATG. Thereafter, a statute of limitations would expire each

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year (i.e., each year the statute of limitations would expire as to gifts occurring approximately 4 years earlier). Over time, this would minimize the potential for fusses with the IRS. There would be no looming fight in the estate settlement context.

Q. Reduced Audit Potential

Since the entire estate upon the surviving G1's death passes to the CLAT and qualifies for the unlimited estate tax charitable deduction, the IRS has little incentive to audit or fuss upon the G1s' deaths. There would also be a 100% state estate tax charitable deduction. As a result, state domicile disputes may also be less likely if no state can increase its estate tax. For estate tax purposes, this also makes the G1s' state of domicile immaterial (i.e., the G1s do not need to live in Florida (or other states with no estate tax) to avoid the state estate taxes). However, state income taxes during the G1s' lifetimes are still relevant.

The idea is also that the ATGs Approach would typically be implemented with making gifts of cash or high basis securities. Therefore, the IRS will likewise have little reason to audit, or if there is an audit they would have little to argue about on audit. As explained below in Section II.R, the ATGs Approach is low tech and that's part of its charm.

R. Limit Use of Risky and Complicated Planning Strategies

It seems entirely possible to just use the ATGs Approach to efficiently transfer the family wealth, without using many of the other complicated estate tax saving strategies. This saves time and expense, as well as mitigates concerns over audit risks that exist with many of the discount planning techniques.[22]

Also, the ATGs Approach will be unaffected by the proposed section 2704 regulations released on August 2, 2016.[23] Moreover, this approach is unaffected by any impending guidance on promissory notes or formula clauses (i.e., as announced in the latest priority guidance plan).

The ATGs Approach is therefore wonderfully "low tech". Clients will appreciate this aspect and the flexibility to annually adjust the gifts.

With the super wealthy, the amounts paid in gift taxes using the ATGs Approach are relatively small compared to the Status Quo, but in terms of total dollars the numbers may still be large. For these families continuing to implement discounting strategies to lower the gift tax costs may still make sense. Moreover, for the super wealthy the risk associated with a shorter than expected LE horizon may point towards combining the ATGs Approach with the traditional planning strategies.

The CLAT part of the planning, however, is complicated. Preparing the CLAT arrangement in the G1s' Wills and revocable trusts requires careful study. Structuring the term, payout to the family foundation, and purchase options[24] intended to apply for purchases under the estate administration exception to the self-dealing rules will all need attention, as well as numerous other issues.

S. Notoriety

In the recent case, *Estate of Davidson v. Comm.*,[25] William M. Davidson, most recently noted for having been the owner of the National Basketball Association's Detroit Pistons and less noted for being the President, Chairman and CEO of Guardian Industries, Corp. (a leading manufacturer of automotive, glass and building products), entered into a number of sophisticated estate tax transactions, including discounting gifting, sales transactions and a self-cancelling installment note (SCIN), which was the basis of a huge estate tax assessment (i.e., $2.6 billion), which, as reported is the largest assessment against an individual in the history of the income and transfer taxes. This, of course, brought great attention to the Davidson family.

After settling with the IRS (for roughly 5% of the initial assessment or $152 million), the Davidson estate (and heirs) brought a malpractice lawsuit against Deloitte Tax, LLP, for $500 million in damages, which included allegations of overpayment of taxes, fees and penalties relating to the sale transaction.[26] The plaintiff's (family) allegations against the defendant (Deloitte Tax LLP), appear to be based on the IRS' pleadings in its case against the estate, and included the following two items in paragraph #74:

- ***"Mr. Davidson did not want to take any unnecessary risk in his estate planning."*** (no emphasis added, the original sentence was in bold and italicized).

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[22] See e.g., Narron, *Non-Charitable Inter Vivos Gifts–A Plan for Tax Relief*, 34 Heckerling Inst. ¶ 1500 (2000)("[A] program of gifting, started early, is almost surely the easiest, simplest and most effective part of the design for an estate plan.").
[23] 81 Fed. Reg. 51413-51425 (Aug. 4, 2016).
[24] *See* Intermediary CLAT, *supra* note 19, at 361.
[25] Tax Court Docket, No. 13748-12, in a stipulated decision entered July 6, 2015. It is the authors' understanding that this case has been settled with the IRS as of the time of the writing of this paper.
[26] *Aaron v. Deloitte Tax LLP*, N.Y. Sup. Ct. No. 653203/2015 (filed September 24, 2015).

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- "In particular, Mr. Davidson did not want his Estate to become a significant tax case or otherwise attract unnecessary IRS attention."[27]

Regardless of whether the allegations in these pleadings are accurate, the case demonstrates that many clients eschew notoriety and wish to maintain a low profile. The beauty of using the ATGs Approach is that it's low tech – i.e., it uses tried and true estate planning strategies (e.g., giving of cash to IGTs) and using a testamentary CLAT (in larger estate situations). Most estate planners would agree that these strategies are not nearly as risky as many of those pursued by Mr. Davidson. Thus, the ATGs Approach is elegantly efficient in its transfer tax benefits and equally elegant in its low tech modesty, which is unlikely to become the subject of case law.

T. Portability

If a G1 spouse dies with any unused applicable exclusion amount, rather than funding a traditional bypass trust, which would not be a grantor trust for income tax purposes, it may be better in the context of the ATGs Approach to rely on portability. This will allow the surviving spouse to use the DSUE amount inherited from the deceased spouse to continue making gifts to an IGT.[28] For wealth transfer tax purposes having grantor trust status for these gifts should achieve a better overall tax result. Alternatively, the G1s could implement lifetime QTIP trusts that will enable the use of any remaining applicable exclusion amount of the spouse who dies first in a bypass like trust that will be a grantor trust as to the G1 surviving spouse.[29]

U. DPOA

To allow the ATGs Approach to continue in the event of the G1's incapacity, ensure that the G1s' durable powers of attorney allow the agent to continue using the ATGs Approach to fund the IGTs. This means that expansive authority to make gifts should be granted -- i.e., to make taxable gifts that generate gift tax liability. Therefore, this is going a step beyond the simple authority to make annual exclusion gifts and even beyond the authority to use the applicable exclusion amount. Also authorize the agent to file gift tax returns, consent to split-gifts with a spouse, and pay the applicable gift taxes (and interest and penalties). Moreover, it may be helpful to authorize the agent to create IGTs into which the annual taxable gifts could be made.

V. Purchases under Estate Administration Exception

1. Private Company Interests and Business Succession

Suppose the family has a large concentration of wealth in one or more private companies. For example, it is not uncommon for a family to own an operating company. The succession of such companies is especially challenging if one or more of the G2s, but not all of the G2s, are involved, or wish to be involved, in the ownership or operation of the company. The ATGs Approach works well in these situations. The idea is to force enough money out of the companies to make the gifts in the ATGs Approach and to perhaps retain the business interests until death. This approach could have the following positive effects:

- The ATGs Approach will build up a large pool of wealth outside the companies and therefore diversify the family's holdings, which is good for several reasons.
  - Typically, one or more of the G2s do not wish to continue in the business operations. Continuing to have non-employed family members involved in the ownership of the family companies, more often than not, leads to eventual disputes between those involved with operations and those who are mere owners of equity interests. Frequently disputes arise over the amount of compensation paid to family members employed in the businesses and over distributions to the non-employed owners.
  - Having a diversified pool of assets in the IGTs will allow options. For example, suppose the IGTs are split into separate trusts for each of the G2s at the death of the G1s. The G2s not wishing to be involved in the businesses will have a separate diversified trust share.
  - The G2s wishing to stay involved in the businesses can purchase the business interests from the G1s' estates before the interests pass to the CLAT. The idea being that only those G2s wishing to be involved in the businesses would own the equity thereafter. The purchasing G2s could use the estate administration exception to the self-dealing rules to accomplish the purchases and use promissory notes to pay for the interests.[30] These G2s could use income from their separate trust shares of the IGTs to help pay the interest

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[27] Note, this allegation was also reiterated in pleading #306.

[28] *See,* Franklin & Law, *Portability's Role in the Evolution Away from Traditional By-Pass Trusts to Grantor Trusts*, Vol. 37, No. 2 of BNA/Tax Management's Estates, Gifts and Trusts Journal (March/April 2012).

[29] *See*, Franklin, *Lifetime QTIPs: Why They Should Be Ubiquitous in Estate Planning?*, 50 U. Miami Heckerling Institute on Estate Planning, ¶ 1601.5 (2016 University of Miami).

[30] *See,* Intermediary CLAT, *supra* note 19, at 360.

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costs on the promissory notes. Alternatively, their separate trust shares of the IGTs could directly purchase a portion or all of the business interests from the G1s' estates. In either case, the pool created within the IGTs help both provide non-business assets to the G2s not wishing to own the business interests and a means of financing the continued ownership of the business interests by those G2s that wish to stay involved. Importantly, this plan also eliminates estate taxes, so that those liquidity concerns are avoided.

    - After the CLAT term is over (e.g., roughly 20 years post-G1s death), the CLAT would terminate and distribute its remainder to the G2s. Those G2s that purchased assets from the estates can receive all or a portion of their notes back, thereby resulting in merger (i.e., the G2 becomes both the borrower and lender) and termination of the note. To the extent that one G2's note passes to a sibling, the borrower G2 could then perhaps borrow funds from his or her IGT share to pay his or her sibling.

- This plan also allows the company interests to obtain a basis increase upon the G1s' deaths.
- If the G1s were bullish on the value of the equity in the private company increasing in value, the G1s might consider selling a portion of the equity to the IGTs for a promissory note – i.e., the so-called sale to an irrevocable defective grantor trust. The sale allows the appreciation (i.e., to the extent the appreciation exceeds the interest payments on the promissory note) to be moved out of the G1's estate without transfer taxes. Perhaps prior to the G1s' deaths, these sold equity interests could be swapped for other higher basis assets or the notes repaid in-kind with such equity interests. Assuming the proposed 2704 regulations become final in there present form, sales could be used to move future appreciation out of the estate.

2. Art

Frequently, the G1s' fine art is retained until death because the G1s' can't bear the thought of parting with it during lifetime. In the context of the ATGs Approach, the art could simply be part of the estate residue that is to be transferred to the CLAT. The Will or revocable trust could grant the children the option to purchase the art from the G1s' estates before it passes to the CLAT. The idea being that only those G2s wishing to own the art would buy it and only those objects desired. The purchasing G2s could use the estate administration exception to the self-dealing rules to accomplish the purchases and use promissory notes to pay for the interests.[31] These G2s could use income from their separate trust shares of the IGTs to help pay the interest costs on the promissory notes. Alternatively, their separate trust shares of the IGTs could directly purchase desired art from the G1s' estates. In either case, the pool created within the IGTs help provide a means of financing the art purchases. Importantly, this plan also eliminates estate taxes and provides the purchasing G2 with a full basis in the objects acquired.

W. Prince Charles Effect

More frequently now the G1s are living to near 100 years old. The average life expectancy in the U.S. is 81.2 years for females; 76.4 years for males (based on 2012 data as reported by the Centers for Disease Control and Prevention's National Center for Health Statistics). However, the statistics for the wealthy are substantially better: 91.9 years for females; 88.8 years for males (see Washington Post's article: <u>The stunning — and expanding — gap in life expectancy between the rich and the poor</u>). This means that the G2 are often in their 70s before inheriting wealth from the G1 – i.e., similar to Prince Charles, age 68, waiting to inherit the kingdom from his mother, Queen Elizabeth II, age 90! An additional benefit of the ATGs Approach and moving the wealth being targeted for family during the lifetime of the G1s is that it will be available sooner to advantage of the G2 and more remote descendants. Perhaps this also lessens the negative energy associated with inheriting wealth (and the prolonged anticipation of that event) upon death.

III. Background on Taxable Gifts

A. Sources to Consult

There have been many, many writings on the merits and detriments of lifetime taxable gifts, as well as thoughtful ideas in executing lifetime gifts. These are a few recommended sources to review:

- James W. Narron, *Non-Charitable Inter Vivos Gifts–A Plan for Tax Relief*, 34 Heckerling Inst. ¶ 1500 (2000). This outline explores the math of lifetime gifts.
- *As Good as it gets: Taxable gifts in 2000*, Perspective, J.P. Morgan (Summer 2010); *Gifts vs. bequests: Is it better to give?*, Perspective (Summer 2009). These articles provide a quantitative analysis of lifetime gifts.
- David A. Handler, *Financed Net Gifts Compared to Sales to Grantor Trusts*, 44 Heckerling Inst., ¶ 1701.1 (2010). This outline provides a discussion of net gifts in the context of the donor loaning the funds to the donee to pay the gifts taxes.

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[31] *Id.*

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- Carlyn S. McCaffrey, *Formulaic Planning to Reduce Transfer Tax Risks*, 45 Heckerling Inst., ¶ 701.6 (2011). This outline provides formulas to reduce the risks of valuation and legislative uncertainty and to reduce the risk of declining values.
- Jonathan G. Blattmachr and Martin M. Shenkman, *Practical Planning Strategies for the Future*, 50 Heckerling Inst., ¶ 17 (2016). This outline reviews lifetime gift strategies.

B. Tax Exclusive

There is an important distinction between the way gift taxes and estate taxes operate. One of the purposes of the gift tax is to raise revenue for the government early – i.e., earlier than upon the death of the taxpayer. To entice taxpayers into paying early, Congress offers to all taxpayers this deal: if the taxpayer is willing to make a taxable gift, gift tax is only paid on the value of the gift. Section 2501(a)(1) provides that the gift tax is "imposed for each calendar year on the *transfer of property by gift* during such calendar year …".

Gift tax is not paid on the funds used to pay the gift tax. That is, gift tax is not paid on the tax because the tax payment is not a "transfer of property by gift." This amount, the gift tax monies, escapes transfer taxation. This explains why the gift tax is referred to as being "tax exclusive" because tax is not paid on the tax funds.

In contrast, the estate tax is referred to as being "tax inclusive." Upon a person's death, estate taxes have to be paid on the decedent's entire taxable estate, including the part that represents the funds paid to the government as estate taxes. Section 2001(a) provides that the estate tax is "imposed on the transfer of the taxable estate of every decedent." The taxable estate as defined in section 2051 is the gross estate less allowable deductions, but importantly for this purpose the federal estate tax is not an allowable deduction. Therefore, to pass the same property upon death costs substantially more because of having to pay estate taxes on the portion of the estate that is paid in estate taxes.

Of course, Congress recognizes that the gift tax exclusive deal is a good one. To prevent taxpayers from making gifts on their deathbed to obtain this tax exclusive feature, Congress created a rule that the taxpayer has to survive for three years from the date of the gift to benefit from the tax exclusive advantage.[32] If the taxpayer dies within three years of the gift (not the gift tax payment), the amount paid in gift taxes is added to the taxable estate value upon death and in effect estate taxes have to be paid on such gift taxes. Therefore, if the donor survives for three years from the date of the gift, estate taxes would be avoided on the funds used to pay the gift tax (discussed below in Section III.D).

Lastly, none of the states that impose an estate tax upon death, other than Connecticut, have a corresponding gift tax. Therefore, lifetime gifts avoid state death taxes in most cases and this increases the advantages of transferring wealth during lifetime.

C. Basis for Gifts[33]

1. In General – Some Historical Background

Basis, a unique income tax concept, is a taxpayer's investment in property. Basis is important because it keeps track of one's investment in property (including improvements and adjustments for depreciation). Basis creates an ascertainable measure by which a taxpayer's gain or loss is calculated, without which gains and losses could not be readily ascertained. The "basis" rules for gifts has its origin in the Revenue Act of 1921,[34] which provided that the "donee" must take a "carryover basis" from the donor and use that basis in computing gain or loss on selling or otherwise disposing of the property.[35] The Revenue Act of 1934[36] provided the rule that the carryover basis could not be used to give losses to the donee,[37] the Small Business Tax Revision Act of 1958[38] added the rule that gift taxes could be added to basis[39] and the Tax Reform Act of 1976[40] reduced the

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[32] IRC § 2035(b).
[33] This section was based upon the co-author's article written with Howard Zaritsky, *Basis – Banal? Basic? Benign? Bewildering*, 49th Annual Heckerling Institute on Estate Planning, U of Miami (2015).
[34] Revenue Act of 1921, Pub. L. No. 98, § 202(a)(2), 42 Stat. 227; S. Rep. No. 275, 67th Cong., 1st Sess. (1921).
[35] 42 Stat. 227 (1921); S. Rep. No. 275, 67th Cong., 1st Sess. (1921). Currently this rule is in IRC § 1015(a). A taxpayer who acquired property by gift prior to 1921 (i.e., someone who it at least 95 year old today), uses its fair market value on the date of the gift as the basis. This is basically an irrelevant rule today. IRC § 1015(c).
[36] 48 Stat 680, Ch. 277. (1934), H.R. Rep. No 1385, 73rd Cong. 2nd Sess. (1934).
[37] Today, that rule is contained in the second sentence of IRC § 1015(a).
[38] The Small Business Tax Revision Act of 1958, Pub. L. 85-866, Title II, 72 Stat. 1640 (Sept. 2, 1958).
[39] Today, that rule is contained in IRC § 1015(d)(1)(B).
[40] The Tax Reform Act of 1976, PL 94-455, §§ 1901(a)(122), 1906(b)(13)(A), 90 Stat. 1784, 1834, 1877 (October 4, 1976).

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addition to gift taxes attributable to net appreciation.[41] The Economic Recovery Tax Act of 1981,[42] introduced what is now in section 1014(e) which is sometimes referred to as the basis limitation on "reverse gifts" made within a year of death. Finally, the Deficit Reduction Act of 1984 made it clear that transfers between spouses is covered under section 1041 and not section 1015.[43]

2. Transferred Basis – Probably the Better Term

Transferred basis transactions generally occur when the Code treats a transaction as anything other than a sale or exchange. In those cases, where property is transferred, in other than a sale or exchange, the basis is said to have a "transferred basis". The new owner (herein sometimes refer to as the "transferee" or "donee") is said to have a "transferred basis" from the old owner (sometimes hereinafter referred to as the "transferor" or "donor").[44]

Whenever there has been a completed gift, the basis of the donated property is said to have a "transferred basis" in the hands of the donee. As alluded to above, there are different rules that apply for gifts of appreciated property (i.e., where, at the time of the gift, the fair market value (FMV) of the donated property is greater than its adjusted basis), and gifts of depreciated property (i.e., where, at the time of the gift, the FMV of the donated property is less than its adjusted basis).

3. When Does the Basis Transfer?

The donee's transferred basis occurs on the date on which the donor relinquishes dominion and control over the property.[45]

4. Gifts of Appreciated Property

a. In General

Appreciated property is property where the fair market value (FMV) exceeds it adjusted basis on the date of the gift. The general rule is that the donee's basis is equal to the donor's basis in the asset at the time of the gift, increased by any gift tax paid on the net appreciation in the property's value (but not to exceed the asset's fair market value) at the time of the gift.[46] This rule is best illustrated with examples.

b. Basic Basis Examples

(I) Example 1

On January 1, 2014, P purchased 20,000 shares of TSLA stock for $1 per share (totaling $20,000). On February 1, 2016, when TSLA's value was $1.50 per share, P gave his 20,000 shares of TSLA to Q. P's basis of $20,000 would become Q's transferred basis.[47]

(II) Example 2

Same facts as Example 1, except assume further that this was P's only gift for 2016 and that the gift triggered a gift tax of $2,500, of which only $1,000 was attributable to the appreciation on the donated property. In this case, under section 1015(d)(6), Q's basis would be P's basis of $20,000 increased by the $1,000 of gift taxes paid (or $21,000).

c. A Bit More Detail

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[41] Today, that rule is contained in IRC §§ 1015(d)(1)(A), (d)(2) and (d)(6).
[42] P.L. 97-34 (1981).
[43] IRC § 1015(e).
[44] IRC § 7701(a)(43). Note, often times in a gift transaction one refers to the basis as a "substituted basis", however, that terms may be overbroad and perhaps technically not as accurate. IRC § 7701(a)(42) defines "substituted basis" to mean both property which is "transferred basis property" and "exchanged basis property". Transferred basis property is defined in IRC § 7701(a)(43) which is property received in a transaction where there has been a gift, whereas exchanged basis property is defined in IRC § 7701(a)(44) which is generally defined as property which has been received in an exchange, where the basis of the acquired property is determined in whole or in part on the disposed property. Generally, one thinks of exchanged property as property received in tax-free exchanges (e.g., partnership contributions, and the like).
[45] Treas. Reg. § 25.2511-2(b). Treas. Reg. § 1.1015-1(c).
[46] IRC §§ 1015(a) and (d)(6).
[47] IRC § 1015(a).

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Technically, the Code provides that the donee's adjusted basis in property received by gift is increased for any "gift tax paid" on the transfer, to the extent attributable to the "net appreciation" in the "value of the gift".

(I) Net Appreciation

What does "net appreciation" mean? The Code and its accompanying regulations state that the donee's basis is increased by that portion of the gift tax paid on the transfer that bears the same ratio to the total gift tax paid as the net appreciation in the value of the gift bears to the amount of the gift.[48] For this purpose, the "net appreciation" in the value of the gift is the amount by which the FMV of the gift exceeds the donor's adjusted basis immediately before the gift.

(II) Value of the Gift

The Treasury Regulations provide that the "value of the gift", is determined after subtracting the available gift tax annual exclusion and any available marital and charitable deductions. If there is more than one gift of a present interest in property made to the same donee during a calendar year, the annual exclusion applies to the earliest of such gifts in point of time.[49]

(III) Amount of Gift Tax Paid

(i) Only One Gift That Year

If only one gift was made during a calendar year, the entire amount of the gift tax paid for that year is the amount of the gift tax paid with respect to the gift.[50]

(ii) Multiple Gifts That Year

1. Generally

In the case where more than one gift is made by the donor in a calendar year, the Treasury Regulations provide that the amount of gift tax paid with respect to any specific gift made during that period is the amount which bears the same ratio to the total gift tax paid for that period (determined after reduction for any available unified credit) as the amount of the gift bears to the total taxable gifts for the period.[51]

2. The Formula

The Treasury Regulations provision can be stated algebraically as follows:

Amount of the Gift[52]
--- X Total Gift Taxes Paid
Total Taxable Gifts (plus exemption allowed)

(IV) More Detailed Example

(i) Example 3

Donor has previously used up all available unified credit. In 2016, Donor gives Donee #1 a property with a FMV of $100,000. Donor's adjusted basis in the property immediately before the gift was $70,000. Also in 2016, Donor gives Donee #2 a painting with a FMV of $70,000. Donor files a timely gift tax return paying $56,800 in gift tax, computed as follows:

FMV of property transferred to Donee #1	$100,000
Less Annual Exclusion for Donee #1	(14,000)
Included Amount of gift for Donee #1	$86,000

FMV of property transferred to Donee #2	$70,000
Less Annual Exclusion for Donee #2	(14,000)

[48] IRC § 1015(d)(6)(A); Treas. Reg. § 1.1015(c)(1).
[49] Treas. Reg. §§ 1.1015-5(c)(1); and 1.1015-5(c)(2).
[50] Treas. Reg. §§ 1.1015-5(b)(1)(i); and 1.1015-5(c)(2).
[51] Treas. Reg. § 1.1015-5(c)(3).
[52] Treas. Reg. § 1.1015-5(b)(1)(ii) provides that the "amount of the gift" is the value of the gift reduced by any portion excluded (i.e., the annual exclusion) or deducted (i.e., the charitable or marital deductions). And, the values are those finally determined for gift tax purposes.

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Included Amount of gift for Donee #2	$56,000

Total included gifts for Donee #1 and #2	$142,000

Gift Tax Liability for 2016 gifts (i.e., 40% of $142,000)	$56,800

The gift tax paid with respect to the real estate transferred to Donee #1, is determined as follows:

$86,000 ------------- x $56,800 = $142,000	$34,400

The amount by which Donee #1's basis in the property is increased is determined as follows:

$30,000 (being net appreciation) -- x $34,400 = 86,000 (Adjusted FMV of Gift #1)	$12,000

Donee-1's basis in the real property is $70,000 plus $12,000, or $82,000.[53]

(V) Planning Pointer: Gifts of Cash and Property

Donors, who plan to give away both cash and appreciated property in an amount that will cause a gift tax to be imposed, should first make the cash gifts, absorbing as much of the annual exclusion and unified credit as possible. In the next year, the donor should give away the appreciated property. This strategy maximizes the increase in the donee's adjusted basis for the gift tax paid by the donor, without increasing the amount of gift tax paid by the donor.

(i) Example 4

Donor plans to give Donee gifts of cash and stock in December 2015 and January 2016. Prior gifts have exhausted all but $100,000 of Donor's applicable exclusion amount. Donors would like to give two gifts: (1) $114,000 in cash; and (2) $114,000 FMV of marketable securities, with an adjusted basis of $20,000.

If, Donor gives Donee the securities in 2015, he would suffer no gift tax liability ($114,000 - $100,000 remaining AEA - $14,000 annual exclusion); thus, there is no adjustment to the securities (since the gift tax paid would be zero ($0)). Then, if Donor makes a gift of cash of $114,000 in 2016 (assuming that the AEA is not increased), Donor would have a gift tax liability of $40,000 of gift tax ($114,000 - $14,000 annual exclusion = $100,000 taxable gift; 40% gift tax x $100,000 = $40,000). Since, cash's basis is equal to its FMV and basis cannot exceed FMV, in this case, there is no adjustment that can be made.

If, however, Donor gives $114,000 of cash to Donee in 2015, which generates no gift tax, Donee's basis in the cash continues as $114,000. And, if Donor gives $114,000 of marketable securities in 2016 (assuming no increase in the AEA), then Donor would suffer a gift tax of $40,000 (see computation above), of which $32,000 (i.e., the gift tax attributable to the appreciation (i.e., $40,000 x [1- {$20,000/($114,000 - $14,000)}]) is added to the securities basis, bringing it up to $52,000 (i.e., $20,000 original basis + $32,000 of gift tax paid attributable to the appreciation).

(VI) Annual Exclusion Rule for Multiple Gifts to One Donee

Where more than one gift of a present interest in property is made to the same donee during a calendar year, the annual exclusion applies to the earliest gifts.[54]

(VII) Gift Splitting Rule

If the donor and the donor's spouse elect to gift split under section 2513, the amount of gift tax paid is the sum of the amounts of tax paid with respect to each half of the gifts, computed separately.[55]

[53] If Donor had not exhausted any of Donor's applicable exclusion equivalent amount, no gift tax would have been "paid" and, as a result, Donee #1's basis would not be increased, rather it would remain at $70,000. *See*, Treas. Reg. § 1.1015-5(c)(5), Ex. 1.
[54] Treas. Reg. §§ 1.1015-5(b)(2); and 1.1015-5(c)(3).
[55] Treas. Reg. § 1.1015-5(b)(3).

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d. When is the Basis Adjustment Made?

(I) In General

The Code and Regulations state that the donee's basis is increased for the "gift tax paid" with respect to the transfer. This suggests that the donee's basis cannot be increased until those taxes are paid, and raises the question about how the donee determines basis before the donor has paid the gift tax. The following example illustrates the issue. Let's assume that Donor gives $10 million of zero-basis shares to Donee on January 1, 2016. Donor pays the gift tax on April 15, 2017. Donee sells the property on December 31, 2016. It is not clear how Donee calculates the tax on a sale of the shares before April 15, 2015. There is, however, some theory under the Treasury Regulations applicable to gifts made before January 1, 1977. The Regulations state:

> *"If section 1015(d)(1)(A) applies, the basis of the property is increased as of the date of the gift regardless of the date of payment of the gift tax. For example, if the property was acquired by gift on September 8, 1958, and sold by the donee on October 15, 1958, the basis of the property would be increased (subject to the limitation of section 1015(d)) as of September 8, 1958 (the date of the gift), by the amount of gift tax applicable to such gift even though such tax was not paid until March 1, 1959. If section 1015(d)(1)(B) applies, any increase in the basis of the property due to gift tax paid (regardless of date of payment) with respect to the gift is made as of September 2, 1958."*

Unfortunately, this portion of the Regulation does not, by its own express language, apply to gifts made after December 31, 1976, although there is nothing that suggests a different rule for later gifts. Since there is nothing contrary in the regulations it is reasonable to take the position for a donee to assume that the donor will pay the gift tax, and therefore adjust the donated property's basis immediately.

5. Does Section 1015(d)(6) Adjust Basis of a "Gift" to an IGT?

a. Gut Feeling v. Empirical Data/Studies

Though not empirically studied, it is the gut feeling, based on review of list serve chatter, conversations and review of various articles, a majority of planners probably believe that a gift of appreciated property to an IGT, which results in the payment of gift tax would enable the basis in the donated asset to be adjusted by the gift tax paid attributable to the appreciation under section 1015(d)(6). However, a minority of planners reach the opposite conclusion.

b. Historical Perspective – Transferred Basis Underpinning is Cost Basis

(I) Cost Basis

From a historical perspective, the general "cost basis" rule, currently in section 1012, provides the basis is determined by looking at the property's cost (i.e., generally, the amount paid for the property). This historical rule, which still applies in many different situations today, was originally placed in the 1913 Code. However, when determining the basis of property acquired from a gift, the Revenue Act of 1921 replaced the traditional "cost basis" rule, and introduced what is now in section 1015.

In its original form, the rule was simple, when the donee received property from the donor, the donee received not only the property, but the donor's adjusted basis. In effect, the "cost basis" of the donor was transferred over to the donee. As the law matured, there were a number of modifications to what is now section 1015.[56]

Of note, one of the theories why the basis should be 'transferred' from the donor to the donee, was that fact that property transferred in a gift was a non-taxable transaction. From 1913 to 1920, even though there was no recognition of income on gifts, taxpayers were using gifts as a way to "step-up" the basis, because before the Revenue Act of 1921, when the donee received the gift, the donee could adjust the basis to the donated property's fair market value (FMV). Thus, before 1921, the FMV basis adjustment was effectively a 'non-recognition' provision, in that no gain was recognized at the time of the gift and the basis was adjusted to the donated property's FMV.[57]

(II) No Gain Recognized – The Other Side of The Coin

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[56] See Notes 33 to 43, *supra*, and accompanying text.

[57] Interestingly, and perhaps now only for historical purposes, section 1015(c) continues to have this special rule that if a donee (who would be at least 96 years old today) received a gift of property before 1921, the basis of that gift (assuming that the gift was still in the donee's hands) would be the fair market value on the date of that gift (some 96 years ago). Section 1015(c) is basically an antiquated rule that would have little or no utility today.

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Today, the basis provision under section 1015 is a deferral provision; upon making the gift, no gain is recognized under section 1001,[58] and, as a corollary thereto, the basis is transferred from the donor to the done under section 1015(a). Section 1015(a) now provides:

> *"If <u>the property</u> was <u>acquired by gift</u> after December 31, 1920, <u>the basis shall be the same</u> as it would be in the hands of the donor ..." [Emphasis Added]*

Over the years, section 1015 has been modified from its original language.[59] Of note is the provision related to gifts of appreciated property and the gift tax paid with respect to such property.

(i) The 1958 Change

Section 1015(d)(1)(A) was originally enacted, as part of The Small Business Tax Revision Act of 1958, to provide a wholesale adjustment for any gift taxes paid related to a gift, provided that the adjusted amount was limited to the donated property's FMV on the date of the gift, and later, in 1976 (to be effective January 1, 1977), the Tax Reform Act of 1976 added section 1015(d)(6) to further modify section 1015(d)(1)(A) to limit the basis adjustment to gift taxes paid that are attributable to the net appreciation[60] in the donated property.

(ii) What in the World was Congress Thinking in 1958?

Examining Congress' thinking at the time they were enacting the provision that provided the gift tax paid attributable to the entire donated property (and not just limited to the net appreciation) would increase basis; provided, however, the new basis would be limited to the property's fair market value at the time of the gift. The rationale, as explained in the Senate Finance Committee's report in 1958 was as follows:

> *"In general, carrying over the basis of property in the case of gifts is in accord with the general principle followed in determining basis; namely, setting the basis of the property at its "cost." In this case the "cost" is the cost of the property to the donor, adjusted for any subsequent depreciation, etc. However, this ignores the fact that in reality there is another "cost" incurred in transferring the property from the donor to the donee; namely, the gift tax, which must be paid in order to make this transfer. As a result, your committee has concluded that to properly reflect total "costs" incurred with respect to donated property, it is necessary to increase the basis of the property by the amount of any gift tax paid with respect to it."*[61]

There are a few of things worth highlighting in this comment. First, Congress continued to indicate that the "cost basis" concept (originally set forth in the 1921 law) was still the theory on which the transferred basis relied upon. The Committee concluded that the new "cost" or carryover basis was the donor's basis, as it may have been adjusted for depreciation, etc. Second, Congress believed that the gift tax was a "cost" incurred in transferring the property from the donor to the donee (i.e., the gift tax), and that "cost", even though borne by the transferor / donor as a result of the transaction / gift is a "cost" that is transferred over to the transferee / donee.[62] As a result of the changes in 1976, discussed next, a third observation is warranted; section 1015(d)(1) only applies to gifts made between 1958 through December 31, 1976.

(iii) The 1976 Change

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[58] It is interesting to review the actual language of section 1001, which states as follows:
"The gain from the sale **<u>or other disposition</u>** of property shall be the excess of the amount realized therefrom over the adjusted basis ... and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized." [Emphasis added] Interestingly, technically, a 'gift' could, in normal parlance in the English language, be considered an 'other disposition', but for some reason, the tax laws have never considered a 'gift' as an 'other disposition'.

[59] See Note 56, *supra*.

[60] IRC § 1015(d)(6)(B) defines "net appreciation" as the difference between the fair market value and the basis of such gift on the date of the gift.

[61] S. Rep. No. 1983, 85th Cong., 2d Sess., reprinted in 1958-3 CB 922, 991.

[62] It should be noted, in income taxable transactions (e.g., sales), commonly the cost of the transferor / seller does not become a basis adjustment to the transferee / buyer. In the gift transaction, the primary liability for the gift tax is on the transferor / donor (and secondarily on the transferee / donee), what Congress appears to be saying, is since this is a "non-taxable" transaction for income tax purposes, passing that "cost" of the gift tax to the transferee / donee is reasonable. Note, as of 1977, the transfer of the gift tax "cost" is limited to the net appreciation. See section III.C.5.b(II)(iii) of this paper.

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The 1977 modification, under the Tax Reform Act of 1976, added section 1015(d)(6). This modification, applicable to gifts made after December 31, 1976, limits the basis adjustment to the gift tax attributable to the net appreciation in the donated property.

(iv) What was Congress Thinking in 1977?

In reviewing the efficacy of this provision, the House Ways & Means Committee stated as follows:

> *"The purpose of the increase in basis for gift taxes paid on the gift is to prevent a portion of the appreciation in the gift (equal to the gift tax imposed on the appreciation) from also being subject to income tax, that is, to prevent the imposition of a tax on a tax. However, [§ 1015(d)(1)] is too generous in that it permits the basis of the gift property to be increased by the full amount of the gift tax paid on the gift and not just the gift tax attributable to the appreciation at the time of the gift. Consequently, the bill provides that the increase in basis of property acquired by gift is limited to the gift tax attributable to the net appreciation on the gift."*[63]

The idea behind the new provision was to provide a way in which to minimize the "tax on the tax" only on the net appreciation. Understanding Congress' intention behind the basis adjustment for the net appreciation on the donated property, let's refocus our attention to the issue at hand — Should the basis of property donated to an IGT be adjusted?

c. The Initial Hypothesis – Was Congress Right?

Clearly, if a donor made an outright gift of appreciated assets to an individual donee (and not a trust) and a gift tax was paid, to the extent that the gift tax is attributable to the net appreciation, probably all agree that the adjustment under section 1015(d)(6) is appropriate. The question is whether the same basis adjustment should be made if the asset were transferred to an IGT.[64]

(I) What Does "Acquired by Gift" Mean?

Recall, section 1015 is only triggered if property is "acquired by gift". There is no definition of what it meant by "acquired by gift" in the Code or its accompanying regulations.[65] For gift tax purposes, it is clear, as long as dominion and control has been given up by the donor (in favor of the donee), which is usually the case for transfers to IGTs, there is a completed gift. We also know, under the *Duberstein*[66] case and its progeny, that the requirement for property transferred from one person to another to be treated as a gift for income tax purposes is slightly different. For income tax purposes, donative intent (a subjective standard) is required. The distinction between the income and gift tax definitions of a gift is probably not relevant in the case where property has been donated to an IGT, since it appears that it would be considered a "gift" under either definition.

(II) Impact on Rev. Rul. 85-13[67]

(i) In General

What, however, is relevant is whether the purported transfer is respected for purposes of section 1015. The crux of the matter turns on the IRS' own ruling -- Rev. Rul. 85-13. Rev. Rul. 85-13, if not the most relied upon ruling in estate planning today, it is one of the most relied upon rulings in the grantor trust provisions for estate planners.

It is universal that most, if not all planners, rely upon Rev. Rul. 85-13 as being is good law.[68] Recall that under the terms of Rev. Rul. 85-13, there has been no "transfer" for income tax purposes. And some (maybe just a few) may argue, if there is no transfer for income tax purposes then perhaps there was no "gift", which is a pre-condition for the application of section

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[63] HR Rep. No. 1380, 94th Cong., 2d Sess., reprinted in 1976-3 CB (vol. 3) 735, 778.

[64] If the gift is made to a non-grantor trust, it seems as though the same result would apply as if given to an individual.

[65] By analogy, when looking at the basis adjustment provision for testamentary transfers, the Code specifically defines the term "acquired from or to have passed from the decedent". See, IRC § 1014(b)(1) through (b)(10). Thus, there appears to be an anomaly between the two basis rules under sections 1014 and 1015. One would have thought that there would have been a good definition of what Congress meant when they wanted to say that a property was acquired by gift, but they did not.

[66] Commissioner v. Duberstein, 363 US 278 (1960).

[67] 1985-1 C.B. 184, 1985-7 I.R.B. 28. (Feb. 19, 1985).

[68] It should be noted that we rely heavily on Rev. Rul. 85-13, but are ever mindful of one of Ron Aucutt's warning: "The fountainhead of modern grantor trust law is Rev. Rul. 85-13. Nevertheless, lest it be thought that the technique addressed in this article is iron-clad, it is good for one's perspective to be reminded from time to time that the most serious authority in this area is an IRS ruling that defies the holding of a respected U.S. Court of Appeals." Aucutt, Installment Sales to Grantor Trusts, 2 Bus. Entities 28 (April/May 2002). The U.S. Court of Appeals case that Ron Aucutt refers to is Rothstein v. U.S., 735 F.2d 704 (2d Cir. 1984).

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1015(d)(6). This is the argument that is made why section 1015(d)(6) should not adjust basis, at least during the time that the trust is a grantor trust. We revisit this argument later.

(ii) A Close Review of Rev. Rul. 85-13 – What did the IRS really mean?

Others will say that section 1015 is operational, regardless of Rev. Rul. 85-13. Perhaps we ought to look at Rev. Rul. 85-13 with a critical eye. Recall that the two issues under Rev. Rul. 85-13 were:

> *"(1) Whether a grantor's receipt of the entire corpus of an irrevocable trust in exchange for an unsecured promissory note given to the trustee, the grantor's spouse, constituted an indirect borrowing of the trust corpus which caused the grantor to be the owner of the entire trust under section 675(3) of the Internal Revenue Code.*"

and

> "*(2) To the extent that a grantor is treated as the owner of a trust, whether the trust will be recognized as a separate taxpayer capable of entering into a sales transaction with the grantor.*"

With respect to the first issue, the Service concluded:

> *"(1) A's receipt of the entire corpus of the trust in exchange for A's unsecured promissory note constituted an indirect borrowing of the trust corpus which caused A to be the owner of the entire trust under section 675(3) of the Code." [Emphasis added]*

Further, with respect to the second issue, the Service concluded (in part):

> *"(2) At the time A became the owner of the trust, A became the owner of the trust property. As a result, the transfer of trust assets to A was not a sale for federal income tax purposes and A did not acquire a cost basis in those assets..." [Emphasis added]*

In their analysis, the Service stated that their holding is contrary to the *Rothstein*[69] holding stating that:

> *"It is anomalous to suggest that Congress, in enacting the grantor trust provisions of the Code, intended that the existence of a trust would be ignored for purposes of attribution of income, deduction, and credit, and yet, retain its vitality as a separate entity capable of entering into a sales transaction with the grantor. The reason for attributing items of income, deduction, and credit to the grantor under section 671 is that, by exercising dominion and control over a trust, either by retaining a power over or an interest in the trust, or, as in this case, by dealing with the trust property for the grantor's benefit, the grantor has treated the trust property as though it were the grantor's property. The Service position of treating the owner of an entire trust as the owner of the trust's assets is, therefore, consistent with and supported by the rationale for attributing items of income, deduction, and credit to the grantor." [Emphasis added]*

The IRS' theory is if the trust is considered a grantor trust under the grantor trust rules (contained in section 671 *et seq*.), the grantor is treated as the "owner of the trust's assets". Further, in its second holding, it is interesting to note the Service's thought that the grantor did not acquire a new cost basis in the assets, rather, the Service concluded that the grantor continued to hold onto those assets (keeping its old cost basis).

(III) Analyzing Section 1015(b)(6) and How it Relates to Rev. Rul. 85-13.

So, how does the rationale behind Rev. Rul. 85-13 square with the theory behind section 1015(d)(6)? The Congressional rationale behind section 1015(d) (before 1977) and section 1015(d)(6) (after 1977) was to give the donee a basis adjustment so that the donee does not suffer a tax on the tax (i.e., an income tax on the gift tax paid attributable to the gain) when the assets are later sold. If the assets are in an IGT and the assets are sold during the grantor's lifetime, then, with respect to the donee, the Congressional intent is not violated, since the donee is not liable for the tax in any event. However, when examining the impact to the donor, when the property is sold, is the donor worse off by having paid the income tax, without a basis adjustment?

(IV) Using Examples to Analyze the Theory

To understand the impact to the donor, consider the following examples:

(i) Basic Fact Pattern for All Examples

[69] *Rothstein v. U.S.*, 735 F.2d 704, 2nd DCA (1984). See Note 68, *infra*.

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- The donor (D) has consumed D's entire applicable exclusion amount.
- D had two assets before the gift: Cash of $3,500,000, and C corporation stock in P, Inc., with a FMV of $100,000 with an adjusted basis (A/B) of $0 (P stock). Thus, the total FMV is $3.6 million and total A/B is $3.5 million.
- The income derived from the investment of the cash will generate just enough every year to pay taxes, living expenses, other gifts, etc. so that at any given time, D will have $3.5 million, except that the effect of the gift, sale, or other disposition of P stock will have a direct impact on D's cash. By example, when D makes a gift of P stock and pays $40,000 of taxes, D's cash would reduce to $3.46 million (i.e., $3.5 million less $40,000).
- D's income, gift and estate tax rates are 25%, 40% and 40% respectively.
- The donee's (E's) income tax rate is also 25%.
- D donates all of the P stock to a trustee (T) to hold in trust for E's benefit for life, then upon D's death to E (outright and free of trust), if E is alive, or if not to E's then living descendants, per stirpes. E will survive D.
- The FMV of all assets stays the same through D's date of death.
- The trust is a grantor trust as to D during D's entire lifetime.
- D dies more than three years after the gift was made to T (to avoid and section 2035(b) issues).
- D consumed all of D's applicable exclusion at the date of death (having made gifts of the increasing applicable exclusion amount each year), and D had only cash at death, which was adjusted for the gifts, taxes, living expenses, etc.

(ii) Different Assumptions for Examples 1 - 6

Let's look at six different examples to see the net result to D and E.

- Example 1, D sells P stock before making the gift and gives the net proceeds of $80 to T (for E's benefit).
- Example 2, D makes the gift of P stock to T. Section 1015(d)(6) adds the gift tax to the basis.
- Example 3, D makes a gift of P stock to T. There is no adjustment for the gift tax to the basis.
- Example 4, D makes a gift of P stock to T on day 1. Section 1015(d)(6) adds the gift tax to the basis. T sells P stock on day 5. (D pays the income tax).
- Example 5, D makes a gift of P stock to T on day 1. There is no adjustment for the gift tax to the basis. T sells P stock on day 5 (D pays the income tax).
- Example 6, D does not make a gift, D holds onto P stock until death.

(iii) The Results of the Six Examples

The results of the examples can be viewed in the next table.

They start at the same place, where the FMV is $3.6 million and the A/B is $3.5 million. The difference between the FMV and A/B is $100,000, which is attributable to P stock having a zero basis.

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
FMV of all of D's assets before the gift	$3,600,000	$3,600,000	$3,600,000	$3,600,000	$3,600,000	$3,600,000
Basis of all of D's assets before the gift	3,500,000	3,500,000	3,500,000	3,500,000	3,500,000	3,500,000

After the gift of D to T, the income and gift tax ramifications (if any) are as follows:

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
Income Tax Paid before the transfer	25,000	-	-	-	-	-
FMV of gift on date of transfer	75,000	100,000	100,000	100,000	100,000	-

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Gift Tax Paid by D	30,000	40,000	40,000	40,000	40,000	-

The resulting FMVs and basis of the assets are as follows immediately after the gift from D to T:

	Example 1	**Example 2**	**Example 3**	**Example 4**	**Example 5**	**Example 6**
FMV of all of D's assets immediately after the gift (excludes P stock, if given)	3,470,000	3,460,000	3,460,000	3,460,000	3,460,000	3,600,000
FMV of P stock in T's hands as trustee for E	-	100,000	100,000	100,000	100,000	-
FMV of Cash in T's hands as trustee for E	75,000	-	-	-	-	-
A/B of P stock in T's hands	-	40,000	-	40,000	-	-

Note, in Examples 2 and 4, section 1015(d)(6) applies. Thus, the donor's basis (i.e., $0) is increased by the amount of the gift taxes paid which is attributable to the net appreciation (i.e., $40,000).[70] Whereas, in Examples 3 and 5, section 1015(d)(6) does not apply. Thus, the basis of those assets would be $0 (i.e., the donor's basis). In Example 1, P was sold and cash was given, thus there is no basis in P stock. In Example 6, the donor did not make a gift.

[70] In this case, since the donor's basis (before the transfer) was $0 and the FMV was $100,000, the net appreciation was $100,000, or in percentage terms, the net appreciation was 100% (i.e., $100,000 ÷ $100,000). Thus, since the gift tax paid in those examples was $40,000, 100% of the gift tax would adjust the basis (from $0 to $40,000).

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Five days after the gift (in Examples 4 and 5) P stock is sold, the results would be as follows:

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
Gross sales proceeds after T sells P stock	-	-	-	100,000	100,000	-
Gain on sale of P stock after the gift	-	-	-	60,000	100,000	-
Income tax paid by D on sale of P stock after the gift	-	-	-	15,000	25,000	-

The difference between Examples 4 and 5 is in the former 1015(d)(6) is operative (thus, a higher basis and lower gain) and in the latter there is a lower basis (i.e. $0) and greater gain.

Upon D's death, the FMV and basis of the assets in E's hands would be as follows:

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
Taxable estate when D dies	3,470,000	3,460,000	3,460,000	3,445,000	3,435,000	3,600,000
D's Estate tax liability (40%)	1,388,000	1,384,000	1,384,000	1,378,000	1,374,000	1,440,000
Net Estate passing to E at D's death	2,082,000	2,076,000	2,076,000	2,067,000	2,061,000	2,160,000

The resulting FMV and A/B of assets in D's hands (from D's estate and from T) is as follows:

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
Net estate passing to E at D's death	2,082,000	2,076,000	2,076,000	2,067,000	2,061,000	2,160,000
Add Value of assets in T for the benefit of E	75,000	100,000	100,000	100,000	100,000	-
Total FMV of assets passing to E at D's death	2,157,000	2,176,000	2,176,000	2,167,000	2,161,000	2,160,000
Basis of assets in E's hands at D's death	2,157,000	2,116,000	2,076,000	2,167,000	2,161,000	2,160,000
Built in Gain	-	60,000	100,000	-	-	-
Possible income tax on Built in Gain	-	15,000	25,000	-	-	-

Based on the foregoing, the economic value (i.e., the value assuming that all assets were converted to cash) on D's death is as follows:

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
Economic Value of assets that passed to E upon E's death (this is the difference between the FMV and the possible built in gains tax)	2,157,000	2,161,000	2,151,000	2,167,000	2,161,000	2,160,000

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(iv) Initial Conclusions About the Results

If Congress' goal was to try to equate the results, on its face it appears that they did a fairly poor job since there is disparity between the economic results. However, when we look deeper into the numbers and evaluate the difference, we see that perhaps the results are not too bad, or even good.

If one of Congress' goals was to try to have the net result of the different alternatives (i.e., Examples 2 through 6) be roughly equal to Example 1, where (a) the donor sells the assets, (b) recognizes the gain and pays the income tax, (c) gives away the net proceeds and (d) pays the gift tax, perhaps they accomplished what they set out to do. At first blush, the results seem to show disparity, but when we look at them closely, we see that maybe there is some sense to all of this.

(v) Comparing Examples 1 and 6

First, let's examine the results of the only two examples, where section 1015(d)(6) would have been inapplicable, and see where the differences lie (i.e., examining Examples 1 and 6).

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
Economic Value of assets that passed to E upon E's death	2,157,000	2,161,000	2,151,000	2,167,000	2,161,000	2,160,000

In comparing the Examples 1 and 6, there is difference of $3,000 (i.e., $2.16 million - $2.157 million). What makes up this economic difference? There are two things, first, the quid pro quo for inclusion in the estate is that basis adjustment under section 1014 (i.e., assets included in the gross estate are entitled to a basis adjustment to the fair market value) at the time of death. In Example 6, P stock was retained until death, thus, achieving full basis step up. Thus, D avoided the income tax of $25,000, but since that $25,000 was include in D's estate at death, he suffered an estate tax of 40% of such savings, yielding a net benefit of $15,000. In Example 6, however, D had to pay the tax inclusive tax on the P stock, versus the tax exclusive tax. By comparison, in Example 1, D's estate did not have to pay an estate tax on the gift tax paid, thus, there was an estate tax savings of 40% of the $30,000 of gift tax paid (or $12,000). The difference between the benefits in Example 6 of $15,000 and in Example 1 of $12,000, is $3,000, which explains the difference between the net result to E in the same examples. In this case, it is clear that since there was no basis adjustment, that we can see that the difference is attributable the tax free step up and the difference of the tax inclusive and exclusive nature of the estate and gift taxes.

(vi) Comparing Examples 1 and 2

Now we compare Example 1 and 2, where the basis adjustment under section 1015(d)(6) comes into play in Example 2. We note the following:

	Example 1	Example 2	Example 3	Example 4	Example 5	Example 6
Economic Value of assets that passed to E upon E's death	2,157,000	2,161,000	2,151,000	2,167,000	2,161,000	2,160,000

The net after tax amount passing to the donee, E, in Examples 1 and 2 are $2.157 million and $2.161 million, respectively. The difference is $4,000. We note that the difference has nothing to do with the basis adjustment under Section 1015(d)(6), rather it has to do with the tax exclusive nature of the gift tax vis-à-vis the tax inclusive nature of the estate tax.

Recall, in Example 1, the asset was sold, income tax paid, the net proceeds given and the gift tax was paid, and in Example 2, the asset was not sold, thus, no income tax was paid, the asset was donated and the gift tax was paid, and the basis of the asset was increased by the gift taxes paid (since the net appreciation was 100%). In Example 1, D gave away the net proceeds of $75,000 (i.e., $100,000 gross proceeds from the sale of P stock less $25,000 of income taxes attributable to the sale), whereas in Example 2, D gave away P stock then valued at $100,000. The $25,000 difference in value (i.e., $100,000 (in Example 2) and $75,000 (in Example 1)) meant that there were less gift taxes paid in Example 1 than in Example 2, by an amount equal to the difference (of $25,000) multiplied by the gift tax rate (of 40%), which was $10,000.

When D died, that $10,000 was still there, and since the gift tax is exclusive (in that there is no estate tax paid on the gift tax paid) and the estate tax is tax inclusive, the $10,000 difference, when multiplied by the estate tax rate (of 40%) yields a tax effected difference of $4,000. Therefore, the difference between Examples 1 and 2 have nothing to do with the basis adjustment, and everything to do with the tax exclusive nature of the gift tax.

(vii) Comparing Examples 2 and 3

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Now, let's compare Examples 2 and 3. The results, as stated above, are restated as follows:

	Example 1	**Example 2**	**Example 3**	Example 4	Example 5	Example 6
Economic Value of assets that passed to E upon E's death	2,157,000	2,161,000	2,151,000	2,167,000	2,161,000	2,160,000

The difference between Examples 2 and 3 is that in Example 2, section 1015(d)(6) was applied and in Example 3, it was not applied. Recall, that P stock was held through date of death. In reviewing the FMV of the assets received at date of death, we note there was no difference between the results, to wit:

	Example 1	**Example 2**	**Example 3**	Example 4	Example 5	Example 6
Total FMV of assets passing to E at D's death	2,157,000	2,176,000	2,176,000	2,167,000	2,161,000	2,160,000

The difference only occurred when we looked at the 'economic value' of the assets (i.e., taking the value of P stock and hypothetically selling the stock for its value and paying the income tax attributable to the stock). In this case, the difference in 'economic value' is merely due to the fact that in Example 2, we had a tax basis of $40,000, whereas, in Example 3 we had zero basis. Thus, the hypothetical gain was $40,000 more in Example 3 and the resulting hypothetical income tax would be such hypothetical gain multiplied by the income tax rate of40%, which is $10,000 (i.e., the difference between $2.161 million (in Example 2) and $2.151 million (in Example 3). Thus, we see the difference between the examples is strictly in the assumption where the basis is adjusted in one scenario and not in the other.

(viii) Comparing Examples 2 and 4

Comparing Examples 2 and 4, we note that there is a $6,000 difference, as follows:

	Example 1	**Example 2**	Example 3	**Example 4**	Example 5	Example 6
Economic Value of assets that passed to E upon E's death	2,157,000	2,161,000	2,151,000	2,167,000	2,161,000	2,160,000

That $6,000 difference is attributed to the fact that in Example 2, the assets are sold after the estate tax is imposed, whereas, in Example 4, the assets are sold and income tax is paid before the estate tax is imposed. Thus, the difference between Examples 2 and 4 is attributed to the tax inclusive nature of the estate tax over the tax exclusive nature of the gift tax. By paying the income tax before death (in Example 4), there is a benefit equal to the amount of the income tax adjusted by the estate tax. In this case, the income tax was $15,000, and the estate tax rate was 40%, thus, the product of the two is $6,000 (i.e., the difference between $2,167,000 and $2,161,000). Again, the difference has nothing to do with the basis adjustment, rather it has to do with the tax inclusive / tax exclusive natures of the estate and gift taxes, respectively.

(ix) Comparing Examples 4 and 5

When comparing Examples 4 and 5, we note that there is also a $6,000 difference.

	Example 1	Example 2	Example 3	**Example 4**	**Example 5**	Example 6
Economic Value of assets that passed to E upon E's death	2,157,000	2,161,000	2,151,000	2,167,000	2,161,000	2,160,000

This $6,000 difference is directly related to the impact of the assumption that in one case the basis is $40,000 and in the other it is $0. With the basis adjustment in Example 4, D recognizes $40,000 less of gain, and thus pays $10,000 less of income tax (i.e., $40,000 x 25% income tax rate). Adjusting that difference for estate taxes of 40%, the net difference is $10,000 x (100% – 40%), or $6,000. Again, the difference in this case, as the difference when we compared Examples 2 and 3, had everything to do with the basis adjustment.

(V) Overall Comparison–How did Congress Do?

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Since Examples 2 and 4 basically get the client in parity with Example 1 (i.e., as if D had sold the property and gave the net proceed to the beneficiary). Thus, strictly from a mathematical standpoint, taking into consideration that Congress wanted to avoid a tax on tax, and tried to reach a fair result, on balance, it appears that it is fairer to add the gift tax paid on the net appreciation to the donor's basis.

(VI) Revisiting the Rev. Rul. 85-13 "Nothing Happened" Argument

Notwithstanding the fairness of adding back the gift tax paid on the net appreciation, one could argue that under the theory of Rev. Rul. 85-13, nothing happened. Stated differently, since D was the owner of the assets before and after the "gift", for income tax purposes, and section 1015 is an income tax provision, nothing happened. Thus, because there was no gift (because nothing happened) for income tax purposes, that there should be no basis adjustment, so long as the IGT remains a grantor trust. This argument has some merit, but as demonstrated from a pure mathematical standpoint, it appears that this maybe the weaker argument considering the stated Congressional intent.

d. Squaring the Basis Adjustment Under Section 1015 and 1014

Knowing now that the better argument appears to favor a basis adjustment during life even for a gift to an IGT, for any gift tax paid, does it make sense that there should be a second adjustment at death to the IGT's assets because of the grantor's death and termination of grantor trust status? It's a red herring to argue that a basis adjustment during life under section 1015(d)(6) prevents an adjustment to the same assets at death. There is no provision anywhere in the Code (or the regulations thereunder) that prohibits a basis adjustment under 1014 if there was a lifetime adjustment under section 1015. Whether death is an event that triggers an adjustment to basis in a grantor trust not part of the grantor's taxable estate is another question not addressed herein.

D. Section 2035 – Gift Tax Gross-Up 3-Year Rule

1. Section 2035(b) – The Rules

a. In General

Section 2035 is the so-called "3-year" rule or "contemplation of death" provision of the estate tax laws, because it causes amounts that have generally been disposed of by the decedent (whether by gift or otherwise) to be included in a decedent's gross estate if there is a transfer of property or relinquishment of a power with respect to property inclusion. For the ATGs Approach, however, the focus is section 2035(b), which causes gift taxes paid on gifts made by the decedent (or spouse) within three years of death to be pulled back into a decedent's estate (i.e., the so-called "gift tax gross-up rule).[71]

b. Some Historical Background

The Tax Reform Act of 1976[72] enacted the 3-year gift tax gross-up rule.[73] Before that Act, "death bed" transfers were effective to achieve transfer tax savings. Even though the assets may have been brought back into the estate, the gift tax paid was not included. Thus, prior to 1976, a death bed transfer was free of estate tax on the gift tax. Section 2035(b) is important to consider in using the ATGs Approach, where gifts are presumably made every year including within three years of death.[74]

c. Gift Splitting and Section 2035(b)

In certain circumstances the 3-year gift tax gross-up rule will affect gifts where there has been a split-gift election under section 2013. Four things must happen for this to occur: (a) a completed gift (either by the decedent or the spouse), (b) timely-elected gift-splitting, (c) the decedent died within three years of the gift, and (d) gift taxes were paid on such gift. If all four have occurred, section 2035(b) causes the inclusion of such gift tax paid by the decedent to be included in the decedent's estate.[75] There are two general situations where this may take place. First, the decedent could be the donor, where the decedent's spouse elects gift splitting. To the extent that the decedent paid the gift tax liability (whether it is the decedent's share or the decedent's spouse's share), the amount paid by the decedent is drawn back into the decedent's estate. Second, the decedent's spouse could be the donor, where the decedent elects to split the gifts. To the extent that the decedent paid the gift tax liability related to that

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[71] IRC § 2035(b).
[72] Pub. L. No. 94-455, § 2001(e)(5), 90 Stat. 1525, 1848 (1976), reprinted in 1976-3 CB (Vol. 1) 1, 324.
[73] IRC § 2035(b). Some may argue IRC § 2035(b) could operate as an entirely separate section of the Code because it is not dependent on the other provisions under IRC § 2035 (and the other provisions are likewise independent of IRC § 2035(b).
[74] We briefly discussed the concept of net gifts, earlier, and in more detail below, to potentially eliminate the interplay of § 2035(b).
[75] IRC § 2035(b). See, Rev. Rul. 82-198, 1982-2 CB 206.

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gift (whether it is the decedent's share or the decedent's spouse's share), the amount paid by the decedent is drawn back into the decedent's estate.[76]

d. Net Gifts – Net, Net Gifts and Estate Tax Net Gifts

(I) In General

To reduce the impact of the 3-year gift tax gross-up rule under IRC 2035(b) one could use the so-called "net gift," the "net, net gift" or the "estate tax net gift" concepts.[77] A net gift occurs when the donor shifts his gift tax liability[78] to the donee, which is generally done by agreement.

(II) Net Gifts

Net gifts occur when the donor either does not want to pay the estate tax liability or is unable to pay the liability, and the donee is willing to accept that responsibility. As a result of the donee's consenting to being obligated to pay the liability, the amount of the gift that the donee receives is less than the amount that the donor gave; therefore, the donor's gift is netted against the donee's liability (thus, the "net gift"). Since the value of what the donee receives is less than what the donor gave, the gift is discounted, which then leads to a reduced gift tax liability.[79] The algebraic formula to determine the amount of the gift is as follows:[80]

$$\text{Gift Tax (Payable by the Donee)} = \frac{\text{Tentative Tax (based on the FMV of All Assets Transferred by the Donor)}}{\text{(1 + Rate of Tax) (based on the Donee's tax rate)}^{81}}$$

In general, the idea with the ATGs Approach is that the G1s pay any gift taxes associated with their taxable gifts. This is in lieu of paying estate taxes as discussed in Section II.H. Therefore, a net gift arrangement typically would not be part of the ATGs Approach.

(III) Net, Net Gifts

With net gifts, donees assume the gift tax liability of donors. A twist to this is the concept is to have the donee also be obligated on any estate tax liability that results under section 2035(b) with respect to such gift. Thus, the donee assumes both the gift tax liability and the estate tax liability. The gift that the donee really receives is "net of the gift tax" and "net of any potential estate tax"; hence, the term "net, net gift".

This strategy was analyzed in a recent Tax Court case,[82] where the Court concluded that the gift could be discounted by both the gift tax payable and the present value of the potential estate tax liability[83] if section 2035(b) caused inclusion in the donor's estate and there was an agreement between the donor and donee, where the donee accepted both the gift tax and the contingent estate tax liability.

Again, in the context of the ATGs Approach, the idea is that the G1s pay any gift taxes associated with their taxable gifts. Therefore, a net, net gift arrangement would also not be part of the ATGs Approach.

(IV) Estate Tax Net Gift

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[76] IRC § 2035 (b) specifically states that the gross estate will include "tax paid under chapter 12 by the decedent or his estate on any gift made by the decedent or his spouse during the 3-year period ending" [emphasis added]. Thus, what is clear is that it is irrelevant whether the spouse or the decedent makes the gift, what is relevant is if the gift is made within three years of death, there is gift-splitting and gift tax is paid (with respect to such gift) by the decedent, that there will be inclusion in the decedent's estate. What is also important to note is that there is no inclusion as to gift tax liability paid by the decedent's spouse (unless she dies within the 3-year period).

[77] For a good explanation of how "net gifts" work, see, H. Zaritsky, *Tax Planning for Family Wealth Transfers During Life: Analysis With Forms* (Thomson Reuters/Tax & Accounting, 5th ed. 2013 & Supp. 2016-1) ¶8..03[3] – Net Gifts; and for a discussion on the "net, net gifts" concept, *see*, T. Carmona and R. Walsh, *Netting a Whole School of Gifts: A Discussion of Net Gifts and Net, Net Gifts*, ABA RPTE 2015 Spring Symposia; (Sept. 2015); J. Bogdanski, *"Net, Net Gifts" and the Enigmatic Section 7520*, Est. P. Jnl., Jan. 2016; R. Keebler, "*Net, Net Gifts*", 92 Taxes 5, Dec. 2014.

[78] Generally, when a donor makes a gift, the donor is responsible for the gift tax liability as a result of the gift. IRC § 2502(c); Treas. Reg. § 25.2502-2.

[79] *Est. of Morgens v. Comm.*, 133 T.C. 402(2009), aff'd, 678 F. 3d 769 (9th DCA).

[80] This formula was first set forth in Rev. Rul. 71-232, 1971-1 C.B. 275, and then again in Rev. Rul. 75-72, 1975-1 C.B. 301.

[81] With today's gift tax rate at a flat 40%, the computation is much easier than in prior years when the marginal tax rates increased from 37% to 55%.

[82] *Steinberg v. Commissioner*, 145 T.C. No. 7 (2015). This case was on rehearing from the earlier case reported at 141 T.C. No 8 (2013).

[83] A good portion of the *Steinberg* case was dedicated to the discussion what is the appropriate method to value the potential estate tax liability.

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The net gift arrangement could be structured so that the donee is obligated to pay any estate tax liability that results under section 2035(b) with respect to such gift. The donor would be responsible for gift taxes, but not estate taxes on the gift taxes if the donor dies within three years of the gift. This estate tax net gift agreement would result in a small discount for gift tax purposes.[84] This type of estate tax net gift arrangement is worth considering in the ATGs Approach as discussed in Section II.I. See the attached Appendix D for a sample Estate Tax Net Gift Agreement.

E. Gift Tax Reporting

1. Gift Tax Filings and Audits.

The chart included in Section II.F above reflects that the average number of gift tax returns filed annually from 2004 – 2014 was approximately 256,000 per year. Only a small number of such returns were audited. For the 10-year period from 1997 to 2006, the average number of gift tax returns audited per year was approximately 2,000.[85] There is some speculation, however, that more of the government's resources will be devoted to examining gift tax returns because with the higher applicable exclusion amount the number of estate tax return filings has been reduced.

2. Time for Filing.

The gift tax return is due no later than April 15th of the year following the calendar year during which the gifts were made, but not later than the time for filing the estate tax return in the case of a donor who has died.[86]

3. Extensions of Time for Filing.

Extending the time for filing the income tax return automatically extends the time for filing the gift tax return for six months.[87] If the time for filing the income tax return is not extended, the taxpayer may obtain a six month extension to file the gift tax return by filing Form 8892, Application for Automatic Extension of Time To File Form 709 and/or Payment of Gift/Generation-Skipping Transfer Tax.[88] It does not appear possible to extend the time for filing the income tax return without extending the time for filing the gift tax return.

4. 3-Year Period for Assessments.

If the gifts are "adequately disclosed" on a gift tax return, the IRS is limited to a period of three years to assess any gift tax with respect to such gifts.[89] For the limitation to apply, the gifts must be disclosed on the return in a manner adequate to apprise the IRS of the nature of such gifts.

Treas. Reg. § 301.6501(c)-1(f) sets forth the adequate disclosure rules. In general, the 3-year period runs from the later of the date of actual filing or the last day for filing without regard to extensions.[90]

Section 6501 prevents assessments after the 3-year period expires, when there has been adequate disclosure. Consider what is meant by "assessment" – i.e., does it just mean a limitation on collecting actual gift tax or is it also a limitation on increasing taxable gifts that would use applicable exclusion amount? Does the statute cover all legal issues appearing on the gift tax return?

PLR 201523003 seems to indicate the statute applies to all legal issues. In this ruling, the government finds that it cannot question the split-gift election after three years for a situation where, according to the ruling, the gift did not qualify for split-gift treatment.

For example, the valuation of a gift of a hard to value asset creates the most angst. Reporting the transfer of a hard to value asset has the advantage of forcing a valuation dispute to be raised within the defined 3-year timeframe, after which time the IRS could not pursue an assessment of gift taxes. It is important to understand that pursuant to section 2001(f), the IRS cannot complain about the valuation of a gift, such as a gift included in the estate as an adjusted taxable gift, if the period of assessments under section § 6501 has passed *but only if the gift was "adequately disclosed."*[91]

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[84] *Steinberg v. Commissioner.*
[85] *See* Joulfaian, *supra* note 6, at section II.F of this paper on page 8 and Table 7.
[86] IRC § 6075(b).
[87] IRC § 6075(b)(2).
[88] Treas. Reg. § 25.6081-1(a).
[89] IRC § 6501(a).
[90] Treas. Reg. §§ 301.6501(a)-1(a) and (b)-1(a).
[91] IRC § 2001(f) overruled *Smith Est. v. Comr.,* 94 T.C. 872 (1990), *acq.*, 1990-2 C.B. 1.

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5. Split-Gift Elections.

Split-gift elections are complicated. This is particularly so in planning large gifts to trusts with spousal interests and GST implications.[92] Be careful to consider the impact of the split-gift election in advance of implementing large gifts and at the time of filing the gift tax returns, but it may be too late at that point in time to avert undesired results!

a. Timing of Election.

The election is made by signifying consent after the close of the calendar year in which the gift was made. The interplay with the due date for the gift tax return is interesting. The split-gift election consent may not be signified after April 15th following the close of the calendar year in which the gift was made. There is one (significant) exception to this rule. If no gift tax return has been filed for that year by either spouse, the split-gift consent may be made on the first gift tax return filed for such year, even if the first return is filed late. Note that the Treasury Regulations refer to "April 15" not the due date of the gift tax return.

b. Revocation of Election.

Once the split-gift election is filed, the consent to the split-gift election may be revoked only if a signed statement of revocation is filed, in duplicate (this harks back to a time when filing in duplicate and triplicate was important), on or before April 15th following the close of the calendar year in which the gift was made. If gift tax returns are filed (for the first time) after April 15th (including when the time for filing the gift tax return has been extended), making the split-gift election will be irrevocable. For example, if gift tax returns are filed on April 10, 2012, with respect to 2011 gifts, on which the spouses' consented to the split-gift election, the election may be revoked through April 15th and thereafter the election is irrevocable. If the same returns are filed for the first time on April 20th, the split-gift election is irrevocable. An extension to file does not alter either result.

c. GST Implications.

Importantly, the rules governing gift splitting for gift tax purposes under section 2513 differ from the rules governing gift splitting for GST tax purposes under section 2652(a)(2).

This difference in gift splitting rules may be of particular use with respect to gifts that have an ETIP period, such as GRATs. In general, gift splitting of such gifts is usually discouraged because if the donor spouse dies during the ETIP period, the value of the trust will be included in the donor's estate and any gift tax applicable exclusion amount used by the gift splitting spouse will have been wasted without any compensating benefit.[93] On the other hand, gift splitting for GST purposes of such trusts may be quite useful in order to allow allocation of both spouses' GST exemption to what may be a significant value for the trust at the end of the ETIP period. Additionally, when using a Walton style GRAT having a near zero remainder value, any potential loss of applicable exclusion amount by the splitting spouse is minimized.

For gift tax purposes, gifts to a spouse, including interests in trusts, cannot be gift split, although a gift to a spouse of an interest in a trust which is ascertainable in value at the time of the gift may be severed from the other trust interests, permitting the value of the remaining trust interests to be gift split.[94] On the other hand, for GST tax purposes, Treas. Reg. §26.2652-1(a)(4) provides that the electing spouse is treated as the transferor of one-half of the property transferred, "regardless of the interest the electing spouse is actually deemed to have transferred under section 2513."

PLR 200218001 illustrates the potential differential impact of these gift splitting rules. Husband made gifts in trust that provided that the trustees had the right to make distributions among Wife, the child, child's descendants, and surviving spouses of child's descendants for their health, support, maintenance or education. Wife consented to gift split. The PLR first rules that for gift tax purposes, because the trustee's distributing power was subject to an ascertainable standard, Wife's interest in the trust was severable, and hence the gift to the trust to the extent not attributable to the Wife's interest was eligible for gift splitting. Nevertheless the ruling goes on to hold that for GST tax purposes, because of Treas. Reg. §26.2652-1(a)(4), Wife and Husband will each be treated as the transferor of half of the gifts to the trust, despite the fact that the split is not 50-50 for gift tax purposes.

It is unclear whether a gift must be eligible for splitting under section 2513 before the non-donor spouse will be treated for GST purposes as a transferor of one half of the property. Treas. Reg. § 26.2652-1(a)(4) provides that the electing spouse will be treated as such a transferor "in the case of a transfer with respect to which the donor's spouse makes an election under Code § 2513." Arguably, this regulation could be read to allow a split for allocation of GST exemption purposes regardless of

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[92] Many of the complicated questions are answered in Zeydel, *Gift-Splitting - A Boondoggle or a Bad Idea? A Comprehensive Look at the Rules*, JOURNAL OF TAXATION 334 (June 2007).

[93] For a GRAT that creates no taxable gift for the transferor, there is no reason not to gift split with the non-donor spouse in order to create two transferors for GST purposes.

[94] Treas. Reg. §25.2513-1(b)(4).

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whether the gift may be split for gift tax purposes.[95] If so, it would be possible to use the electing spouse's GST exemption without using his or her gift tax exemption.

For example, the non-donor spouse could elect to split the donor's gift to a GRAT that provided that the non-donor spouse would enjoy a discretionary interest in trust property following the retained term. Gift-splitting under section 2513 would not be permitted in this case, because the non-donor spouse's interest would not be ascertainable and severable as described in Treas. Reg. § 25.2513-1(b)(4). However, under the reading of Treas. Reg. § 26.2652-1(a)(4) suggested above, an election could be made to treat the "electing" spouse as the transferor of one-half of the donor spouse's gift.

Assuming this is not the case, and that the gift must qualify for gift splitting under section 2513 before the non-donor spouse will be treated as a one-half transferor for GST purposes, the lack of ascertainability and severability in the example above could be remedied in a number of ways. The spouse's interest in the GRAT remainder could be limited by an ascertainable standard, as discussed in PLR 200218001 cited above, or the spouse's interest might be limited to some portion, but not all, of the remainder trust.

This raises the question of how small the ascertainable and severable interest may be before it will be deemed *de minimis* for purposes of permitting gift splitting under section 2513. For example, assume one spouse gives a $3,000,000 to a GRAT which, following the retained term, requires the trustee to distribute 1% of the trust's net income to someone other than the non-donor spouse, and the balance of the trust may be distributed to the non-donor spouse in the trustee's sole discretion. The non-donor spouse's interest in the trust is ascertainable and severable. Under a literal reading of Treas. Reg. § 26.2652-1(a)(4), because a section 2513 election with respect to the gift is made, the non-donor spouse will be treated as a transferor of one half of the entire gift, and may allocate GST exemption to one half of the trust at the close of the ETIP.

6. Gifts to Charity.

Pursuant to section 6019 gifts that qualify under section 2022 for the charitable gift tax deduction, and which are not partial interests, do not trigger a requirement to file a gift tax return. Partial interest gifts, such as a gift to a charitable remainder trust or charitable lead trust, do require reporting. "If you are required to file a return to report noncharitable gifts and you made gifts to charities, you must include all your gifts to charities on the return." 2012 Instructions for Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return. This would apply to all outright charitable gifts in excess of the $14,000 annual gift tax exclusion amount. Yes, outright gifts to charity qualify for the annual gift tax exclusion and the amount of such a gift in excess of the annual gift tax exclusion qualifies under section 2522(a) as a charitable gift.

Some gift tax return preparers assume that all outright charitable gifts do not require any reporting, but under the above analysis one concern is that if unreported charitable gifts exceed 25% of the amount of total gifts (not just taxable gifts) reported on a gift tax return, the statute of limitations for all gifts in that year may remain open for 6 years. While this is not a concern if such gifts would not push the taxpayer over the 25% threshold, the donor must sign the return under penalties of perjury: "Under penalties of perjury, I declare that I have examined this return, including any accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than donor) is based on all information of which preparer has any knowledge." To avoid any concern, all outright charitable gifts over $14,000 should be listed if a return is otherwise required.

7. Time for Gift Tax QTIP Election.

The gift tax “qualified terminable interest property” election, or “QTIP election,” must be made by the time for filing a gift tax return, plus extensions. Section 2523(f)(4)(A) provides that the gift tax QTIP election must be made "on or before the date prescribed by section 6075(b) for filing a gift tax return with respect to the transfer (determined without regard to section 6019(2)) and shall be made in such manner as the Secretary shall by regulations prescribe."[96]

A great deal of caution is warranted in ensuring that a gift tax return is timely filed and the QTIP election is made. This is because in PLRs 200314012 and 9641023, the IRS ruled that it does not have discretion to grant a request for an extension of time to file the QTIP election, beyond the 6-month period allowed automatically by Treas. Reg. § 301.9100-2, because the time

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[95] The regulation does not say, for example: “In the case of a transfer with respect to which the donor’s spouse *is permitted to make* an election under Code § 2513 to treat the gift as made one-half by the spouse *and with respect to which the donor’s spouse validly makes such an election*, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor . . . .” Perhaps this argument is bolstered by the regulation’s use of the words “the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under Code § 2513.”

[96] Treas. Reg. § 25.2523(f)-1(b)(4) repeats this requirement.

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for filing an *inter vivos* QTIP election is expressly prescribed by section 2523(f)(4), and the IRS's authority to grant discretionary extensions applies only to requests for extensions of time fixed by regulations or other published guidance.

In PLR 201025021 (February 19, 2010), the IRS granted a 60-day extension of time pursuant to Treas. Reg. § 301.9100-3 to make a gift tax QTIP election on a supplemental Form 709. The IRS mistakenly issued this ruling and revoked it in PLR 201109012 because "it did not have the discretion to grant an extension of time under Treas. Reg. §301.9100-3 to make that election." This is because the time for making the gift tax QTIP election is set by the statute. There is, however, no good reason for Treas. Reg. §301.9100-3 relief to be available for estate tax QTIP elections and not available for gift tax QTIP elections.[97]

a. Planning Suggestion:

Gift tax QTIP elections are scary because the failure to make the election means no marital deduction and perhaps immediate gift tax liability. Because this election is so critical, and apparently there is no relief available for making it on a late basis, we suggest that the draftsperson of the lifetime QTIP insist that he or she prepare and file the return making the election - just to be sure it is done. Alternatively, write the client and accountant and confirm that they are responsible for the return and election, being sure to explain the critical nature of the election. Even in this case, because the client may be out large sums of gift tax, interest and penalties if the election is not actually made; do not rest easy until you obtain a copy of the signed and filed return. A client who must unexpectedly pay hundreds of thousands or millions of dollars in gift taxes will not be happy with you even if you have a letter in your files saying the accountant is responsible for the mistake.

8. Valuation Discounts - Schedule A, Question A.

Although the ATGs Approach contemplates using cash gifts, in the event that the planner considers using this strategy using "discounted gifts" one should consider the gift tax filing implications. On the gift tax return, the donor is required to answer the question at the top of Schedule A (question A) "Yes" if the valuation of the asset given reflects a discount. If the question is answered "yes," the donor must also attach an explanation giving the factual basis for the claimed discounts and the amount of discounts taken. Typically all of this information will be set forth in the appraisal that would be attached to the gift tax return. The following is an example of a rider to this question:

> *The value of the gift reported at Schedule A, Part 3, item ___ reflects valuation discounts. The factual basis for the discounts and the amount of discounts are set forth in the attached appraisal report prepared by ____________.*

9. Adequate Disclosure.

As noted above, to start the statute of limitations on the period of assessments, and thereby the period during which the IRS can question valuations, the gifts must be adequately disclosed. This particularly important with gifts of interests subject to valuation discounts, such as interests in private companies and fractional interests in real estate. Treas. Reg. §§ 301.6501(c)-1(f)(2) and (3) set forth the adequate disclosure rules and the information that must be disclosed to start the statute of limitations. Transfers reported as gifts will be considered adequately disclosed if the following information is provided:

- A description of the transferred property and any consideration received by the transferor;
- The identity of, and relationship between, the transferor and each transferee;
- If the property is transferred in trust, the trust's tax identification number and a brief description of the terms of the trust, or in lieu of a brief description of the trust terms, a copy of the trust instrument;
- Unless an appraisal is filed consistent with Treas. Reg. § 301.6501(c)-1(f)(3), a detailed description of the method used to determine the fair market value of the property transferred, including any financial data, any restrictions on the transferred interest, and a description of discounts;[98] and
- A statement describing any position taken that is contrary to any proposed, temporary or final Treasury regulations or revenue rulings published at the time of the transfer.

Typically, on the gift tax return the taxpayer will (1) set forth the information required by the first three and the fifth items, and (2) incorporate an appraisal into the gift disclosure that complies with the rules of Treas. Reg. § 301.6501(c)-1(f)(3) to satisfy the information required by the fifth item.

Careful attention to complying with the adequate disclosure rules is warranted. The taxpayer does not want to be in a fight over whether the period of assessments has passed or whether the IRS can revalue the gifts for estate tax purposes over a foot fault on the adequate disclosure rules.

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[97] For the reasons why the IRS should adopt PLR 2010025021 as being the correct result, see the letter from Beth Shapiro Kaufman, Douglas Siegler, Howard M. Zaritsky, and Richard Franklin to the IRS (July 23, 2010), published by Tax Notes on July 27, 2010.

[98] Note that this is an abbreviated summary of the provisions of Treas. Reg. § 301.6501(c)-1(f)(2)(iv).

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The IRS has been fussy over the adequate disclosure requirements. In Field Service Advice 20152201F, the government determined it was not limited by the period of assessments in section 6501(a) as a result of the reporting being incomplete. According to the government, the gift tax return failed to sufficiently identify one of the partnerships (the EINs for entity was stated incorrectly), and it failed to adequately describe the method used to determine the fair market values of both partnership interests. Apparently, an appraisal was not attached.

If the gift is pursuant to formula clause, such as a formula consistent with the *Petter*[99] or *Wandry*[100] cases, describe the formula as part of the disclosure and attach the gift agreement and other transfer documents, such as the assignment documents, that incorporate elements of the gift formula arrangement.

10. Gifts from Prior Periods.

Section 2505(a) (flush language) provides that for purposes of determining the amount of applicable credit used against taxable gifts from prior periods the current year's rates of tax are used. The instructions to the gift tax return provide a worksheet to use for this re-computation process. Fortunately, some of the software programs assist in this painstaking process. Steve Leimberg's NumberCruncher is one such program (http://www.leimberg.com).

F. Considerations with Irrevocable Grantor Trusts and the Grantor Trust Rules[101]

1. Grantor Trust Status – In general

Many trusts are structured as non-foreign IGTs today.[102] The primary purpose of using IGTs in the ATGs Approach is to be able to shift appreciation of assets held in the IGT from the senior generation to the junior (or more junior) generation for transfer tax purposes, while the senior generation is subject to the income tax liability on the income and gains generated by the property inside such trust.[103] Thus, the assets in the IGT grow "income tax free" for the benefit of the junior generation so long as the grantor trust status is maintained.

From an income tax standpoint, the theory behind the taxation of grantor trusts is that the trust is simply disregarded, and the income, deductions and credits (for brevity, "income, etc.") are attributed directly to the grantor.[104]

In planning today, the more common types of powers that cause irrevocable trusts to be IGTs are: (i) the non-fiduciary power to reacquire assets through a power of substitution;[105] (ii) the power of someone other than the grantor to add beneficiaries;[106] (iii) the ability to distribute to or accumulate assets for a grantor's spouse,[107] (iv) the ability to distribute to or accumulate assets

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[99] *Estate of Petter v. Comm'r*, T.C. Memo. 2009-280 ; *aff'd* 653 F.3d 1012,108 AFTR 2d 2011-5593 (9th Cir., 2011).
[100] *Petter v. Comm'r,* T.C. Memo. 2009-280 ; *aff'd* 653 F.3d 1012,108 AFTR 2d 2011-5593 (9th Cir., 2011).
[101] This section borrows heavily from a presentation written by the authors together, with George Karibjanian and Beth Shapiro Kaufman, titled, *Care and Feeding of 2012 Estate Plans*, American Bar Association Section of Real Property, Trust and Estate Law 24th Annual Spring CLE Symposia, May 3, 2013, Washington, DC.
[102] It is beyond the scope of this paper to discuss foreign grantor trusts. For a discussion of that topic and a detailed discussion of many of the nuances of grantor trusts, see Danforth and Zaritsky, 819 T.M., *Grantor Trusts: Income Taxation Under Subpart E*; Peschel and Spurgeon, *Federal Taxation of Trusts, Grantors and Beneficiaries* (WGL 3ed 1997 and Supp Sept. 2012); and Freeland, Ascher and Ferguson, *Federal Income Taxation of Estates, Trusts and Beneficiaries* (CCH – 2007 & Supp).
[103] Generally, if a trust is treated as a grantor trust, the grantor (or possibly the third party), who is considered the owner of the trust for income tax purposes (whether in part or in whole), must include such grantor's (or the third party's) portion of items of income, etc., in computing the taxable income of the grantor (or the third party). To the extent that the trust is wholly a grantor trust, under Revenue Ruling 85-13, the trust is generally ignored as a taxable entity, and the items of income, etc., are reportable by the grantor on such grantor's income tax return. Importantly, transactions between the grantor and the grantor trust are ignored. In Revenue Ruling 2004-64, 2004-27 IRB 7 (July 6, 2004), the IRS ruled that the payment of the income tax liability by the grantor will not be treated as a gift for gift tax purposes. Prior to Rev. Rul. 2004-64, the IRS ruled privately that the payment of the income tax liability would be a gift. Thus, the combination of Rev. Rul. 2004-64 and Rev. Rul. 85-13 has resulted in the prolific use of grantor trusts for estate planning purposes. To add to its ubiquitous use, as discussed in Note 111, *infra*, the IRS positively ruled in two revenue rulings (i.e., Rev. Rul. 2008-22, 2008-16 IRB 798 (4/2102008) and Rev. Rul. 2011-28, 2011-49 IRB 830 (12/5/2011)) which has increased the use of the so-called substation power under IRC § 675(4)(C) .
[104] See Estate of O'Connor v. Comm'r, 69 TC 165 (T.C. 1977).
[105] IRC § 675(4)(C).
[106] IRC § 674(b)(5).
[107] IRC §§ 677(a)(1) and (2).

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for the grantor,[108] (v) the use of trust assets to pay premiums on the life of a grantor or grantor's spouse;[109] and (vi) power to borrow without adequate interest or security.[110] We will generally focus on the first three powers (i.e., power of substitution, power to add beneficiaries and power to distribute or accumulate assets for a spouse), since these are most commonly seen in practice today).

2. Why the Prolific use of IGTs?

The IGTs accomplishes two primary goals. First, there is the income and transfer tax benefit. The IGTs keeps the tax burden of the trust's income, etc., with G1, while transferring the assets out of the G1's gross estate for gift, estate and GST tax purposes. Second, there is the flexibility of investment benefit. The substitution power allows the G1 to initially fund the IGT, knowing that they can make changes in the composition of assets at a later point in time without triggering income tax.

3. Specific Powers Commonly Seen in Grantor Trusts Today

a. Power of Substitution

Code § 675(4)(C) provides that the grantor shall be treated as the owner of any portion of a trust with respect to which a power to reacquire the trust corpus is present by substituting other property of an equivalent value, if the power of substitution is exercisable in the proscribed non-fiduciary capacity by the person without the approval or consent of any other person in a fiduciary capacity.

Treas. Reg. § 1.675-1(b)(4)(iii) provides that the power of substitution may be exercisable in a non-fiduciary capacity by any "non-adverse" party. Thus, the Regulations impose a more restrictive group of persons than the Code (i.e., the Code provides for "any person" whereas the Treasury Regulations provide for "non-adverse parties").

If the grantor is given the swap power, the IGT should clearly provide that the grantor is holding that power in a non-fiduciary capacity.[111]

An issue arises as to whom, other than the grantor, could have that power of substitution. It may be possible to give the power to a "trust protector." However, income tax issues arise if the non-grantor exercises this power and attempts to swap assets. If a grantor is the power hold and the grantor swaps assets, Rev. Rul. 85-13 would treat the transaction is ignored for income tax

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[108] *Id.*
[109] IRC § 677(a)(3).
[110] IRC § 675(2).
[111] As mentioned in Note 103, *supra*, Rev. Rul. 2008-22 and Rev. Rul. 2011-28, have expanded the use of the substitution power extensively in estate planning. Rev. Rul. 2008-22, 2008-16 IRB 749, addressed the question of whether the corpus of an *inter vivos* trust is includible in the grantor's gross estate under IRC § 2036 or 2038 if the grantor retained the power, exercisable in a nonfiduciary capacity, to acquire property held in the trust by substituting other property of equivalent value." The ruling held that "for estate tax purposes, the substitution power will not, by itself, cause the value of the trust corpus to be includible in the grantor's gross estate, provided the trustee has a fiduciary obligation (under local law) to ensure the grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the grantor are in fact of equivalent value and further provided that the substitution power cannot be exercised in a manner that can shift benefits among the trust beneficiaries." After Rev. Rul. 2008-22 was issued, many planners were still concerned whether one could have this power when life insurance on the grantor's life was held in an IGT. Rev. Rul. 2011-22 answered that question in a taxpayer friendly manner, holding a "grantor's retention of the power, exercisable in a nonfiduciary capacity, to acquire an insurance policy held in trust by substituting other assets of equivalent value will not, by itself, cause the value of the insurance policy to be includible in the grantor's gross estate under § 2042, provided the trustee has a fiduciary obligation (under local law or the trust instrument) to ensure the grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the grantor are in fact of equivalent value, and further provided that the substitution power cannot be exercised in a manner that can shift benefits among the trust beneficiaries. A substitution power cannot be exercised in a manner that can shift benefits if: (a) the trustee has both the power (under local law or the trust instrument) to reinvest the trust corpus and a duty of impartiality with respect to the trust beneficiaries; or (b) the nature of the trust's investments or the level of income produced by any or all of the trust's investments does not impact the respective interests of the beneficiaries, such as when the trust is administered as a unitrust (under local law or the trust instrument) or when distributions from the trust are limited to discretionary distributions of principal and income."
For discussions about these revenue rulings, see: Leimberg, *Rev. Rul. 2011-28 - IRS Blesses Substitution of Assets in ILIT*, Estate Planning Newsletter #1900 (December 2011); and Steele and Lee, *Revenue Ruling 2011-28 Life Insurance can be subject to a grantor's power of substitution,* a copy of the article is at:
http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2013/1_february/te_steele.authcheckdam.pdf

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purposes. However, if a non-grantor holds and exercises the power, the exchange may be deemed to be an exchange between the non-grantor and the grantor, which is not protected under Rev. Rul. 85-13. Thus, arguably there would be an income taxable event.

b. Power to Add Beneficiaries

Another common power that is seen in many IGTs is the combination of the non-adverse person's power to alter the beneficial enjoyment of trust income and principal and the power to add beneficiaries (other than after-born or after-adopted children).

Section 674(a) provides that if a non-adverse party[112] holds the power to alter the beneficial enjoyment of the trust's income and principal, the trust is a wholly grantor trust as to the grantor. Section 672(b) defines a "non-adverse" party as one who is not an adverse party. Section 672(a) and the regulations define an adverse party as a person who (i) has a beneficial interest in the trust, (ii) which interest is substantial; and (ii) which interest would be adversely affected either by the exercise or the non-exercise of the power to alter the person's beneficial enjoyment of the trust.[113]

Section 674(b)(1) through (8) and sections 674(c) and (d) provide ten general exceptions to causing grantor trust status under section 674(a).[114] Thus, if the trust has a provision in any of those enumerated exceptional sections, the trust will not be a grantor trust.

There are however exceptions to those exceptions. The exception to the exceptions arise with respect to: (i) the power to distribute corpus under section 674(b)(5); (ii) the power to withhold income temporarily under section 674(b)(6); (iii) the power to withhold income during disability under section 674(b)(7); (iv) the powers with respect to independent trustees under section 674(c); and (v) powers subject to certain standards under section 674(d). Specifically, sections 674(b)(5), (b)(6), (b)(7), (c) and (d) provide that the trust would be considered a grantor trust (as to the grantor) notwithstanding the exception powers under those Code sections, if (and only if) any person has a "power to add the beneficiary or beneficiaries or a class beneficiaries designed to receive the income or corpus, except where such action is to provide for after-born or after-adopted children." Thus, notwithstanding the fact that the trustee has the limiting powers under sections 674(b)(5), (b)(6), (b)(7), (c) and (d), if any person is granted the power to add beneficiaries (other than after-born and after-adopted children), then the trust will be considered a grantor trust as to the grantor.

The Code and Treasury Regulations provide that any "person" can hold the power to add beneficiaries. It need not be an adverse person or a trustee; it can be anyone (other than the grantor because of estate tax inclusion issues under sections 2036 and/or 2038).

c. Power to Distribute to or Accumulate Assets for a Grantor's Spouse

Section 677(a)(1) and (2) provides that an IGT will be a grantor trust as to the grantor if the trust income "without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the … the grantor's spouse; [or] held or accumulated for future distribution to the … grantor's spouse."

This provision allows for both mandatory and discretionary payments to a spouse. Thus, in the typical spousal trust (i.e., SLAT), it is common that the payments to a spouse were discretionary. That payment right, without anything else causes the trust to be a grantor trust. The regulations provide that the trust will be a grantor trust, even if no distributions are actually made. All that is needed is the discretionary right to distribute to the spouse.[115] It is unclear under the regulations (and there is no case law directly on point) if the discretionary right is to be based on an ascertainable standard or some other contingency. Thus, it is probably best to simply have the discretionary right to distribute trust assets and not limit it to a standard.

The creation of this beneficial interest in the spouse will not cause inclusion in the grantor's estate by itself.

It should be noted that when the spouse dies, this power goes away, thus, if this is the only power that is going to be relied upon by the grantor, an untimely death of the spouse may cause termination of the grantor trust status, and other attendant issues.

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[112] IRC § 674(a) also provides that the grantor could have that power, but if the grantor has such power, IRC§§ 2036 and/or 2038 would cause inclusion in the grantor's estate, thus, that power is not given to the grantor because of the adverse estate tax consequences.

[113] IRC § 672(a), and Treas. Reg. § 1.672(a)-1.

[114] Those exceptions include the power to apply income to support a dependent (IRC § 674(b)(1)); the power that may affect beneficial enjoyment only after the occurrence of an event (IRC § 674(b)(2)); the power exercisable only by will (IRC § 674(b)(3)); power to allocate among charitable beneficiaries (IRC § 674(b)(4)); power to distribute corpus (IRC § 674(b)(5)); the power to withhold income temporarily (IRC § 674(b)(6)); power to withhold income during disability of a beneficiary (IRC § 674(b)(7)); and the power to allocate between income and corpus (IRC § 674(b)(8)).

[115] Treas. Reg. § 1.677(a)-1(b)(2).

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4. Power to distribute Trust Property to Pay Income Tax Liability – Good Idea? Bad Idea?

Prior to 2004, the IRS privately ruled[116] that the payment of the income tax liability by the grantor was a gift to the trust's remaindermen. However, Revenue Ruling 2004-64[117] clarified that when the grantor of a trust, who is treated as the owner of the trust, pays the income tax attributable to the trust's income in the grantor's taxable income, the grantor is not treated as having made a gift in the amount of the tax paid. The ruling also clarifies if local law or the trust instrument mandated reimbursement to the grantor, then the trust would be included in the grantor's estate under section 2036(a)(1); however, if the reimbursement was discretionary, there will be no estate inclusion. Further, if local law provides for mandatory reimbursement, estate tax inclusion could be avoided if local law also permits the trust instrument to provide otherwise and the trust so provides. The authors are unaware of any state's law that mandates the reimbursement.

The issue arises whether it makes good sense to have a reimbursement clause, and if so, should the trustee ever reimburse. If there is a reimbursement clause, it should be a discretionary clause to avoid section 2036. Whether funds should be reimbursed by the trustee depends on the individual client's situation and the nature of the assets in the trust and the tax nature of the trust. If the client needs the funds, then perhaps reimbursement would be warranted. It may be better to simply have the trust lend the funds to the grantor. Recall that this is a grantor trust, so the loan will be ignored for income tax purposes. So long as the loan is for adequate consideration, it is unlikely that there will be any estate tax inclusion in the trust.

As a general rule, it would be preferable not to reimburse. If the income tax becomes a burden, then consider turning off the grantor trust status for future years (and plan accordingly ahead of time).

5. Effect of Turning off the Grantor Trust Power

a. At Death

Much has been written on the effect of the grantor's death on a trust's grantor trust status. Death terminates the trust's status as a grantor trust. The tax implications of death for the trust, however, are not crystal clear. The reason for this is that to date there is no authority that directly addresses whether death is an income taxable event for income tax purposes. Many propose that death does not cause an income taxable event; others are not of that school of thought.[118] Regardless of the income tax result that may or may not occur, immediately after death, the trust generally becomes a separate taxpayer for income tax purposes, unless another person also owns the trust under section 678 (e.g., the beneficiary grantor).[119]

(I) Gain Recognition

In general, income tax laws have viewed death as a non-recognition event.[120] Rev. Rul. 85-13 also appears to supports this view.

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[116] Private Letter Ruling 9444033.

[117] 2004-27 I.R.B. 7 (July 6, 2004).

[118] See, Cantrell, The Fiduciary's Handbook of Sneaky Post-Mortem Income Tax Issues, 47th Heckerling Institute (2013); Blattmachr, Gans and Jacobson, Income Tax Effects of Termination of Grantor Trust Status By Reason of the Grantor's Death, 96 JOURNAL OF TAX'N 149 (Sept. 2002); Manning & Hesch, Deferred Payment Sales to Grantor Trusts, GRATs and Net Gifts: Income and Transfer Tax Elements, 24 TAX MANAGEMENT EST. GIFT & TR. JOURNAL 3 (Jan / Feb 1999); Zaritsky, Open Issues and Close Calls – Using Grantor Trusts in Modern Estate Planning, 43th Heckerling Institute (2009); Hodge, On the Death of Dr. Jekyll — the Disposition of Mr. Hyde: the Proper Treatment of an Intentionally Defective Grantor Trust at the Grantor's Death, 29 TAX MGMT. EST., GIFTS & TR. J. 275 (Nov./Dec. 2004), and Aucutt, Installment Sales to Grantor Trusts, 2 BUSINESS ENTITIES 28 (Apr/May 2002);.

[119] *See* Blattmachr, Gans and Zeydel – *Supercharged Credit Shelter Trust* and Franklin and Law, *Portability's Role in the Evolution Away from Traditional By-Pass Trusts to Grantor Trusts*, Vol. 37, No. 2 of BNA/TAX MANAGEMENT'S ESTATES, GIFTS AND TRUSTS JOURNAL (March-April 2012). The first article discusses the concept of the Supercharged Credit Shelter Trust[SM], the second article incorporates that concept and discusses portability's role in evolving such a grantor trust concept.

[120] *See*, *Crane. V. Comm.*, 331 U.S.1 (1947), where the Supreme Court treated the transaction as a devise (i.e., non-taxable) and not a sale or exchange. *See, also*, Rev. Rul. 73-183, 1973-1 C.B. 364 where the IRS stated that gain and loss are not recognized as a result of death. This is buttressed by Senate and House reports in 1954, where they stated: "*The mere passing of property to an executor or administrator on the death of the decedent does not constitute a taxable realization of income even though the property may have appreciated in value since the decedent acquired it*." H.Rep. No. 1337, 83 Cong., 2d Sess., 1954 U.S.C.A.N. 4017, 4331(1954) and S. Rep. No. 1622, 83rd Cong., 2d Sess., 1954 U.S.C.A.N. 4621, 4981 (1954). Further in the Legislative history to the Economic Growth and Tax Relief Reconciliation Act of 2001, P. 107-16,§ 542(a), 107th Cong., 1st Sess., 115 Stat. 38 (2001), a proposal was made to impose gain at death where debt exceeded basis,

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(II) Basis Adjustment

If no gain or loss is recognized at the time of death, and if there is no inclusion of the trust's assets in the gross estate of the decedent/grantor, then should the basis of the assets in the trust be adjusted? The general response to this is "No." However, there are contrarians to this point of view.

The nay-sayers point to sections 1014(a), (b) and (b)(9), and argue that since the assets are not included in the gross estate there is no adjustment. This seems to be supported by the IRS's view in CCA 200937028 (9/11/09).

The contrarians argue for a date of death basis adjustment because under section 1014(b)(1) the property inside of the IGT property is acquired "from the decedent or to whom the property passed from a decedent." The argument goes as follows, if the theory under Rev. Rul. 85-13 and *Madorin v. Comm.*,[121] is right, in that the assets are still in the hands of the grantor (and not in the trust for federal income tax purposes), then the asset, for income tax purposes, passed from the grantor/decedent to the trustee at the time of death. It's interesting to note that section 1014(b)(1) does not require that the assets have to be included in the decedent's gross estate, whereas under section 1014(b)(9) there is the inclusion requirement.

For purposes of the illustrations in the appendices the more conservative position is used: the assets that were in the IGTs the moment before death do not receive a basis adjustment under section 1014.

b. During life

Grantor trust status can be terminated during the grantor's lifetime. When this happens, there are a number of issues that arise. Some of the issues have clear answers, some issues are unresolved. Thus, care must be exercised if grantor trust status is to be terminated during life.

(I) Rev. Rul. 77-402

The first IRS ruling to address the termination of grantor trust status is Revenue Ruling 77-402.[122] In Rev. Rul. 77-402, the taxpayer created a grantor trust. The trust purchased a limited partnership which generated losses (which losses were taken by the grantor on his personal tax return). By taking losses, the trust's basis in the partnership was reduced. The limited partnership's liabilities were in excess of basis at the time when the limited partnership finally turned a profit. At the cross-over point (i.e., when the partnership turned a profit) the grantor relinquished the trust powers that caused the trust to be a grantor trust. The ruling held that the gain recognized would be the difference between the trust's adjusted basis in the partnership interest and its share of partnership liabilities. The theory behind this reasoning was that the IRS looked to see what was given and what was received. What was given was a low basis asset (i.e., the limited partnership interest) and what was received was the relief of debt.

The position taken by most authorities is that if there is no debt on the property, there is no "exchange." Thus, when the toggle is switched to "off", the donor has made an income tax gratuitous transfer of property, and has received nothing in exchange.[123]

(II) GCM 37228

General Council Memorandum 37228 (August 23, 1977) explains the IRS's position and thinking behind Rev. Rul. 77-402, as follows:

"[I]f the taxpayer-grantor is considered the tax owner of the trust assets, then upon termination of the grantor trust classification, there has been a transfer of ownership of those assets to the now-separate entity, the non-grantor trust, and such a transfer is a disposition that may well give rise to tax consequences to the transferor."

The GCM further reasoned:

> *"[A] grantor who is the owner of a trust under section 671 et seq. must necessarily be considered the owner for Federal income tax purposes of the underlying trust property. In stating that the grantor would be considered the "owner" of a certain portion of the trust, Congress must have meant something more than just being the "owner" of the "items of income, deductions, and credits' attributable to such portion. Otherwise, Congress would*

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and the Conference Committee report stated as follows: "*The bill clarifies that gain is not recognized at the time of death when the estate or heir acquires from the decedent property subject to a liability that is greater than the decedent's basis in the property.*"

121 94 T.C. 667 (1985). See full discussion of the *Madorin* case below.

122 Rev. Rul. 77-402-1977-2 C.B. 222.

123 See, Danforth & Zaritsky, Grantor Trusts: Income Taxation Under Subpart E, Section I,2.; see also, Cantrell, The Fiduciary's Handbook of Sneaky Post-Mortem Income Tax Issues, 47th Heckerling Institute (2013)

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have enacted language to the effect that the grantor would be treated as "the taxpayer" with respect to the items of income, deductions, and credits attributable to the appropriate portion of the trust. However, the fact that "owner" is used in the statute, with all its significance for tax purposes, implies that ownership of the trust and its underlying assets is intended by Congress."

GCM 37228 goes through a history of cases, and cites to many of the IRS' own rulings, to support the theory that the grantor remains the owner of the property for income tax purposes, even though the property is "owned" by the trust. The GCM further analyzes the Service's prior positions that were contrary to the grantor-ownership theory and states that those positions should be modified based on GCM 37228.

The GCM then summarizes that while the trust is a grantor trust, the grantor is deemed to be the owner of the property (and thus the income, etc.); however, when grantor trust status terminates, and the grantor is no longer considered the owner of the trust property, then there will be tax consequences to the grantor. In Rev. Rul. 77-402's fact pattern, the GCM contends that the termination of grantor trust status during life is, in effect, a sale of the underlying assets by the grantor to the trust (which is now a "non-grantor" trust) for the relief of debt, thus, gain or loss will be recognized.

(III) Treasury Regulation § 1.1001-2(c) Example 5.

In coordination with Rev. Rul. 77-402, Example 5 of Treasury Regulations §1.1001-2 provides that when the grantor releases his grantor trust powers, the grantor is "considered to have transferred ownership" of the grantor's interest in the trust's property to a new "separate taxable entity", thereby recognizing gain on the transfer.

(IV) Other cases

(i) Mandorin v. Comm.

In *Mandorin v. Comm'r,*[124] the Tax Court, relying on Example 5 of Treasury Regulations 1.1001-2, held that the cessation of grantor trust status caused a transfer of the trust's underlying assets from the grantor, who was the owner, to a new separate taxable entity (i.e., the trust). Additionally, in *Deidrich v. Commissioner*[125] the Supreme Court held that the donor could be subject to income tax on the relief of debt.

(V) Is Gain Recognized on the Turning Off of the Power

Based on the foregoing, it appears, based on the Regulations, rulings and the court cases, that unless the grantor receives something in return (e.g., forgiveness of a debt), there will be no recognition of income as a result of converting from a grantor to a non-grantor trust.

(i) General Thoughts

Although it is unlikely that there will be a recognition event, it does not mean that one should "toggle-on" and "toggle-off" at will. Acknowledging that there are no rules about how many times one can go back and forth between grantor and non-grantor status, there is some thought that if the taxpayer turns on and off too often (or even if the taxpayer only goes back and forth only once), it may raise the IRS' antenna. This is discussed below in the section called "Toggling Back and Forth – Will the Little Piggies Get Slaughtered?"

(ii) Current income taxes

Structuring the IGT as a grantor trust generally means that the grantor (G1), will be liable on the income tax liability attributable to the trust's income. In light of the recent increase of tax rates,[126] the G1 grantors may not be as excited about paying the income tax as they may have been under the prior tax regime. The G1s will likely be in higher income tax rates, thus, one may be swayed to look at toggling off so that the trust will be a non-grantor trust. Before turning off the grantor trust status, consider the overall income, estate and GST tax implications for the foreseeable future, making reasonable assumptions about growth and taxes in the future. In illustrations attached in the appendix the tax rates for the beneficiaries are assumed to be the same

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[124] 84 T.C. 667 (1985)
[125] 457 U.S. 191 (1982).
[126] The American Taxpayer Relief Act of 2012, P.L. 112–240, H.R. 8, 126 Stat. 2313, enacted January 2, 2013 ("ATRA 2012"), increased income tax rates for ordinary income, capital gains and qualified dividends, implemented the 3.8% Medicare Surtax (under IRC § 1411), and reintroduced the elimination of a number of deductions (e.g., because of the phase-out of the Pease limitations and the personal exemptions). Combining the ATRA 2012 changes with state income taxes for those living in states with an income tax, has generally increased the tax liability for the higher income and net worth individual.

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to the grantors (which happens often with those who are very wealthy). The results show that maintaining grantor trust status is beneficial. Note, the analysis is not whether the beneficiaries have a lower income tax rate, one has to look at both the beneficiaries and the trust. In most cases, where capital gains are recognized, the trust recognizes the income as income allocated to principal – i.e., it is not part of DNI. As we know, it only takes slightly more than $12,000 of net income in a trust to get to the highest marginal tax rates. Thus, in general, keeping the grantor trust status would likely be advisable.

To avoid the imposition of such high marginal income tax rates, one may consider making distributions from the IGTs to the beneficiaries to subject such income, etc., to the beneficiaries' (generally the junior generations') lower tax rates (and thus has a lower income tax burden for the family). All things being equal, this may make sense if income taxes are the only consideration. However, the trustee must be mindful of trustee's fiduciary duty to administer the trust according to its terms. Quite often the trusts were structured to accumulate income and to be held as a spendthrift trust for asset protection purposes. Moreover, typically capital gains are allocated to principal under local law and would not be part of DNI anyway.

Suffice to say, converting to non-grantor trust status to potentially "save income taxes" may <u>not</u> be the best idea for the following reasons: (1) the trustee may not be able to make distributions to "flush out" the income to the beneficiaries who are at lower income tax rates; (2) currently the tax rates are a bit higher than in the past, we do not know what the future holds for income and estate taxes, accordingly to jump to make tax decision based on our "new normal" may be imprudent; (3) the trusts may have other advantages by remaining grantor trusts, such as the grantor may be able to swap assets on a continuing basis to accomplish a basis step-up over time for the appreciating assets; (4) the trustee may be able to change the investments to reduce taxable income, while allowing the trust to grow at a favorable rate of return given appropriate risk parameters; (5) it may not be possible for the trust to go back to grantor trusts in the event that future tax laws change that would make grantor trust more beneficial; (6) the grantor may have allocated such grantor's GST exemption to the trust, accordingly, distributing trust assets would diminish the benefit of the allocation of GST exemption; and (7) by having the grantor pay the income tax, it effectively reduces the grantors estate, thus, there is an indirect estate tax benefit by having the grantor pay the income tax with pre-estate tax dollars. Therefore, the present value of the income tax burden may be less with grantor trust status, by comparison to non-grantor trust status. We proved this in our analysis above.

c. Power in a non-fiduciary capacity to substitute assets

The power to reacquire assets and substitute assets of equivalent value may be relinquished to terminate the IGT's grantor trust status. If the grantor is the power holder, then the grantor simply relinquishes the power. If a third party relinquishes the power, one must be certain that the third party is not one who owes a fiduciary duty with respect to such power. If so, that person may have violated a duty of loyalty to the trust beneficiaries, because now either, (i) the trust, (ii) the beneficiaries, or (iii) both, are straddled with the income tax liability attributable to the trust's income. Consider granting a trust protector with the power to eliminate the powers, such as the substitution power, to effect a termination in grantor trust status.

d. Impact of Toggling On/Off on Various Powers

(I) Power to Add Beneficiaries

If a trust is relying on the combination of the non-adverse person's power to alter the beneficial enjoyment of trust income and principal and the power in any person to add beneficiaries (other than after-born or after-adopted children), and if the trustee is vested with both powers, the trustee may have some conflict in fiduciary duty in relinquishing the power.

Recall that this power is not necessarily held in a non-fiduciary capacity, where the power to substitute assets must be held in a non-fiduciary capacity. Thus, if a trustee has the power to add beneficiaries, then by relinquishing the power, the trustee may be breaching the duty of loyalty / impartiality to the beneficiaries of the trust. This is especially true when the trust does not have a tax reimbursement clause because by relinquishing the power, the trustee would be causing the beneficiaries (and/or the trust) to be subject to income tax that they did not have to bear before.

(II) Power to Distribute to or Accumulate Assets for a Grantor's Spouse

In order to terminate grantor trust status for this power, the grantor's spouse would have to give up such spouse's interest. This could be adverse to the non-tax reasons for having created the interest in the first place. Moreover, a spouse's release of a beneficial interest could have gift tax consequences.

e. Toggling Back and Forth – Will the Little Piggies Get Slaughtered?

The first issue involved with toggling back and forth is to toggle back. Toggling off is generally done by relinquishing a power, or in some cases having a trust protector change the dispositive or administrative terms of the trust to cease a power or right. If the relinquishment is done by the grantor (e.g., where the grantor has the power of substitution), once released the grantor cannot get the power back easily. It may be accomplished by the trust protector amending the trust and allowing the grantor to have that power. If the trust protector was the person with the power and released the power, then it may be difficult for the

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trust protector to resurrect the power. If the trustee was the person with the power, again, it may be difficult for the trustee to resurrect that power.[127]

While there are no limitations to toggling on and off, the IRS has identified two transactions that they view to be abusive where the grantor toggles on and off to avoid the recognition of income, while materially changing the grantor's economic situation.[128] The IRS issued Notice 2007-73, [129] where they identified two toggling transactions as reportable transactions of interest.[130] Generally, these transactions have to be reported on pursuant to Treasury Regulations §1.6011-4(b)(6) on Reportable Transactions Disclosure Statement (Form 8886). The two transactions that were identified were involved a short-term toggling on and off to avoid the recognition of income. The IRS noted that the transactions do not include a situation when the grantor status is toggled off without subsequent toggling on.

The IRS is leery about a taxpayer's ability to toggle on and off in situation where the taxpayer uses grantor trusts with very sophisticated financial instruments. The normal estate planning trusts do not involve such sophisticated financial instruments. It is uncertain whether the IRS will capture other situations where toggling on and off will be a reportable transaction. However, the planner should consider the implications of toggling off and on, and the possibility that in the future the IRS may list other "plain vanilla" estate planning transactions as reportable transactions.

Some of the collateral income tax issues involved with toggling on and off include the income tax implications of suspended losses (e.g., section 469 suspended losses) and other tax attributes (e.g., basis and holding period). Many of the answers to those issues are unresolved today.

6. Reporting of Grantor Trust Income, Deductions, Credits, etc.

a. Non-grantor trusts

All domestic trusts are required to obtain a taxpayer identification number and file an annual return if the trust has taxable income for any year, gross income of $600 or more (regardless of taxable income, or a beneficiary who is a non-resident alien.[131] The trustee must complete U.S. Income Tax Return for Estates and Trust (Form 1041).[132] However, if the trust is a wholly grantor trust, the grantor has options regarding the annual filing and the taxpayer identification number requirements.[133]

b. Grantor Trusts

For wholly owned grantor trusts the trustee may opt out of filing a Form 1041.[134] The Trustee may provide the grantor's taxpayer identification number (TIN), which is, for an individual, the individual's social security number to the trust's payors, who are then to report all income on Form 1099 to the grantor under the grantor's social security number.[135] Alternatively, if

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[127] One commentator suggests a "relative dramatic" way to restart the grantor trust is to name a foreign trustee and to have the foreign trustee cause grantor trust status. *See*, Zaritsky*, Open Issues and Close Calls – Using Grantor Trusts in Modern Estate Planning,* 43th Heckerling Institute (2009), p 2-75 – 77.

[128] Notice 2007-73, 2007-2 C.B. 545; Section 6011(a); and Treas. Reg. § 1.6011-4(b)

[129] Additionally, in Notices 2009-55 and 2009-59, IRB 2009-31 (August 2009), the IRS reminded taxpayers about its position on trusts that wish to toggle between grantor trust status, and that certain toggle trusts would be transactions of interest, thereby imposing obligations on the taxpayers and their tax preparers certain reporting requirements.

[130] Generally a 'transaction of interest' is a transaction that the IRS believes has significant tax avoidance potential, but the IRS does not have adequate information to determine if it is a tax avoidance type transaction. Tax avoidance transactions are listed transactions the primary purpose of which is tax avoidance. In the early 1990's Congress enacted IRC § 6011, giving the Treasury new weapons to capture transaction that have as its primary goal tax avoidance, but that would not ordinarily have been able to capture under the laws that existed at that time. Section 6011 gives the Treasury the authority to issue regulations that would capture these transactions. Most of the transactions are technical tax shelters that use sophisticated financial instruments and transactions to provide tax benefits to the taxpayer under hyper-technical interpretations of the tax laws, which did not appear to be originally intended when the tax laws were written. Toggling on and off of grantor trust status in certain circumstances listed in Notice 2007-73 is captured under Treas. Reg. § 1.6011-4(b)(6).

[131] Section 6109; Section 6012; Treas. Reg. 1.6109-1(a); instructions for U.S. income of Trusts and Estates (Form 1041).

[132] A copy of Form 1041 can be obtained at http://www.irs.gov/pub/irs-pdf/f1041.pdf; and a copy of the instructions can be obtained at: http://www.irs.gov/pub/irs-pdf/i1041.pdf.

[133] Treas. Reg. 1.671-4; Special Reporting Instructions to the Instructions to Form 1041.

[134] Treas. Reg. 1.671-2.

[135] Treas. Reg. 1.671-4(b).

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the trustee has obtained a TIN for the trust, the trustee can provide the TIN to the payors and the payors would file their Forms 1099 with the trust and the trust would then file a compiled Form 1099 and provide it to the grantor.[136] Prior to 1996, the latter reporting was common, however the IRS realized that some trustees of grantor trusts would prefer not to do that reporting, and as such the regulations provide that the trustee could do a final Form 1041, advise the payors of the grantor's TIN, and have the payors report the income, deductions, etc., on the Form 1099 and report it directly to the grantors.[137] For trusts where both spouses are treated as the grantor of the trust, they will be treated as one grantor.[138]

It is common that when there are corporate trustees, that the corporate trustees require the taxpayer identification number and prepare a simplified Form 1041. From a practical standpoint, for the corporate trustee it is a method of keeping track of the filing requirements and also keeping track of the trust income, etc., especially if the corporate trustee is managing many trusts for the particular grantor.

When the trust converts from a grantor trust to a non-grantor trust, whether as a result of death or some other triggering event (e.g., turning of grantor trust status during life), the normal reporting requirements set forth above come into play (i.e., the trust must obtain a TIN and the trustee must file the returns as set forth above).

IV. Conclusion

The ATGs Approach is simple and effective. It reduces the overall payment of funds that go to the government and are instead passed to the family and/or charity. It maximizes assets passing not only to the next generation, G2, but also beyond to the G3s and G4s, etc., of this world, in GST protected trusts. When the planner looks beyond planning for one asset, and looks to planning holistically for all the assets over numerous generations, one sees that there is sufficient reason for a client to pay the tax-exclusive gift tax, instead of the tax-inclusive, onerous estate tax. Thus, using the ATGs Approach to never pay an estate tax is planning that should be become ubiquitous in future planning!

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[136] Treas. Reg. § 1.671-4(b).
[137] Treas. Reg. § 1.671-4(g).
[138] Treas. Reg. § 1.167-4(b)(8).

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Appendix A

Status Quo Plan

	A	B	C	D	E	F	G	H	I	J	K	L
	H's Age	W's Age	Year	Total Estate Value	Cash Used For Living Expenses (net of taxes and cash needed for gifts)	Lifetime Gifts to Beneficiaries in Trusts	Reductions for payment of Settlement Expenses, State and Federal Estate Taxes	Net assets passing to family at the time of death	Amount to Beneficiaries in GST Exempt Trust	Amount to Beneficiaries in Non-GST Exempt Trust	Total Amount in Trust for Beneficiaries	Cash Used For Children's Living Expenses
0	66	66	2016	258,380,000	3,000,000	-	107,642,840	150,737,160	14,260,000	149,837,160	164,097,160	-
1	67	67	2017	267,583,200	3,075,000	-	111,433,778	156,149,422	15,436,800	155,109,422	170,546,222	-
2	68	68	2018	277,577,232	3,151,875	-	115,547,283	162,029,949	16,716,544	160,829,949	177,546,493	
3	69	69	2019	288,342,268	3,230,672	-	119,983,068	168,359,200	18,085,867	166,999,200	185,085,067	
4	70	70	2020	299,869,037	3,311,439	-	124,737,257	175,131,780	19,551,937	173,611,780	193,163,717	
5	71	71	2021	312,151,230	3,394,225	-	129,807,214	182,344,016	21,122,491	180,664,016	201,786,507	
6	72	72	2022	325,201,758	3,479,080	-	135,198,335	190,003,423	22,805,890	188,163,423	210,969,313	
7	73	73	2023	339,034,621	3,566,057	-	140,916,472	198,118,149	24,611,162	196,118,149	220,729,311	
8	74	74	2024	353,669,656	3,655,209	-	146,961,916	206,707,740	26,568,055	204,527,740	231,095,795	
9	75	75	2025	369,131,899	3,746,589	-	153,361,134	215,770,765	28,647,101	213,430,765	242,077,866	
10	76	76	2026	385,445,090	3,840,254	-	160,108,048	225,337,042	30,899,669	222,817,042	253,716,711	
11	77	77	2027	402,648,858	3,936,260	-	167,227,223	235,421,635	33,318,043	232,721,635	266,039,678	
12	78	78	2028	420,781,312	4,034,666	-	174,734,588	246,046,724	35,915,485	243,166,724	279,082,209	
13	79	79	2029	439,884,406	4,135,533	-	182,647,682	257,236,724	38,706,325	254,176,724	292,883,049	
14	80	80	2030	459,997,795	4,238,921	-	190,983,078	269,014,717	41,706,030	265,774,717	307,480,747	
15	81	81	2031	481,176,327	4,344,894	-	199,763,705	281,412,622	44,931,312	277,992,622	322,923,934	
16	82	82	2032	503,472,864	4,453,517	-	209,003,657	294,469,207	48,420,217	290,849,207	339,269,424	
17	83	83	2033	526,943,862	4,564,855	-	218,734,534	308,209,328	52,172,234	304,389,328	356,561,562	-
18	84	84	2034	551,643,410	4,678,976	-	228,986,945	322,656,465	56,188,412	318,656,465	374,844,877	-
19	85	85	2035	577,640,845	4,795,951	-	239,773,873	337,866,972	60,531,484	333,666,972	394,198,456	-
20	86	86	2036	605,003,716	4,915,849	-	251,123,553	353,880,163	65,226,003	349,460,163	414,686,166	-
21	*	*	2037	-	-	-	-	-	68,987,825	371,234,210	440,222,034	2,250,000
22	*	*	2038	-	-	-	-	-	72,995,741	396,058,732	469,054,473	2,306,250
23	*	*	2039	-	-	-	-	-	77,219,682	421,609,535	498,829,218	2,363,906
24			2040					-	81,676,357	448,067,472	529,743,829	2,423,004
25			2041					-	86,382,778	475,598,614	561,981,391	2,483,579
26			2042					-	91,356,413	504,358,153	595,714,566	2,545,668
27			2043					-	96,615,318	534,493,654	631,108,971	2,609,310
28	*	*	2044					-	102,178,258	566,147,754	668,326,013	2,674,543
29	*	*	2045	-				-	108,064,826	599,460,462	707,525,288	2,741,407
30	*	*	2046	-				-	114,295,546	634,571,085	748,866,631	2,809,942
31	*	*	2047	-				-	120,891,976	671,619,907	792,511,883	2,880,190
32	*	*	2048	-				-	127,876,811	710,749,631	838,626,442	2,952,195
33	*	*	2049	-				-	135,273,986	752,106,653	887,380,639	3,026,000
34	*	*	2050	-				-	143,108,768	795,842,211	938,950,979	3,101,650
35	*	*	2051	-	-	-	-	-	151,407,864	842,113,426	993,521,290	3,179,191
36	*	*	2052	-				-	160,199,521	891,084,259	1,051,283,780	3,258,671
37	*	*	2053	-				-	169,513,635	942,926,426	1,112,440,062	3,340,138
38	*	*	2054	-				-	179,381,863	997,820,270	1,177,202,133	3,423,641
39	*	*	2055	-				-	189,837,733	1,055,955,606	1,245,793,339	3,509,232
40	*	*	2056	-				-	200,916,770	1,117,532,566	1,318,449,336	3,596,963
41	*	*	2057	-				-	212,656,624	1,182,762,437	1,395,419,062	3,686,887
42	*	*	2058	-				-	225,097,198	1,251,868,518	1,476,965,716	3,779,059
43	*	*	2059	-	-	-	-	-	238,280,793	1,325,086,979	1,563,367,773	3,873,536
44	*	*	2060	-	-	-	-	-	252,252,253	1,402,667,772	1,654,920,025	3,970,374
45	*	*	2061	-	-	-	-	-	267,059,125	1,484,875,548	1,751,934,673	4,069,633
46	*	*	2062	-	-	-	-	-	282,751,821	1,571,990,635	1,854,742,455	4,171,374
47	*	*	2063	-	-	-	-	-	299,383,798	1,664,310,042	1,963,693,840	4,275,659
48	*	*	2064	-	-	-	-	-	317,011,740	1,762,148,527	2,079,160,267	4,382,550
49	*	*	2065	-	-	-	-	-	335,695,760	1,865,839,704	2,201,535,464	4,492,114
50	*	*	2066	-	-	-	-	-	355,499,598	1,975,737,234	2,331,236,832	4,604,417

Death is assumed to occur each year before LE for illustration purposes, but the key year is the one for projected LE which sets the target amount.

20-year illustration period.

Asset values grow substantially.

For consistency, the assumed cash flow for living expenses is the same in the Status Quo and ATGs Approach (see Column Q).

Assumes 3% for settlement expenses, 40% federal estate tax and no state estate tax is applicable.

For consistency, the assumed cash flow for living expenses paid to the children/descendants is the same in the Status Quo and ATGs Approach (see column Z).

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Appendix A

Annual Taxable Gifts (ATGs) Approach

During the G1s' Lifetime. | Assets Removed From Taxable Estate | Post G1s' Deaths

	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
	H's Age	W's Age	Year	Total Estate Value	Cash Used For Living Expenses (net of taxes and cash needed for gifts)	Lifetime Gifts to Beneficiaries in Trusts	Gift Taxes Paid Per Year	Total Amount of Gift Taxes Paid	Total of Gifts and Gift Tax as a percentage of Total Estate Value (Column P)	Amount to Beneficiaries in GST Exempt Trust	Amount to Beneficiaries in Non-GST Exempt Trust	Total Amount in Trust for Beneficiaries	Percentage of Total to Beneficiaries in ATGs Plan to Status Quo	Cash Used For Beneficiaries' Living Expenses	Reductions for payment of Settlement Expenses, State and Federal Estate Taxes	CLAT Balance	Annuity Distributions	Family Foundation Endowment from CLAT Annuity	Family Foundation 5% Distributions to Public Charities
0	66	66	2016	257,480,000	3,000,000	900,000	-	-	0.35%	14,260,000	-	14,260,000	8.69%	-	-	-	-	-	-
1	67	67	2017	257,931,200	3,075,000	6,240,000	2,440,000	2,440,000	3.37%	15,508,800	6,100,000	21,608,800	12.67%	-			-	-	-
2	68	68	2018	258,468,912	3,151,875	6,260,000	2,440,000	4,880,000	3.37%	16,877,504	12,672,000	29,549,504	16.64%	-			-	-	-
3	69	69	2019	259,046,120	3,230,672	6,260,000	2,440,000	7,320,000	3.36%	18,355,704	19,769,760	38,125,464	20.60%	-			-	-	-
4	70	70	2020	259,603,485	3,311,439	6,260,000	2,440,000	9,760,000	3.35%	19,952,160	27,435,341	47,387,501	24.53%	-			-	-	-
5	71	71	2021	260,079,834	3,394,225	6,260,000	2,440,000	12,200,000	3.35%	21,676,334	35,714,168	57,390,502	28.44%	-			-	-	-
6	72	72	2022	260,428,251	3,479,080	6,260,000	2,440,000	14,640,000	3.34%	23,538,440	44,655,301	68,193,741	32.32%	-					-
7	73	73	2023	260,597,681	3,566,057	6,260,000	2,440,000	17,080,000	3.34%	25,549,515	54,311,725	79,861,240	36.18%	-					-
8	74	74	2024	260,517,413	3,655,209	6,280,000	2,440,000	19,520,000	3.35%	27,741,475	64,740,664	92,482,139	40.02%	-					-
9	75	75	2025	260,174,514	3,746,589	6,260,000	2,440,000	21,960,000	3.34%	30,088,794	76,003,917	106,092,711	43.83%	-					-
10	76	76	2026	259,471,637	3,840,254	6,280,000	2,440,000	24,400,000	3.36%	32,643,898	88,168,230	120,812,127	47.62%	-		-			-
11	77	77	2027	258,377,620	3,936,260	6,280,000	2,440,000	26,840,000	3.37%	35,403,409	101,305,688	136,709,098	51.39%	-		-			-
12	78	78	2028	256,834,191	4,034,666	6,280,000	2,440,000	29,280,000	3.40%	38,383,682	115,494,144	153,877,826	55.14%	-		-			-
13	79	79	2029	254,779,335	4,135,533	6,280,000	2,440,000	31,720,000	3.42%	41,602,377	130,817,675	172,420,052	58.87%	-		-			-
14	80	80	2030	252,140,601	4,238,921	6,280,000	2,440,000	34,160,000	3.46%	45,078,568	147,367,090	192,445,657	62.59%	-		-			-
15	81	81	2031	248,851,982	4,344,894	6,280,000	2,440,000	36,600,000	3.50%	48,832,854	165,240,457	214,073,311	66.29%	-		-			-
16	82	82	2032	244,816,111	4,453,517	6,300,000	2,440,000	39,040,000	3.57%	52,907,483	184,543,694	237,451,176	69.99%	-		-			-
17	83	83	2033	239,967,479	4,564,855	6,300,000	2,440,000	41,480,000	3.64%	57,308,082	205,391,189	262,699,271	73.68%	-		-			-
18	84	84	2034	234,228,830	4,678,976	6,280,000	2,440,000	43,920,000	3.72%	62,040,729	227,906,484	289,947,213	77.35%	-		-			-
19	85	85	2035	227,468,028	4,795,951	6,300,000	2,440,000	46,360,000	3.84%	67,171,986	252,223,004	319,394,990	81.02%	-	-	-			-
20	86	86	2036	219,575,466	4,915,849	6,320,000	2,440,000	48,800,000	3.99%	72,733,746	278,484,844	351,218,589	84.70%	-	(11,686,864)	-	-	-	-
21	*	*	2037	-	-	-	-			76,947,634	294,493,904	371,441,539	84.38%	2,250,000	-	195,174,817	12,713,785	11,950,958	(635,689)
22	*	*	2038	-	-		-			81,407,942	311,298,507	392,706,449	83.72%	2,306,250	-	198,059,018	12,713,785	24,124,934	(1,233,237)
23	*	*	2039				-			86,117,378	328,971,199	415,088,577	83.21%	2,363,906	-	201,173,954	12,713,785	36,542,391	(1,841,936)
24	*	*	2040				-			91,093,602	347,584,182	438,677,783	82.81%	2,423,004	-	204,538,086	12,713,785	49,208,196	(2,462,809)
25	*	*	2041				-			96,354,831	367,210,169	463,565,000	82.49%	2,483,579	-	208,171,348	12,713,785	62,127,318	(3,096,099)
26	*	*	2042				-			101,919,970	387,923,133	489,843,103	82.23%	2,545,668	-	212,095,272	12,713,785	75,304,821	(3,742,055)
27	*	*	2043				-			107,808,733	409,798,969	517,607,702	82.02%	2,609,310	-	216,333,108	12,713,785	88,745,875	(4,400,930)
28	*	*	2044				-			114,041,749	432,916,077	546,957,826	81.84%	2,674,543	-	220,707,226	12,713,785	102,455,749	(5,072,983)
29	*	*	2045				-			120,640,672	457,355,910	577,996,582	81.69%	2,741,407	-	225,177,969	12,713,785	116,439,822	(5,758,477)
30	*	*	2046				-			127,628,284	483,203,459	610,831,742	81.57%	2,809,942	-	229,782,802	12,713,785	130,703,576	(6,457,680)
31	*	*	2047				-			135,028,597	510,547,730	645,576,327	81.46%	2,880,190	-	234,555,515	12,713,785	145,252,605	(7,170,868)
32	*	*	2048				-			142,866,953	539,482,194	682,349,146	81.37%	2,952,195	-	239,527,136	12,713,785	160,092,615	(7,898,319)
33	*	*	2049				-			151,170,131	570,105,223	721,275,353	81.28%	3,026,000	-	244,726,670	12,713,785	175,229,424	(8,640,320)
34	*	*	2050				-			159,966,450	602,520,524	762,486,974	81.21%	3,101,650	-	250,181,706	12,713,785	190,668,970	(9,397,160)
35	*	*	2051				-			169,285,873	636,837,575	806,123,448	81.14%	3,179,191	-	255,918,939	12,713,785	206,417,306	(10,169,138)
36	*	*	2052				-			179,160,125	673,172,067	852,332,192	81.08%	3,258,671	-	261,964,586	12,713,785	222,480,610	(10,956,555)
37	*	*	2053				-			189,622,807	711,646,352	901,269,159	81.02%	3,340,138	-	268,344,753	12,713,785	238,865,179	(11,759,720)
38	*	*	2054				-			200,709,516	752,389,899	953,099,415	80.96%	3,423,641	-	275,085,750	12,713,785	255,577,441	(12,578,948)
39	*	*	2055				-			212,457,973	795,539,787	1,007,997,760	80.91%	3,509,232	-	282,214,355	12,713,785	272,623,948	(13,414,561)
40	*	*	2056				-			224,908,162	841,241,193	1,066,149,355	80.86%	3,596,963	-	289,758,060	12,713,785	290,011,384	(14,266,887)
41	*	*	2057			-	-			238,102,464	1,196,385,143	1,434,487,607	102.80%	3,686,887	-	-	-	295,795,612	(14,500,569)
42	*	*	2058			-	-			252,085,808	1,265,792,561	1,517,878,369	102.77%	3,779,059			-	301,695,524	(14,789,781)
43	*	*	2059			-	-	-		266,905,830	1,339,428,602	1,606,334,431	102.75%	3,873,536			-	307,713,434	(15,084,776)
44	*	*	2060			-	-	-		282,613,039	1,417,531,978	1,700,145,017	102.73%	3,970,374			-	313,851,703	(15,385,672)
45	*	*	2061			-	-	-		299,260,991	1,500,358,841	1,799,619,832	102.72%	4,069,633			-	320,112,737	(15,692,585)
46	*	*	2062			-	-	-		316,906,474	1,588,183,272	1,905,089,747	102.71%	4,171,374			-	326,498,992	(16,005,637)
47	*	*	2063			-	-	-		335,609,713	1,681,297,917	2,016,907,631	102.71%	4,275,659			-	333,012,972	(16,324,950)
48	*	*	2064			-	-	-		355,434,569	1,780,014,738	2,135,449,308	102.71%	4,382,550			-	339,657,231	(16,650,649)
49	*	*	2065	-	-	-	-	-		376,448,767	1,884,665,887	2,261,114,653	102.71%	4,492,114			-	346,434,376	(16,982,862)
50	*	*	2066	-	-	-	-	-		398,724,129	1,995,604,675	2,394,328,804	102.71%	4,604,417			-	353,347,064	(17,321,719)
																Total Annuity Payments:	(254,275,693)		(299,693,570)

Risk of premature death, before the goal is achieved, can be covered with insurance and/or other solutions.

In this illustration, the goal is set at 85% of the target amount in Column K.

Net of expenses, the balance of the estates pass to a zeroed-out CLAT, qualifying for the unlimited estate tax charitable deduction. Since there is no estate tax to pay, the risk of audits with federal or state authorities is vastly reduced.

The pool of assets established outside the taxable estate, in the IGTs, is established slowly over time, allowing the G1s to feel more secure as the wealth would be slowly declining (or growing more slowly) over their LEs concomitantly with their needs declining as they age.

In this illustration, the goal is reached paying $48.8 million in gift taxes, rather than estate taxes of approximately $233 million in the Status Quo (i.e., net of settlement expenses).

At least one-half of the ATGs could be into trusts in which one of the G1 spouses is a discretionary beneficiary, along with descendants, allowing the gifts to be available to benefit that G1 directly or indirectly.

When the CLAT remainder is distributed to the family after the CLAT term (i.e., 20 years), the total assets for the family's benefit is approximately equal to the Status Quo. Yet, the ATGs Approach funds the Family Foundation and provided a substantial benefit to charity.

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Line #	Input Data	Status Quo	Alt 1
	Factors that Will Likely Not Change		
1	First Year of Analysis	2016	2016
	Is this a Married Couple or Single Person	Married	Married
2	Client's Name (if not alive or if female client is single, enter "None")	Mick	Mick
3	Spouse's Name (if not alive of if male client is unmarried , enter "None")	Min	Min
4	Age of Client in Year of Analysis	66	66
5	Age of Spouse in Year of Analysis	66	66
6	Client's prior taxable gifts - Federal	$ 5,000,000	$ 5,000,000
7	Spouse's prior taxable gifts - Federal	$ 5,000,000	$ 5,000,000
8	Client's prior taxable gifts - State	$ -	$ -
9	Spouse's prior taxable gifts - State	$ -	$ -
10	Client's prior use of his GST Exemption	$ 5,000,000	$ 5,000,000
11	Spouse's prior use of her GST Exemption	$ 5,000,000	$ 5,000,000
12	Number of Beneficiaries	3	3
13	Parents' Cash in Year 1	$ 10,000,000	10,000,000
14	Parents' Fair Market Value of Investment Assets in Year 1	$ 230,000,000	$ 230,000,000
15	Parents' Fair Market Value of Personal Assets in Year 1	$ 10,000,000	$ 10,000,000
16	Desired Cash Balance at Year End for Parents	$ 10,000,000	$ 10,000,000
17	GST Exempt Descendants Trust Cash in Year 1	$ 200,000	$ 200,000
18	GST Exempt Descendants Trust Fair Market Value of Investments in Year 1	$ 6,000,000	$ 6,000,000
19	GST Exempt Descendants Trust Adjusted Basis of Investments in Year 1	$ 3,000,000	$ 3,000,000
20	Non-GST Exempt Descendants Trust Cash in Year 1	$ -	$ -
21	Non-GST Exempt Descendants Trust Fair Market Value of Investments in Year 1	$ -	$ -
22	Non-GST Exempt Descendants Trust Adjusted Basis of Investments in Year 1	$ -	$ -
23	GST Exempt SLAT Cash in Year 1	$ 200,000	$ 200,000
24	GST Exempt SLAT Fair Market Value of Investments in Year 1	$ 6,000,000	$ 6,000,000
25	GST Exempt SLAT Adjusted Basis of Investments in Year 1	$ 3,000,000	$ 3,000,000
26	Non-GST Exempt SLAT Cash in Year 1	$ -	$ -
27	Non-GST Exempt SLAT Fair Market Value of Investments in Year 1	$ -	$ -
28	Non-GST Exempt SLAT Adjusted Basis of Investments in Year 1	$ -	$ -
29	Desired Cash Balance at Year End for Trusts	$ 200,000	$ 200,000
30	Estimated Cost of Living (not including payment of taxes) - Parents	$ 3,000,000	$ 3,000,000
31	Annual Exclusion Initial Year	$ 14,000	$ 14,000
32	Annual Exclusion Amount - In Year 2010	$ 10,000	$ 10,000
33	Basic Exclusion Amount - Federal - First Year of Analysis	$ 5,450,000	$ 5,450,000
34	Basic Exclusion Amount - State - First Year of Analysis	$ 2,000,000	$ 2,000,000
35	Basic Exclusion Amount - In Year 2010	$ 5,000,000	$ 5,000,000
36	GST Exemption - First Year of Analysis	$ 5,450,000	$ 5,450,000
37	Settlement Expense Rate	3.00%	3.00%
38	Tax Year 2011 - For COLA Adjustment Calculation	2011	2011
39	Cost of Living Adjustment - Living Expenses	2.50%	2.50%
40	Cost of Living Adjustment - Estate Tax	1.50%	1.50%
41	Initial Allocation Ratio to Cash Upon Receipt by SLAT and/or Descendants Trust	10.00%	10.00%
42	Initial Allocation Ratio to Investments Upon Receipt by SLAT and/or Descendants Trust	90.0%	90.00%
43	Other Factors that Can Change Easily		
44	Is there a Federal Estate Tax (if "Yes" the default tax rate will be the rate in existence in 2016)	Yes	Yes
45	Tax Rate - Federal - Estate Tax	40.00%	40.00%
46	Is there a Federal Gift Tax (if "Yes" the default tax rate will be the rate in existence in 2016)	Yes	Yes
47	Tax Rate - Federal - Gift Tax	40.00%	40.00%
48	Does Client live in a State subject to an estate tax	No	No
49	Does Spouse life in a State subject to an estate tax	No	No
50	Will the GST Exempt SLAT be a grantor trust?	Yes	Yes
51	Will the NON-GST Exempt SLAT be a grantor trust?	Yes	Yes
52	Will the GST Exempt Dynasty Trust be a grantor trust?	Yes	Yes
53	Will the NON-GST Exempt Dynasty Trust be a grantor trust?	Yes	Yes
54	Will the Client give the remaining exclusion in the beginning year?	No	Yes
55	If the Client will give an amount other than remaining exclusion, enter amount.	$ -	$ -
56	Will the Client give the indexed exclusion amount each subsequent year?	No	Yes
57	Taxable gifts in excess of indexed exclusion amount made by the Client in year 2 and subsequent years (until death).		$ 6,100,000
58	Will the Spouse give the remaining exclusion in the beginning year?	No	Yes
59	If the Spouse will give an amont other than the remaining exclusion, enter amount.	$ -	$ -
60	Will the Spouse give the indexed exclusion amount each subsequent year?	No	Yes
61	Taxable gifts in excess of indexed exclusion amount made by the Spouse in year 2 and subsequent years (until death).		
62	Tax Rate - State - Estate Tax	16.00%	16.00%
63	Beginning Adjusted Basis Ratio - Investment Assets	60.00%	60.00%
64	Beginning Adjusted Basis Ratio - Personal Assets	60.00%	60.00%
65	Rate of Return - Income - Investments	2.00%	2.00%
66	Rate of Return - Income - Personal Assets	0.00%	0.00%
67	Rate of Return - Principal - Investments	6.00%	6.00%
68	Rate of Return - Principal - Personal Assets	2.00%	2.00%
69	Turnover Rate - Investments	20.00%	20.00%
70	Turnover Rate - Personal Assets	0.00%	0.00%
71	Tax Rate - Federal - Income Tax - Ordinary Income	25.00%	25.00%
72	Tax Rate - Federal - Income Tax - Capital Gains	24.00%	24.00%
73	Tax Rate - State - Income Tax - Ordinary Income	5.00%	5.00%
74	Tax Rate - State - Income Tax - Capital Gain	5.00%	5.00%
75	Distribution From Non GST Exempt Descendants Trust First Year after Parents Death	$ 2,000,000	$ 2,000,000
76	Distribution From GST Exempt Descendants Trust First Year after Parents Death	$ 250,000	$ 250,000
77	CLAT Factors		
85	Testamentary CLAT		
86	Portion of Gross Estate (after expenses) that will pass to charity	0.00%	100.00%
87	To Run the Circular Calculation if 100% of the Estate is Going To Charity		
88	CLAT - Term (in years)	20	20
89	CLAT - 7520 Rate	2.00%	2.00%
90	CLAT - Increasing Annuity Percentage	0.00%	0.00%
91	To Run the Iteration to accomplish a Zeroed-Out Testamentary CLAT		
92	Private Foundation Factors		
93	Expense Ratio	1.00%	1.00%
94	Payout to Public Charity	5.00%	5.00%
95	Calculated Amounts		
96	Year of Client's Passing	2036	
97	Year of Spouse's Passing	2036	
98	Client's Age at Actuarial Date of Death	86	
99	Spouse's Age at Actuarial Date of Death	86	

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Appendix B

Status Quo Plan

	A	B	C	D	E	F	G	H	I	J	K	L
	H's Age	W's Age	Year	Total Estate Value	Cash Used For Living Expenses (net of taxes and cash needed for gifts)	Lifetime Gifts to Beneficiaries in Trusts	Reductions for payment of Settlement Expenses, State and Federal Estate Taxes	Net assets passing to family at the time of death	Amount to Beneficiaries in GST Exempt Trust	Amount to Beneficiaries in Non-GST Exempt Trust	Total Amount in Trust for Beneficiaries	Cash Used For Children's Living Expenses
0	66	66	2016	30,546,800	750,000	-	10,869,080	19,677,720	10,900,000	8,777,720	19,677,720	-
1	67	67	2017	31,142,233	768,750	-	11,117,419	20,024,814	11,040,000	8,984,814	20,024,814	-
2	68	68	2018	31,781,639	787,969	-	11,380,231	20,401,408	11,200,000	9,201,408	20,401,408	
3	69	69	2019	32,461,379	807,668	-	11,663,660	20,797,719	11,360,000	9,437,719	20,797,719	
4	70	70	2020	33,178,652	827,860	-	11,966,273	21,212,379	11,520,000	9,692,379	21,212,379	
5	71	71	2021	33,925,345	848,556	-	12,283,923	21,641,422	11,680,000	9,961,422	21,641,422	
6	72	72	2022	34,705,470	869,770	-	12,618,660	22,086,810	11,840,000	10,246,810	22,086,810	
7	73	73	2023	35,517,937	891,514	-	12,969,928	22,548,009	12,000,000	10,548,009	22,548,009	
8	74	74	2024	36,362,041	913,802	-	13,329,366	23,032,675	12,180,000	10,852,675	23,032,675	
9	75	75	2025	37,237,398	936,647	-	13,712,779	23,524,619	12,340,000	11,184,619	23,524,619	
10	76	76	2026	38,137,898	960,063	-	14,101,043	24,036,855	12,520,000	11,516,855	24,036,855	
11	77	77	2027	39,069,209	984,065	-	14,505,054	24,564,155	12,700,000	11,864,155	24,564,155	
12	78	78	2028	40,031,628	1,008,667	-	14,924,966	25,106,662	12,880,000	12,226,662	25,106,662	
13	79	79	2029	41,025,616	1,033,883	-	15,361,013	25,664,603	13,060,000	12,604,603	25,664,603	
14	80	80	2030	42,045,777	1,059,730	-	15,810,438	26,235,339	13,240,000	12,995,339	26,235,339	
15	81	81	2031	43,098,396	1,086,224	-	16,276,452	26,821,944	13,420,000	13,401,944	26,821,944	
16	82	82	2032	44,184,309	1,113,379	-	16,751,484	27,432,825	13,620,000	13,812,825	27,432,825	
17	83	83	2033	45,304,445	1,141,214	-	17,244,008	28,060,437	13,820,000	14,240,437	28,060,437	-
18	84	84	2034	46,453,831	1,169,744	-	17,759,483	28,694,348	14,000,000	14,694,348	28,694,348	-
19	85	85	2035	47,639,137	1,198,988	-	18,285,316	29,353,821	14,200,000	15,153,821	29,353,821	-
20	86	86	2036	48,861,548	1,228,962	-	18,822,114	30,039,434	14,420,000	15,619,434	30,039,434	-
21	*	*	2037	-	-	-	-	-	15,130,372	16,472,187	31,602,559	500,000
22	*	*	2038	-	-	-	-	-	15,948,605	17,450,022	33,398,627	512,500
23	*	*	2039	-	-	-	-	-	16,777,360	18,447,872	35,225,232	525,313
24			2040					-	17,623,134	19,473,202	37,096,337	538,445
25			2041					-	18,491,684	20,532,740	39,024,424	551,906
26			2042					-	19,388,201	21,632,646	41,020,847	565,704
27			2043					-	20,317,442	22,778,664	43,096,106	579,847
28	*	*	2044					-	21,283,840	23,976,240	45,260,080	594,343
29	*	*	2045	-				-	22,291,602	25,230,629	47,522,231	609,201
30	*	*	2046	-				-	23,344,783	26,546,975	49,891,758	624,431
31	*	*	2047	-				-	24,447,357	27,930,386	52,377,742	640,042
32	*	*	2048	-				-	25,603,264	29,385,994	54,989,258	656,043
33	*	*	2049	-				-	26,816,466	30,919,014	57,735,481	672,444
34	*	*	2050	-				-	28,090,984	32,534,786	60,625,770	689,256
35	*	*	2051	-			-	-	29,430,935	34,238,818	63,669,753	706,487
36	*	*	2052	-				-	30,840,561	36,036,826	66,877,386	724,149
37	*	*	2053	-				-	32,324,264	37,934,768	70,259,032	742,253
38	*	*	2054	-				-	33,886,633	39,938,877	73,825,511	760,809
39	*	*	2055	-				-	35,532,463	42,055,698	77,588,162	779,829
40	*	*	2056	-				-	37,266,786	44,292,110	81,558,895	799,325
41	*	*	2057	-				-	39,094,887	46,655,360	85,750,247	819,308
42	*	*	2058	-	-	-	-	-	41,022,334	49,153,098	90,175,433	839,791
43	*	*	2059	-	-	-	-	-	43,055,002	51,793,404	94,848,406	860,786
44	*	*	2060	-	-	-	-	-	45,199,087	54,584,816	99,783,903	882,305
45	*	*	2061	-	-	-	-	-	47,461,141	57,536,366	104,997,506	904,363
46	*	*	2062	-	-	-	-	-	49,848,088	60,657,614	110,505,703	926,972
47	*	*	2063	-	-	-	-	-	52,367,256	63,958,683	116,325,939	950,146
48	*	*	2064	-	-	-	-	-	55,026,399	67,450,294	122,476,693	973,900
49	*	*	2065	-	-	-	-	-	57,833,723	71,143,802	128,977,525	998,248
50	*	*	2066	-	-	-	-	-	60,797,918	75,051,236	135,849,155	1,023,204

Death is assumed to occur each year before LE for illustration purposes, but the key year is the one for projected LE which sets the target amount.

20-year illustration period.

Asset values grow substantially.

For consistency, the assumed cash flow for living expenses is the same in the Status Quo and ATGs Approach (see Column Q).

Assumes 3% for settlement expenses, 40% federal estate tax and state estate tax is applicable.

For consistency, the assumed cash flow for living expenses paid to the children/descendants is the same in the Status Quo and ATGs Approach (see column Z).

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For illustration purposes only. Actual results will vary.

Appendix B

Annual Taxable Gifts (ATGs) Approach

During the G1s' Lifetime. (columns M–U) | Assets Removed From Taxable Estate (columns V–Y) | Post G1s' Deaths (columns Z–AE)

	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
	H's Age	W's Age	Year	Total Estate Value	Cash Used For Living Expenses (net of taxes and cash needed for gifts)	Lifetime Gifts to Beneficiaries in Trusts	Gift Taxes Paid Per Year	Total Amount of Gift Taxes Paid	Total of Gifts and Gift Tax as a percentage of Total Estate Value (Column P)	Amount to Beneficiaries in GST Exempt Trust	Amount to Beneficiaries in Non-GST Exempt Trust	Total Amount in Trust for Beneficiaries	Percentage of Total to Beneficiaries in ATGs Plan to Status Quo	Cash Used For Beneficiaries' Living Expenses	Reductions for payment of Settlement Expenses, State and Federal Estate Taxes	CLAT Balance	Annuity Distributions	Family Foundation Endowment from CLAT Annuity	Family Foundation 5% Distributions to Public Charities
0	66	66	2016	30,046,800	750,000	500,000	-	-	1.66%	500,000	-	500,000	2.54%	-	-	-	-	-	-
1	67	67	2017	30,022,233	768,750	580,000	-	-	1.93%	1,120,000	-	1,120,000	5.59%	-			-	-	-
2	68	68	2018	29,972,039	787,969	600,000	-	-	2.00%	1,809,600	-	1,809,600	8.87%	-			-	-	-
3	69	69	2019	29,907,011	807,668	600,000	-	-	2.01%	2,554,368	-	2,554,368	12.28%	-			-	-	-
4	70	70	2020	29,819,933	827,860	600,000	-	-	2.01%	3,358,718	-	3,358,718	15.83%	-			-	-	-
5	71	71	2021	29,697,929	848,556	600,000	-	-	2.02%	4,227,415	-	4,227,415	19.53%	-			-	-	-
6	72	72	2022	29,539,858	869,770	600,000	-	-	2.03%	5,165,608	-	5,165,608	23.39%	-					-
7	73	73	2023	29,339,075	891,514	600,000	-	-	2.05%	6,178,857	-	6,178,857	27.40%	-					-
8	74	74	2024	29,068,870	913,802	620,000	-	-	2.13%	7,293,166	-	7,293,166	31.66%	-					-
9	75	75	2025	28,760,774	936,647	600,000	-	-	2.09%	8,476,620	-	8,476,620	36.03%	-					-
10	76	76	2026	28,363,144	960,063	620,000	-	-	2.19%	9,774,749	-	9,774,749	40.67%	-		-			-
11	77	77	2027	27,892,474	984,065	620,000	-	-	2.22%	11,176,728	-	11,176,728	45.50%	-		-			-
12	78	78	2028	27,340,755	1,008,667	620,000	-	-	2.27%	12,690,866	-	12,690,866	50.55%	-		-			-
13	79	79	2029	26,699,475	1,033,883	620,000	-	-	2.32%	14,326,136	-	14,326,136	55.82%	-		-			-
14	80	80	2030	25,953,546	1,059,730	620,000	-	-	2.39%	16,092,226	-	16,092,226	61.34%	-		-			-
15	81	81	2031	25,098,787	1,086,224	620,000	-	-	2.47%	17,999,603	-	17,999,603	67.11%	-		-			-
16	82	82	2032	24,104,731	1,113,379	640,000	-	-	2.66%	20,079,572	-	20,079,572	73.20%	-		-			-
17	83	83	2033	22,978,500	1,141,214	640,000	-	-	2.79%	22,325,938	-	22,325,938	79.56%	-		-			-
18	84	84	2034	21,721,809	1,169,744	620,000	-	-	2.85%	24,732,012	-	24,732,012	86.19%	-		-			-
19	85	85	2035	20,288,555	1,198,988	640,000	-	-	3.15%	27,350,573	-	27,350,573	93.18%	-	-	-			-
20	86	86	2036	18,662,919	1,228,962	660,000	-	-	3.54%	30,198,619	-	30,198,619	100.53%	-	(559,888)	-	-	-	-
21	*	*	2037	-	-	-	-			31,596,992	-	31,596,992	99.98%	500,000	-	16,995,909	1,107,122	1,040,695	(55,356)
22	*	*	2038	-	-		-			33,048,520	-	33,048,520	98.95%	512,500	-	17,248,460	1,107,122	2,102,203	(107,391)
23	*	*	2039				-			34,559,520	-	34,559,520	98.11%	525,313	-	17,521,214	1,107,122	3,184,942	(160,466)
24	*	*	2040				-			36,136,046	-	36,136,046	97.41%	538,445	-	17,815,789	1,107,122	4,289,336	(214,603)
25	*	*	2041				-			37,783,996	-	37,783,996	96.82%	551,906	-	18,133,930	1,107,122	5,415,817	(269,823)
26	*	*	2042				-			39,509,184	-	39,509,184	96.31%	565,704	-	18,477,523	1,107,122	6,564,828	(326,147)
27	*	*	2043				-			41,317,431	-	41,317,431	95.87%	579,847	-	18,848,603	1,107,122	7,736,820	(383,597)
28	*	*	2044				-			43,214,617	-	43,214,617	95.48%	594,343	-	19,231,261	1,107,122	8,932,250	(442,197)
29	*	*	2045				-			45,206,742	-	45,206,742	95.13%	609,201	-	19,622,425	1,107,122	10,151,590	(501,969)
30	*	*	2046				-			47,299,979	-	47,299,979	94.81%	624,431	-	20,025,365	1,107,122	11,395,316	(562,936)
31	*	*	2047				-			49,500,712	-	49,500,712	94.51%	640,042	-	20,443,033	1,107,122	12,663,917	(625,122)
32	*	*	2048				-			51,815,577	-	51,815,577	94.23%	656,043	-	20,878,139	1,107,122	13,957,890	(688,552)
33	*	*	2049				-			54,251,510	-	54,251,510	93.97%	672,444	-	21,333,217	1,107,122	15,277,742	(753,251)
34	*	*	2050				-			56,815,766	-	56,815,766	93.72%	689,256	-	21,810,678	1,107,122	16,623,992	(819,243)
35	*	*	2051				-			59,515,970	-	59,515,970	93.48%	706,487	-	22,312,855	1,107,122	17,997,167	(886,556)
36	*	*	2052				-			62,360,143	-	62,360,143	93.25%	724,149	-	22,842,043	1,107,122	19,397,804	(955,214)
37	*	*	2053				-			65,356,738	-	65,356,738	93.02%	742,253	-	23,400,522	1,107,122	20,826,455	(1,025,246)
38	*	*	2054				-			68,514,673	-	68,514,673	92.81%	760,809	-	23,990,596	1,107,122	22,283,679	(1,096,679)
39	*	*	2055				-			71,843,363	-	71,843,363	92.60%	779,829	-	24,614,607	1,107,122	23,770,047	(1,169,540)
40	*	*	2056				-			75,352,762	-	75,352,762	92.39%	799,325	-	25,274,962	1,107,122	25,286,143	(1,243,858)
41	*	*	2057			-	-			79,053,396	26,757,166	105,810,561	123.39%	819,308	-	-	-	25,791,866	(1,264,307)
42	*	*	2058			-	-			82,956,400	28,338,725	111,295,124	123.42%	839,791			-	26,307,703	(1,289,593)
43	*	*	2059			-	-	-		87,073,557	30,023,897	117,097,454	123.46%	860,786			-	26,833,857	(1,315,385)
44	*	*	2060			-	-	-		91,417,340	31,817,533	123,234,873	123.50%	882,305			-	27,370,534	(1,341,693)
45	*	*	2061			-	-	-		96,000,961	33,725,041	129,726,002	123.55%	904,363			-	27,917,945	(1,368,527)
46	*	*	2062			-	-	-		100,838,409	35,752,378	136,590,787	123.61%	926,972			-	28,476,304	(1,395,897)
47	*	*	2063			-	-	-		105,944,501	37,906,039	143,850,540	123.66%	950,146			-	29,045,830	(1,423,815)
48	*	*	2064			-	-	-		111,334,932	40,193,055	151,527,988	123.72%	973,900			-	29,626,747	(1,452,291)
49	*	*	2065	-	-	-	-	-		117,026,335	42,621,004	159,647,338	123.78%	998,248			-	30,219,282	(1,481,337)
50	*	*	2066	-	-	-	-	-		123,036,326	45,198,016	168,234,342	123.84%	1,023,204			-	30,823,668	(1,510,964)
																Total Annuity Payments:	(22,142,439)		(26,131,557)

Risk of premature death, before the goal is achieved, can be covered with insurance and/or other solutions.

In this illustration, the goal is set at 100% of the target amount in Column K.

Net of expenses, the balance of the estates pass to a zeroed-out CLAT, qualifying for the unlimited estate tax charitable deduction. Since there is no estate tax to pay, the risk of audits with federal or state authorities is vastly reduced.

The pool of assets established outside the taxable estate, in the IGTs, is established slowly over time, allowing the G1s to feel more secure as the wealth would be slowly declining (or growing more slowly) over their LEs concomitantly with their needs declining as they age.

In this illustration, the goal is reached without paying any gift taxes, rather than estate taxes of approximately $17.4 million in the Status Quo (i.e., net of settlement expenses).

At least one-half of the ATGs could be into trusts in which one of the G1 spouses is a discretionary beneficiary, along with descendants, allowing the gifts to be available to benefit that G1 directly or indirectly.

When the CLAT remainder is distributed to the family after the CLAT term (i.e., 20 years), the total assets for the family's benefit are substantially more than the Status Quo. Yet, the ATGs Approach funds the Family Foundation and provides a substantial benefit to charity.

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Line #	Input Data	Status Quo	Alt 1
	Factors that Will Likely Not Change		
1	First Year of Analysis	2016	2016
	Is this a Married Couple or Single Person	Married	Married
2	Client's Name (if not alive or if female client is single, enter "None")	Mick	Mick
3	Spouse's Name (if not alive of if male client is unmarried , enter "None")	Min	Min
4	Age of Client in Year of Analysis	66	66
5	Age of Spouse in Year of Analysis	66	66
6	Client's prior taxable gifts - Federal	$ -	$ -
7	Spouse's prior taxable gifts - Federal	$ -	$ -
8	Client's prior taxable gifts - State	$ -	$ -
9	Spouse's prior taxable gifts - State	$ -	$ -
10	Client's prior use of his GST Exemption	$ -	$ -
11	Spouse's prior use of her GST Exemption	$ -	$ -
12	Number of Beneficiaries	3	3
13	Parents' Cash in Year 1	$ 1,000,000	1,000,000
14	Parents' Fair Market Value of Investment Assets in Year 1	$ 26,000,000	$ 26,000,000
15	Parents' Fair Market Value of Personal Assets in Year 1	$ 3,000,000	$ 3,000,000
16	Desired Cash Balance at Year End for Parents	$ 1,000,000	$ 1,000,000
17	GST Exempt Descendants Trust Cash in Year 1	$ -	$ -
18	GST Exempt Descendants Trust Fair Market Value of Investments in Year 1	$ -	$ -
19	GST Exempt Descendants Trust Adjusted Basis of Investments in Year 1	$ -	$ -
20	Non-GST Exempt Descendants Trust Cash in Year 1	$ -	$ -
21	Non-GST Exempt Descendants Trust Fair Market Value of Investments in Year 1	$ -	$ -
22	Non-GST Exempt Descendants Trust Adjusted Basis of Investments in Year 1	$ -	$ -
23	GST Exempt SLAT Cash in Year 1	$ -	$ -
24	GST Exempt SLAT Fair Market Value of Investments in Year 1	$ -	$ -
25	GST Exempt SLAT Adjusted Basis of Investments in Year 1	$ -	$ -
26	Non-GST Exempt SLAT Cash in Year 1	$ -	$ -
27	Non-GST Exempt SLAT Fair Market Value of Investments in Year 1	$ -	$ -
28	Non-GST Exempt SLAT Adjusted Basis of Investments in Year 1	$ -	$ -
29	Desired Cash Balance at Year End for Trusts	$ -	$ -
30	Estimated Cost of Living (not including payment of taxes) - Parents	$ 750,000	$ 750,000
31	Annual Exclusion Initial Year	$ 14,000	$ 14,000
32	Annual Exclusion Amount - In Year 2010	$ 10,000	$ 10,000
33	Basic Exclusion Amount - Federal - First Year of Analysis	$ 5,450,000	$ 5,450,000
34	Basic Exclusion Amount - State - First Year of Analysis	$ 2,000,000	$ 2,000,000
35	Basic Exclusion Amount - In Year 2010	$ 5,000,000	$ 5,000,000
36	GST Exemption - First Year of Analysis	$ 5,450,000	$ 5,450,000
37	Settlement Expense Rate	3.00%	3.00%
38	Tax Year 2011 - For COLA Adjustment Calculation	2011	2011
39	Cost of Living Adjustment - Living Expenses	2.50%	2.50%
40	Cost of Living Adjustment - Estate Tax	1.50%	1.50%
41	Initial Allocation Ratio to Cash Upon Receipt by SLAT and/or Descendants Trust	10.00%	10.00%
42	Initial Allocation Ratio to Investments Upon Receipt by SLAT and/or Descendants Trust	90.0%	90.00%
43	Other Factors that Can Change Easily		
44	Is there a Federal Estate Tax (if "Yes" the default tax rate will be the rate in existence in 2016)	Yes	Yes
45	Tax Rate - Federal - Estate Tax	40.00%	40.00%
46	Is there a Federal Gift Tax (if "Yes" the default tax rate will be the rate in existence in 2016)	Yes	Yes
47	Tax Rate - Federal - Gift Tax	40.00%	40.00%
48	Does Client live in a State subject to an estate tax	Yes	Yes
49	Does Spouse life in a State subject to an estate tax	Yes	Yes
50	Will the GST Exempt SLAT be a grantor trust?	Yes	Yes
51	Will the NON-GST Exempt SLAT be a grantor trust?	Yes	Yes
52	Will the GST Exempt Dynasty Trust be a grantor trust?	Yes	Yes
53	Will the NON-GST Exempt Dynasty Trust be a grantor trust?	Yes	Yes
54	Will the Client give the remaining exclusion in the beginning year?	No	No
55	If the Client will give an amount other than remaining exclusion, enter amount.	$ -	$ 250,000
56	Will the Client give the indexed exclusion amount each subsequent year?	No	Yes
57	Taxable gifts in excess of indexed exclusion amount made by the Client in year 2 and subsequent years (until death).		$ 220,000
58	Will the Spouse give the remaining exclusion in the beginning year?	No	No
59	If the Spouse will give an amont other than the remaining exclusion, enter amount.	$ -	$ 250,000
60	Will the Spouse give the indexed exclusion amount each subsequent year?	No	Yes
61	Taxable gifts in excess of indexed exclusion amount made by the Spouse in year 2 and subsequent years (until death).		$ 220,000
62	Tax Rate - State - Estate Tax	16.00%	16.00%
63	Beginning Adjusted Basis Ratio - Investment Assets	60.00%	60.00%
64	Beginning Adjusted Basis Ratio - Personal Assets	60.00%	60.00%
65	Rate of Return - Income - Investments	2.00%	2.00%
66	Rate of Return - Income - Personal Assets	0.00%	0.00%
67	Rate of Return - Principal - Investments	6.00%	6.00%
68	Rate of Return - Principal - Personal Assets	2.00%	2.00%
69	Turnover Rate - Investments	20.00%	20.00%
70	Turnover Rate - Personal Assets	0.00%	0.00%
71	Tax Rate - Federal - Income Tax - Ordinary Income	25.00%	25.00%
72	Tax Rate - Federal - Income Tax - Capital Gains	24.00%	24.00%
73	Tax Rate - State - Income Tax - Ordinary Income	5.00%	5.00%
74	Tax Rate - State - Income Tax - Capital Gain	5.00%	5.00%
75	Distribution From Non GST Exempt Descendants Trust First Year after Parents Death	$ 250,000	$ -
76	Distribution From GST Exempt Descendants Trust First Year after Parents Death	$ 250,000	$ 500,000
77	CLAT Factors		
85	Testamentary CLAT		
86	Portion of Gross Estate (after expenses) that will pass to charity	0.00%	100.00%
87	To Run the Circular Calculation if 100% of the Estate is Going To Charity		
88	CLAT - Term (in years)	20	20
89	CLAT - 7520 Rate	2.00%	2.00%
90	CLAT - Increasing Annuity Percentage	0.00%	0.00%
91	To Run the Iteration to accomplish a Zeroed-Out Testamentary CLAT		
92	Private Foundation Factors		
93	Expense Ratio	1.00%	1.00%
94	Payout to Public Charity	5.00%	5.00%
95	Calculated Amounts		
96	Year of Client's Passing	2036	
97	Year of Spouse's Passing	2036	
98	Client's Age at Actuarial Date of Death	86	
99	Spouse's Age at Actuarial Date of Death	86	

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Appendix C

	Status Quo Plan										
	A	B	C	D	E	F	G	H	I	J	K
	H's Age	Year	Total Estate Value	Cash Used For Living Expenses	Lifetime Gifts to Beneficiaries in Trusts	Reductions for payment of Settlement Expenses, State and Federal Estate Taxes	Net assets passing to family at the time of death	Amount to Beneficiaries in GST Exempt Trust	Amount to Beneficiaries in Non-GST Exempt Trust	Total Amount in Trust for Beneficiaries	Cash Used For Children's Living Expenses
0	70	2016	10,079,200	350,000	-	2,033,106	8,046,094	5,450,000	2,596,094	8,046,094	-
1	71	2017	10,165,195	358,750	-	2,041,052	8,124,143	5,520,000	2,604,143	8,124,143	-
2	72	2018	10,255,938	367,719	-	2,046,982	8,208,956	5,600,000	2,608,956	8,208,956	-
3	73	2019	10,349,667	376,912	-	2,054,161	8,295,506	5,680,000	2,615,506	8,295,506	-
4	74	2020	10,444,843	386,335	-	2,061,944	8,382,899	5,760,000	2,622,899	8,382,899	-
5	75	2021	10,537,099	395,993	-	2,068,507	8,468,592	5,840,000	2,628,592	8,468,592	-
6	76	2022	10,627,980	405,893	-	2,074,495	8,553,485	5,920,000	2,633,485	8,553,485	-
7	77	2023	10,716,346	416,040	-	2,079,432	8,636,914	6,000,000	2,636,914	8,636,914	-
8	78	2024	10,801,127	426,441	-	2,078,871	8,722,256	6,090,000	2,632,256	8,722,256	-
9	79	2025	10,881,300	437,102	-	2,080,383	8,800,917	6,170,000	2,630,917	8,800,917	-
10	80	2026	10,952,869	448,030	-	2,074,299	8,878,570	6,260,000	2,618,570	8,878,570	-
11	81	2027	11,017,626	459,230	-	2,065,368	8,952,258	6,350,000	2,602,258	8,952,258	-
12	82	2028	11,074,577	470,711	-	2,053,173	9,021,404	6,440,000	2,581,404	9,021,404	-
13	83	2029	11,122,707	482,479	-	2,037,291	9,085,416	6,530,000	2,555,416	9,085,416	-
14	84	2030	11,157,977	494,541	-	2,016,034	9,141,943	6,620,000	2,521,943	9,141,943	-
15	85	2031	11,182,086	506,904	-	1,990,112	9,191,974	6,710,000	2,481,974	9,191,974	-
16	86	2032	11,193,903	519,577	-	1,955,051	9,238,852	6,810,000	2,428,852	9,238,852	-
17	87	2033	11,192,239	532,566	-	1,914,356	9,277,883	6,910,000	2,367,883	9,277,883	-
18	*	2034	-	-	-	-	-	7,245,206	2,411,240	9,656,446	250,000
19	*	2035	-	-	-	-	-	7,631,584	2,466,186	10,097,770	256,250
20	*	2036	-	-	-	-	-	8,022,466	2,515,363	10,537,829	262,656
21	*	2037	-	-	-	-	-	8,420,938	2,559,425	10,980,363	269,223
22	*	2038	-	-	-	-	-	8,829,729	2,598,855	11,428,584	275,953
23	*	2039	-	-	-	-	-	9,251,292	2,634,002	11,885,294	282,852
24		40					-	9,687,871	2,665,093	12,352,964	289,923
25		41					-	10,141,549	2,692,257	12,833,806	297,171
26		42					-	10,614,297	2,715,536	13,329,833	304,601
27		43					-	11,108,014	2,734,899	13,842,914	312,216
28	*	2044	-				-	11,624,553	2,750,251	14,374,803	320,021
29	*	2045	-				-	12,165,747	2,761,437	14,927,184	328,022
30	*	2046	-				-	12,733,438	2,768,251	15,501,689	336,222
31	*	2047	-				-	13,329,492	2,770,435	16,099,927	344,628
32	*	2048	-				-	13,955,815	2,767,690	16,723,504	353,243
33	*	2049	-				-	14,614,371	2,759,668	17,374,039	362,075
34	*	2050	-				-	15,307,195	2,745,981	18,053,176	371,126
35	*	2051	-	-	-	-	-	16,036,408	2,726,197	18,762,605	380,405
36	*	2052	-				-	16,804,221	2,699,844	19,504,065	389,915
37	*	2053	-				-	17,612,956	2,666,400	20,279,356	399,663
38	*	2054	-				-	18,465,052	2,625,303	21,090,355	409,654
39	*	2055	-				-	19,363,078	2,575,942	21,939,020	419,895
40	*	2056	-				-	20,309,738	2,517,661	22,827,398	430,393
41	*	2057	-				-	21,307,889	2,449,747	23,757,636	441,153
42	*	2058	-				-	22,360,549	2,371,438	24,731,987	452,181
43	*	2059	-	-	-	-	-	23,470,909	2,281,916	25,752,826	463,486
44	*	2060	-	-	-	-	-	24,642,343	2,180,300	26,822,643	475,073
45	*	2061	-	-	-	-	-	25,878,422	2,065,647	27,944,068	486,950
46	*	2062	-	-	-	-	-	27,182,924	1,936,945	29,119,870	499,124
47	*	2063	-	-	-	-	-	28,559,850	1,793,115	30,352,965	511,602
48	*	2064	-	-	-	-	-	30,013,440	1,632,996	31,646,436	524,392
49	*	2065	-	-	-	-	-	31,548,182	1,455,349	33,003,531	537,502
50	*	2066	-	-	-	-	-	33,168,829	1,258,846	34,427,675	550,939

17-year illustration period.

Asset value grow.

For consistency, the assumed cash flow for living expenses is the same in the Status Quo and ATGs Approach (see Column O).

Assumes 3% for settlement expenses, 40% federal estate tax and no state estate tax.

For consistency, the assumed cash flow for living expenses paid to the children/descendants is the same in the Status Quo and ATGs Approach (see column Y).

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Appendix C

	L	M	N	O	P	Q	R	S	T	U	V	W	X	Y	Z
	Annual Taxable Gifts (ATGs) Approach														
	During the G1's Lifetime.									Assets Removed From Taxable Estate				Post G1's Deaths	
	H's Age	Year	Total Estate Value	Cash Used For Living Expenses	Lifetime Gifts to Beneficiaries in Trusts	Gift Taxes Paid Per Year	Total of Gifts and Gift Tax as a percentage of Total Estate Value (Column P)	Reductions for payment of Settlement Expenses, State and Federal Estate Taxes	Net assets passing to family at the time of death	Cumulative Gifts in GST Exempt Trust	Cumulative Gifts to Non-GST Exempt Trust	Total Amount in Trust for Beneficiaries	Percentage of Total to Beneficiaries in ATGs Plan to Status Quo	Cash Used For Beneficiaries' Living Expenses	Amount of Estate Settlement Expenses Paid
0	70	2016	9,904,200	350,000	175,000	-	1.77%	2,029,956	7,874,244	175,000	-	8,049,244	100.04%	-	-
1	71	2017	9,731,195	358,750	245,000	-	2.52%	2,027,640	7,703,555	434,000	-	8,137,555	100.17%	-	-
2	72	2018	9,532,218	367,719	255,000	-	2.68%	2,014,467	7,517,751	723,720	-	8,241,471	100.40%	-	-
3	73	2019	9,313,049	376,912	255,000	-	2.74%	1,992,854	7,320,195	1,036,617	-	8,356,812	100.74%		
4	74	2020	9,070,296	386,335	255,000	-	2.81%	1,961,384	7,108,912	1,374,546	-	8,483,458	101.20%		
5	75	2021	8,797,588	395,993	255,000	-	2.90%	1,917,392	6,880,196	1,739,510	-	8,619,706	101.78%		
6	76	2022	8,494,307	405,893	255,000	-	3.00%	1,860,620	6,633,687	2,133,671	-	8,767,358	102.50%		
7	77	2023	8,156,980	416,040	255,000	-	3.13%	1,789,617	6,367,363	2,559,364	-	8,926,727	103.36%		
8	78	2024	7,772,013	426,441	265,000	-	3.41%	1,698,701	6,073,312	3,029,113	-	9,102,425	104.36%		
9	79	2025	7,354,858	437,102	255,000	-	3.47%	1,594,331	5,760,527	3,526,441	-	9,286,968	105.52%		
10	80	2026	6,879,312	448,030	265,000	-	3.85%	1,465,552	5,413,760	4,073,557	-	9,487,317	106.86%		
11	81	2027	6,353,184	459,230	265,000	-	4.17%	1,315,631	5,037,553	4,664,441	-	9,701,994	108.37%		
12	82	2028	5,771,981	470,711	265,000	-	4.59%	1,142,688	4,629,293	5,302,597	-	9,931,890	110.09%		
13	83	2029	5,127,626	482,479	265,000	-	5.17%	943,348	4,184,278	5,991,805	-	10,176,083	112.00%		
14	84	2030	4,386,610	494,541	265,000	-	6.04%	703,603	3,683,007	6,736,149	-	10,419,156	113.97%		
15	85	2031	3,543,004	506,904	265,000	-	7.48%	420,976	3,122,028	7,540,041	-	10,662,069	115.99%		
16	86	2032	2,574,740	519,577	275,000	-	10.68%	86,241	2,488,499	8,418,244	-	10,906,743	118.05%	-	-
17	87	2033	1,481,783	532,566	275,000	-	18.56%	44,453	1,437,330	9,366,704	-	10,804,034	116.45%	-	(44,453)
18	*	2034	-	-	-	-				11,242,774	-	11,242,774	116.43%	250,000	-
19	*	2035	-	-	-	-				11,701,293	-	11,701,293	115.88%	256,250	-
20	*	2036	-	-	-	-				12,171,651	-	12,171,651	115.50%	262,656	-
21	*	2037	-	-	-	-				12,656,105	-	12,656,105	115.26%	269,223	-
22	*	2038	-	-	-	-				13,156,726	-	13,156,726	115.12%	275,953	-
23	*	2039			-	-				13,675,446	-	13,675,446	115.06%	282,852	-
24	*	2040			-	-				14,214,100	-	14,214,100	115.07%	289,923	-
25	*	2041			-	-				14,774,456	-	14,774,456	115.12%	297,171	-
26	*	2042			-	-				15,358,247	-	15,358,247	115.22%	304,601	-
27	*	2043			-	-				15,967,193	-	15,967,193	115.35%	312,216	-
28	*	2044			-	-				16,603,019	-	16,603,019	115.50%	320,021	-
29	*	2045			-	-				17,267,473	-	17,267,473	115.68%	328,022	-
30	*	2046			-	-				17,962,349	-	17,962,349	115.87%	336,222	-
31	*	2047			-	-				18,689,488	-	18,689,488	116.08%	344,628	-
32	*	2048			-	-				19,450,800	-	19,450,800	116.31%	353,243	-
33	*	2049			-	-				20,248,271	-	20,248,271	116.54%	362,075	-
34	*	2050			-	-				21,083,978	-	21,083,978	116.79%	371,126	-
35	*	2051			-	-				21,960,093	-	21,960,093	117.04%	380,405	-
36	*	2052			-	-				22,878,897	-	22,878,897	117.30%	389,915	-
37	*	2053			-	-				23,842,788	-	23,842,788	117.57%	399,663	-
38	*	2054			-	-				24,854,295	-	24,854,295	117.85%	409,654	-
39	*	2055			-	-				25,916,081	-	25,916,081	118.13%	419,895	-
40	*	2056	-	-	-	-				27,030,955	-	27,030,955	118.41%	430,393	-
41	*	2057	-	-	-	-				28,201,886	-	28,201,886	118.71%	441,153	-
42	*	2058	-	-	-	-				29,432,012	-	29,432,012	119.00%	452,181	-
43	*	2059	-	-	-	-				30,724,646	-	30,724,646	119.31%	463,486	-
44	*	2060	-	-	-	-				32,083,294	-	32,083,294	119.61%	475,073	-
45	*	2061	-	-	-	-				33,511,664	-	33,511,664	119.92%	486,950	-
46	*	2062	-	-	-	-				35,013,678	-	35,013,678	120.24%	499,124	-
47	*	2063	-	-	-	-				36,593,488	-	36,593,488	120.56%	511,602	-
48	*	2064	-	-	-	-				38,255,485	-	38,255,485	120.88%	524,392	-
49	*	2065	-	-	-	-				40,004,320	-	40,004,320	121.21%	537,502	-
50	*	2066	-	-	-	-				41,844,917	-	41,844,917	121.54%	550,939	-

In this illustration, the accumulated gifts result in greater net benefits compared to Column K.

The pool of assets established outside the taxable estate, in the IGTs, is established slowly over time, allowing the G1 to feel more secure as the wealth would be slowly declining (or growing more slowly) over his LE concomitantly with his needs declining as he ages.

In this illustration, no gift taxes and no estate taxes are paid. Funding the GST exempt trust just uses gift exclusion of the husband. In the Status Quo, approximately $1.6 million is paid in estate taxes, net of settlement expenses.

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Line #	Input Data	Status Quo	Alt 1
	Factors that Will Likely Not Change		
1	First Year of Analysis	2016	2016
	Is this a Married Couple or Single Person	Single	Single
2	Client's Name (if not alive or if female client is single, enter "None")	Mick	Mick
3	Spouse's Name (if not alive of if male client is unmarried , enter "None")	Min	Min
4	Age of Client in Year of Analysis	70	70
5	Age of Spouse in Year of Analysis		
6	Client's prior taxable gifts - Federal	$ -	$ -
7	Spouse's prior taxable gifts - Federal	$ -	$ -
8	Client's prior taxable gifts - State	$ -	$ -
9	Spouse's prior taxable gifts - State	$ -	$ -
10	Client's prior use of his GST Exemption	$ -	$ -
11	Spouse's prior use of her GST Exemption	$ -	$ -
12	Number of Beneficiaries	3	3
13	Parents' Cash in Year 1	$ 300,000	300,000
14	Parents' Fair Market Value of Investment Assets in Year 1	$ 9,000,000	$ 9,000,000
15	Parents' Fair Market Value of Personal Assets in Year 1	$ 700,000	$ 700,000
16	Desired Cash Balance at Year End for Parents	$ 300,000	$ 300,000
17	GST Exempt Descendants Trust Cash in Year 1	$ -	$ -
18	GST Exempt Descendants Trust Fair Market Value of Investments in Year 1	$ -	$ -
19	GST Exempt Descendants Trust Adjusted Basis of Investments in Year 1	$ -	$ -
20	Non-GST Exempt Descendants Trust Cash in Year 1	$ -	$ -
21	Non-GST Exempt Descendants Trust Fair Market Value of Investments in Year 1	$ -	$ -
22	Non-GST Exempt Descendants Trust Adjusted Basis of Investments in Year 1	$ -	$ -
23	GST Exempt SLAT Cash in Year 1	$ -	$ -
24	GST Exempt SLAT Fair Market Value of Investments in Year 1	$ -	$ -
25	GST Exempt SLAT Adjusted Basis of Investments in Year 1	$ -	$ -
26	Non-GST Exempt SLAT Cash in Year 1	$ -	$ -
27	Non-GST Exempt SLAT Fair Market Value of Investments in Year 1	$ -	$ -
28	Non-GST Exempt SLAT Adjusted Basis of Investments in Year 1	$ -	$ -
29	Desired Cash Balance at Year End for Trusts	$ -	$ -
30	Estimated Cost of Living (not including payment of taxes) - Parents	$ 350,000	$ 350,000
31	Annual Exclusion Initial Year	$ 14,000	$ 14,000
32	Annual Exclusion Amount - In Year 2010	$ 10,000	$ 10,000
33	Basic Exclusion Amount - Federal - First Year of Analysis	$ 5,450,000	$ 5,450,000
34	Basic Exclusion Amount - State - First Year of Analysis	$ 2,000,000	$ 2,000,000
35	Basic Exclusion Amount - In Year 2010	$ 5,000,000	$ 5,000,000
36	GST Exemption - First Year of Analysis	$ 5,450,000	$ 5,450,000
37	Settlement Expense Rate	3.00%	3.00%
38	Tax Year 2011 - For COLA Adjustment Calculation	2011	2011
39	Cost of Living Adjustment - Living Expenses	2.50%	2.50%
40	Cost of Living Adjustment - Estate Tax	1.50%	1.50%
41	Initial Allocation Ratio to Cash Upon Receipt by SLAT and/or Descendants Trust	10.00%	10.00%
42	Initial Allocation Ratio to Investments Upon Receipt by SLAT and/or Descendants Trust	90.0%	90.00%
43	Other Factors that Can Change Easily		
44	Is there a Federal Estate Tax (if "Yes" the default tax rate will be the rate in existence in 2016)	Yes	Yes
45	Tax Rate - Federal - Estate Tax	40.00%	40.00%
46	Is there a Federal Gift Tax (if "Yes" the default tax rate will be the rate in existence in 2016)	Yes	Yes
47	Tax Rate - Federal - Gift Tax	40.00%	40.00%
48	Does Client live in a State subject to an estate tax	No	No
49	Does Spouse life in a State subject to an estate tax	No	No
50	Will the GST Exempt SLAT be a grantor trust?	Yes	Yes
51	Will the NON-GST Exempt SLAT be a grantor trust?	Yes	Yes
52	Will the GST Exempt Dynasty Trust be a grantor trust?	Yes	Yes
53	Will the NON-GST Exempt Dynasty Trust be a grantor trust?	Yes	Yes
54	Will the Client give the remaining exclusion in the beginning year?	No	No
55	If the Client will give an amount other than remaining exclusion, enter amount.	$ -	$ 175,000
56	Will the Client give the indexed exclusion amount each subsequent year?	No	Yes
57	Taxable gifts in excess of indexed exclusion amount made by the Client in year 2 and subsequent years (until death).		$ 175,000
58	Will the Spouse give the remaining exclusion in the beginning year?	No	No
59	If the Spouse will give an amont other than the remaining exclusion, enter amount.	$ -	$ -
60	Will the Spouse give the indexed exclusion amount each subsequent year?	No	No
61	Taxable gifts in excess of indexed exclusion amount made by the Spouse in year 2 and subsequent years (until death).		$ -
62	Tax Rate - State - Estate Tax	16.00%	16.00%
63	Beginning Adjusted Basis Ratio - Investment Assets	60.00%	60.00%
64	Beginning Adjusted Basis Ratio - Personal Assets	60.00%	60.00%
65	Rate of Return - Income - Investments	2.00%	2.00%
66	Rate of Return - Income - Personal Assets	0.00%	0.00%
67	Rate of Return - Principal - Investments	6.00%	6.00%
68	Rate of Return - Principal - Personal Assets	2.00%	2.00%
69	Turnover Rate - Investments	20.00%	20.00%
70	Turnover Rate - Personal Assets	0.00%	0.00%
71	Tax Rate - Federal - Income Tax - Ordinary Income	25.00%	25.00%
72	Tax Rate - Federal - Income Tax - Capital Gains	24.00%	24.00%
73	Tax Rate - State - Income Tax - Ordinary Income	5.00%	5.00%
74	Tax Rate - State - Income Tax - Capital Gain	5.00%	5.00%
75	Distribution From Non GST Exempt Descendants Trust First Year after Parents Death	$ 125,000	$ -
76	Distribution From GST Exempt Descendants Trust First Year after Parents Death	$ 125,000	$ 250,000
77	CLAT Factors		
85	Testamentary CLAT		
86	Portion of Gross Estate (after expenses) that will pass to charity	0.00%	0.00%
87	To Run the Circular Calculation if 100% of the Estate is Going To Charity		
88	CLAT - Term (in years)	20	20
89	CLAT - 7520 Rate	2.00%	2.00%
90	CLAT - Increasing Annuity Percentage	0.00%	0.00%
91	To Run the Iteration to accomplish a Zeroed-Out Testamentary CLAT		
92	Private Foundation Factors		
93	Expense Ratio	1.00%	1.00%
94	Payout to Public Charity	5.00%	5.00%
95	Calculated Amounts		
96	Year of Client's Passing	2033	
97	Year of Spouse's Passing	2015	
98	Client's Age at Actuarial Date of Death	87	
99	Spouse's Age at Actuarial Date of Death	N/A	

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ESTATE TAX NET GIFT AGREEMENT
(for Federal and/or State estate tax on gift taxes)

THIS AGREEMENT is entered into on [MONTH], [DATE], [YEAR], by me, [NAME OF DONOR], as the donor (hereinafter "Donor"), and by [NAME OF TRUSTEE], as Trustee of the [NAME OF IRREVOCABLE TRUST], as the donee (hereinafter "Donee").

WHEREAS, Donor anticipates making annual gifts to Donee. It is anticipated that the annual gifts will be considered 'taxable gifts' for purposes of the Federal gift tax laws under Chapter 12 of the Internal Revenue Code of 1986, as amended (the "Code"), and that such gifts may cause a gift tax liability to be assessed on such annual gifts.

WHEREAS, Donor desires that any gift to Donee be conditioned upon Donee's payment of all of taxes imposed on any such transfer on account of Donor's death within three (3) years of the date of such gift under Chapter 11 of the Code, and any similar taxes imposed under applicable state law (the "reimbursable estate taxes").

WHEREAS, Donee desires to accept any gifts from Donor, subject to the obligation to pay all reimbursable estate taxes.

NOW THEREFORE, in consideration of the foregoing, of the mutual promises of the parties contained herein and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending legally and equitably to be bound, hereby covenant and agree as follows:

SAMPLE

1. Recitals. The foregoing recitals are incorporated herein and, by this reference, made a substantive part hereof.

2. Estate Tax on Gift Tax. Donee agrees to assume, pay and indemnify the executor of Donor's estate (the "Executor") against all liability for the reimbursable estate taxes with respect to any gift made by Donor, if Donor does not survive for three (3) years following the date of such gift, including all penalties and interest which accrue upon such reimbursable estate tax liability except such penalties and interest that are directly attributable to actions or delays committed by Executor. For purposes of determining and allocating the estate taxes, (i) the value of all additional tax shall be as finally determined for federal and state estate tax purposes with respect to Donor's estate, and (ii) the only gift tax taken into account in the calculation shall be the gift tax on Donor's gifts to Donee.

3. Payment. Donee shall deliver to Executor an amount equal to the reimbursable estate taxes (including interest and penalties, if any), by certified check made payable to the United States Treasury, no later than thirty (30) days before the due date for payment of said reimbursable estate taxes, or, if later, as soon thereafter as Executor notifies Donee of the amount of the reimbursable estate taxes (including interest and penalties, if any).

4. Gift Tax Returns. Donor or Executor (as the case may be) shall timely file a gift tax return and pay the federal and state gift taxes, if any, related to any gifts, together with any additional gift taxes that may later be correctly assessed with respect to any gifts, including any interest and penalties. All costs of contesting such assessment shall be borne solely by Donor or Executor (on behalf of Donor's estate).

5. Copies of Gift Tax Returns. Executor will deliver copies of said gift tax returns (and any amendments) reporting any gifts within three (3) years of Donor's death to Donee. Executor shall deliver such copies within three (3) months after the time of Donor's death or, if later, within 30 days following the filing of such return or returns.

SAMPLE

6. Governing Law. This agreement and the rights and duties of the parties thereunder will be determined in accordance with the laws of [*state*].

7. Entire Agreement. This agreement sets forth the entire understanding and agreement of the parties with respect to the property. Any change or modification of this agreement shall be valid only if it is in writing and signed by all of the parties.

8. Third Parties. This agreement shall inure to the benefit of the parties and be binding upon them and their legal representatives, successors, and assigns.

____________________ [*signature*]
[NAME OF DONOR], Donor

Donee
[NAME OF TRUSTEE], as Trustee of the
[NAME OF IRREVOCABLE TRUST]

____________________ [*signature*]
By: _________________

Its:_________________

SAMPLE

Appendix E

Strategic Estate Planning Summary

Analysis of Alternative Planning Scenarios

A COMPARISON OF KEY VALUES

AN ANALYSIS PREPARED EXCLUSIVELY FOR

Mick & Min Sample

Base Case vs. ATGs, GST Planning & T-CLAT to Eliminate Estate Taxes

Estate Analysis Summary

Mick & Min Sample

Mick's Estate Analysis	**Base**	**Planning**
Year	2036	2036
Combined net worth plus the value of estate planning vehicles	50,757,787	54,779,031
Net worth includible in Mick's gross estate	25,378,894	10,923,046
Gross estate	25,378,894	10,923,046
Less: nontax estate settlement costs	-761,367	-327,691
Adjusted gross estate	**24,617,527**	**10,595,354**
Specific outright bequests to Min	6,766,366	3,757,198
Outright residuary bequests to Min	10,511,160	0
Residuary bequests to Min in trust	0	6,294,156
Total marital bequests	**17,277,526**	**10,051,354**
Federal taxable estate	7,340,001	544,001
Post-1976 adjusted taxable gifts	0	6,796,000
Federal estate tax base	**7,340,001**	**7,340,001**
State taxable estate	**600,000**	**544,001**
Federal estate tax	0	0
State death taxes	0	0
Total Death Taxes	**0**	**0**

Min's Estate Analysis	**Base**	**Planning**
Year	2037	2037
Personal net worth plus the value of estate planning vehicles	50,735,615	50,114,728
Net worth includible in gross estate	43,073,242	19,936,224
Gross estate	43,073,242	19,936,224
Less: nontax estate settlement costs	-1,292,197	-598,087
Adjusted gross estate	**41,781,045**	**19,338,137**
Residuary charitable bequests	0	19,104,137
Total charitable bequests	**0**	**19,104,137**
Taxable estate before state death tax deduction	41,781,045	234,001
Less: state death tax deduction	7,181,531	0
Federal taxable estate	34,599,514	234,001
Post-1976 adjusted taxable gifts	0	7,216,000
Federal estate tax base	**34,599,514**	**7,450,001**
State taxable estate [includes value of state QTIP trust]	**48,817,067**	**234,001**
Federal estate tax	10,859,805	0
State death taxes	7,181,531	0
Total Death Taxes	**18,041,336**	**0**

Strategic Estate Planning Summary - Base Case vs. ATGs, GST Planning & T-CLAT to Eliminate Estate Taxes

Wealth Transfer Summary as of the End of the Senior Generation

Mick & Min Sample

Net to Heirs Summary	Base	Planning
Year	2037	2037
Heirs Accumulation Fund & testamentary trust remainder interests	23,739,709	0
Bypass Trust	7,662,373	574,891
QTIP Trust	0	234,001
Mick's ATG Trust & Min's ATG Trust	0	31,351,278
T-CLAT	0	1
Net to Heirs	**31,402,082**	**32,160,170**

Settlement Costs & Taxes	Base	Planning
Federal & state death taxes	18,041,336	0
Estate settlement costs	2,053,564	925,778
Deferred capital gains & Medicare taxes	0	4,676,895
Total Settlement Costs & Taxes	**20,094,900**	**5,602,673**

Wealth Transfer Summary as of the End of the 2nd Generation

Mick & Min Sample

Net to Heirs Summary	Base	Planning
Year	2057	2057
Heirs Accumulation Fund & testamentary trust remainder interests	122,978,090	3,167,814
Mick's ATG Trust & Min's ATG Trust	0	117,252,516
T-CLAT	0	28,227,879
Net to Heirs	**122,978,090**	**148,648,208**

Settlement Costs & Taxes	Base	Planning
Federal & state death taxes	18,041,336	0
Estate settlement costs	2,053,564	925,778
Deferred capital gains & Medicare taxes	16,676,582	30,547,205
Total Settlement Costs & Taxes	**36,771,482**	**31,472,983**

Value of Cumulative Transfers to Charity	Base	Planning
Year	2057	2057
Cumulative payments from charitable lead trusts	0	23,820,322
Cumulative income & growth on charitable transfers	0	30,682,915
Total Value of Charitable Transfers	**0**	**54,503,237**

Net to 3rd Generation Summary	Base	Planning
Year	2057	2057
Net to heirs	31,402,082	32,160,170
Aggregate growth between 2037 and 2057 net of T-CLAT annuity payments to charity	91,576,008	116,488,038
Total transferable family wealth	122,978,090	148,648,208
Amount subject to second generation death taxes	63,777,692	28,227,879
Less: second generation federal & state death taxes	-25,511,077	-11,291,151
Net to 3rd Generation	**97,467,013**	**137,357,057**

	Base	Planning
Net transfer as a percentage of wealth - 2nd generation	61.0%	85.2%
Net transfer as a percentage of wealth - 3rd generation	61.0%	58.5%

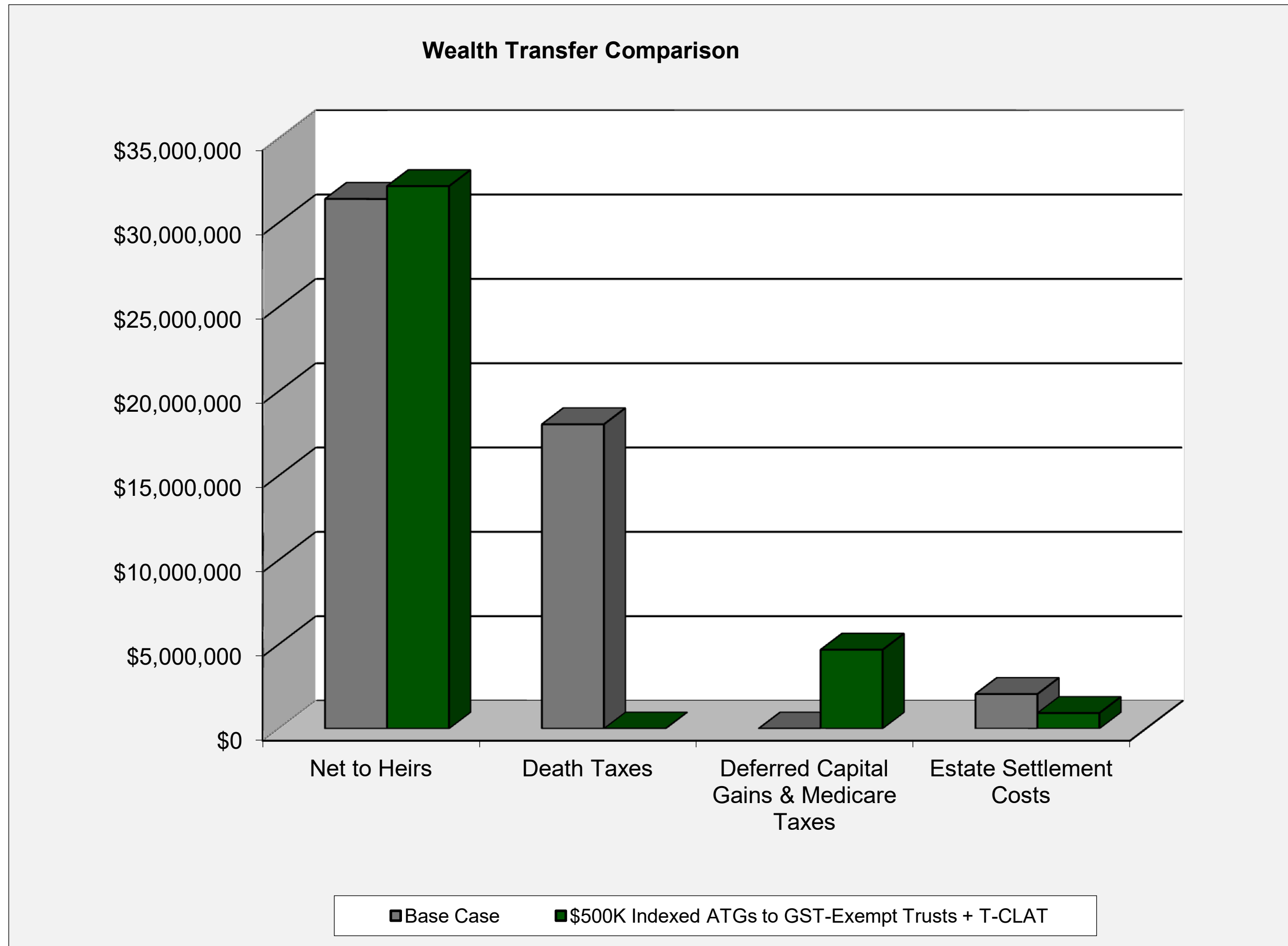
Planning Assumptions

Mick & Min Sample

Planning Assumptions	Base	Planning
1. Annual returns are 2% income (80% qualified dividends) and 6% growth	x	x
2. Mick's and Min's portfolios are turned over 20% at year end annually	x	x
3. $750,000 annual living expenses, indexed at 2.5%	x	x
4. Annual exclusion gifts to three donees with gift splitting, indefinitely	x	x
5. Mick and Min fund credit shelter bypass trusts at death with remaining AEA	x	x
6. Mick fund's a state QTIP trust at death ($600K state death tax exemption)	x	x
7. Mick and Min together make annual taxable gifts of $500K, indexed at 2.5%		x
8. Mick's and Min's ATG trusts are treated as grantor trusts		x
9. Mick and Min allocate GST exemptions to ATGs		x
10. Remaining GST exemptions allocated to family trusts at death	x	x
11. 20-year zero-out T-CLAT funded at the 2nd death to eliminate estate taxes		x

Wealth Transfer Illustration as of the End of the Senior Generation

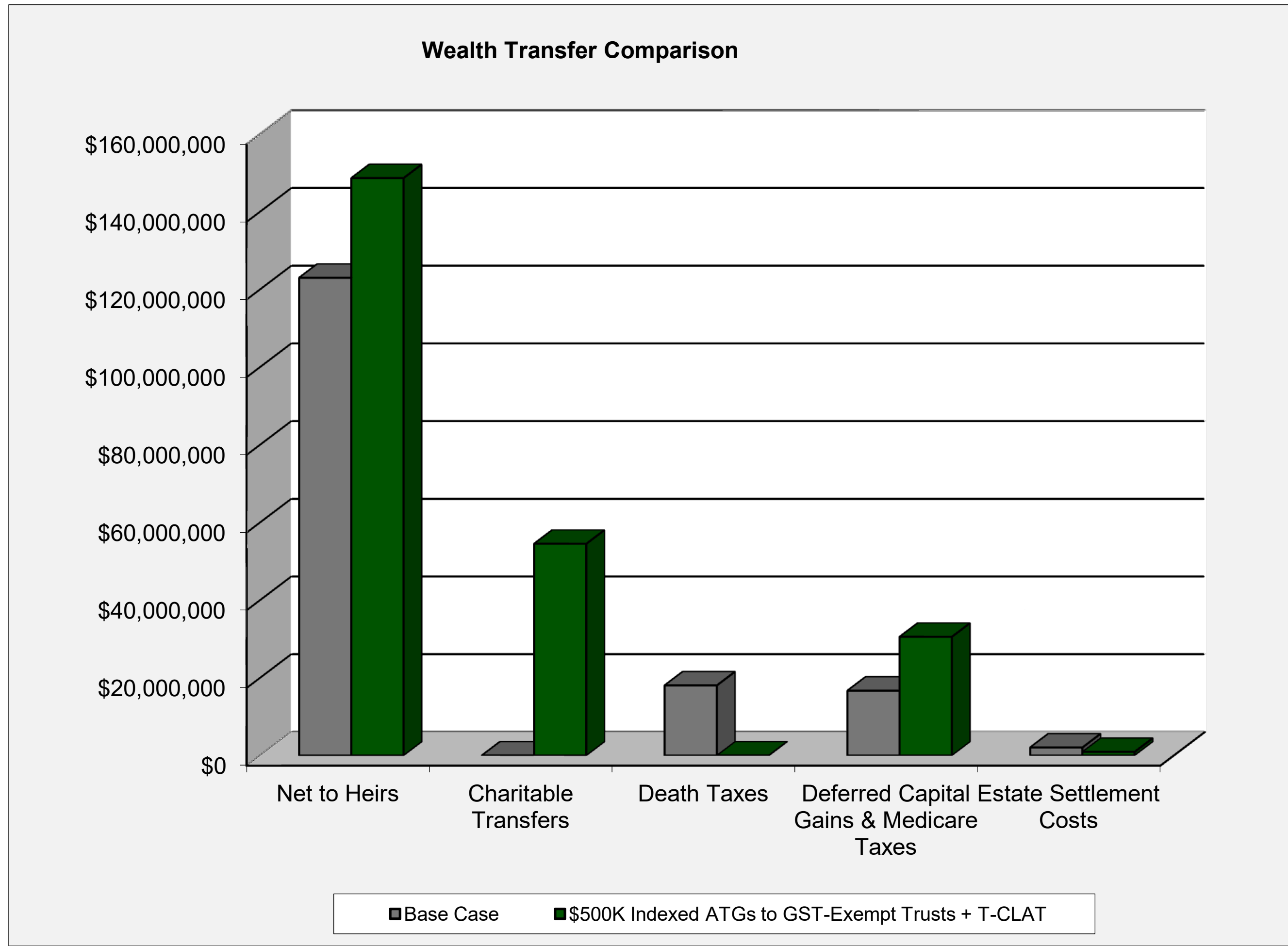
Mick & Min Sample



The chart above compares the wealth transferred to heirs, along with federal and state death taxes.

Wealth Transfer Illustration as of the End of the 2nd Generation

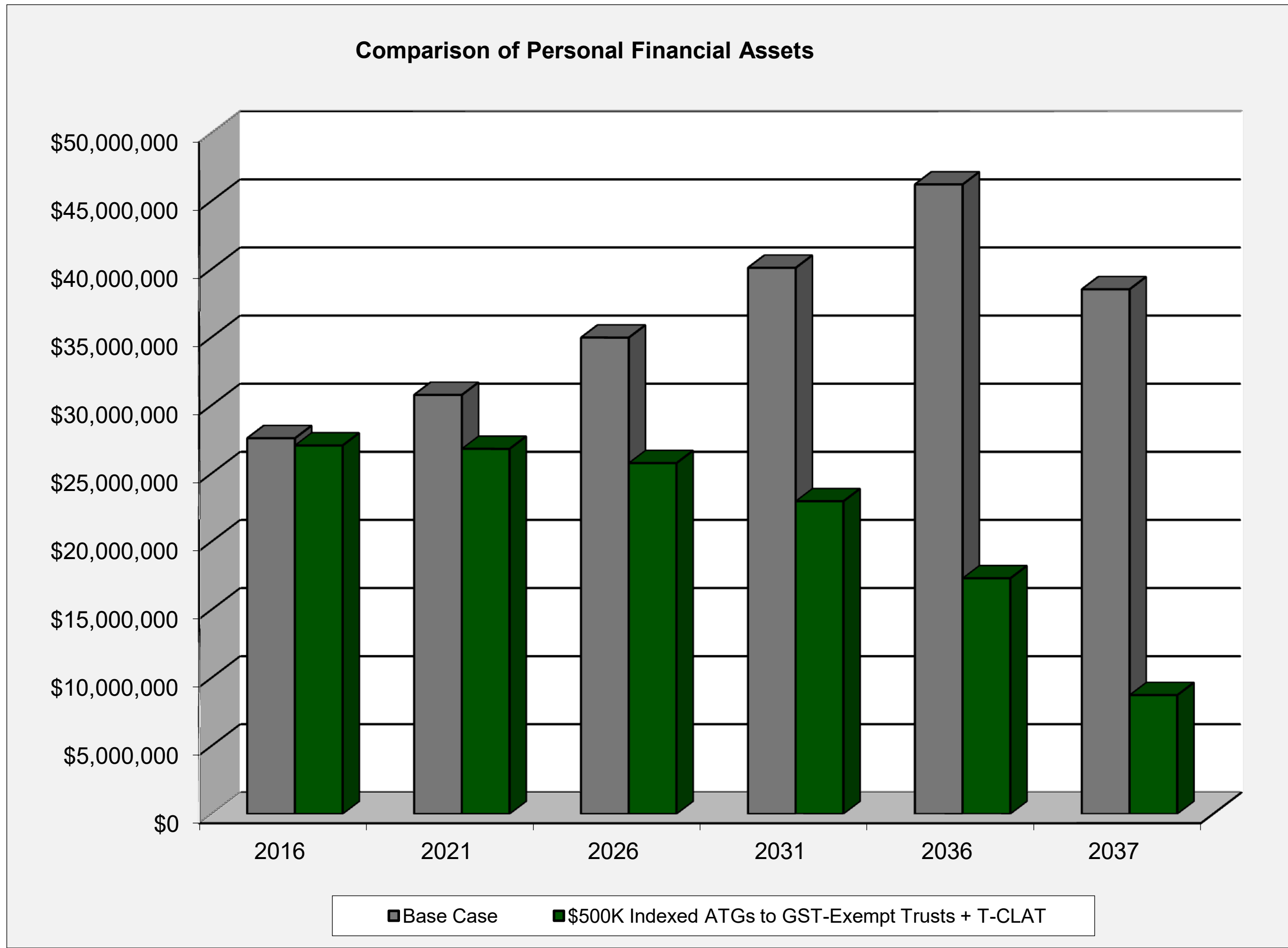
Mick & Min Sample



The chart above compares the wealth transferred to heirs, along with federal and state death taxes.

Personal Financial Assets Comparison

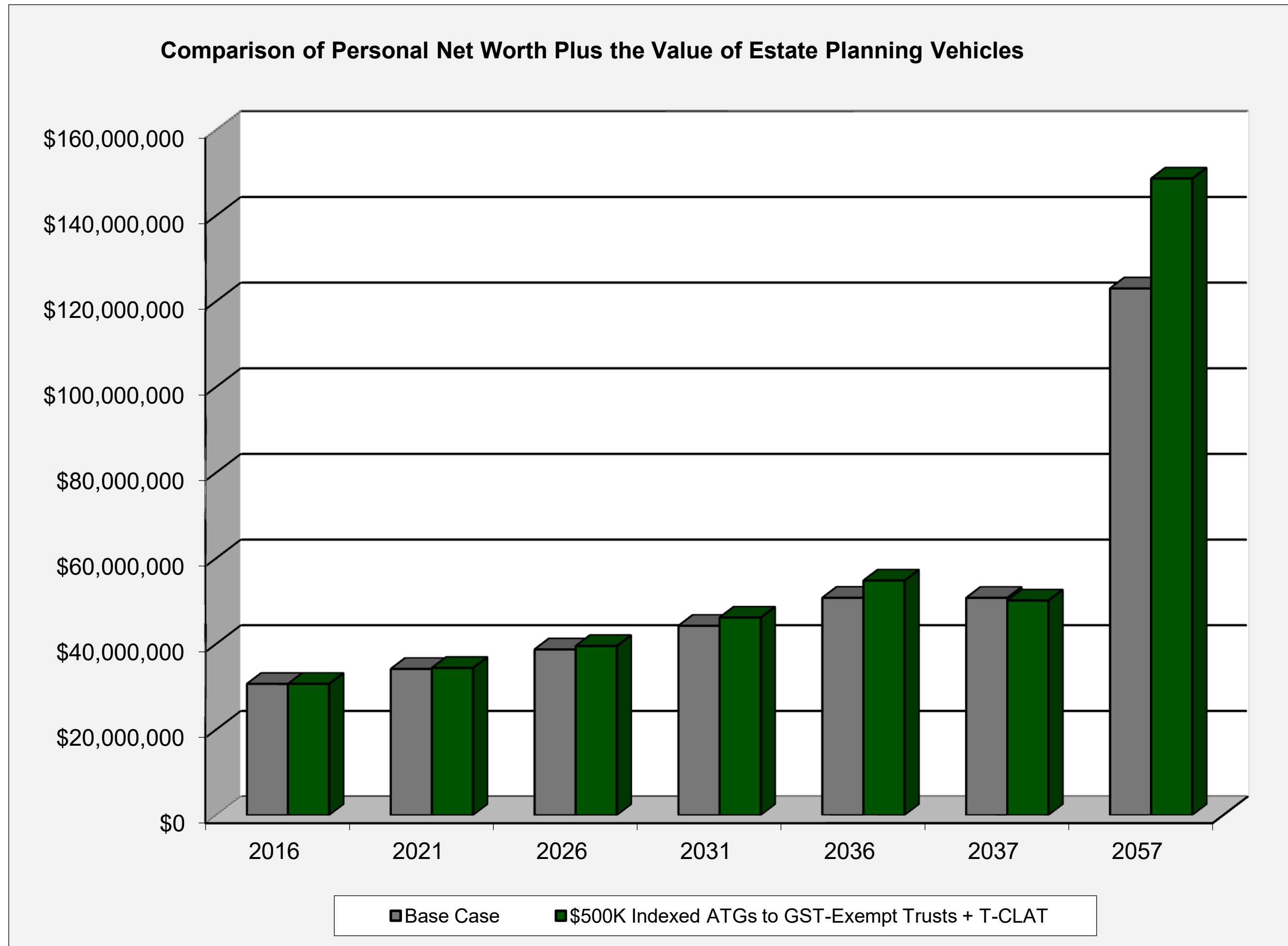
Mick & Min Sample



The chart above compares the personal financial assets under alternative planning scenarios.

Family Wealth Comparison

Mick & Min Sample



The chart above compares total family wealth under alternative planning scenarios.

Strategic Estate Planning Illustration

An Integrated Analysis of

LIFETIME CASH FLOWS, NET WORTH & FAMILY WEALTH

AN ANALYSIS PREPARED EXCLUSIVELY FOR

Mick & Min Sample

$500K Indexed ATGs to GST-Exempt Trusts + T-CLAT

Annual Cash Flows & Projected Net Worth Summary

Mick & Min Sample

	Integrated Cash Flows				Assets					
Year	Pretax Cash Inflows	Nontax Cash Outflows	Taxes	Cash Flow Surplus/ -Deficit	Personal Financial Assets	Personal Assets	Total Liabilities	Net Worth	Irrevocable Trusts	Pretax Family Wealth
Start					27,000,000	3,000,000	0	30,000,000	0	30,000,000
2016	5,916,000	834,000	654,638	4,427,363	27,051,363	3,060,000	0	30,111,363	540,000	30,651,363
2017	5,925,132	852,750	718,205	4,354,177	27,011,557	3,121,200	0	30,132,757	1,136,160	31,268,917
2018	5,912,649	871,969	675,929	4,364,751	26,976,503	3,183,624	0	30,160,127	1,795,133	31,955,260
2019	5,901,733	891,668	644,058	4,366,007	26,937,858	3,247,296	0	30,185,155	2,519,783	32,704,938
2020	5,889,519	911,860	620,466	4,357,193	26,884,401	3,312,242	0	30,196,643	3,317,526	33,514,169
2021	5,873,869	938,556	603,665	4,331,648	26,801,652	3,378,487	0	30,180,139	4,194,208	34,374,347
2022	5,851,423	959,770	592,299	4,299,354	26,687,315	3,446,057	0	30,133,372	5,156,145	35,289,517
2023	5,821,649	981,514	584,950	4,255,185	26,534,316	3,514,978	0	30,049,294	6,210,156	36,259,450
2024	5,782,441	1,003,802	580,742	4,197,897	26,333,717	3,585,278	0	29,918,995	7,365,769	37,284,764
2025	5,732,654	1,032,647	578,996	4,121,011	26,074,851	3,656,983	0	29,731,834	8,628,950	38,360,785
2026	5,668,885	1,056,063	579,129	4,033,694	25,754,447	3,730,123	0	29,484,570	10,010,466	39,495,037
2027	5,590,840	1,080,065	580,814	3,929,960	25,365,444	3,804,725	0	29,170,169	11,519,784	40,689,953
2028	5,496,879	1,104,667	583,582	3,808,630	24,900,670	3,880,820	0	28,781,490	13,167,127	41,948,617
2029	5,384,875	1,129,883	587,104	3,667,888	24,350,537	3,958,436	0	28,308,973	14,965,697	43,274,669
2030	5,253,532	1,161,730	591,185	3,500,617	23,703,184	4,037,605	0	27,740,789	16,925,432	44,666,222
2031	5,099,171	1,188,224	595,540	3,315,407	22,953,756	4,118,357	0	27,072,113	19,061,387	46,133,500
2032	4,921,127	1,215,379	600,046	3,105,702	22,093,271	4,200,724	0	26,293,995	21,387,658	47,681,653
2033	4,717,319	1,249,214	604,554	2,863,551	21,106,165	4,284,739	0	25,390,904	23,919,471	49,310,374
2034	4,483,670	1,277,744	608,878	2,597,049	19,985,636	4,370,434	0	24,356,070	26,675,428	51,031,498
2035	4,219,068	1,306,988	612,915	2,299,165	18,720,585	4,457,842	0	23,178,427	29,673,462	52,851,890
2036	3,920,936	1,336,962	616,577	1,967,396	17,299,092	4,546,999	0	21,846,092	32,932,939	54,779,031
2037	2,158,236	1,316,686	508,523	333,027	8,721,858	4,637,939	75,136	13,284,661	36,830,067	50,114,728

Integrated Cash Flows Illustration

Mick & Min Sample

	Pretax Cash Inflows				Nontax Cash Outflows				
Year	Interest Income	Qualified Dividends	Portfolio Liquidations	Total Pretax Cash Inflows	Annual Exclusion Gifts	Living Expenses	Total Nontax Cash Outlfows	Taxes	Cash Flow Surplus/ -Deficit
2016	102,000	408,000	5,406,000	5,916,000	84,000	750,000	834,000	654,638	4,427,363
2017	102,157	408,630	5,414,345	5,925,132	84,000	768,750	852,750	718,205	4,354,177
2018	101,942	407,769	5,402,938	5,912,649	84,000	787,969	871,969	675,929	4,364,751
2019	101,754	407,016	5,392,963	5,901,733	84,000	807,668	891,668	644,058	4,366,007
2020	101,543	406,174	5,381,802	5,889,519	84,000	827,860	911,860	620,466	4,357,193
2021	101,274	405,094	5,367,501	5,873,869	90,000	848,556	938,556	603,665	4,331,648
2022	100,887	403,546	5,346,990	5,851,423	90,000	869,770	959,770	592,299	4,299,354
2023	100,373	401,493	5,319,783	5,821,649	90,000	891,514	981,514	584,950	4,255,185
2024	99,697	398,789	5,283,955	5,782,441	90,000	913,802	1,003,802	580,742	4,197,897
2025	98,839	395,355	5,238,460	5,732,654	96,000	936,647	1,032,647	578,996	4,121,011
2026	97,739	390,958	5,180,188	5,668,885	96,000	960,063	1,056,063	579,129	4,033,694
2027	96,394	385,575	5,108,871	5,590,840	96,000	984,065	1,080,065	580,814	3,929,960
2028	94,774	379,095	5,023,010	5,496,879	96,000	1,008,667	1,104,667	583,582	3,808,630
2029	92,843	371,371	4,920,662	5,384,875	96,000	1,033,883	1,129,883	587,104	3,667,888
2030	90,578	362,313	4,800,642	5,253,532	102,000	1,059,730	1,161,730	591,185	3,500,617
2031	87,917	351,667	4,659,587	5,099,171	102,000	1,086,224	1,188,224	595,540	3,315,407
2032	84,847	339,388	4,496,892	4,921,127	102,000	1,113,379	1,215,379	600,046	3,105,702
2033	81,333	325,332	4,310,653	4,717,319	108,000	1,141,214	1,249,214	604,554	2,863,551
2034	77,305	309,219	4,097,147	4,483,670	108,000	1,169,744	1,277,744	608,878	2,597,049
2035	72,743	290,970	3,855,355	4,219,068	108,000	1,198,988	1,306,988	612,915	2,299,165
2036	67,602	270,409	3,582,924	3,920,936	108,000	1,228,962	1,336,962	616,577	1,967,396
2037	62,206	248,822	1,847,208	2,158,236	57,000	1,259,686	1,316,686	508,523	333,027

Income Tax Illustration

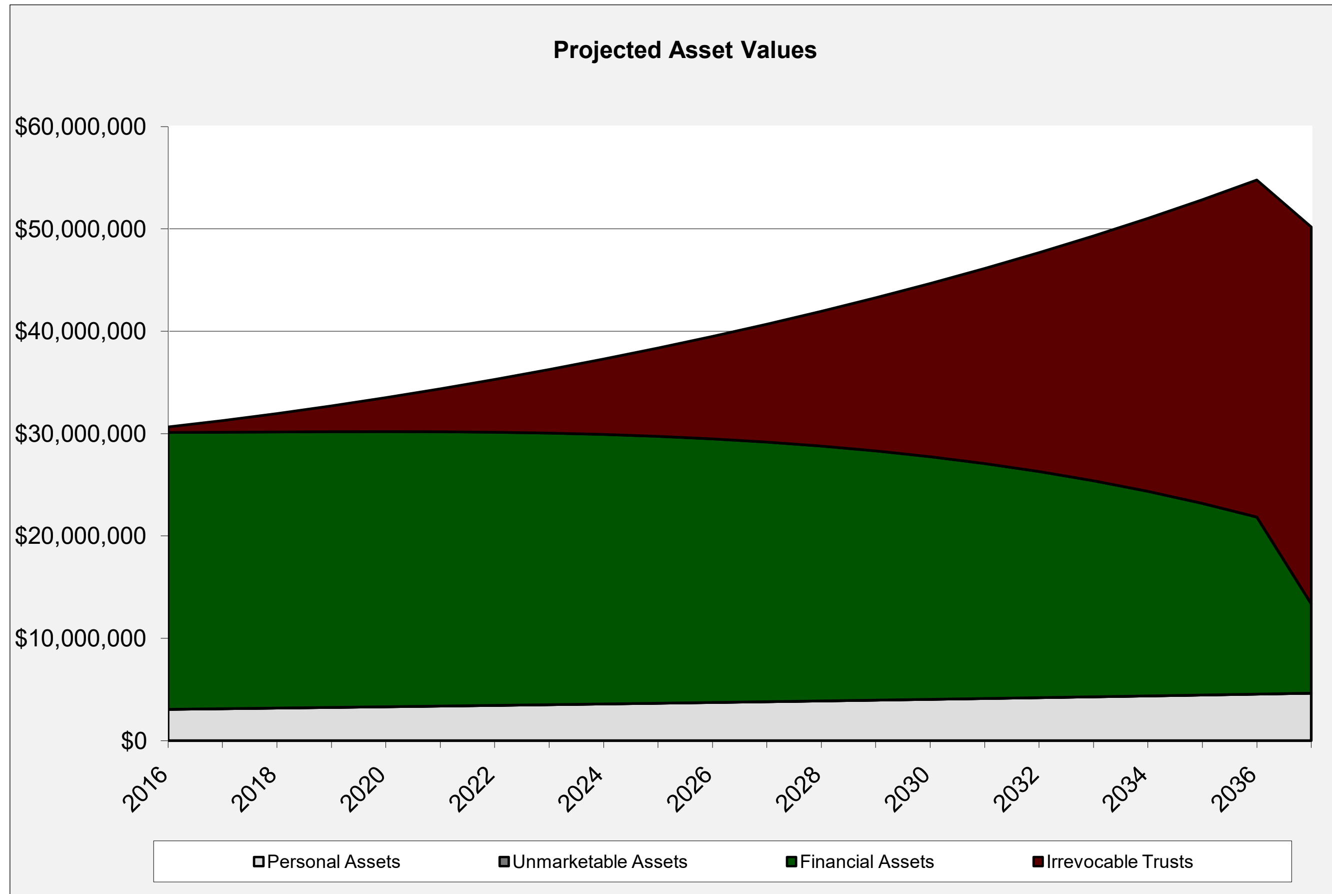
Mick & Min Sample

Note: AGI includes taxable income and capital gains associated with ATG grantor trusts

	Adjusted Gross Income				Taxable Income		Taxes		
Year	Ordinary Income	Qualified Dividends	Capital Gains/-Losses	Adjusted Gross Income	Tax Deductions	Taxable Income	Federal & State Income Taxes	Social Security & Medicare Taxes	Total Taxes
2016	104,000	416,000	2,352,000	2,872,000	143,600	2,728,400	654,638	0	654,638
2017	106,365	425,462	2,151,459	2,683,286	134,164	2,549,122	609,069	109,136	718,205
2018	108,591	434,363	1,995,283	2,538,237	126,912	2,411,325	573,964	101,965	675,929
2019	111,087	444,346	1,874,190	2,429,623	121,481	2,308,142	547,605	96,453	644,058
2020	113,831	455,322	1,780,652	2,349,805	117,490	2,232,315	528,141	92,326	620,466
2021	116,808	467,231	1,708,777	2,292,816	114,641	2,178,175	514,372	89,293	603,665
2022	119,983	479,934	1,653,768	2,253,685	112,684	2,141,001	505,172	87,127	592,299
2023	123,374	493,495	1,611,833	2,228,702	111,435	2,117,267	499,310	85,640	584,950
2024	126,978	507,912	1,579,816	2,214,706	110,735	2,103,971	496,051	84,691	580,742
2025	130,798	523,192	1,555,393	2,209,383	110,469	2,098,914	494,837	84,159	578,996
2026	134,815	539,261	1,536,396	2,210,472	110,524	2,099,948	495,172	83,957	579,129
2027	139,060	556,239	1,521,218	2,216,516	110,826	2,105,690	496,816	83,998	580,814
2028	143,541	574,164	1,508,547	2,226,252	111,313	2,114,939	499,355	84,228	583,582
2029	148,271	593,085	1,497,185	2,238,540	111,927	2,126,613	502,506	84,598	587,104
2030	153,265	613,060	1,486,323	2,252,648	112,632	2,140,016	506,120	85,065	591,185
2031	158,514	634,058	1,474,995	2,267,567	113,378	2,154,189	509,939	85,601	595,540
2032	164,061	656,242	1,462,512	2,282,815	114,141	2,168,674	513,879	86,168	600,046
2033	169,924	679,695	1,448,266	2,297,885	114,894	2,182,991	517,807	86,747	604,554
2034	176,103	704,410	1,431,509	2,312,022	115,601	2,196,421	521,558	87,320	608,878
2035	182,644	730,577	1,411,697	2,324,919	116,246	2,208,673	525,058	87,857	612,915
2036	189,576	758,305	1,388,296	2,336,177	116,809	2,219,368	528,230	88,347	616,577
2037	195,617	782,469	889,775	1,867,862	93,393	1,774,469	419,748	88,775	508,523

Asset Values Illustration

Mick & Min Sample



The chart above illustrates the changes in asset values during the analysis period.

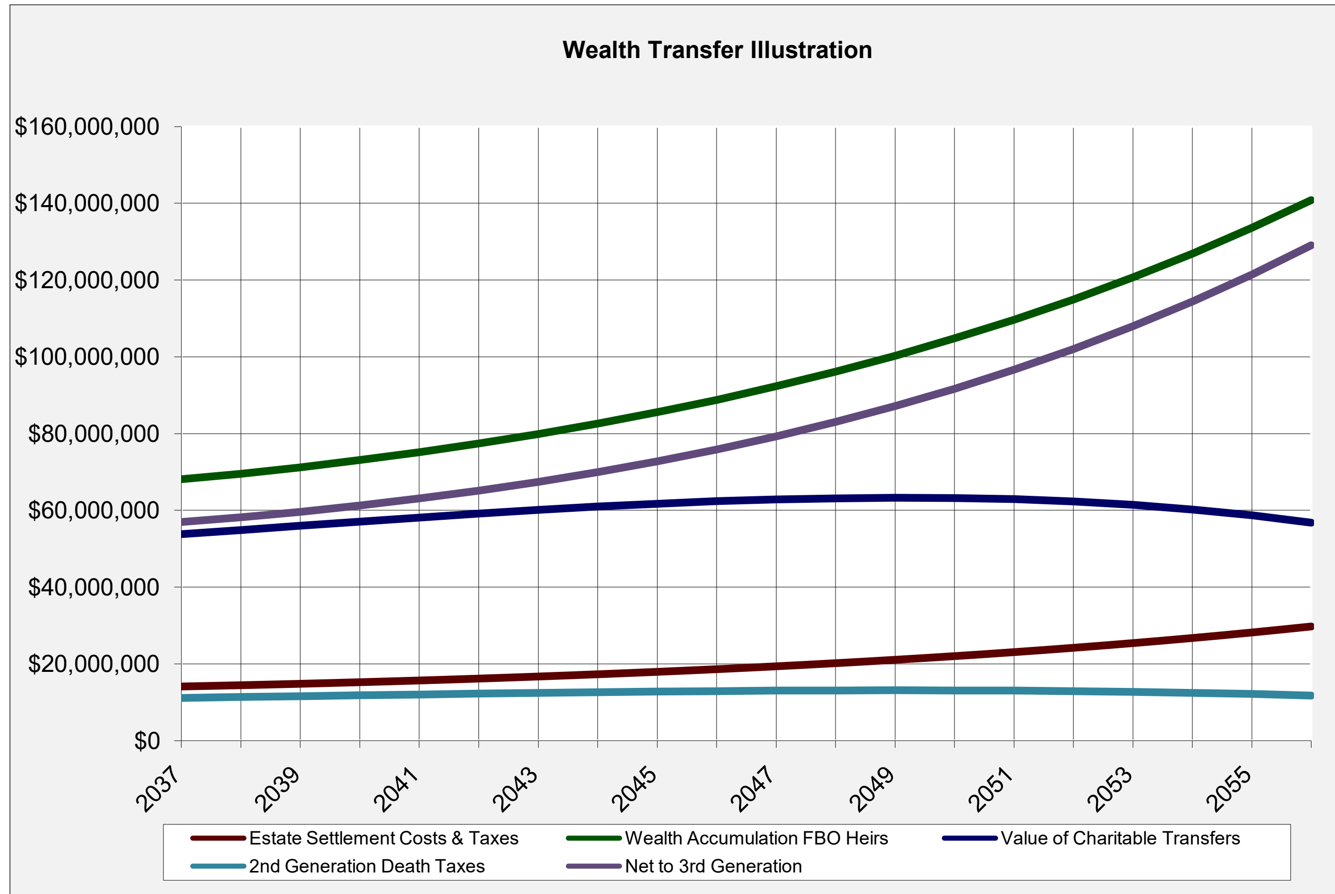
Wealth Transfer Illustration Across a Range of Life Expectancies

Mick & Min Sample

		Wealth Transfer at the End of the Senior Generation				Wealth Transfer at the End of the 2nd Generation					
Mick's Age at Death	Min's Age at Death	Year	Estate Settlement Costs & Taxes	Net to Heirs	Total Value of Charitable Transfers	Year	Estate Settlement Costs & Taxes	Net Wealth Accumulation FBO Heirs	Total Value of Charitable Transfers	2nd Generation Federal & State Death Taxes	Net to 3rd Generation
67	68	2017	2,316,079	10,319,961	0	2037	14,079,823	68,109,759	53,791,922	11,143,792	56,965,967
68	69	2018	2,344,508	10,578,088	0	2038	14,412,638	69,565,395	54,874,840	11,368,134	58,197,261
69	70	2019	2,379,378	10,893,356	0	2039	14,786,058	71,229,250	55,966,792	11,594,348	59,634,902
70	71	2020	2,418,975	11,262,733	0	2040	15,197,789	73,092,196	57,068,668	11,822,618	61,269,578
71	72	2021	2,467,252	11,686,848	0	2041	15,649,435	75,141,944	58,149,566	12,046,542	63,095,402
72	73	2022	2,524,277	12,182,236	0	2042	16,144,494	77,416,791	59,156,192	12,255,080	65,161,711
73	74	2023	2,591,009	12,744,205	0	2043	16,684,110	79,907,545	60,104,602	12,451,557	67,455,988
74	75	2024	2,669,458	13,377,841	0	2044	17,271,625	82,624,408	60,975,431	12,631,962	69,992,446
75	76	2025	2,759,152	14,091,276	0	2045	17,908,579	85,585,460	61,741,381	12,790,640	72,794,820
76	77	2026	2,864,307	14,888,568	0	2046	18,599,928	88,796,580	62,382,773	12,923,514	75,873,066
77	78	2027	2,984,421	15,789,523	0	2047	19,352,051	92,314,454	62,859,819	13,022,341	79,292,113
78	79	2028	3,124,550	16,799,365	0	2048	20,171,324	96,148,594	63,151,595	13,082,787	83,065,807
79	80	2029	3,280,636	17,912,534	0	2049	21,056,109	100,295,897	63,295,235	13,112,544	87,183,353
80	81	2030	3,459,299	19,143,617	0	2050	22,015,167	104,783,129	63,232,785	13,099,606	91,683,523
81	82	2031	3,663,872	20,512,538	0	2051	23,057,358	109,660,059	62,910,506	13,032,842	96,627,217
82	83	2032	3,896,838	22,030,291	0	2052	24,190,489	114,960,715	62,312,564	12,908,969	102,051,746
83	84	2033	4,159,501	23,700,668	0	2053	25,418,477	120,695,946	61,432,291	12,726,607	107,969,339
84	85	2034	4,454,824	25,535,892	0	2054	26,749,108	126,898,402	60,242,123	12,480,046	114,418,356
85	86	2035	4,786,349	27,550,780	0	2055	28,192,711	133,612,866	58,718,325	12,164,369	121,448,497
86	87	2036	5,165,288	29,752,208	0	2056	29,762,304	140,849,520	56,829,754	11,773,124	129,076,396
87	88	2037	5,602,673	32,160,170	0	2057	31,472,983	148,648,208	54,503,237	11,291,151	137,357,057

Wealth Transfer Illustration as of the End of the 2nd Generation

Mick & Min Sample



The chart above illustrates the wealth transfer to heirs and charity, along with estate settlement costs and taxes.

Mick's ATG Trust Illustration

Mick & Min Sample

			Current-Year Returns		Taxes			
Year	Beginning Value	Gifts Received	Income	Growth	Taxable Income	Taxable Gains	Taxes	Ending Value
2016	0	250,000	5,000	15,000	5,000	3,000	0	270,000
2017	270,000	256,000	10,520	31,560	10,520	6,312	0	568,080
2018	568,080	263,000	16,622	49,865	16,622	9,973	0	897,566
2019	897,566	269,000	23,331	69,994	23,331	13,999	0	1,259,892
2020	1,259,892	276,000	30,718	92,154	30,718	18,431	0	1,658,763
2021	1,658,763	283,000	38,835	116,506	38,835	23,301	0	2,097,104
2022	2,097,104	290,000	47,742	143,226	47,742	28,645	0	2,578,072
2023	2,578,072	297,000	57,501	172,504	57,501	34,501	0	3,105,078
2024	3,105,078	305,000	68,202	204,605	68,202	40,921	0	3,682,884
2025	3,682,884	312,000	79,898	239,693	79,898	47,939	0	4,314,475
2026	4,314,475	320,000	92,690	278,069	92,690	55,614	0	5,005,233
2027	5,005,233	328,000	106,665	319,994	106,665	63,999	0	5,759,892
2028	5,759,892	336,000	121,918	365,754	121,918	73,151	0	6,583,563
2029	6,583,563	345,000	138,571	415,714	138,571	83,143	0	7,482,848
2030	7,482,848	353,000	156,717	470,151	156,717	94,030	0	8,462,716
2031	8,462,716	362,000	176,494	529,483	176,494	105,897	0	9,530,693
2032	9,530,693	371,000	198,034	594,102	198,034	118,820	0	10,693,829
2033	10,693,829	380,000	221,477	664,430	221,477	132,886	0	11,959,735
2034	11,959,735	390,000	246,995	740,984	246,995	148,197	0	13,337,714
2035	13,337,714	400,000	274,754	824,263	274,754	164,853	0	14,836,731
2036	14,836,731	410,000	304,935	914,804	304,935	182,961	0	16,466,470
2037	16,466,470	0	329,329	987,988	329,329	197,598	0	17,783,787
2038	17,783,787	0	355,676	1,067,027	355,676	213,405	166,570	19,039,920
2039	19,039,920	0	380,798	1,142,395	380,798	228,479	178,336	20,384,778
2040	20,384,778	0	407,696	1,223,087	407,696	244,617	190,932	21,824,629
2041	21,824,629	0	436,493	1,309,478	436,493	261,896	204,418	23,366,181
2042	23,366,181	0	467,324	1,401,971	467,324	280,394	218,857	25,016,618
2043	25,016,618	0	500,332	1,500,997	500,332	300,199	234,316	26,783,632
2044	26,783,632	0	535,673	1,607,018	535,673	321,404	250,866	28,675,456
2045	28,675,456	0	573,509	1,720,527	573,509	344,105	268,586	30,700,907
2046	30,700,907	0	614,018	1,842,054	614,018	368,411	287,557	32,869,423
2047	32,869,423	0	657,388	1,972,165	657,388	394,433	307,868	35,191,108
2048	35,191,108	0	703,822	2,111,466	703,822	422,293	329,614	37,676,783
2049	37,676,783	0	753,536	2,260,607	753,536	452,121	352,896	40,338,030
2050	40,338,030	0	806,761	2,420,282	806,761	484,056	377,822	43,187,250
2051	43,187,250	0	863,745	2,591,235	863,745	518,247	404,509	46,237,721
2052	46,237,721	0	924,754	2,774,263	924,754	554,853	433,081	49,503,658
2053	49,503,658	0	990,073	2,970,219	990,073	594,044	463,671	53,000,279
2054	53,000,279	0	1,060,006	3,180,017	1,060,006	636,003	496,422	56,743,880
2055	56,743,880	0	1,134,878	3,404,633	1,134,878	680,927	531,486	60,751,904
2056	60,751,904	0	1,215,038	3,645,114	1,215,038	729,023	569,027	65,043,030
2057	65,043,030	0	1,300,861	3,902,582	1,300,861	780,516	609,219	69,637,253

Min's ATG Trust Illustration

Mick & Min Sample

Year	Beginning Value	Gifts Received	Current-Year Returns		Taxes			Ending Value
			Income	Growth	Taxable Income	Taxable Gains	Taxes	
2016	0	250,000	5,000	15,000	5,000	3,000	0	270,000
2017	270,000	256,000	10,520	31,560	10,520	6,312	0	568,080
2018	568,080	263,000	16,622	49,865	16,622	9,973	0	897,566
2019	897,566	269,000	23,331	69,994	23,331	13,999	0	1,259,892
2020	1,259,892	276,000	30,718	92,154	30,718	18,431	0	1,658,763
2021	1,658,763	283,000	38,835	116,506	38,835	23,301	0	2,097,104
2022	2,097,104	290,000	47,742	143,226	47,742	28,645	0	2,578,072
2023	2,578,072	297,000	57,501	172,504	57,501	34,501	0	3,105,078
2024	3,105,078	305,000	68,202	204,605	68,202	40,921	0	3,682,884
2025	3,682,884	312,000	79,898	239,693	79,898	47,939	0	4,314,475
2026	4,314,475	320,000	92,690	278,069	92,690	55,614	0	5,005,233
2027	5,005,233	328,000	106,665	319,994	106,665	63,999	0	5,759,892
2028	5,759,892	336,000	121,918	365,754	121,918	73,151	0	6,583,563
2029	6,583,563	345,000	138,571	415,714	138,571	83,143	0	7,482,848
2030	7,482,848	353,000	156,717	470,151	156,717	94,030	0	8,462,716
2031	8,462,716	362,000	176,494	529,483	176,494	105,897	0	9,530,693
2032	9,530,693	371,000	198,034	594,102	198,034	118,820	0	10,693,829
2033	10,693,829	380,000	221,477	664,430	221,477	132,886	0	11,959,735
2034	11,959,735	390,000	246,995	740,984	246,995	148,197	0	13,337,714
2035	13,337,714	400,000	274,754	824,263	274,754	164,853	0	14,836,731
2036	14,836,731	410,000	304,935	914,804	304,935	182,961	0	16,466,470
2037	16,466,470	420,000	337,729	1,013,188	337,729	202,638	0	18,237,387
2038	18,237,387	0	364,748	1,094,243	364,748	218,849	170,819	19,525,560
2039	19,525,560	0	390,511	1,171,534	390,511	234,307	182,884	20,904,720
2040	20,904,720	0	418,094	1,254,283	418,094	250,857	195,802	22,381,296
2041	22,381,296	0	447,626	1,342,878	447,626	268,576	209,632	23,962,167
2042	23,962,167	0	479,243	1,437,730	479,243	287,546	224,439	25,654,701
2043	25,654,701	0	513,094	1,539,282	513,094	307,856	240,292	27,466,785
2044	27,466,785	0	549,336	1,648,007	549,336	329,601	257,265	29,406,863
2045	29,406,863	0	588,137	1,764,412	588,137	352,882	275,436	31,483,976
2046	31,483,976	0	629,680	1,889,039	629,680	377,808	294,892	33,707,803
2047	33,707,803	0	674,156	2,022,468	674,156	404,494	315,721	36,088,706
2048	36,088,706	0	721,774	2,165,322	721,774	433,064	338,021	38,637,781
2049	38,637,781	0	772,756	2,318,267	772,756	463,653	361,897	41,366,907
2050	41,366,907	0	827,338	2,482,014	827,338	496,403	387,459	44,288,800
2051	44,288,800	0	885,776	2,657,328	885,776	531,466	414,827	47,417,078
2052	47,417,078	0	948,342	2,845,025	948,342	569,005	444,127	50,766,317
2053	50,766,317	0	1,015,326	3,045,979	1,015,326	609,196	475,498	54,352,124
2054	54,352,124	0	1,087,042	3,261,127	1,087,042	652,225	509,084	58,191,211
2055	58,191,211	0	1,163,824	3,491,473	1,163,824	698,295	545,042	62,301,465
2056	62,301,465	0	1,246,029	3,738,088	1,246,029	747,618	583,540	66,702,042
2057	66,702,042	0	1,334,041	4,002,123	1,334,041	800,425	624,758	71,413,447

Gift Tax Illustration

Mick & Min Sample

	Mick				Min				Lifetime Gifting Analysis		
Year	Prior Taxable Gifts	Current Taxable Gifts	Cumulative Taxable Gifts	Gift Tax	Prior Taxable Gifts	Current Taxable Gifts	Cumulative Taxable Gifts	Gift Tax	Beginning of Year Net Worth	Aggregate Current Taxable Gifts	Aggregate Gifts As a Percentage of Net Worth
2016	0	250,000	250,000	0	0	250,000	250,000	0	30,000,000	500,000	1.7%
2017	250,000	256,000	506,000	0	250,000	256,000	506,000	0	30,111,363	512,000	1.7%
2018	506,000	263,000	769,000	0	506,000	263,000	769,000	0	30,132,757	526,000	1.7%
2019	769,000	269,000	1,038,000	0	769,000	269,000	1,038,000	0	30,160,127	538,000	1.8%
2020	1,038,000	276,000	1,314,000	0	1,038,000	276,000	1,314,000	0	30,185,155	552,000	1.8%
2021	1,314,000	283,000	1,597,000	0	1,314,000	283,000	1,597,000	0	30,196,643	566,000	1.9%
2022	1,597,000	290,000	1,887,000	0	1,597,000	290,000	1,887,000	0	30,180,139	580,000	1.9%
2023	1,887,000	297,000	2,184,000	0	1,887,000	297,000	2,184,000	0	30,133,372	594,000	2.0%
2024	2,184,000	305,000	2,489,000	0	2,184,000	305,000	2,489,000	0	30,049,294	610,000	2.0%
2025	2,489,000	312,000	2,801,000	0	2,489,000	312,000	2,801,000	0	29,918,995	624,000	2.1%
2026	2,801,000	320,000	3,121,000	0	2,801,000	320,000	3,121,000	0	29,731,834	640,000	2.2%
2027	3,121,000	328,000	3,449,000	0	3,121,000	328,000	3,449,000	0	29,484,570	656,000	2.2%
2028	3,449,000	336,000	3,785,000	0	3,449,000	336,000	3,785,000	0	29,170,169	672,000	2.3%
2029	3,785,000	345,000	4,130,000	0	3,785,000	345,000	4,130,000	0	28,781,490	690,000	2.4%
2030	4,130,000	353,000	4,483,000	0	4,130,000	353,000	4,483,000	0	28,308,973	706,000	2.5%
2031	4,483,000	362,000	4,845,000	0	4,483,000	362,000	4,845,000	0	27,740,789	724,000	2.6%
2032	4,845,000	371,000	5,216,000	0	4,845,000	371,000	5,216,000	0	27,072,113	742,000	2.7%
2033	5,216,000	380,000	5,596,000	0	5,216,000	380,000	5,596,000	0	26,293,995	760,000	2.9%
2034	5,596,000	390,000	5,986,000	0	5,596,000	390,000	5,986,000	0	25,390,904	780,000	3.1%
2035	5,986,000	400,000	6,386,000	0	5,986,000	400,000	6,386,000	0	24,356,070	800,000	3.3%
2036	6,386,000	410,000	6,796,000	0	6,386,000	410,000	6,796,000	0	23,178,427	820,000	3.5%
2037	0	0	0	0	6,796,000	420,000	7,216,000	0	21,846,092	420,000	1.9%

Applicable Exclusion Amount - Mick

Mick & Min Sample

		Lifetime AEA Utilization			DSUE Transferred		
Year	Basic Exclusion	BOY Lifetime Utilization of AEA	EOY Lifetime Utilization of AEA	Applicable Exclusion Amount	Maximum Transferable Exclusion Amount	Unused Spousal Exclusion Transferred	State Death Tax Exclusion
2016	5,450,000	0	250,000	5,200,000	5,200,000	0	600,000
2017	5,530,000	250,000	506,000	5,024,000	5,024,000	0	600,000
2018	5,610,000	506,000	769,000	4,841,000	4,841,000	0	600,000
2019	5,700,000	769,000	1,038,000	4,662,000	4,662,000	0	600,000
2020	5,780,000	1,038,000	1,314,000	4,466,000	4,466,000	0	600,000
2021	5,870,000	1,314,000	1,597,000	4,273,000	4,273,000	0	600,000
2022	5,960,000	1,597,000	1,887,000	4,073,000	4,073,000	0	600,000
2023	6,050,000	1,887,000	2,184,000	3,866,000	3,866,000	0	600,000
2024	6,140,000	2,184,000	2,489,000	3,651,000	3,651,000	0	600,000
2025	6,230,000	2,489,000	2,801,000	3,429,000	3,429,000	0	600,000
2026	6,320,000	2,801,000	3,121,000	3,199,000	3,199,000	0	600,000
2027	6,420,000	3,121,000	3,449,000	2,971,000	2,971,000	0	600,000
2028	6,520,000	3,449,000	3,785,000	2,735,000	2,735,000	0	600,000
2029	6,610,000	3,785,000	4,130,000	2,480,000	2,480,000	0	600,000
2030	6,710,000	4,130,000	4,483,000	2,227,000	2,227,000	0	600,000
2031	6,810,000	4,483,000	4,845,000	1,965,000	1,965,000	0	600,000
2032	6,920,000	4,845,000	5,216,000	1,704,000	1,704,000	0	600,000
2033	7,020,000	5,216,000	5,596,000	1,424,000	1,424,000	0	600,000
2034	7,130,000	5,596,000	5,986,000	1,144,000	1,144,000	0	600,000
2035	7,230,000	5,986,000	6,386,000	844,000	844,000	0	600,000
2036	7,340,000	6,386,000	6,796,000	544,000	544,000	0	600,000

Applicable Exclusion Amount - Min

Mick & Min Sample

		Lifetime AEA Utilization			
Year	Basic Exclusion	BOY Lifetime Utilization of AEA	EOY Lifetime Utilization of AEA	Applicable Exclusion Amount	State Death Tax Exclusion
2016	5,450,000	0	250,000	5,200,000	600,000
2017	5,530,000	250,000	506,000	5,024,000	600,000
2018	5,610,000	506,000	769,000	4,841,000	600,000
2019	5,700,000	769,000	1,038,000	4,662,000	600,000
2020	5,780,000	1,038,000	1,314,000	4,466,000	600,000
2021	5,870,000	1,314,000	1,597,000	4,273,000	600,000
2022	5,960,000	1,597,000	1,887,000	4,073,000	600,000
2023	6,050,000	1,887,000	2,184,000	3,866,000	600,000
2024	6,140,000	2,184,000	2,489,000	3,651,000	600,000
2025	6,230,000	2,489,000	2,801,000	3,429,000	600,000
2026	6,320,000	2,801,000	3,121,000	3,199,000	600,000
2027	6,420,000	3,121,000	3,449,000	2,971,000	600,000
2028	6,520,000	3,449,000	3,785,000	2,735,000	600,000
2029	6,610,000	3,785,000	4,130,000	2,480,000	600,000
2030	6,710,000	4,130,000	4,483,000	2,227,000	600,000
2031	6,810,000	4,483,000	4,845,000	1,965,000	600,000
2032	6,920,000	4,845,000	5,216,000	1,704,000	600,000
2033	7,020,000	5,216,000	5,596,000	1,424,000	600,000
2034	7,130,000	5,596,000	5,986,000	1,144,000	600,000
2035	7,230,000	5,986,000	6,386,000	844,000	600,000
2036	7,340,000	6,386,000	6,796,000	544,000	600,000
2037	7,450,000	6,796,000	7,216,000	234,000	600,000

Main Charitable Fund Illustration

Mick & Min Sample

		Current-Year Returns		End of Year	
Year	Beginning Value	Income	Growth	Private Foundation Distributions	Ending Value
2038	0	0	0	59,551	59,551
2039	59,551	1,191	3,573	120,650	184,965
2040	184,965	3,699	11,098	183,338	383,100
2041	383,100	7,662	22,986	247,655	661,403
2042	661,403	13,228	39,684	313,645	1,027,960
2043	1,027,960	20,559	61,678	381,351	1,491,548
2044	1,491,548	29,831	89,493	450,817	2,061,688
2045	2,061,688	41,234	123,701	522,089	2,748,712
2046	2,748,712	54,974	164,923	595,214	3,563,822
2047	3,563,822	71,276	213,829	670,240	4,519,168
2048	4,519,168	90,383	271,150	747,217	5,627,919
2049	5,627,919	112,558	337,675	826,196	6,904,348
2050	6,904,348	138,087	414,261	907,227	8,363,923
2051	8,363,923	167,278	501,835	990,366	10,023,403
2052	10,023,403	200,468	601,404	1,075,667	11,900,942
2053	11,900,942	238,019	714,057	1,163,185	14,016,202
2054	14,016,202	280,324	840,972	1,252,978	16,390,476
2055	16,390,476	327,810	983,429	1,345,106	19,046,821
2056	19,046,821	380,936	1,142,809	1,439,630	22,010,196
2057	22,010,196	440,204	1,320,612	30,732,225	54,503,237

T-CLAT Illustration

Mick & Min Sample

		Current-Year Returns		Annuity Payments				
Year	Beginning Value	Income	Growth	Annuity Rate	Annuity Payments	Ending Value	Present Value of Remaining Annuity Payments	Net to Heirs
2037	0	0	0	0.000%	0	19,104,137	19,104,136	1
2038	19,104,137	382,083	1,146,248	6.234%	1,191,016	19,441,452	18,333,394	1,108,058
2039	19,441,452	388,829	1,166,487	6.234%	1,191,016	19,805,752	17,545,712	2,260,039
2040	19,805,752	396,115	1,188,345	6.234%	1,191,016	20,199,196	16,740,702	3,458,494
2041	20,199,196	403,984	1,211,952	6.234%	1,191,016	20,624,115	15,917,981	4,706,134
2042	20,624,115	412,482	1,237,447	6.234%	1,191,016	21,083,028	15,077,161	6,005,867
2043	21,083,028	421,661	1,264,982	6.234%	1,191,016	21,578,654	14,217,842	7,360,812
2044	21,578,654	431,573	1,294,719	6.234%	1,191,016	22,113,931	13,339,619	8,774,312
2045	22,113,931	442,279	1,326,836	6.234%	1,191,016	22,692,029	12,442,074	10,249,955
2046	22,692,029	453,841	1,361,522	6.234%	1,191,016	23,316,375	11,524,784	11,791,591
2047	23,316,375	466,328	1,398,983	6.234%	1,191,016	23,990,669	10,587,313	13,403,356
2048	23,990,669	479,813	1,439,440	6.234%	1,191,016	24,718,906	9,629,218	15,089,689
2049	24,718,906	494,378	1,483,134	6.234%	1,191,016	25,505,403	8,650,044	16,855,359
2050	25,505,403	510,108	1,530,324	6.234%	1,191,016	26,354,819	7,649,329	18,705,490
2051	26,354,819	527,096	1,581,289	6.234%	1,191,016	27,272,188	6,626,598	20,645,590
2052	27,272,188	545,444	1,636,331	6.234%	1,191,016	28,262,947	5,581,367	22,681,580
2053	28,262,947	565,259	1,695,777	6.234%	1,191,016	29,332,967	4,513,141	24,819,826
2054	29,332,967	586,659	1,759,978	6.234%	1,191,016	30,488,588	3,421,414	27,067,174
2055	30,488,588	609,772	1,829,315	6.234%	1,191,016	31,736,659	2,305,669	29,430,990
2056	31,736,659	634,733	1,904,200	6.234%	1,191,016	33,084,576	1,165,378	31,919,198
2057	33,084,576	661,692	1,985,075	6.234%	1,191,016	34,540,326	0	34,540,326

Private Foundation Illustration

Mick & Min Sample

Year	Beginning Value	Current-Year Returns: Income	Current-Year Returns: Growth	CLAT Annuity Distributions Received	Transferable Value	Transfers to Main Charitable Fund	Ending Value
2038	0	0	0	1,191,016	1,191,016	59,551	1,131,465
2039	1,131,465	22,629	67,888	1,191,016	2,412,999	120,650	2,292,349
2040	2,292,349	45,847	137,541	1,191,016	3,666,753	183,338	3,483,415
2041	3,483,415	69,668	209,005	1,191,016	4,953,104	247,655	4,705,449
2042	4,705,449	94,109	282,327	1,191,016	6,272,901	313,645	5,959,256
2043	5,959,256	119,185	357,555	1,191,016	7,627,013	381,351	7,245,662
2044	7,245,662	144,913	434,740	1,191,016	9,016,331	450,817	8,565,515
2045	8,565,515	171,310	513,931	1,191,016	10,441,772	522,089	9,919,683
2046	9,919,683	198,394	595,181	1,191,016	11,904,274	595,214	11,309,060
2047	11,309,060	226,181	678,544	1,191,016	13,404,801	670,240	12,734,561
2048	12,734,561	254,691	764,074	1,191,016	14,944,342	747,217	14,197,125
2049	14,197,125	283,943	851,828	1,191,016	16,523,911	826,196	15,697,716
2050	15,697,716	313,954	941,863	1,191,016	18,144,549	907,227	17,237,322
2051	17,237,322	344,746	1,034,239	1,191,016	19,807,324	990,366	18,816,957
2052	18,816,957	376,339	1,129,017	1,191,016	21,513,330	1,075,667	20,437,664
2053	20,437,664	408,753	1,226,260	1,191,016	23,263,693	1,163,185	22,100,508
2054	22,100,508	442,010	1,326,030	1,191,016	25,059,565	1,252,978	23,806,587
2055	23,806,587	476,132	1,428,395	1,191,016	26,902,130	1,345,106	25,557,023
2056	25,557,023	511,140	1,533,421	1,191,016	28,792,601	1,439,630	27,352,971
2057	27,352,971	547,059	1,641,178	1,191,016	30,732,225	30,732,225	0

Heirs Accumulation Fund Illustration

Mick & Min Sample

Year	Beginning Value	Bypass Trust Remainder Interest	QTIP Trust Remainder Interest	Current-Year Returns		Taxes			Ending Value
				Income	Growth	Taxable Income	Taxable Gains	Taxes	
2038	0	574,891	234,001	16,178	48,534	16,178	9,707	7,571	866,032
2039	866,032	0	0	17,321	51,962	17,321	10,392	8,106	927,208
2040	927,208	0	0	18,544	55,632	18,544	11,126	8,679	992,706
2041	992,706	0	0	19,854	59,562	19,854	11,912	9,292	1,062,831
2042	1,062,831	0	0	21,257	63,770	21,257	12,754	9,948	1,137,909
2043	1,137,909	0	0	22,758	68,275	22,758	13,655	10,651	1,218,291
2044	1,218,291	0	0	24,366	73,097	24,366	14,619	11,403	1,304,351
2045	1,304,351	0	0	26,087	78,261	26,087	15,652	12,209	1,396,491
2046	1,396,491	0	0	27,930	83,789	27,930	16,758	13,071	1,495,139
2047	1,495,139	0	0	29,903	89,708	29,903	17,942	13,995	1,600,756
2048	1,600,756	0	0	32,015	96,045	32,015	19,209	14,983	1,713,833
2049	1,713,833	0	0	34,277	102,830	34,277	20,566	16,041	1,834,898
2050	1,834,898	0	0	36,698	110,094	36,698	22,019	17,175	1,964,515
2051	1,964,515	0	0	39,290	117,871	39,290	23,574	18,388	2,103,289
2052	2,103,289	0	0	42,066	126,197	42,066	25,239	19,687	2,251,865
2053	2,251,865	0	0	45,037	135,112	45,037	27,022	21,077	2,410,937
2054	2,410,937	0	0	48,219	144,656	48,219	28,931	22,566	2,581,245
2055	2,581,245	0	0	51,625	154,875	51,625	30,975	24,160	2,763,584
2056	2,763,584	0	0	55,272	165,815	55,272	33,163	25,867	2,958,804
2057	2,958,804	0	0	59,176	177,528	59,176	35,506	27,694	3,167,814

Strategic Estate Planning Illustration

An Integrated Analysis of

LIFETIME CASH FLOWS, NET WORTH & FAMILY WEALTH

AN ANALYSIS PREPARED EXCLUSIVELY FOR

Mick & Min Sample

Base Case

Strategic Estate Planning Illustration - Base Case

Annual Cash Flows & Projected Net Worth Summary

Mick & Min Sample

	Integrated Cash Flows				Assets					
Year	Pretax Cash Inflows	Nontax Cash Outflows	Taxes	Cash Flow Surplus/ -Deficit	Personal Financial Assets	Personal Assets	Total Liabilities	Net Worth	Irrevocable Trusts	Pretax Family Wealth
Start					27,000,000	3,000,000	0	30,000,000	0	30,000,000
2016	6,032,000	834,000	664,238	4,533,763	27,581,763	3,060,000	0	30,641,763	0	30,641,763
2017	6,166,969	852,750	739,148	4,575,071	28,116,406	3,121,200	0	31,237,606	0	31,237,606
2018	6,291,006	871,969	706,737	4,712,300	28,707,012	3,183,624	0	31,890,636	0	31,890,636
2019	6,428,027	891,668	683,530	4,852,829	29,348,375	3,247,296	0	32,595,672	0	32,595,672
2020	6,576,823	911,860	667,941	4,997,023	30,036,445	3,312,242	0	33,348,688	0	33,348,688
2021	6,736,455	938,556	658,650	5,139,249	30,762,154	3,378,487	0	34,140,641	0	34,140,641
2022	6,904,820	959,770	654,520	5,290,530	31,528,837	3,446,057	0	34,974,894	0	34,974,894
2023	7,082,690	981,514	654,709	5,446,467	32,334,921	3,514,978	0	35,849,899	0	35,849,899
2024	7,269,702	1,003,802	658,543	5,607,357	33,179,369	3,585,278	0	36,764,647	0	36,764,647
2025	7,465,614	1,032,647	665,625	5,767,342	34,055,447	3,656,983	0	37,712,430	0	37,712,430
2026	7,668,864	1,056,063	675,243	5,937,557	34,968,576	3,730,123	0	38,698,699	0	38,698,699
2027	7,880,710	1,080,065	687,063	6,113,582	35,918,934	3,804,725	0	39,723,660	0	39,723,660
2028	8,101,193	1,104,667	700,823	6,295,703	36,906,959	3,880,820	0	40,787,779	0	40,787,779
2029	8,330,415	1,129,883	716,292	6,484,240	37,933,341	3,958,436	0	41,891,778	0	41,891,778
2030	8,568,535	1,161,730	733,311	6,673,494	38,992,967	4,037,605	0	43,030,572	0	43,030,572
2031	8,814,368	1,188,224	751,680	6,874,465	40,092,501	4,118,357	0	44,210,858	0	44,210,858
2032	9,069,460	1,215,379	771,343	7,082,738	41,233,179	4,200,724	0	45,433,903	0	45,433,903
2033	9,334,098	1,249,214	792,219	7,292,665	42,410,401	4,284,739	0	46,695,140	0	46,695,140
2034	9,607,213	1,277,744	814,216	7,515,253	43,631,274	4,370,434	0	48,001,707	0	48,001,707
2035	9,890,456	1,306,988	837,317	7,746,151	44,897,471	4,457,842	0	49,355,313	0	49,355,313
2036	10,184,213	1,336,962	861,518	7,985,733	46,210,788	4,546,999	0	50,757,787	0	50,757,787
2037	6,317,596	1,316,686	553,545	4,447,365	38,513,851	4,637,939	78,548	43,073,242	7,662,373	50,735,615

Integrated Cash Flows Illustration

Mick & Min Sample

	Pretax Cash Inflows				Nontax Cash Outflows				
Year	Interest Income	Qualified Dividends	Portfolio Liquidations	Total Pretax Cash Inflows	Annual Exclusion Gifts	Living Expenses	Total Nontax Cash Outlfows	Taxes	Cash Flow Surplus/ -Deficit
2016	104,000	416,000	5,512,000	6,032,000	84,000	750,000	834,000	664,238	4,533,763
2017	106,327	425,308	5,635,334	6,166,969	84,000	768,750	852,750	739,148	4,575,071
2018	108,466	433,862	5,748,678	6,291,006	84,000	787,969	871,969	706,737	4,712,300
2019	110,828	443,312	5,873,887	6,428,027	84,000	807,668	891,668	683,530	4,852,829
2020	113,394	453,574	6,009,856	6,576,823	84,000	827,860	911,860	667,941	4,997,023
2021	116,146	464,583	6,155,726	6,736,455	90,000	848,556	938,556	658,650	5,139,249
2022	119,049	476,194	6,309,577	6,904,820	90,000	869,770	959,770	654,520	5,290,530
2023	122,115	488,461	6,472,113	7,082,690	90,000	891,514	981,514	654,709	5,446,467
2024	125,340	501,359	6,643,003	7,269,702	90,000	913,802	1,003,802	658,543	5,607,357
2025	128,717	514,870	6,822,026	7,465,614	96,000	936,647	1,032,647	665,625	5,767,342
2026	132,222	528,887	7,007,755	7,668,864	96,000	960,063	1,056,063	675,243	5,937,557
2027	135,874	543,497	7,201,338	7,880,710	96,000	984,065	1,080,065	687,063	6,113,582
2028	139,676	558,703	7,402,814	8,101,193	96,000	1,008,667	1,104,667	700,823	6,295,703
2029	143,628	574,511	7,612,275	8,330,415	96,000	1,033,883	1,129,883	716,292	6,484,240
2030	147,733	590,933	7,829,868	8,568,535	102,000	1,059,730	1,161,730	733,311	6,673,494
2031	151,972	607,887	8,054,509	8,814,368	102,000	1,086,224	1,188,224	751,680	6,874,465
2032	156,370	625,480	8,287,610	9,069,460	102,000	1,113,379	1,215,379	771,343	7,082,738
2033	160,933	643,731	8,529,434	9,334,098	108,000	1,141,214	1,249,214	792,219	7,292,665
2034	165,642	662,566	8,779,005	9,607,213	108,000	1,169,744	1,277,744	814,216	7,515,253
2035	170,525	682,100	9,037,830	9,890,456	108,000	1,198,988	1,306,988	837,317	7,746,151
2036	175,590	702,360	9,306,264	10,184,213	108,000	1,228,962	1,336,962	861,518	7,985,733
2037	135,753	543,012	5,638,831	6,317,596	57,000	1,259,686	1,316,686	553,545	4,447,365

Income Tax Illustration

Mick & Min Sample

	Adjusted Gross Income				Taxable Income		Taxes		
Year	Ordinary Income	Qualified Dividends	Capital Gains/-Losses	Adjusted Gross Income	Tax Deductions	Taxable Income	Federal & State Income Taxes	Social Security & Medicare Taxes	Total Taxes
2016	104,000	416,000	2,392,000	2,912,000	145,600	2,766,400	664,238	0	664,238
2017	106,327	425,308	2,232,581	2,764,216	138,211	2,626,006	628,492	110,656	739,148
2018	108,466	433,862	2,111,462	2,653,790	132,689	2,521,100	601,697	105,040	706,737
2019	110,828	443,312	2,021,654	2,575,794	128,790	2,447,004	582,686	100,844	683,530
2020	113,394	453,574	1,957,503	2,524,471	126,224	2,398,247	570,061	97,880	667,941
2021	116,146	464,583	1,914,440	2,495,169	124,758	2,370,410	562,721	95,930	658,650
2022	119,049	476,194	1,888,698	2,483,941	124,197	2,359,744	559,703	94,816	654,520
2023	122,115	488,461	1,877,304	2,487,881	124,394	2,363,487	560,319	94,390	654,709
2024	125,340	501,359	1,877,863	2,504,561	125,228	2,379,333	564,003	94,539	658,543
2025	128,717	514,870	1,888,442	2,532,030	126,601	2,405,428	570,451	95,173	665,625
2026	132,222	528,887	1,907,419	2,568,528	128,426	2,440,102	579,026	96,217	675,243
2027	135,874	543,497	1,933,558	2,612,930	130,646	2,482,283	589,458	97,604	687,063
2028	139,676	558,703	1,965,874	2,664,253	133,213	2,531,040	601,532	99,291	700,823
2029	143,628	574,511	2,003,583	2,721,722	136,086	2,585,636	615,050	101,242	716,292
2030	147,733	590,933	2,046,066	2,784,733	139,237	2,645,496	629,886	103,425	733,311
2031	151,972	607,887	2,092,769	2,852,628	142,631	2,709,997	645,860	105,820	751,680
2032	156,370	625,480	2,143,325	2,925,175	146,259	2,778,916	662,943	108,400	771,343
2033	160,933	643,731	2,197,458	3,002,122	150,106	2,852,016	681,062	111,157	792,219
2034	165,642	662,566	2,254,891	3,083,099	154,155	2,928,944	700,135	114,081	814,216
2035	170,525	682,100	2,315,488	3,168,114	158,406	3,009,708	720,159	117,158	837,317
2036	175,590	702,360	2,379,160	3,257,110	162,855	3,094,254	741,130	120,388	861,518
2037	135,753	543,012	1,270,843	1,949,608	97,480	1,852,128	429,774	123,770	553,545

Heirs Accumulation Fund Illustration

Mick & Min Sample

Year	Beginning Value	Bequests From Min's Estate	Bypass Trust Remainder Interest	Current-Year Returns		Taxes			Ending Value
				Income	Growth	Taxable Income	Taxable Gains	Taxes	
2038	0	23,739,709	7,662,373	628,042	1,884,125	628,042	376,825	293,923	33,620,325
2039	33,620,325	0	0	672,407	2,017,220	672,407	403,444	314,686	35,995,265
2040	35,995,265	0	0	719,905	2,159,716	719,905	431,943	336,916	38,537,970
2041	38,537,970	0	0	770,759	2,312,278	770,759	462,456	360,715	41,260,293
2042	41,260,293	0	0	825,206	2,475,618	825,206	495,124	386,196	44,174,920
2043	44,174,920	0	0	883,498	2,650,495	883,498	530,099	413,477	47,295,436
2044	47,295,436	0	0	945,909	2,837,726	945,909	567,545	442,685	50,636,386
2045	50,636,386	0	0	1,012,728	3,038,183	1,012,728	607,637	473,957	54,213,340
2046	54,213,340	0	0	1,084,267	3,252,800	1,084,267	650,560	507,437	58,042,970
2047	58,042,970	0	0	1,160,859	3,482,578	1,160,859	696,516	543,282	62,143,126
2048	62,143,126	0	0	1,242,863	3,728,588	1,242,863	745,718	581,660	66,532,916
2049	66,532,916	0	0	1,330,658	3,991,975	1,330,658	798,395	622,748	71,232,801
2050	71,232,801	0	0	1,424,656	4,273,968	1,424,656	854,794	666,739	76,264,687
2051	76,264,687	0	0	1,525,294	4,575,881	1,525,294	915,176	713,837	81,652,024
2052	81,652,024	0	0	1,633,040	4,899,121	1,633,040	979,824	764,263	87,419,923
2053	87,419,923	0	0	1,748,398	5,245,195	1,748,398	1,049,039	818,250	93,595,266
2054	93,595,266	0	0	1,871,905	5,615,716	1,871,905	1,123,143	876,052	100,206,836
2055	100,206,836	0	0	2,004,137	6,012,410	2,004,137	1,202,482	937,936	107,285,447
2056	107,285,447	0	0	2,145,709	6,437,127	2,145,709	1,287,425	1,004,192	114,864,091
2057	114,864,091	0	0	2,297,282	6,891,845	2,297,282	1,378,369	1,075,128	122,978,090

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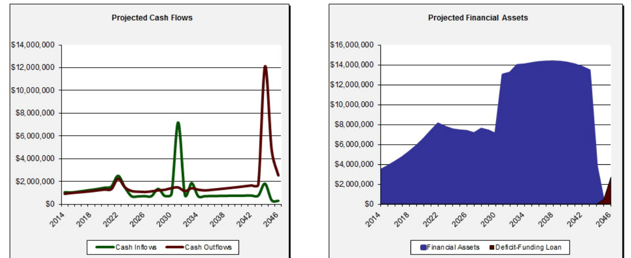
Strategic Wealth Planning Illustration - Recommended Allocations & Advanced Planning

Financial Assets & Cash Flow Summary

Jack & Jill Flash

Cash Flow Sufficiency & Financial Asset Depletion	
Cash flow needs are met in all years between 2014 and 2046	No
First year when financial assets are depleted	NA
Jack's attained age at year end when financial assets are depleted	NA
Aggregate ending financial asset balances	**148,643**
Outstanding balance of defict-funding loan in 2046	**2,716,803**

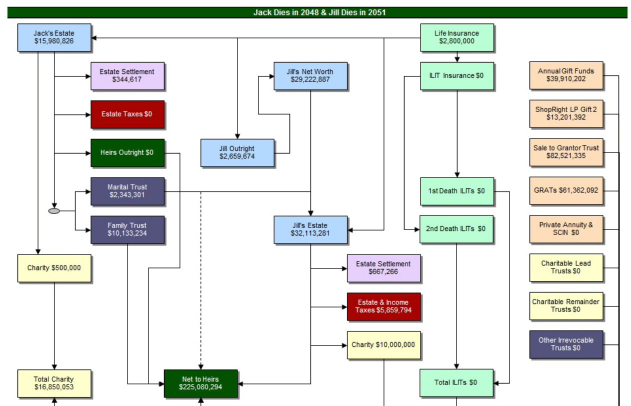
Projected Cash Flows Discounted @ 3.0%	
Present value of projected cash inflows between 2014 and 2046	26,341,312
Present value of projected cash outflows between 2014 and 2046	33,743,940
Present value of cash flow surplus/-deficit	**-7,402,628**



Strategic Estate Planning Illustration - Recommended Allocations & Advanced Planning

Estate Flow Illustration

Jack & Jill Flash

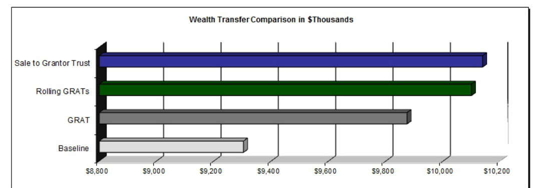


GRAT vs. Sale to Grantor Trust - Estate Freeze Planning Technique Comparison for ShopRight, Inc.

Summary

Jack & Jill Flash

In 2023	Baseline	GRAT	Rolling GRATs	Sale to Grantor Trust
Taxable gift	NA	23	37	325,000
Value of trust at the end of the GRAT or note term	**NA**	**3,575,109**	**4,271,782**	**9,623,462**
Grantor's accumulations/-estate depletion	13,209,286	7,859,319	6,896,710	2,563,210
Total transferable value in 2023	13,209,286	13,209,287	13,209,278	13,209,285
Estate taxes or tax savings	-3,906,708	-2,422,804	-2,104,703	-1,155,284
Deferred capital gains and Medicare taxes	0	-913,460	-1,006,656	-1,917,224
Net to heirs	**9,302,578**	**9,873,023**	**10,097,919**	**10,136,777**
Planning advantage/-disadvantage over baseline		**570,445**	**795,341**	**834,200**
Present value of advantage/-disadvantage @ 3.0%		424,465	591,808	620,723



NOTE: Please refer to the accompanying reports illustrating the GRAT and installment sale to grantor trust planning techniques for the detailed schedules, charts and planning assumptions used for this comparative analysis.

About the Author

Howard L. Eisenberg, CPA/PFS, CFP®, CGMA, CEBS, CLU®, ChFC®, CASL® is the founding president and creative force behind **WealthTec**. As an experienced financial and estate planner he knows your business well.

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Appendix F

The Intermediary CLAT Alternative to the Residuary Estate Family Foundation Gift

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A common plan among wealthy individuals is to leave the balance of his or her estate to charity, usually a private family foundation the individual established. While these transfers mitigate estate taxes, they may not eliminate all concerns or tax issues for the family, the family company, or the family foundation.

Rather than leaving the estate directly to the family foundation, this article explains, through a detailed example, the benefits of using an intermediary charitable lead annuity trust, which will pay the bequest to the family foundation over a number of years yet have the same federal estate tax benefit as a direct bequest.[1] Rather than flooding the foundation with a large bequest that may overwhelm its existing operation, distributing the large charitable bequest over a period of years allows the family foundation time to grow its operation to match its larger endowment.

> *As illustrated through Monte Carlo simulations prepared by Bernstein, this approach also enables the family foundation's endowment to be larger at the end of the CLAT term than the endowment would be with a direct bequest.*

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* Grateful acknowledgement goes to Matthew S. Pritzkur, Senior Investment Planning Analyst, and Brad M. Hawkins, Vice President, of Bernstein Global Wealth Management, Washington, DC, for their assistance and skill in preparing the modeling included in this article.

[1] This same approach could be used as an alternative to any large testamentary charitable bequest.

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For the individual's family, this approach allows for the possibility of a reinfusion of wealth to counteract the succeeding generation's wealth depletion by estate taxes or its own large charitable bequests. The possibility of this reinfusion may soften the blow for the wealthy individual's children who are being skipped as direct beneficiaries of this charitable gift from the parent's estate, and do so at no estate tax costs. The transfer to a charitable lead annuity trust also will provide a framework in which the children could purchase private company interests or other illiquid assets from the parent's estate without running afoul of the self-dealing rules and perhaps provide a little more privacy.

Factual Scenario

Peter's existing Will leaves his remaining assets (the "remaining family fortune") upon his death to his private family foundation (the "Foundation"). Peter believes that through lifetime gifts and associated planning he has sufficiently provided for his daughters and their families and now wishes to leave a more significant legacy to charity. This article reviews the alternative of Peter leaving his remaining family fortune indirectly to the Foundation by having it first pass to a charitable lead annuity trust ("CLAT"), a trust that would make annual payments to the Foundation with an aggregate present value equal to the remaining family fortune on Peter's death.[2]

Peter founded WXY Enterprises, Inc. ("WXY"). It is structured as an S corporation and it has a value of $400 million. Peter currently owns 49% of WXY's stock. Peter's three daughters own the remaining 51% of the stock. Peter's stock is estimated to be worth $130 million, after discounts for lack of marketability and lack of control. Peter also has a portfolio of publically traded securities, several houses, and an art collection, which assets have an aggregate estimated value of $70 million. Each of Peter's three daughters has an estimated net worth of over $100 million.

The Foundation currently has assets of approximately $20 million. Peter is the sole contributor to the Foundation. Peter and his three daughters serve on the Foundation's Board of Directors. Currently, the Foundation makes grants to public charities of approximately $1 million, in the aggregate, per year. The Foundation does not provide any direct charitable services. Upon Peter's death, his estate will be entitled to deduct the value of the assets passing from Peter's estate to the Foundation pursuant to the unlimited Federal charitable estate tax deduction.

[2] For a review of the issues that arise under the private foundation rules (Sections 4941 though 4945) with respect to the intermediary CLAT plan, see PLRs 200024052 and 201323007.

This appeals to Peter because, even though he will leave behind a large estate, he does not want his estate burdened by estate taxes.

Peter's daughters are supportive of their father's desires, but are concerned with how this plan will unfold. Peter's oldest daughter, Natalie, is the current President of WXY, and she is concerned that Peter's transfer of his WXY stock to the Foundation will cause problems for WXY and perhaps for the Foundation. Peter's middle daughter, Nancy, is an art historian and curator of the local museum, and she has long been enamored with Peter's two prized modern master's paintings and is concerned about them passing to the Foundation. Natasha, Peter's youngest daughter, is the Foundation's Secretary and generally handles the Foundation's affairs on behalf of the family (e.g., oversees grant applications, meets with the Foundation's attorneys, accountants, and financial advisers, and coordinates meetings of the Board and the distribution of grants), and she worries that a large influx of funding to the Foundation will overwhelm its existing modest operation.

A. Natalie's Concerns

1. *Excess Business Holdings Rules ("EBH Rules")*. Natalie understands that Peter's WXY stock will constitute "excess business holdings"[3] that the Foundation must dispose of within five years.[4] While the normal period in which to dispose of excess business holdings is 90 days, the Foundation will have 5 years to dispose of the stock since it was not purchased but rather received as a gift from Peter's estate.[5]

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[3] "Excess business holdings" means the amount of stock or other interest in a business enterprise that the foundation would have to dispose of to a non-disqualified person in order for the foundation's remaining holdings in the enterprise to be "permitted holdings," as defined by I.R.C. § 4943(c)(2)-(3). The general rule is that a private foundation's permitted holdings in a corporation's voting stock are 20% of the voting stock, less the percentage of the voting stock owned by all disqualified persons. If all disqualified persons together do not own more than 20% of a corporation's voting stock, the nonvoting stock held by the foundation is treated as permitted holdings. In the case of a partnership or joint venture, "profits interest" is substituted for "voting stock," and "capital interest" is substituted for "nonvoting stock." In the case of a proprietorship, there are no permitted holdings, and in any other case, "beneficial interest" is substituted for "voting stock." Note that there is a special rule, which allows a foundation and disqualified persons to own up to 35%, if they do not have effective control over the company. There is also a de minimis safe harbor rule which allows a private foundation to own 2% or less of the outstanding shares, regardless of the percentage held by disqualified persons.

[4] Pursuant to Treas. Reg. § 53.4943-6(b)(1), the 5 year period begins upon receipt of the holdings from the estate.

[5] Treas. Reg. § 53.4943-6(a)(2). The Foundation should be able to properly dispose of the interest in the prescribed timeframe. If not, the IRS has discretion to extend the five-year divestiture period by an additional five years, if certain factors are present. I.R.C. § 4943(c)(7).

Natalie has been informed that a prohibited "self-dealing" issue arises if WXY's shareholder agreement restricts the sale of Peter's stock to family members, who are considered "related parties."[6] To satisfy the excess business holdings requirement, the Foundation must dispose of the stock to one or more non-disqualified persons without imposing any material restrictions or conditions that would prevent such transferee(s) from freely or effectively using or disposing of the stock. While WXY's shareholder agreement has been amended to allow for the Foundation to sell stock to a non-family member, Natalie is uncomfortable with this change and is hesitant to grant non-family members the ability to further transfer stock outside of the family. Natalie would prefer that WXY's ownership remain in the family.

2. *Self-Dealing Rules*. Self-dealing includes any *direct or indirect* furnishing of goods, services, or facilities between a private foundation and a disqualified person.[7] Almost all transactions between a private foundation and a "disqualified person" are prohibited, irrespective of any positive benefit to the private foundation. For example, prohibited transactions include: (i) the purchasing or selling of assets between a disqualified person and the foundation, (ii) leasing property from a disqualified person, or any entity, such as a corporation or partnership, controlled by a disqualified person, unless such lease is without charge, and (iii) compensating a disqualified person, unless such compensation is for services rendered that are reasonable and necessary to the organization's exempt purpose and the compensation is not excessive.

Peter is a disqualified person as to the Foundation because he is a substantial contributor to it – in fact, he is the only contributor. Peter's daughters and WXY are also disqualified persons as to the Foundation. Disqualified persons include: (i) substantial contributors, (ii) foundation managers (trustees and officers), (iii) an owner of more than 20% of the total voting power of a corporation, profits interest in a partnership, or beneficial interest in a trust that is a substantial contributor, (iv) any spouse, ancestor, lineal descendant, or spouse of a lineal descendant of any person in (i) – (iii) above (a "family member")[8], and (v) any partnership, corporation, or trust in which a substantial contributor and/or his or her family members hold a greater than 35% interest.[9]

The self-dealing rules would generally prohibit the repurchase by family members of any interest in an entity, such as WXY, given to a private foundation. Likewise, most trusts created by a disqualified per-

[6] I.R.C. § 4941(d)(1).

[7] I.R.C. § 4941(d)(1)(C).

[8] Note that a "family member" excludes such individual's siblings.

[9] Treas. Reg. § 53.4946-1(a)(1).

son or for the benefit of a disqualified person would be prohibited from purchasing such interests.

Additionally, even if the repurchase were permitted, the private foundation could not finance the purchase. Generally, a loan between a disqualified person and a private foundation is considered self-dealing, regardless of whether the foundation is the lender or borrower. I.R.C. § 4941(d)(1)(B) provides that the lending of money or any other extension of credit between a private foundation and a disqualified person qualifies as self-dealing.

Natalie understands that there are two ways to navigate around the EBH and self-dealing rules and keep the ownership of Peter's equity interest within the family.[10]

> (a) *Corporate Redemption Exception*. The general rule is that WXY cannot redeem its shares from the Foundation without violating the self-dealing rules. WXY is deemed a disqualified person with respect to the Foundation due to Peter's past contributions and his daughters' majority ownership of WXY's stock. However, provided that WXY offers to redeem all of WXY's outstanding stock, subject to the same terms and for no less than fair market value, no act of self-dealing will occur.[11] One drawback to using the corporate redemption exception to the self-dealing rules is that the redemption must be done for cash. Natalie is concerned that WXY will find it difficult to raise $130 million in cash.
>
> (b) *Estate Administration Exception to Self-Dealing Rules*. The estate administration exception to the self-dealing rules allows for transactions between a disqualified person and an estate in which a private foundation has expectancy (i.e., a case of indirect self-dealing), if the transaction is approved by the probate court having jurisdiction over the estate and the transaction is fair to the private

---

[10] A great deal of caution is warranted as an excise tax is imposed on each act of self-dealing between a disqualified person and a private foundation. I.R.C. § 4941(a). The penalties for self-dealing are severe and include, but are not limited to, a 10% penalty tax on the "self-dealer" (10% of the amount involved) for each tax year and a 200% penalty tax on the self-dealer if the self-dealing activity is not corrected within the taxable period (e.g., reversing the deal so the funds are returned to the charity or the charity is placed in at least as good a position as if it had never engaged in the activity). I.R.C. § 4941(a)(1), (b)(1). A 5% penalty tax is imposed on any participating foundation manager (5% of the amount involved) for each tax year, unless such participation is not willful and is due to reasonable cause. I.R.C. § 4941(a)(2).

[11] Treas. Reg.§ 53.4941(d)-3(d). The "cash-only" corporate redemption exception to self-dealing is not applicable if the IRS finds that the price is not adequate. A potential drawback is that I.R.C. § 512(e) deems any gain to be UBTI. In our example, the basis of Peter's stock would be subject to an adjustment pursuant to I.R.C. § 1014(a) and gain should be minimal if the redemption occurs quickly after Peter's death.

foundation.[12] This exception protects sales by the estate (not sales directly by the foundation).

Under the estate administration exception, Peter's three daughters (or WXY or a trust for the benefit of the daughters or their descendants) could purchase Peter's WXY stock from Peter's estate during its period of administration before the stock passes to the Foundation.[13] The purchase would be for the stock's fair market value and could be financed with a promissory note that would then pass to the Foundation as part of the residuary estate distribu-

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[12] Treas. Reg. § 53.4941(d)-1(b)(3) states the following:

"The term "indirect self-dealing" shall not include a transaction with respect to a private foundation's interest or expectancy in property (whether or not encumbered) held by an estate (or revocable trust, including a trust which has become irrevocable on a grantor's death), regardless of when title to the property vests under local law, if —

(i) The administrator or executor of an estate or trustee of a revocable trust either —

(a) Possesses a power of sale with respect to the property,

(b) Has the power to reallocate the property to another beneficiary, or

(c) Is required to sell the property under the terms of any option subject to which the property was acquired by the estate (or revocable trust);

(ii) Such transaction is approved by the probate court having jurisdiction over the estate (or by another court having jurisdiction over the estate (or trust) or over the private foundation;

(iii) Such transaction occurs before the estate is considered terminated for Federal income tax purposes pursuant to paragraph (a) of 1.641(b)-3 of this chapter (or in the case of a revocable trust, before it is considered subject to section 4947);

(iv) The estate (or trust) receives an amount which equals or exceeds the fair market value of the foundation's interest or expectancy in such property at the time of the transaction, taking into account the terms of any option subject to which the property was acquired by the estate (or trust); and

(v) With respect to transactions occurring after April 16, 1973, the transaction either —

(a) Results in the foundation receiving an interest or expectancy at least as liquid as the one it gave up,

(b) Results in the foundation receiving an asset related to the active carrying out of its exempt purposes, or

(c) Is required under the terms of any option which is binding on the estate (or trust)."

[13] If one of Peter's daughters purchases Peter's WXY stock from him during his lifetime for a promissory note, the self-dealing rules appear to prohibit the same promissory note from passing to the Foundation as part of the residuary estate distribution. Perhaps, under the estate administration exception to the self-dealing rules, the original note could be purchased from Peter's estate in exchange for a newly issued promissory note (with an interest rate and payment period that would allow the note to be valued at face value) that could pass as part of the residuary estate distribution to the Foundation.

tion.[14] Essentially, the estate and, subsequently, the Foundation would finance the purchase. The value of the promissory note must equal the fair market value of the stock[15], and the probate court

[14] Treas. Reg. § 53.4941(d)-2(c)(1) ("[E]xcept in the case of the receipt and holding of a note pursuant to a transaction described in § 53.4941(d)-1(b)(3) [the estate administration exception], an act of self-dealing occurs where a note, the obligor of which is a disqualified person, is transferred by a third party to a private foundation which becomes the creditor under the note.). If the purchase is made pursuant to an option arrangement that is controlling on Peter's estate, the liquidity of the property the purchaser exchanges does not have to be as liquid as the property sold by the estate. Therefore, in some cases specifically designing an option arrangement into Peter's estate planning documents or into the shareholder's agreement may be beneficial.

[15] In 2012, the IRS announced: "EO Technical will not issue letter rulings pertaining to the exception to § 4941 for transactions during the administration of an estate or trust set forth in Treas. Reg. § 53.4941(d)-1(b)(3) in cases in which a disqualified person issues a promissory note in exchange for property of an estate or trust." Rev. Proc. 2012-4, § 6.18 (Jan. 3, 2012). This no ruling position has been carried forward each subsequent year. *See* Rev. Proc. 2014-4, § 6.18 (Jan. 2, 2014). The motivation for this position is unclear, but one thought is that the government views such a disqualified person as gaining an "abusive" advantage, in some cases, through the issuance of the promissory note. Some planners believe that a promissory note issued under the estate administration exception to the self-dealing rules could simply carry an interest rate at the applicable Federal rate ("AFR"), and that would make the fair market value of the promissory note equal its face amount. In support for this position, I.R.C. § 7872 cites the AFR as the floor for a market rate loan. Moreover, in several existing PLRs, the IRS has blessed purchase transactions under the estate administration exception where the purchase price was provided through a promissory note bearing interest at the AFR. PLR 201206019 (Nov. 15, 2011); PLR 201129049 (Apr. 26, 2011); PLR 200124029 (Mar. 22, 2001). Attention should be paid, however, to the fact that in each PLR the taxpayer made a blanket representation that the promissory note in question had a fair market value equal to that of the property purchased without providing any further explanation. Additionally, the IRS made specific reference to such representation in reaching its conclusion despite having already established the note's rate of interest. Third-party loans, however, often carry much higher rates of interest. Given the near historically low AFRs, the government may view an AFR loan for purposes of the estate administration exception as being abusive. Pursuant to Treas. Reg. § 53.4941(d)-1(b)(3)(iv), the estate or trust must receive from the disqualified person property that "equals or exceeds the fair market value of the foundation's interest or expectancy. . ." Therefore, consider whether the value of an AFR note is equal to its face value for purposes of the estate administration exception. Treas. Reg. § 53.4941(e)-1(f) provides that "fair market value" under the estate administration exception should be determined pursuant to Treas. Reg. § 53.4942(a)-2(c)(4). This provision in turn makes reference to the principles stated in I.R.C. § 2031. Clearly, on the seller's side, the principles of § 2031 control how the property sold by the estate or trust would need to be valued. On the purchaser's side, it would seem odd if the promissory note being exchanged by the purchaser could be valued pursuant to different rules, such as § 7872, which might allow an AFR note to have a value equal to its face value. I.R.C. § 2031 provides for an all-inclusive view of a promissory note's value (i.e., the note's value is not merely a factor of its principal amount and interest rate but also its terms of payment and enforceability, etc.). Treas. Reg. § 20.2031-4. The basic idea of the self-dealing rules is to prohibit a disqualified person from gaining an advantage at the founda-

having jurisdiction over Peter's estate must approve of the sale. To use this exception, the purchase must occur while Peter's estate is being administered – i.e., there is a time limit on this arrangement. Compared to the "cash only" corporate redemption, the estate administration exception is frequently more useful since the family does not have to raise all the cash at once.

B. Nancy's Concerns

With Nancy's museum background, she knows that charitable *income tax* deductions are limited if art is given to (i) a charity if the charity's does not use the art as part of its charitable mission or (ii) a charity that is a private non-operating foundation.[16] But that will not be a concern for Peter's gift of his art to the Foundation upon his death, as there is no such limitation on the *estate tax* charitable deduction.[17] Still the Foundation may have trouble justifying its continued ownership of such valuable paintings. Owning such a large portion of the Foundation's assets in two modern master's paintings may be considered an imprudent investment.[18] If this determination were made, the Foundation would need to sell the paintings for diversification purposes. One alternative would be that the Foundation could make grants of the paintings to a museum, but this would have the effect of depleting the Foundation's endowment.

Besides that, Nancy wants Peter's Modigliani and Manet for herself! Upon hearing Natalie describe the estate administration exception

tion's expense. To construe the estate administration exception as allowing a disqualified person to garner a bargain rate of interest using the current low AFRs would seemingly violate the sprit of the self-dealing rules. For purposes of this paper, the assumption is that any promissory note issued under the estate administration exception must carry a market rate of interest, as well as other reasonable terms relating to enforceability, to enable the promissory note's value (i.e., by appraisal) to equal its face value.

[16] I.R.C. § 170(e)(1)(B).

[17] I.R.C. § 2055(a).

[18] The Board's management of the Foundation's assets will be subject to the Uniform Prudent Management of Institutional Funds Act, an act currently adopted (in some form) by 49 states and the District of Columbia (the "UPMIFA"). Under Section 3 of this act, "an institution shall diversify the investments of the institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification". However, this duty to diversify may be modified by a donor's gift instrument, provided that the Foundation must retain its charitable mission. Thus, after reviewing the needs of the Foundation, the general economic conditions, the expected total return from the Foundation's investments, etc., the Board's duty to diversify may require the disposal of Peter's paintings. If Peter wishes to prevent this, he may include a restriction in his Will that such paintings are to be retained by the Foundation. This restriction will need to coincide with the Foundation's charitable purposes (e.g., the Foundation is to retain the paintings and grow the collection for later distribution to a museum).

to the self-dealing rules, Nancy felt much better knowing there was a way for her to buy the paintings from Peter's estate. She has requested that Peter simply provide her with that option. This arrangement suits Nancy, as she has already picked a spot for them to be displayed in her home. Nancy knows that if the paintings pass to the Foundation she could not display them in her home as that would be a prohibited act of self-dealing – she couldn't even pay the fair rental value to the Foundation for the paintings as that too would be a prohibited act of self-dealing. Moreover, being in the art world, Nancy knows there is no market for the rental of fine art and therefore determining a fair rental value is not possible even if a rental arrangement were permitted.

C. Natasha's Concerns

1. *5 Percent Distribution Requirement*. Natasha understands that a private non-operating foundation, such as the Foundation, must annually spend a minimum amount to accomplish its charitable purposes or it will be subject to an excise tax. The minimum amount to be distributed is computed as (i) 5 percent of the excess of the aggregate fair market value of the foundation's assets (other than those used or held for use directly in carrying out its exempt purpose), over (ii) any acquisition indebtedness with respect to those assets, plus (iii) any amounts previously taken as qualifying distributions that have been reacquired, reduced by (iv) taxes imposed on the foundation on net investment income and unrelated business income.[19] For any year in which the foundation makes qualifying distributions that exceed the minimum amount, the foundation can carry over the excess to the next five succeeding tax years.[20] If the foundation's distributions in a year do not meet the minimum amount, the foundation has until the end of the next succeeding tax year to make distributions to cover the shortfall.[21] The requirements may be met through direct expenditures or through grants to certain public charities or private operating foundations.[22]

Natasha recognizes that adding $200 million from Peter's estate will instantly increase the Foundation's prominence, making it one of the largest in the community, but worries that the concomitant required changes, such as the increase in the distribution required under the minimum distribution rule, will create a difficult period of adjustment. The

[19] I.R.C. § 4942.

[20] I.R.C. § 4942(i).

[21] I.R.C. § 4942(g)(2)(C).

[22] If a foundation does not make its required minimum distributions, a two-tiered excise tax is imposed. For the first year after the distribution shortfall, the tax is 30% of the undistributed income. If not corrected by the next year, or by ninety days after a notice, the second-tier tax is 100% of the undistributed amount. I.R.C. § 4942(a)-(b).

annual distribution requirement will jump from approximately $1 million to $11 million. While on the surface it sounds easy to give away money, Natasha has learned through experience that thoughtfully using the funds requires research and significant efforts, including marshaling the agreement of the other members of the Board – i.e., her family!

2. *Unrelated business taxable income ("UBTI")*. Natasha is also concerned about certain tax issues the Foundation's accountant has explained related to unrelated business income. Unrelated business income is, in general, gross income from an unrelated trade or business regularly carried on, less a deduction for expenses that are directly connected to the carrying on of such trade or business.[23] A trade or business is, in general, considered unrelated if its conduct is not substantially related to the exercise or performance of the organization's tax exempt purpose, "aside from the need of such organization for income or funds or the use it makes of the profits."[24] Income from property acquired with debt (acquisition indebtedness) is included in a tax exempt organization's calculation of UBTI.[25] For example, marketable securities purchased on margin are considered debt-financed property. Debt-financed property can also be indirectly owned through the ownership of an interest in a flow-through entity, meaning that some or all of the income from that entity is included in UBTI.[26]

Since WXY is an S corporation, I.R.C. § 512(e) deems the stock as an interest in an unrelated trade or business. All items and income, loss or deduction, and any gain on disposition of the stock are taken into account in computing UBTI.

A private foundation is taxed on its UBTI. Income tax is imposed at either the corporate rates or the rates generally applicable to trusts and estates, depending on how the foundation was formed.[27]

Of further concern is that an organization's exempt status may be jeopardized if it engages in *too much* unrelated business activity or earns *too much* UBTI. There is no quantifiable answer as to how much is too much.[28] In general, an organization may keep its tax-exempt status, even though it operates a trade or business as a substantial part of its activities, provided that the business furthers the organization's exempt purpose. The tax-exempt entity cannot be operated for the primary pur-

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[23] I.R.C. § 512(a)(1).

[24] I.R.C. § 513.

[25] I.R.C. § 512(b)(4).

[26] Rev. Rul. 74-197, 1974-1 C.B. 143.

[27] I.R.C. § 511.

[28] TAM 201005061 (Feb. 5, 2010); PLR 9550001 (Dec. 15, 1995); and PLR 9128003 (Dec. 10, 1990) are examples of where the Service did not revoke the tax-exempt status for organizations with UBTI.

pose of carrying on an unrelated trade or business. The facts and circumstances, including the size and extent of the trade or business and the size and extent of the charitable activities, are considered in determining whether a tax-exempt entity has too much UBTI.[29] Generally, the rule is that an organization that is organized and operated for the primary purpose of carrying on an unrelated trade or business is not exempt from tax.

If a private foundation owns an interest in an operating business that is a flow-through entity, the income from the trade or business is considered UBTI, assuming the conduct of the operating business is not substantially related to the exercise or performance of the organization's tax exempt purpose. A special rule exists in I.R.C. § 512(e) for S corporations, which deems all flow-through income or gain on disposition as UBTI. Accordingly, the foundation is subject to tax at ordinary rates (corporate or trust) on the income. If the operating business is a C corporation, the foundation does not realize UBTI on dividends.[30] In addition to the filing of Form 990-PF, any foundation with UBTI of $1,000 or more must file Form 990-T, Exempt Organization Business Income Tax Return, that computes a tax based on UBTI.

3. *S Corporation Election*. Finally, Natasha fears that the transfer of WXY stock to the Foundation would terminate WXY's S corporation election. However, WXY's accountants have assured her that, due to changes in the law, a 501(c)(3) charity may now be an S corporation shareholder.[31] Regardless, Natasha realizes that the Foundation is a poor candidate to serve as a WXY shareholder given the problems posed by the EBH Rules and the UBTI WXY will generate.

D. Intermediary Charitable Lead Annuity Trust

During her last meeting with the Foundation's attorney, Natasha learns of an intermediary device called a charitable lead annuity trust or CLAT that may solve many of the daughter's concerns and still achieve Peter's goals. The attorney explains that a CLAT is a trust that could receive the remaining family fortune and pay an annuity to the Foundation over a period of time, say 20 years (the "Intermediary CLAT"). The annuity payment is determined as a fixed percentage of the fair market value of the property transferred into the CLAT on Peter's death. The idea is that the CLAT's annuity payments are designed to have an aggregate present value (based on the I.R.C. § 7520 rate) equal to the fair market value of the remaining family fortune. Peter's estate

[29] Treas. Reg. § 1.501(c)(3)-1.
[30] I.R.C. § 512(b)(1).
[31] I.R.C. § 1361(c)(6).

also receives a charitable estate tax deduction for the aggregate present value of the annuity payments.

For example, a 20-year term CLAT paying an annuity equal to 6.355% of the initial value of the CLAT assets would reach a zero remainder value (assuming a 2.4% 7520 rate)(see Chart 1). This means that a 100% charitable estate tax deduction will be applicable to the funding of the CLAT, just as in the case of a direct transfer of the remaining family fortune to the Foundation. Additionally, the Foundation, as recipient of the annuity payments from the CLAT, will receive 100% of the value of the contributed assets on a present value basis. In effect, on a present value basis, the Foundation is whole under this approach.[32]

CHART 1

CLAT remainder calculation			
	Year	**Annual Payments:**	
1	2014	12,710,000	
2	2015	12,710,000	
3	2016	12,710,000	
4	2017	12,710,000	
5	2018	12,710,000	
6	2019	12,710,000	
7	2020	12,710,000	
8	2021	12,710,000	
9	2022	12,710,000	
10	2023	12,710,000	
11	2024	12,710,000	
12	2025	12,710,000	
13	2026	12,710,000	
14	2027	12,710,000	
15	2028	12,710,000	
16	2029	12,710,000	
17	2030	12,710,000	
18	2031	12,710,000	
19	2032	12,710,000	
20	2033	12,710,000	
		254,200,000	
Present Value @		2.40%	$200,022,815.91
		Assumed 7520 Rate	
Trust Funding			200,000,000.00
Annuity Percentage			6.35500%

[32] There is a great deal of flexibility in structuring the CLAT arrangement. The annuity payments could start out at lower amounts and grow over time or even balloon at the end of the term. Additionally, several CLATs could be established with differing terms. Another favorable benefit to the CLAT arrangement is that it offers valuation protection for hard to value assets. If the fair market value of the asset transferred is challenged and determined to be higher than originally appraised, the annuity payments will automatically adjust (since they can be based on a percentage of the initial fair market value of the CLAT's assets) based on the increased value.

1. *Reinfusion of Wealth to Family*. After the annuity payments end upon conclusion of the 20-year term, any remaining assets in the CLAT could pass to Peter's daughters. The remainder interest held by Peter's daughters has a zero value upon Peter's death and therefore causes no transfer tax (i.e., no gift, estate or GST tax).

2. *5 Percent Distribution Requirement*. Utilizing the CLAT structure allows the Foundation's endowment to grow at a slower rate, which will reduce the annual required 5% distributions (and eliminate some of Natasha's concerns). If the remaining family fortune is contributed to the Foundation in a lump sum, the value of this contribution must be considered when complying with the Foundation's minimum distribution requirement, thereby causing a spike in the amount distributed. Conversely, if the remaining family fortune is contributed to a CLAT, only the annual annuity payment will be added to the Foundation's endowment each year for purposes of the minimum distribution requirement.[33] Chart 2, below, illustrates (very simplistically) the 5 percent distribution requirements with use of the intermediary CLAT (Part 1) as compared to the direct transfer of the remaining family fortune to the Foundation (Part 2). The important point is that, under the CLAT plan, the 5 percent distributions grow steadily over the 20-year period. This allows the Foundation's operations time to adjust to meet the increased demand.

3. *Private Foundation Restrictions and Estate Administration Exception*. CLATs are considered to be private foundations for purposes of the restrictions placed on such organizations. Therefore, like the Foundation, a CLAT created and funded by Peter's estate could not engage in self-dealing, violate the excess business holdings rule, hold jeopardizing investments, own assets that produce UBTI, or make taxable expenditures.[34]

The estate administration exception to the self-dealing rules, however, would also apply to a CLAT's expectancy interest in Peter's estate. Peter's daughters could buy assets from Peter's estate before the assets pass to the CLAT.[35] For example, assume that at the time of Peter's

[33] The Foundation's net worth does not include the capitalized value of the potential future annuity distributions from the CLAT to the Foundation. *See The Ann Jackson Family Found. v. Comm'r*, 15 F.3d 917 (9th Cir. 1994).

[34] Per I.R.C. § 4945(d), a "taxable expenditure" is any amount paid to carry on propaganda or influence legislation, to influence the outcome of a public election or carry on any voter registration, or, under certain circumstances, as a grant to an individual or taxable organization.

[35] The sale of the Peter's WXY stock to his daughters would not only satisfy the EBH Rules but would also permit the CLAT to claim a larger charitable deduction for charitable distributions made. While a CLAT may be an S corporation shareholder if it elects to be treated as an electing small business trust (an "ESBT"), the portion of the

CHART 2

	Year	Part 1—Foundation with CLAT Plan					Part 2—Foundation Directly Receiving Estate				
		Beginning Year Value of Foundation	CLAT Payment	Net Investment Return @ 6%	5% Distribution based on 12/31 value of prior year	End of Year Value of Foundation	Beginning Year Value of Foundation	Distribution form Estate	Net Investment Return @ 6%	5% Distribution based on 12/31 value of prior year	End of Year Value of Foundation
	12/31/2013		-	-	-	20,000,000		-	-	-	20,000,000
1	12/31/2014	20,000,000	12,710,000	1,200,000	(1,000,000)	32,910,000	20,000,000	200,000,000	1,200,000	(1,000,000)	220,200,000
2	12/31/2015	32,910,000	12,710,000	1,974,600	(1,645,500)	45,949,100	220,200,000	-	13,212,000	(11,010,000)	222,402,000
3	12/31/2016	45,949,100	12,710,000	2,756,946	(2,297,455)	59,118,591	222,402,000	-	13,344,120	(11,120,100)	224,626,020
4	12/31/2017	59,118,591	12,710,000	3,547,115	(2,955,930)	72,419,777	224,626,020	-	13,477,561	(11,231,301)	226,872,280
5	12/31/2018	72,419,777	12,710,000	4,345,187	(3,620,989)	85,853,975	226,872,280	-	13,612,337	(11,343,614)	229,141,003
6	12/31/2019	85,853,975	12,710,000	5,151,238	(4,292,699)	99,422,514	229,141,003	-	13,748,460	(11,457,050)	231,432,413
7	12/31/2020	99,422,514	12,710,000	5,965,351	(4,971,126)	113,126,740	231,432,413	-	13,885,945	(11,571,621)	233,746,737
8	12/31/2021	113,126,740	12,710,000	6,787,604	(5,656,337)	126,968,007	233,746,737	-	14,024,804	(11,687,337)	236,084,205
9	12/31/2022	126,968,007	12,710,000	7,618,080	(6,348,400)	140,947,687	236,084,205	-	14,165,052	(11,804,210)	238,445,047
10	12/31/2023	140,947,687	12,710,000	8,456,861	(7,047,384)	155,067,164	238,445,047	-	14,306,703	(11,922,252)	240,829,497
11	12/31/2024	155,067,164	12,710,000	9,304,030	(7,753,358)	169,327,836	240,829,497	-	14,449,770	(12,041,475)	243,237,792
12	12/31/2025	169,327,836	12,710,000	10,159,670	(8,466,392)	183,731,114	243,237,792	-	14,594,268	(12,161,890)	245,670,170
13	12/31/2026	183,731,114	12,710,000	11,023,867	(9,186,556)	198,278,425	245,670,170	-	14,740,210	(12,283,508)	248,126,872
14	12/31/2027	198,278,425	12,710,000	11,896,706	(9,913,921)	212,971,209	248,126,872	-	14,887,612	(12,406,344)	250,608,140
15	12/31/2028	212,971,209	12,710,000	12,778,273	(10,648,560)	227,810,921	250,608,140	-	15,036,488	(12,530,407)	253,114,222
16	12/31/2029	227,810,921	12,710,000	13,668,655	(11,390,546)	242,799,031	253,114,222	-	15,186,853	(12,655,711)	255,645,364
17	12/31/2030	242,799,031	12,710,000	14,567,942	(12,139,952)	257,937,021	255,645,364	-	15,338,722	(12,782,268)	258,201,818
18	12/31/2031	257,937,021	12,710,000	15,476,221	(12,896,851)	273,226,391	258,201,818	-	15,492,109	(12,910,091)	260,783,836
19	12/31/2032	273,226,391	12,710,000	16,393,583	(13,661,320)	288,668,655	260,783,836	-	15,647,030	(13,039,192)	263,391,674
20	12/31/2033	288,668,655	12,710,000	17,320,119	(14,433,433)	**304,265,342**	263,391,674	-	15,803,500	(13,169,584)	**266,025,591**
					(150,326,708)					(230,127,954)	

death, his estate is still worth $200 million ($130 million of WXY stock, and $70 million of publicly traded securities, houses, and art). Assume further that each of Peter's three daughters buys one-third of his WXY stock from his estate in exchange for a $43,333,333 million, 21-year promissory note, paying annual interest at a market rate of interest that is 6.5% (e.g., assume that an interest rate equal to the January 2014 long-term AFR of 3.49% plus three percent, rounded to 6.5%, is a market rate of interest). Finally, assume that Nancy purchases Peter's Modigliani and Manet for the aggregate appraised value of $15.5 million in exchange for a 21-year promissory note, paying annual interest at a market rate of interest that is 6.5%.[36] Peter's fiduciaries sell the estate's remaining assets and distribute to the CLAT $145,500,000 of promissory notes and $54,500,000 of cash.[37]

The CLAT will be a separate taxable trust for Federal income tax purposes. A CLAT, however, is entitled to a charitable income tax deduction of 100% of its distributions to the Foundation (i.e., it is not subject to any percentage of AGI limitation). Therefore, if the CLAT's annuity payment is equal to or greater than its income, the CLAT pays no income taxes! This means that the CLAT can operate very efficiently for income tax purposes and with careful planning it may pay little or no income taxes.[38]

Each daughter would be required to pay annual interest of $2,816,667 on her promissory note used to purchase her share of Peter's WXY stock. Generally, this interest payment should be deductible on the daughter's income tax return as an interest expense against the corresponding income. Nancy would also pay interest of $1,007,500 on the promissory note used to purchase the paintings. This would typically be personal interest and, therefore, not deductible.

CLAT that holds S corporation stock will be denied a charitable deduction for any charitable distribution made by the CLAT. If the CLAT holds a promissory note in place of the WXY stock, no such diminishment of the charitable deduction will occur. Treas. Reg. §§ 1.1361-1(m), 1.641(c)-1(g)(4), and 1.641(c)-1(l), Example 4.

[36] PLR 200024052 involved revocable trusts for a couple that would establish a charitable lead unitrust and CLAT ("CLTs") upon the surviving spouse's death. The terms of the revocable trusts required that any purchase note issued in a transaction qualified under the estate administration exception to carry interest at the percentage payment rate of the CLT receiving assets upon the surviving spouse's death.

[37] For simplicity purposes, the example ignores estate administration expenses of Peter's estate.

[38] Pursuant to Treas. Reg. § 1.642(c)-3(b)(2), the I.R.C. § 642(c) deduction is deemed to consist of the same proportion of each class of the items of the trust's (or estate's) income as the total of each class bears to the total of all classes. Any provision otherwise in a will or trust must have an economic effect independent of the income tax consequences to be respected for federal tax purposes.

The CLAT would distribute one-third of the remainder of the trust after the 20-year term ends to each daughter. Natalie and Natasha each could be assigned her promissory note, respectively, and one-third of the remaining portfolio assets (including, for this purpose, a one-third interest in Nancy's $15.5 million promissory note).[39] Nancy could be assigned her stock-related promissory note and the remaining portfolio assets (including her share of the art-related promissory note). Each daughter would, at this point, be both lender and borrower under each stock-related promissory note and the underlying obligation for such note would merge and should disappear without any adverse income tax issues. The same would be true for the Nancy's one-third interest in the art-related promissory note. Nancy could utilize her portion of the distributed portfolio assets to satisfy any remaining obligations under the art-related promissory note. Alternatively, the art-related promissory note could be assigned just to Nancy with compensating adjustments in other portfolio assets to her two sisters.

4. *Moving the Remainder Down a Generation*. Perhaps a better plan is to provide each daughter with a vested remainder interest in the CLAT. The interest would be fully assignable. Each daughter would sell her remainder interest to a trust (an "Irrevocable Descendants Trust") for the primary benefit of her children (i.e., Peter's grandchildren) shortly after Peter's death when the value of the remainder is quite low (i.e., early in the term of the CLAT). For purposes of the generation-skipping transfer tax, the daughters would be the transferors of their remainder interests in the CLAT.[40] This has the effect of mov-

[39] Use of the CLAT structure would eliminate any need to justify the retention of the promissory notes in the context of the Foundation's charitable purposes. Unlike the UPMIFA that governs the Foundation's investment strategy, the CLAT will most likely be subject to the Uniform Prudent Investor Act, an act adopted (in some form) by 41 states and the District of Columbia (the "UPIA"). The UPIA requires that a trustee "diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." However, all or any portion of the UPIA may be waived by the trust's terms. Thus, careful drafting of the CLAT would permit the Trustee to retain the promissory notes throughout the trust term, an outcome that may be more difficult to achieve if such notes were held by the Foundation.

[40] In PLR 200107015, the IRS determined that the grantor of a CLAT would be considered a transferor for generation-skipping transfer tax purposes of a portion of the remainder interest assigned by the remainder beneficiary. Some practitioners believe that the reasoning of the PLR is flawed. Consider whether the issue can be avoided by a child assigning the remainder to a trust when its value is low and then repurchasing the interest from the trust shortly before the CLAT term expires when its value is higher. As additional protection against incurring generation-skipping transfer tax, the trust could be a non-skip person. For example, Natalie could assign her interest to a trust for the benefit of both her husband and her children shortly after the CLAT is funded and repurchase the interest shortly before the CLAT expires. In this manner, nothing passes di-

ing the remainder value of the CLAT down a generation without the imposition of the GST tax.

Furthermore, the obligation of the daughters to repay the promissory notes would continue. When the 20-year term of the CLAT ends, the promissory notes would be assigned (along with the other CLAT assets) to the Irrevocable Descendants Trusts created by the daughters, respectively. This is helpful because the liability would in effect reduce the value of each daughter's estate for estate tax purposes. Each daughter could negotiate with her Irrevocable Descendants Trust to either satisfy the note by paying it off, or in some cases swapping other assets into the Irrevocable Descendants Trust in payment of the note, or perhaps extending the term of the note.

5. *Privacy and Tax Reporting*. The CLAT structure also would provide Peter's daughters with more privacy than an outright bequest to the Foundation. This may be a concern to the daughters if they wish to avoid public scrutiny of their purchases from Peter's estate. With the direct bequest of $200 million to the family Foundation, the Foundation's endowment would be $220 million, but $145.5 million would be promissory notes from the daughters. The daughters may wish to keep the loans more private, if possible.

The Foundation is required to file a Form 990-PF Private Foundation Return with the Internal Revenue Service each year, on which it must report the identity of each contributor to the Foundation for that tax year.[41] This return is open to public inspection and may be requested from the IRS.[42] Additionally, the Foundation is required to make the return available for public inspection at the Foundation's principal office during regular business hours for three years after the return's required filing date and must provide a copy of such return to any individual who requests one.[43] The Foundation may forgo providing copies to inquiring parties if the return is made "widely available" (e.g., posted to the Foundation's website or to a database of returns from other tax-exempt organizations).[44] The Form 990-PF requires that loans receivable be disclosed, including the name of the borrower and the balance due. Therefore, the purchase of Peter's assets by his daughters with promissory notes will be subject to public disclosure.

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rectly from the CLAT to a generation-skipping trust. Moreover, if the IRS takes the position that the CLAT did fund the trust, because Natalie's husband is a discretionary beneficiary, there has not yet been a generation-skipping transfer.

41 I.R.C. § 6033.

42 Treas. Reg. § 301.6104(b)-1.

43 Treas. Reg. § 301.6104(d)-1.

44 Treas. Reg. § 301.6104(d)-2.

A CLAT, on the other hand, must file a Form 5227 Split-Interest Trust Information Return with the IRS each year.[45] Only certain portions of this form are open to public inspection so that the identity of contributors and non-charitable beneficiaries may remain anonymous.[46] Additionally, the public disclosure requirements for the Form 5227 are less strenuous. The trust is not required to provide reasonable access to the return or copies to requesting parties, thereby eliminating any reason to make such returns widely available. Thus, the only recourse of an individual seeking further information about the assets of a CLAT is to file a written request for the 5227 with the IRS. If someone does gain access to the 5227, however, it does require that loans receivable be disclosed, including the name of the borrower and the balance due. While the promissory notes will be subject to public disclosure even when using the CLAT alternative, there are hurdles for the curious and it seems less likely to attract attention. For example, most 990s are readily available at www.guidestar.org, whereas 5227s are not available at this site.

6. *Impact to Foundation's Endowment*. The use of the Intermediary CLAT generates a larger endowment for the Foundation at the end of the 20-year CLAT term than the endowment generated by a direct bequest. Chart 2 illustrates this result: when the CLAT is used, at the end of the 20th year, the Foundation's endowment is approximately $304 million versus $266 million with the direct bequest.

Chart 2, however, is admittedly an overly simplistic illustration. Does this conclusion hold up under more rigorous analysis and stress testing? Matthew S. Pritzkur, Senior Investment Planning Analyst, and Brad M. Hawkins, Vice President, of Bernstein Global Wealth Management, in Washington, DC, assisted by preparing a Monte Carlo analysis of this fact pattern that is summarized on Exhibit A (the "Bernstein Analysis"). The Bernstein Analysis illustrates that across the spectrum of investment performance, the Foundation's endowment should be more with the Intermediary CLAT than without it. These are fascinating results, especially given the other benefits of the CLAT plan as outlined above.

Page 3 of the Bernstein Analysis (on page 380) provides a numeric comparison of five scenarios. Scenario A is the baseline example of the Foundation receiving the $200 million lump sum contribution. Scenarios B – E are CLAT alternatives, in each case funded with the $200 million estate. Scenario B is a CLAT with level annuity payments of $12,710,000 for 20 years to reach a zero gift amount (matching the annuity amounts in Chart 1). Scenario C is a spread of 3 CLATs, of 10, 15

[45] Treas. Reg. § 1.6034-1.

[46] It should be noted, however, that a copy of the trust must be filed with the initial return and will be open to public inspection.

and 20 terms, each with 1/3rd of the $200 million estate, designed to reach a zero gift amount. Scenario D is the same as Scenario C, except that the CLATs have increasing 20% annuity amounts, and therefore are more backloaded. Scenarios A – D assume the investments of the Foundation and CLATs are according to an asset allocation of 70% globally diversified equities and 30% intermediate-term taxable bonds. Scenario E tracks the article's example, with $145.5 million of the estate's assets being purchased under the estate administration exception to the self-dealing rules and promissory notes of an equivalent amount passing to the CLAT paying annual interest of 6.5%, and the remaining portfolio invested as indicated above. Additional assumptions are detailed in the Bernstein Analysis. The results of the Bernstein Analysis are shown on page 380.

a. *50th Percentile – Typical Markets*. At the 50th percentile for investment performance, or typical markets, the Foundation's endowment at the end of 20 years (i.e., when the CLATs would have all ended) is approximately *10% larger* if the CLAT alternative is used.

b. *90th Percentile – Poor Markets*. At the 90th percentile for investment performance, or poor markets, the Foundation's endowment at the end of 20 years is approximately *38% larger* if the CLAT alternative is used. Therefore, in bad markets, the CLAT acts a buffer to insolate the Foundation's endowment from being harder hit.

c. *10th Percentile – Very Good Markets*. At the 10th percentile for investment performance, or very good markets, the Foundation's endowment at the end of 20 years is approximately *$70 million smaller* if the CLAT alternative is used. However, and this is a big however, the remainder to the family is astronomically larger – e.g., in Scenario B the remainder to the family is $496.9 million. The CLAT could be written to ensure the Foundation's endowment is larger in this permutation too. For example, the CLAT could be written to direct the distribution of the remainder as follows: the first $200 million (i.e., the original funding amount) is distributed to Peter's daughters, and the balance is split 50% to the Foundation and 50% to Peter's daughters. With this split, the Foundation's endowment under Scenario B would be $657 million or about $80 million more than under Scenario A and the family would still be receiving $348 million.

Peter might look at the Bernstein Analysis (page 380, fourth row) and see that the cumulative distributions made from the Foundation (i.e., under the 5% distribution requirement) during the 20-year period of the CLAT is less by using the CLAT plan. At the 50th percentile for

investment performance, under Scenario A with the direct bequest to the Foundation, it will pay $228.1 million in 5% distributions over the 20-year period. Under Scenario B, the Foundation will distribute only $131.8 million over the same 20-year period. Thus, the Intermediary CLAT reduces the Foundation's 5% required distributions by 42%. Peter may see this as a detriment of the Intermediary CLAT, but the countervailing attributes of the alternative plan might console him:

a. First, the CLAT plan allows the Foundation to grow its operations more slowly and perhaps that means the funds distributed under the 5% distribution requirement during these early years, while less in total dollars, could be used more thoughtfully.

b. Second, the CLAT plan enables the Foundation's endowment to be larger at the 20th year and from that point on the Foundation's 5% distributions will be larger than without using the CLAT plan. Therefore, in terms of total dollars spent some catch-up will start to occur.

c. Third, the CLAT plan allows for the possibility of some reinfusion of wealth to the family. One could argue that the Foundation is advantaged in the long-term if the family remains advantaged.

The Bernstein Analysis also illustrates the remainders to Peter's daughters (page 380, last 3 rows). These numbers illustrate the reinfusion of wealth back to the family in 20-years by using the Intermediary CLAT. This reinfusion is done without causing estate tax in Peter's estate and without reducing the Foundation's endowment – it will actually be larger. In the last row, when the CLAT investment performance is stress tested, at the 90th percentile – poor markets, the CLAT remainder may be meager, but remember, if Peter gave his estate directly to the Foundation, nothing would pass to his daughters (and, as noted above, in this situation the Foundation's endowment is on the average 38% better off from having used the CLAT plan). While there is no guarantee of a large remainder passing to the family, it is a zero cost option.

Importantly, note that under Scenario E, the scenario in which Peter's daughters buy $145.5 million of assets from Peter's estate in exchange for the promissory notes, the illustrated remainder numbers do not include the promissory note values — i.e., the $138.7 million in the 3rd row from the bottom are the assets of the CLAT in addition to the notes passing back to the Peter's daughters! When the fixed rate promissory notes are part of the CLAT plan as illustrated under Scenario E, they act to cushion the remainder during a period of poor performance and limit the remainder during a period of stellar performance.

Conclusion

The use of the Intermediary CLAT will likely lead to a larger endowment built up in a more controlled and manageable pace. The use of the Intermediary CLAT also enables a reinfusion of wealth to occur into Peter's family at the end of the 20-year term. And what if the total rate of return on the CLAT's assets plummets to the point that the annuity payments exhaust the trust and leave nothing to Peter's family? In that event, all of the assets comprising Peter's remaining family fortune would be paid to the Foundation, which was Peter's initial plan. Thus, the Intermediary CLAT is a heads "win" for the Foundation and family or a tails "even" scenario – i.e., the same result as the original plan of leaving the remaining family fortune to the Foundation.[47] The Interme-

[47] If Peter's residuary estate passes to the Foundation, the income tax returns for the estate should be able to claim a charitable income tax deduction for any gross income during the period of administration, but this benefit is not available for the CLAT alternative plan. I.R.C. § 642(c) provides that an estate is allowed a charitable income tax deduction, without limitation, for any amounts which pursuant to the terms of the governing instrument are paid or permanently set aside for organizations described in I.R.C. § 170(c), determined without regard to I.R.C. § 170(c)(2)(A). A testamentary CLAT would not qualify under I.R.C. § 170(c). In the CLAT alternative, the planning would involve distributing all net income to the CLAT in each taxable year of the estate to enable a distribution deduction under I.R.C. § 661(a).

In the case of the Foundation alternative, the charitable set aside income tax deduction would be available with a residuary charitable gift, whether or not the income is actually distributed. For example, the regulations under I.R.C. § 642(c) provide that a remainder to charity and mandatory allocation of capital gains to corpus (which is not subject to invasion) is a permanent setting aside of the capital gain for charity. Treas. Reg. § 1.642(c)-3(c), Ex. (1). Even income to be added to corpus is deductible on the grounds that ultimately all the income from the built-up corpus will be used for charitable purposes. This includes post-mortem income of the deceased which falls into his residuary estate left to charity. An estate may take a charitable deduction for UBTI. The limitation on charitable deductions for UBTI that applies to trusts does not apply to estates. I.R.C. § 681(a) provides, "In computing the deduction allowable under I.R.C. § 642(c) to a *trust*, no amount otherwise allowable under I.R.C. § 642(c) as a deduction shall be allowed as a deduction with respect to income of the taxable year which is allocable to its unrelated business income for such year." There are no estate limitations on charitable deductions in the I.R.C. § 681 Regulations. Caution is needed however, because an estate is not entitled to take a charitable deduction unless income has been paid or permanently set aside for the charity. In *Richardson Foundation v. United States*, 430 F.2d 710 (5th Cir. 1970), a decedent had left all the stock of a subchapter S corporation to a foundation. The decedent's estate took a deduction for *undistributed S corporation earnings* accrued during the estate administration period (i.e., phantom income from a pass through entity). The Service denied the deduction. The court agreed with the Service and held that although the undistributed income was considered in computing the gross income of the decedent's estate, the income was never a part of the estate because the estate never had dominion and control over the income and the income never actually went to the foundation. The income was not permanently set aside although the income would ultimately belong to the foundation. The Service has also won other phan-

diary CLAT should be considered for any large testamentary charitable gift.

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tom income cases. In *Estate of Joseph R. Esposito*, 40 T.C. 459 (2nd Cir.1963), the court held that an estate could not take a charitable deduction for dividend income when no cash or property was distributed. In *Freund's Estate v. Commissioner*, 303 F.2d 30 (1962), the court held that an estate was not entitled to a charitable deduction for partnership income when the underlying cash had already been withdrawn by the partner prior to the partner's death.

Prepared For

Richard Franklin

CLAT and Foundation Analysis

January 8, 2014

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Essential Facts*

This Wealth Forecasting Analysis has been prepared for Richard Franklin in order to analyze the difference between the amount of assets held in a private foundation over 20 years after being funded entirely in year one, and the amount of assets held in a private foundation after being funded on an annual basis through the use of a Testamentary Charitable Lead Annuity Trust.

We have assumed that the private foundation and the CLAT are funded in year one with assets in the amount of $200 million received from the decedent's estate. In each scenario, we assumed that the foundation and CLAT assets are invested according to an asset allocation of 70% globally diversified equities and 30% intermediate-term taxable bonds.

The private foundation will distribute 5% annually based on the value of the portfolio as of the end of the preceding year. In addition, any excise taxes owed by the foundation on net investment income have been accounted for.

With regard to the CLAT, we have modeled trusts of various term lengths and assumed that each CLAT will be "zeroed out" based on the prevailing IRS Section 7520 rate. We have varied the rate in order to quantify the range of outcomes driven by a change in the amount the CLAT must distribute annually based on the prevailing 7520 rate. In this initial analysis, we have assumed the prevailing 7520 rate at the time each CLAT is funded is 2.4% for the month of October 2013.

In an alternate iteration of this analysis, we have modeled the same scenarios as outlined below assuming a 7520 rate of 5.8%, which is the average rate from May 1989 to present.

Scenarios

A: In this scenario, we assumed the private foundation is funded with $200 million at the onset of the analysis.

B: In this scenario, we assumed that a CLAT with a term of 20 years will be established at the onset of the analysis and funded with $200 million. We assumed the CLAT will be "zeroed out" and will make level annual annuity payments to a private foundation, which will in-turn distribute 5% of the portfolio annually. Annual annuity payments from the CLAT to the private foundation are assumed to be $12,710,000. Any assets remaining in the CLAT at the end of the term will be transferred to the decedent's children free of tax.

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Essential Facts*

C: In this scenario, we assumed that three CLATs of varying terms will be established at the onset of the analysis, one each with a term of 10, 15 and 20 years. Each CLAT will be funded with 1/3rd of $200 million, will be "zeroed out", and will make level annual annuity payments to a private foundation, which will in-turn distribute 5% annually. Annual annuity payments are assumed to be $4,236,667, $5,345,333 and $7,578,000 for the 20, 15 and 10 year CLATs, respectively. Any assets remaining at the end of the term of each CLAT will be distributed to the decedent's children free of tax.

D: In this scenario, we have made all of the same assumptions as in scenario C, but we assumed that the annual annuity distributions from the three CLATs to the private foundation will increase by 20% each year. The initial annual annuity payments to the private foundation are assumed to be $513,333, $1,198,000 and $3,020,667 for the 20, 15 and 10 year CLATs, respectively.

E: In this scenario, we have made all of the same assumptions as modeled in scenario B, but we assumed that of the $200 million worth of assets used to fund the 20-year CLAT, $145.5 million will be composed of a promissory note with a term of 21 years. The note will earn interest at a rate of 6.5%, which is the Long-Term AFR of 3.5% for October 2013 plus 3%. This will serve as a proxy for a "market" rate of interest and annual interest payments to the CLAT are assumed to be $9,457,500. The remaining $54.5 million will be composed of a liquid portfolio invested according to an asset allocation of 70% globally diversified equities and 30% intermediate-term taxable bonds.

In Scenarios C and D, we assumed the children will reinvest any CLAT remainder in a taxable portfolio invested according to an allocation identical to those of the CLAT and foundation. We assumed the children will be subject to top marginal federal and Maryland state and local income tax rates.

Please see the appendix for further details concerning the annual annuity payout amounts for the version of the analysis where a 7520 rate of 5.8% has been used.

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Range of Foundation Values After Taxes and Cash Flows – 20th Year (nominal)*

7520 Rate Assumption – 2.4%

	Scenario A Private Foundation Only	Scenario B CLAT With Level Payments	Scenario C Three CLATs With Level Payments	Scenario D Three CLATs with Increasing Payments	Scenario E*** CLAT With Level Payments Funded W/Note
Foundation Assets ($ Millions)					
50th Percentile – Typical Markets	$280.3	$308.5	$301.9	$310.1	$311.0
10th Percentile – Very Good Markets	$576.4	$508.1	$533.5	$500.2	$509.2
90th Percentile – Poor Markets	$139.3	$195.0	$174.9	$198.4	$201.2
Cumulative Distrib. From Foundation 50th Percentile – Typical Markets	$228.1	$131.8	$156.3	$119.8	$131.9
CLAT Remainders**					
50th Percentile – Typical Markets	NA	$191.2	$145.7	$179.3	$138.7
10th Percentile – Very Good Markets	NA	$496.9	$414.9	$510.8	$256.0
90th Percentile – Poor Markets	NA	$5.6	$5.1	$15.0	$75.0

*Based on Bernstein's estimates of the range of returns for the applicable capital markets over the forecast period. Data does not represent any past performance and is not a promise of actual future results. All portfolios are assumed to be invested according to an asset allocation of 70% Globally Diversified Equities and 30% Intermediate-Term Bonds. "Typical Markets", "Very Good Markets" and "Poor Markets" are defined as the 50th percentile, 10th percentile, and 90th percentile outcomes, respectively, of 10,000 trials in our Wealth Forecasting System. See Assumptions and Notes on Wealth Forecasting System in Appendix for further details.

**With regard to Scenarios C and D, any assets remaining at the end of the 10-year and 15-year term CLATs is assumed to be transferred to a taxable portfolio for the benefit of the client's children. The children are assumed to be subject to top marginal federal and Maryland state / local income tax rates and the portfolio will be invested according to the same asset allocation as referenced above.

***With regard to Scenario E, CLAT remainder values do not include the principal value of the promissory note in year 20.

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APPENDIX

Capital Markets Projections

	Median 20-Year Growth Rate	Mean Annual Return	Mean Annual Income	1-Year Volatility	20-Year Annual Equivalent Volatility
Cash Equivalents	2.1	2.4	2.4	0.0	6.2
Int.-Term Diversified Municipals	2.9	3.1	3.0	3.3	4.8
Int.-Term Taxables	3.3	3.5	4.8	3.9	5.3
US Diversified	7.2	8.8	2.6	16.3	16.4
US Value	7.5	9.0	3.1	15.8	16.3
US Growth	6.9	8.8	2.1	18.2	17.7
US SMID	7.5	9.5	2.2	18.6	18.9
Developed International	7.9	9.9	3.2	18.0	17.3
Emerging Markets	6.3	10.0	3.6	25.8	25.8
Diversified Hedge Fund Portfolio	5.5	6.0	2.5	10.8	14.9
Inflation	2.7	3.0	n/a	0.9	7.5

Based on 10,000 simulated trials each consisting of 20-year periods.

Reflects Bernstein's estimates and the capital market conditions of September 30, 2013.

Does not represent any past performance and is not a guarantee of any future specific risk-levels or returns, or any specific range of risk-levels or returns.

For hedge fund asset classes, "Mean Annual Income" represents income and short-term capital gains.

PROJECTED CORRELATIONS

	Cash Equivalents	Int.-Term Diversified	Int.-Term Taxables	US Diversified	US Value	US Growth	US SMID	Developed International
Cash Equivalents	1.00	(0.02)	(0.03)	0.00	0.01	(0.01)	0.00	0.00
Int.-Term Diversified Municipals	(0.02)	1.00	0.47	0.01	0.01	0.01	0.00	0.00
Int.-Term Taxables	(0.03)	0.47	1.00	0.30	0.28	0.29	0.27	0.27
US Diversified	0.00	0.01	0.30	1.00	0.95	0.96	0.87	0.76
US Value	0.01	0.01	0.28	0.95	1.00	0.84	0.86	0.72
US Growth	(0.01)	0.01	0.29	0.96	0.84	1.00	0.81	0.73
US SMID	0.00	0.00	0.27	0.87	0.86	0.81	1.00	0.66
Developed International	0.00	0.00	0.27	0.76	0.72	0.73	0.66	1.00
Emerging Markets	0.01	0.03	0.28	0.56	0.54	0.53	0.55	0.57
Diversified Hedge Fund Portfolio	0.01	0.00	0.16	0.48	0.46	0.47	0.42	0.44
Inflation	(0.02)	(0.17)	(0.13)	(0.08)	(0.08)	(0.08)	(0.06)	(0.06)

Based on the first year of each of 10,000 simulated trials.

Reflects Bernstein's estimates and the capital market conditions of September 30, 2013.

Does not represent any past performance and is not a guarantee of any future specific risk-levels or returns, or any specific range of risk-levels or returns.

[Continued...]

PROJECTED CORRELATIONS

	Emerging Markets	Diversified Hedge Fund	Inflation
Cash Equivalents	0.01	0.01	(0.02)
Int.-Term Diversified Municipals	0.03	0.00	(0.17)
Int.-Term Taxables	0.28	0.16	(0.13)
US Diversified	0.56	0.48	(0.08)
US Value	0.54	0.46	(0.08)
US Growth	0.53	0.47	(0.08)
US SMID	0.55	0.42	(0.06)
Developed International	0.57	0.44	(0.06)
Emerging Markets	1.00	0.31	(0.04)
Diversified Hedge Fund Portfolio	0.31	1.00	(0.03)
Inflation	(0.04)	(0.03)	1.00

Based on the first year of each of 10,000 simulated trials.

Reflects Bernstein's estimates and the capital market conditions of September 30, 2013.

Does not represent any past performance and is not a guarantee of any future specific risk-levels or returns, or any specific range of risk-levels or returns.

Notes on Wealth Forecasting System

Purpose and Description of Wealth Forecasting Analysis

Bernstein's Wealth Forecasting Analysis is designed to assist investors in making their long-term investment decisions as to their allocation of investments among categories of financial assets. Our planning tool consists of a four-step process: (1) Client-Profile Input: the client's asset allocation, income, expenses, cash withdrawals, tax rate, risk-tolerance level, goals and other factors; (2) Client Scenarios: in effect, questions the client would like our guidance on, which may touch on issues such as when to retire, what his cash-flow stream is likely to be, whether his portfolio can beat inflation long-term, and how different asset allocations might impact his long-term security; (3) The Capital-Markets Engine: our proprietary model that uses our research and historical data to create a vast range of market returns, which takes into account the linkages within and among the capital markets, as well as their unpredictability; and finally (4) A Probability Distribution of Outcomes: based on the assets invested pursuant to the stated asset allocation, 90% of the estimated ranges of returns and asset values the client could expect to experience are represented within the range established by the 5th and 95th percentiles on "box- and- whiskers" graphs. However, outcomes outside this range are expected to occur 10% of the time; thus, the range does not establish the boundaries for all outcomes. Expected market returns on bonds are derived taking into account yield and other criteria. An important assumption is that stocks will, over time, outperform long bonds by a reasonable amount, although this is in no way a certainty. Moreover, actual future results may not meet Bernstein's estimates of the range of market returns, as these results are subject to a variety of economic, market and other variables. Accordingly, the analysis should not be construed as a promise of actual future results, the actual range of future results or the actual probability that these results will be realized. The information provided here is not intended for public use or distribution beyond our private meeting.

Rebalancing

Another important planning assumption is how the asset allocation varies over time. We attempt to model how the portfolio would actually be managed. Cash flows and cash generated from portfolio turnover are used to maintain the selected asset allocation between cash, bonds, stocks, REITs, and hedge funds over the period of the analysis. Where this is not sufficient, an optimization program is run to trade off the mismatch between the actual allocation and targets against the cost of trading to rebalance. In general, the portfolio will be maintained reasonably close to the target allocation. In addition, in later years, there may be contention between the total relationship's allocation and those of the separate portfolios. For example, suppose an investor (in the top marginal federal tax bracket) begins with an asset mix consisting entirely of municipal bonds in his personal portfolio and entirely of stocks in his retirement portfolio. If personal assets are spent, the mix between stocks and bonds will be pulled away from targets. We put primary weight on maintaining the overall allocation near target, which may result in an allocation to taxable bonds in the retirement portfolio as the personal assets decrease in value relative to the retirement portfolio's value.

Expenses and Spending Plans (Withdrawals)

All results are generally shown after applicable taxes and after anticipated withdrawals and/or additions, unless otherwise noted. Liquidations may result in realized gains or losses which will have capital gains tax implications. See details on withdrawals in Cash-Flow Summary, if any.

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Notes on Wealth Forecasting System

Volatility

Volatility is a measure of dispersion of expected returns around the average. The greater the volatility, the more likely it is that returns in any one period will be substantially above or below the expected result. The volatility for each asset class used in this analysis is listed on the Assumptions page. In general two-thirds of the returns will be within one standard deviation. For example, assuming that stocks are expected to return 8.0% on a compounded basis and the volatility of returns on stocks is 17.0%, in any one year it is likely that two-thirds of the projected returns will be between (8.9)% and 28.0%. But with intermediate government bonds, if the expected compound return is assumed to be 5.0% and the volatility is assumed to be 6.0%, two-thirds of the outcomes will typically be between (1.1)% and 11.5%. Bernstein's forecast of volatility is based on historical data and incorporates Bernstein's judgment that volatility of fixed-income assets is different for different time periods.

Technical Assumptions

Bernstein's Wealth Forecasting Analysis is based on a number of technical assumptions regarding the future behavior of financial markets. Bernstein's Capital Markets Engine is the module responsible for creating simulations of returns in the capital markets. These simulations are based on inputs which summarize the current condition of the capital markets as of September 30, 2013. Therefore, the first 12-month period of simulated returns represents the period from September 30, 2013 through September 30, 2014, and not necessarily the calendar year of 2013. A description of these technical assumptions is available on request.

Tax Implications

Before making any asset allocation decisions, an investor should review with his/her tax advisor the tax liabilities incurred by the different investment alternatives presented herein including any capital gains that would be incurred as a result of liquidating all or part of his/her portfolio, retirement-plan distributions, investments in municipal or taxable bonds, etc. Bernstein does not provide tax, legal, or accounting advice. In considering this material, you should discuss your individual circumstances with professionals in those areas before making any decisions.

Private Foundations

The Private Foundation is modeled as a charitable trust or not-for-profit corporation, which can be either a private operating foundation or a private non-operating foundation. The foundation may receive an initial donation and periodic funding from either the personal portfolio modeled in the system or an external source. Annual distributions from the foundation may be structured in a number of different ways, so long as the foundation distributes the minimum amount required under federal regulations, including: 1) only the minimum amount; 2) an annuity or fixed dollar amount, which may be increased annually by inflation or by a fixed percentage; 3) a unitrust, or annual payout of a percentage of foundation assets, based on a single year or averaged over multiple years; 4) a linear distribution of foundation assets, determined each year by dividing the foundation assets by the remaining number of years; or 5) the greater of the previous year's distribution or any of the above methods. These distribution policies can be varied in any given year. For non-operating foundations, the system calculates the excise tax on net investment income.

Charitable Lead Trusts

The Charitable Lead Trust (CLT) is modeled as a portfolio which receives its initial funding from the grantor and transfers payments to one or more charitable recipients each year for a specified number of years. The annual payments may be a fixed dollar amount (Charitable Lead Annuity Trust or CLAT) or a percentage of the trust's assets (Charitable Lead Unitrust or CLUT). In the case of a CLAT, annuities may be fixed (the same amount each year), or increasing. The annual payment is made first from available cash and then from other trust assets in kind. The trust will pay income taxes on retained income and will receive a charitable income tax deduction for income paid to the charitable recipient(s). Realized capital gains may be treated in one of two ways, as directed: 1) taxed entirely to the trust, or 2) included in the payment to charity and, therefore, deducted from the trust's income, to the extent the payment exceeds traditional income. When the CLT term ends, the remainder, if any, may be transferred in kind to 1) a non-modeled recipient, 2) a taxable trust, or 3) a beneficiary's portfolio. The transferred assets will have carryover basis.

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Lifetime QTIP for Basis Adjustment & Asset Protection

By

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AN OXYMORON? THE DEATHBED LIFETIME QTIP FOR BASIS ADJUSTMENT AND ASSET PROTECTION

Annual Seminar
of the
Florida Bar Real Property Probate & Trust Law Section's
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"An In Depth Look At Current Strategies In Asset Protection & Tax Planning for the Modern Estate Plan"

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An Oxymoron? The Deathbed Lifetime QTIP for Basis Adjustment and Asset Protection[1]

I. Prelude

A. "Deathbed" estate planning is one concept that has always piqued the interest of estate planners. For the most part, death is one of the few great unknowns of the human existence – no one truly knows when one will die.

B. When the probability of death is heightened, estate planners have long sought to utilize this insight to maximize the wealth transfer potential for the soon-to-be-deceased client and the client's family.

C. Based on the premise that a client's death is imminent, this outline will combine two distinct concepts - deathbed transfers and self-settled spendthrift trusts - to present a technique that, while only applicable under limited circumstances, could reap big rewards.

II. Foundation for the Plan – an Introduction to Important Concepts

A. Introduction to Income Taxation of Deathbed Transfers

(1) Pre-1982 Deathbed Transfer Tax Advantages

(a) Prior to 1982, deathbed planning had significant income tax advantages.

(b) Pursuant to the general rule under §1014,[2] the cost basis of the appreciated asset upon the decedent's death was automatically adjusted to the asset's then fair market value (referred to as the "General Basis Adjustment Rule") regardless of,

(i) the decedent's cost basis in a particular appreciated asset that he or she may own, and

(ii) the timing of the decedent's acquisition of such asset in proximity to his/her death,

(c) Because there were no timing restrictions on the General Basis Adjustment Rule, it was possible to transfer low basis assets to a dying person, have such assets become subject

[1] This outline is based on Richard S. Franklin and George D. Karibjanian, *An Oxymoron? The Deathbed Lifetime QTIP for Basis Adjustment and Asset Protection*, BBNA Tax Management Estates, Gifts, and Trusts Journal, Vol. , No. 6 (November 10, 2016) at p.219.

[2] *See generally* §1014(a)(1). For all purposes of this Article, unless otherwise specified, all section references in this article shall be to the Internal Revenue Code of 1986, as amended (the "IRC").

to the General Basis Adjustment Rule upon the decedent's death, and have the dying person bequeath those assets immediately back to the donor.

(d) As a result of acquiring the assets from a decedent, the donor's basis was increased to the assets' fair market value as of the decedent's date of death.

(2) 1982 and the adoption of §1014(e)

(a) This loophole, however, was closed in 1982 with the enactment of §1014(e), which imposes a one year "re-transfer threshold" in order to qualify for the General Basis Adjustment Rule.

(b) Under §1014(e), assets that are gratuitously transferred to a donee and then, within one year thereafter, retransferred back to the donor as a result of the donee's death, no longer qualify for the General Basis Adjustment Rule (referred to as the "One Year Rule").[3]

(c) Beyond this simplistic example, however, the language of §1014(e) is somewhat nebulous and, since its enactment, the Internal Revenue Service (the "Service") has provided little detailed information the application of the One Year Rule.[4]

B. Introduction to Self-Settled Spendthrift Trusts

(1) In present-day estate planning, asset protection has grown to become one of the primary elements in crafting a sound estate plan.

(2) Pre-1997 Asset Protection

(a) While most testamentary trusts have historically contained a spendthrift feature (described in more detail below), in recent years the objective has to been to minimize the creditor exposure of the client during his or her lifetime.

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[3] *See* ECONOMIC RECOVERY TAX ACT OF 1981, PL 97-34, 8/13/81, RIA COMREP ¶ 20,561.06 (Unlimited Marital Deduction).

[4] Jeff Scroggin, *Understanding Section 1014(e) & Tax Basis Planning*, LISI ESTATE PLANNING NEWSLETTER #2192 (February 6, 2014) at http://www.leimbergservices.com (referred to in this article as the "Scroggin Article").

(b) Until 1997, no domestic jurisdiction allowed a settlor to create an irrevocable trust for his/her own benefit and have his/her retained interest feature spendthrift protection.[5]

(3) 1997 and the Advent of the Self-Settled Spendthrift Trust

(a) In 1997, Alaska became the first state to enact legislation allowing an individual to create a self-settled spendthrift trust ("SST").

(b) As of August 1, 2016, 16 states have adopted legislation allowing SSTs.[6]

(4) Anatomy of a Standard SST

(a) During the settlor's lifetime, the trustee has the discretion to pay to the settlor (and, in some instances, the settlor's descendants) any portion or all of the trust's income and principal.

(b) Assuming that the other formation requirements are met (which customarily include a specific designation of governing law and a local resident or institution acting as a trustee), the applicable state law recognizes spendthrift protection as to the settlor.[7]

(5) SSTs and the Third Party Trust – "Quasi-SSTs"

(a) SSTs are not limited to the settlor's initial retention of a current beneficial interest in that they can also take the form of a transfer in trust for the benefit of a third party which, upon the termination of the third party's interest, reverts back in further trust for the benefit of the settlor.

(b) For example, the settlor can create a trust for his/her spouse, qualify that trust for the federal estate tax marital deduction as "qualified terminable interest property"

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[5] *See* Restatement (Second) of Trusts (1959), 156; Restatement (Third) of Trusts (2003), §58(2); N.Y. Est. Powers & Trusts §7-3.1.

[6] *See* Alaska – AS §34.40.110(a); Delaware - 12 DEL. C. §§3570-3576; Hawaii – HAW. REV. STAT. §554G Mississippi – MISS. CODE ANN. §§91-9-701 to 91-9-723; Missouri – MO. REV. STAT. §456.5-505; Nevada - NEV. REV. STAT. §§166.010 to 166.170; New Hampshire – N.H. REV. STAT. ANN. §564-D:1-18; Ohio – OHIO REV. CODE Ch. 5816; Oklahoma – OKLA. STAT. TIT. 31, §§10 to 18; Rhode Island – 18 R.I. GEN. LAWS CH. 18-9.2; South Dakota – S.D. CODIFIED LAWS §§55-16-1 to 16; Tennessee – TENN. CODE ANN. §§35-16-101 to 112; Utah – UTAH CODE §25-6-13; Virginia – VA. CODE ANN. §64.2-745.1; §64.2-745.2; West Virginia – W. VA. CODE §§44D-5-503a-c; and Wyoming – WYO. STAT. ANN. §§4-10-502, 504, 506(c), 510-523.

[7] For example, under 12 DEL. C. §3570(11), in order to qualify as an SST in Delaware, the trust instrument must, (a) expressly provide that Delaware law govern the validity, construction and administration of the trust, (b) be irrevocable, and (c) contain a spendthrift clause.

("QTIP," with such trust referred to as a "Lifetime QTIP Trust"),[8] and provide in the trust instrument that if the spouse predeceases him/her, the remainder of the trust is to be held in further trust for the settlor's benefit (the "Resulting Trust").

(c) Because the settlor created the Lifetime QTIP Trust, which has, as one of its provisions, the Resulting Trust for the settlor's benefit, the Resulting Trust is technically an SST.

(d) The Quasi-SST States

(i) In states that authorize SSTs (referred to as "SST States"), the fact that the Resulting Trust is an SST is of zero consequence – the laws of the state already allow for self-settled spendthrift trust protection.

(ii) Other states, though, have adopted statutes allowing for some self-settled spendthrift trust protection without adopting full SST legislation.

(iii) As of August 1, 2016, 10 additional non-SST States, along with 5 SST States, have enacted statutes to specifically abrogate the rule against SSTs for Resulting Trusts benefiting the settlor that are created upon the termination of a Lifetime QTIP Trust (each a "Quasi-SST State," and the particular authorization statute is referred to as "Quasi-SST Statute").[9]

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[8] Establishing a Lifetime QTIP Trust is complicated and it involves more considerations than are applicable in the context of creating a testamentary QTIP. For background on Lifetime QTIP Trusts, ideas for specific uses of Lifetime QTIP Trusts, and practical implementation information *see* Richard S. Franklin, *Lifetime QTIPs – Why They Should be Ubiquitous in Estate Planning*, 50 U. MIAMI HECKERLING INSTITUTE ON ESTATE PLANNING, ¶ 16 (Jan. 14, 2016) (hereinafter "Ubiquitous").

[9] This article uses the term "Quasi-SST Jurisdiction" which is a derived from the term "Inter-Vivos QTIP Trust Jurisdiction" as coined by Barry Nelson of North Miami Beach, Florida. The 10 Quasi-SST Jurisdictions that do not authorize SSTs are: Arizona - ARIZ. REV. STAT. §14-10505 (E); Arkansas – Ark. Rev. Stat. §28-73-505(c); Florida - FLA. STAT. §736.0505(3); Kentucky - KY. REV. STAT. ANN. §386B.5-020(8)(a); Maryland - MD. CODE, EST. & TRUSTS §14.5-1003; Michigan - MICH. COMP. LAWS §700.7506(4); North Carolina - N.C. GEN. STAT. §36C-5-505(c); Oregon - OR. REV STAT. §130.315(4); South Carolina - S.C. CODE ANN. §62-7-505(b)(2); and Texas - TEX. PROP. CODE §112.035(g). The 5 SST States that have enacted Quasi-SST Statutes are: Delaware - DEL. CODE ANN. Tit. 12, § 3536(c); New Hampshire - N.H. REV. STAT. ANN. § 564-B:5-505; Tennessee - TENN. CODE ANN. § 35-15-505(d); Virginia - VA. CODE ANN. § 64.2-747.B.3.); and Wyoming - WYO. STAT. ANN. § 4-10-506(f). Within a SST State that also has enacted a Quasi-SST Statute, a lifetime QTIP could be created to qualify under one statutory scheme or the other or perhaps both. Typically, the requirements to establish a SST Trust are more involved than to qualify a lifetime QTIP under a Quasi-SST Statute.

Most of the Quasi-SST Statutes provide that after the donee spouse's death, if the donor spouse has an interest in the Resulting Trust, the donor spouse is not deemed to be the settlor of the trust that created the Resulting Trust, i.e., the Lifetime QTIP Trust. Tennessee's statute, however, takes a slightly different approach. Rather than deeming the donor spouse to not be the settlor, Tennessee's statute deems the

(iv) Example – Arizona Quasi-SST Statute

(I) Under the Arizona Quasi-SST Statute, the settlor of a Lifetime QTIP Trust is not considered, for creditor purposes, to be the settlor of any Resulting Trust if,

(A) the QTIP election is made as to the Lifetime QTIP Trust pursuant to §2523(f), and

(B) the settlor is the beneficiary of the Resulting Trust after the donee spouse's death.

(II) Hence, if the settlor is not considered to be the settlor for purposes of this rule, Arizona's other rules governing creditor's rights in non-SSTs would apply, which generally permit spendthrift trust protection of a trust beneficiary's interests.

C. With this background, the challenge is now to determine analytically whether, under certain circumstances, when a spouse's death is imminent, it is possible to meld the income tax advantages associated with an automatic basis adjustment upon death and self-settled spendthrift trust protection to achieve income tax and asset protection benefits for the donor/surviving spouse.

III. Deathbed Lifetime QTIP Trust Strategy – An Overview

A. Example #1

(1) Facts

(a) As of August 1, 2016, W and H, Florida residents, are in their first marriage and are ages 75 and 80, respectively.

(b) They each have a revocable trust funded (for over 1 year) with $10 million of assets all having a zero basis for income tax purposes in which no portion of the potential gain is income in respect of a decedent.

(c) Each revocable trust provides that, upon the settlor's death, two trusts are to be created –

(i) first, a pre-residuary pecuniary QTIP trust, to be funded with the minimum amount to reduce federal estate taxes to the lowest possible amount, and

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settlor's interest in the Resulting Trust to not be property that may be distributed to the donor spouse.

(ii) second, a residuary bypass trust to be funded with the balance of the assets.

(d) The formula adjusts for assets passing outside of the revocable trust that do not qualify for the marital deduction.

(e) Upon the surviving spouse's death, all remaining assets pass to long-term generation-skipping transfer ("GST") tax-exempt and non-exempt trusts for couple's descendants.

(f) H becomes ill and, with his health in rapid decline, enters hospice care and is expected to die within a few days.

(g) W and H have made no prior taxable gifts.

(2) W is aware that upon H's death, the entire $10 million of assets in H's revocable trust will be subject to the General Basis Adjustment Rule and that testamentary trusts will be created for her that will provide creditor protection features with a standard spendthrift clause.

B. Application of the Deathbed Strategy

(1) One way to enhance the facts in Example #1 is to implement a strategy to provide for greater tax and creditor protection benefits.

(2) Introduction to the Deathbed Strategy as to Example #1

(a) Upon the diagnosis of H's terminal condition, W quickly establishes a Lifetime QTIP Trust for H's benefit and funds it with $5.45 million of assets from her revocable trust (all of which, as stated above, have a zero cost basis).

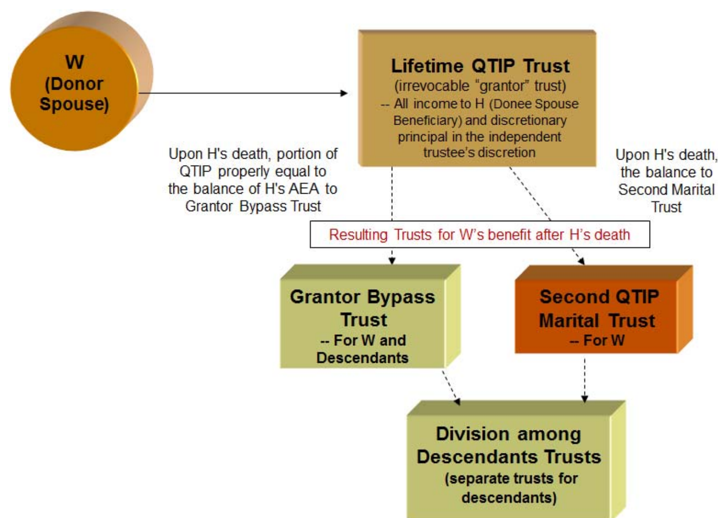
(b) W timely files a Form 709, U.S. Gift (and Generation-Skipping Transfer) Tax Return (a "709") and elects, pursuant to §2523(f), to qualify the entire Lifetime QTIP Trust for the federal gift tax marital deduction.

(c) W names a non-trust beneficiary to be the trustee of the Lifetime QTIP Trust (W, however, can be an administrative trustee).

(d) The Lifetime QTIP Trust provides that, upon H's death, the balance of the trust assets is to be held in a discretionary Resulting Trust for W and W's descendants.

(e) With H's available applicable exclusion amount under §2010 ("AEA") having been allocated against the Resulting Trust, the formula provision in H's revocable trust passes the balance of H's assets to a standard testamentary QTIP trust for W's benefit.

(f) Alternatively, W could fund the Lifetime QTIP Trust with her entire $10 million of zero basis assets so that the Resulting Trust to be funded upon H's death for W's benefit could be split between a bypass trust and a secondary QTIP trust, illustrated as follows:



(3) General Effect of the Strategy

(a) W's transfer of a minimum of $5.45 million into a Lifetime QTIP Trust is intended to be taxed in H's gross estate[10] in order to create a Resulting Trust utilizing both of H's AEA and his available GST tax exemption under §2631.

(b) Assuming that W only transferred the $5.45 million into the Lifetime QTIP Trust, the Resulting Trust becomes a "bypass trust" that can provide for discretionary payments of income and principal to any one or more of W and any of W and H's descendants (i.e., similar to a traditional testamentary bypass trust).

(c) In addition, as described below, the bypass trust is also a "grantor trust" for federal income tax purposes.

[10] For all purposes of this Article, references to the "gross estate" shall be to the "gross estate for federal estate tax purposes under §2031."

(d) Because the Lifetime QTIP Trust was included in H's gross estate under §2044, Treas. Reg. §25.2523(f)-1(f), Examples 10 and 11 provide that the bypass Resulting Trust will *not* be included in W's gross estate pursuant to §2036 or §2038 even though W's beneficial interest in the Resulting Trust is technically a retained interest.

IV. Income Tax Analysis

A. Introduction

(1) As stated above, the General Basis Adjustment Rule under §1014 provides that the income tax basis of property acquired from a decedent is the fair market value of such property at the date of the decedent's death, or, if the decedent's executor so elects, at the alternate valuation date.[11]

(2) In the context of the Deathbed Strategy used in Example #1, upon H's death, the $10 million of assets in H's revocable trust are subject to the General Basis Adjustment Rule and acquire a new basis equal to the fair market value of such assets on the date of H's death.[12]

B. Basis Step-Up Applies to Lifetime QTIP Trust Assets

(1) What happens to the basis of the assets in the Lifetime QTIP Trust?

(a) Generally, if QTIP property is included in a spouse's gross estate pursuant to §2044, then, pursuant to §1014(b)(10), the QTIP property is considered to have been "acquired from or to have passed from" that spouse, which triggers the General Basis Adjustment Rule for the QTIP property.

(b) As for QTIP property held in trust, at the moment of the decedent's death, such property is treated, for income tax purposes, as owned by the donor spouse.

(c) Applying these two concepts, does the taxpayer status for income tax purposes have any effect on the applicability of the General Basis Adjustment Rule?

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[11] Section 1014(a); Treas. Reg. §1.1014-1(a). Note that Treas. Reg. §1.1014-2(b)(2) provides that the General Basis Adjustment Rule applies even if a 706 is not required to be filed.

[12] Because no federal estate taxes are due, the alternate valuation under §2032 is not applicable. Further, even though the assets are owned by H's revocable trust, §1014(b)(2) considers the assets to pass directly from H so, therefore, the General Basis Adjustment Rule applies.

(2) Taxpayer Status Has No Effect on General Basis Adjustment Rule

(a) In Example #1, when W establishes the Lifetime QTIP Trust, several provisions of Subchapter J of the IRC cause all items of income and deductions from Lifetime QTIP Trust to be taxed to W (i.e., the Lifetime QTIP Trust is a "grantor trust" as to W).

(b) For example, pursuant to §677(a)(1), the Lifetime QTIP Trust is a "grantor trust" as to W because the income from the Lifetime QTIP Trust must be paid directly to H, who is W's spouse, and such income is therefore "paid to the grantor's spouse without the approval or consent of any adverse party is, or is payable to him or her in the discretion of the grantor or a nonadverse party, or both."

(c) The Lifetime QTIP Trust can also be considered to be a grantor trust as to W assuming that the actuarial value of her interest in the Resulting Trust exceeds 5% of the overall trust value (which is likely if the Resulting Trust provides her with mandatory income).

(d) As the Lifetime QTIP Trust is a "grantor trust," Rev. Rul. 85-13, 1985-1 C.B. 184, in effect, concludes that during H's life, W owns the assets of the trust for income tax purposes.

(e) Contrast the above with the purpose of §1014 (also an income tax provision), which is to grant a benefit for assets "acquired from a decedent" - if Rev. Rul. 85-13 stands for the premise that, for "grantor trust" purposes, the grantor (i.e., W) "owns" the property, then, under §1014, does "grantor trust" property actually "pass" from a decedent (i.e., H) since the decedent is not treated as "owning" the property for income tax purposes?

(f) Stated differently, does Rev. Rul. 85-13 indirectly create an exception to the General Basis Adjustment Rule under §1014(a) for Lifetime QTIP Trusts that are taxed for income tax purposes to the grantor?

(g) The short answer is that there does not appear to be such an exception.

(i) The phrase "acquiring the property from a decedent" in §1014(a) is explained in §1014(b), which appears to refer to the <u>actual</u> transfer of property as a result of a

decedent's death and not to the "income tax" transfer of property.

(ii) This conclusion is reinforced by the reference in Treas. Reg. §1.1014-2(b)(2) to the decedent's 706 (or lack thereof): "It is not necessary for the application of this paragraph that an estate tax return be required to be filed for the estate of the decedent or that an estate tax be payable."

(iii) If §1014(a) were only to apply to property owned by another for income tax purposes, the issue of the decedent's 706 would be irrelevant – the true test would be whether such assets were taxed to the decedent for income tax purposes, which is not a test under any of the Treasury Regulations under §1014.

C. Effects of the One-Year Rule

(1) Although there are three exceptions within §1014 to the General Basis Adjustment Rule, for purposes of the Deathbed Strategy, only one exception is pertinent – under §1014(e), there is no basis adjustment for property transferred to the decedent within one year of the decedent's death and which is then bequeathed back to the transferor.[13]

(2) Specifically, §1014(e)(1) provides as follows:

> "(e) Appreciated property acquired by decedent by gift within 1 year of death.
>
> (1) In general. In the case of a decedent dying after December 31, 1981, if—
>
> (A) appreciated property was acquired by the decedent by gift during the 1-year period ending on the date of the decedent's death, and
>
> (B) such property is acquired from the decedent by (or passes from the decedent to) the donor of such property (or the spouse of such donor),

[13] Treas. Reg. §1.1014-1(c)(1). Also excepted from the General Basis Adjustment Rule are unexercised incentive stock options and options to purchase pursuant to an employee stock purchase plan. Treas. Reg. §1.1014-1(c)(2).

> the basis of such property in the hands of such donor (or spouse) shall be the adjusted basis of such property in the hands of the decedent immediately before the death of the decedent.

(3) As stated above, the general rule is fairly straightforward – if gifted property passes back to the donor as a result of the death of the recipient within one year of the gift, the General Basis Adjustment Rule does not apply.

(4) However, a more careful reading of the statute may present an "exception-to-the-exception."

   (a) The statute refers to property re-acquired by the "donor" of the property.

   (b) Who exactly is the "donor" in this instance – is this to be interpreted literally, i.e., directly to the donor, or is this to be interpreted generally, i.e., directly to the donor or indirectly to the donor through a trust in which the donor is a beneficiary?

(5) Application to Example #1

   (a) H is in hospice care and expected to die within a few days.

   (b) The Lifetime QTIP Trust assets will be included in H's gross estate pursuant to §2044. The remainder, however, is not returning directly to W, but, rather, is returning *indirectly* to W in the form of a current interest in a trust (or trusts).

   (c) Therefore, it would appear as if the premise of the Deathbed Strategy falls outside the literal wording of §1014(e)(1).[14]

(6) However, a more in-depth analysis may lead to a different conclusion.

   (a) The legislative history to §1014(e) appears to provide for a far more expansive reach than the statutory language.

   (b) Specifically, the legislative history states that,

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[14] *See* Mark R. Siegel, *I.R.C. Section 1014(e) and Gifted Property Reconveyed in Trust,* 27 AKRON TAX J. 33 (2011-2012), at p. 45: "Consistent with the statutory language contained in §1014(e)(1), the legislative history to §1014(e) clearly indicates congressional concern about the situation where the donee-spouse dies within a year of the transfer and leaves the donor-spouse the property outright. The statutory language found in §1014(e)(1) lends support to the argument that the step up in basis is not barred where, rather than returning the property directly to the donor, the donee-spouse instead provides that the property passes in trust for the surviving donor-spouse."

> "For decedents dying after December 31, 1981, the bill provides that the stepped-up basis rules contained in section 1014 will not apply with respect to appreciated property acquired by the decedent through gift within [one-year] of death (including the gift element of a bargain sale), if such property passes, *directly or indirectly*, from the donee-decedent to the original donor or the donor's spouse. (Emphasis provided.)"[15]

(c) It is unclear how the phrase "directly or indirectly" is to be interpreted, especially since such language was not adopted in the final statute.

(d) If the legislative history is applied to interpret the statute, the statutory phrase "acquired from the decedent by (or passes from the decedent to) the donor" would be interpreted to include *indirect* interests for the donor's benefit.

(e) A narrow interpretation is that "indirectly" refers to transfers in trust where the funds will ultimately be distributed outright to the donor, such as if the trust agreement provides that if a particular asset is sold, the sales proceeds are to be distributed outright to the surviving spouse.[16]

(f) A broader application is that "indirectly" could include a mandatory or discretionary income interest in a trust - if the broader interpretation is applied, then under facts similar to the Deathbed Strategy, the General Basis Adjustment Rule would not apply to the entire Resulting Trust for W.

(7) Since §1014(e) was enacted, the Service has provided little detailed information on how to apply §1014(e)[17] - a search for

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[15] ECONOMIC RECOVERY TAX ACT OF 1981, PL 97-34, 8/13/81, RIA COMREP ¶10,141.009 (Basis of certain appreciated property transferred to decedent by gift within one year of death).

[16] *See* Siegel, *supra* note 14, at p. 46: "The language may be limited only to situations where the appreciated property is sold and the fiduciary is directed to distribute the proceeds to the donor. For example, in the context of the sale of appreciated property by a trust, the language may be intended to cover the limited situation where the donee created a trust and the trustee of that trust sells the appreciated property and distributes the proceeds to the donor according to the trust agreement. In contrast, the statute may not expressly cover the donee-decedent's testamentary trust funded with the appreciated property with the donor as beneficiary of a life interest or term certain interest."

[17] Scroggin Article, *supra* note 2, at p.4.

guidance located only 5 published Private Letter Rulings in which §1014(e) was a primary focus, and, in each such ruling, the Service relied on the "direct or indirect" language from the legislative history in interpreting the scope of §1014(e) (the "1014(e) PLRs").[18]

(a) How best to plan to avoid the 1014(e) PLRs depends on the standard of living of the donor spouse.

(b) If the donor spouse does not necessarily need full access to the funds, the Resulting Trust for the donor spouse should be prepared as a discretionary trust under which the distribution of income and principal among the donor spouse and the donor spouse's descendants is at the complete discretion of independent trustees.

(c) Drawn in this manner, it would appear impossible to actuarially determine the "definite" interest in the donor spouse.

(d) In this instance, with the default rule of §1014(a) applying, and if the portion subject to §1014(e) cannot be actuarially determined, it can be concluded that the §1014(e) portion has no value, so therefore the entire Resulting Trust is subject to the General Basis Adjustment Rule.[19]

(8) Bifurcation rule

(a) What if, however, the donor spouse must have access to some of the funds - not enough access to require an outright payment of all assets back to the donor spouse, but partial access by means of a mandatory income interest?

(b) Under the 1014(e) PLRs, the suggestion is made that §1014(e) would apply to any portion of assets in trust where

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[18] Id., *citing* Priv. Ltr. Rul. 9026036 (March 28, 1990); *reversed, in part but not as to §1014(e)*, by Priv. Ltr. Rul. 9321050 (February 25, 1993); Priv. Ltr. Rul. 9308002 (November 16, 1992). Priv. Ltr. Rul. 200101021 (January 8, 2001); Priv. Ltr. Rul. 200210051 (March 8, 2002). Although Private Letter Rulings are binding only on the requesting party, they do provide insight on the Service's position as to a particular issue.

[19] *See* Howard M. Zaritsky, *Tax Planning for Family Wealth Transfers During Life: Analysis With Forms,* ¶8.07[5][c] (THOMSON REUTERS/TAX & ACCOUNTING, 5TH ED. 2013, WITH UPDATES THROUGH MAY 2016) (online version accessed on Checkpoint (www.checkpoint.riag.com). *See also* Lester B. Law and Howard M. Zaritsky, *Basis, Banal? Basic? Benign? Bewildering?*, 49 U. MIAMI HECKERLING INSTITUTE ON ESTATE PLANNING, IV.E.3(d (unpublished) (2015); Steve Akers, *Current Developments and Hot Topics*, pp. 47–48 (June 2014) (available at www.bessemer.com/advisor).

the donor spouse has a definite interest, such as a mandatory income interest.

(c) Under that scenario, the 1014(e) PLRs infer that §1014(a) and §1014(e) would apply proportionately between the determinable interest for the spouse (i.e., the mandatory income interest) and the other interests in the trust, with the default rule of §1014(a) applying and then excepted by any portions deemed to be subject to §1014(e) (the "Bifurcation Rule").

(d) Illustrative Example

(i) For example, at 65 years of age, by applying a 2.2% interest rate as determined under §7520 (the "7520 Rate"), the life estate factor for valuing a trust interest is 31% (with a remainder factor of 69%).

(ii) At age 75, applying the same 2.2% 7520 Rate, the life estate factor is decreased 21% (and remainder factor is increased to 79%).

(iii) Under the Bifurcation Rule, if W, a 75 year old Florida resident, creates a Lifetime QTIP Trust on H's deathbed and, upon H's death, the Resulting Trust is a mandatory income trust for W's lifetime, the entire Resulting Trust would be subject to the General Basis Adjustment Rule under §1014(a), except that a portion of the Resulting Trust equal to the 21% actuarial value of W's income interest is subject to the One Year Rule under §1014(e).[20]

(e) Complexities are added to the Bifurcation Rule if the donor spouse requires more than just the income from the Resulting Trust.

(i) The actuarial calculation when the donor spouse retains the income interest in the Resulting Trust is a simple calculation; complications arise, and an increase in the portion subject to §1014(e) is likely, if the Resulting Trust also provides that the donor spouse is granted a discretionary principal right

[20] Although the Bifurcation Rule is inferred within the 1014(e) PLRs, no mention is made as to how to implement the Bifurcation Rule within the trust, i.e., do all appreciated assets receive a pro-rata basis increase totaling 79% of all trust appreciation, are certain assets allocated to the "remainder" so that such assets are the only assets that receive the basis increase, or is there some other mechanism to implement the General Basis Adjustment Rule?

subject to an ascertainable standard or a "5 and 5" annual withdrawal right (a "5&5 Right").

(ii) The reason for the increase in the value of the §1014(e) portion is that both principal rights can be ascertained for valuation purposes (although the valuation process for the discretionary principal interest can be extremely complex).

(iii) The better plan is to not include a 5&5 Right and provide that the income and principal distribution provisions be wholly discretionary and not subject to an ascertainable standard.

(iv) This should allow the trustees to assert the argument that all discretion in favor of W is "unascertainable" for valuation purposes, which would effectively negate the imposition of §1014(e).[21]

(f) Is it a certainty that the Bifurcation Rule will be applied?

(i) Not according to a recent Tax Court opinion. In *Estate of Kite*,[22] Mrs. Kite transferred certain stock into a Lifetime QTIP Trust for Mr. Kite seven days before his death on February 23, 1995.

(ii) The Lifetime QTIP Trust provided that, upon Mr. Kite's death, the balance of the trust would be held in an income trust for Mrs. Kite's lifetime (i.e., a trust that would qualify for the QTIP election in Mr. Kite's gross estate).

(iii) Upon Mr. Kite's death, the Lifetime QTIP Trust was included in his gross estate under §2044.

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[21] In any event, the addition of a principal distribution power could cause the valuation methodology to fall outside of a standard actuarial calculation involving the 7520 Rate. *See* John A. Bogdanski, *Federal Tax Valuation* ¶ 5.07[4][b][ii] (THOMSON REUTERS/TAX & ACCOUNTING, 1996, WITH UPDATES THROUGH APRIL 2016) (online version accessed on Checkpoint (www.checkpoint.riag.com), *citing* Priv. Ltr. Rul. 9811044 (Dec. 11, 1997), which involved the partition of a trust in which the income beneficiary possessed a discretionary right to receive income and principal for her lifetime, and the Service declined to issue an advance ruling as to the amount of the gift from the beneficiary to the remaindermen on account of the severance, stating that "[S]ince the gift is not an absolute right to distributions of income or principal, it cannot be valued by use of the tables contained in Section 2512. Rather, the value of the gift should be determined in accordance with the general valuation principles contained in [Treas. Reg. §] 25.2512-1." While it may be that such a valuation is not definable, nevertheless, it involves a much more complex approach to valuing the trust interests. *See also* Siegel, *supra* note 14, at p. 50.

[22] T.C. Memo. 2013-43 (2013). For an analysis of the court's order and Rule 155 computations issued in an unpublished opinion on October 25, 2013, *see* Steve R. Akers, *Estate of Kite v. Commissioner*, LISI ESTATE PLANNING NEWSLETTER #2185 (January 21, 2014).

(iv) From a reading of the opinion, the issues before the Tax Court did not include the applicability of §1014(e); however, Footnote 9 of the opinion stated, "All of the underlying trust assets, including the OG&E stock transferred to Mr. Kite in 1995 [the Lifetime QTIP Trust],[23] received a step-up in basis under sec. 1014."[24]

(v) It was very apparent to all that Mr. Kite died very soon after the creation of the trust, yet the Tax Court stated that the assets in the Lifetime QTIP Trust were all subject to the General Basis Adjustment Rule.

(vi) Query whether the Tax Court,

(I) neglected to consider §1014(e) in its opinion,

(II) the Service neglected to consider the applicability of §1014(e) in its audit of the matter and arguments before the Tax Court, and/or

(III) the Tax Court ignored the 1014(e) PLRs and focused on the literal language of §1014(e) and concluded that, since Mrs. Kite, the donor, did not receive outright ownership of the assets passing from the Lifetime QTIP Trust, the statutory provisions of §1014(e) did not apply.[25]

D. Continuing Grantor Trust Status for Resulting Trusts

(1) Introduction

(a) If, upon a spouse's death, the testamentary documents provide for a bypass trust, the bypass trust is its own taxpayer for income tax purposes.

(b) Under a modern drafting approach, the bypass trust would be total discretionary trust for the benefit of either the

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[23] The court loosely refers to "the stock transferred to Mr. Kite" in the quoted sentence from footnote 9. However, when read together with footnote 5 and the accompanying text in the body of the *Kite* opinion, it is clear that the court is referring to the stock transferred to the Lifetime QTIP Trust.

[24] *See* Kerry A. Ryan, *Kite: IRS Wins QTIP Battle but Loses Annuity War*, Tax Notes, 2013 TNT 239-9 (Dec. 12, 2013).

[25] Note, however, that there are further potential issues with the applicability of §1014(e), and, in particular, the disposition of assets that could potentially be subject to the provisions of §1014(e)(2). *See* Scroggin Article *supra* note 2, at pp. 8-10.

surviving spouse or the surviving spouse and the descendants of the deceased spouse.

(c) If, in a particular taxable year, such discretion is not exercised so that there are no distributions carrying out distributable net income, the bypass trust pays all income taxes on its taxable income.

(d) Although this would result in taxable income being taxed at a potential top federal income tax rate of 43.4% (with additional state income taxes if the trust is subject to state income taxation), this would also mean that 56.6% of all such taxable income (or less, if state income taxes are applicable) would be reinvested into principal.

(e) In an ideal world, it would be extremely income tax advantageous for the bypass trust to be a grantor trust as to the surviving spouse so that *all* federal (and potential state) income tax dollars could remain in the bypass trust.

(2) Resulting Trust is a Grantor Trust

(a) Unlike traditional bypass trusts, upon the donee spouse's death, regardless of whether the Resulting Trust is a bypass trust or QTIP trust, or both, it is possible to structure the Resulting Trust (or Trusts) to be grantor trusts as to the donor spouse.

(b) This can occur even though the Lifetime QTIP Trust assets have been included in the donee spouse's gross estate under §2044.

(c) This result is achieved by applying the language of Treas. Reg. §1.671-2(e)(5), which provides, in pertinent part, as follows:

> If a trust makes a gratuitous transfer of property to another trust, the grantor of the transferor trust generally will be treated as the grantor of the transferee trust. However, if a person with <u>a general power of appointment over the transferor trust exercises that power in favor of another trust</u>, then such person will be treated as the grantor of the transferee trust, even if the grantor of the transferor trust is treated as the owner of the

transferor trust under subpart E of the Internal Revenue Code. (Emphasis added.)

(d) Pursuant to this Regulation, a change in the taxpayer for income tax purposes occurs only if someone other than the grantor spouse possesses a general power of appointment over the particular trust and actually exercises it in favor of another trust.

(e) Recall that prior to the introduction of §2056(b)(7) under the Economic Recovery Tax Act of 1981, the primary manner in which a surviving spouse's terminable interest could qualify for the marital deduction is if the surviving spouse were granted a general power of appointment over the trust principal.

(f) The theory for this was that the general power of appointment granted the spouse virtual ownership of the property.[26]

(g) Treas. Reg. §1.671-2(e)(5) follows the same logic - if the donee spouse was granted a general power of appointment and exercised it, the donee spouse would have actual ownership and would have appointed the property however he/she pleased; for this reason, he/she should become the "grantor" of the property. However, with a QTIP election, the effect is a "fiction" in terms of actual control.

(h) It is possible to qualify a trust for the QTIP election even if the donee/deceased spouse only was given the income from the trust with no discretionary principal or the granting of a testamentary limited power of appointment.

(i) For this reason, since the donee/deceased spouse lacks actual control over the Lifetime QTIP Trust property, there should be no shift in grantor status.[27]

(j) Therefore, as a result of inter-vivos planning, the scenario is created under which a Resulting Trust that is bypass

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[26] Richard B. Stephens, Guy B. Maxfield, Stephen A. Lind, & Dennis A. Calfee, *Federal Estate and Gift Taxation*, ¶5.06, *citing* S. Rep. No. 1013, 80th Cong., 2d Sess. 1163, 1238 (1948), reprinted in 1948-1 CB 285, 342 (THOMSON REUTERS/WG&L, 9TH ED. 2013, WITH UPDATES THROUGH JUNE 2016) (accessed on Checkpoint (www.checkpoint.riag.com)).

[27] *See* Pennell, *Myths, Mysteries, & Mistakes*, sec. 3. Note that Treas. Reg. §1.671-2(e)(5) was released in T.D. 8831 on August 23, 1999, or 17 years after Congress passed the QTIP legislation, so if Treasury intended to include QTIP trusts as part of this Regulation, it would have done so. Since Treasury did not include references to QTIP trusts within Treas. Reg. §1.671-2(e)(5), electing QTIP treatment does not convert "grantor trust" status.

trust can be exponentially enhanced by the ability to retain the income tax dollars within the trust.[28]

(3) One final benefit to this analysis – there is no comparable rule to the One Year Rule of §1014(e) with respect to Treas. Reg. §1.671-2(e)(5) and "grantor trust" status. Therefore, even if the donee spouse dies within one day after the Lifetime QTIP Trust has been created, the provisions of Treas. Reg. §1.671-2(e)(5) should apply as to the Resulting Trust.

V. Creditor Protection

A. Introduction

(1) In addition to tax planning, an additional key to the Deathbed Strategy is grounded in state law.

(2) Certain asset protection features are available if all trusts created under the Lifetime QTIP Trust are governed under the laws of either an SST state or a Quasi-SST State.

B. Creditor Protection During H's Lifetime

(1) As described above, the Lifetime QTIP Trust is an irrevocable trust under which W, as the settlor, has not retained any current interests.

(2) For the duration of H's lifetime, H is the sole current recipient of trust income and, depending on the trust provisions, will be the sole recipient of discretionary principal distributions.

(3) As is the case with most irrevocable trusts, the Lifetime QTIP Trust will likely include a "spendthrift clause," which provides, in general, that the holder of a beneficial interest in the trust may not transfer or assign such interest and that such interest

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[28] As to the bypass trust, the benefits include having the donor spouse pay the income tax on the income earned by the bypass trust, which enhances the bypass trust by preserving the assets that would otherwise have been used to pay such income taxes, i.e., "supercharging" the bypass trust. *See* Mitchell M. Gans, Jonathan G. Blattmachr, Diana S. C. Zeydel, *Supercharged Credit Shelter Trust,*[SM] 21 PROB. & PROP. 52 (July/Aug. 2007) and Jonathan G. Blattmachr, Mitchell M. Gans and Diana S. C. Zeydel, *Supercharged Credit Shelter Trust*[SM] *versus Portability*, 28 PROB. & PROP. 10 (March/April 2014). *See also* American Bar Association Section on Real Property Trust and Estate Law, Estate Tax Committee of the Income and Transfer Tax Group, *Portability – The Game Changer*, DISTRIBUTED AT 47 U. MIAMI HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 2013 (available at http://apps.americanbar.org/dch/committee.cfm?com=RP512500) and Richard S. Franklin and Lester B. Law, *Portability's Role in the Evolution Away from Traditional Bypass Trusts to Grantor Trusts*, 37 BLOOMBERG BNA, TAX MANAGEMENT'S ESTATES, GIFTS AND TRUSTS JOURNAL 135 (No. 2, March-April 2012).

may not be used to satisfy the obligations of any creditors of the interest holder.

(4) It is important to include a spendthrift provision because some states mandate spendthrift protection while other states require it to be part of the trust agreement.[29]

(5) In Example #1, because H did not create the trust, H's interest in the Lifetime QTIP Trust should be protected from H's creditors (but this protection ends once income is actually distributed to H because H's income right is mandatory and, once distributed to H, the income then becomes H's property).[30]

(6) The use of the spendthrift provision for H's income interest is a standard feature that would be found in almost every irrevocable trust.

C. H's Death – Protection for W

(1) Where the Deathbed Strategy deviates from the norm is upon H's death.

(2) Upon H's death, as set forth above, the Lifetime QTIP Trust provides for an interest in W in the Resulting Trust, which is a

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[29] Under the Uniform Trust Code ("UTC"), spendthrift protection must be specifically elected. The approach under the UTC is one of negative inference, as UTC §501 provides that, to the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The UTC then explains the nature of a "spendthrift provision" in UTC §502, which provides that, (a) a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest; (b) a term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest; and (c) a beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. This trend is carried forward by states that adopt the UTC, e.g., FLA. STAT. §§736.0501 and 736.0502. In other states, spendthrift protection is the default, e.g., N.Y. EST. POWERS & TRUSTS §7-3.1(b)(2), which provides that "All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended."

[30] Although beyond the scope of this article, questions abound as to certain protection afforded to discretionary distributions as to exception creditors. For example, pursuant to NEV. REV. STAT. §163.419(4), unless otherwise provided in the trust instrument, regardless of whether a beneficiary has an outstanding creditor, a trustee of a discretionary interest may directly pay any expense on the beneficiary's behalf and may exhaust the income and principal of the trust for the benefit of such beneficiary. The protection afforded by this provision is all-encompassing and is not subject to the rights of any exception creditor, such as a spousal payments or child support. *See* Steven J. Oshins, *4th Annual Dynasty Trust State Rankings Chart* (www.oshins.com/images/Dynasty_Trust_Rankings.pdf) and *7th Annual Domestic Asset Protection Trust State Rankings Chart* (www.oshins.com/images/DAPT_Rankings.pdf). Contrast this view with FLA. STAT. §736.0504(2), which provides that if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary may not

discretionary trust interest for W (in the form of a bypass trust), a mandatory income trust interest for W (in the form of a QTIP trust), or both.

(3) At first glance, once the Resulting Trust is created, W, who created the Lifetime QTIP Trust, now has a beneficial interest in a trust created under the Lifetime QTIP Trust.

(4) In other words, the Resulting Trust is technically an SST for W's benefit and, as previously stated, most states do not provide creditor protection for such self-settled interests.

(5) As the objective is to provide creditor protection for W, the Lifetime QTIP Trust must be established in either an SST State or a Quasi-SST State.

(6) In Example #1, because W established the Lifetime QTIP Trust under Florida law, and since Florida is a Quasi-SST State, W's interest in the Resulting Trust will be protected from the claims of her creditors after H's death.[31]

(7) No One-Year Rule Equivalent

(a) Most importantly, unlike §1014(e), state law does not impose a One Year Rule.

(b) As the One Year Rule is purely a tax concept, none of the SST States nor the Quasi-SST States establishes a mandatory minimum period of duration for the donee spouse's interest to merit the creditor protection feature

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compel a distribution that is subject to the trustee's discretion, or attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary. The Florida Second District Court of Appeal, in Berlinger v. Casselberry, 133 So.3d 961 (Fla. 2nd Dist. Ct. App. 2013), distinguished between attaching the interest and attaching distributions from the interest when it upheld an ex-spouse's right as an exception creditor to attach discretionary distributions from the interest. *See also* Barry A. Nelson, *Bacardi on the Rocks*, 86 FLA. BAR J. 21 (March 2012); Barry A. Nelson, *Bacardi: The Hangover*, 88 FLA. BAR J. 40 (March 2014).

[31] FLA. STAT. §736.0505(3) provides:

> (3) Subject to the provisions of s. 726.105, for purposes of this section, the assets in:
>
> (a) A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended, or a trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; and
>
> (b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a), shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.

relating to the donor spouse's interest in the Resulting Trust.

(c) Hence, W's creation of the Lifetime QTIP Trust on H's deathbed does not exclude the protection of W's interest in the Resulting Trust from the claims of her creditors.[32]

D. The asset protection feature of the Quasi-SST Statutes is applicable so long as the donor spouse makes a timely and proper gift tax QTIP election.[33]

(1) If the donee spouse dies before the QTIP election is due to be timely made, a timely election can nevertheless be made by his/her executor and such election is retroactive for federal transfer tax purposes.

(2) Because the Quasi-SST Statute is linked directly to the QTIP election, presumably the protection provided by the Quasi-SST Statute should likewise be retroactive.

E. No Effect on Grantor Trust Status

(1) It is important to acknowledge that, while a Quasi-SST Statute "switches" the settlor for state law purposes only, such statutes have no effect on "grantor trust" status for federal income tax purposes.

(2) For example, the Florida Quasi-SST Statute (Fla. Stat. §736.0505(3)) provides that the donee spouse is deemed to be the settlor but only *after* the donee spouse's death.[34]

(3) As described above, Treas. Reg. §§1.671-2(e)(1) and (2) provide that the donor spouse is the "grantor" for income tax purposes when the trust is created and continues as the "grantor" even after the death of the donee spouse, unless, as set forth in

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[32] Also consider that the asset protection afforded by the Quasi-SST Statutes is seemingly not limited to residents of the particular state having such a statute. For example, a resident of Georgia, which is neither an SST State nor a Quasi-SST State, could take steps to properly establish a nexus to Florida when creating a Lifetime QTIP Trust, such as using a Florida trustee and using Florida for the trust's situs. This nexus would provide a basis for using Florida law, thereby allowing the Georgia resident to take advantage of the creditor protection benefits of Florida's Quasi-SST Statute.

[33] Likewise, the QTIP election for transfer tax purposes causes the donee spouse to be the deemed transferor for gift, estate and GST tax purposes. *See* Ubiquitous *supra* note 6, at ¶ 1600.6[B].

[34] Most of the Quasi-SST Statutes invoke the protection only after the donee spouse's death and ignore any termination of the donee spouse's interest during his/her lifetime. Exceptions to this general rule include Maryland, in MD. CODE, EST. & TRUSTS §14.5-1003(a)(2)(iii) ("The individual's interest in the trust income, trust principal, or both follows the termination of the spouse's prior interest in the trust.); and Michigan, in the preamble to MICH. COMP. LAWS §700.7506(4) ("…that follows the termination of the individual's spouse's prior beneficial interest…").

Treas. Reg. §1.671-2(e)(5), the donee spouse is given, and exercises, a general power of appointment.[35]

(4) No reference is made within Treas. Reg. §1.671-2(e) to the effect of state law on "grantor" status, so it can be concluded that state law has no effect on such status.

F. Negating a §2041 Argument

(1) Lifetime QTIP Trust planning is not new – it has been in existence for as long as the QTIP election has been the law. However, due to enhanced awareness of creditor issues, practitioners began to focus on a new potential wrinkle to the transfer tax consequences of Lifetime QTIP Trust planning.

(2) Variation on Example #1 – the §2041 Argument

(a) Suppose in Example #1 that W is a resident of New York and not Florida.

(b) As stated above, Treas. Reg. §25.2523(f)-1(f), Examples 10 and 11 provide clear guidance that the Resulting Trust established as a bypass trust for W's lifetime is not included in W's gross estate upon her death.

(c) However, as described above, because the Resulting Trust is created under a trust document created by W, and because the Resulting Trust benefits W, the Resulting Trust is technically an SST as to W, which means that W's creditors can potentially reach a portion (or all) of the Resulting Trust.

(d) Recall that under §2041(b)(1), the basic definition of a "general power of appointment" is a power which is exercisable in favor of the decedent, his/her estate, his/her creditors or the creditors of his/her estate.

(e) If W's creditors can reach a portion of a Resulting Trust, would that portion then be includible in W's gross estate under §2041?

(f) Support for excluding such property from W's gross estate cannot be found in Treas. Reg. §25.2523(f)-1(f), Examples

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[35] Moreover, most of the Quasi-SST Statutes specifically limit the statute's applicability to the particular state statute which a clause such as "for purposes of this section." That being said, the Maryland, Michigan and Oregon statutes are not so specifically narrow, but it is unlikely that such a statute would be deemed by the Service to have an effect on grantor trust status.

10 and 11 because those Examples do not contemplate gross estate inclusion under §2041.

(3) One alternative for avoiding this concern is to establish the Resulting Trust in either an SST State or a Quasi-SST State.

(a) If creditors cannot reach the Resulting Trust, there should be no potential §2041 gross estate inclusion of the Resulting Trust.

(b) In the actual facts of Example #1, the §2041 concern is avoided because the Lifetime QTIP Trust is established under Florida's Quasi-SST Statute.[36]

G. Interaction with Applicable Fraudulent/Voidable Statutes

(1) Introduction

(a) The creditor protection feature of the Quasi-SST Statutes is not elective or discretionary (i.e., it applies if a Lifetime QTIP Trust is established, a timely gift tax QTIP election is made and the donor spouse retains a current beneficial interest in any Resulting Trust).

(b) However, there is one additional requirement in order to invoke this protection - the transfer may not be in violation of the particular state's fraudulent transfer laws.

(2) Under the law of most states, a transfer made or an obligation incurred by a debtor is voidable as to a creditor if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor.

(3) Such voidability is present regardless of whether the creditor's claim arose before or after the transfer was made or the obligation was incurred.[37]

(4) Badges of Fraud

(a) In terms of what is "actual intent," such laws provide a non-exclusive list of examples often referred to as the "badges of fraud."

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[36] *See* Ubiquitous *supra* note 6 at ¶ 1602.1[B].

[37] *See generally* §4(a)(1) of the Uniform Fraudulent Transfer Act (the "UFTA"), which was revised in 2014 and renamed the "Uniform Voidable Transactions Act" ("UVTA").

(b) Some of the “badges of fraud” include the following:

(i) the debtor retained possession or control of the property transferred after the transfer;

(ii) the transfer or obligation was disclosed or concealed;

(iii) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(iv) the transfer was of substantially all the debtor’s assets; and

(v) the debtor removed or concealed assets.[38]

(c) As a result of such fraudulent transfer statutes, if W is determined to have had the intent to avoid a specific creditor, the transfer of property to the Lifetime QTIP Trust could be reversed.

(d) Not only would the transferred assets be available for W’s creditors, but any tax advantages achieved by the transfer would be negated.

(e) This is not to say that every transfer involving an asset protection technique is done with an intent to hinder, delay or defraud; on the contrary, if the donor spouse had no pending creditor issues, fraudulent transfer statutes *should* not be a concern.

(5) Deathbed Strategy and Future Creditors

(a) What if, however, after engaging in the Deathbed Strategy, W is involved in a transaction from which legal action is commenced, the result of which is a judgment against W. Assume that W has no assets available to satisfy the judgment - to what degree does the Deathbed Strategy intersect with the fraudulent transfer law as to *future* creditors?

(b) In some Quasi-SST Statutes, the intersection is direct - consider the opening language of the North Carolina Quasi-

[38] *See generally* UFTA/UVTA §4(b).

SST Statute: "Subject to the Uniform Voidable Transactions Act, Article 3A of Chapter 39 of the General Statutes…"[39]

(c) The Deathbed Strategy involves taking advantage of the creditor protection laws of either an SST State or a Quasi-SST State, thereby presenting a definite and acknowledged asset protection element to the transaction.

(d) Query: is this "asset protection" intent enough to signify the "actual" intent needed to invoke fraudulent transfer law?

(i) For example, under Example #1, W transfers all of her $10 million of assets into the Lifetime QTIP Trust, and soon thereafter H dies, with the Lifetime QTIP Trust providing for the balance to pass into a discretionary bypass Resulting Trust and a QTIP Resulting Trust.

(ii) W has an interest in both Resulting Trusts – in effect, W will have transferred all of her assets into the Lifetime QTIP Trust, which appears to satisfy one of the "badges of fraud."

(iii) Even though she had no creditor issues at the time that she created the Lifetime QTIP Trust, has W now run afoul as to a future creditor because she violated one of the "badges of fraud"?

(iv) This is unclear and this risk should not be understated.

(6) Potential Effect of the UVTA's New §10 and the UVTA Official Comments

(a) The creditor issue is further enhanced if a state adopts the UVTA and its courts apply the new Comments issued as part of the UVTA to the application of its UVTA law.

(b) If H and W are not residents of either an SST state or a Quasi-SST State, the ability to implement the Deathbed Strategy may be hampered.

(c) Section 10(b) of the UVTA (which is not present in the UFTA) provides as follows:

"(b) A claim for relief in the nature of a

[39] N.C. GEN. STAT. §36C-5-505(c).

claim for relief under this [Act] is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred."

(d) Under pre-UVTA law, many individuals sought to achieve greater asset protection by creating SSTs, and, if the individual's state of residence had not enacted SST legislation (the "Resident State"), the individual would create the SST in an SST State.

(e) If a judgment were rendered against the individual in the Resident State, and if the creditor sought to enforce the judgment in the SST State, often a conflict of laws issue would arise, with the SST State denying the enforcement of the judgment due to the fact that the SST State allows the creation and protections afforded to SSTs.[40]

(f) In adopting the UVTA, the Uniform Law Commission was not shy about its purpose with respect to SSTs – it wished to eliminate them.

(i) For example, in his "White Paper" on the UVTA, Uniform Law Commission Reporter Kenneth C. Kettering stated,

> The avoidance laws of some jurisdictions are substantially debased by comparison with the UVTA. That is notably so in "asset havens" that have eviscerated, or completely expunged, their avoidance laws, commonly as part of a package of local laws that facilitate the local formation of so-called "asset-protection trusts" by persons seeking to shield their assets from their creditors…Section 10 reflects the committee's conclusion, which was to include no escape hatch in the statutory text. It addresses asset tourism through a comment

[40] Many articles have been written on this topic; for this particular purpose, the authors cite to George D. Karibjanian, Gerard "J.J." Wehle, Robert L. Lancaster and Michael A. Snerringer, *The New Uniform Voidable Transactions Act: Good for the Creditors' Bar, But Bad for the Estate Planning Bar? - Part Two,* LISI ASSET PROTECTION PLANNING NEWSLETTER #317 (March 15, 2016) ("UVTA I") and George D. Karibjanian, Gerard "J.J." Wehle and Robert L. Lancaster, *History Has Its Eyes on UVTA - A Response to Asset Protection Newsletter #319*, LISI ASSET PROTECTION NEWSLETTER #320 (April 18, 2016) ("UVTA II").

> stating that a debtor's "principal residence," "place of business," or "chief executive office" should be determined on the basis of genuine and sustained activity, not on the basis of artificial manipulations.[41]

(ii) In the seventh paragraph to new Comment 8 ("Paragraph 7") to the UVTA, the Uniform Law Commission set forth its intentions regarding traveling to a particular SST State to create an SST:

> By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under §10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under §4(a)(1) as in force in Y.[42]

(g) The effect of this particular provision and others[43] is clear-cut - if the donor spouse's Residence State has adopted the UVTA and is not either an SST State or a Quasi-SST State, and if the Lifetime QTIP Trust is established in either an SST State or a Quasi-SST State, then, because the Resulting Trust is an SST, the transfers to the Lifetime QTIP Trust are voidable *per se*.

(h) Thus, the assets are not free from the claims of the donor spouse's creditors, which can include *future, presently unknown* creditors.

(i) The interpretation of this Comment cannot be clearer - the effect of this interpretation increases the risk of gross estate

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[41] UVTA I, *supra* note 40, at p. 3, *citing* Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 THE BUSINESS LAWYER 778 (Summer 2015) at p. 800-1.

[42] UVTA I, *supra* note 40, at p. 4.

[43] Other Comments have an effect on the ability of creditors to reach an SST. *See, for example*, Comment 2 to UVTA §4.

inclusion of the bypass Resulting Trust in the donor spouse's estate.

(j) Such a result clearly imperils the effectiveness of the Deathbed Strategy for this particular donor spouse.[44]

(k) Establishment in Quasi-SST Jurisdiction if the Settlor Lives in such Quasi-SST Jurisdiction

(i) The concerns under Paragraph 7 as to future creditors are not, however, present if the Lifetime QTIP Trust is established by a resident of one of the Quasi-SST Jurisdictions under the law of his or her home state.

(ii) Consider this passage from Paragraph 7 that immediately precedes the above-quoted provision:

> If an individual Debtor whose principal residence is in X establishes such a trust and transfers assets thereto, then under § 10 of this Act the voidable transfer law of X applies to that transfer. That transfer cannot be considered voidable in itself under § 4(a)(1) as in force in X, for the legislature of X, having authorized the establishment of such trusts, must have expected them to be used. (Other facts might still render the transfer voidable under § 4(a)(1).)[45]

(l) Therefore, so long as the debtor did not violate other provisions of the UVTA in creating the Lifetime QTIP Trust, the transfer is not voidable *per se*.

[44] As set forth in both UVTA I and UVTA II, *supra* note 40, Comments are not adopted by states as part of their respective laws and are only intended to provide the Uniform Law Commission's interpretation of a particular provision; however, many states will rely on the Comments, and it is with that background that great attention must be paid to the Comments.

[45] Comment 8 to UVTA §4.

VI. Application of §1014(a) and Creditor Protection to Example #1

A. No Technique Employed

(1) To summarize the effect of §1014(a) and applying the particular creditor protection statutes, suppose that, in Example #1, W does not create the Lifetime QTIP Trust.

(2) Upon H's death, W will have a beneficial interest in a testamentary QTIP trust and a traditional bypass trust created by H's revocable trust, and she will continue to own her $10 million of assets in her revocable trust.

(3) H's entire gross estate will be subject to the General Basis Adjustment Rule of §1014(a).

(4) W's beneficial interests created in the testamentary trusts under H's revocable trust would be protected from W's creditors by a standard spendthrift provision.[46]

(5) However, W's revocable trust with her $10 million of assets remains with a zero basis for income tax purposes and subject to the claims of her creditors.

B. Deathbed Technique is Employed

(1) If, however, W creates and funds the proposed Lifetime QTIP Trust with $5.45 million (and makes a timely gift tax QTIP election), upon H's death, this amount passes to the grantor bypass Resulting Trust under the Lifetime QTIP Trust.

(2) Assuming that W's beneficial interests in the grantor bypass Resulting Trust are limited to discretionary distributions by an independent trustee, the authority for which is not subject to an ascertainable standard, the General Basis Adjustment Rule should also apply to adjust the basis of this $5.45 million of assets to the fair market value of such assets on H's death.

(3) Additionally, the grantor bypass Resulting Trust is protected from W's creditors as a spendthrift trust created by H (i.e., as a result of Florida's Quasi-SST Statute).

(4) The formula in H's revocable trust adjusts automatically to fund the testamentary QTIP trust under his revocable trust with H's

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[46] Creditors are, however, likely able to reach the income of the QTIP once distributed to W.

$10 million of assets (i.e., because H's AEA was applied to the Lifetime QTIP Trust).

(5) A standard spendthrift provision protects the testamentary QTIP trust is protected from W's creditors.[47]

(6) Therefore, in this permutation, $15.45 million of the entire $20 million estate receives an automatic basis adjustment to fair market value on H's death and is protected from W's creditors.

C. Fully Funding the Lifetime QTIP Trust

(1) Alternatively, if W funds the Lifetime QTIP Trust with her entire $10 million of zero basis assets and she makes a timely gift tax QTIP election, upon H's death the $10 million is split between a grantor bypass Resulting Trust and the secondary QTIP Resulting Trust.

(2) As indicated above, the basis of the $5.45 million of assets transferred to the grantor bypass Resulting Trust will be adjust to fair market value on H's death.

(3) The $4.55 million of assets transferred to the secondary QTIP Resulting Trust will likewise receive a basis adjustment (which is potentially subject to the Bifurcation Rule eliminating a basis adjustment for the portion representing W's mandatory income interest).

(4) Both Resulting Trusts will be protected from W's creditors pursuant to the Florida Quasi-SST Statute as spendthrift trusts deemed to have been created by H.

(5) The formula in H's revocable trust will again adjust automatically to fund the testamentary QTIP trust under his revocable trust with H's $10 million of assets.

(6) Therefore, in this permutation, at least $19 million[48] of the entire $20 million estate (and possibly the entire estate if the

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[47] As previously stated, although the entire testamentary QTIP trust would be protected, once the income is distributed to W, the income in W's hands is now available for W's creditors.

[48] If the $4,550,000 million passing to the secondary QTIP Resulting Trust is subject to the Bifurcation Rule, then, assuming that W is 75 years of age and a 2.2% 7520 Rate, 21% of this trust, or $995,500, is subject to §1014(e) and receives no basis adjustment. The remaining portion of the secondary QTIP Resulting Trust, or $3,594,500, plus the $4,450,000 million grantor bypass Resulting Trust and H's $10,000,000 estate all receive an automatic basis adjustment.

Bifurcation Rule does not apply) receives an automatic basis adjustment to fair market value on H's death.

(7) In addition, regardless of the potential application of the Bifurcation Rule, the entire $20 million estate is protected from W's creditors.[49]

VII. Plan in Advance for Deathbed Lifetime QTIP Trust

A. Advance Planning

(1) If the discovery of a spouse's terminal illness is sudden and death is truly imminent, there may not be sufficient time prior to such spouse's death to draft the necessary paperwork and complete the asset transfers into the Lifetime QTIP Trust.

(2) For this reason, consider planning in advance and creating the Deathbed Strategy from within the couple's current estate planning documents.

B. Application to Example #1

(1) In the context of Example #1, each of W's and H's revocable trusts could have provisions that trigger the establishment of the Lifetime QTIP Trust upon a release of the right to revoke all or a portion of the particular revocable trust (the "Release").

(2) Suppose that W's revocable trust has provisions in it that provide that if W executes a Release, the assets becomes subject

---

[49] A couple of planning ideas to consider: (i) the secondary QTIP Resulting Trust could allow the independent trustee to have broad authority to distribute assets back outright to W without creating any adverse transfer tax consequences. *See generally* Howard M. Zaritsky, *Tax Planning for Family Wealth Transfers During Life: Analysis With Forms,* ¶3.07 (THOMSON REUTERS/TAX & ACCOUNTING, 5TH ED. 2013, WITH UPDATES THROUGH MAY 2016) (online version accessed on Checkpoint (www.checkpoint.riag.com)). Therefore, if the §1014(e) analysis as outlined herein is incorrect, or if the asset protection advantages of the Resulting Trust are not of a high concern to W, the independent trustee could distribute these assets back to W if the independent trustee determined that to be appropriate; and (ii) the testamentary QTIP under H's revocable trust could also have a clause granting an independent trustee to have broad authority to distribute assets to W. In the context of Example 1, the testamentary QTIP trust is neither exempt from estate taxes at W's death or exempt from GST taxes, but it is protected from the claims of W's creditors with a spendthrift clause. If the independent trustee thought it was appropriate, assets of the testamentary QTIP could be distributed out to W so that she has some assets in her individual name and control without jeopardizing the automatic basis adjustment that would be available for $19 million of the aggregate estate. This possibility may give W more comfort in implementing the Deathbed Strategy.

to provisions contained in the revocable trust that qualify as a Lifetime QTIP Trust for H.

(3) When such a deathbed situation arises, a one page Release could be quickly signed by the donor spouse, thereby switching to the Lifetime QTIP Trust arrangement.

(4) Such provisions can be added to the revocable trusts for married persons (or a joint revocable trust) by bundling the Lifetime QTIP Trust provisions as a separate article within said revocable trust. The revocable trust can contain a "triggering" mechanism such as the following:

> If, at any time, the Settlor releases the right under Paragraph ___ to amend or revoke this Declaration (the "Exercise"), the property held under this Declaration subject to such Exercise shall, as of the date of the Exercise, be disposed of as provided in Article ___ of this Declaration. The Exercise may encompass all or a portion of this Declaration. The Exercise shall be effected by a written instrument executed with the same formalities as required for the execution of any amendment to this Declaration and shall be delivered to the then-acting Trustee of this Declaration.

(5) In effect, the exercise provisions would be analogous to disclaimer provisions – i.e., they remain dormant unless the spouse who would be the surviving spouse decides to execute the plan.

(6) In addition, depending on the applicable state law, the revocable trust should allow an agent under a durable power of attorney to implement the Release and the settlor's durable power of attorney should authorize the agent to implement such Releases.[50]

(7) Notwithstanding the provisions under applicable state law regarding the formalities of executing documents relating to

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[50] For example, while under Florida law, an attorney-in-fact may not create, amend or revoke a Will, FLA. STAT. §709.2202(1)(b) provides that the attorney-in-fact can, with respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent.

testamentary dispositions, it is highly recommended that, at a minimum, the Release be notarized.

(8) Since notarizations require the insertion of the date of notarization, the notarial clause can act as a validation that the Release was executed prior to the death of the donee spouse.

VIII. Conclusion

A. The Deathbed Strategy offers significant rewards, particularly for individuals residing in one of the 21 states with Quasi-SST Statutes (16 Quasi-SST States and 5 SST States with Quasi-SST Statutes), but the strategy also carries risks.

B. Implementation of the strategy should be carefully considered and discussed with the clients, as the strategy involves the relinquishment of full fee ownership of assets by the donor spouse.

C. The strategy is potentially subject to reduced income tax benefits and, depending on the domicile of the donor spouse, could be severely hampered if the donor spouse's Residence State adopts the UVTA and the donor spouse crosses state lines to form the lifetime QTIP in SST State or Quasi-SST State.

D. However, for those clients who fit within the parameters and who are not risk adverse, the strategy can provide significant income tax and creditor protection advantages.

Trust Protector: The Practical and Legal Nuances

By

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TRUST PROTECTORS

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Disclaimer

The following materials are intended for educational purposes only. They do not serve as a substitute for the advice of an attorney licensed to practice law in Florida. Each situation must be evaluated based upon its own unique facts and circumstances and the application of the current laws to those facts. Any forms, case citations, statutory citations, charts, diagrams, opinions, or other information in these materials should serve as a starting point for an attorney advising a client in an attorney-client relationship and should not be sole basis for the handling of any legal or tax matter.

I. INTRODUCTION

A. The Trust Advisor

In a recent article, Professor Lawrence A. Frolik attributed the development of trust protectors to the trust advisor.

> But before there was a protector, there was a trust adviser.[12] [See generally Note, Trust Advisers, 78 HARV. L. REV. 1230 (1965).] As originally understood, a trust adviser had the "power to control a trustee in the exercise of some or all of his powers."[13] [Id.] Advisors could have the power to order a trustee to perform some action, such as ordering the trustee to cease investing trust assets in real estate, or they could have the more limited power of consent, so that the trustee could only undertake specified acts with the consent of the advisor, such as requiring the consent of the advisor to sell a particular asset that is owned by the trust.14 Whatever the power, the advisor was thought to be a fiduciary and bound to the fiduciary standard, whether directing the trustee to act or consenting, or not consenting, to a trustee's proposed act.[15] [See id. at 1231–32.] By the 1990s, trust advisers had morphed into trust protectors, who were conceived of as a means of securing the settlor's control over an off-shore asset protection trust.[16] [See James T. Lorenzetti, The Offshore Trust: A Contemporary Asset Protection Scheme, 102 COM. L.J. 138, 149 (1997). The term "protector" appears to have been first employed in the 1989 Cook Island International Trusts Amendment Act. See Richard Lewis, The Foreign Irrevocable Life Insurance Trust as Asset Protection for Abuse and Suggestions for Reform, 9 CONN. INS. L.J. 613, 618 (2003).] The off-shore trust was a way to legally shield the settlor's assets from tort liability.[17] [See Lorenzetti, supra note 16, at 140.] But because the trust was under the jurisdiction of a foreign entity and subject to the law of that jurisdiction, the settlor appointed a protector to ensure that the trustee, who might not act in a manner desired by the settlor, nevertheless carried out the wishes of the settlor or faced removal by the protector.[18] [See id. at 149–50.] The appointment of a protector permitted the settlor to maintain indirect control over the trustee without the assets of the trust being subject to creditor claims.[19] [See id.; see also Richard C. Ausness, When Is a Trust Protector a Fiduciary?, 27 QUINNIPIAC PROB. L.J. 277, 279 (2014). Today, of course, several states have granted self-settled trusts protection from creditors. See David M. English, The Impact of Uniform Laws on the Teaching of Trusts and Estates, 58 ST. LOUIS U. L.J. 689, 693 (2014). Settlors of these "on-shore" trusts, however, may still want the control offered through the appointment of a trust protector.] [1]

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[1] Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing",* 50 Real Property, Trust and Estate Journal 267, 270 (2015)

B. Common Law

In *Minassian v. Rachins*[2], the decedent's children argued that a trust protector could not amend a trust because such an action would conflict with the "black letter common law rule … that a trustee may not delegate discretionary powers to another." The court rejected this agreement by first recognizing the power to amend was not a delegation by the trustee, but instead a delegation of the settlor's authority to modify the trust provisions. Next, the court found that the common law of trusts and principles of equity "supplement" the provisions of the Florida Trust Code, "except to the extent modified by this code or the law of another state."[3]

C. Statutory Development

Mr. Bove pointed out that the first protector statute in the US was seen in South Dakota in 1997, and in Idaho in 1999. He attributed the first offshore statutory definition to the Cook Islands in 1989.[4] A compilation of statutes by the Trust Law Committee of the Florida Bar's Real Property, Probate and Trust Law Section is included in the appendix.[5] A summary chart by the author is attached and illustrates the variations between states through October 2016.

Current statutory provisions vary significant, and include:

- One, three, or four subsections from Section 808 of the Uniform Trust Code.
- Distinctions between trustees, trust advisors, trust protectors, investment advisors, and other persons having the authority to direct.
- Statements subjecting trust protectors to court jurisdiction.
- Fiduciary status of trust protectors and advisors, ranging from traditional fiduciary liability to liability only in cases of bad faith.
- Liability of trustees, advisors, and trust protectors.
- Duty to monitor or not monitor actions of trustees, protectors, and advisors.

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[2] 152 So. 3d 719, 724 (Fla. 4th DCA 2014). It should be noted that at the time of the preparation of these materials, the case is still pending at the circuit court level, with issues directed to the actions of the trust protector, and the trust protector has since passed away.

[3] *Id.*, citing § 736.0106, Fla. Stat. (2008).

[4] Alexander A. Bove, Jr., *The Case Against The Trust Protector,* The ACTEC Law Journal, Vol. 37 No. 1, p.77 (Summer 2011).

[5] The compilation was provided with the permission of the chair of the subcommittee that assembled the compilation, ACTEC Fellow, Chuck Rubin.

- Time limitations for actions against advisors and protectors.
- Authority to bind beneficiaries as recipients of notices and information.
- Prohibitions to prevent modifications that would jeopardize the benefits of special needs trusts, S-corporation trust status, charitable deductions, and marital deductions.
- Entitlement to compensation and reimbursement of costs expended from the trust assets, including costs of defending claims against the protector.

D. Current Status of Protectors as a Planning Option

In his 2011 ACTEC Law Journal article[6], Alexander Bove recognized the confusion surrounding the use of trust protectors.

> I believe that the reluctance of practitioners to employ the trust protector in more of their trusts may well be on account of the confusion surrounding the position, and in my opinion, the confusion, in turn, stems in large part from two sources: the handful of speculative and contradictory commentary on the subject, [*See, e.g.*, Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807 (2006); Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. EST. & TR. J. 319 (2010); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty,* 27 CARDOZO L. REV. 2761 (2006)] and the inconsistent manner in which the position is regarded in the several state statutes which reference the term.[*Compare* IDAHO CODE ANN. § 15-7-501(1)(g) (2011) *with* ALASKA STAT. § 13.36.370(d) (2011).] That is to say, if the handful of commentary is itself uncertain and repeatedly refers to the total absence of United States case law on the subject of trust protectors, thereby generally discouraging their use, and if the relevant state statutes themselves are largely inconsistent and contradictory, how can practitioners draw adequately solid conclusions about how and to what extent they might use a protector in their trusts?

[6] *Id.*

E. The Directed Trust Act

The National Conference of Commissioners of Uniform State Laws is currently working on a Directed Trust Act. In a memo dated May 23, 2016 from Robert H. Sitkoff, Chair, Turney Berry, Vice-Chair, and John D. Morley, Reporter, discussed the status of a the draft scheduled for a first reading at the 2016 annual meeting. The memo discusses the current status of state laws concerning directed trusts:

> *Background.* The Directed Trust Act addresses an increasingly common arrangement in contemporary estate planning and asset management known as a directed trust. A directed trust involves the naming of a trustee to hold custody of the trust property and another person who is not a trustee to perform one or more of the investment, distribution, and administration functions that would otherwise have belonged to the trustee. There is no consistent vocabulary for the nontrustee powerholder in a directed trust. Several terms are common in practice, including "trust protector," "trust adviser," and "trust director." There is much uncertainty about the fiduciary status of a nontrustee who has control or potential control over a function of trusteeship and about the fiduciary responsibility of a trustee with regard to actions taken or directed by such a nontrustee. Existing uniform trusts and estates statutes address the issue inadequately. Existing nonuniform state laws are in disarray.

The provisions of the most recent draft are included in the summary chart.

F. Further Reading

Perhaps the best, and most authoritative resource on this topic is Trust Protectors – A Practice Manual with Forms by Alexander A. Bove, Jr. Mr. Bove's book includes a thorough discussion of issues that are beyond the scope of this presentation, as well as outstanding sample forms.

II. WHAT ARE THE CLIENT'S GOALS?

A. Reasons for Including a Trust Protector

A Trust Protector is not for every trust. The purposes of the trust, the client's assets, and the nature and identity of the trust beneficiaries should all be considered. The types of objectives can vary from client to client:

- Reform clerical or scrivener errors;
- Add, replace, or remove trustees;

- Tax planning;
- Special needs planning;
- Changes in the law;
- Efficient trust administration;
- Add or remove beneficiaries;
- Protect children from a prior marriage;
- Protect the spouse from children from a prior marriage;
- Protect against future spouses of the surviving spouse;
- Creditors of the beneficiaries;
- Divorcing beneficiaries;
- Incentives for the beneficiaries – charity, education, non-traditional careers; and/or
- Bad behavior – addiction, incarceration, domestic violence, gambling.

B. Statement of Intent

If the client's reason for including a trust protector is not clear from the document, is it worth including a statement of intent? As discussed later, the administration of a trust often involves a conflict between the Settlor's intent and the best interests of the beneficiaries. Although statements of intent should be used carefully, they could be very helpful to everyone involved. We use them already for certain specific purposes, but could easily add some new ones in the right situations:

1. Protection of Exemptions under Florida Law

Exempt Property.
It my intent that any property that would be exempt under the Florida Constitution, the Florida Probate Code, the Florida Trust Code, Chapter 222 of the Florida Statutes, or as otherwise provided under Florida law, shall retain its exempt character during my lifetime and upon my death. To the extent necessary, the Trustee shall hold all such exempt assets as a separate trust and shall not use exempt assets to pay claims against my estate.

2. Tax-based Savings Clauses:

Settlor's Intent. The Settlor intends that the Retirement Plan be payable to trust beneficiaries who are identifiable and who are treated as "designated beneficiaries" within the meaning of the minimum distribution rules under

Section 401(a)(9) of the Internal Revenue Code and applicable regulations. Therefore, except to the extent permitted or required under applicable law, (i) the Accounts will not be liable for any share of estate taxes payable from this Trust or chargeable to the Settlor's estate, and (ii) any power of appointment over the Accounts exercisable by the Settlor's spouse may be exercised only in favor of individuals who are younger than the Settlor's spouse.

3. Trust Protector Language

Settlor's Intent. It is the Settlor's intent that the Trust Protector have the authority to enforce the intention of the Settlor, including instances where the trust beneficiaries might be inclined to argue that the administration of the trust as written is not in their best interests. I intend for my spouse to live her remaining years without the financial pressures of my children supervising her use of the trust assets. For that reason, the Trust Protector has been granted specific powers, and a Designated Representative has been appointed, to the Settlor's desire that my spouse live without interference from my children, even if that means the Trsutee exhausts the trust assets for her benefit during her lifetime, leaving nothing for my children upon her death.

III. OTHER PLANNING OPTIONS

A. Designated Representatives

Some state statutes authorize the delivery of notices and information to a trust director or trust advisor. Section 736.0306, Florida Statutes provides an alternative to limit information passing directly to a beneficiary.

736.0306 Designated representative.—

(1) If specifically nominated in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report. The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.

(2) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind a beneficiary while that person is serving as trustee.

(3) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind another beneficiary if the person designated also is a beneficiary, unless:

(a) That person was named by the settlor; or

(b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.

(4) No person designated, as provided in subsection (1), is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.

B. Power of Appointment

A power of appointment to change the ultimate distributions of a trust could be utilized to keep the "trouble-maker" remainder beneficiary in check. Tax consequences and the formalities for executing the power should be carefully considered. For example, if the settlor's concern is to favor the surviving spouse over the children from a prior marriage, a power to appoint the remaining trust estate among the settlor's descendants could be utilized.

C. Statement of Intent

Because modification procedures, statutory provisions, and trust provisions often require that the trust protector's actions be consistent with the purposes of the trust, a statement of intent could be helpful. The risk is that the language used to state the settlor's intent could be misconstrued, offensive to persons affected by the statement, and a source of litigation.

D. Decanting

At least some of the objectives that can be achieved with a trust protector could be achieved through decanting. Decanting allows, in effect, a non-judicial modification of a trust. Decanting requirements can vary depending upon the applicable common law or statutory law in a particular jurisdiction.

Florida's statutory authority for decanting is § 736.04117.

736.04117. Trustee's power to invade principal in trust

(1)

(a) Unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section as the "first trust," to make distributions to or for the benefit of one or more persons may instead exercise the power by appointing all

or part of the principal of the trust subject to the power in favor of a trustee of another trust, referred to in this section as the "second trust," for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided:

1. The beneficiaries of the second trust may include only beneficiaries of the first trust;

2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust; and

3. If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.

(b) **For purposes of this subsection, an absolute power to invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used.** A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.

(2) The exercise of a power to invade principal under subsection (1) shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust.

(3) The exercise of a power to invade principal under subsection (1) shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate, and shall be subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(4) The trustee shall notify all qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the trustee's exercise of the trustee's power to invade principal pursuant to subsection (1), of the manner in which the trustee intends to exercise the power. A copy of the proposed instrument exercising the power shall satisfy the trustee's notice obligation under this subsection. If all qualified beneficiaries waive the notice period by signed written instrument delivered to the trustee, the trustee's power to invade principal shall be exercisable immediately. The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to invade principal except as provided in other applicable provisions of this code.

(5) The exercise of the power to invade principal under subsection (1) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(6) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of a trustee not exercising the power to invade principal conferred under subsection (1).

(7) The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

E. Nonjudicial Modification

A well-drafted trust could permit non-judicial modification. The requirements for nonjudicial modification may not be consistent with the client's objectives in all cases. In addition, the client may not want the beneficiaries or the trustee to have the option of modifying the trust. Where beneficiary consent is required, the trustee may be faced with uncooperative beneficiaries.

736.0412. Nonjudicial modification of irrevocable trust

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification.

(c) Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

F. Judicial Modification

The uncertainty of any judicial proceeding, coupled with the cost, makes judicial modification an undesirable option in many cases.

736.04115. Judicial modification of irrevocable trusts when modification is in best interest of beneficiaries.

(1) Without regard to the reasons for modification provided in s. 736.04113, if compliance with the terms of a trust is not in the best interests of the beneficiaries, upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in s. 736.04113(2).

(2) In exercising discretion to modify a trust under this section:

(a) The court shall exercise discretion in a manner that conforms to the extent possible with the intent of the settlor, taking into account the current circumstances and best interests of the beneficiaries.

(b) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.

(c) The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.

(3) This section shall not apply to:

(a) Any trust created prior to January 1, 2001.

(b) Any trust created after December 31, 2000, if:

1. Under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f).

2. The terms of the trust expressly prohibit judicial modification.

(4) For purposes of subsection (3), a revocable trust shall be treated as created when the right of revocation terminates.

(5) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

IV. WHO WILL SERVE?

Because the Trust Protector does not follow the traditional role of a trustee, the challenge in finding someone willing, qualified, and able to serve is a challenge. It seems unlikely that an institutional fiduciary would be willing to serve. The Trust could provide standards for the appointment of a Trust Protector:

- Professional criteria, such as education, professional license, or other indications of expertise;
- Specialists with education and legal, medical, psychological, accounting, tax, business, or financial expertise;
- A trusted family friend or advisor;
- Someone with the unique skills or relationships to achieve the settlor's goals.

Consideration should also be given to the procedures for appointing an initial or successor Trust Protector:

- A majority of the beneficiaries?
- A member of the law firm that advises the Settlor?
- An independent third party, such as an accountant or mental health professional?
- A trusted family friend or advisor?
- A specific member of the family or someone with a defined relationship to the beneficaires?

V. AUTHORITY OF TRUST PROTECTORS

A. Statutory Provisions in Florida

The Florida Statutes don't use the term "trust protector," but use the phrase, "power to direct.

> 736.0808. Powers to direct.
>
> (1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable.
>
> (2) If the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.
>
> (3) The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.

B. Powers to Consider

In a presentation at the Attorney Trust Officer Liaison Conference in the Summer of 2015, Charles Ian Nash cited the types of powers that can be given to a trust protector in the trust instrument, citing *Schwartz v. Wellin*, 2014 WL 1572767 (D.S.C., April 17, 2014). State statutes generally do not specify the powers that can be granted, so they must be provided in the trust instrument. Options include the following, as suggested by Mr. Nash.

1. Power to remove any person (individual or entity) serving as a trustee or co-trustee.

2. Power only to remove a corporate fiduciary (bank or trust company).

3. Power to replace the trustee or co-trustee who has been removed? If so, are there limitations on who can be so appointed, such as limiting the field to corporate fiduciaries or to unrelated and non-subordinate persons vis-a-vis IRC §672(c).

4. Power to appoint an additional co-trustee and, if so, what limitations should be included as to who can be so appointed.

5. Power to appoint a trustee or co-trustee when a nominated trustee or co-trustee declines to serve as such.

6. Power to appoint a trustee or co-trustee when a then-serving trustee or co-trustee resigns as such.

7. Power to appoint an independent trustee and, if so, what limitations should be included as to who can be so appointed.

8. Power to add or remove an investment manager or advisor and, if so what limitations should be included as to who can be so appointed.

9. Power to veto or direct trust distributions.

10. Power to add or remove beneficiaries of the trust.

11. Power to advise Corporate Trustee on matters of beneficiary behavior –such as substance abuse or other areas included by the grantor.

12. Power to consent to the exercise of a power of appointment.

13. Power to approve trust accountings (remember the provisions of §736.0306, Florida Statutes, pertaining to designated representatives).

14. Power to amend the trust as to administrative provisions.

15. Power to amend the trust as to distribution provisions (often found in special or supplemental needs trusts)? *Minassian v. Rachins*, 152 So.3d 719 (4th DCA 2014) – see additional discussion in Article V. below.

16. Power to approve or veto the sale of trust assets, such as interests in a closely-held entity (corporation, limited liability company, partnership, etc.) or certain real property.

17. Power to cast the deciding vote when there is a deadlock among co-trustees (tie breaker).

18. Power to change the situs or governing law of the trust.

19. Power to grant a beneficiary a power of appointment (general or non-general).

20. Power to determine whether an event of duress has occurred (typically in an asset protection trust).

21. Power to terminate the trust.

C. The Power to Modify

The court in *Minassian* considered whether a trust protector had the power to modify the terms of a trust. The settlor who created the trust had died, so ordinarily, the trust would be considered irrevocable. The trust instrument provided that upon the death of the settlor, the trust estate would be held in further trust for the lifetime of the settlor's wife, and then divided into separate *shares* for the settlor's children.

- The children argued that they were qualified beneficiaries of the trust and sued the wife for breach of fiduciary duty, surcharge, and accounting.
- The wife responded that she was the sole beneficiary of the trust during her lifetime, that she had no duties to the children, and that their interests as beneficiaries did not arise until separate shares were created for them after her death.

VI. FIDUCIARY DUTIES OF A TRUST PROTECTOR

A. Traditional View of Persons Acting Pursuant to a Trust Agreement

Is a trust protector a fiduciary? If so, to whom is the fiduciary duty owed?

A review of the various state statutes reflects that the majority of states require at least a standard of good faith, and some carefully limit the fiduciary duty to the specific powers authorized. Most states require actions in the interest of the beneficiaries and compliance with the terms and purposes of the trust.

Mr. Bove discusses the office of trust protector and the status of the trust protector as a fiduciary.[7] He points out that some state statutes make fiduciary status the default, while other state statutes provide that the trust protector is not a fiduciary unless the trust instrument so states. In considering the fiduciary status of a protector, Mr. Bove looks to several factors:

> When one considers the reported case law on the subject, knowledgeable commentary, the history of fiduciary law, and the very purpose of having a protector, the question of the true role of the protector should hardly be a question at all. At the outset, the very choice of the term "protector", is suggestive. As one justice put it, "It seems to me that it would be wrong to entirely neglect the terminology involved. The word 'protector' seems to me to connote a role for the person holding that position even before one considers the detailed provisions relating to it. A 'protector' is, presumably, one who 'protects'. But what is he to protect?"[40] [Steele v. Paz, Ltd., Manx LR 102 426 at 119-120 (High Court, Isle of Man 1993-95).] In the relevant document in this case, the protector was referred to as a "protector of the trust" (or as we customarily say, the "trust protector"), and in this regard, the court stated, in answer to its own question, "It is, therefore, the settlement that he is obliged to protect" [*Id.*] (emphasis added). As such, then, the protector can serve a critical function "outside" the trust while acting in conjunction with the trustee to enhance the carrying out of the settlor's wishes, but not without responsibility to interested parties if the protector breaches his duty. In such a role he can introduce flexibility and response to future needs and changes that a trustee could not or would certainly be reluctant to do. In this context, then, the position can be uniquely useful and should be considered in any trust where such flexibility and outside consultation is indicated. At the same time, however, we as advisors must not be vague about it, as that is often what has proved to be the real source of the problems. Perhaps, then, we should take a lesson from the character Humpty Dumpty when he said to Alice, "When I use a word, it means just what I choose it to mean – neither more nor less.",42 [Lewis

[7] Bove, *supra.*

Carroll, Through the Looking Glass, Chapter VI (Macmillan 1871).] so that when we decide to utilize the position of a protector in a trust, let us present it in a thoughtful way so that the position is deemed to be just what we choose it to be – neither more nor less.

B. Protection of Beneficiaries

Much attention has recently been given to the balance between the interests of the beneficiaries and the settlor's intent. Professor Lee Ford-Tritt provided a thought-provoking presentation in 2016 about the "benefit of the beneficiaries" rule.[8] Subsections (2)(b) and (2)(c) of Section 736.0105, Florida Statutes, reflect this rule.

736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this code except:

(b) The duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(c) The requirement that a trust and its terms be for the benefit of the trust's beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

In an effort to address what was seen as a shift away from the "settlor's intent," the Real Property, Probate and Trust Law Section proposed legislation eliminating the current rule that the "benefit of the trust's beneficiaries" trumps the terms of the trust.

736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this code except:

(c) The requirement that a trust~~ and its terms be for the benefit of the trust's beneficiaries, and that the~~ trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

Unfortunately, the legislation was vetoed by Governor Rick Scott for reasons unrelated to this portion of the bill.

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[8] Lee-ford Trust, The Benefit-of-the-Beneficiary Rule: How Trustees Must Serve Their Beneficiaries, ALL CHILDREN'S HOSPITAL'S EIGHTEENTH ANNUAL ESTATE, TAX, LEGAL & FINANCIAL PLANNING SEMINAR, Tampa, Florida February 10, 2016.

C. Protection of the Settlor's Intent

1. The Florida Probate Code

The Florida Probate Code recognizes the principal that the testator's intent controls in the construction of a will.

> § 732.6005. Rules of construction and intention.
> (1) The intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will.

2. The Florida Trust Code

Similarly, the Florida Trust Code emphasizes the settlor's intent in the construction of the trust instrument:

> 736.0103. Definitions
>
> (21) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.
>
> 736.1101. Rules of construction; general provisions. Except as provided in s. *736.0105(2)*:
>
> (1) The intent of the settlor as expressed in the terms of the trust controls the legal effect of the dispositions made in the trust.
>
> (2) The rules of construction as expressed in this part shall apply unless a contrary intent is indicated by the terms of the trust.

[Emphasis added.] After recognizing that the Settlor's intent controls, the reference to § 736.0105(2) in § 736.1101, governing rules of construction, brings us back to the benefit of the beneficiaries rule as a mandatory requirement for the trust for purposes of the terms of the trust and the trustee's duties.

3. 2017 Legislation

House Bill 277 passed both houses of the Florida Legislature in 2017 and would have eliminated the benefit of the beneficiaries rule from the default rules under the Trust Code:

> 736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this code except:

(c) The requirement that a trust ~~and its terms be for the benefit of the trust's beneficiaries, and that the~~ trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

Unfortunately, the legislation was vetoed by Governor Rick Scott for reasons unrelated to this portion of the bill. This would shift the focus back to the settlor's intent.

4. The Florida Constitution

Florida not only recognizes the sanctity of donative freedom, but recognizes the freedom to dispose of one's property at death as a constitutionally-protected.

> Property rights are protected by article I, section 2 of the Florida Constitution:
>
> SECTION 2. Basic rights.--All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and *to acquire. possess and protect property: except that the ownership. inheritance, disposition and possession of real property by aliens ineligible for citizenship may be* ***[*67]*** *regulated or prohibited by law.* No person shall be deprived of any right because of race, religion or physical handicap.
>
> (Emphasis added.) *Shriners Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64,66 (Fla. 1990)

In *Zrillic*, the Florida Supreme Court found that the mortmain statute violated constitutional equal protection rights because it was over-inclusive. The Florida Supreme Court held that the needs of descendants protected by the statute restrictions on gifts to charities were not reasonably necessary

D. Interaction Between Trust Directors and Excluded Fiduciaries

A related question, currently being addressed by the NCCUSL and already addressed in several state statutes, is the liability of a directed trustee for following the directions of a trust protector, trust advisor, or trust director. A review of statutes from various jurisdictions shows that a majority of states start with the presumption of fiduciary status. The statutes also consider the duty liability of the trust protector for acts or omissions of the trustee. Certainly, this is an

area to consider when drafting trust provisions. For entities offering investment advisor services, many require provisions that the liability of an investment advisor be limited.

VII. CASE LAW

As states are in the process of establishing or updating statutory law, case law is important and may be the only source of law for issues coming before a court. For a good discussion of current issues, see "Trust Protectors: Why They Have Become "The Next Big Thing", by Professor Lawrence A. Frolik.[9] Several of the recent cases discussed below were brought to the attention of this author as a result of Professor Frolik's article.

A. Minassian v. Rachins[10] - Florida

1. The Facts

The Settlor, Mr. Minassian, established a trust that designated his estate planning attorney as his trust protector. The Settlor was survived by his wife and children from a prior marriage. The trust provided that, upon his death, a trust would be established for his wife. He intended that his wife continue to enjoy the lifestyle established during the marriage.

2. Initial Trial Court Proceedings

The children filed suit as qualified beneficiaries of the trust, alleging she breached her fiduciary duty as trustee by improperly administering the estate. The wife claimed that the trust was drafted in such a way that the children were not qualified beneficiaries of her trust, because the trust terminated at her death and new trusts were created for their benefit after her death. The court focused on the language that provided for "shares" for each of the children, rather than new trusts. After a hearing on the wife's motion to dismiss, the trial court ruled against her.

3. Appointment of the Trust Protector Under the Document

The trust instrument allowed the wife to appoint a trust protector. The instrument provided very detailed authority to the trust protector. The appellate court described the terms of the trust in detail:

> After the trial court denied the motion, the wife appointed a "trust protector" pursuant to Article 16, Section 18 of the trust. This section authorizes the wife, after the husband's death, to appoint a trust protector "to protect ... the interests of the beneficiaries as the Trust Protector deems, in its sole and absolute discretion,

[9] 50 Real Property, Trust and Estate Law Journal 267 (2015).
[10] 152 So. 3d 719 (Fla. 4th DCA 2014).

> to be in accordance with my intentions....” The trust protector is empowered to modify or amend the trust provisions to, *inter alia:* (1) “correct ambiguities that might otherwise require court construction”; or (2) “correct a drafting error that defeats my intent, as determined by the Trust Protector in its sole and absolute discretion, following the guidelines provided in this Agreement[.]” The trust protector can act without court authorization under certain circumstances. The trust directs the trust protector, prior to amending the trust, to “determine my intent and consider the interests of current and future beneficiaries as a whole,” and to amend “only if the amendment will either benefit the beneficiaries as a group (even though particular beneficiaries may thereby be disadvantaged), or further my probable wishes in an appropriate way.” The trust provided that “any exercise ... of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons.”[11]

The children filed a supplemental complaint to challenge the validity of the proposed amendment. The wife claimed that the amendment resolved an ambiguity.

> The new Section 1 provided, “Upon the death of [the wife] and the termination of the Family Trust as provided in Article Ten, Section 7, if there is any property remaining, it shall be disbursed to a *new* trust to be created upon the death of [the wife] with a separate share for each of” the children. (Emphasis added).[12]

The trial court found that there was no ambiguity, that the amendment was not in the interest of the beneficiaries, and that the amendment was improper.

4. Appeal

The 4th DCA overruled the trial court, finding that:

- Florida law permits the use of trust protectors.
- The powers granted to the Trust Protector to modify the trust are authorized by Florida law.
- The settlor intended to use the Trust Protector, instead of the court to resolve any ambiguity or problem with drafting of the trust.

5. Current Status

The pending lawsuit was initiated on March 29, 2012. The docket reflects the following:

- Multiple hearings;

[11] *Id.*, at 721.
[12] *Id.*

- Motions to Compel;
- Depositions and production requests;
- Mediation;
- Opposing complaints and motions to dismiss;
- Motions for Summary Judgment;
- Appeals in 2013 and 2016;
- Motion to Recommence Discovery – 2016
- Demand for Jury Trial
- Motion to Disqualify Counsel
- Motion to Substitute Assets Within the Trust;
- Motions for Protective Orders;
- Motions for Sanctions;
- Plaintiff's Amended Trust Complaint:
    - Trust Construction;
    - Constructive Fraud;
    - Breach of Fiduciary Duties;
    - Malpractice/Negligence Regarding Gambling Provisions;
    - Conspiracy Relating to Trust Protector;
- Defenses:
    - Lack of Standing
    - Amended Motion (July 14, 2016)

B. Robert T. McLean Irrevocable Trust v. Ponder[13] - Missouri

1. Basic Facts

In 1996, Robert T. McLean was paralyzed in an automobile accident. A settlement was reached, and in 1999, the settlement proceeds were placed in a first-party, irrevocable Medicaid trust for the lifetime benefit of Robert T. McLean.

2. Trust Protector Provisions

[13] *Robert T. McLean Irrevocable Trust u/a/d March 31, 1999 v. Ponder,* 418 S.W. 3d 482 (Mo. Ct. App. 2013).

J. Michael Ponder ("Ponder") was the attorney who handled the personal injury case. He was appointed to serve as the trust protector in the trust instrument. The trust instrument gave the trust protector the power to remove the trustee, to appoint another trustee, to appoint another trust protector, and to resign as the Trust Protector. These powers could not be given to the trust beneficiary of a special needs trust. The trust instrument provided:

> 5.4 The Trust Protector's authority...is conferred in a fiduciary capacity and shall be so exercised, but the Trust Protector shall not be liable for any action taken in good faith.
>
> 5.4.1 The Trust Protector shall have the right to remove any Trustee...
>
> 5.4.2 The Trust Protector shall also have the right to appoint an individual or corporation with fiduciary powers to replace the removed Trustee...
>
> 5.4.3 Trust Protector may resign [and]...may appoint one or more persons to be successor Trust Protector...

3. The Suit Against Ponder

In 2002, after Ponder resigned his position as trust protector, Linda McLean, the mother of Robert T. McLean, became the Successor Trustee. She was also guardian of the property for her son. Linda McLean, as trustee, filed suit, claiming that Ponder violated his fiduciary duties and acted in "bad faith" by failing to monitor and report expenditures made by the several prior trustees, by failing to stop the prior trustees when they were acting against the interest of the beneficiary, and by placing the interests of the trustees above the interests of the beneficiary.

Ponder responded, claiming that, in the absence of statutory duties, his duties were limited to those set forth in the trust instrument. The trust only authorized him to remove or appoint trustees. Since the trust did not impose the obligation to review and supervise the actions of the trustees, he could not be held liable for their actions.

4. Fiduciary Duties

The court examined the nature of fiduciary duties and whether a trust protector was subject to the fiduciary duties of a trustee. In the absence of statutory guidance, the court looked to the relationship of the parties and the provisions of the trust instrument. The court granted Ponder's motion for directed verdict, finding that the plaintiff failed to show that Ponder caused

the damages alleged. The court further found that Ponder owed a duty that was breached, reasoning that Ponder had no duty to supervise or monitor the actions of the trustees.

C. In re Rivas – New York

Although New York does not have statutory provisions for trust protectors or advisors, New York Courts have recognized the ability of a settlor to designate someone to direct or advise the trustee.[14] A more recent ruling held that a committee of trust advisors was subject to the fiduciary duties governing trustees.

> For the reasons set forth above, this Court cannot allow the proposed investment of the Helen Rivas Trust corpus, as such investment in the LTIP is contrary to the Agreement and the intent of the settlor, may give rise to an impermissible division of fiduciary loyalties among the majority of the Advisory Committee, and would also violate the Prudent Investor Act. The provisions of the Trust shall be executed as set forth by the clear wording of the Agreement, with any future disputes to be brought before this Court for disposition and additional consideration.[15]

D. In re Eleanor Pierce (Marshall) Stevens Living Tr.[16] - Louisiana

1. The Trust Instrument

The Trust permitted the removal of a co-trustee by a Trust Protector. The trust instrument provided:

> … should the Trust Protector determine, in his or her sole discretion, that the individual then serving [as trustee] cannot properly represent the interest of the beneficiaries, the Trust Protector may remove the trustee, with or without cause, and designate one or more residents of the State of Louisiana to succeed to the office of trustee.

2. Public Policy & The Settlor's Intent

On appeal, the party opposing the actions of the trust protector argued that the appointment of a trust protector was against public policy. The court rejected the argument and found that the appointment of a trust protector was consistent with public policy.

> Although a trustee may, to an extent, become accountable to the trust protector, a trust protector can serve important functions in the administration of a ***14* trust.

[14] *Matter of Will of Rubin,* 143 Misc. 2d 303, 540 N.Y.S. 2d 944 (N.Y. 1989).
[15] *In re Rivas*, 30 Misc. 3d 1207A, 540 N.Y.S.2d 944 (2011).
[16] *In re Eleanor Pierce (Marshall) Stevens Living Tr.*, 159 So. 3d 1101, 1110 (La. Ct. App. 2015).

> Inherent in the trust concept is that the settlor does not intend the trustee to treat the property as his own, despite the fact that title was conferred to the trustee. Instead, the settlor intends that the trustee manage the assets for the benefit of the beneficiaries. However, the trust settlor has often been deceased for many years during the existence of the trust. This makes it "impossible to determine whether the trustee is faithfully representing the wishes of the dead settlor." Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty,* 27 Cardozo L.Rev. 2761, 2777 (2006).
>
> **1111* Traditionally, the beneficiaries have been responsible for ensuring the trustee manages the assets in accordance with the wishes of the settlor, that is, for the benefit of the beneficiaries, through an action for breach of fiduciary duty. However, the action for breach of fiduciary duty is not foolproof. Beneficiaries may not have the expertise to determine whether there has been a breach. Additionally, beneficiaries may be reluctant to take action for any breach detected, as they are, often, dependent on the trustee. Finally, in an action for breach, the trust beneficiaries will bear much of the litigation cost.
>
> By designating a trust protector, the settlor's interest in managing the assets for the benefit of the beneficiaries is better protected, as the trust protector is someone whom the settlor has selected "to represent the settlor's interests in making specified trust decisions that the settlor will be unable to make." Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty,* 27 Cardozo L.Rev. 2761, 2777 (2006). It has even been said that the trust protector is "the living embodiment of the dead settlor," that is, "a person whose primary function is to exercise judgment on behalf of the trust settlor." By appointing a trust protector, the beneficiaries are no longer saddled with the responsibility of monitoring the trustee for a breach of fiduciary duty and costs of litigation may be avoided as the ***15* settlor "could even give the protector power to remove the trustee without judicial approval."

The court was not persuaded that the interests of the beneficiaries required a finding that the trust protector's actions should not be approved.

E. Midwest Trust Co. v. Brinton - Kansas

In 2014, in an unpublished opinion, a Kansas Court examined a trust that required the approval of a trust protector as a condition to a beneficiary's exercise of a power of appointment.[17] The court found that the clear and unambiguous language of the trust required the approval of the trust protector, which the beneficiary did not obtain. As a result, the attempted exercise of the power of appointment was not valid.

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[17] *Midwest Trust Co. v. Brinton,* 331 P.3d 834, 2014 WL 4082219 (Kan. Ct. App., July 22, 2015).

F. Estate of Wimberley[18] - Washington

The trial court removed a trust protector, who was the settlor's former estate planning attorney. The trust provided that the trust protector could only be removed for violating his fiduciary duty to the settlor. Following the settlor's death, litigation ensued. The trust protector filed motions against one of the beneficiaries. The beneficiary alleged a conflict of interest between the protector's duties and the trial court removed the protector.

G. IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust – Delaware

A Delaware Chancery Court, in an unpublished opinion, reviewed choice of law issues in a matter involving six actions in three states. An underlying source of conflict between the parties was a claim that the settlor's caretaker unduly influenced the settlor to designate the drafting attorney as trust protector. They claimed that the settlor's caretaker (and future wife) sought the appointment of the drafting attorney so she would have an "ally" to control the distributions from the trust to the children. The trust provided that distributions would be directed by a distribution committee. The drafting attorney removed one member of the committee and appointed another person. The children alleged that the appointed committee member was also an ally of the caretaker. Although these facts were not determinative of the outcome, they appear to have been a source of conflict among the parties. The caretaker/wife was appointed to serve as guardian in Florida proceedings, but was later removed.

H. McMillian v. McMillan – North Carolina

Although the McMillian decision is only a slip opinion, it is illustrative of the issues that can arise in litigation. One of the litigants sought to disqualify another litigant's counsel. As grounds, the moving party claimed an imputed conflict of interest because counsel's former law partner drafted a will giving members of the firm authority to appoint a successor trustee or trust protector. The litigant argued that there was an imputed fiduciary duty owed by the opposing party's attorney simply because he was a former partner with an attorney who drafted an instrument granting certain authority with respect to trust protectors. Although the argument ultimately failed, it certainly created additional litigation costs.

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[18] *Estate of Wimberley*, 186 Wash.App. 475, 349 P.3d 11 (Wash. Ct. App. 2015).

In the present case, Mary's counsel, Brian E. Jones, alleges that by filing a motion for sanctions against him with this Court, Carol's counsel, William W. Walker, has violated Rule 1.9(c). Specifically, Jones argues that Walker owes him the same duty he would owe any present, prospective, or former client on account of the fact that one of Walker's former law partners did some estate planning work for Jones's parents. Apparently, before Jones ever appeared in this litigation, his parents visited Walker's former partner to help them execute their wills and set up a discretionary trust for the benefit of Jones, the terms of which give the partners of Walker's firm the authority to appoint a successor trustee and/or trust protector should the need arise. In light of Rule 1.10(b)(2)'s provision imputing the conflicts any attorney at a firm would have to all members of that firm, Jones now argues that Walker's Rule 34 motion for sanctions is incompatible with his professional responsibilities as an attorney, and also violates fiduciary duties he owes to Jones, because it exploits confidential financial information about Jones and his parents that Walker's firm possesses as a result of the earlier representation in a manner materially adverse to Jones's interests. Thus, Jones requests that this Court take the highly unprecedented step of disqualifying Walker from the case.

There are several reasons why this argument is totally baseless. Most significantly, Jones misapprehends the relevance of his purported conflict to this Court's determination of whether to impose sanctions under Rule 34. As we have repeatedly made clear, our sole focus in evaluating a Rule 34 motion is on the issue of whether the appeal is frivolous. *See, e.g., Yeager v. Yeager,* —— N.C.App. ——, ——, 753 S.E.2d 497, 504 (2014). The assets of both the litigant and her attorney are wholly irrelevant to our analysis. Thus, it is difficult to discern how Walker's imputed knowledge of Jones's finances has any impact whatsoever on Walker's Rule 34 motion, which focuses exclusively on the frivolous nature of this interlocutory appeal. Moreover, while it is true that Jones's parents obtained legal services from Walker's firm, it does not appear that Jones himself is or ever was a client there, while his conclusory insistence that he is owed fiduciary duties as a prospective client based on the terms of the discretionary trust is similarly unsupported. However, what this Court finds most troubling about Walker's purported conflict is the manner in which it arose. Namely, although Walker has been Carol's counsel since this litigation commenced in 2010, Jones did not first appear in this matter until February 2013 when he filed notice of appeal to this Court of the trial court's order granting Carol's Motion in the Cause. Despite the fact that Jones's parents were by then already clients of Walker's firm, Jones made no mention of this purported conflict until July 2014, when he sent Walker a letter threatening to file a motion for his disqualification if Walker filed a motion for Rule 34 sanctions against him. Of course, this means that by failing to raise

> the issue in the trial court, Jones has not preserved his disqualification argument for our review. *See* N.C.R.App. P. 10. In any event, in light of the preceding discussion, we conclude that the purported conflict described in Jones's motion to disqualify looks less like a conflict of interest and more like the judicial equivalent of a European soccer player taking a dive and then writhing around on the ground feigning injury in an effort to trick the referee into disciplining his opponent. As such, Jones's motion to disqualify is denied.[19]

VIII. SAMPLE TRUST PROVISIONS

The following provisions are intended to serve as a starting point for the drafting of provisions for a trust protector.

[19] *MacMillan v. MacMillan*, 771 S.E. 2d 633 (unpublished opinion) (N.C. App. 2015).

ARTICLE VIII – TRUST PROTECTOR

A. Initial Trust Protector. The Settlor hereby nominates [TRUST PROTECTOR] to serve as the initial Trust Protector. The Trust Protector's duties and authority shall take effect:

[select, delete, or modify as appropriate]

immediately;

upon the Settlor's incapacity;

upon the Settlor's death;

upon the filing of any suit involving the construction, administration, termination, or modification of the terms of this trust;

upon the filing of a suit for declaratory relief relating to the validity or administration of this trust;

upon the filing of a suit for declaratory relief relating to the validity or administration of this trust;

upon the filing of a suit for the removal or surcharge of a trustee; or

the invocation of the authority to appoint a Trust Protector granted to _____ under Article ____ of this trust.

B. Nomination of Additional Trust Protectors. The Trust Protector may nominate additional Trust Protectors if there are fewer than three serving, and in such case, references herein to a "Trust Protector" shall include all such Trust Protectors. Each Trust Protector shall have the right to nominate a successor Trust Protector, such nomination to take effect when the nominating Trust Protector dies, resigns, or becomes incapacitated. If there are no Trust Protectors serving, and no successors have been nominated pursuant to the terms of this Section, the power to nominate a successor Trust Protector shall be exercisable by a majority of the primary beneficiaries of the trusts created under this Trust Agreement for a period of 60 days, or if no successor has been nominated within such 60 day period, then the power to nominate a successor shall be exercisable by a majority of the Trustees of the trusts created hereunder for a period of 30 days (with Co-Trustees of a single trust having only one vote), or if no successor has been nominated within such additional 30 day period, then a successor Trust Protector shall be appointed by a court of competent jurisdiction.

C. Multiple Trust Protectors. At all times, there shall be at least one but not more than three Trust Protectors. When there are two Trust Protectors, they shall act jointly, and when there are three Trust Protectors, they shall act by majority.

D. Resignation. A Trust Protector may resign by giving notice to the Settlor, while the Settlor is living, to the Wife after the death of the Settlor, and to the beneficiaries or Ward of such trust after the death of both the Settlor and the Wife. Notice of such resignation shall also be given to each remaining Trust Protector. A Trust Protector who has resigned shall not be liable or responsible for the acts of any successor Trust Protector.

E. Persons Who May Not Serve. A Trust Protector may not serve as both a Trust Protector and as a Trustee. None of the following persons shall serve as a Trust Protector: (i) the Settlor; (ii) any beneficiary of a trust created hereunder; or (iii) any person who is related or subordinate to the Settlor or to any beneficiary within the meaning of Section 672(c) of the Code.

F. Powers. The Trust Protector shall have the following powers after the death of the Settlor:

1. The power to modify or amend the administrative and technical provisions of this Trust Agreement to achieve favorable tax status or to respond to changes in the Code and state law, or the rulings and regulations thereunder, and further to amend this Trust Agreement to ensure that the Settlor's intentions and desires are carried out;

2. The power to designate the laws of another jurisdiction as the controlling law with respect to the administration of a particular trust if the primary beneficiary of such trust resides in such designated jurisdiction, in which event the laws of such designated jurisdiction shall apply to such trust as of the date specified in such designation;

3. The power to correct ambiguities, including scrivener errors, that might otherwise require court reformation or construction;

4. The power to convert any trust created under this Trust Agreement to a purely discretionary supplemental needs trust designed to preserve the public benefits eligibility of the primary beneficiary of such trust, the terms and provisions of which shall be determined by the Trust Protector;

5. The power to irrevocably release, renounce, suspend, or limit any or all of the powers conferred by this Section;

6. The power to remove a Trustee and appoint a successor corporate or independent trustee;

7. The power to remove an Investment Manager and appoint a successor Investment Manager;

8. The power to terminate the trust and distribution the remaining trust estate as follows …..;

9. The power to veto distributions;

10. The power to veto the exercise of a power of appointment;

11. The power to approve distributions for the following purposes: ……

G. Bond; Exoneration; Limitations. No Trust Protector shall:

1. be required to post bond or other security;

2. have the duty to monitor the conduct of the Trustee;

3. be liable for any exercise or non-exercise of the powers granted under this Section;

4. exercise a power granted in this Section in a manner that would directly or indirectly benefit a Trust Protector, any family member of a Trust Protector, the estate of a Trust Protector, the creditors of the estate of a Trust Protector, or the creditors of a Trust Protector, or that would in any other way cause a Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Code; or

5. exercise a power granted in this Section in a manner that would reduce or discharge a legal or contractual obligation of a Trust Protector to support any other person.

H. Access to Records. All properties, books of account and records of each trust shall be made available by the Trustee to each Trust Protector for inspection at all times during normal business hours.

I. Compensation; Reimbursement. Each Trust Protector shall be entitled to reasonable compensation and shall be reimbursed for all expenses incurred in the performance of the duties as a Trust Protector, including travel related expenses. A Trust Protector who holds an active professional license, such as a certified public accountant or attorney, or who holds other professional designations, shall be entitled to reasonable compensation based upon the compensation normally charged by professionals with similar credentials in the community where the Trust Protector maintains an office.

J. Non-Fiduciary Capacity. Each Trust Protector shall serve in a non-fiduciary

capacity and shall not be liable for any act or omission taken in good faith.

IX. OTHER CONSIDERATIONS

Many other factors should be considered, including, but not limited to:

- Defining the standard of care for the trust protector;
- Compensation;
- When, and if the trust protector will act – springing powers;
- Qualifications for trust protectors;
- Bond requirements.

X. CONCLUSION

Trust protectors are certainly a viable tool to provide flexibility for clients who wish to utilize continuing trusts. They can offer an option that is private and less costly than judicial proceedings. The client and the drafting attorney should consider many factors and should not simply accept "boilerplate" language.

- *Why?* A conversation between the drafting client and the drafting attorney is crucial. Why would the drafting attorney recommend a protector? Why would such a recommendation be consistent with the client's planning goals, financial circumstances, and personal relationships? Is a protector necessary to protect the settlor's intent or the interests of the beneficiaries?

- *Who will serve?* The relationship of the trustee, the trust beneficiaries, and the potential for a conflict of interest between the protector and the trustee or the beneficiaries, must be considered. How will successors be appointed? What standard of care will apply to the protector?

- *What are the trust assets and trustee duties?* Do the anticipated trust assets include any assets that require management expertise, such as interests in a closely-held

partnership, a farm, rental properties, or intellectual property? If so, does the proposed trust protector have the expertise required to carry out the settlor's intent.

- *Which powers should be granted?* Does the settlor want flexibility to address the beneficiaries' needs and wishes? Does the settlor want to control from the grave and require strict adherence to the settlor's objectives? Will any of the powers result in a conflict of interest for the protector, or subject the protector to litigation?

- *When will the Protector Act?* The trust instrument can direct when the protector's duties arise. For example, will the protector only act when there is a vacancy in the office of trustee, or only when the beneficiaries are not satisfied with the current trustee?

- *Where will the Protector Act?* The geographic location of the trustee, the protector, the beneficiaries, the trust administration, and the trust assets should all be considered. Can the protector serve remotely? Will the location of the protector invoke the jurisdiction or tax laws of another state?

XI. SUMMARY OF CURRENT STATUTORY PROVISIONS

Each statute should be reviewed to determine effective date and applicability to trusts executed before the effective date or becoming irrevocable before the effective date. The preparer of this summary is licensed in the State of Florida only, and the contents of this summary are intended for educational and discussion purposes only.

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Uniform Trust Code	§808	(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
NCCUSL July 19, 2017 Draft Uniform Directed Trust Act		SECTION 2. DEFINITIONS. In this [act] (1) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this [act], or law of this state other than this [act] pertaining to trusts. (9) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not then serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a		SECTION 2. DEFINITIONS. In this [act] (8) "Terms of a trust" means: (A) except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as: (i) expressed in the trust instrument; or (ii) established by other evidence that would be admissible in a judicial proceeding; or (B) the trust's provisions as established, determined, or amended by: (i) a trustee or trust director in accord with applicable law; [or] (ii) court order[; or (iii) nonjudicial settlement agreement under [Uniform	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		trust director and whether or not the person is a beneficiary or settlor of the trust. SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR. (a) Subject to subsection (b), with respect to a power of direction or a further power under Section 6(c)(1): (1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power: (A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or (B) if the power is held jointly with a trustee or		Trust Code Section 111]]. (9) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not then serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust. (10) "Trustee" includes an original, additional, and successor trustee, and a cotrustee. Legislative Note: A state that has enacted Uniform Trust Code Section 103(18) (2004), defining "terms of a trust," or Uniform Trust Decanting Act Section 2(28) (2015), defining "terms of the	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		another trust director, as a cotrustee in a like position and under similar circumstances; and (2) the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances. (b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the		trust," should update those definitions to conform to paragraph (8). A state that has enacted Uniform Trust Code Section 103(15) and (20) could replace paragraphs (6) and (10) of this section with cross-references to those provisions of the Uniform Trust Code. A state that has not enacted Uniform Trust Code Section 111 (2000) should replace the bracketed language of paragraph (8)(B)(iii) with a cross reference to the state's law governing nonjudicial settlement or should omit paragraph (8)(B)(iii) if the state does not have such a law. SECTION 6. POWERS OF TRUST DIRECTOR. (a) Subject to Section 7, the terms of a trust may grant a power of direction	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		director has no duty or liability under this [act] . (c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this [act].		to a trust director. (b) A power of direction includes only those powers granted by the terms of the trust. (c) Unless the terms of a trust provide otherwise: (1) a trust director may exercise any further power appropriate to the exercise or nonexercise of the director's power of direction; and (2) trust directors with joint powers must act by majority decision.	
Alabama	§19-3B-808	(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power		(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, then the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		to direct is liable for any loss that results from breach of a fiduciary duty.		trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	
Alaska	§ 13.36.370	(d) Subject to the terms of the trust instrument, a trust protector is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector taken when performing the function of a trust protector under the trust instrument		(b) A trust protector appointed under (a) of this section has the powers, delegations, and functions conferred on the protector by the trust instrument, which may include the power to (1) remove and appoint a trustee; (2) modify or amend the trust instrument to achieve favorable tax status or to respond to changes in 26 U.S.C. (Internal Revenue Code) or state law, or the	(c) A modification authorized under (b) of this section may not (1) grant a beneficial interest to an individual or a class of individuals unless the individual or class of individuals is specifically provided for under the trust instrument; (2) modify the beneficial interest of a governmental unit in a trust created under AS 47.07.020(f).

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				rulings and regulations under those laws; (3) increase or decrease the interests of any beneficiary to the trust; and (4) modify the terms of a power of appointment granted by the trust.	
Arizona	§ 14-10818		D. Any provision of this title to the contrary, but except to the extent otherwise provided by the trust instrument, a trust protector is not a trustee or fiduciary and is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector when performing or failing to perform the duties	B. A trust protector appointed by the trust instrument has the powers, delegations and functions conferred on the trust protector by the trust instrument. These powers, delegations and functions may include the following, which do not limit what powers, delegations and functions may be granted to the trust protector: 1. Remove and appoint a trustee. 2. Modify or amend the trust instrument for any valid purpose or reason, including, without	C. Except to the extent otherwise specifically provided in the trust instrument, a modification authorized under subsection B of this section may not: 1. Grant a beneficial interest to an individual or a class of individuals unless the individual or class of individuals is specifically provided for under the trust instrument. 2. Modify the beneficial interest of a governmental unit in a special needs trust.

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
			of a trust protector under the trust instrument. This subsection does not apply to trusts that become irrevocable before January 1, 2009 if the trust instrument allows the settlor to remove and replace the trust protector.	limitation, to achieve favorable tax status or to respond to changes in the internal revenue code or state law, or the rulings and regulations under that code or law. 3. Increase, decrease, modify or restrict the interests of any beneficiary of the trust. 4. Modify the terms of a power of appointment granted by the trust. 5. Change the applicable law governing the trust.	
Arkansas	§ 28-73-808	(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for		(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		any loss that results from breach of a fiduciary duty.		the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	
California	No statute[20]				

[20] *see Crocker v. Citizens National Bank v. Younger*, 481 P. 2d 222, 93 Cal. Rptr. 214 (Cal. 1971), which held that a trust advisor can be given powers that would normally be exercised by a trustee.

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Colorado	§15-16-801 §15-16-803	§15-16-801 (8)(a) "Trust advisor" means a person who is: (I) Acting in a fiduciary capacity; and (II) Vested under a governing instrument with fiduciary powers to direct a trustee's actual or proposed investment decisions or non-investment decisions. §15-16-803 (1) A trust advisor with power over investment decisions is subject to the "Uniform Prudent Investor Act", article 1.1 of this title. A trust advisor who has special skills or expertise or who is named a trust advisor in reliance upon his or her representation that he	§15-16-801 (8)(b) A person who holds a nonfiduciary power over a trust, including a power of appointment as defined in section 15-2-102, is not subject to the provisions of this part 8, regardless of whether he or she is described as a "trust advisor" within a governing instrument.	§15-16-803 (2) The powers and duties of a trust advisor, and the extent of such powers and duties, are established by the governing instrument, and the exercise or nonexercise of such powers and duties is binding on all other persons. (3) The powers and duties of a trust advisor may include, but are not limited to: (a) The exercise of a specific power or the performance of a specific duty or function that would normally be performed by a trustee; (b) The direction of a trustee's actions regarding all investment decisions or one or more specific investment decisions; or (c) The direction of a trustee's actions relating to one or more specific non-	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		or she has special skills or expertise has a duty to use those special skills or expertise.		investment decisions, including the exercise of discretion to make distributions to beneficiaries. (4) If a governing instrument provides that a trustee must follow the direction of a trust advisor and the trustee acts in accordance with such direction, the trustee is an excluded trustee.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Connecticut	CT Probate Rule 1, §1.1	(13) "Fiduciary" means a person serving as an administrator, executor, conservator of the estate, conservator of the person, guardian of an adult with intellectual disability, guardian of the estate of a minor, guardian of the person of a minor, temporary custodian of the person of a minor, trustee or person serving in any other role that the court determines is fiduciary in nature. (37) "Trust protector" means a person identified in a will or other governing instrument who is charged with protecting the interests of a trust beneficiary and is identified as a trust protector, trust advisor, or beneficiary			

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		surrogate, or as a person in an equivalent role.			

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Delaware	12 Del. Code §3313 §3570	§3313 (a) Where 1 or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.		§3570 (f) For purposes of this section, the term "adviser" shall include a "protector" who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to: (1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors; (2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				governing instrument.	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
Florida[21]	§ 736.0808	(4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		(1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable. (2) If the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (3) The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.	

[21] *Minassian v. Rachins*, 152 So. 2d 719 (Fla. 4th DCA 2014) held that the trust protector could amend the trust as provided in the trust instrument.

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Georgia	No statute				

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Hawaii	HRS § 554G-4.5			(a) A transferor may appoint, through the trust instrument, one or more advisors or protectors, including: (1) Advisors who have authority under the terms of the trust to remove and appoint trustees, advisors, trust committee members, or protectors; (2) Advisors who have authority under the terms of the trust to direct, consent to, or disapprove of distributions from the trust; and (3) Advisors, including the transferor beneficiary of the trust, who serve as investment advisors to the trust. (b) While a trustee may appoint an advisor, the administrative and non-administrative authority over the trust shall remain with the trustee.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				(c) Notwithstanding subsection (b), whenever there is a dispute, deadlock, or difference of opinion between a trustee and an advisor, the transferor may direct that the determination of the advisor shall be binding upon the trustee; provided that the trustee shall bear no liability or accountability for any act or transaction entered into or omitted as a result of the enforcement of the advisor's determination. The trustee's administrative and non-administrative fiduciary duty to the beneficiaries shall be waived as to the specific act or transaction entered into or omitted as a result of the enforcement of the advisor's determination; provided that : (1) The trustee dissents in writing :	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				(A) Before the act or transaction is completed; (B) To a failure to act; or (C) In a reasonably timely manner to enter into a transaction; or (2) If the advisor is appointed by the transferor under the terms of the trust and section 560:7-302 applies to the trust and the advisor, the trustee is not required to dissent in writing for the waiver of the trustee's administrative and nonadministrative fiduciary duties to the beneficiaries to take effect.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Idaho	§15-7-501	(1) Definition of terms: (c) "Fiduciary" means a trustee under any testamentary or other trust, an executor, administrator, or personal representative of a decedent's estate, or any other party, including a trust advisor or a trust protector, who is acting in a fiduciary capacity for any person, trust or estate. (2) Liability limits of excluded fiduciary. An excluded fiduciary is not liable, either individually or as a fiduciary, for either of the following: (a) Any loss that results from compliance with a direction of the trust advisor; (b) Any loss that results from a failure to take	The trust instrument may relieve trust protector of fiduciary duty over investment decisions.	(1)(a) "Distribution trust advisor" means a person given authority by the trust instrument to exercise all or any portions of the powers and discretions set forth in subsection (11) of this section. (b) "Excluded fiduciary" means any fiduciary excluded from exercising certain powers under the instrument, which powers may be exercised by the grantor or a trust advisor or a trust protector. (6) Powers and discretions of trust protector. The powers and discretions of a trust protector shall be as provided in the governing instrument and may, in the best interests of the trust, be exercised or not exercised in the sole and absolute discretion of the trust protector and shall be	May not modify the terms of a power of appointment to add persons or classes not specifically provided for in the trust instrument.

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization. Any excluded fiduciary is also relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the trust advisor had authority to direct the acquisition, disposition or retention of any such investment. (4) When trust advisor considered as fiduciary. If one (1) or more trust advisors are given authority by the terms of a governing instrument to direct,		binding on all other persons. Such powers and discretion may include the following: (a) To modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder; (b) To increase or decrease the interests of any beneficiaries to the trust; (c) To modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument; (d) To terminate the trust; (e) To veto or direct trust distributions;	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		consent to, or disapprove a fiduciary's investment decisions, or proposed investment decisions, such trust advisors shall be considered to be fiduciaries when exercising such authority unless the governing instrument provides otherwise. (5) Excluded fiduciary's liability for loss if trust protector appointed. If an instrument appoints a trust protector, the excluded fiduciary is not liable for any loss resulting from any action taken upon such trust protector's direction.		(f) To change situs or governing law of the trust, or both; (g) To appoint a successor trust protector; (h) To interpret terms of the trust instrument at the request of the trustee; (i) To advise the trustee on matters concerning a beneficiary; and (j) To amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust. (8) Powers of trust protector incorporated by reference in will or trust instrument. Any of the powers enumerated in subsection (6) of this section, as they exist at the time of the signing of a will by a testator or testatrix or at the time of	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				the signing of a trust instrument by a trustor may be, by appropriate reference made thereto, incorporated in whole or in part in such will or trust instrument by a clearly expressed intention of a testator or testatrix of a will or trustor of a trust instrument. (9) Investment trust advisor or distribution trust advisor provided for in trust instrument. A trust instrument governed by the laws of Idaho may provide for a person to act as an investment trust advisor or a distribution trust advisor, respectively, with regard to investment decisions or discretionary distributions. (10) Powers and discretions of investment trust advisor. The powers and discretions of an investment trust advisor shall be provided in the	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the investment trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document provide otherwise, the investment trust advisor has the power to perform the following: (a) Direct the trustee with respect to the retention, purchase, sale or encumbrance of trust property and the investment and reinvestment of principal and income of the trust; (b) Vote proxies for securities held in trust; and (c) Select one (1) or more investment advisors, managers or counselors,	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				including the trustee, and delegate to them any of its powers. (11) Powers and discretions of distribution trust advisor. The powers and discretions of a distribution trust advisor shall be provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the distribution trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document provide otherwise, the distribution trust advisor shall direct the trustee with regard to all discretionary distributions to beneficiaries.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Illinois	§ 16.3	(e) Duty and liability of directing party. A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the governing instrument provides otherwise, but the governing instrument may not, however, relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust. (f) Duty and liability of excluded fiduciary. The excluded fiduciary shall act in accordance with the governing instrument and comply with the directing	… unless the governing instrument provides otherwise, but the governing instrument may not, however, relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust.	(a) Definitions. In this Section: (1) "Directing party" means any investment trust advisor, distribution trust advisor, or trust protector as provided in this Section. (2) "Distribution trust advisor" means any one or more persons given authority by the governing instrument to direct, consent to, veto, or otherwise exercise all or any portion of the distribution powers and discretions of the trust, including but not limited to authority to make discretionary distribution of income or principal. (3) "Excluded fiduciary" means any fiduciary that by the governing instrument is directed to act in accordance with the exercise of specified powers by a directing	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		party's exercise of the powers granted to the directing party by the governing instrument. Unless otherwise provided in the governing instrument, an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate, or warn with respect to a directing party's exercise or failure to exercise any power granted to the directing party by the governing instrument, including but not limited to any power related to the acquisition, disposition, retention, management, or valuation of any asset or investment. Except as otherwise provided in this Section or the governing instrument, an excluded fiduciary is not liable,		party, in which case such specified powers shall be deemed granted not to the fiduciary but to the directing party and such fiduciary shall be deemed excluded from exercising such specified powers. If a governing instrument provides that a fiduciary as to one or more specified matters is to act, omit action, or make decisions only with the consent of a directing party, then such fiduciary is an excluded fiduciary with respect to such matters. Notwithstanding any provision of this Section to the contrary, a person does not fail to qualify as an excluded fiduciary solely by reason of having effectuated, participated in, or consented to a transaction, including but not limited to any transaction described in Section 16.1 or Section	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		either individually or as a fiduciary, for any action, inaction, consent, or failure to consent by a directing party, including but not limited to any of the following: (1) if a governing instrument provides that an excluded fiduciary is to follow the direction of a directing party, and such excluded fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the excluded fiduciary in complying with the direction of the directing party, the excluded fiduciary is not liable for any loss resulting directly or indirectly from following any such direction, including but		16.4 of this Act, invoking the provisions of this Section with respect to any new or existing trust. (4) "Fiduciary" means any person expressly given one or more fiduciary duties by the governing instrument, including but not limited to a trustee. (5) "Governing instrument" refers to the instrument stating the terms of a trust, including but not limited to any court order or nonjudicial settlement agreement establishing, construing, or modifying the terms of the trust in accordance with Section 16.1, 16.4, or 16.6 or other applicable law. (6) "Investment trust advisor" means any one or more persons given authority by the governing instrument to direct, consent to, veto, or	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
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		not limited to compliance regarding the valuation of assets for which there is no readily available market value; (2) if a governing instrument provides that an excluded fiduciary is to act or omit to act only with the consent of a directing party, then except in cases of willful misconduct on the part of the excluded fiduciary, the excluded fiduciary is not liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such directing party's failure to provide such consent after having been asked to do so by the excluded fiduciary; or (3) if a governing		otherwise exercise all or any portion of the investment powers of the trust. (7) "Power" means authority to take or withhold an action or decision, including but not limited to an expressly specified power, the implied power necessary to exercise a specified power, and authority inherent in a general grant of discretion. (8) "Trust protector" means any one or more persons given any one or more of the powers specified in subsection (d), whether or not designated with the title of trust protector by the governing instrument. (b) Powers of investment trust advisor. An investment trust advisor may be designated in the governing instrument of a trust. The powers of an	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		instrument provides that, or for any other reason, an excluded fiduciary is required to assume the role or responsibilities of a directing party, or if the excluded party appoints a directing party or successor to a directing party, then the excluded fiduciary shall also assume the same fiduciary and other duties and standards that applied to such directing party.		investment trust advisor may be exercised or not exercised in the sole and absolute discretion of the investment trust advisor, and are binding on all other persons, including but not limited to each beneficiary, fiduciary, excluded fiduciary, and any other party having an interest in the trust. The governing instrument may use the title "investment trust advisor" or any similar name or description demonstrating the intent to provide for the office and function of an investment trust advisor. Unless the terms of the governing instrument provide otherwise, the investment trust advisor has the authority to: (1) direct the trustee with respect to the retention, purchase, transfer, assignment, sale, or	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				encumbrance of trust property and the investment and reinvestment of principal and income of the trust; (2) direct the trustee with respect to all management, control, and voting powers related directly or indirectly to trust assets, including but not limited to voting proxies for securities held in trust; (3) select and determine reasonable compensation of one or more advisors, managers, consultants, or counselors, including the trustee, and to delegate to them any of the powers of the investment trust advisor in accordance with subsection (b) of Section 5.1; and (4) determine the frequency and methodology for valuing any asset for which there is	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				no readily available market value. (c) Powers of distribution trust advisor. A distribution trust advisor may be designated in the governing instrument of a trust. The powers of a distribution trust advisor may be exercised or not exercised in the sole and absolute discretion of the distribution trust advisor, and are binding on all other persons, including but not limited to each beneficiary, fiduciary, excluded fiduciary, and any other party having an interest in the trust. The governing instrument may use the title "distribution trust advisor" or any similar name or description demonstrating the intent to provide for the office and function of a distribution trust advisor. Unless the terms of the governing	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				instrument provide otherwise, the distribution trust advisor has authority to direct the trustee with regard to all decisions relating directly or indirectly to discretionary distributions to or for one or more beneficiaries. (d) Powers of trust protector. A trust protector may be designated in the governing instrument of a trust. The powers of a trust protector may be exercised or not exercised in the sole and absolute discretion of the trust protector, and are binding on all other persons, including but not limited to each beneficiary, investment trust advisor, distribution trust advisor, fiduciary, excluded fiduciary, and any other party having an interest in the trust. The governing instrument may use the title "trust protector" or	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				any similar name or description demonstrating the intent to provide for the office and function of a trust protector. The powers granted to a trust protector by the governing instrument may include but are not limited to authority to do any one or more of the following: (1) modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, federal laws, State law, or the rulings and regulations under such laws; (2) increase, decrease, or modify the interests of any beneficiary or beneficiaries of the trust; (3) modify the terms of any power of appointment granted by the trust; provided, however, such modification or	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				amendment may not grant a beneficial interest to any individual, class of individuals, or other parties not specifically provided for under the trust instrument; (4) remove, appoint, or remove and appoint, a trustee, investment trust advisor, distribution trust advisor, another directing party, investment committee member, or distribution committee member, including designation of a plan of succession for future holders of any such office; (5) terminate the trust, including determination of how the trustee shall distribute the trust property to be consistent with the purposes of the trust; (6) change the situs of the trust, the governing law of the trust, or both;	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				(7) appoint one or more successor trust protectors, including designation of a plan of succession for future trust protectors; (8) interpret terms of the trust instrument at the request of the trustee; (9) advise the trustee on matters concerning a beneficiary; or (10) amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or to improve the administration of the trust. If a charity is a current beneficiary or a presumptive remainder beneficiary of the trust, a trust protector must give notice to the Attorney General's Charitable Trust Bureau at least 60 days before taking any of the	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				actions authorized under item (2), (3), (4), (5), or (6) of this subsection. The Attorney General's Charitable Trust Bureau may, however, waive this notice requirement. (g) Submission to court jurisdiction; effect on directing party. By accepting an appointment to serve as a directing party of a trust that is subject to the laws of this State, the directing party submits to the jurisdiction of the courts of this State even if investment advisory agreements or other related agreements provide otherwise, and the directing party may be made a party to any action or proceeding if issues relate to a decision or action of the directing party. (h) Duty to inform excluded fiduciary. Each	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				directing party shall keep the excluded fiduciary and any other directing party reasonably informed regarding the administration of the trust with respect to any specific duty or function being performed by the directing party to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary or other directing party is reasonably necessary for the excluded fiduciary or other directing party to perform its duties, and the directing party shall provide such information as reasonably requested by the excluded fiduciary or other directing party. Neither the performance nor the failure to perform of a directing party's duty to inform as provided in	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				this subsection affects whatsoever the limitation on the liability of the excluded fiduciary as provided in this Section. (i) Reliance on counsel. An excluded fiduciary may, but is not required to, obtain and rely upon an opinion of counsel on any matter relevant to this Section. (j) Applicability. On and after its effective date, this Section applies to: (1) all existing and future trusts that appoint or provide for a directing party, including but not limited to a party granted power or authority effectively comparable in substance to that of a directing party as provided in this Section; or (2) any existing or future trust that: (A) is modified in	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
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				accordance with applicable law or the terms of the governing instrument to appoint or provide for a directing party; or (B) is modified to appoint or provide for a directing party, including but not limited to a party granted power or authority effectively comparable in substance to that of a directing party, in accordance with (i) a court order, or (ii) a nonjudicial settlement agreement made in accordance with Section 16.1, whether or not such order or agreement specifies that this Section governs the responsibilities, actions, and liabilities of persons designated as a directing party or excluded fiduciary.	
Indiana	IC 30-4-3-9	(a) If the terms of the			

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		trust give a person a power to direct the trustee in the administration of the trust and those terms expressly direct the trustee to rely, or relieve the trustee from liability if he does rely, on that person's directions, the trustee may do so and will incur no liability for any loss to the trust estate. (b) If the terms of the trust give a person a power to direct the trustee in the administration of the trust, except as provided in subsection (a) of this section: (1) If the person holds the power as a fiduciary, the trustee has a duty to refuse to comply with any direction which he			

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		knows or should know would constitute a breach of a duty owed by that person as a fiduciary. (2) If the person holds the power solely for his own benefit, the trustee may refuse to comply only if the attempted exercise of the power violates the terms of the trust with respect to that power.			
Iowa	§633A.4207	3. A person other than a beneficiary who holds a power to direct is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from a breach of a fiduciary		1. While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the terms of the trust. 2. If the terms of the trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		duty.		unless the trustee knows the attempted exercise violates the terms of the trust or the trustee knows that the person holding the power is not competent.	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Kansas[22]	§58a-808	(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or	

[22] *Midwest Trust Co. v. Brinton,* 331 P.3d 834, 2014 WL 4082219 (Kan. Ct. App., July 22, 2015).

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				termination of the trust.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Kentucky	§386B.8-080	(4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		(1) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. (2) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (3) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Louisiana[23]	LSA-R.S. 9 §2025 §2031	§2031 (4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		§2031 (1) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. (2) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (3) The terms of a trust may confer upon a trustee or other person a power to direct the modification or	

[23] *In re Eleanor Pierce (Marshall) Stevens Living Tr.*, 159 So. 3d 1101, 1110 (La. Ct. App. 2015).

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				termination of the trust. §2025 - A settlor may delegate to another person the right to terminate a trust, or to modify the administrative provisions of a trust, but the right to modify other provisions of a trust may not be delegated except as provided in R.S. 9:2031.	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Maine	Me Rev. Stat. Ann. 18-B, §110, §105 §808	§808 – 4. Power to direct; fiduciary duty. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		§105 3. Waiver or modification. The settlor, in the trust instrument or in another writing delivered to the trustee, may waive or modify the duties of a trustee under section 813, subsection 1 or 2 to give notice, information and reports to qualified beneficiaries in either or both of the following ways: A. Waiving or modifying such duties as to all qualified beneficiaries except the settlor's surviving spouse during the lifetime of the settlor or the lifetime of the settlor's surviving spouse; and B. With respect to one or more of the current beneficiaries as to whom the settlor has waived or modified such duties, designating a person or persons, any of whom may	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
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				or may not be a beneficiary, to act in good faith to protect the interests of the current beneficiaries who are not receiving notice, information or reports and to receive any notice, information or reports required under section 813, subsection 1 or 2 in lieu of providing such notice, information or reports to the current beneficiaries. The person or persons designated under this paragraph are deemed to be representatives of the current beneficiaries not receiving notice, information or reports for the purposes of the time limitation for a beneficiary to commence an action against the trustee for breach of trust as provided in section 1005, subsection 1.	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				§110 - Designated representatives to receive notice and protect the interests of the beneficiaries, other than spouse. §808 - 1. Revocable trust; direction of settlor. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. 2. Directions of person conferred power to direct trustee. If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted	

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		Yes	No	Permitted Powers	Prohibited Powers
				exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. 3. Modification or termination. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	
Maryland	§14-5-808	Advisers given powers to direct, consent to, or disapprove decisions of trustee (b)(1)(i) Except as provided in paragraph (2) of this subsection, if the terms of a trust confer on one or more persons, other than the settlor of a revocable trust, a power to direct, consent to, or disapprove the actual or proposed investment		(a) While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the terms of the trust. (2) A beneficiary that holds a power to direct, consent to, or disapprove of a trustee action may not be treated as a fiduciary with respect to the exercise of the power to the extent that the only persons whose	unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		decisions, distribution decisions, or other decisions of the trustee, the persons shall be considered advisers and fiduciaries that, as such, are required to act reasonably under the circumstances with regard to the purposes of the trust and the interests of the beneficiaries. (ii) The trustee may not act in accordance with an exercise of the power if: 1. The attempted exercise is manifestly contrary to the terms of the trust, unless expressly waived in writing by the settlor; or 2. The trustee knows the attempted exercise would constitute a breach of a fiduciary		interests in the trust are affected by the decision of the beneficiary are the beneficiary and those persons whose interests in the trust are subject to control by the beneficiary through the exercise of a power of appointment. (3) An adviser under this subsection is liable for a loss that results from breach of a fiduciary duty. Terms of trust requiring trustee to follow direction of adviser (c)(1) If the terms of a trust require that a trustee shall follow the direction of an adviser with respect to proposed investment decisions, distribution decisions, or other decisions of the trustee: (i) The trustee shall act in accordance with the direction of the adviser and may not be liable for a loss	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		duty that the person holding the power owes to the beneficiaries of the trust.		resulting directly or indirectly from the act except in the case of willful misconduct on the part of the trustee; and (ii) The trustee shall have no duty to: 1. Monitor the conduct of the adviser; 2. Provide advice to the adviser; or 3. Communicate with, warn, or apprise a beneficiary or third party concerning instances in which the trustee would or might have exercised the discretion of the trustee in a manner different from the manner directed by the adviser. (2) Absent a preponderance of the evidence to the contrary, the actions of the trustee pertaining to matters within the scope of the authority of the adviser, such as confirming that the	

State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				directions of the adviser have been carried out and recording and reporting actions taken at the direction of the adviser, shall be presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee by the terms of the trust, and these administrative actions may not be deemed to constitute an undertaking by the trustee to monitor the adviser or otherwise participate in actions within the scope of the authority of the adviser. Powers of adviser relating to investment decisions (d) Unless the terms of a trust otherwise provide, an adviser that is given authority with respect to investment decisions has the power to perform the	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				following: (1) Direct the trustee with respect to the retention, purchase, sale, or encumbrance of the trust property and the investment and reinvestment of principal and income from the trust; (2) Vote proxies for securities held in trust; and (3) Select one or more investment advisers, managers, or counselors, including the trustee, and delegate to the advisers, managers, or counselors a power of the adviser. Power to direct modification or termination of trust (e) The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.	
Massachusetts	MGLA	(c) A person who holds		(a) While a trust is	…. unless the attempted

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
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	203E § 808	a power to direct is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct shall be liable for any loss that results from a breach of a fiduciary duty.		revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. (b) If the terms of a trust confer upon a person, other than the settlor of a revocable trust, power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power, unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (Does not specify power to amend or direct.)	exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Michigan	§700.7808 §700.7809	§700.7809 (1) A trust protector, other than a trust protector who is a beneficiary of the trust, is subject to all of the following: (a) Except as provided in subsection (2), the trust protector is a fiduciary to the extent of the powers, duties, and discretions granted to him or her under the terms of the trust. (b) In exercising or refraining from exercising any power, duty, or discretion, the trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. (c) The trust protector is liable for any loss	(2) The terms of a trust may provide that a trust protector to whom powers of administration described in section 675(4) of the internal revenue code, 26 USC 675, have been granted may exercise those powers in a nonfiduciary capacity. However, the terms of the trust shall not relieve the trust protector from the requirement under subsection (1)(b) that he or she exercise or refrain from exercising any power, duty, or discretion in good faith and in	§700.7808 While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.	

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		that results from the breach of his or her fiduciary duties. (3) Except as otherwise provided in subsection (4), the trustee shall act in accordance with a trust protector's exercise of the trust protector's specified powers and is not liable for so acting. (4) If either of the following applies to a trust protector's attempted exercise of a specified power, the trustee shall not act in accordance with the attempted exercise of the power unless the trustee receives prior direction from the court: (a) The exercise is contrary to the terms of the trust. (b) The exercise would	accordance with the terms and purposes of the trust and the interests of the beneficiaries.		

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		constitute a breach of any fiduciary duty that the trust protector owes to the beneficiaries of the trust. (5) A trustee is not liable for any loss that results from any of the following: (a) The trustee's compliance with a direction of a trust protector, unless the attempted exercise was described in subsection (4). (b) The trustee's failure to take any action that requires a prior authorization of the trust protector if the trustee timely sought but failed to receive the authorization. (c) Seeking a determination from the court regarding the trust protector's actions			

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		or directions. (d) The trustee's refraining from action pursuant to subsection (4). (6) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust. (7) By accepting an appointment to serve as a trust protector of a trust registered in this state or having its principal place of administration in this state, the trust protector submits to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the trust protector may be made a party to any			

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		action or proceeding relating to a decision, action, or inaction of the trust protector. (8) A term of a trust that relieves a trust protector from liability for breach of his or her fiduciary duties is unenforceable to the extent that either of the following applies: (a) The term relieves the trust protector of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries. (b) The term was inserted as the result of an abuse by the trust protector of a fiduciary or confidential relationship to the settlor.			

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State	Statute	Trust Protector’s Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
Minnesota	§501C.0808	Subdivision 1. (d) "Excluded fiduciary" means any fiduciary that by the governing instrument is directed to act in accordance with the exercise of specified powers by a directing party, in which case such specified powers shall be deemed granted not to the fiduciary but to the directing party and such fiduciary shall be deemed excluded from exercising such specified powers. If a governing instrument provides that a fiduciary as to one or more specified matters is to act, omit action, or make decisions only with the consent of a directing party, then such fiduciary is an excluded fiduciary with	The instrument may not relieve or exonerate from duty to act or withhold action as the directing party in good faith reasonably believes to be in the best interests of the trust.	Subdivision 1. (a) The definitions in this section apply to this section. (b) "Directing party" means any investment trust advisor, distribution trust advisor, or trust protector as provided in this section. (c) "Distribution trust advisor" means one or more persons given authority by the governing instrument to direct, consent to, veto, or otherwise exercise all or any portion of the distribution powers and discretions of the trust, including but not limited to authority to make discretionary distributions of income or principal. (f) "Governing instrument" means the instrument stating the terms of a trust, including but not limited to any court	

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		respect to such matters. A person may be an excluded fiduciary even if such person participated in the exercise of (1) a power described in section 501C.0111 relating to nonjudicial settlement agreements, (2) a power described in section 502.851 relating to decanting, (3) a permitted trustee amendment, or (4) a similar power that invokes the provisions of this section with respect to any new or existing trust. (e) "Fiduciary" means any person expressly given one or more fiduciary duties by the governing instrument, including but not limited to a trustee. Subd. 5. Duty and		order, or nonjudicial settlement agreement establishing, construing, or modifying the terms of the trust in accordance with section 501C.0111 or 502.851, or other applicable law. (g) "Investment trust advisor" means any one or more persons given authority by the governing instrument to direct, consent to, or veto the exercise of all or any portion of the investment powers of the trust. (h) "Power" means authority to take or withhold an action or decision, including but not limited to an expressly specified power, the implied power necessary to exercise a specified power, and authority inherent in a general grant of discretion. (i) "Trust protector" means	

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		liability of directing party. A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the governing instrument provides otherwise, but the governing instrument may not, however, relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust. Subd. 6. Duty and liability of excluded fiduciary. (a) The excluded fiduciary shall act in accordance with the governing instrument and comply with the directing		one or more persons given one or more of the powers specified in subdivision 4, whether or not designated with the title of trust protector by the governing instrument. Subd. 2. Powers of investment trust advisor. An investment trust advisor may be designated in the governing instrument of a trust. The powers of an investment trust advisor may be exercised or not exercised in the sole and absolute discretion of the investment trust advisor, and are binding on all other persons, including but not limited to each beneficiary, fiduciary, excluded fiduciary, and any other party having an interest in the trust. The governing instrument may use the title "investment trust advisor" or any similar	

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		party's exercise of the powers granted to the directing party by the governing instrument. Unless otherwise provided in the governing instrument, an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate, or warn with respect to a directing party's exercise of or failure to exercise any power granted to the directing party by the governing instrument, including but not limited to, any power related to the acquisition, disposition, retention, management, or valuation of any asset or investment. Except as otherwise provided in this section or the governing instrument, an excluded fiduciary is not liable,		name or description demonstrating the intent to provide for the office and function of an investment trust advisor. Unless the terms of the governing instrument provide otherwise, the investment trust advisor has the authority to: (1) direct the trustee with respect to the retention, purchase, transfer, assignment, sale, or encumbrance of trust property and the investment and reinvestment of principal and income of the trust; (2) direct the trustee with respect to all management, control, and voting powers related directly or indirectly to trust assets, including but not limited to voting proxies for securities held in trust; (3) select and determine	

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		either individually or as a fiduciary, for any action, inaction, consent, or failure to consent by a directing party, including but not limited to, any of the following: (1) if a governing instrument provides that an excluded fiduciary is to follow the direction of a directing party, and the excluded fiduciary acts in accordance with the direction, then except in cases of willful misconduct on the part of the excluded fiduciary in complying with the direction of the directing party, the excluded fiduciary is not liable for any loss resulting directly or indirectly from following the direction, including but not		reasonable compensation of one or more advisors, managers, consultants, or counselors, including the trustee, and to delegate to them any of the powers of the investment trust advisor in accordance with section 501C.0807; and (4) determine the frequency and methodology for valuing any asset for which there is no readily available market value. Subd. 3. Powers of distribution trust advisor. A distribution trust advisor may be designated in the governing instrument of a trust. The powers of a distribution trust advisor may be exercised or not exercised in the sole and absolute discretion of the distribution trust advisor, and are binding on all other persons, including but not limited to each beneficiary,	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
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		limited to, compliance regarding the valuation of assets for which there is no readily available market value; (2) if a governing instrument provides that an excluded fiduciary is to act or omit to act only with the consent of a directing party, then except in cases of willful misconduct on the part of the excluded fiduciary, the excluded fiduciary is not liable for any loss resulting directly or indirectly from any act taken or omitted as a result of the directing party's failure to provide consent after having been requested to do so by the excluded fiduciary; or (3) if a governing instrument provides		fiduciary, excluded fiduciary, and any other party having an interest in the trust. The governing instrument may use the title "distribution trust advisor" or any similar name or description demonstrating the intent to provide for the office and function of a distribution trust advisor. Unless the terms of the governing instrument provide otherwise, the distribution trust advisor has authority to direct the trustee with regard to all decisions relating directly or indirectly to discretionary distributions to or for one or more beneficiaries. Subd. 4. Powers of trust protector. A trust protector may be designated in the governing instrument of a trust. The powers of a trust protector may be exercised or not exercised in the sole	

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		that, or if for any other reason, an excluded fiduciary is required to assume the role or responsibilities of a directing party, or if the excluded fiduciary appoints a directing party or successor to a directing party, then except in cases of willful misconduct on the part of the excluded fiduciary, the excluded fiduciary is not liable for any loss resulting directly or indirectly from its actions in carrying out the roles and responsibilities of the directing party. (b) Any excluded fiduciary is also relieved from any obligation to review or evaluate any direction from a distribution trust advisor or to perform investment or		and absolute discretion of the trust protector, and are binding on all other persons, including but not limited to each beneficiary, investment trust advisor, distribution trust advisor, fiduciary, excluded fiduciary, and any other party having an interest in the trust. The governing instrument may use the title "trust protector" or any similar name or description demonstrating the intent to provide for the office and function of a trust protector. The powers granted to a trust protector by the governing instrument may include but are not limited to authority to do any one or more of the following: (1) modify or amend the governing instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code,	

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		suitability reviews, inquiries, or investigations or to make recommendations or evaluations with respect to investments to the extent the directing party, custodial account owner, or authorized designee of a custodial account owner had authority to direct the acquisition, disposition, or retention of any such investment. If the excluded fiduciary offers such communication to the directing party or any investment person selected by the investment trust advisor, the action may not be deemed to constitute an undertaking by the excluded fiduciary to monitor or otherwise participate in actions		federal laws, state law, or the rulings and regulations under such laws; (2) increase, decrease, or modify the interests of any beneficiary or beneficiaries of the trust; (3) modify the terms of any power of appointment granted by the trust; provided, however, such modification or amendment may not grant a beneficial interest to any individual, class of individuals, or other parties not specifically provided for under the trust instrument; (4) remove, appoint, or remove and appoint, a trustee, investment trust advisor, distribution trust advisor, another directing party, investment committee member, or distribution committee member, including	

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		within the scope of the advisor's authority or to constitute any duty to do so. (c) An excluded fiduciary is also relieved of any duty to communicate with, warn, or apprise any beneficiary or third party concerning instances in which the excluded fiduciary would or may have exercised the excluded fiduciary's own discretion in a manner different from the manner directed by the directing party. (d) Absent a contrary provision in the governing instrument, the actions of the excluded fiduciary, including any communications with the directing party or others, or carrying out,		designation of a plan of succession for future holders of any such office; (5) terminate the trust, including determination of how the trustee shall distribute the trust property to be consistent with the purposes of the trust; (6) change the situs of the trust, the governing law of the trust, or both; (7) appoint one or more successor trust protectors, including designation of a plan of succession for future trust protectors; (8) interpret terms of the trust instrument at the request of the trustee; (9) advise the trustee on matters concerning a beneficiary; (10) amend or modify the governing instrument to take advantage of laws governing restraints on	

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		recording, or reporting actions taken at the directing party's direction pertaining to matters within the scope of authority of the directing party, shall be deemed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the governing instrument. An administrative action described under this paragraph may not be deemed to constitute an undertaking by the excluded fiduciary to monitor, participate, or otherwise take any fiduciary responsibility for actions within the scope of authority of the directing party.		alienation, distribution of trust property, or to improve the administration of the trust; (11) veto or direct trust distributions; or (12) provide direction regarding notification of qualified beneficiaries. If a charity is a current beneficiary or a presumptive remainder beneficiary of the trust, a trust protector must give notice to the attorney general's charitable trust division at least 60 days before taking any of the actions authorized under clause (2), (3), (4), (5), or (6). The attorney general's charitable trust division may, however, waive this notice requirement.	

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		Subd. 8. Duty to inform excluded fiduciary. Each directing party shall keep the excluded fiduciary and any other directing party reasonably informed regarding the administration of the trust with respect to any specific duty or function being performed by the directing party to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary or other directing party is reasonably necessary for the excluded fiduciary or other directing party to perform its duties. The directing party shall			

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		provide such information as reasonably requested by the excluded fiduciary or other directing party. Neither the performance nor the failure to perform of a directing party's duty to inform as provided in this subdivision affects the limitation on the liability of the excluded fiduciary as provided in this section.			
Mississippi	§91-8-1201 §91-8-1202 §91-8-1203 §91-8-1204 §91-8-1205 §91-8-1206	§91-8-1202 Trust Advisors and Trust Protectors as Fiduciaries (a) A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to the trust advisor or trust protector. In exercising any power or refraining from exercising any power, a	§91-8-1204 No Duty to Review Actions of Trustee, Trust Advisor or Trust Protector. (a) Whenever, pursuant to the terms of a trust, an excluded fiduciary is to follow the direction of a trustee, trust	§91-8-1201 Powers of Trust Advisors and Trust Protectors (a) A trust protector or trust advisor is any person, and may be a committee of more than one (1) person, other than a trustee, who under the terms of the trust has a power or duty with respect to a trust, including, but not limited to, one or more of the	(e) Notwithstanding anything in this section to the contrary, no modification, amendment, or grant of a power of appointment with respect to a trust, all of whose beneficiaries are charitable organizations, may authorize a trust protector or trust advisor to grant a beneficial interest in the trust to any noncharitable interest or

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
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		trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. (b) A trust advisor or trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors. § 91-8-1205. Fiduciary's liability for action or inaction of trustee, trust advisor, and trust protector An excluded fiduciary is not liable, either individually or as a fiduciary, for: (1) Any loss resulting from compliance with a	advisor, or trust protector with respect to investment decisions, distribution decisions, or other decisions of the nonexcluded fiduciary, then, except to the extent that the terms of the trust provide otherwise, the excluded fiduciary shall have no duty to: (1) Review, evaluate, perform investment reviews, suitability reviews, inquiries, or investigations, or in any other way monitor the conduct of the	following powers: (1) The power to modify or amend the trust instrument to achieve favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including, but not limited to, any rulings, regulations, or other guidance implementing or interpreting such laws; (2) The power to amend or modify the trust instrument to take advantage of changes in the rule against perpetuities, laws governing restraints on alienation, or other state laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust; (3) The power to appoint a successor trust protector or trust advisor; (4) The power to review	purpose.

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
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		direction of a trustee, trust advisor, or trust protector, including, but not limited to, any loss from the trustee, trust advisor, or trust protector breaching fiduciary responsibilities or acting beyond the trustee's, trust advisor's, or trust protector's scope of authority; (2) Any loss resulting from any action or inaction of a trustee, trust advisor, or trust protector; or (3) Any loss that results from the failure of a trustee, trust advisor, or trust protector to take any action proposed by the excluded fiduciary where the action requires the authorization of the trustee, trust advisor, or trust protector, if an	trustee, trust advisor, or trust protector; (2) Make recommendations or evaluations or in any way provide advice to the trustee, trust advisor, or trust protector or consult with the trustee, trust advisor, or trust protector; or (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the excluded fiduciary would or might have exercised the excluded fiduciary's own	and approve a trustee's trust reports or accountings; (5) The power to change the governing law or principal place of administration of the trust; (6) The power to remove and replace any trust advisor or trust protector for the reasons stated in the trust instrument; (7) The power to remove a trustee, cotrustee, or successor trustee, for the reasons stated in the trust instrument, and appoint a successor; (8) The power to consent to a trustee's or cotrustee's action or inaction in making distributions to beneficiaries; (9) The power to increase or decrease any interest of the beneficiaries in the trust, to grant a power of appointment to one or	

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		excluded fiduciary who had a duty to propose the action timely sought but failed to obtain the authorization. § 91-8-1206. Limitation of action against trust advisor or trust protector Currentness (a) A beneficiary may not commence a proceeding against a trust advisor or trust protector for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust. (b) A report adequately discloses facts	discretion in a manner different from the manner directed by the trustee, trust advisor, or trust protector. (b) Absent provisions in the trust instrument to the contrary, the actions of the excluded fiduciary pertaining to matters within the scope of the trustee, trust advisor, or trust protector's authority, including, but not limited to, confirming that the trustee, trust advisor, or trust protector's directions have been carried out	more trust beneficiaries, or to terminate or amend any power of appointment granted in the trust; (10) The power to perform a specific duty or function that would normally be required of a trustee or cotrustee; (11) The power to advise the trustee or cotrustee concerning any beneficiary; (12) The power to consent to a trustee's or cotrustee's action or inaction relating to investments of trust assets; (13) The power to direct the acquisition, disposition, or retention of any trust investment; (14) The power to terminate all or part of a trust; (15) The power to veto or direct all or part of any	

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		indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence. (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trust advisor or trust protector for breach of trust must be commenced within three (3) years after the first to occur of: (1) The removal, resignation, or death of the trust advisor or trust	and recording and reporting actions taken at the trustee, trust advisor, or trust protector's direction or other information pursuant to Section 91-8-813, shall be deemed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the terms of the trust; those administrative actions, as well as any communications made by the	trust distribution; (16) The power to borrow money with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust; (17) The power to make loans out of trust property, including, but not limited to, loans to a beneficiary on terms and conditions, including without interest, considered to be fair and reasonable under the circumstances; (18) The power to vote proxies and exercise all other rights of ownership relative to securities and business entities held by the trust; (19) The power to select one or more investment advisors, managers or counselors, including, but not limited to, a trustee,	

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		protector; (2) The termination of the beneficiary's interest in the trust; or (3) The termination of the trust. (d) A trustee may not commence a proceeding against a trust advisor or trust protector for breach of trust more than one (1) year after the date the trustee or a representative of the trustee was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust. (e) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the	excluded fiduciary to the trust advisor, trust protector, or any of their agents or persons they have selected to provide services to the trust, shall not be deemed to constitute an undertaking by the excluded fiduciary to monitor the trustee, trust advisor, or trust protector or otherwise participate in actions within the scope of the trustee's, trust advisor's, or trust protector's authority.	and delegate to them any of its powers; (20) The power to direct the trustee with respect to any additional powers and discretions over investment and management of trust assets provided in the trust instrument; (21) The power to receive notices, information, and reports otherwise required to be provided to a beneficiary under Section 91-8-813(a) and (b); (22) The power to represent and bind a beneficiary under Section 91-8-303(8) to the extent there is not material conflict of interest between the trust protector or trust advisor and the beneficiary; and (23) The power to designate someone to represent and bind a beneficiary under Section	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
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		trustee or the trustee's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence. (f) If subsection (d) does not apply, a judicial proceeding by a trustee against a trust advisor or trust protector for breach of trust must be commenced within three (3) years after the first to occur of: (1) The removal, resignation, or death of the trust advisor or trust protector; (2) The termination of the beneficiary's interest in the trust; or (3) The termination of the trust.		91-8-303(8) to the extent there is no material conflict of interest between the person designated and the beneficiary. (b) The exercise of a power by a trust advisor or a trust protector shall be exercised in the sole and absolute discretion of the trust advisor or trust protector and shall be binding on all other persons. (c) Any power of a trust advisor or trust protector to directly or indirectly modify a trust may be granted notwithstanding the provisions of Sections 91-8-410 through 91-8-412 and 91-8-414. (d) An excluded fiduciary may continue to follow the direction of a trust protector or trust advisor upon the incapacity or death of the grantor of a trust to the extent provided	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
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		(g) A trust advisor or trust protector may not commence a proceeding against another trust advisor or another trust protector for breach of trust more than one (1) year after the date the trust advisor or trust protector or the respective representative of each was sent a report that adequately disclosed facts indicating the existence of a potential claim for breach of trust. (h) A report adequately discloses facts indicating the existence of a potential claim for breach of trust if it provides sufficient information so that the trust advisor or trust protector or the respective		in the trust instrument.	

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		representative of each knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence. (i) If subsection (g) does not apply, a judicial proceeding by a trust advisor or trust protector against another trust advisor or another trust protector for breach of trust must be commenced within three (3) years after the first to occur of: (1) The removal, resignation, or death of the other trust advisor or other trust protector; (2) The termination of the beneficiary's interest in the trust; or (3) The termination of the trust.			

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
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		(j) Notwithstanding subsections (d) through (i), no trustee, trust advisor, or trust protector may commence a proceeding against a trust advisor or trust protector or another trust advisor or another trust protector if, under either subsections (a) through (c) or Section 91-8-1005(a) through (c), none of the beneficiaries may commence a proceeding against the trust advisor or trust protector for such breach of trust.			
Missouri[24]	§456.8-808	6. Except to the extent otherwise provided in the trust instrument and in subsection 7 of this section, and		1. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to	4. Notwithstanding any provision in the trust instrument to the contrary, a trust protector shall have no power to modify a trust

[24] *Robert T. McLean Irrevocable Trust v. Patrick Davis,P.C.,* 283 S.W. 3d 786 (Mo. Ct. App. 2009); *Robert T. McLean Irrevocable Trust u/a/d March 31, 1999 v. Ponder,* 418 S.W. 3d 482 (Mo. Ct. App. 2013).

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		notwithstanding any provision of sections 456.1-101 to 456.11-1106 to the contrary: (1) A trust protector shall act in a fiduciary capacity in carrying out the powers granted to the trust protector in the trust instrument, and shall have such duties to the beneficiaries, the settlor, or the trust as set forth in the trust instrument. A trust protector is not a trustee, and is not liable or accountable as a trustee when performing or declining to perform the express powers given to the trust protector in the trust instrument. A trust protector is not liable for the acts or omissions of any fiduciary or beneficiary		the terms of the trust. 2. A trust instrument may provide for the appointment of a trust protector. For purposes of this section, a "trust protector", whether referred to in the trust instrument by that name or by some other name, is a person, other than the settlor, a trustee, or a beneficiary, who is expressly granted in the trust instrument one or more powers over the trust. 3. A trust protector appointed in the trust instrument shall have only the powers granted to the trust protector by the express terms of the trust instrument, and a trust protector is only authorized to act within the scope of the authority expressly granted in the trust instrument. Without limiting the authority of the	to: (1) Remove a requirement from a trust created to meet the requirements of 42 U.S.C. Section 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary of the trust at the death of that beneficiary; or (2) Reduce or eliminate an income interest of the income beneficiary of any of the following types of trusts: (a) A trust for which a marital deduction has been taken for federal tax purposes under Section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse; (b) A charitable remainder

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		under the trust instrument; (2) A trust protector is exonerated from any and all liability for the trust protector's acts or omissions, or arising from any exercise or nonexercise of the powers expressly conferred on the trust protector in the trust instrument, unless it is established by a preponderance of the evidence that the acts or omissions of the trust protector were done or omitted in breach of the trust protector's duty, in bad faith or with reckless indifference; (3) A trust protector is authorized to exercise the express powers granted in the trust instrument at any time and from time to time		settlor to grant powers to a trust protector, the express powers that may be granted include, but are not limited to, the following: (1) Remove and appoint a trustee or name a successor trustee or trust protector; (2) Modify or amend the trust instrument to: (a) Achieve favorable tax status or respond to changes in the Internal Revenue Code or state law, or the rulings and regulations under such code or law; (b) Reflect legal changes that affect trust administration; (c) Correct errors or ambiguities that might otherwise require court construction; or (d) Correct a drafting error that defeats a grantor's intent;	trust under Section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary; (c) A grantor retained annuity trust under Section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary; or (d) A trust for which an election as a qualified Sub-Chapter S Trust under Section 1361(d) of the Internal Revenue Code is currently in place. 5. Except to the extent otherwise provided in a trust instrument specifically referring to this subsection, the trust protector shall not exercise a power in a way that would result in a taxable gift for federal gift tax purposes or cause the

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		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		after the trust protector acquires knowledge of their appointment as trust protector and of the powers granted; (4) A trust protector is entitled to receive, from the assets of the trust for which the trust protector is acting, reasonable compensation, and reimbursement of the reasonable costs and expenses incurred, in determining whether to carry out, and in carrying out, the express powers given to the trust protector in the trust instrument; (5) A trust protector is entitled to receive, from the assets of the trust for which the trust protector is acting, reimbursement of the reasonable costs and expenses, including		(3) Increase, decrease, modify, or restrict the interests of the beneficiary or beneficiaries of the trust; (4) Terminate the trust in favor of the beneficiary or beneficiaries of the trust; (5) Change the applicable law governing the trust and the trust situs; or (6) Such other powers as are expressly granted to the trust protector in the trust instrument. 9. Except to the extent otherwise expressly provided in the trust instrument, the trust protector shall be entitled to receive information regarding the administration of the trust as follows: (1) Upon the request of the trust protector, unless unreasonable under the circumstances, the trustee shall promptly provide to	inclusion of any assets of the trust in the trust protector's gross estate for federal estate tax purposes.

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
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		attorney's fees, of defending any claim made against the trust protector arising from the acts or omissions of the trust protector acting in that capacity unless it is established by clear and convincing evidence that the trust protector was acting in bad faith or with reckless indifference; and (6) The express powers granted in the trust instrument shall not be exercised by the trust protector for the trust protector's own personal benefit. 7. If a trust protector is granted a power in the trust instrument to direct, consent to, or disapprove a trustee's actual or proposed investment decision, distribution decision, or		the trust protector any and all information related to the trust that may relate to the exercise or nonexercise of a power expressly granted to the trust protector in the trust instrument. The trustee has no obligation to provide any information to the trust protector except to the extent a trust protector requests information under this section; (2) The request of the trust protector for information under this section shall be with respect to a single trust that is sufficiently identified to enable the trustee to locate the records of the trust; and (3) If the trustee is bound by any confidentiality restrictions with respect to an asset of a trust, a trust protector who requests information under this section about such asset	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		other decision of the trustee required to be performed under applicable trust law in carrying out the duties of the trustee in administering the trust, then only with respect to such power, excluding the powers identified in subsection 3 of this section, the trust protector shall have the same duties and liabilities as if serving as a trustee under the trust instrument. 8. A trustee shall carry out the written directions given to the trustee by a trust protector acting within the scope of the powers expressly granted to the trust protector in the trust instrument. Except in cases of bad faith or reckless indifference on		shall agree to be bound by the confidentiality restrictions that bind the trustee before receiving such information from the trustee. 10. A trust protector may resign by giving thirty days' written notice to the trustee and any successor trust protector. A successor trust protector, if any, shall have all the powers expressly granted in the trust instrument to the resigning trust protector unless such powers are expressly modified for the successor trust protector. 11. A trust protector of a trust having its principal place of administration in this state submits personally to the jurisdiction of the courts of this state during any period that the principal place of administration of the trust is located in this state and	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		the part of the trustee, or as otherwise provided in the trust instrument, the trustee shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of the written direction of the trust protector or the failure of the trust protector to provide consent. Except as otherwise provided in the trust instrument, the trustee shall have no duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with or warn or apprise any beneficiary concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different		the trust protector is serving in such capacity.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		from the manner directed by the trust protector.			
Montana	§72-38-808	(4) A person other than a beneficiary who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		(1) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. (2) If the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (3) The terms of a trust	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				may confer upon a trustee or other person a power to direct the modification or termination of the trust.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Nebraska	§308-3873	(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		(a) While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the terms of the trust. (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				termination of the trust.	
Nevada	§163.553 §163.5536 §163.5537 §163.554	§163.554 - "Fiduciary" means a trustee or custodian under any instrument, or an executor, administrator or personal representative of a decedent's estate or any other person, including an investment trust adviser, trust protector or a trust committee which is acting in a fiduciary capacity for any person, trust or estate. §163.5548 - For the purposes of NRS 163.553 to 163.556, inclusive, a fiduciary is a "directed fiduciary" with respect to any action that the fiduciary: 1. Has no power to take under the terms of the governing instrument;		§ 163.5536 - "Directing trust adviser" means a trust adviser, trust protector or other person designated in the trust instrument who has the authority to give directives that must be followed by the fiduciary. The term does not include a trust adviser, trust protector or other person who gives recommendations, counsel or advice that the fiduciary is not required to follow under the terms of the trust instrument. § 163.5537 - "Distribution trust adviser" means a fiduciary given authority by an instrument to exercise any or all powers and discretion set forth in NRS 163.5557. § 163.5539 - "Excluded fiduciary" means any fiduciary excluded from	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		2. Is mandated by the governing instrument and for which the fiduciary has no discretion to act otherwise; and 3. Is directed to take or prohibited from taking by a directing trust adviser. §163.5549 - 1. A directed fiduciary is not liable, individually or as a fiduciary for any loss which results from: (a) Complying with a direction of a directing trust adviser, whether the direction is to act or to not act; or (b) Failing to take any action proposed by a directed fiduciary if the action: (1) Required the approval, consent or		exercising certain powers under the instrument and those powers may be exercised by the settlor, custodial account owner, investment trust adviser, trust protector, trust committee or other person designated in the instrument. § 163.5543 - "Investment trust adviser" means a fiduciary given authority by the instrument to exercise any or all of the powers and discretion set forth in NRS 163.5557. § 163.5545 - "Trust adviser" means a distribution trust adviser or investment trust adviser. § 163.55457- "Trust protector" means any person whose appointment is provided for in the instrument. § 163.5553 - 1. A trust protector may exercise the	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		authorization of a person who did not provide the approval, consent or authorization; or (2) Was contingent upon a condition that was not met or satisfied. 2. A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser. 3. The provisions of this section do not impose an obligation or liability on a custodian of a custodial account		powers provided to the trust protector in the instrument in the best interests of the trust. The powers exercised by a trust protector are at the sole discretion of the trust protector and are binding on all other persons. The powers granted to a trust protector may include, without limitation, the power to: (a) Modify or amend the instrument to achieve a more favorable tax status or to respond to changes in federal or state law. (b) Modify or amend the instrument to take advantage of changes in the rule against perpetuities, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property or the administration of the trust.	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		for providing any authorization. §163.5551 If one or more trust advisers are given authority, by the terms of an instrument, to direct, consent to or disapprove a fiduciary's investment decisions, the investment trust advisers shall be considered fiduciaries when exercising that authority unless the instrument provides otherwise.		(c) Increase or decrease the interests of any beneficiary under the trust. (d) Modify the terms of any power of appointment granted by the trust. A modification or amendment may not grant a beneficial interest to a person which was not specifically provided for under the trust instrument. (e) Remove and appoint a trustee, trust adviser, investment committee member or distribution committee member. (f) Terminate the trust. (g) Direct or veto trust distributions. (h) Change the location or governing law of the trust. (i) Appoint a successor trust protector or trust adviser. (j) Interpret terms of the instrument at the request of	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				the trustee. (k) Advise the trustee on matters concerning a beneficiary. (l) Review and approve a trustee's reports or accounting. 2. The powers provided pursuant to subsection 1 may be incorporated by reference to this section at the time a testator executes a will or a settlor signs a trust instrument. The powers provided pursuant to subsection 1 may be incorporated in whole or in part.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
New Hampshire	§564-B12-1201 through 1206	564-B:12-1202 Trust Advisors and Trust Protectors as Fiduciaries. (a) Except as otherwise provided under the terms of the trust, a trust advisor of a noncharitable trust or trust protector of a noncharitable trust is a fiduciary with respect to each power granted to such trust advisor or trust protector. A trust advisor of a charitable trust or a trust protector of a charitable trust is a fiduciary with respect to each power granted to that trust advisor or trust protector. Notwithstanding the breadth of discretion granted to a trust advisor or trust protector under the terms of the trust, including the use of such terms as		564-B:12-1201 Powers of Trust Advisors and Trust Protectors. (a) A trust protector or trust advisor is any person, other than a trustee, who under the terms of the trust, an agreement of the qualified beneficiaries, or a court order has a power or duty with respect to a trust, including, without limitation, one or more of the following powers: (1) the power to modify or amend the trust instrument to achieve favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including (without limitation) any rulings, regulations, or other guidance implementing or interpreting such laws; (2) the power to amend or modify the trust instrument	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		"absolute," "sole," or "uncontrolled," a trust advisor or trust protector must exercise a discretionary power and otherwise act in good faith and in accordance with the terms of the trust, the purposes of the trust, and the interests of the beneficiaries. (b) A trust advisor or trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors. (a) Whenever, pursuant to the terms of a trust, an agreement of the qualified beneficiaries, or a court order, an excluded fiduciary is to follow the direction of a trustee, trust advisor,		to take advantage of changes in the rule against perpetuities, laws governing restraints on alienation, or other state laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust; (3) the power to appoint a successor trust protector or trust advisor; (4) the power to review and approve a trustee's trust reports or accountings; (5) the power to change the governing law or principal place of administration of the trust; (6) the power to remove and replace any trust advisor or trust protector for the reasons stated in the trust instrument; (7) the power to remove a trustee, cotrustee, or successor trustee, for the reasons stated in the trust	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		or trust protector with respect to investment decisions, distribution decisions, or other decisions of the non-excluded fiduciary, then, except to the extent that the terms of the trust, the agreement of the qualified beneficiaries, or the court order provide otherwise, the excluded fiduciary shall have no duty to: (1) monitor the conduct of the trustee, trust advisor, or trust protector; (2) provide advice to the trustee, trust advisor, or trust protector or consult with the trustee, trust advisor, or trust protector; or (3) communicate with or warn or apprise any beneficiary or third party concerning		instrument, and appoint a successor; (8) the power to consent to a trustee's or cotrustee's action or inaction in making distributions to beneficiaries; (9) the power to increase or decrease any interest of the beneficiaries in the trust, to grant a power of appointment to one or more trust beneficiaries, or to terminate or amend any power of appointment granted in the trust; however, a modification, amendment or grant of a power of appointment may not grant a beneficial interest in a charitable trust with only charitable beneficiaries to any non-charitable interest or purpose and may not grant a beneficial interest in any trust to the trust protector or trust advisor, or to the estate or for the benefit of	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		instances in which the excluded fiduciary would or might have exercised the excluded fiduciary's own discretion in a manner different from the manner directed by the trustee, trust advisor, or trust protector. (b) Absent clear and convincing evidence to the contrary, the actions of the excluded fiduciary pertaining to matters within the scope of the trustee, trust advisor, or trust protector's authority (such as confirming that the trustee, trust advisor, or trust protector's directions have been carried out and recording and reporting actions taken at the trustee, trust advisor, or trust protector's direction or other information		the creditors of such trust protector or such trust advisor; (10) the power to perform a specific duty or function that would normally be required of a trustee or cotrustee; (11) the power to advise the trustee or cotrustee concerning any beneficiary; (12) the power to consent to a trustee's or cotrustee's action or inaction relating to investments of trust assets; and (13) the power to direct the acquisition, disposition, or retention of any trust investment. (b) To the extent that a trust advisor or trust protector exercises a power in accordance with the terms of the trust, the trust advisor's or trust protector's action is binding upon all	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		pursuant to RSA 564-B:8-813), shall be presumed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the terms of the trust, the agreement of the qualified beneficiaries, or the court order, and such administrative actions shall not be deemed to constitute an undertaking by the excluded fiduciary to monitor the trustee, trust advisor, or trust protector or otherwise participate in actions within the scope of the trustee, trust advisor, or trust protector's authority.		other persons.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
New Jersey	None				
New Mexico	§46A-8-808	D. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		§ 46A-8-808. Powers to direct A. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. B. If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				C. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
New York[25]	Pending legislation				
North Carolina	§36C-8A-3	§ 36C-8A-3. Duty and liability of power holder (a) A power holder is a fiduciary with respect to the powers conferred upon the power holder who, as such, is required to act in good faith and in accordance with the purposes and terms of a trust and the interests of the beneficiaries, … (b) A power holder is liable for any loss that results from breach of fiduciary duty	(a) …except a power holder is not a fiduciary with respect to the following: (1) A power to remove and appoint a trustee or power holder. (2) A power that constitutes a power of appointment held by a beneficiary of a trust. (3) A power the exercise or nonexercise of	§ 36C-8A-2. Powers of a power holder (a) The terms of a trust may confer upon a power holder a power to direct or consent to a duty that would normally be required of a trustee, including, but not limited to, a power to direct or consent to the following: (1) Investments, including any action relating to investment of all or any one or more of the trust assets that a trustee is authorized to take under this Chapter.	May not grant or modify a power of appointment to include an individual or class not included in the trust; in favor of the person having the power to grant, modify or alter; or the estate and creditors of the person having the power to grant, modify or terminate the power.

[25] *Matter of Will of Rubin,* 143 Misc. 2d 303, 540 N.Y.S. 2d 944 (N.Y. 1989) upheld the validity of restrictions on an executor or trustee requiring them to follow the directions of a designated third party. *In re Rivas*, 30 Misc. 3d 1207A, 540 N.Y.S.2d 944 (2011).

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		occurring as a result of the exercise or nonexercise of the power. (c) The following provisions applicable to a trustee shall also be applicable to a power holder with respect to powers conferred upon the power holder as a fiduciary: (1) The provisions of G.S. 36C-8-814 regarding discretionary powers and tax savings. (2) The provisions of G.S. 36C-10-1001 through G.S. 36C-10-1012 regarding liability of trustees and rights of third persons dealing with trustees. (3) The provisions of Article 9 of this Chapter regarding the uniform prudent	which may affect only the interests of the power holder and no other beneficiary.	(2) Discretionary distributions of trust assets, including distributions to one or more beneficiaries, distribution of one of more trust assets, and termination of the trust by distribution of all of the trust assets. (3) Any other matter regarding trust administration, including the transfer of the principal place of administration of the trust. (b) The terms of a trust may also confer upon the power holder any other power, including, but not limited to, the power to do the following: (1) Modify or amend the trust to do any of the following: a. Achieve favorable tax status under applicable law. b. Take advantage of laws	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		investor rule.		governing restraints on alienation or other State laws restricting the terms of the trust, distribution of trust property, or the administration of the trust. (2) Remove and appoint trustees and power holders. (3) Increase or decrease the interests of any beneficiary. (4) Grant a power of appointment to one or more beneficiaries of the trust or modify the terms of or terminate a power of appointment granted to a beneficiary by the governing instrument, except that a grant or modification of a power of appointment may not grant a beneficial interest to any of the following: a. Any individual or class of individuals not specifically provided for in the trust instrument.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				b. The person having the power to grant, modify, or terminate the power of appointment. c. The estate and creditors of the person having the power to grant, modify, or terminate the power of appointment. (5) Change the governing law of the trust.	
North Dakota	§59-16-08	4. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of fiduciary duty.		§ 59-16-08. (808) Powers to direct 1. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. 2. If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. 3. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	
Ohio	§5808.08	(D) Except to the extent otherwise provided by the terms of a trust, a person other than a beneficiary who holds a power to direct, including, but not limited to, a power to direct the modification or termination of a trust, is presumptively a fiduciary who, as a fiduciary, is required to act in good faith with		5808.08 Powers to direct (A) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. (B) As provided in section 5815.25 of the Revised Code, a trustee is not liable for losses resulting from certain actions or failures to act when other persons are granted certain powers with respect to the	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.		administration of the trust. (C) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.	
Oklahoma	§175.21	§ 175.21. Duties, restrictions or liabilities of trustee--Trustor may relieve trustee or add others The trustor of any trust affected by this act may, by provisions in the instrument creating the trust, or by an amendment of the trust if the trustor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon him by this act;		…or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this act; or add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by this act; but no act of the trustor shall relieve a corporate trustee from the duties, restrictions, and liabilities imposed upon it by Sections 9, 10, and 11 of this act.[1]	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Oregon	§130.735 – Trust Advisers	130.735. Advisers ….. An adviser shall exercise all authority granted under the trust instrument as a fiduciary unless the trust instrument provides otherwise. A person who agrees to act as an adviser is subject to Oregon law and submits to the jurisdiction of the courts of this state. (2) If a trust instrument provides that a trustee is to follow the direction of an adviser, and that trustee acts in accordance with the adviser's directions, the trustee is not liable for any loss resulting directly or indirectly from the trustee's decision unless the decision constitutes reckless indifference to the purposes of the		(1) A trust instrument may appoint a person to act as an adviser for the purpose of directing or approving decisions made by the trustee, including decisions related to distribution of trust assets and to the purchase, sale or exchange of trust investments. The appointment must be made by a provision of the trust that specifically refers to this section. The appointment may provide for succession of advisers and for a process for the removal of advisers.	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		trust or the interests of the beneficiaries. (3) If a trust instrument provides that a trustee is to make decisions with the approval of an adviser, and the adviser does not provide approval within a reasonable time after the trustee has made a request for approval of a decision, the trustee is not liable for any loss resulting directly or indirectly from the decision unless the decision constitutes reckless indifference to the purposes of the trust or the interests of the beneficiaries. (4) Except to the extent specifically provided by the trust instrument, a trustee has no duty to monitor an adviser's conduct, provide advice to the adviser, consult			

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		with the adviser or give notice to any beneficiary or third party about decisions made pursuant to the adviser's direction that the trustee would have decided differently. (5) Absent clear and convincing evidence to the contrary, all actions taken by a trustee for the purpose of implementing directions from an adviser, including confirming that the adviser's directions have been carried out and recording and reporting activities requested by the adviser, are presumed to be administrative actions taken by the trustee solely for the purpose of allowing the trustee to perform the duties assigned to the			

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		trustee under the trust instrument. Administrative actions taken by a trustee for the purpose of implementing directions from an adviser do not constitute monitoring of the adviser or other participation in decisions that are within the scope of the adviser's authority. (6) A court may remove an adviser if the court finds: (a) The adviser has committed a serious breach of trust; or (b) Removal of the adviser best serves the interests of the beneficiaries because the adviser is unfit or unwilling, or has persistently failed to timely and effectively			

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		advise the trustee in matters assigned to the adviser in the trust instrument under subsection (1) of this section.			

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Pennsylvania	§7778 – Power to Direct	§ 7778. Powers to direct - UTC 808 (d) Fiduciary relationship.--A person other than a beneficiary who holds a power to direct certain actions of a trustee is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of the holder's fiduciary duty.		§ 7778. Powers to direct - UTC 808 (a) Direction of settlor.--While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the trust instrument. (b) Compliance with power.--If a trust instrument confers upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with a written exercise of the power unless the attempted exercise is manifestly contrary to the trust instrument or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				the trust. (c) Modification or termination of trust.--A trust instrument may confer upon a trustee or other person a power to modify or terminate the trust.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Rhode Island	§18-9.2-2 §18-9.2-4	§18-9.2-2 (9) "Qualified trustee" means a person who: (i) In the case of natural person, is a resident of this state other than the transferor, or, in all other cases, is authorized by the provisions of the general or public laws to act as a trustee, and whose activities are subject to supervision by the department of business regulation, The Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision, or any successor to them; and (ii) Maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition,			(§18-9.2-4 addresses avoidance of qualified dispositions)

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		maintains records for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of fiduciary income tax returns for the trust, or otherwise materially participates in the administration of the trust. (iii) For the purposes of this chapter, neither the transferor nor any other natural person who is a nonresident of this state nor an entity that is not authorized by the law of this state to act as a trustee or whose activities are not subject to supervision as provided in subparagraph (I) of this subsection shall be considered a qualified trustee; however, nothing in this chapter			

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		shall preclude a transferor from appointing one or more advisors, including, but not limited to: (A) Advisors who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisors; and (B) Advisors who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust. For purposes of this section, the term "advisor" includes a trust "protector" or any other person who, in addition to a qualified trustee, holds one or more trust powers.			

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
South Carolina	§62-7-818 §62-7-1005A	§62-7-1005A (A) If a trust instrument provides that a trustee is to follow the direction of a trust protector and the trustee acts in accordance with such direction, then except in cases of willful misconduct on the part of the trustee so directed, the trustee is not liable directly or indirectly from any such act. (B) If a trust instrument provides that a trustee is to make decisions with the consent of a trust protector, then except in cases of willful misconduct or gross negligence on the part of the trustee, the trustee is not liable for any loss resulting directly or indirectly from any act taken or		§62-7-818 The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons. These powers and discretion may include, but are not limited to, the following: (1) modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder; (2) increase or decrease the interests of any beneficiaries to the trust; (3) modify the terms of any power of appointment granted by the trust.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		omitted as a result of such trust protector's failure to provide such consent after having been requested to do so by the trustee. (C) If the trust document provides for a trust protector and the serving trust protector is unwilling or unable to serve or continue to serve and there is no provision for a successor trust protector, the then serving trustee may petition the court having jurisdiction over the trust estate to appoint an individual or a bank or trust company qualified to do business in the state of the settlor's domicile at the time of the settlor's death as successor trust protector.		However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument; (4) remove and appoint a trustee, trust advisor, investment committee member, or distribution committee member; (5) terminate the trust; (6) veto or direct trust distributions; (7) change situs or governing law of the trust, or both; (8) appoint a successor trust protector; (9) interpret terms of the trust instrument at the request of the trustee; (10) advise the trustee on matters concerning a beneficiary; and	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		(D) A trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to such trust protector. In exercising a power or refraining from exercising any power, a trust protector shall act in good faith and in accordance with the terms and purposes of the trust. (E) A trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.		(11) amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust. The powers referenced in items (5), (6) and (11) may be granted notwithstanding the provisions of Sections 62-7-410 through 62-7-412, inclusive.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
South Dakota	§55-1B-1; §55-1B-1.1 §55-1B-4 §55-1B-8 §55-1B-10	55-1B-1. Definition of terms. Terms used in this chapter mean: (1) "Instrument," any revocable or irrevocable trust document created inter vivos or testamentary or any custodial account agreement; (2) "Trust protector," any person whose appointment as protector is provided for in the instrument. Such person may not be considered to be acting in a fiduciary capacity except to the extent the governing instrument provides otherwise. However, a protector shall be considered acting in a fiduciary capacity to the extent that the person exercises the authority of an investment trust	The instrument may provide that the ability to direct investment decisions is not subject to a fiduciary duty.	55-1B-1.1. Governing instrument may provide trust advisor or trust protector with powers and immunities of trustee. Any governing instrument providing for a trust advisor or trust protector may also provide such trust advisor or trust protector with some, none, or all of the rights, powers, privileges, benefits, immunities, or authorities available to a trustee under South Dakota law or under the governing instrument. Unless the governing instrument provides otherwise, a trust advisor or trust protector has no greater liability to any person than would a trustee holding or benefiting from the rights, powers, privileges, benefits, immunities, or authority provided or allowed by the governing instrument to such trust advisor or trust	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		advisor or a distribution trust advisor; (3) "Trust advisor," either an investment trust advisor or a distribution trust advisor; (4) "Fiduciary," a trustee or custodian under any instrument, an executor, administrator, or personal representative of a decedent's estate, or any other party, including a trust advisor, a trust protector, or a trust committee, who is acting in a fiduciary capacity for any person, trust, or estate; (5) "Excluded fiduciary," any fiduciary excluded from exercising certain powers under the instrument which		protector. 55-1B-6. Powers and discretions of trust protector. The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons. Such powers and discretion may include the following: (1) Modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder; (2) Increase or decrease the interests of any beneficiaries to the trust; (3) Modify the terms	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		powers may be exercised by the grantor, custodial account owner, trust advisor, trust protector, trust committee, or other persons designated in the instrument; (6) "Investment trust advisor," a fiduciary, given authority by the instrument to exercise all or any portions of the powers and discretions set forth in § 55-1B-10; §55-1B-4 When Trust Advisor Considered a Fiduciary. If one or more trust advisors are given authority by the terms of a governing instrument to direct, consent to, or disapprove a fiduciary's		of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument; (4) Remove and appoint a trustee, a fiduciary provided for in the governing trust instrument, trust advisor, investment committee member, or distribution committee member; (5) Terminate the trust; (6) Veto or direct trust distributions; (7) Change situs or governing law of the trust, or both; (8) Appoint a successor trust protector;	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		investment decisions, or proposed investment decisions, such trust advisors shall be considered to be fiduciaries when exercising such authority unless the governing instrument provides otherwise.		(9) Interpret terms of the trust instrument at the request of the trustee; (10) Advise the trustee on matters concerning a beneficiary; (11) Amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust; and (12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13. The powers referenced in subdivisions (5), (6), and (11) may be granted notwithstanding the provisions of §§ 55-3-24 to 55-3-28, inclusive. 55-1B-8. Powers of trust protector incorporated by reference in will or trust instrument. Any of the	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				powers enumerated in § 55-1B-6, as they exist at the time of the signing of a will by a testator or at the time of the signing of a trust instrument by a trustor, may be, by appropriate reference made thereto, incorporated in whole or in part in such will or trust instrument, by a clearly expressed intention of a testator of a will or trustor of a trust instrument.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
Tennessee	§35-15-1201; §35-15-1202; §35-15-1206;	§35-15-1202 (a) A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to such trust advisor or trust protector. In exercising any power or refraining from exercising any power, a trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. (b) A trust advisor or trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.		§ 35-15-1201. Powers of trust advisors and trust protectors (a) A trust protector or trust advisor is any person, and may be a committee of more than one person, other than a trustee, who under the terms of the trust, an agreement of the qualified beneficiaries, or a court order has a power or duty with respect to a trust, including but not limited to, one or more of the following powers: (1) The power to modify or amend the trust instrument to achieve favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including but not limited to, any rulings, regulations, or other guidance implementing or interpreting such laws;	e) Notwithstanding anything in this section to the contrary, no modification, amendment or grant of a power of appointment with respect to a trust all of whose beneficiaries are charitable organizations may authorize a trust protector or trust advisor to grant a beneficial interest in such trust to any non-charitable interest or purpose.

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		§35-15-1206 [limitation of action against a trust advisor or protector]		(2) The power to amend or modify the trust instrument to take advantage of changes in the rule against perpetuities, laws governing restraints on alienation, or other state laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust; (3) The power to appoint a successor trust protector or trust advisor; (4) The power to review and approve a trustee's trust reports or accountings; (5) The power to change the governing law or principal place of administration of the trust; (6) The power to remove and replace any trust advisor or trust protector for the reasons stated in the trust instrument; (7) The power to remove a	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				trustee, cotrustee, or successor trustee, for the reasons stated in the trust instrument, and appoint a successor; (8) The power to consent to a trustee's or cotrustee's action or inaction in making distributions to beneficiaries; (9) The power to increase or decrease any interest of the beneficiaries in the trust, to grant a power of appointment to one (1) or more trust beneficiaries, or to terminate or amend any power of appointment granted in the trust; (10) The power to perform a specific duty or function that would normally be required of a trustee or cotrustee; (11) The power to advise the trustee or cotrustee concerning any beneficiary;	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				(12) The power to consent to a trustee's or cotrustee's action or inaction relating to investments of trust assets; (13) The power to direct the acquisition, disposition, or retention of any trust investment; (14) The power to appoint under § 35-15-816(b)(27); (15) The power to terminate all or part of a trust; (16) The power to veto or direct all or part of any trust distribution; (17) The power to borrow money with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust; (18) The power to make loans out of trust property, including but not limited	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				to, loans to a beneficiary on terms and conditions, including without interest, considered to be fair and reasonable under the circumstances; (19) The power to vote proxies and exercise all other rights of ownership relative to securities and business entities held by the trust; (20) The power to select one (1) or more investment advisors, managers or counselors, including but not limited to, a trustee and delegate to them any of its powers; and (21) The power to direct the trustee with respect to any additional powers and discretions over investment and management of trust assets provided in the trust instrument. (b) The exercise of a power by a trust advisor or a trust	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				protector shall be exercised in the sole and absolute discretion of the trust advisor or trust protector and shall be binding on all other persons. (c) Any power of a trust advisor or trust protector to directly or indirectly modify a trust may be granted notwithstanding §§ 35-15-410 --35-15-412 and 35-15-414. (d) An excluded fiduciary may continue to follow the direction of a trust protector or trust advisor upon the incapacity or death of the grantor of a trust to the extent provided in the trust instrument.	
Texas	§114.0031	§ 114.0031. Directed Trusts; Advisors (a) In this section: (1) "Advisor" includes protector. (2) "Investment		(d) A protector has all the power and authority granted to the protector by the trust terms, which may include: (1) the power to remove and appoint trustees,	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		decision" means, with respect to any investment, the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of the investment or rights in the investment with respect to a nonpublicly traded investment , the valuation of the investment. (b) This section does not apply to a charitable trust as defined by Section 123.001. (c) For purposes of this section, an advisor with authority with respect to investment decisions is an investment advisor. (e) If the terms of a trust give a person the authority to direct,	… except that the trust terms may	advisors, trust committee members, and other protectors; (2) the power to modify or amend the trust terms to achieve favorable tax status or to facilitate the efficient administration of the trust; and (3) the power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the trust terms.	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is considered to be an advisor and a fiduciary when exercising that authority except that the trust terms may provide that an advisor acts in a nonfiduciary capacity. (f) A trustee who acts in accordance with the direction of an advisor, as prescribed by the trust terms, is not liable, except in cases of willful misconduct on the part of the trustee so directed, for any loss resulting directly or indirectly from that act. (g) If the trust terms provide that a trustee	provide that an advisor acts in a nonfiduciary capacity.		

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		must make decisions with the consent of an advisor, the trustee is not liable, except in cases of willful misconduct or gross negligence on the part of the trustee, for any loss resulting directly or indirectly from any act taken or not taken as a result of the advisor's failure to provide the required consent after having been requested to do so by the trustee. (h) If the trust terms provide that a trustee must act in accordance with the direction of an advisor with respect to investment decisions, distribution decisions, or other decisions of the trustee, the trustee does not, except to the extent the trust terms provide otherwise, have			

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		the duty to: (1) monitor the conduct of the advisor; (2) provide advice to the advisor or consult with the advisor; or (3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the advisor. (i) Absent clear and convincing evidence to the contrary, the actions of a trustee pertaining to matters within the scope of the advisor's authority, such as confirming that the advisor's directions have been carried out and recording and			

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		reporting actions taken at the advisor's direction, are presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the trust terms, and such administrative actions are not considered to constitute an undertaking by the trustee to monitor the advisor or otherwise participate in actions within the scope of the advisor's authority.			
Utah	No statute				
Vermont	§1101; §1102.	§ 1102. Trust advisors and trust protectors as fiduciaries (a) A trust advisor or trust protector is a fiduciary with respect to each power granted to such trust advisor or		§ 1102. Trust Advisors and Protectors (a) A trust protector or trust advisor is any person, other than a trustee, who under the terms of the trust, an agreement of the qualified	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		trust protector. In exercising any power or refraining from exercising any power, a trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. (b) A trust advisor or trust protector is an excluded fiduciary with respect to each power granted or reserved exclusively to any one or more other trustees, trust advisors, or trust protectors.		beneficiaries authorized by the terms of the trust, or a court order has a power or duty with respect to a trust, including, without limitation, one or more of the following powers: (1) the power to modify or amend the trust instrument to achieve favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including any rulings, regulations, or other guidance implementing or interpreting such laws; (2) the power to amend or modify the trust instrument to take advantage of changes in the rule against perpetuities, laws governing restraints on alienation, or other state laws restricting the terms of the trust, the distribution of trust property, or the	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				administration of the trust; (3) the power to appoint a successor trust protector or trust advisor; (4) the power to review and approve a trustee's trust reports or accountings; (5) the power to change the governing law or principal place of administration of the trust; (6) the power to remove and replace any trust advisor or trust protector for the reasons stated in the trust instrument; (7) the power to remove a trustee, cotrustee, or successor trustee for the reasons stated in the trust instrument, and to appoint a successor; (8) the power to consent to a trustee's or cotrustee's action or inaction in making distributions to beneficiaries;	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				(9) the power to increase or decrease any interest of the beneficiaries in the trust, to grant a power of appointment to one or more trust beneficiaries, or to terminate or amend any power of appointment granted in the trust; however, a modification, amendment, or grant of a power of appointment may not grant a beneficial interest in a charitable trust with only charitable beneficiaries to any noncharitable interest or purpose and may not grant a beneficial interest in any trust to the trust protector or trust advisor or to the estate or for the benefit of the creditors of such trust protector or such trust advisor; (10) the power to perform a specific duty or function that would normally be required of a trustee or	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				cotrustee; (11) the power to advise the trustee or cotrustee concerning any beneficiary; (12) the power to consent to a trustee's or cotrustee's action or inaction relating to investments of trust assets; and (13) the power to direct the acquisition, disposition, or retention of any trust investment.	
Virginia	§ 64.2-770	D. A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a		§ 64.2-770. Powers to direct A. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust. B. If (i) the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee and (ii) subsection	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		fiduciary duty. Notwithstanding anything in the trust instrument to the contrary, the trust director shall be deemed a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The trust director is liable for any loss that results from a breach of the trust director's fiduciary duty. Unless the governing instrument provides otherwise, the trust director may assert defenses to liability on the same basis as a trustee serving under the governing instrument, other than defenses provided to the trustee under this subsection.		E does not apply, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. C. The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust. E. The provisions of this subsection shall apply if the settlor incorporates this subsection into the trust instrument by specific reference. The provisions of this subsection shall also apply if this subsection is incorporated into the trust instrument by a nonjudicial	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		Notwithstanding the foregoing, a term of a trust relieving a trust director of liability for breach of trust is unenforceable to the extent that it (i) relieves the trust director of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries or (ii) was inserted as the result of an abuse by the trust director of a fiduciary or confidential relationship to the settlor. An exculpatory term drafted or caused to be drafted by the trust director is invalid as an abuse of a fiduciary or confidential relationship unless the trust director proves that the existence and		settlement agreement under § 64.2-709 by specific reference. 1. For the purpose of this subsection, a "trust director" means any person who is not a trustee and who has, pursuant to the governing instrument, a power to direct the trustee on any matter. No person shall be a "trust director" for purposes of this subsection merely by holding a general or limited power of appointment over the trust assets.	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		contents of the exculpatory term were adequately communicated to the settlor. 2. A trustee who acts in accordance with a direction in the governing instrument that the trustee is to follow the trust director's direction or act only with the trust director's consent or direction shall not, other than in cases of willful misconduct or gross negligence on the part of the directed trustee, be liable for any loss resulting directly or indirectly from any act taken or not taken by the trustee (i) pursuant to the trust director's direction or (ii) as a result of the trust director's failure to direct, consent, or			

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		act, after receiving a request by the trustee for such direction, consent, or action. 3. A trustee shall not, except as otherwise expressly provided in the trust instrument, have any duty to (i) monitor the trust director's conduct; (ii) provide the trust director with information, other than material facts related to the trust administration expressly requested in writing by the trust director; (iii) inform or warn any beneficiary or third party that the trustee disagrees with any of the trust director's actions or directions; (iv) notify the trust director that the trustee disagrees with any of the trust director's actions or			

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		directions; (v) do anything to prevent the trust director from giving any direction or taking any action; or (vi) compel the trust director to redress its action or direction. 4. The actions of the trustee pertaining to matters within the scope of the authority of the trust director, including confirming that the trust director's directions have been carried out and recording and reporting actions taken pursuant to the trust director's direction, shall, absent clear and convincing evidence to the contrary, presumptively be considered administrative actions by the trustee and not be considered to constitute either			

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		monitoring the trust director's actions or participating in the actions of the trust director.			
Washington[26]	§ 11.98A.900 § 11.98A.030 § 11.98A.	§ 11.98A.030 (1)(b) Notwithstanding (a) of this subsection, a statutory trust advisor who has accepted appointment and holds any of the powers enumerated in subsection (1)(c) through (j) of this section has no duty to monitor the administration of the trust to determine whether that power should be exercised except upon request of the trustee or a qualified beneficiary under chapter 11.98 RCW, or unless		§11.98A.030. Statutory Trust Advisor. (1) As used in this chapter, "statutory trust advisor" means one or more persons as the context requires, including, without limitation, a trust advisor, special trustee, trust protector, or committee, who, under the terms of the governing instrument, is expressly made subject to the provisions of this chapter, and who has a power or duty to direct, consent to, or disapprove an action, or has a power or duty that would normally be required of a trustee. The powers and	

1. [26] ***Estate of Wimberley,*** **186 Wash.App. 475, 349 P.3d 11 (Wash. Ct. App. 2015).**

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		otherwise provided under the governing instrument. The extent of the duty of a statutory trust advisor to monitor the administration of the trust to determine if any other power granted to the statutory trust advisor should be exercised will be determined based upon the scope and nature of the power under the governing instrument and the then existing circumstances of the trust. In no event may the governing instrument relieve the statutory trust advisor from the fiduciary duty described in this subsection or relieve the statutory trust advisor from the duty to act in good faith and with honest judgment.		duties granted to a statutory trust advisor under the governing instrument may include but are not limited to: (a) The power to direct the acquisition, management, disposition, or retention of any trust investment; (b) The power to direct a trustee to make or withhold distributions to beneficiaries; (c) The power to consent to a trustee's action or inaction relating to investments of trust assets; (d) The power to consent to a trustee's action or inaction in making distributions to beneficiaries; (e) The power to increase or decrease any interest of any beneficiary in the trust, to grant a power of appointment to one or more trust beneficiaries, or	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		§ 11.98A.110. Statutes of limitation The provisions of RCW 11.96A.070 with respect to limitations on actions against a trustee shall apply to any claims against a statutory trust advisor arising out of any power or duty granted to, or function being performed by, the statutory trust advisor under the governing instrument. For purposes of a report described in RCW 11.96A.070(1)(b), a statutory trust advisor is a trustee only with respect to the specific duties and functions being performed by the statutory trust advisor.		to terminate or amend any power of appointment granted in the trust. However, a modification, amendment, or grant of a power of appointment may not: (i) Grant a beneficial interest in a charitable trust with only charitable beneficiaries to any noncharitable interest or purpose; or (ii) Unless the governing instrument provides otherwise, expressly or impliedly grant any power that would cause all or any portion of the trust estate to be includible in the gross estate of the trustor, trustee, statutory trust advisor, or any trust beneficiary for estate tax purposes; (f) The power to modify or amend the governing instrument to achieve	

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State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
				favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including, without limitation, any rulings, regulations, or other guidance implementing or interpreting such laws; (g) The power to modify or amend the governing instrument to take advantage of changes in (i) the rule against perpetuities, (ii) laws governing restraints on alienation, or (iii) other state laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust; (h) The power to appoint a successor trustee, trust advisor, or statutory trust advisor; (i) The power to change the governing law or principal	

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State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				place of administration of the trust; and (j) The power to remove a trustee, trust advisor, or statutory trust advisor for the reasons stated in the governing instrument. (2) Unless provided otherwise in the governing instrument, the exercise of a power by a statutory trust advisor shall be exercised in the sole and absolute discretion of the statutory trust advisor and shall be binding on all other persons. (3) Any of the powers enumerated in subsection (1) of this section, as they exist at the time of the signing of the governing instrument, may, by appropriate reference made thereto, be incorporated in whole or in part in such instrument, by a clearly expressed intention in the	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				governing instrument. (4)(a) In exercising any power or refraining from exercising any power granted to such statutory trust advisor in the governing instrument, a statutory trust advisor shall have a fiduciary duty with respect to each power to act in accordance with the terms and purposes of the trust and solely in the interests of the beneficiaries. (5) A statutory trust advisor may accept appointment by written notice to the trustee, by taking affirmative action to exercise powers or perform duties granted to the statutory trust advisor or by any other means provided in the governing instrument. (6) Unless otherwise provided in the governing	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				instrument, whenever any power is jointly granted to more than one statutory trust advisor, RCW 11.98.016 applies to the exercise of powers by the statutory trust advisors. (7) A statutory trust advisor is entitled to the same protection from liability provided to a directed trustee under RCW 11.98A.100(2) with respect to each power, duty, or function granted or reserved exclusively to the trustee or any one or more other statutory trust advisors. (8) A statutory trust advisor may at any time decline to serve or resign as statutory trust advisor by written notice to the then serving trustee of the trust, unless another procedure is prescribed by the	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				governing instrument. (9) Except as otherwise provided in the governing instrument, a statutory trust advisor is entitled to reasonable compensation considering all circumstances including the time, effort, skill, and responsibility involved in the performance of services by the statutory trust advisor.	
West Virginia	§44D-8-808	(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from the holder's breach of a fiduciary		§ **44D-8-808**. Powers to direct (a) While a trust is revocable, the trustee may follow a direction of the grantor that is contrary to the terms of the trust instrument. (b) If the terms of a trust instrument confer upon a person other than the grantor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in	Trustee is not bound to follow directions manifestly contrary to the terms of the trust, a serious breach of duty owed to beneficiaries.

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		duty.		accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust instrument or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust. (c) The terms of a trust instrument may confer upon a trustee or other person a power to direct the modification or termination of the trust.	
Wisconsin	§701.0818	(2) Trust protector powers; legal capacity. (a) A settlor in a trust instrument, a court in a trust instrument or court order, or interested persons in a nonjudicial settlement agreement may specify the legal	(2) Trust protector powers; legal capacity.(b) 2. If it is not a power described in subd. 1. a. to e., the power is exercisable in a nonfiduciary	701.0818. Trust protectors (1) Appointment. A settlor in a trust instrument, a court in a trust instrument or court order, or interested persons in a nonjudicial settlement agreement may provide for the appointment of a trust	A trust protector may not exercise a power granted to the trust protector to do any of the following: (a) Except as provided in sub. (2)(b)3. and 4., create or expand any beneficial interest, power of appointment, right of

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		capacity in which a particular power is exercisable by a trust protector and whether a power granted to the trust protector in a capacity other than a fiduciary capacity must be exercised in good faith. (b) If the settlor, court, or interested persons do not specify the legal capacity in which a particular power is exercisable by the trust protector, all of the following apply: 1. The power is exercisable in a fiduciary capacity if it is a power to do any of the following: a. Interpret or enforce the terms of the trust at the request of the trustee. b. Review and approve	capacity, including a power to do any of the following: a. Modify or amend the trust instrument to respond to opportunities related to, or changes in, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property, or the administration of the trust. b. Modify or amend the trust instrument to achieve a different tax status or to respond to changes in federal	protector, whether referred to as a trust protector, another title, or no title. A trust protector has only the powers granted to the trust protector in the trust instrument, court order, or nonjudicial settlement agreement. 3. Notwithstanding subds. 1. and 2., a trust protector who is also the settlor may exercise any power granted to the trust protector in the trust protector's personal interests. 4. Notwithstanding subd. 2., a trust protector who is also a qualified beneficiary may exercise any power granted to the trust protector that is exercisable in a nonfiduciary capacity in the trust protector's personal interests. (c) Notwithstanding pars. (a) and (b) and any provision in the trust	withdrawal, or right to receive trust property as a result of the exercise of a power of appointment if the creation or expansion would benefit the trust protector, the trust protector's estate, the trust protector's creditors, or creditors of the trust protector's estate. Modify or amend a trust to do any of the following: 1. Remove a requirement pursuant to 42 USC 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary. 2. Reduce or eliminate an income interest of an income beneficiary of any of the following trusts: a. A trust for which a marital deduction has been taken for federal or

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		the trustee's reports or accounting. c. Resolve disputes between the trustee or a directing party and a beneficiary. d. Consent to or veto distributions to a beneficiary. e. Consent to or veto investment actions. (3) Trust protector duties. (a) If a power is exercisable in a fiduciary capacity, the trust protector shall act in good faith and shall exercise the power in a manner that is consistent with the terms and purposes of the trust instrument, court order, or nonjudicial settlement agreement and the interests of the beneficiaries. (c) A trust protector	or state law. c. Change the principal place of administration, the tax situs of the trust, or the governing law of the trust. d. Eliminate or modify the interests of a beneficiary, add a new beneficiary or class of beneficiaries, or select a beneficiary from an indefinite class. e. Modify the terms of a power of appointment granted under the trust. f. Remove, replace, or appoint a trustee, trust protector, or	instrument to the contrary, a trust protector who is also serving as the trustee or a directing party shall exercise any power granted to the trust protector in a fiduciary capacity. (5) Resignation and release of powers. A trust protector may resign or release a power granted to the trust protector by giving written notice to the trustee and to any successor trust protector. (7) Settlor rights. A trust protector is not subject to the direction of the settlor and the settlor may not bring a cause of action against the trust protector. A trust protector may consider a settlor's goals, objectives, and philosophies in establishing the trust and the trust's structure when exercising the powers granted to the trust	state estate tax purposes under section 2056, 2056A, or 2523 of the Internal Revenue Code or any comparable provision of applicable state law, during the life of the settlor's spouse. b. A charitable remainder trust under section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary. 6 c. A trust in which the settlor has a qualified interest under section 2702(b) 7 of the Internal Revenue Code, during any period in which the settlor is a beneficiary. 9 d. A trust for which an election as a qualified Subchapter S Trust under 10 section 1361(d) of the Internal Revenue Code is in place. 11 (c) Modify any beneficial interest in a trust that qualified for a

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		does not have a duty to exercise its powers, to monitor the conduct of the trustee or a directing party, or to monitor changes in the law or circumstances of the beneficiaries. (4) Liability. A trust protector is liable for any loss that results from a breach of the trust protector's duties, except as follows: (a) If the trust protector is also the settlor, the trust protector is not liable for any loss that results from a breach of the trust protector's duties. (b) If the trust protector is also a qualified beneficiary, the trust protector is not liable for any loss that results from a breach of the trust protector's duties	directing party or a successor trustee, trust protector, or directing party. g. Terminate the trust. h. Appoint assets to a new trust under s. 701.0418. i. Advise the trustee on matters concerning a beneficiary, including whether to provide information to a beneficiary under s. 701.0813. j. Correct errors or ambiguities in the terms of the trust that might otherwise require court construction or defeat the	protector and may do so regardless of whether the settlor is deceased. (9) Right to information. (a) A trust protector may request information about the trust from the trustee and, if the requested information is related to a power granted to the trust protector, the trustee shall provide the requested information to the trust protector. If a trustee is bound by any confidentiality restrictions with respect to information requested by a trust protector, the trustee may require that the trust protector agree to be bound by the confidentiality restrictions before delivering such information to the trust protector. A trustee is not liable to any beneficiary for any loss or damages resulting from the trustee	marital deduction or 12 charitable deduction from federal or state estate tax in a manner that would have caused 13 the trust not to qualify for the deduction. (6) Prohibited actions. A trust protector may not exercise a power granted to the trust protector to do any of the following: (a) Except as provided in sub. (2)(b)3. and 4., create or expand any beneficial interest, power of appointment, right of withdrawal, or right to receive trust property as a result of the exercise of a power of appointment if the creation or expansion would benefit the trust protector, the trust protector's estate, the trust protector's creditors, or creditors of the trust protector's estate.

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		for a power that is exercised in a nonfiduciary capacity. (8) Duties of a trustee and a directing party. (a) A trustee and a directing party shall act in accordance with a trust protector's exercise of a power granted to the trust protector. A trustee and a directing party are not liable for acting in accordance with the trust protector's exercise of a power granted to the trust protector unless the attempted exercise is manifestly contrary to the power granted to the trust protector or the trustee or the directing party knows that the attempted exercise would constitute a serious breach of a duty that	settlor's intent. (3) Trust protector duties. (b) If a power is exercisable in a nonfiduciary capacity, the trust protector shall act in good faith unless the trust instrument, court order, or nonjudicial settlement agreement provides otherwise.	providing information to the trust protector that is related to the power granted to the trust protector. (b) Except as otherwise provided in this chapter, a trustee does not have to provide any information to the trust protector that the trust protector does not request. (10) Payment or reimbursement of attorney fees and costs. A trustee shall, in accordance with s. 701.1004, pay or reimburse a trust protector for attorney fees and costs to defend any claim made against the trust protector. (11) Application of other sections to trust protectors. Sections 701. 0701, 701.0708, 701.0709, 701.1001 to 701.1003, and 701.1005 to 701.1010 apply to a trust protector as	(b) Modify or amend a trust to do any of the following: 1. Remove a requirement pursuant to 42 USC 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary. 2. Reduce or eliminate an income interest of an income beneficiary of any of the following trusts: a. A trust for which a marital deduction has been taken for federal or state estate tax purposes under section 2056, 2056A, or2523 of the Internal Revenue Code[1] or any comparable provision of applicable state law, during the life of the settlor's spouse. b. A charitable remainder trust under section 664 of

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		the trust protector owes to the beneficiaries of the trust. (b) A trustee and a directing party do not have a duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with, warn, or apprise any beneficiary concerning instances in which the trustee or the directing party would or might have exercised the trustee's or the directing party's discretion in a manner different from the manner in which the trust protector exercised its discretion.		if the trust protector is the trustee. (12) Jurisdiction. A person who accepts an appointment as a trust protector of a trust submits to the jurisdiction of the courts of this state, as provided in s. 701.0202(1).	the Internal Revenue Code,[2] during the life of the noncharitable beneficiary. c. A trust in which the settlor has a qualified interest under section 2702(b) of the Internal Revenue Code,[3] during any period in which the settlor is a beneficiary. d. A trust for which an election as a qualified Subchapter S Trust under section 1361(d) of the Internal Revenue Code[4] is in place. (c) Modify any beneficial interest in a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused the trust not to qualify for the deduction.
Wyoming	§4-10-103	§4-10-103 Definitions		§ **4-10-710**. Trust protector	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
	§4-10-710 §4-10-711 §4-10-718	(a) As used in this act: (vi) "Excluded fiduciary" means any fiduciary excluded from exercising certain powers under the trust instrument or by court order which powers may be exercised by the settlor, trust advisor, trust protector or other persons designated by the instrument or court order; (vii) "Fiduciary" means a trustee under a testamentary or other trust, an executor, administrator, or personal representative of a decedent's estate, or any other party including a trust advisor or a trust protector, who is acting in a fiduciary capacity for any person, trust or		(a) The powers and discretions of a trust protector shall be provided in the trust instrument or may be established or modified by a judicial order, and may, in the best interests of the trust, be exercised or not exercised. The powers and discretions may include, but are not limited to the following: (i) To modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law or the rulings and regulations implementing such changes; (ii) To amend or modify the trust instrument to take advantage of changes in the rule against perpetuities, laws governing restraints on alienation, or other state laws restricting the terms of the trust, the distribution	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
		estate; (x) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust; (xxii) "Trust advisor" means the settlor of a trust instrument or another person whose appointment is provided in the trust instrument and whose powers are defined in W.S. 4-10-712; (xxiii) "Trust protector" means any disinterested party whose appointment is provided for in the trust instrument or who is appointed by a court of competent jurisdiction and whose powers are defined in W.S. 4-10-710; (xxviii) "Directed trust" means a trust		of trust property, or the administration of the trust; (iii) To appoint a successor trust protector; (iv) To review and approve the accountings of a trustee; (v) To change the governing law or principal place of administration of the trust; (vi) To remove and replace any trust advisor for the reasons stated in the trust instrument; (vii) To remove a trustee, cotrustee or successor trustee, for the reasons stated in the trust instrument, and appoint a replacement; (viii) To interpret terms of the trust instrument at the request of the trustee; (ix) To advise the trustee or cotrustee on matters concerning any	

State Law Treatment of Trust Protectors					
State	**Statute**	**Trust Protector's Status as a Fiduciary**		**Authority**	
		Yes	**No**	**Permitted Powers**	**Prohibited Powers**
		where either through the terms of the trust, an agreement of the qualified beneficiaries or a court order, one (1) or more persons is given the authority to direct, consent to or disapprove a fiduciary's actual or proposed investment decision, distribution decision or any other noninvestment decision of the fiduciary; § 4-10-711. Trust protector as a fiduciary Trust protectors are fiduciaries to the extent of the powers, duties and discretions granted to them under the terms of the trust instrument.		beneficiary; (x) To direct, consent or disapprove a trustee's or cotrustee's action or inaction in making distributions to beneficiaries; (xi) To increase or decrease any interest of the beneficiaries to the trust, to grant a power of appointment to one (1) or more trust beneficiaries or to terminate or amend any power of appointment granted by the trust; however, a modification, amendment or grant of a power of appointment may not grant a beneficial interest to any person or class of persons not specifically provided for under the trust instrument or to the trust protector, the trust protector's estate or for the benefit of the creditors of the trust	

State Law Treatment of Trust Protectors					
State	Statute	Trust Protector's Status as a Fiduciary		Authority	
		Yes	No	Permitted Powers	Prohibited Powers
				protector; and (xii) To elect for the trust to become a qualified spendthrift trust under W.S. 4-10-516.	

XII. Minassian v. Rachins

2015 WL 7293579 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Seventeenth Judicial Circuit
Broward County

In Re: Estate of Zaven MINASSIAN Trust dated December 29, 1999, as amended and Restated July 16,2008.
Rebecca RACHINS and Rick Minassian, Plaintiffs,
v.
Paula M. MINASSIAN, individually, as Trustee of the Zaven Minassian Trust dated December 29, 1999 as Amended and restated July 16, 2008, Defendant.

No. PRC120001320.
January 14, 2015.

Probate Division

Defendant's Renewed Motion for Summary Judgement Based Upon the Determina in Minassian v. Rachins, ---so.3d--- (Fla. 4th DCA 2014), 4d13-2241, 2014 Wl 6775269

The Andersen Firm, A Professional Corporation, Thomas F. Luken, Florida Bar #168697, 500 E. Broward Blvd., Suite 1600, Fort Lauderdale, FL 33394, Telephone: 866-230-2206, Fax: 877-773-1433, E-Mail #1: tomluken@comcast.net, E-Mail #2: jgula@theandersenfirm.com, for defendant.

COMES NOW the Defendant and moves this Honorable Court for the entry of summary judgment in her favor and as grounds therefor would show the Court that there is no genuine issue of material fact involved and that the Defendant is entitled to judgment as a matter of law. The Defendant relies upon the Affidavits, Answers to Interrogatories, Admissions, Depositions, and other materials which are admissible to support this Defendant's motion.

Material Uncontested Facts

1. ZAVEN MINASSIAN, the father of the Plaintiffs and the husband of the Defendant, died on May 11, 2010 and left in existence the ZAVEN MINASSIAN TRUST Dated December 29, 1999 as Amended and Restated on July 16, 2008 (see Plaintiffs Complaint). The Trust is admitted in the pleadings and was attached in part to Plaintiffs Complaint as Exhibit A and a full and complete copy is attached to this motion.

2. As the Federal estate tax was not in effect at the time of ZAVEN'S passing, the Marital Trust spoken of in Article Eight, Section 5 of the Trust was not funded and pursuant to Article Eight, Section 5(a), the Trust property was distributed to the Family Trust as described in Article Ten of the Trust.

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3. That pursuant to Article Ten, Section 7, "The Family Trust shall terminate at the death of my spouse. The remainder of the Family Trust including any accrued and undistributed net income, shall be administered as provided in the articles that follow." (e.s.)

4. Article Eleven of the Trust then clarifies that the grantor did not wish to create a common trust, it specifically states that there is no common trust and that "all of the trust property which has not been distributed under prior provisions of this agreement shall be divided, administered and distributed under the provisions of the articles that follow."

5. That as a result of this litigation and certain comments by the Trial Court, a Trust Protector was appointed pursuant to the terms of the trust (see attached Affidavit of William Andersen with attachments).

6. That the Trust Protector has amended, clarified, and corrected potential ambiguities as shown on the attachment to the William Andersen Affidavit.

Argument Standing to Complain

In order to have standing to complain, Plaintiffs must be qualified beneficiaries of The Zaven Minassian Trust. Section 736.0103(14) of the Trust Code defines a "qualified beneficiary." In the definition of a "qualified beneficiary," the term "beneficiary" is utilized thus in order to be a "qualified beneficiary" you must first be a "beneficiary" as defined in Section 736.0103(4). In order to be a "beneficiary under the statute, the person must have "a present or a future beneficial interest in a trust, vested or contingent, or holds a power of appointment over trust property in a capacity other than that of trustee."

Zaven Minassian's children do not have any interest in this trust. Article Eight of the Trust creates both a Marital and a Family Trust, but pursuant to Article Eight, Section 5 (as the federal estate tax was not in effect at the time of Zaven's passing), the marital trust was not funded and pursuant to Article Eight, Section 5(a), the trust property was distributed to the family trust as described in Article Ten of the trust. Article Ten describes the distributions to the defendant, Paula Minassian, Zaven's wife. It essentially provides that the income can be distributed pursuant to a standard and principal can likewise be distributed pursuant to a standard. The important part then is Article Ten, Section 7 which bears repeating here. It states as follows:

> The Family Trust shall *terminate* at the death of my spouse. The remainder of the Family Trust, including any accrued and undistributed net income, shall be administered as provided in the Articles that follow. (e.s.)

Note the use of the term "terminate."

Article Eleven then clarifies that Zaven did not wish to create a common trust. It specifically states that there is no common trust and that "all of the trust property which has not been distributed under prior provisions of this agreement shall be divided, administered and

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distributed under the provisions of the articles that follow." That is, if there is any property left upon the death of Paula Minassian, then we move to Article Twelve.

Article Twelve then speaks of the creation of separate trust shares which will benefit the children. Of course, if the Family Trust is exhausted prior to the death of Paula Minassian, there will be no separate shares "created." The utilization of the term "creation" of separate new trusts and the like permeates the trust document throughout its remainder. There are numerous places where the document talks about the trust created under the agreement and the like, all of which buttress the concept that the Article Twelve trust is a new trust especially in light of the language in Article Ten which states that the Family Trust shall "terminate" upon the death of Paula Minassian.

Remember that in order to be a "qualified beneficiary," a person must first be a beneficiary and in order to be a beneficiary, it must be a person who has a "present or future beneficial interest in a trust..." The children do not have a present or future interest in the "Family Trust" because their interest in a trust may not be created and will only be created in the event that that there are monies left in the trust upon the death of Paula Minassian.

Archer on Trusts speaks to this issue and states that an intention to create a trust in the future or a promise to create a trust does not create a trust. Further, if a person promises to transfer property to another as trustee at some future date, no trust arises until the transfer actually occurs. See the leading case, *Tierce v. Mecedonia United,* 509 So.2d 451 (Ala.S.C. 1987).

This issue was raised in a Motion to Dismiss heard on May 15, 2012. The Court was troubled by the utilization of the language in Article Twelve that creates the trust for the children because it speaks in terms of creating "separate shares" and the court opined:
Creation of separate shares. Now if you read that, if it said creation of separate trusts, clearly I think Mr. Luken has a valid point. But you read on and it says all trust property not previously distributed under the terms of my trust shall be divided into a separate trust, and there's the word share.

So had the word trust not been there and said share, the Court would have one interpretation. *Had the word share not been there but just the word trust, the Court would have another ruling. Had that been the case Mr. Luken would have prevailed on this issue of standing.* (e.s.)

But this Court cannot make a definitive finding based upon that which is before the Court. It is not that clear and unambiguous that the Court is - - sorry, the court is not going to find that the daughter and son lack the ability to be potential beneficiaries.

Clearly, the provisions of the trust, and this is a gratis comment, the provisions of the trust give the trustee the sole, absolute discretionary ability to deplete the entire res of the trust for the health, welfare and - - health, education, I don't know how much education there is at this point, but health, education and maintenance of the spouse. And it says further on, the preservation of principal is not as important as the accomplishment of these objectives.

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So theoretically, whatever the spouse needs in the discretion of the trustee, the spouse gets. And if it depletes the entire trust, so be it.

But at this juncture the Court is not going to find that the sons and daughter do not have standing as a potential beneficiary because the wording just simply isn't clear.

Because of the court's comments and not because the defendant agrees with the court on this matter, the defendant has appointed a trust protector to clarify this particular issue and the trust protector has now amended the trust to show definitively that the Article Twelve trust is not "created" until *and* unless both Paula Minassian dies and there are assets remaining in the Family Trust.

The actions of the Trust Protector have now been ratified by the Fourth District Court of Appeal thus clarifying any ambiguity effective with the date of the Trust Protector's actions. Clearly, based upon the Opinion of the Fourth District Court of Appeal, Plaintiffs do not have any standing to complain about Defendant's actions.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via E-Mail to **James A. Herb, Esq. at** *jahprobate@.com* and *slvprobate@aol.com,* this 14th day of January, 2015.

THE ANDERSEN FIRM

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The Use of Out of State & International Entities/Trusts for Florida Residents

By

Michael A. Sneeringer, Naples

The Use of Out of State & International Entities/Trusts for Florida Residents

by Michael Sneeringer
Porter Wright Morris & Arthur LLP
Naples, Florida

A. **Introduction**

People move to Florida for the sunshine and warm weather. People love Florida's beaches. People appreciate that Florida has no state income tax. But once people get to Florida, what happens when they go to a Florida attorney for estate planning and asset protection advice: is Florida's homestead protection enough; do clients come away assured that a discretionary trust is protected in Florida; do Florida entities have the best protection? The answers to those questions are no, No, **No** and **NO**!

For clients with non-taxable estates and estates with few assets, many types of trust and asset protection planning are overkill: meeting with an attorney who focuses on estate planning to create trusts and obtaining adequate umbrella insurance coverage can take care of both needs. Clients with wealth have different needs. For a client who wants to create a trust that last will last in perpetuity and be creditor protected, or use an LLC or partnership for business and/or investments and be creditor protected, Florida trusts and entities are not enough. And for Florida residents, asset protection should always be top of mind. Some of Florida's more recent honors include, but are not limited to: ranked #46 in the 2017 Lawsuit Climate Survey[1]; led the nation with the most fraud complaints[2]; home to Hialeah, one of the most dangers cities to drive in[3]; the 8th most expensive state for auto insurance[4]; and ranked #20 in states with greatest likelihood to die in a car accident, but #1 in pedestrian deaths.[5]

The purpose of this outline is to inform practitioners on some of the nuances of Florida law pertaining to asset protection. First, this outline will provide a brief overview of Florida asset protection benefits. From there, this outline will point out the ethical issues to keep in mind when using an out-of-state or foreign jurisdiction for asset protection planning. Finally, this outline will detail some of the laws of use in out-of-state and foreign jurisdictions for asset protection planning.

B. **Basic Florida law on asset protection**

Under Florida law, there are several important protections (termed "exemptions") that residents in other states may not have available or if available, to a lesser extent.

1. *Vehicle Liability.* Under section 324.021(9)(b)(3), Florida Statutes, the owner of an automobile can be held vicariously liable for the negligence of any individual permitted to drive the vehicle. The law limits liability of the individual owner where the driver has at least $500,000 of liability insurance coverage.[6] In such case, the automobile owner is only liable for up to $100,000 per person, up to $300,000 per incident for bodily injury, and up to $50,000 per incident for property damages, all of which will be satisfied by payment made by the liability insurance carrier providing the coverage described above.[7] If the driver does not have sufficient liability insurance coverage, the vehicle owner may be liable for an additional $500,000 in economic damages, however, the economic damages responsibility is reduced by amounts actually recovered from the driver and from any insurance covering the driver.[8] It is not clear under the statute if joint owners will have any limitation on liability for one another's driving negligence even when there is $500,000 of insurance coverage. Also, this limitation statute does not apply to situations where an automobile has been "negligently entrusted" to an inexperienced or known dangerous driver, or where the accident occurs outside of Florida.[9]

2. *Homestead Exemption*. The Florida Constitution protects a portion of an individual's real property located in Florida, and claimed as such individual's "homestead" in three different ways: it provides the homestead with an exemption from taxes[10]; it protects the homestead from forced sale by creditors[11]; and it places certain restrictions on a homestead owner from alienating or devising the homestead property.[12]

Florida provides that a portion of an individual's homestead is exempt from forced sale by process of any court.[13] No judgment, decree or execution is permitted to constitute a lien on a homestead other than for the payment of: (1) taxes and assessments related to such property; (2) obligations contracted for the purchase, improvement or repair of such property; or (3) obligations contracted for house, field or other labor performed on such property.[14]

The homestead must be owned by a "natural person."[15] The portion of a homestead protected by this exemption will vary depending upon the location of the property. If the homestead is located in an unincorporated area, the exemption will protect up to 160 acres of contiguous land and improvements on such land.[16] If the homestead is located within a municipality, the exemption will protect up to one-half acre of contiguous land, and the exemption is limited to the residence of the owner or the owner's family.[17]

Florida provides certain exemptions that reduce or otherwise eliminate ad valorem taxes relative to homestead. However, to be eligible for the homestead exemption the owner must be a permanent resident of Florida and have a present intent of living at the property.[18] Additionally, the owner must apply for the exemption.[19]

The homestead exemption inures to the benefit of a surviving spouse or heirs of the owner.[20] The homestead exemption also protects the value of up to one thousand dollars ($1,000) of personal property.[21] The conversion of non-exempt assets into an exempt homestead

with the intent to hinder, delay or defraud creditors is not one of the three exceptions to the homestead exemption provided in Article X, § 4 of the Florida Constitution. A Florida court should apply equitable principals to reach beyond the literal language of the exceptions provided in Article X, § 4 only where funds obtained through fraud or egregious conduct were used to purchase, or improve the homestead.[22]

3. *Life Insurance*. The proceeds of an insurance policy on the life of a Florida resident will inure to the benefit of the person who is designated as the beneficiary of such policy and such proceeds will be exempt from the claims of the insured's creditors (unless the policy or a valid assignment of the policy provides it is for the benefit of a creditor).[23] Nevertheless, if the insurance proceeds become payable to the estate of the insured, such proceeds will constitute a part of the insured's estate for all purposes and will be administered by the personal representative of the insured's estate according to the Florida Probate Code.[24] It does not matter whether the insured's estate is specifically designated as the beneficiary of such insurance or such proceeds become payable to the insured's estate through another source.[25] This exemption does not protect life insurance policy proceeds from a beneficiary's creditors. Nonetheless, if the insurance proceeds are payable to an irrevocable trust, the trust can be designed to maximize the protection of those proceeds from the claims of a beneficiary's creditors. The cash value of an insurance policy issued on the life of a Florida resident cannot be attached, garnished or become subject to legal process in favor of any creditor of the insured (unless the policy was effected for the benefit of such creditor).[26]

4. *Retirement Accounts*. In Florida, cash and other property payable to an owner, a participant, or a beneficiary from, and any interest of any individual in a qualified retirement or profit-sharing plan (including a traditional IRA or Roth IRA) is exempt from the

claims of creditors of the beneficiary or participant.[27] Inherited IRAs are exempt from a beneficiary's creditors under Florida law.[28]

5. *Tenants by the Entirety.* Although technically not an exemption, Florida law recognizes tenancy by the entireties, a form of ownership that can only exist between two individuals who are married to each other.[29] Property owned in tenancy by the entireties under Florida law cannot be reached to satisfy the claims of a creditor of only one spouse.[30] However, upon the death of one spouse, the tenancy by the entireties estate vests in the surviving spouse and becomes the individually owned property of such spouse.[31] Thus, where the surviving spouse is a debtor spouse, such individually owned property can be reached to satisfy the claims of a creditor.

C. **Concepts applicable to asset protection planning**

1. *Fraudulent Transfers.* Section 726.105, Florida Statutes, provides that a transfer made or obligation incurred by a debtor is considered fraudulent as to a creditor, whether the creditor's claim originated before or after the transfer or the obligation, if the debtor made the transfer or incurred the obligation:

a. with the actual intent to hinder, delay, or defraud any creditor of the debtor; or

b. without obtaining reasonably equivalent value in exchange for the property that was transferred or the obligation that was incurred, and the debtor:

i. was engaged or was about to engage in a business or a transaction for which the debtor's remaining assets were unreasonably small in relation to the business or transaction; or

ii. intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.[32]

Section 726.108, Florida Statutes, provides the remedies for a creditor under Florida Uniform Fraudulent Transfer Act. The potential remedies may include:

1) avoidance of the transfer or obligation (to the extent needed to satisfy a creditor's claim);

2) attachment (or other provisional remedy) against the asset that was transferred or against other property of the transferee as provide under applicable law;

3) an injunction against further transfers by a debtor or a transferee, or both, of the asset that was transferred or against other property of the debtor or transferee;

4) appointment of a receiver who would take control of a transferred asset or other property of the transferee; or

5) such other relief as the circumstances may require.[33]

A cause of action to avoid a fraudulent transfer in Florida made by a debtor with the actual intent to hinder, delay, or defraud any creditor of the debtor will be eliminated unless it is brought "within 4 years following the time a transfer was made or, if later, within 1 year following the time a transfer or obligation was or could reasonably have been discovered by a claimant."[34] Additionally, a cause of action to avoid a fraudulent transfer by a debtor who does not receive reasonably equivalent value in exchange for the property that was transferred is extinguished if not brought within four years following the time a transfer was made (or within one year following the time a transfer was made in the case of a creditor whose claim arose before the transfer was made).[35]

The Florida Fraudulent Transfer Act was an enactment of the Uniform Fraudulent Transfer Act.[36] The Florida Fraudulent Transfer Act cites to the Uniform Fraudulent Transfer Act.[37] Sections of the Florida Bar are debating whether or not to enact the Uniform Voidable Transactions Act, the successor to the Uniform Fraudulent Transfer Act.[38]

2. *Fraudulent Conversions.* Section 222.30, Florida Statutes, contains Florida's fraudulent conversion rule. A "**conversion**" includes any method of selling or disposing of an asset such that the asset becomes exempt from the claims of a debtor's creditors, yet the asset remains the property of such debtor.[39] If a debtor converts nonexempt property to exempt property with the intent to hinder, delay, or defraud a creditor, the conversion is a

fraudulent asset conversion as to the creditor.[40] It does not matter whether the creditor's claim accrued prior to or after the conversion of the asset.[41]

If a creditor proves a debtor made a fraudulent asset conversion, the creditor may avoid the conversion to the extent necessary to satisfy its claim, attach the asset converted as provided by applicable law (or obtain such other provisional remedy against the asset or obtain an injunction prohibiting a debtor from further converting an asset or other property or any other relief the circumstances may require. [42]

Any claim that an asset was fraudulently converted must be brought within 4 years after the conversion was made by the debtor, otherwise the action is extinguished.[43] If an asset is converted and then transferred to a third party, the fraudulent transfer rules apply to the transfer to the third party.[44]

Florida's fraudulent transfer and conversion statutes have been held inapplicable under the Florida Constitution to the conversion of a non-exempt asset to homestead property.[45] Thus, the conversion of non-exempt property to exempt homestead property appears permissible at any time before such non-exempt property is seized by a creditor.[46]

D. **Trusts under Florida law**[47]

1. *Introduction.* Effective July 1, 2007, Florida adopted the Florida Trust Code ("FTC"), a modified version of the Uniform Trust Code ("UTC").[48] Although the term "self-settled trust" is not used in the FTC, section 736.0505, Florida Statutes, establishes rules related to revocable and irrevocable trusts created by a settlor where the settlor retains a beneficial interest in the trust.[49] The inclusion of a spendthrift provision is irrelevant.[50]

Under Florida law, the assets of a revocable trust are subject to the claims of the settlor's creditors during the settlor's lifetime, but only to the extent such assets would not be exempt

from creditors' claims if held directly by the settlor.[51] So for example, a settlor's homestead held by his or her revocable trust should remain exempt under Florida law.[52]

Florida law provides that a creditor or assignee of a settlor may reach the maximum amount that can be distributed to or for the benefit of the settlor of an irrevocable trust.[53] If there is more than one settlor, the amount that may be reached may not exceed the portion of the irrevocable trust attributable to the settlor's contribution.[54] If the trustee has the discretion to distribute the entire income and principal to the settlor, the effect is as if the settlor had not created the trust for purposes of placing the settlor's assets beyond the reach of his or her creditors.[55]

2. *Discussion of Section 736.0505(1)(c), Florida Statutes.* Drafting irrevocable trusts as grantor trusts for federal income tax purposes is a common technique to enhance the benefits of such trusts by effectively permitting tax-free gifts when the grantor pays income taxes attributable to trust assets. Still, it may be desirable to grant the trustee a discretionary power to pay such taxes or reimburse the settlor. Accordingly, section 736.0505(1)(c), Florida Statutes, provides in part:

> The assets of an irrevocable trust may not be subject to the claims of an existing or subsequent creditor or assignee of the settlor, in whole or in part, solely because of the existence of a discretionary power granted to the trustee by the terms of the trust, or any other provision of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax.[56]

a. There is no time limit on reimbursement. Thus, in theory a trustee can accrue a reimbursement account for several decades and reimburse the settlor for a tax liability incurred many years in the past. As a result of this, Florida may have unwittingly added an additional exemption to its laws. This provision could have been drafted to prevent abuse by

mandating the formula for determining the maximum amount that the trustee could distribute to the settlor.

b. Although potentially difficult under certain circumstances, the provision could have prevented abuse by directing that any tax payments be made directly to the appropriate taxing authority rather than reimbursing the settlor for such amounts. Of course, one could argue that such a provision would be too restrictive.

c. Query whether the payment by the settlor of the settlor's tax liability subject to the fraudulent transfer statute? The funds could one day be returned to the settlor pursuant to a discretionary distribution. It would seem that such payment should not be a fraudulent transfer, but inequitable results will be caused to a creditor because of this provision if the fraudulent transfer statute is not applicable.

3. *Discussion of Section 736.0505(3), Florida Statutes*. The benefits of marriage are numerous and in the case of trust law in Florida were increased when section 736.0505(3), Florida Statutes, became effective. It provides:

> Subject to the provisions of s. 726.105, for purposes of this section, the assets in:
>
> (a) A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended, or a trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made; and (b) Another trust, to the extent that the assets in the other trust are attributable to a trust described in paragraph (a), shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.[57]

Section 736.0505(3), Florida Statutes, arguably creates an exception to the self-settled trust doctrine. It protects the assets in a self-settled trust from the claims of a creditor of the settlor. The exception relates to any trust for the benefit of the settlor that is established after the death of the settlor's spouse when the settlor created and funded an inter vivos general power of appointment or qualified terminable interest property ("QTIP") marital trust for the initial benefit

of the settlor's spouse. A settlor can fund an inter vivos QTIP trust for the settlor's spouse by gifting assets to such trust. A QTIP election must be made with respect to any gift to this QTIP trust. As a result of the QTIP election the trust will be includible in the estate of the settlor's spouse for estate tax purposes.[58] The gift by the settlor to the trust will qualify for the unlimited marital deduction. The inter vivos QTIP trust may contain provisions that provide for the settlor following the donee-spouse's death. The trust assets should not be subject to the claims of the settlor's creditors although the trust is self-settled. According to section 736.0505(3), Florida Statutes, the settlor would not be treated as the settlor of the trust.

a. *Planning Points to Consider*.

i. The Reciprocal Trust Doctrine. The reciprocal trust doctrine "requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as life beneficiaries."[59] Query whether the reciprocal trust doctrine can be applied to uncross trusts created contemporaneously by spouses for the benefit of each other?[60] If the reciprocal trust doctrine is applicable, what period is sufficient between one spouse establishing and funding a trust and the other spouse doing the same to avoid the application of the doctrine? Would the federal government be concerned about the application of the reciprocal trust doctrine in this instance?

The doctrine applies to inter vivos QTIP trusts as often, spouses will create mostly identical inter vivos QTIP trusts for the benefit of one another, around the same time period. While there is no existing guidance on this issue in Florida, care should be taken in drafting such trusts. For example, using different trustees, creating the trusts using different jurisdictions,

signing the trusts in different time periods and having different distribution standards are a few drafting differences which could be employed to lessen the reciprocal trust doctrine argument.

ii. Making the QTIP Election. The protection afforded to the successor trust or trusts is dependent upon a Federal tax election in the case of an inter vivos QTIP trust and the trust containing the proper provisions to ensure it qualifies as a marital trust under either of Sections 2523(e) and 2523(f) of the Internal Revenue Code (the "Code").[61]

iii. Additional Planning Concerns. This strategy cannot work if the donee-spouse is not a US citizen as the transfer would not qualify for the marital deduction.[62] If the donee-spouse and settlor-spouse divorce, they may be unaware of the potential continuing obligations of the settlor of an inter vivos QTIP trust to pay income taxes on trust capital gains post-divorce, despite the settlor having no right to trust distributions or access to trust assets to pay such capital gains taxes.[63]

b. *Compare Florida Inter Vivos QTIP Trusts to Inter Vivos QTIP Trusts in Other Jurisdictions*. The protection afforded to the successor trust or trusts is dependent upon a Federal tax election in the case of an inter vivos QTIP trust and the trust containing the proper provisions to ensure it qualifies as a marital trust under either of Sections 2523(e) and 2523(f) of the Code. This does not appear to be the case in other states that have or may soon have similar laws.

Besides Florida, the planning described above may also be used in jurisdictions such as Arizona, Delaware, Kentucky, Maryland, Michigan, North Carolina, Oregon, South Carolina, Texas, Virginia and Wyoming.[64]

> For example, specifically in North Carolina's inter vivos QTIP statute provides:
> Subject to Article 3A of Chapter 39 of the General Statutes, for purposes of this section, if the settlor is a beneficiary of the following trusts after the death of the settlor's spouse, the property of the trusts shall, after the death of the settlor's

> spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor:
> (1) An irrevocable intervivos marital trust that is treated as a general power of appointment trust described in section 2523(e) of the Internal Revenue Code.
> (2) An irrevocable intervivos marital trust that is treated as qualified terminable interest property under section 2523(f) of the Internal Revenue Code.
> (3) An irrevocable intervivos trust of which the settlor's spouse is the sole beneficiary during the lifetime of the settlor's spouse but which does not qualify for the federal gift tax marital deduction.
> (4) Another trust, to the extent that the property of the other trust is attributable to property passing from a trust described in subdivision (1), (2), or (3) of this subsection. For purposes of this subsection, the settlor is a beneficiary whether so named under the initial trust instrument or through the exercise of a limited or general power of appointment, and the "settlor's spouse" refers to the person to whom the settlor was married at the time the irrevocable intervivos trust was created, notwithstanding a subsequent dissolution of the marriage.[65]

Unlike Delaware, Florida, Maryland, Michigan, Oregon, South Carolina, Virginia and Wyoming, four states, Arizona, Kentucky, North Carolina and Texas, statutorily provide that the initial settlor of any irrevocable inter vivos QTIP trust created for the settlor's spouse will not be deemed to have been contributed by the settlor if the settlor is the beneficiary of the trust after the death of the settlor's spouse, even if there is no QTIP election.

While at first glance Arizona, Kentucky, North Carolina and Texas appear to create great asset protection and the possibility of enhanced estate tax benefits that are afforded to credit shelter trusts as compared to an inter vivos QTIP trust (*i.e.*, all appreciation of assets in the credit shelter trust would avoid future estate taxes and regardless of whether the applicable exclusion amount is reduced the assets in a credit shelter trust should not be subject to estate tax inclusion), there are two potential pitfalls to the statute: (1) the trust needs to have its situs in Arizona, Kentucky, North Carolina or Texas and be subject to income tax there; and (2) there is no provision similar to Internal Revenue Service ("IRS") Treas. Reg. § 25.2523(f)-1(f), Example 11 that assures that the initial settlor will not be subject to tax under Sections 2036 or 2038 of the

Code. As a result, the IRS could take the position that despite state law, the initial settlor has an interest under sections 2036 and 2038, of the Code, resulting in estate tax inclusion.[66]

It would also seem possible under these states' statutes to design the lead trust without a mandatory income distribution provision so all distributions to the spouse could be solely within the trustee's discretion. Perhaps the lead trust could also be designed such that gifts to the trust would not constitute completed gifts for Federal gift tax purposes. In order for Florida to become a leader in inter vivos QTIP trusts, it would be prudent to update section 736.0505(3), Florida Statutes, with similar provisions to such states as Arizona, Kentucky, North Carolina and Texas.

E. **Charging order protection under Florida law**

The member or members of a limited liability company ("LLC") do not have personal liability for the debts, obligations or other liabilities of the LLC.[67] The managers or managing-members have similar limited liability, except for misconduct or torts they commit in the course of carrying out their duties.[68] Each member's liability is limited to the member's capital commitment to the LLC.[69]

The assets of a multi-member LLC generally are not subject to attachment by the creditor of a member of the LLC. Rather, the creditor is generally limited to obtaining a charging order against the member's economic interest in the LLC, and cannot obtain any membership rights, other than the ability to receive a distribution if and when the LLC ever makes such a distribution.[70] However, in the case of an LLC that has only one member, a charging order against the member's economic interest is not the sole and exclusive remedy and the court may order a foreclosure sale if the creditor makes a showing to the court that distributions under a charging order will not satisfy the judgment within a reasonable time.[71]

A limited partner "is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership."[72] Additionally, a limited partner "does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner."[73] A charging order is the exclusive remedy which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor's interest in a Florida limited partnership.[74] Such judgment creditor has only the right of a transferee of the limited partnership interest.[75]

F. **<u>Considerations and Problems under Florida law</u>**

1. *Trust Law*. For purposes of this outline, there are at least four major limitations for trusts created under, and governed by, Florida law. First, Florida does afford protections to traditional "self-settled" asset protection trusts (revocable and irrevocable trusts created by a settlor where the settlor retains a beneficial interest in the trust).[76] For dynasty trust purposes, Florida's rule against perpetuities limits trust length to 360 years.[77] Florida has not adopted its own version of community property law or allow for the creation of a community property trust. Finally, Florida allows certain exception creditors to obtain a continuing writ of garnishment to attach to distributions made to or for the benefit of beneficiaries of discretionary trusts in Florida.[78]

2. *Entity Law*. Limited liability of all members is often one of the most attractive reasons for creating LLCs. For LLC members in some states, it is also beneficial that a charging order is the sole and exclusive remedy for a member's creditor. A charging order differs from other remedies such as judicial foreclosure. Judicial foreclosure enables the creditor to become an assignee of the LLC, converting a "lien interest" to a "title interest" where a

membership interest may be sold by the court.[79] At its most basic description, a charging order limits the judgment creditor to "charge" the member's interest and receive the distribution the LLC member would have been otherwise entitled to; it does not entitle a member to take action in regards to the daily function of the LLC, it is a lien on the member's distributional interest.[80]

The issue in Florida is that LLCs do not afford charging order protection as the sole and exclusive remedy to single-member LLCs. Likewise, although partnerships afford charging order protection as the sole and exclusive remedy to limited partners, a limited partnership still has to have a general partner that is "liable jointly and severally for all obligations of the limited partnership."[81] This leaves high net worth clients, and clients who use LLCs and partnerships for their active businesses, turning to other jurisdictions to form their entities of choice.

G. **Ethics**[82]

1. *Introduction*. Beyond solely asset protection, laws described in this outline, including those applicable to domestic asset protection trusts ("DAPT"), inter vivos QTIP trusts ("QTIP Trust") foreign asset protection trusts ("Foreign Trusts"), domestic entities and foreign entities, serve legitimate purposes such as for tax and personal financial planning reasons. For example, although the IRS has announced that it would investigate abusive trusts and to vigorously attack their promoters and participants, the IRS notice also clearly states that there should be no concerns about the legitimate uses of trusts, including the proper use of trusts in estate planning.[83] They are based on full compliance with the rules and regulations under the Code. Except as described in this outline below, Florida law is scant on the ethics of asset protection planning using trusts and entities. However, secondary sources, such as the Model Rules of Professional Conduct, as well as guidance from ethics opinions and court cases in other states help provide guidance.

2. *Applicable Model Rules of Professional Conduct*. The Model Rules of Professional Conduct applicable in analyzing whether an attorney's conduct was unethical for assisting or counseling a client in a transaction deemed to be a fraudulent transfer begin with Model Rule 1.2(d), that provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rule 4.4(1) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Model Rule 8.4(c) provides:

> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) engage in conduct that is prejudicial to the administration of justice;
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

3. *State Ethics Opinions*. In Connecticut Informal Opinion 91-23,[84] a lawyer sought an opinion on whether the lawyer could ethically recommend and/or assist a client in making a transfer of the client's jointly owned residence to the client's wife while the client was insolvent. Based on the Model Rules of Professional Responsibility, the Connecticut Bar Association's Committee on Professional Ethics stated that:

> A lawyer may not counsel or assist a client to engage in a fraudulent transfer that the lawyer knows is either intended to deceive creditors or that has no substantial purpose other than to delay or burden creditors.

The committee further stated:

> [W]hether or not a particular transaction is a fraudulent transfer as a matter of substantive law is not the decisive factor in applying the Rules. The decisive factors are whether the lawyer knows that the transfer constitutes conduct having a purpose to deceive (see Rule 1.2(d)) or whether in counseling or assisting the client the lawyer is using means that have no substantial purpose other than to embarrass, delay or burden third parties (see Rule 4.4).

The committee concluded that although all fraudulent transfers are thought of as illegal, the Model Rules do not apply to all illegal conduct and only apply to conduct that is "known" to be criminal or fraudulent. As a result, following the reasoning in Connecticut Informal Opinion 91-23, if a lawyer assists or counsels a client in a transaction "known" to be a fraudulent transfer, the attorney's conduct would be unethical.[85]

In South Carolina Bar Ethics Advisory Opinion 84-02, the ethics committee considered whether the model code prohibited a lawyer from transferring a client's property from the client's name to the client's spouse's name in anticipation of the possibility that an adverse judgment would be rendered against the client. The committee held that "a lawyer may not transfer a client's property from the client's name to the client's spouse's name in order to avoid the likely possibility that the client's creditors could recover the property if a judgment were rendered against the client." The committee held that this conduct would be prohibited because it violates DR 7-102(A)(7) which states that "in his representation of a client, a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

The committee further stated:

> The critical issue would be whether or not the transfer took place with a reasonable prospect that a judgment would be obtained against the client, or whether or not the transfer took place to avoid some possibility in the distant future. If the transfer was solely for the purpose of avoiding creditors, it could not

> be done by an attorney for a client. If, however, there does not exist the immediate reasonable prospect of a judgment being entered against the client, the transfer merely to avoid the possibility of an action by a creditor or creditors would not be in violation of DR 7-102(A)(7).

In Ethics Opinion 1993-1 of the Legal Ethics and Unlawful Practice Committee of the San Diego County Bar Association,[86] the issue of the extent an attorney may advise or assist a client with respect to an avoidance of existing and identifiable creditors' rights and a protection of the client's assets was answered. A potential client sought advice to protect the client's personal assets from existing and identifiable creditors. The client expressed intent to transfer the assets beyond the reach of the client's creditors to the attorney and requested that the attorney advise, prepare and assist in the implementation of an asset protection plan, including trusts, family limited partnerships and similar techniques.

The committee cited Rule 3-210 of the State Bar of California Rules of Professional Conduct:

> A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.[87]

The Uniform Fraudulent Transfer Act provides a remedy to creditors to whom its provisions apply for transfers deemed fraudulent. Section 3439.04(a) of the Civil Code sets forth that a transfer made or obligation incurred by a debtor is fraudulent as to a creditor whether the creditor's claim arose before or after the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation with the actual intent to hinder, delay or defraud the creditor. The committee viewed an attorney's "knowing" assistance in fraudulent transfers as contrary to civil law and would subject an attorney to discipline.

Furthermore, to the extent that the attorney participates in the transfer, the attorney and the client would be subject to criminal sanctions under the California Penal Code that imposes a

criminal misdemeanor on a debtor's fraudulent transfer of property out of state or transfer with the "intent to defraud, hinder or delay creditors." [88]

In the case *Iowa Supreme Court Attorney Disciplinary Board v. Ouderkirk*,[89] the Iowa Supreme Court determined that an attorney did not commit an ethical violation in assisting a client (who was accused of murder and ultimately convicted of manslaughter) with transactions that were determined by a court to be fraudulent transfers. The court discussed whether a fraudulent transfer is fraud for purposes of the rules of professional responsibility and concluded that in deciding if a conveyance is fraudulent, fraud is not presumed.[90] The court distinguished the point of an attorney's knowledge of the facts for purposes of making its ruling.[91] Most notably, the court indicated:

> If a lawyer knows a transfer is fraudulent and assists a client in completing the transfer nonetheless, it is no defense that the lawyer is acting merely as a scrivener. Though a client has "the ultimate authority to determine the purposes to be served by legal representation," this authority is subject to the limitations of the law and the attorney's professional obligations.[92]

4. *Florida.*

a. *Aiding and Abetting Liability for a Fraudulent Transfer.* Some states do not recognize an action for aiding and abetting a fraudulent transfer by third-party non-transferees of the property in question.[93] Florida does not recognize such an action.[94]

In *Freeman v. First Union National Bank*,[95] First Union was sued by investors in Unique Gems International Corp., claiming that Unique Gems conducted a Ponzi scheme involving jewelry assembly.[96] The investors alleged that First Union, as a banking institution servicing Unique Gems' financial transactions, aided and abetted Unique Gems in the fraudulent transfers of money.[97] The Eleventh Circuit Court of Appeals certified the following question for the Florida Supreme Court: "Under Florida law, is there a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee?"[98]

The investors argued that the Florida Uniform Fraudulent Transfer Act ("FUFTA") encompassed a separate tort for aiding and abetting a fraudulent transfer by including the words "[a]ny other relief the circumstances may require" in the language of the statute.[99] The Plaintiffs contended that FUFTA was broad enough to allow a claim for money damages against the Defendant, which allegedly facilitated the fraudulent transfers.[100] The court held that FUFTA was not intended to create a cause of action against a non-transferee party for monetary damages arising from the non-transferee's alleged aiding-abetting of a fraudulent transfer, and the court answered the certified question in the negative.[101]

b. *Attorney Discipline*. While a third party non-transferee may not be held liable under the FUFTA for assisting a client in making a fraudulent transfer, an attorney may separately be subject to state bar discipline. Based on the state ethics opinions discussed above, it appears that there exists a reasonable basis that a state bar may subject an attorney to discipline if the attorney "knows" he is assisting a client in making a fraudulent transfer.[102]

In *In re Niroomand*,[103] a judgment was entered against the debtor.[104] Prior to the judgment and filing for bankruptcy protection, the debtor engaged a law firm to create a Foreign Trust.[105] At a later date, the debtor then requested the trustee to terminate the Foreign Trust and repatriate the funds, and the trustee complied.[106] The bankruptcy trustee alleged the debtor's payment of legal fees constituted a fraudulent transfer to the law firm.[107] The bankruptcy trustee also alleged that the law firm committed malpractice in assisting the debtor in establishing the Trust and was unjustly enriched from the payment of legal fees.[108]

The Eleventh Circuit did not find any support in the record for the bankruptcy trustee's claim that the bankruptcy court did not consider the documentary evidence in reaching its conclusions. The court found the bankruptcy trustee's case "woefully lacking" any evidence to

support its allegations.[109] The court found no fraudulent transfer and no evidence of malpractice or unjust enrichment.[110] According to the Bankruptcy Court:

> The plaintiff's case consisted of one witness, which in the first place the Court did not find credible, but, in addition, the evidence presented is rather clear.
> While, I never found any evidence about legal malpractice, I'm looking for what could possibly be argued as unjust enrichment. As to the constructive fraud, fraudulent transfer, the Court thinks it's abundantly clear that there's been no establishment of insolvency. In fact, the record is abundant with records of solvency. The witness signed a solvency affidavit, which she said she did not read, but the Court notes-noted that the witness could remember some things in the way of financial numbers of a rather complicated structure down to the penny, and other things, she couldn't remember at all.[111]

On appeal, the district court upheld the bankruptcy court's findings. The Eleventh Circuit affirmed these decisions on Oct. 17, 2012. The bankruptcy court was entitled to find the debtor solvent at the time of the transfers because the credible evidence supported that finding.

In re Niroomand does represent an important victory for attorneys who assist clients with asset protection planning, but it also teaches planners a valuable lesson – attorneys considering helping clients with asset protection planning should engage in an appropriate level of due diligence in relation to clients to ensure that the attorney is advising clients to engage in appropriate planning.

c. *Attorney Due Diligence.* Under Florida law, it is arguably acceptable to protect wealth using a properly implemented DAPT, QTIP Trust, Foreign Trust or domestic or foreign entity. Under the Constitution of the State of Florida, an argument can be made that this protection is a constitutional right: "[a]ll natural persons…are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property."[112] However, the FTC contains a contradictory provision that indicates a trust must be created to the extent the purposes are lawful and "not contrary to public policy, and possible to achieve."[113]

The FTC has no official “white paper” so attorneys can review the UTC comments for what an illegal purpose is and what “contrary to public policy” means. The UTC explains that a trust “has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor’s purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal,” and purposes that are “violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious.”[114] It would appear that using a properly implemented DAPT, QTIP Trust, Foreign Trust or domestic or foreign entity to diversify assets, plan for succession and inheritance, as well as plan against unforeseeable tort creditors would not be contrary to public policy. Additionally, diversifying assets, planning for succession and inheritance, as well as planning against unforeseeable tort creditors would not be creating a DAPT, QTIP Trust, Foreign Trust or domestic or foreign entity to defraud creditors.

In order to document that such DAPT, QTIP Trust, Foreign Trust or domestic or foreign entity is being properly implemented and for the right purposes, due diligence is critical on the part of the attorney. To avoid assisting clients in making fraudulent transfers in a manner that will subject the attorney to liability for the transfer or ethical issues, it is crucial to have sufficient procedures for due diligence in place. Such procedures should be adhered to so that the attorney can readily identify existing and/or potential claims or sources of liability prior to counseling and assisting client asset transfers into asset protection structures. The following best practices are a good start to some of the procedures that should be adhered to:

i. Timing. If a claim against a settlor exists, the creation and funding of a DAPT, QTIP Trust or Foreign Trust is not appropriate. Clients should plan only at

appropriate times and under appropriate circumstances and attorneys should only assist clients under such conditions. Many people seek advice about asset protection because they are involved or concerned that they are about to become involved in litigation. However, once litigation is in process or soon to be, asset protection planning for clients should be halted. Starting an asset protection plan at the wrong time will result in valuable opportunities being foreclosed and may raise serious fraudulent transfer issues. As a general rule, if assisting a client with a particular strategy raises an issue as to a fraudulent transfer, do not proceed or proceed with great caution.

ii. Domicile. As a result of the jurisdiction where a client resides or may want to reside, the manner in which a client owns certain property interests (*i.e.*, homestead or tenancy by the entirety), may result in the ability to achieve significant wealth protection for a client involved in litigation or concerned that litigation is imminent. For example, in *In re Niroomand*,[115] it was only after tens of thousands of dollars were wasted on an Foreign Trust structure that the defendant eventually followed advice to pay down her mortgage – which ultimately may have been a much safer strategy for the defendant as well as far less expansive.

iii. Procedures. In assisting a client with the implementation of an effective asset protection plan a firm should have due diligence-client intake procedures in force that are used as a matter of common business practice in all cases. In designing the procedures, thought should be given with a view toward that individual someday being prepared to answer questions candidly and produce documentation related to such asset protection plan in a deposition or court proceeding. At the outset, it should be noted that any banks, trust companies and other financial institutions in the United States ("U.S.") or a foreign jurisdiction will require that the attorney produce due diligence on the potential client before accepting a new

client relationship. For example, a client may be required to prove source of wealth and substantiate that funding the structure will not result in a fraudulent transfer issue. Proving source of wealth will require a tracing of bank statements, proof of employment and proof of title to ownership of assets. A financial statement prepared by a reputable accounting firm is also required, as well as the last three years tax returns for the client (and possibly the client's spouse). Additionally, for clients with businesses, such business's tax returns for at least the three past tax years will be required.

The attorney will want to request reference letters from professionals who have worked with the client such as attorneys, accountants, bankers and financial advisors. Generally best practices would necessitate at least two letters. The attorney should also ask for three personal references. Finally, an extensive background check on the client should be performed using the following steps: (1) first, use Lexis Nexis and Westlaw to perform a background check on the client (and possibly the client's spouse) which would include a comprehensive list of all addresses associated with the client, registered assets, political party affiliation, entity interests, real property ownership, criminal records, etc.; (2) second, a criminal background check outside of Lexis Nexis and Westlaw which would include a search of each county and state's law enforcement website that the client resided in and a check of the federal inmate records, keeping in mind that crimes of larceny and theft will be major red flags; (3) third, a check of PACER to determine independently (*e.g.*, outside of what the client has told the attorney) whether the client or a business affiliated with the client has ever filed for bankruptcy; (4) fourth, a check of the federal and state dockets to determine whether the client has ever been sued or done the suing; and (5) a deep internet search of the client using google, yahoo and other search engines. Properly using this data enables the estate planner to uncover civil and criminal cases involving

the client as well as any tax liens, administrative proceedings and civil penalties that may have been imposed against the client.

The attorney should properly draft the engagement letter. The scope of the engagement should be clearly defined, particularly if the scope is limited. The engagement letter should indicate that the client shall disclose all relevant information to the attorney and that the attorney is entitled to rely on the client's representations. The letter should state that failure on the part of the client to fully and properly disclose is grounds for the attorney to terminate the relationship (or fail to commence if failure to disclose occurs before services commence).

H. **Solutions to problems under Florida law**

As described above, the particular problems of focus for Florida trusts are that Florida: does not allow for the creation of DAPTs; limits trust length to 360 years; has not adopted its own version of community property law or allow for the creation of community property trusts; and allows certain exception creditors to obtain a continuing writ of garnishment to attach to distributions made to or for the benefit of beneficiaries of discretionary trusts in Florida. And for Florida entities, the major problem is that a Florida single-member LLC does not have charging order protection, and a judge can order a more "drastic" remedy such as foreclosure on a member's interest.

Assuming as described above that proper due diligence was conducted and that the client has legitimate purposes for such trust or entity's creation, the following should be considered:

1. *Creation of self-settled asset protection trust*. A self-settled trust is a trust in which the settlor is also a beneficiary of the trust, remaining eligible to receive distributions of income or principal from the trust. The Restatement (Second) of Trusts provides in relevant part, "[w]here a person creates for his own benefit a trust for support or a discretionary trust, his

transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."[116] Restatement (Third) of Trusts provides, "[a] restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid."[117] This Black Letter rule is commonly referred to as the "Self-Settled Trust Doctrine," adopted from old English law.[118] The Self-Settled Trust Doctrine is currently the majority rule in the U.S., but the present legislative trend is to reverse this rule.

Outside the U.S., foreign countries have allowed self-settled trusts for years.[119] According to one source, "[t]he American approach to self-settled trusts is prudish when compared to the approach of other common law jurisdictions. For example, England and those nations that follow its precedents, have long recognized common law trusts known as the 'protective trust' and the 'discretionary trust.'"[120] Over time, the stigma of self-settled trusts has eroded to the point where now many U.S. states allow them.

Beginning in 1997, states in the U.S. became players in the self-settled trust legislation game when Alaska enacted into law a set of statutes whereby a person can establish a "self-settled" perpetual trust (because there is no rule against perpetuities that limits the term of the trust, it can conceivably continue forever), have the assets held in the trust protected from the claims of "unknown future creditors," and still remain a discretionary beneficiary of the trust. (Under most states' laws, if a person transfers assets to a trust for his or her own benefit, the transfer can be ignored by both present and future creditors). Alaska was the first state to enact such asset protection legislation.[121] Presently, however, as many as seventeen states allow a person who settles a trust to remain a as a "discretionary beneficiary."[122]

Arguably, the four U.S. jurisdictions with a combination of protections for self-settled trusts and a limited or lengthy perpetuities period are Alaska, Delaware, Nevada and South

Dakota.[123] It should be noted that Alaska, Delaware and Nevada have had their statutes in existence since the 1990s.[124]

If a self-settled Foreign Trust is desired, Nevis, the Cook Islands, Belize and the Bahamas are some of the jurisdictions that attorneys choose to form trusts in. In each of those jurisdictions, it is important to note that the trustee must be registered in such particular jurisdiction (*i.e.*, the client or his or her domestic advisors cannot be trustee).[125] The ultimate choice of which particular jurisdiction to form the trust in will often turn on the relationship the trust drafting attorney has with the particular jurisdiction, or more accurately, the relationship the drafting attorney has with the specific trust company who will serve as a trustee of the foreign trust and the law firm who will sign off on the trust. These relationships occur over time as the drafting attorney creates Foreign Trusts with more frequency. The prudent drafting attorney will have established multiple relationships with trust companies and attorneys in two or three of the above referenced jurisdictions. The reason this occurs is because clients want certainty and assurances that the company is reputable and efficient. The client may want to interview the trust company either over the phone or visit the jurisdiction in person. By having more than one trust company to go to in each jurisdiction, the drafting attorney assures himself or herself that if the right trustee fit is not found on the first try, there may be a second bite at the apple. Foreign Trusts are not a one off; attorneys that draft and aid clients with the funding process create multiple trusts every year, and have done so over the course of many years.

2. *Creation of trust with limited or no perpetuities period.* Alaska, Delaware, Nevada and South Dakota feature a variety of perpetuities periods. Out of the four states, South Dakota is the only state that has eliminated its perpetuities period for all purposes.[126] In contrast, while Alaska and Delaware allow for perpetual trusts, Alaska limits them to 1,000 years unless a

general or non-general power of appointment is exercised or terminates within 1,000 years of such trust's creation,[127] and Delaware provides that "the rule against perpetuities for real property held in trust is that at the expiration of 110 years from the later of the date on which a parcel of real property or an interest in real property is added to or purchased by [such] trust."[128] Nevada's perpetuities period allows for a trust to last 365 years.[129] In contrast, all of the Bahamas,[130] Nevis,[131] Belize[132] and the Cook Islands[133] have eliminated their perpetuities periods.

3. *Creation of community property trust*. The characterization of property as community property results in the ability to receive a "double-step up in basis" on the death of the first spouse. Under section 1014(b)(6) of the Code, property is considered to have been acquired from or to have passed from the decedent which represents a surviving spouse's one-half share of community property held by a decedent and the surviving spouse under the community property laws of any state, if at least one-half of the whole of the community interest in such property was includible in determining the value of the decedent's gross estate for federal estate tax purposes.[134] Accordingly, pursuant to section 1014(a) of the Code, "all community property (including both the decedent's one-half interest in the community property and the surviving spouse's one-half interest in the community property) receives a new basis at the death of the first spouse to die equal to its fair market value."[135] For tax purposes, section 1014(b)(6) of the Code is important because:

> Under that section, the surviving spouse of a marriage (which now includes same-sex married couples) will receive a fair market value basis in all community property upon the death of the first spouse. In contrast, the surviving spouse of a marriage in a common law state will receive a FMV basis only in the property owned by the first spouse to die; the tax basis of property owned by the surviving spouse is unaffected by the death of the other spouse.[136]

Nevada is a true community property state. In contrast, Alaska and South Dakota have some form of community property.

The Alaska Community Property Act[137] provides for "opt-in" community property whereby a married couple may establish community property by entering a community property agreement (both must be domiciled) or establishing a community property trust (neither need be domiciled).[138] Alaska community property establishes a present undivided one-half interest in each spouse.[139] A spouse acting alone may manage community property if owned in such spouse's name, property is held "in the alternative" (such as H or W), and in certain other situations.[140] There is no residency requirement to establish a community property trust.[141] With respect to a trust, one trustee must be a "qualified person," meaning an individual residing in Alaska, a trust company with its principal place of business in Alaska, or a bank with its principal place of business in Alaska.[142]

South Dakota enacted the community property trust legislation in 2016.[143] Spouses in a marriage may classify all or any of their property as "special spousal property" by transferring property to a South Dakota special spousal trust, and by expressly declaring in the trust that the property is community property.[144] As opposed to Alaska, South Dakota directly references IRC §1014(b)(6):

> For purposes of the application of § 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. § 1014(b)(6), as of January 1, 2016, a South Dakota special spousal trust is considered a trust established under the community property laws of South Dakota. For purposes of this chapter, the term, special spousal property, means community property for those purposes. Community property as classified by a jurisdiction other than South Dakota transferred to a South Dakota special spousal trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than South Dakota retains its character as community property to the extent otherwise provided by South Dakota law.[145]

The reasoning for choosing between Alaska and South Dakota as the situs of the trust, where community property is the major consideration, has to do with asset protection as arguably South Dakota has more recent legislation on point and has a "greater" asset protection trust ranking.[146]

With forming trusts to hold as community property, attorneys need to be aware of the argument that "[n]o reported cases or IRS rulings have addressed the federal income tax capital gains step-up of basis in property held in an Alaska community property trust or a Special Spousal Trust similar to that permitted in South Dakota."[147] Thus, attorneys in South Dakota take the position that because the more recent legislation in South Dakota makes specific reference to community property for purposes of section 1014(b)(6) of the Code, the surviving spouse's receipt of a step-up in basis on the property held in the community property trust by the decedent and the surviving spouse should by respected by the IRS.[148] Of the foreign jurisdictions discussed in this outline, only the Cook Islands and Nevis appear to have addressed community property.[149]

4. *Creation of discretionary trust for the benefit of children or grandchildren*. Discretionary and self-settled trusts created in Alaska, Delaware, Nevada and South Dakota offer various protections from exception creditors. The issue becomes in all of these states whether certain exception creditors, mainly for alimony and child support, can obtain access to the assets of trusts created in each of these four DAPT states. Some states have favorable caselaw for DAPTs and discretionary trusts; others do not.[150] It should be noted that the trend moving could be to allow some access, via use of the trust assets in an alimony or support calculation, using a judge's powers in equity, to the extent beneficiaries live off the trust assets, as oppose to having mere access to the trust.[151]

If a trust has a transfer restriction as provided in § 34.40.110(a), Alaska Statutes, and a beneficiary of such trust divorces or dissolves his or her marriage, such beneficiary's interest in the trust will not be considered property subject to division under § 25.24.160 of the Alaska Statutes or § 25.24.230 of the Alaska Statutes or a part of a property division under § 25.24.160 of the Alaska Statutes or § 25.24.230 of the Alaska Statutes.[152] Unless otherwise agreed in writing by the parties to the marriage, the foregoing does not apply to a settlor's interest in a self-settled trust with respect to assets transferred to the trust after the settlor's marriage or within 30 days prior to the marriage unless the settlor provides written notice to the other party to the marriage of the transfer.[153]

Delaware allows residents and non-residents to create self-settled trusts pursuant to the Qualified Dispositions in Trust Act ("QDTA).[154] Section 3573 of the QDTA provides that the limitations on creditor actions for qualified dispositions under the QDTA do not apply to any person to whom a donor-settlor owes a debt because of an agreement or a court order for the payment of support or alimony to such donor's spouse, former spouse or children, or for a division or distribution of property in favor of a donor-settlor's spouse or former spouse (but only to the extent of such debt).[155] The provisions of the QDTA do not apply to any person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a donor-settlor if such death, injury or damage is at any time determined to have been caused in whole or in part by the actions or an omission of either a donor-settlor or another person for whom a donor is or was vicariously liable (but only to the extent of such claim).[156] For discretionary trusts, Delaware law provides that a creditor of a beneficiary of a trust has only such rights with respect to such interest as is granted to such creditor by the terms of the trust instrument.[157]

Like the statutes in Alaska and Delaware described above, Nevada similarly allows for the creation of self-settled asset protection trusts.[158] Nevada law differs in that it has the shortest applicable period for a creditor to challenge a transfer to an asset protection as a fraudulent conveyance among states with DAPT legislation.[159] Some commentators view Nevada as the strongest DAPT jurisdiction and trust jurisdiction in the U.S.[160]; others have pointed out flaws.[161] Third party discretionary trusts created under Nevada law provide similar strong protections. In Nevada, there is no statutory allowance for exception creditors, and Nevada specifically disallows claims of spouses, former spouses, children, or dependents. Section 166.090, Nevada Revised Statutes ("NRS"), provides that a "[p]rovision for the beneficiary will be for the support, education, maintenance and benefit of the beneficiary alone, and without reference to or limitation by the beneficiary's needs, station in life, or mode of life, or the needs of any other person, whether dependent upon the beneficiary or not."[162] Section 166.080, NRS, adds that "[t]he beneficiary or beneficiaries of such trust shall be named or clearly referred to in the writing. No spouse, former spouse, child, or dependent shall be a beneficiary unless named or clearly referred to as a beneficiary in the writing."[163] A trustee's exercise of discretion in a Nevada discretionary trust can only be reviewed if such trustee acts "dishonestly, with improper motive or fails to act."[164] "Regardless of whether a beneficiary has an outstanding creditor, a trustee of a discretionary interest may directly pay any expense on the beneficiary's behalf and may exhaust the income and principal of the trust for the benefit of such beneficiary."[165] Further, creditors will have a tough time trying to get a Nevada court to force a trustee to make a distribution out of a discretionary trust as Nevada law provides:

> 1. A creditor may not exercise, and a court may not order the exercise of:
> (a) A power of appointment or any other power concerning a trust that is held by a beneficiary;

> (b) Any power listed in NRS 163.5553 that is held by a trust protector as defined in NRS 163.5547 or any other person;
> (c) A trustee's discretion to:
> (1) Distribute any discretionary interest;
> (2) Distribute any mandatory interest which is past due directly to a creditor; or
> (3) Take any other authorized action in a specific way; or
> (d) A power to distribute a beneficial interest of a trustee solely because the beneficiary is a trustee...
> 3. A settlor may provide in the terms of the trust instrument that a beneficiary's beneficial interest may not be transferred, voluntarily or involuntarily, before the trustee has delivered the interest to the beneficiary.[166]

Absent a fraudulent transfer, under South Dakota law, no type of action, including an action to enforce a judgment entered by a court or other adjudicative authority, may be filed at law or in equity for attachment or any other remedy against any property that is the subject of a qualified disposition or for the avoidance of a qualified disposition unless the action is filed pursuant to chapter 54-8A of the Uniform Fraudulent Transfer Act.[167] Notwithstanding sections 55-16-9 to 55-16-14, the following persons may bring an action against a trust subject to a qualified disposition: (1) a person who is owed alimony or child support payments to the extent of such debt; and (2) any person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a transferor and such death, personal injury or property damage is determined to be caused by the transferor's act or omission or the transferor is vicariously liable.[168] Section 55-1-24(6), South Dakota Codified Laws ("SDCL") states a creditor cannot reach assets in a discretionary trust and defines reach as follows: "to subject the distribution to a judgment, decree, garnishment, attachment, execution, levy, creditor's bill or other legal, equitable, or administrative process, relief, or control of any court, tribunal, agency, or other entity as provided by law."[169] Section 55-1-35, SDCL, states that a declaration in a trust that the intent of the beneficiary "shall be held subject to a spendthrift trust" is sufficient to restrain voluntary or involuntary alienation.[170]

> Regardless of whether a beneficiary has any outstanding creditor, a trustee of a spendthrift trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a spendthrift. trust.[171]

South Dakota law indicates that a beneficiary's support interest does not rise to the level of a property interest.[172] "If the trust contains a spendthrift provision, notwithstanding the beneficiary's right to force a distribution with regard to a mandatory or support interest, no creditor may force a distribution [nor reach a present or future support distribution] with regard to a mandatory or support interest."[173] Even if a beneficiary has an outstanding creditor, the trustee of a mandatory or support interest "may directly pay any expense on behalf of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a mandatory or support interest."[174]

Further, a discretionary interest is explicitly defined as a "mere expectancy" in South Dakota: "[n]o creditor may force a distribution with regard to a discretionary interest. No creditor, may require the trustee to exercise the trustee's discretion to make a distribution with regard to a discretionary interest."[175] A South Dakota court cannot:

> [O]rder a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.[176]

The choice between DAPT jurisdictions will come down to cost, relationships and law. For a client where community property is the chief concern, Delaware is not the jurisdiction to use. Where a trust in perpetuity is desired, South Dakota might be the best jurisdiction for such purposes. Where the potential beneficiaries of a client's trust have exception creditors, Nevada may be most appealing.

Foreign jurisdictions, as previously noted, were the frontrunners for self-settled asset protection trusts. Beside for diversification of assets, where the client is looking to keep money in trust as a rainy day fund or include additional layers of complexity for future unforeseeable creditors, a foreign trust is the perfect addition.

Nevis contains specific legislation permitting the establishment of a so called self-settled "asset protection" trust. Section 47, Nevis International Exempt Trust Ordinance ("NIETO"), provides a list of interests and powers that a settlor can retain over a Nevis trust without a trust being declared invalid.[177] The list incorporates many of the types of trusts used in the U.S. for estate planning purposes, such as GRATs and GRUTs which are permitted under the statutes of most of the states that allow self-settled asset protection trusts.[178] The hallmark of Nevis trust legislation is section 24, NIETO, the fraudulent transfer rule.[179] Modeled after legislation from the Cook Islands, subsection (3) of section 24, NIETO, implements a fixed one year window for a creditor to file a fraudulent transfer claim, beginning with the date on which the creditor's cause of action accrues.[180] Additionally, subsection (5)(b) of section 24, NIETO, expands the list of powers that a settlor can retain without having an intent to defraud a creditor imputed to the settlor.[181]

For discretionary trusts, Nevis specifically provides that trust rights are not a property interest or an enforceable right, but rather is a mere expectancy that a creditor of a beneficiary (including the settlor) cannot attached, garnish or otherwise reach.[182] In the absence of such a provision, a creditor of a beneficiary could attempt to obtain a court order to garnish future distributions made to or for the benefit of a beneficiary. Such garnishment could result in a trustee being unable to make any distributions for the benefit of a beneficiary. However, section 8A, NIETO, specifically permits a trustee to make payments to third parties on behalf of the

beneficiary without incurring any liability to a creditor, and prevents even the remote possibility of any such attachment, garnishment or interference.[183]

The Cook Islands has specific legislation permitting the establishment of a self-settled trust. The act allowing such establishment is referred to as the International Trusts Act 1984 (the "Cook Islands Act"). Subsection (1) of section 13F, Cook Islands Act, contains a provision specifically recognizing the validity and enforceability of a spendthrift provision in the trust.[184] Subsection (g) of section 13C, Cooks Islands Act, provides that a settlor may also be a beneficiary of the trust and the settlor's interest will not affect the validity of the trust.[185] The settlor can be either the sole beneficiary of the trust or one of multiple beneficiaries.[186] Under section 13K, Cook Islands Act, no action may be brought in the Cook Islands to set aside an international trust or a transfer to an international trust or to seek relief under section 13B of the act (for fraudulent transfers) unless the action is brought within two years of the date of the settlement or disposition.[187] Under section 13D, Cook Islands Act, foreign judgments against settlors, donors, trustees, protectors or beneficiaries of international trusts will not be recognized.[188] Taking into consideration the laws of Nevis, Belize and the Bahamas, the Cook Islands is viewed as one of the most difficult jurisdictions for a creditor to attack a trust and gain access to its assets.[189] Even mainstream newspaper articles have recognized the protections of a Cook Islands Trust.[190]

Belize is another popular trust jurisdiction. The Belize Trusts Act of 2000 was amended by the Trusts (Amendment) Act, 2007 (collectively the "Belize Acts"). Subsection (2) of section 9, Part II, Belize Acts, provides that a settlor may also be a beneficiary, trustee or protector of the trust.[191] Section 12, Belize Acts, contains a provision specifically recognizing the validity and enforceability of a spendthrift provision in the trust.[192] Under section 7, Belize Acts, without any

waiting period, a Belizian Court cannot set aside a trust created under its laws, recognize any claim against the assets of the trust, or the order of a court of another jurisdiction respecting the trust, with regard to marriage, divorce, forced heirship, and creditor claims in the event of a settlor's insolvency.[193] This applies notwithstanding Belizian fraudulent transfer laws, bankruptcy laws, and international reciprocity laws according to the Law of Property Act section 149, the Belizian Bankruptcy Act section 42 and the Belizian Reciprocal Enforcement of Judgments Act.[194] The Bahamas similarly allows self-settled trusts, *albeit* its legislation was recently updated.[195]

5. *Using a domestic trust as opposed to a foreign trust*. Proponents of DAPTs take the position that states such as Alaska, Delaware, Nevada and South Dakota offer many of the same creditor protection opportunities available from the Cook Islands, Belize, the Bahamas and Nevis at less cost, without going offshore (*i.e.*, to a less developed island country), and with the political and economic stability of the U.S. While such position can be questioned, those states that have adopted self-settled trust laws have positioned themselves high on the list of jurisdictions in which to establish a trust designed mainly for favorable asset protection. Such a state may be particularly useful for a client who does not want to place the ownership and control of assets in the hands of a person or entity that is foreign or if the size of the estate does not warrant the expense and complexity of a foreign trust. Additionally, some of the states that have adopted legislation favorable for DAPTs also have no income tax, and it is possible for such trusts to accumulate income free of state income tax.[196] This absence of income tax on trust income not currently distributed to trust beneficiaries can have a dramatic effect on the net amount received by heirs. In contrast, foreign trusts have additional tax reporting not present with DAPTs. Potential advantages of using a DAPT include reduced set-up costs, possible state

income tax savings and no extensive tax compliance which is required of foreign trusts. Ultimately, when considering an asset protection trust, the specific objectives should be identified to facilitate the decision as to whether a foreign trust or DAPT will serve to meet the objectives most effectively when considering cost and overall complexity.

6. *Creation of single-member LLC*. Besides single-member LLC charging order protection and specific guidance that a charging order is the sole and exclusive remedy for a member's interest, other considerations for LLCs are such creation state's court accessibility, state registration and annual fees, and state tax rates. States with single-member protection include Alaska, Delaware, Nevada, New Jersey, Oklahoma, South Dakota, Texas and Wyoming.[197] It should be noted that certain states go to greater lengths to clarify that the exclusive remedy applies, with specificity, to single-member as well as multiple-member LLCs.[198]

For foreign LLCs and other similar entities, other than annual fees and registered agent fees, the other consideration prior to creating such entity is the Federal tax filings applicable to such entities, and reporting for any foreign bank accounts attached to such entity. The most recent legislation addressing LLCs and charging orders is the Nevis Limited Liability Company (Amendment) Ordinance, 2015, that made improvements such as the addition of: fraudulent transfer provisions governing assets contributed to a Nevis LLC; language prohibiting enforcement of foreign judgments against member equity; and enhanced limitations on creditor remedies.[199]

I. **Unlicensed practice of law**

In following up on the discussion above on using trusts and entities in other jurisdictions, domestic or foreign, attorneys need to realize that they cannot practice law in a jurisdiction

where such attorney is not licensed.[200] While an attorney can certainly read and interpret laws, it follows that unless that attorney is licensed in such jurisdiction, the attorney should not be drafting trust documents or preparing operating agreements without the review and approval of an attorney practicing law in such jurisdiction.

For example, if a Florida resident client, after a thorough review of the planning options and extensive due diligence showing the client passes a background check and is solvent (among other considerations) would like to create a Nevada dynasty trust for the benefit of the client's grandchildren, while the Florida attorney could draft the trust, the client should not sign the trust until an attorney licensed in Nevada has reviewed and approved the trust. Other practicing estate planning attorneys may quiver with the above ascertain, but is it not better to be safe than sorry? Who is the client going to sue if the terms in the trust instrument do not comply with Nevada trust law?

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[1] U.S. Chamber of Commerce, *U.S. Chamber Institute for Legal Reform: Florida*, http://www.instituteforlegalreform.com/states/florida ("Florida scores poorly in all of the key element categories, but particularly with regard to the competence and impartiality of trial judges–where it ranked 48th").
[2] Thomas C. Frohlich, *Top states with the most fraud complaints*, USA Today (Mar. 8, 2014), *available at* https://www.usatoday.com/story/money/business/2014/03/08/states-with-most-fraud-complaints/6173855/.
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[6] Fla. Stat. § 324.021(9)(b)(3).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] § 6(a), Art. VII, Fla. Constitution.
[11] § 4(a), Art. X, Fla. Constitution.
[12] § 4(c), Art. X, Fla. Constitution.
[13] § 4, Art. X, Fla. Constitution.
[14] § 4(a), Art. X, Fla. Constitution.
[15] *Id.*
[16] § 4(a)(1), Art. X, Fla. Constitution.
[17] *Id.*
[18] § 6(a), Art. VII, Fla. Constitution.

[19] *See e.g.*, Collier County Property Appraiser, *Homestead Exemption*, http://www.collierappraiser.com/Main_Homestead/MainHomestead.html?ccpaver=1707221124 (last visited Aug. 17, 2017) ["Appraiser"].
[20] § 4(b), Art. X, Fla. Constitution.
[21] § 4(a)(2), Art. X, Fla. Constitution.
[22] *See Bank Leumi Trust Co. v. Lang*, 898 F. Supp. 883 (S.D. Fla. 1995); *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001).
[23] Fla. Stat. § 222.13(1).
[24] *Id.*
[25] *See id.*
[26] *See* Fla. Stat. § 222.14.
[27] *See* Fla. Stat. § 222.21(2)(a)3(c).
[28] *See* Fla. Stat. § 222.21(2)(a).
[29] *Estate of Berlin v. Pecora*, 968 So.2d 47 (Fla. 4th D.C.A. 2007); *In re McRae*, 282 B.R. 704 (2002); *In re Koesling*, 210 B.R. 487 (1997); and *Amsouth Bank of Florida v. Hepner*, 647 So.2d 907 (Fla. 1st D.C.A. 1994).
[30] See *Bridgeview Bank Group v. Callaghan*, 84 S.3d 1154 (Fla. 4th D.C.A. 2012); *In re Sinnreich*, 391 F.3d 1295 (Cir. 11, 2004); *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45 (Fla. 2001); *Neu v. Andrews*, 528 So. 2d 1278 (Fla. 4th D.C.A. 1988); *Losey v. Losey*, 221 So.2d 417 (Fla. 1969); and *Winters v. Parks*, 91 So.2d 649 (Fla. 1956).
[31] *Estate of Berlin v. Pecora*, 968 So.2d 47 (Fla. 4th D.C.A. 2007); *Cacciatore v. Fisherman's Wharf Realty Ltd. P'ship*, 821 So.2d 1251 (Fla. 4th D.C.A. 2002); *Colclazier v. Colclazier*, 89 So.2d 261 (Fla. 1956); *Baumgardner v. Kennedy*, 343 So.2d 1323 (Fla. 3rd D.C.A. 1977); *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932); *Knapp v. Fredricksen*, 148 Fla. 311, 4 So. 2d 251 (1941); *Bamber v. Bamber*, 216 So.2d 806 (Fla. 3rd D.C.A. 1968); *Bendl v. Bendl*, 246 So.2d 574 (Fla. 3rd D.C.A. 1971); *Anderson v. Trueman*, 100 Fla. 727, 130 So. 12 (1930); *Logan Moore Lumber Co. v. Legato*, 100 Fla. 1451, 131 So. 381 (1930); and *Winters v. Parks*, 91 So.2d 649 (Fla. 1956).
[32] Fla. Stat. § 726.105(1).
[33] Fla. Stat. § 726.108(1).
[34] Fla. Stat. § 726.110(1).
[35] Fla. Stat. § 726.110(2)-(3).
[36] *See* Fraudulent Transfer Act (1984), Enactment Status Map, http://www.uniformlaws.org/Act.aspx?title=Fraudulent%20Transfer%20Act%20(1984).
[37] Fla. Stat. § 726.101.
[38] *See* George Karibjanian, J.J. Wehle, Jr., and Robert L. Lancaster, History Has Its Eyes on UVTA - A Response to Asset Protection Newsletter #319, LISI Asset Protection Newsletter #320 (Apr. 18, 2016); Karibjanian *et all*, *George Karibjanian, J.J. Wehle, Robert Lancaster & Michael Sneeringer on the Uniform Voidable Transactions Act and its Effect on the Estate Planning Community*, LISI Asset Protection Newsletter #316 (Mar. 14, 2016).
[39] Fla. Stat. § 222.30(1).
[40] Fla. Stat. § 222.30(2).
[41] *Id.*
[42] Fla. Stat. § 222.30(3).
[43] Fla. Stat. § 222.30(4).
[44] Fla. Stat. § 222.30(6).
[45] *See Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001); *Conseco Servs, LLC v. Cuneo*, 904 So.2d 438 (Fla. App. 3rd Dist. 2005).
[46] *Id.*
[47] Adapted from Jonathan E. Gopman & Michael A. Sneeringer, *Trust Law & Planning Under the Florida Trust Code*, LISI Asset Protection Planning Newsletter #274, (Dec. 4, 2014), http://www.LeimbergServices.com; and Stephan R. Leimberg, et al., *The Tools & Techniques of Trust Planning* (National Underwriter 1st ed.) (2017) ["Tools & Techniques"].
[48] *See* Fla. Stat. § 736.1303.
[49] *See* Fla. Stat. § 736.0505.
[50] Fla. Stat. § 736.0505(1).
[51] Fla. Stat. § 736.0505(1)(a).
[52] *In re Cocke*, 371 B.R. 554 (Bankr. M.D. Fla. 2007).
[53] Fla. Stat. § 736.0505(1)(b).

[54] *Id.*
[55] *See* Unif. Tr. Code § 505, comments.
[56] Fla. Stat. § 736.0505(1)(c).
[57] Fla. Stat. § 736.0505(3).
[58] See I.R.C. § 2044.
[59] *U.S.* v. Grace Estate, 395 U.S. 316, 324, 325 (1969).
[60] For an excellent discussion of this issue see Gideon Rothschild & Eli Akhavan, *Creditor Protection – The Reciprocal Issue for Reciprocal Trusts (It's Not Just About Estate Taxes)*, 38 Est. G. & Tr. Jrnl. 187 (Mar.-Apr. 2013). See also Security Trust v. Sharp, 77 A.2d 543 (Del. Ch. 1950); Ariz. Rev. Stat. Ann. §14-10505(E)(4); and Restatement (Third) of Trusts, §58, cmt. f, Reporter Note's cmt. f.
[61] *See* I.R.C. §§ 2523(f)(4) & 6075(b). These sections of the Code provide the rules and time limitations for making the QTIP election for an *inter vivos* QTIP trust. All references to the Internal Revenue Code or the "Code" are to the Internal Revenue Code of 1986, as amended.
[62] *See* I.R.C. § 2523(f).
[63] See Barry A. Nelson & Richard S. Franklin, *Inter Vivos QTIP Trusts Could Have Unanticipated Income Tax Results to Donor Post-Divorce*, LISI Estate Planning Newsletter #2244 (Sept. 15, 2014) http://www.leimbergservices.com.
[64] *See* Ariz. Rev. Stat. § 14-10505(E); Del. Code Ann. Tit. 12 § 3536(C)(2); Ky. Rev. Stat. Ann. § 381.180(8)(a); Md. Est. & Tr. Code Ann. § 14-116(a)(1)-(2); Mich. Comp. Laws § 700.7506(4); N.C. Gen. Stat. § 36C-5-505(c); Or. Rev. Stat. § 130.315(4); S.C. Code Ann. § 62-7-505(b)(2); Tex. Prop. Code § 112.035(g); Va. Code Ann. § 64.2-747(B)(2); Wyo. Stat. Ann. § 4-10-506(e). Additionally, it may also be possible to utilize an inter vivos QTIP trust plan in a state with laws authorizing self-settled asset protection trusts).
[65] N.C. Gen Stat. § 36C-5-505. *See also* Ariz. Rev. Stat. § 14-10505(E); Ky. Rev. Stat. Ann. § 381.180(8)(a)(3); and Tex. Prop. Code § 112.035(g)(3)(A).
[66] *See* discussion at Barry A. Nelson, Asset Protection & Estate Planning – Why Not Have Both? in the Forty-Sixth Annual Heckerling Institute on Estate Planning at 17-1 (Matthew Bender 2012).
[67] *See* Fla. Stat. § 605.0304.
[68] *See* Fla. Stat. § 605.04093.
[69] *See* Fla. Stat.§ 605.0403.
[70] See Fla. Stat. § 605.0503(3).
[71] *See* Fla. Stat. § 605.0503(4).
[72] Fla. Stat. § 620.1303.
[73] Fla. Stat. § 620.1305.
[74] *See* Fla. Stat. § 620.1703(3).
[75] *See* Fla. Stat. § 620.1703(1).
[76] *See* Fla. Stat. § 736.0505.
[77] *See* Fla. Stat. § 689.225.
[78] *See Berlinger v. Casselberry*, 133 So. 3d 961, 964 (Fla. 2d DCA 2013).
[79] Jay D. Adkisson et. all, *Recent Developments in Charging Orders*, Business Law Today – ABA, Feb. 2, 2013, https://www.americanbar.org/publications/blt/2013/02/04_adkisson.html
[80] *See Peach Reo, LLC v. Rice*, No. 2:12-cv-02752-SHM, 2017 U.S. Dist. LEXIS 106853, at *12-13 (W.D. Tenn. July 11, 2017).
[81] Fla. Stat. 620.1404(1).
[82] Portions of this chapter are adapted from the author's materials written for Tools & Techniques, *supra* note 47 at 303.
[83] *See* Notice 97-24, 1997-16 I.R.B. 6, Apr. 21, 1997, *available at* https://www.irs.gov/pub/irs-drop/pub_n_97.24.pdf.
[84] Conn. Bar Assoc, *Informal Opinion 91-22* (Dec. 5, 1991).
[85] *See* Rothschild et. all, *The Ethics of Asset Protection Planning: An Oxymoron?*, as presented to the America Bar Association Real Property, Probate and Trust Law Section at the Spring 2005 Meeting in San Diego, CA at 456-57 (May 5, 2005) *available at* https://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2006/11_wealth_planning_group.authcheckdam.pdf.
[86] San Diego County Bar Assoc., Ethics Opinion 1993-1, https://www.sdcba.org/index.cfm?Pg=ethicsopinion93-1.
[87] *Id.*

[88] *Id.*
[89] *Iowa Supreme Court Attorney Disciplinary Board v Ouderkirk*, 845 N.W. 2d 31 (Iowa 2014).
[90] *Id.* at 43.
[91] *Id.*
[92] *Id.* at 44 (citing the Iowa Rules of Processional Comment 32:1.2, comment 1).
[93] Alaska and Delaware specifically negate the potential for attorney liability to a client's creditors in certain instances, *see, e.g.*, Alaska Stat. § 34.40.110(f); Del. Code tit. 12 §3572(e).
[94] See Freeman v. First Union National Bank, 865 So.2d 1272 (Fla. 2004); Danzas Taiwan, Ltd. v. Freeman, 28 Fla. L. Weekly D 1163 (3d DCA 2003); BankFirst v. UBS Paine Webber, 842 So 2d 155 (5th DCA 2003); Yusem v. South Florida Water Management District, 770 So. 2d 746 (4th DCA 2000).
[95] 865 So.2d 1272 (Fla. 2004).
[96] *Id.* at 1273-74.
[97] *Id.* at 1274.
[98] *Id.* at 1275.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1277.
[102] For examples of other potential liability, *see e.g.*, Elie v. Smith, 2011 WL 9349985 (Cal. Super. Napa, Oct. 13, 2011); In re Cutuli, 2013 WL 5236711 (S.D. Fla., Sept. 16, 2013); Cevdet Aksut v. Cavusoglu, 2015 WL 4318131 (D.N.J., Unpublished, July 14, 2015), Trustee v. Rupprecht, Trustee's Second Amended Complaint (Cal.Super.Napa., Feb. 6, 2013). For a discussion of this group of cases see Adkisson & Slenn, "In re Cutuli: $10 Million in Punitive Damages Result After Financially-Distressed Clients Seek Asset Protection Advice," LISI Asset Protection Planning Newsletter #229 (Oct. 10, 2013); & Gassman & Lawrence, "Imposing Punitive Damages on Fraudulent Transfer," LISI Asset Protection Planning Newsletter #235 (Jan. 15, 2014).
[103] 493 F. App'x 11 (11th Cir. 2012).
[104] *Id.* at 12.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 12.
[110] *Id.*
[111] *Id.* at 13.
[112] § 2, Art. I, Fla. Constitution.
[113] Fla. Stat. § 736.0404.
[114] UTC § 404, comment.
[115] *In re Niroomand*, Nos. 09-12141-BKC-AJC, 11-1676-BKC-AJC-A, 2012 Bankr. LEXIS 3591, *2-4 (Bankr. S.D. Fla. Aug. 2, 2012).
[116] Restatement (Second) of Trusts § 156(2) (1959). See also Restatement (Third) of Trusts § 25.
[117] Restatement (Third) of Trusts § 58(2) (2003).
[118] See *e.g.*, Stat. 3 Hen. VII, c.4. (1487), providing, "[a]ll deeds of gift of goods and chattels, made or to be made in trust to the use of that person or persons that made the same deed or gift, be void and of none effect."
[119] *See generally* the Cook Islands International Trust Act (1984 as amended); the Nevis International Exempt Trust Ordinance (1994 as amended); Trusts (Jersey) Law (1984 as amended); and the two statute format of the Bahamian Fraudulent Disposition Act (1991) and the Bahamian Trusts (Choice of Governing Law) Act (1989).
[120] John E. Sullivan III, *Article: Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts*, 23 Del. J. Corp. L. 423, 432 (1998).
[121] *See* Alaska Stat. § 34.40.110.
[122] Alaska, Delaware, Utah, Rhode Island, Nevada, Missouri, South Dakota, Tennessee, Wyoming, New Hampshire, Hawaii, Virginia, Ohio, Oklahoma, Mississippi, West Virginia and Michigan.
[123] Oshins, *8th Annual Domestic Asset Protection Trust State Rankings Chart…with Links to Statutes!*, LISI Asset Protection Newsletter (Apr. 2017), chart available at http://www.oshins.com/images/DAPT_Rankings.pdf.
[124] *See* David G. Shaftel, *Eleventh Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes*, Aug. 2017, *available at* http://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf.

[125] *See e.g.* Int'l Tr. Act § 2.
[126] S.D. Codified L. § 43-5-8.
[127] Alaska Stat. § 34.27.051.
[128] 2 Del. Code § 503.
[129] Nev. Rev. Stat. § 111.1031.
[130] Rule Against Perpetuities (Abolition) Act, 2011
[131] Nevis Int'l Exempt Tr. Ordinance § 5.
[132] Belize Tr. Act § 6.
[133] Int'l Tr. Act § 6(1).
[134] *See* I.R.C. § 1014(b).
[135] *See* I.R.C. § 1014(a); Philip J. Hayes & Nicole M. Pearl, *Community Property Issues in Estate Planning*, TSVB30 ALI-ABA 1 (Feb. 2014).
[136] Paul L. Caron and Jay A. Soled, *New Prominence of Tax Basis in Estate Planning*, 150 Tax Notes 1569 (Mar. 28, 2016).
[137] Alaska Stat § 34.77.10 et seq.
[138] Alaska Stat. § 34.77.060.
[139] Alaska Stat. § 34.77.030(c).
[140] Alaska Stat. § 34.77.040.
[141] Alaska Stat. § 34.777.060(b).
[142] *See* Alaska Stat § 34.77.110.
[143] *See* S.D. Codified Laws § 55-17-5.
[144] *See e.g.*, S.D. Codified Laws ch. 55-17.
[145] S.D. Codified Laws § 55-17-5.
[146] *See* discussion in William D. Lipkind & Terry Prendergast, *New South Dakota Special Spousal Trust*, Steve Leimberg's Estate Planning Newsletter #2433, July 7, 2016, www.leimbergservices.com; Steve Oshins, *8th Annual Domestic Asset Protection Trust Rankings Chart* (Apr. 2017) *available at* https://docs.wixstatic.com/ugd/b211fb_27c14ad60a414a2986e667d0fcd79049.pdf.
[147] Terry Prendergast, *South Dakota Special Spousal Property Trusts: South Dakota "Steps-Up" to the Plate and Hits a Home Run for Surviving Spouses*, 61 S.D. L. Rev. 431, 433 (2016).
[148] *Id.*
[149] Int'l Tr. Act §13J; Nevis Int'l Exempt Tr. Ordinance § 56. *See Reilly v. Reilly*, 671 So. 2d 1274, 1276, (La.App. 4 Cir. 1996) ("No community property law exists in the Bahamas.")
[150] Compare the facts and outcomes of *Klabacka v. Nelson*, 394 P.3d 940 (Nev. 2017); *In re Mortensen*, 2011 WL 5025249 (Bankr. D. Alaska); *Parrott v. Sasaki*, Del. Ch., C.A. No. 7227-VCL (Filed Feb. 7, 2012); *In re Huber*, 493 B.R. 798 (Bankr. W.D. Wash 2013); *Dahl v. Dahl*, 345 P.3d 566 (Utah 2015).
[151] *See e.g.*, *Pfannenstiehl v. Pfannenstiehl*, 55 N.E.3d 933 (Mass. 2016).
[152] Alaska Stat. § 34.40.110(l).
[153] *Id.*
[154] *See* Del. Code Ann. tit. 12, part V, chap. 35, subchap. VI.
[155] Del. Code Ann. tit. 12 § 3573(1).
[156] Del. Code Ann. tit. 12 § 3573(2).
[157] *See* Del. Code Ann. tit. 12 § 3536. *See also Garretson v. Garretson*, 306 A.2d 737 (Del. 1973).
[158] *See* Nev. Rev. Stat. §§166.010-166.170.
[159] Nev. Rev. Stat. § 166.170.
[160] *See* Oshins, *supra* note 33.
[161] *See* Sitkoff & Horowitz, Unconstitutional Perpetual Trusts, 67 Vand. L. Rev. 1769 (2014); Borowsky & Wallace, In re Garretson, LISI Asset Protection Newsletter #221 (Feb. 28, 2013). *But see* Oshins, Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines: Unconstitutional Perpetual Trusts - Not So Fast Says the Nevada Supreme Court!, LISI Asset Protection Newsletter #2297 (Apr. 6, 2015).
[162] Nev. Rev. Stat. § 166.090.
[163] Nev. Rev. Stat § 166.080.
[164] Nev. Rev. Stat. § 163.419(1).
[165] Nev. Rev. Stat. § 163.419(4).
[166] Nev. Rev. Stat. § 163.417(1) and (3).
[167] S.D. Codified Laws § 55-16-9.

[168] S.D. Codified Laws § 55-16-15.
[169] S.D. Codified Laws § 55-1-24(6).
[170] S.D. Codified Laws § 55-1-35.
[171] *Id.*
[172] S.D. Codified Laws § 55-1-42.
[173] *Id.*
[174] *Id.*
[175] S.D. Codified Laws § 55-1-43(1)-(2).
[176] S.D. Codified Laws § 55-13A-I05(a).
[177] Nevis Int'l Exempt Tr. Ordinance § 47.
[178] *Id.*
[179] *See* Nevis Int'l Exempt Tr. Ordinance § 24.
[180] *Id.*
[181] *Id.*
[182] Nevis Int'l Exempt Tr. Ordinance §8A.
[183] Nevis Int'l Exempt Tr. Ordinance §8A(9).
[184] Int'l Tr. Act § 13F(1).
[185] Int'l Tr. Act § 13C(g).
[186] *Id.*
[187] Int'l Tr. Act § 13K.
[188] Int'l Tr. Act § 13D.
[189] *See* Brooke Harrington, Inside the Secretive World of Tax-Avoidance Experts, The Atlantic (Oct. 26, 2015) available at http://www.theatlantic.com/business/archive/2015/10/elite-wealth-management/410842 ("No litigant on earth has been able to break a Cook Islands trust, including the U.S. government, which has repeatedly been unable to collect on multi-million-dollar judgments against fraudsters convicted in federal court.")
[190] For a non-law review level article on the Cook Islands as a trust jurisdiction, see Leslie Wayne, Cook Islands, a Paradise of Untouchable Assets, N.Y. TIMES, Dec. 14, 2013, available at http://www.nytimes.com/2013/12/15/business/international/paradise-of-untouchable-assets.html. For a discussion of Cook Islands law, see Patricia Donlevy-Rosen, *Offshore Trusts: Why They Work Well*, LISI Asset Protection Planning Newsletter #306 (September 16, 2015) at http://www.leimbergservices.com.
[191] Belize Tr. Act § 9(2).
[192] Belize Tr. Act § 12.
[193] Belize Tr. Act § 7.
[194] *Id.*
[195] *See* Jerry Wolf, *Jerry Wolf & Amendments to Bahamian Trust Law Enhance Gifting to Offshore, Self-Settled Spendthrift Trusts*, Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #338, Feb. 13, 2017, http://leimbergservices.com.
[196] Of the states of Alaska, Delaware, Nevada and South Dakota, only Delaware has a state income tax. *See* Morgan Scarbor, State Individual Income Tax Rates and Brackets for 2017, Tax Foundation, Mar. 9, 2017, https://taxfoundation.org/state-individual-income-tax-rates-brackets-2017/.
[197] *See* Alaska Stat. §10.50.380; Nev. Rev. Stat. § 86.401; N.J. Stat. § 42:2B-45; 18 Okl. St. § 2034; S.D. Codified Laws § 47-34A-504; Tex. Business Organizations Code § 101.112; Wyo. Stat. § 17-29-503, for examples of states that provide statutory language that clearly provides that a charging order is the exclusive remedy and other remedies, such as foreclosure, are not available for creditors of LLCs. Other states, such as Delaware, have exclusive remedy statutes but have only case law and legislative history prohibiting foreclosure. *See also New Times Media LLC v. Bay Guardian Co.*, 2010 U.S. Dist. LEXIS 64395 (D. Del. 6/28/10). For a chart of state charging order laws updated frequently, see Carter G. Biship, *Fifty State Series: LLC Charging Order Statute Table*, Legal Studies Research Paper Series, Research Paper 10-03, Social Science Research Network, Sept. 6, 2017, *available at* http://ssrn.com/abstract=1542244.
[198] *See e.g.*, Nev. Rev. Stat. 86.401(2)(a) ("whether the limited-liability company has one member or more than one member.").
[199] For a discussion on the Nevis Limited Liability Company (Amendment) Ordinance, see Gary A. Forster, *The New Nevis LLC*, 31 Prob. & Prop. (Sept./Oct. 2017), available at https://www.americanbar.org/groups/real_property_trust_estate/publications/probate_property_magazine_2012/2017/september_october_2017/ppv31-5-article-new-nevis-llc.html.

[200] *See e.g.*, *Fla. Bar Re Advis. Op.-Nonlawyer Prep. of Living Trs.*, 613 So. 2d 426 (Fla. 1992).

The Use of Estate Planning and Asset Protection to Protect in Cases of Divorce

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The Use of Estate Planning and Asset Protection to Protect in Cases of Divorce

Prenuptial and Postnuptial Agreements

- A prenuptial agreement is an agreement entered into by the parties contemplating marriage, before the marriage. It sets forth the rights and obligations of each party in the event of death or divorce, as well as during the marriage.
- A postnuptial agreement is an agreement entered into by the parties after they have married that sets forth the rights and obligations of each party in the event of death or divorce, as well as during the marriage.
  - Can be used when no divorce is contemplated or when a divorce is not imminent.
  - If a divorce is imminent, postnuptial agreements are referred to as separation agreements.
- Before *Posner v. Posner*, 233 So.2d 381 (Fla. 1970), most courts refused to enforce the provisions of a nuptial agreement relating to divorce or separation because nuptial agreements covering divorce actually encouraged the dissolution of marriage and violated legal principles requiring marriage until death. In *Posner*, the Florida Supreme Court began to eradicate the idea that nuptial agreements focused on the potential for divorce were void per se.
- Florida statutes and case law now provide that nuptial agreements meeting certain requirements will be enforced by a court.

Purposes of Agreements

- Provide protection of parties' assets in the event of a divorce
  - Fla. Stat. § 61.075 – Without a nuptial agreement, Florida courts could make an equitable distribution of the property and assets of the marriage based on the circumstances of the parties.
- Provide protection of a party's assets in the event of death of the party
- Delineate the obligations of the parties during the marriage
  - Which party is responsible for certain expenses during the marriage
  - Whether parties must file joint income tax returns or must do so only at the request of one party

Requirements of Agreements

- In 2007, Florida enacted the Uniform Premarital Agreement Act ("Florida UPAA: – Fla. Stat. § 61.079).
- The Florida UPAA applies to prenuptial agreements executed on or after October 1, 2007.
- Fla. Stat. § 61.052(5) – The court may enforce an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties

<u>Requirements Pursuant to Florida States and Case Law</u>

Complete Financial Disclosure

- Under Florida law, individuals who contemplate marriage are in a confidential relationship with each other.
  - *Doig v. Doig*, 787 So.2d 100 (Fla. 2d 2001); *O'Connor v. O'Connor*, 435 So. 2d 344 (Fla. 1st DCA 1983) – This relationship gives rise to a duty to make a full and fair disclosure of the nature, extent, and value of the assets that each party holds to ensure

the other party can make an informed decision as to what will be relinquished as a result of entering into the nuptial agreement.

- Fla. Stat. § 732.702(2) – While disclosure is required in connection with an agreement executed after marriage waiving rights in the event of death, no disclosure is required for an agreement, contract, or waiver executed before marriage.
  - It is still recommended that each party provide the other with full and fair disclosure in order to avoid a Florida court concluding the nuptial agreement was invalid.
- *Doig*; *O'Connor* – To make complete financial disclosure, each party must disclose his net worth (all assets and liabilities, and values and amounts) and income.
  - While income tax returns should be reviewed, the preparer of the agreement should be cognizant that such returns do not include nontaxable income.
- *Waton v. Waton*, 887 So. 2d 419 (Fla. 4th DCA 2004) – Disclosure must be complete, but it does not need to be exact.
  - The nuptial agreement should indicate what the value reflects (FMV, book value, cash value).
  - Information regarding such values, such as a party's federal income tax returns for the three years before the date of the nuptial agreement, appraisals, and brokerage statements, should be provided to the other party and his or her attorney for review.
- *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987) – Complete financial disclosure is not required if the nuptial agreement makes a fair and reasonable provision for the other party or if the other party has a general knowledge of the character and extent of the other's assets, liabilities, and income.
- *Hahamovitch v. Hahamovitch*, 133 So. 3d 1008 (Fla. 4th DCA 2014) – Complete financial disclosure is recommended to avoid a court's later interpretation that the nuptial agreement does not make a fair and reasonable provision for the other party, or that the other party did not have the knowledge as to the assets, liabilities, and income of the first party.
  - *Francavilla v. Francavilla*, 969 So. 2d 522 (Fla. 4th DCA 2007) – Prenuptial agreement dealing with alimony and property division was not unfair to former wife, given parties' circumstances when it was signed and fact that former husband made full disclosure of assets to her.
- Fla. Stat. § 61.079(7)(a)(3) – A prenuptial agreement is not enforceable in an action if the party against whom enforcement is sought proves that the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  - Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Disclosure of DSUE and Lifetime Taxable Gifts

- The American Taxpayer Relief Act of 2012 made portability of the deceased spousal exclusion amount a permanent provision.

- § 2010(c)(5)(A) – The personal representative of a deceased spouse may make an election on a timely filed estate tax return to make a deceased spouse's unused gift tax and estate tax exemption amounts available to the surviving spouse.
    - If the portability election is made on a timely filed estate tax return and the deceased spouse made no lifetime taxable gifts, the deceased spouse's unused $5 million exclusion amount (adjusted annually for inflation) can be passed to surviving spouse, who will have a $10 million exclusion amount (adjusted annually for inflation) available for his or her use.
    - This exclusion amount can be used to shelter lifetime taxable gifts or to shield assets from federal estate taxation at his or her death.
- It may be advisable for parties, when executing a prenuptial agreement, to disclose any lifetime taxable gifts they may have made and to allow the other party's attorney the opportunity to review their gift tax returns, to make sure these taxable gifts were properly reported.
- This disclosure is important if one of the parties is a widow or widower. Under § 2010(c)(4)(B)(i), a surviving spouse who remarries may use only the DSUE amount of his or her most recently deceased spouse.
- A surviving spouse's remarriage comes at the risk of losing the DSUE amount of his or her deceased first spouse if the new spouse likewise predeceases him or her. It is extremely important for a widow contemplating marriage to determine how much of the other party's exclusion amount has already been exhausted by lifetime taxable gifts.

Consideration

- The nuptial agreement must recite the consideration for it.
    - *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. 2d DCA 1996) – For a prenuptial agreement, the consideration is the marriage.
    - *Hieber v. Hieber*, 151 So. 2d 646 (Fla. 3d DCA 1963) – For a postnuptial agreement, mutual promises encompassing various rights of the parties, in addition to disposing of property owned by them, have been considered sufficient consideration.
- Fla. Stat. § 61.079(3) – A prenuptial agreement "is enforceable without consideration other than the marriage itself."
- Fla. Stat. § 61.079(6) – An amendment to, revocation of, or abandonment of a premarital agreement is enforceable without consideration.

Formalities of Execution

- Fla. Stat. § 732.701; § 732.502 – If the nuptial agreement contains testamentary provisions, it should be executed in conformity with the requirements for a last will and testament (signed in the presence of two witnesses who must sign in the presence of each other.
- Fla. Stat. § 61.079(3) – A prenuptial agreement "must be in writing and signed by both parties."
    - This provision does not affect the requirement under Florida law that a nuptial agreement that contains testamentary provisions must be executed in conformity with the requirements for a last will and testament.

Specific Waiver Provisions

- *Del Vecchio v. Del Vecchio*, 143 So. 2d 17 (Fla. 1962) – The court must uphold the intent of the parties as expressed in the agreement regarding the waiver of equitable distribution of property.
- *Irwin v. Irwin*, 857 So. 2d 247 (Fla. 2d DCA 2003) – If the parties intend to keep all income and earnings, including income earned during the marriage, as separate property, that intention must be clearly stated in the nuptial agreement. Otherwise, the income and earnings and assets acquired with the income and earnings will be marital property subject to equitable distribution.
- *Doig v. Doig*, 787 So. 2d 100 (Fla. 2d 2001) – If the parties desire to ensure that separate property, including all appreciation, remains separate property, the nuptial agreement must clearly state that desire. The nuptial agreement should specifically refer to active appreciation on such separate property. Otherwise, it is possible that only passive appreciation on the property would remain separate property.
- The case law is not entirely consistent.
    - *Cameron v. Cameron*, 591 So. 2d 275 (Fla. 5th DCA 1992) – The Fifth DCA held that the trial court was correct in its reliance upon a prenuptial agreement, which specifically addressed future enhancement, in denying the former wife any equitable distribution of properties owned by the husband before the marriage, even though the properties appreciated in value due to the investment of marital labor and income.
    - *Hahamovitch v. Hahamovitch*, 133 So. 3d 1008 (Fla. 4th DCA 2014) – The Fourth DCA held that antenuptial agreement in which the wife waived all rights to the husband's property was broad enough to waive the wife's right to any asset titled in the husband's name at the time of dissolution of marriage proceedings that was acquired or enhanced during the marriage with marital labor or earnings. The Florida Supreme Court scheduled oral arguments on this case.

Alimony

- *White v. White*, 617 So. 2d 732 (Fla. 2d DCA 1993) – If intended, the nuptial agreement must expressly waive the party's right to alimony.
- *Ledea-Genaro v. Genaro*, 963 So. 2d 749 (Fla. 4th DCA 2007) – The waiver provision should include all types of alimony, such as rehabilitative, permanent, periodic, bridge the gap, durational, and lump sum alimony.
- *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972) – Temporary alimony during the divorce proceeding cannot be waived in Florida.
- Fla. Stat. § 61.079(4)(a)(4) – Parties to a prenuptial agreement may contract with respect to the "establishment, modification, waiver, or elimination of spousal support." Florida UPAA does not alter the fact that temporary alimony cannot be waived under Florida law.

Interest in Homestead Property

- *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007) – A provision waiving a party's constitutional right to homestead property may only be waived knowingly and intelligently.
- If each party intends to waive his or her homestead rights in the other party's homestead property, the nuptial agreement should provide the definition of homestead property, the homestead rights that each spouse would enjoy in the absence of the nuptial agreement, and that each party knowingly and intelligently waives those homestead rights.

- There may be issues for a non-Florida resident who executes a nuptial agreement, and subsequently becomes a Florida resident with a Florida homestead. It is likely that a court would find that a spouse could not validly waive his or her homestead rights because the waiver could not be made knowingly and intelligently if the homestead did not exist when the nuptial agreement was executed.
    - If an individual becomes a Florida resident after he or she has entered into a prenuptial agreement and wants their spouse to waive homestead rights, an amended marital agreement (or postnuptial agreement) should be entered into by the parties, in which the spouse specifically waives his or homestead rights.
- If a spouse is the sole owner of the homestead property individually or through a revocable trust and it is that spouse's sole or primary asset, the spouses may decide to execute a standalone nuptial agreement for estate tax purposes that waives homestead rights. The homestead could be devised to an irrevocable credit shelter trust to maximize the use of the homestead owner's estate tax exemption amount.
    - Fla. Stat. § 732.702(1) – Any standalone homestead waiver executed after 12/31/2001 must be signed in the presence of two subscribing witnesses.
- Recent case law may be relaxing the knowingly and intelligently requirement for a valid homestead waiver.
    - *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2015) – A husband conveyed his one-half interest in the homestead residence to a QPRT he created, and the wife conveyed her one-half interest in the homestead residence to a QPRT she created. Each spouse joined in a deed to sever the property into two, one-half tenant in common interests and then each spouse joined in the deeds to the QPRTs. The husband did not survive the term of his QPRT, and the property reverted to his estate under the QPRT terms, which resulted in an improper devise. The court determined that the transfer to the trust for the wife was a testamentary devise, which would ordinarily be prohibited under the Florida Constitution. Because the wife joined in the deed to the husband's QPRT, she waived her homestead rights in the property under Fla. Stat. § 732.702. The execution of a deed by a homeowner that conveys real property "together with all tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining" is a waiver of the homeowner's homestead rights in the property.

Interest in Retirement Plans

- A preparer of a nuptial agreement must ensure that any waiver of retirement benefits complies with Florida and federal law.
    - The Retirement Equity Act of 1984 amended ERISA to provide protection spouses and descendants of employees. A surviving spouse must receive certain benefits from a qualified plan of a spouse who was a plan participant even if the participant dies before retirement age. IRA benefits are not subject to this Act.
- § 417(a)(2) provides that a spouse may waive a right to a qualified plan benefit if the waiver meets all of the following requirements.
    - The waiver is in writing
    - The election must designate a beneficiary that may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by spouse.
    - The spouse's consent must acknowledge the election's effect

  - The spouse's signature must be witnessed by a plan representative or notary public
- In nuptial agreement planning, most clients desire to waive their rights to the other party's retirement plans. Treas. Reg. § 1.401(a)-20, Q&A 28 provides that an agreement entered into before marriage does not satisfy the applicable consent requirements.
  - A nuptial agreement should require the nonparticipant to sign the applicable waivers after the parties are married. The participant spouse must actually obtain the applicable waivers from his or her spouse after the marriage.
  - A nuptial agreement should provide that the nonparticipant spouse releases all claims to the retirement plan benefits. To the extent that the participant spouse fails to obtain the required waivers from the nonparticipant spouse and the nonparticipant spouse fails to release his or her claims to the retirement plan benefits, the heirs of the participant spouse may have a cause of action against the nonparticipant spouse.
  - For a plan not required to provide the qualified joint and survivor annuity to a married participant, a participant can withdraw his or her interest in the plan and roll it over to an IRA. The participant could defeat the requirement that the nonparticipant spouse waive his or her right to the death benefits of the retirement plan.
- Although federal law does not require that a nonparticipant spouse waive his or her rights in an IRA, some financial institutions impose such a requirement.

Rights Upon Death

- If intended, the prenuptial agreement should provide that each party waives the following rights upon the death of the other party
  - Rights to elect against the will or any other testamentary instrument of the other party (elective share rights)
  - Dower or curtesy rights
  - Rights as intestate successor
  - Rights as a pretermitted spouse
  - Family allowance rights
  - Homestead rights
  - Rights to qualify and serve as personal representative of the other party's estate, or trustee of any trust created by the other party
- It is important that the parties specifically waive the above rights in the nuptial agreement.
- Fla. Stat. § 732.702(1) provides that an individual may waive in writing his or her right to an elective share. Unless the waiver provides to the contrary, a waiver of "all rights" or equivalent language, in the property or estate of a prospective spouse is a waiver of all rights to elective share.

Waiver of Child Support, Parenting Plan, and Time-sharing Prohibited

- *Ervin v. Chason*, 750 So. 2d 148 (Fla. 1st DCA 2000) – Rights regarding child support, parenting plans, and time-sharing plans cannot be waived under Florida law in a nuptial agreement and should not be included in such an agreement.
- *Morris v. Morris*, 932 So. 2d 1007 (Fla. 2006) – Although such waivers are against public policy, the Florida Supreme Court upheld the validity of a no-challenge provision by which the former wife was ordered to forfeit a substantial settlement as a result of requesting a modification to the parties' child custody agreement.

Timing of Execution

- For a prenuptial agreement, all meetings with the attorneys, the negotiations, and the execution of the prenuptial agreement should occur in advance of the wedding in order to make it more difficult for a challenging spouse to assert duress or undue influence.
    - *Hjortaas v. McCabe*, 656 So. 2d 168 (Fla. 2d DCA 1995) – The court set aside a prenuptial agreement executed two days before the wedding.
    - *Gordon v. Gordon*, 25 So. 3d 615 (Fla. 4th DCA 2009) – The court held the prenuptial agreement executed ten days before the wedding was not reached under duress, coercion, or overreaching because the ten-day period was sufficient time for the wife to review the agreement and seek legal counsel, the wife had a high level of education and business acumen, and having twice married, understood the significance of the document she was signing.
    - *Bakos v. Bakos*, 950 So. 2d 1257 (Fla. 2d DCA 2007) – An agreement was voidable on coercion grounds when the husband presented premarital agreement to wife for first time less than 24 hours before their wedding an insisted that she sign it or he would cancel the wedding.
    - *Francavilla v. Francavilla*, 969 So. 2d 522 (Fla. 4th DCA 2007) – Duress did not exist when prenuptial negotiations stretched over several months, husband properly disclosed extent of his assets, and wife was represented by attorney despite the wife being pregnant and unemployed at the time she signed the agreement, the agreement was signed one hour before the wedding, and husband required signing the prenuptial agreement as a condition precedent to marriage.

Separate Counsel

- Although not required under Florida law, it is recommended that each party obtain separate representation with regard to the nuptial agreement. Separate representation can refute a claim that the nuptial agreement was entered into under duress or as a result of undue influence.

<u>Tax-Related Issues</u>

Income Tax Issues

- Cash payments of alimony are generally taxable to the recipient spouse and deductible by the payor spouse.
    - § 71(b) – A stream of cash payments to or on behalf of a spouse or former spouse pursuant to a divorce or separation instrument, whether for support or as part of a property payout, is taxable to the payee and deductible to the payor if the liability for payment ceases upon death of the payee, if the liability is not fixed as child support, and as long as the divorce or separation instrument does not designate such payment as a payment that is not included in gross income under § 71 and not allowable as a deduction under § 215.
- Both parties must be aware of the recapture rules applicable to excess spousal support payments.
    - § 71(f) – If, during the first three post-separation years, there is impermissible front loading of a cash payment determined to be alimony, phantom taxable income could be attributable to the payor, and a deduction could be created for the payee, in the

third post-separation year. This rule prevents spouses from characterizing nondeductible property settlement payments as deductible alimony payments.

- The nuptial agreement may mandate that the parties file joint or separate federal income tax returns. The nuptial agreement may mandate that the parties file joint or separate federal income tax returns if either party makes such a request of the other party (preferred option as it provides for more flexibility).
    - o § 6013(d)(3) – The parties should be aware that filing a joint return imposes joint and several liability on both spouse.

Gift Tax Issues

- Transfers incident to divorce may be considered gifts under the federal gift tax.
    - o § 2512(b) – Any transfer for "less than adequate and full consideration in money or money's worth" is a gift.
- Exceptions to the treatment of a transfer incident to divorce as a gift
    - o A pre-divorce gift that would qualify for the marital deduction.
    - o § 2516 – The transferor spouse will be deemed to have received full and adequate consideration if the payment is made from one spouse to the other pursuant to a written agreement and the agreement is effective within two years before or one year after the date of divorce. The agreement must be signed within the prescribed period of time, but the transfer may occur at any time.
    - o *Harris v. Comm'r*, 340 U.S. 106 (1950) – Payments made pursuant to an agreement incorporated into a judicial decree or under a court order for divorce or support do not have to be made for full and adequate consideration.
    - o Rev. Rul. 68-379 – Payments made in satisfaction of a legal obligation to support a spouse and minor children are not gifts, because the release of such obligation is deemed to be adequate consideration.
    - o Annual exclusion payments made under § 2503(b) and qualified transfers made for certain educational and medical expenses under § 2503(e) are not treated as gifts.
    - o Waivers of pension rights under § 2503(f) are not treated as gifts.
- If representing the wealthier spouse, the lawyer may suggest that spouse include language in the nuptial agreement that provides that the other spouse must consent to split gifts under § 2513 if the wealthier spouse makes such a request of the other spouse. By requiring a consent, the wealthier spouse can double the amount of annual exclusion gifts he or she makes during the year.
    - o Including this provision would enable the wealthier spouse to gift up to $10.86 million during the marriage, which is two times the lifetime gift tax exemption amount (adjusted annually for inflation).

Estate Tax Issues

- The DSUE amount is available to a surviving spouse only if the deceased spouse's personal representative makes an affirmative election on a timely filed estate tax return.
- Without a requirement in the nuptial agreement, the personal representative may not have an obligation to file an estate tax return, make a portability election in favor of surviving spouse, or refrain from using the decedent's entire DSUE amount to shelter assets passing to the decedent's children from his or her prior marriage.

    - This result is likely unacceptable to a client who wants to ensure that he or she will obtain the benefit of the DSUE amount of the poorer spouse in case the poorer spouse dies first.
- Since a surviving spouse may use only the DSUE amount of his or her most recently deceased spouse, he or she runs the risk that the DSUE amount of his or her prior spouse will be lost forever, if the surviving spouse's new spouse also predeceases him or her.
- Rather than relying on portability, it may be advantageous to use an inter vivos trust to use the poorer spouse's estate tax exemption amount.
    - The parties may mandate in their prenuptial agreement that one or both of them will, pursuant to the terms of a will, direct their personal representative to make a portability election in favor of the surviving spouse.
- To ensure that there will be DSUE amount remaining for a surviving spouse, the prenuptial agreement may require that any future use by one spouse of his or her lifetime gift tax exclusion amount requires the consent of the other, and that the personal representative of the first spouse to die must set aside a prescribed minimum amount of unused exclusion for the surviving spouse.
- When drafting these provisions, the agreement should be broad enough to encompass annual inflation adjustments to the exclusion amount as well as regulatory changes to how the portability election should be made.

Checklist for Drafting Nuptial Agreement

- Obtain full financial information from client, including information regarding assets, liabilities, and income, and disclose the information to the other party. Such disclosures include
    - Income tax returns and all financial statements from the previous three years
    - List of all assets and FMV of such assets
    - Value of and beneficiary designation information regarding retirement accounts, annuities, life insurance, and similar plans
    - Information regarding trusts of which client is a beneficiary
    - Information regarding entities in which client has an interest
    - List of all debts and other liabilities, including contingent liabilities
- Provisions to consider for inclusion in nuptial agreement
    - Recital of consideration for the agreement
    - Waiver of marital rights to separate and marital property
    - Waiver of marital rights to active and passive appreciation on separate and marital property
    - Waiver of alimony
    - Waiver of homestead rights
    - Waiver of interest in retirement plans, life insurance, annuities, and similar plans
    - Waiver of statutory rights upon death
    - Obligation to file joint income tax returns
    - Obligation to consent to gift split
    - Obligation to make DSUE amount portability election
- Recommendations to avoid other party attacking validity
    - Avoid overreaching by ensuring that the client does not exert emotional pressure on the other party

- Avoid coercion and duress by ensuring that the client does not intimidate the other party to execute the nuptial agreement. The other party should obtain separate representation to avoid charges of coercion or duress. For a prenuptial agreement, it should not be executed within close proximity to the wedding date.
- Avoid fraud and misrepresentation by ensuring that the client fully and fairly discloses all of his or her assets to the other party

Planning Before Dissolution of Marriage

Property Settlement Agreements

- A property settlement agreement is an agreement that is entered into in contemplation of a dissolution of marriage and dictates the division of the property owned by the two spouses after the dissolution. A property settlement agreement usually covers division of property, liabilities, and any other issues related to the property of the spouses.
- Property settlement agreements can be entered into at any time before the court issues the final judgment of dissolution of marriage, and are often incorporated into the final judgment.
    - *Kirchen v. Kirchen*, 484 So. 2d 1308 (Fla. 2d DCA 1986) – A pure property settlement agreement is not subject to modification by the trial court without the consent of the parties.
    - *Karch v. Karch*, 445 So. 2d 1077 (Fla. 3d DCA 1984) – Once incorporated into a final judgment of dissolution of marriage, the property settlement agreement is not subject to modification by the parties.

Provisions for Inclusion in Property Settlement Agreement

- The property settlement agreement should specifically address each asset owned by the parties, whether owned by the parties jointly (as tenants by entireties, as joint tenants with right of survivorship, or as tenants in common), in a party's individual name, in the name of a revocable trust of which a party is the settlor, or otherwise.
- The property settlement agreement should specifically address any irrevocable trusts of which a party is the settlor, such as a life insurance trust.
- The property settlement agreement should specifically address any trusts or entities (family limited partnership or LLC) in which a party has an interest.

Florida Statutes § 732.703

- Fla. Stat. § 732.703 now controls beneficiary-designated assets for decedents dying on or after July 1, 2012, regardless of when the beneficiary designation was made. A designation made before the dissolution of marriage by one former spouse for the benefit of the other former spouse is void upon the final judgment of dissolution of marriage with respect to the following assets:
    - A life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan
    - An employee benefit plan
    - A traditional or Roth IRA and an individual retirement annuity described in § 408(b)(2)
    - A payable on death account
    - A security or other account registered in a transfer on death form

- A life insurance policy, annuity, or other similar contract that is not held within an employee benefit plan or a tax-qualified retirement account
- This statute does not apply to
  - To the extent that controlling federal law provides otherwise (ERISA-based plans, such as a 401(k))
  - If the designation is signed after the order of dissolution and such instrument expressly provides that benefits will be payable to the decedent's former spouse
  - To the extent a will or trust governs the disposition of the assets and Fla. Stat. § 732.507(2) or Fla. Stat. § 736.1105 applies
  - If the order of dissolution requires that the decedent acquire or maintain the asset for the benefit of a former spouse or children of the marriage (but only if other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children do not exist upon the death of the decedent
  - If, under the terms of the order of dissolution, the decedent could not have unilaterally terminated or modified the ownership of the asset, or its disposition upon the death of the decedent
  - If the designation of the decedent's former spouse as a beneficiary is irrevocable under applicable law
  - If the governing instrument is governed by the laws of a state other than this state
  - To jointly held property with survivorship rights
  - If the spouses remarry each other and are married to one another at the death of the first spouse
  - To state-administered retirement plans under Florida Statutes Chapter 121.
- Due to these exceptions, the parties should account for and specifically waive any rights to the relevant assets in the property settlement agreement.
- The property settlement agreement should specifically divide the liabilities of each of the parties as well as any joint liabilities of the parties (mortgage, home equity loan, and credit card debt).

Tax Issues

- The wealthier spouse may want to include a requirement in the property settlement agreement that the parties file joint federal income tax returns until the year subsequent to the final judgment of dissolution of marriage.
- The wealthier spouse may want the property settlement agreement to provide that the other spouse must consent to split gifts for federal gift tax purposes under § 2513 in an amount not to exceed the $5 million lifetime gift tax exemption amount.
  - § 2513 is an "all or nothing rule," so either all gifts are split or no gifts are split.
  - Treas. Reg. § 25.2513-1(a) – For a spouse's consent to gift split to be valid, he or she cannot remarry during the calendar year.
    - To ensure the spouse does not remarry during the calendar year in which the gifts are made and the divorce occurs, it may be possible to postpone the effective date of the divorce until December 31 so that a remarriage would not occurring until the following calendar year.
  - The consent must be made on a federal gift tax return, which is not due until April 15th of the year following the year during which the gift is made. The property

settlement agreement should specifically provide that the spouse irrevocably consents to gift splitting under § 2513 for any gifts made during the year of the divorce.

- The wealthier spouse may want to include a requirement in the property settlement agreement that provides that if a spouse dies before a final judgment of dissolution of marriage, the personal representative of the deceased spouse is required to make a portability election for the DSUE amount in favor of the surviving spouse.

Retitling of Assets

- Fla. Stat. § 689.15 – Upon dissolution of marriage, tenancy by entireties property shall become property owned as tenants in common.
  - These assets must be retitled in accordance with the terms of the property settlement agreement, which typically will not provide for the ownership of the assets as tenants in common.
- *Kelly v. Kelly*, 583 So. 2d 667 (Fla. 1991) – If the property is not retitled and the parties become tenants in common, the parties are responsible for dividing equally all payments such as mortgage payments, taxes, repairs, and insurance, necessary to maintain their ownership of the property until its sale.

Last Will and Testaments

- In contemplation of the dissolution of a marriage, each spouse should execute a codicil to his or her will (or execute a new will) to provide for the following:
  - If the will provides for appointment of the spouse as personal representative of the estate, the codicil or new will should provide for one or more other individuals, rather than the spouse, to serve as personal representative of the estate;
  - To the extent allowed by the property settlement agreement, the codicil or new will should revoke any beneficial interest of the spouse and provide for new beneficiaries. Each spouse should execute a new will or codicil before the final dissolution of marriage to further the terms of the property settlement agreement;
  - If the other spouse has descendants who are not common descendants of the testator spouse, and if the will names those descendants as beneficiaries, the individual should consider whether he or she wants to change or revoke those beneficiary provisions;
  - A will often establishes trusts that contain powers of appointment. If intended, the descendants of the spouse should be removed as donees of the powers of appointment;
  - A will may provide that the remote contingent beneficiaries of the trusts created under the will are the testator spouse's intestate hairs and the other spouse's intestate heirs. If intended, it would be important to remove the other spouse's intestate heirs as remote contingent beneficiaries; and
  - If the parties have minor children, a codicil or new will should name one or more guardians of the minor children.

Durable Powers of Attorney, Designations of Health Care Surrogate, and Living Wills

- In contemplation of divorce, the spouses should revoke any existing durable power of attorney, designation of health care surrogate, and living will in favor of the spouse, and prepare new documents in favor of one or more other individuals.

- Fla. Stat. § 709.2109 – A power of attorney terminates upon the filing of dissolution or annulment of the agent's marriage to the principal or for their legal separation, unless the power of attorney provides otherwise.
    - The principal may wish to affirmatively revoke any power of attorney in favor of the principal's spouse and not rely on the statute.
- Fla. Stat. § 709.2110 – The execution of a power of attorney, by itself, does not revoke a power of attorney previously executed by the principal.
    - A principal should revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal.
- Florida law allows a principal to grant an agent the authority to take actions that could significantly impact an estate plan. The "estate planning powers" could permit an agent to
    - Create an inter vivos trust
    - Modify, revoke, or terminate an inter vivos trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent
    - Make gifts
    - Create or change rights of survivorship
    - Create or change a beneficiary designation
    - Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
    - Disclaim property and powers of appointment
- These powers may allow an agent to make changes to an estate plan, although the agent is subject to the statutory duty to preserve the estate plan if consistent with the best interests of the principal.
- If one or more estate planning powers is granted to an agent, he or she will be granted access to the principal's estate planning documents so that the agent can become familiar with the principal's estate plan. If an estate planning power is granted to a divorcing spouse, the principal should give serious consideration to affirmatively revoking the power of attorney in favor of the divorcing spouse to ensure that he or she does not change the principal's estate plan or have access to the principal's estate planning documents.
    - If the power of attorney is revoked, the principal should give notice of the revocation to any banks, financial institutions, or broker-dealers where the principal has an account to ensure that a revoked power of attorney is not improperly used by a divorcing spouse.
    - A notice, including a notice of revocation, is not effective until written notice is provided to the third person relying upon the power of attorney.

Revocable Trusts

- In contemplation of dissolution of marriage, each spouse should execute an amendment to his or her revocable trust (or execute a complete restatement of the revocable trust) to provide for the following
    - If the trust provides for appointment of the spouse as successor trustee, the amendment or restated trust should provide for one or more other individuals, rather than the spouse, to serve as successor trustee. If the spouse is serving as a trustee, he or she should be removed.

- To the extent allowed by the property settlement agreement, the amendment or restated trust should revoke any beneficial interest of the spouse and provide for new beneficiaries. Each spouse should execute a restated revocable trust or amendment before the final dissolution of marriage to further the terms of the property settlement agreement.
- To the extent the property settlement agreement does not provide for the omission of the spouse as a beneficiary under the revocable trust, the amendment or restated trust could establish an elective share trust for the spouse.
- If the other spouse has descendants who are not common descendants with the settlor spouse, and if the trust names those descendants as beneficiaries, the individual should consider whether he or she wants to change or revoke those beneficiary provisions.
- A revocable trust often contains powers of appointment or establishes trusts that contain powers of appointment. If intended, the descendants of the spouse should be removed as donees of the powers of appointment.
- A revocable trust may provide that the remote contingent beneficiaries of the trusts are the settlor spouse's intestate hairs and the other spouse's intestate heirs. If intended, it would be important to remove the other spouse's intestate heirs as remote contingent beneficiaries.

Irrevocable Trusts

- It is important that any irrevocable trust created by a spouse that names the other spouse as beneficiary include a provision whereby the spouse would be removed as a beneficiary if they are no longer in a relationship.
    - The settlor spouse can provide in the irrevocable trust that if the beneficiary spouse is no longer married to or is not living with the settlor spouse while a dissolution proceeding is pending, the beneficiary must be treated as predeceased for purposes of construing the irrevocable trust.
- Floating spouse provision – Instead of simply terminating a particular spouse's beneficial interest, an alternative trust provision could cause a non-qualifying spouse to cease to be a beneficiary. The spouse is defined as any person who is married to and living with the settlor from time to time. This provision allows any future qualifying spouse (or former non-qualifying spouse) of the settlor to become a beneficiary.
- If the irrevocable trust does not contain such a provision, the property settlement agreement or final judgment of dissolution of marriage should specifically provide that the spouse must be treated as predeceased for purposes of construing the irrevocable trust.
- If the irrevocable trust does not provide a mechanism for the removal of the settlor's former spouse in the event of divorce and the property settlement agreement or final judgment of dissolution of marriage does not specifically provide that the spouse must be treated as predeceased for purposes of construing the irrevocable trust, it may be possible for the trustee of the irrevocable trust to decant the assets of the existing trust to a new trust of which the former spouse is not a beneficiary.
- Effective July 1, 2007, Fla. Stat. § 736.04117 provides a statutory mechanism that allows the trustee to distribute the principal of an existing trust to a new trust, providing that certain conditions are met. These conditions include, but are not limited to, the following:

    - The existing trust must provide the trustee with the “absolute power” to invade the principal of the trust, and
    - The beneficiaries of the new trust may include only beneficiaries of the existing trust (note that not all of the beneficiaries of the existing trust must be beneficiaries of the new trust).
- Depending on the circumstances and terms of the irrevocable trust, it may be possible to remove the former spouse as a beneficiary through a judicial modification or through a non-judicial modification.

Beneficiary Designations

- If allowed by the property settlement agreement, the parties must revoke all beneficiary designations in connection with life insurance, retirement plans, annuities, and similar assets that name the other spouse as beneficiary, and execute new beneficiary designations.
- The importance of taking the steps to remove the spouse as a beneficiary of such assets is especially critical if a significant ERISA-based plan, such as a 401(k), is involved.
- If the former spouse died before July 1, 2012, and the property settlement agreement fails to mention the proceeds and death benefits of other beneficiary-designated assets, the beneficiary designation will control the disposition of the assets.

Inheritance Held in Discretionary Spendthrift Trusts

- An individual expecting to receive gifts or an inheritance from his or her parents should ask them to explore the use of a discretionary spendthrift trust created for the benefit of such individual.
    - The goal of the discretionary spendthrift trust is to protect the gifts or inheritance from the claims of the divorcing spouse or former spouse.
- If implemented, any lifetime gifts or inheritance would be left to the discretionary spendthrift trust rather than outright to the individual. The trust would provide for discretionary distributions of income or principal for the individual. The assets held in the trust should be treated as the individual’s separate property and excluded for purposes of the elective share.
- The creditor protection benefits thought to be afforded to discretionary trusts under Florida Trust Code have been placed into question.
    - *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2014), held that a former spouse may obtain a continuing writ of garnishment against discretionary disbursements made by a trustee of a discretionary spendthrift trust. Because a continuing writ of garnishment does not compel the trustee to make a distribution or attach the beneficiary’s interest in the trust, the writ of garnishment does not violate Fla. Stat. § 736.0504(2).
    - It remains to be seen whether other Florida District Courts of Appel will follow the same rationale.

Elective Share

- Fla. Stat. § 732.201 – The surviving spouse of a person who dies domiciled in Florida has the right to a share of the elective estate of the decedent.
- Fla. Stat. § 732.2065 – The elective share of the spouse is 30% of the elective estate.
- Fla. Stat. § 732.2035 sets forth the following categories of property that are included in determining the elective estate

- Probate Estate – Under Fla. Stat. § 732.2035(1), the elective estate includes the decedent's probate estate, which is all property wherever located that is subject to estate administration in any state of the United States or in the District of Columbia.
    - Fla. Stat. § 732.2035(2) – Probate estate does not include homestead property.
    - Fla. Stat. § 732.2055(5) – The value of estate property is the date of death FMV, less mortgages, liens, and security interests, and any other claims payable from the estate.
- Jointly Held Property – Under Fla. Stat. § 732.2035(3), the elective estate includes the decedent's ownership in jointly owned accounts and securities, and "pay on death," "transfer on death," and "in trust for" accounts.
    - Fla. Stat. § 732.2035(3) – The value of decedent's interest in any accounts or securities owned as tenants by the entireties is one-half of the value of such accounts.
    - Fla. Stat. § 732.2035(3) – In all other cases, the value of the decedent's ownership interest is the portion of the account or securities that the decedent had the power to access immediately before death without having to account to another person.
    - Fla. Stat. § 732.2035(4) – For property other than accounts and securities that is held as joint tenants with right of survivorship or as tenants by the entireties, the elective estate includes the decedent's interest in any property, which is valued by dividing the value of the property by the number of tenants.
- Revocable Trusts and Other Revocable Transfers – Under Fla. Stat. § 732.2035(5), the elective estate includes any property transferred by the decedent to the extent that the transfer was revocable by the decedent (either alone or in conjunction with another person) at the time of the decedent's death.
    - Fla. Stat. § 732.2155(6) – Assets held in a revocable trust are not subject to the elective share if
        - The property was an asset of the trust at all times between 10/1/1999 and the date of the decedent's death
        - The decedent was not married to the surviving spouse when the property was transferred to the spouse
        - The property was a nonmarital asset as defined in § 61.075 immediately prior to the decedent's death.
- Irrevocable Transfers – Under Fla. Stat. § 732.2035(6), irrevocable transfers by the decedent are included in the elective estate if at the time of death, the decedent retained the right to, or enjoyed the possession or use of, the income or principal of the property, or if the principal could be distributed or appointed to or for the benefit of the decedent.
    - Fla. Stat. § 732.2035(6)(b) – The amount included is the value of the portion of the property to which the decedent's right or enjoyment related to the extent it passed to or for the benefit of a person other than the decedent's probate estate.
- Life Insurance Policies – Under Fla. Stat. § 732.2035(7), the elective estate includes life insurance to the extent the decedent possessed a "beneficial interest in the net cash surrender value" of the policy "immediately before death."

- Pensions and Retirement Plans – Under Fla. Stat. § 732.2035(8), the elective estate includes the amounts payable because of the decedent's death to any person from pensions, retirement plans, deferred compensation plans, and similar contracts.
  - Fla. Stat. § 732.2055(3) – The amount included is the transfer tax value of such assets on the date of decedent's death.
- Transfers and Gifts Made Within One Year of Death – Under Fla. Stat. § 732.2035(9), the elective estate includes gifts made within one year of death.
  - Fla. Stat. § 732.2055(4) – The amount included is the value of the property on the date of the gift, less mortgages, liens, or security interests on the property.
  - Transfers of assets for medical and educational expenses that are excluded from federal gift tax under § 2503(e) are excluded from the elective estate.
- Termination of Includable Rights or Interests – Under Fla. Stat. § 732.2035(9)(a), the elective estate includes the value of property transferred as a result of the termination of a right or interest in property within one year of death that would otherwise be included if the termination had not yet occurred.
  - Fla. Stat. § 732.2055(4) – The amount included is the FMV of the property on the date of termination, less liens, mortgages, and security interests.
- Transfers to Elective Share Trusts – Under Fla. Stat. § 732.2025(10) and Fla. Stat. § 732.2035(9), irrevocable transfers made to an elective share trust to satisfy the elective share are included in the elective estate.
  - The requirements to qualify as an elective share trust are essentially the same as the requirements to qualify as a QTIP under § 2056(b)(7), except that no QTIP election must be made to an elective share trust on a federal estate tax return.
  - Fla. Stat. § 732.2075(1) – Absent a contrary provision in the decedent's will or revocable trust, property otherwise distributable as a result of the decedent's death is first used to satisfy the elective share.

Elective Share

- An individual contemplating divorce should consider the possibility that he or she may die before the divorce becomes final. Absent a nuptial agreement or property settlement agreement that would allow an individual to omit the spouse as a beneficiary of assets, or in which the spouse waives all rights to the individual's property, the spouse would be entitled to 30% of the elective estate if the individual dies before the final dissolution of marriage.
- It is recommended that the individual plan by using the elective share rules to his or her advantage.
  - Rather than allow for an outright distribution to the spouse of 30% of the elective estate, the individual could create an elective share trust within his or her will or revocable trust. The individual could provide that the spouse would be entitled to principal for health, support, and maintenance needs. A third-party trustee could be named to make such discretionary distributions of principal. The governing instrument could provide that the trustee may consider other resources of the spouse before making such distributions of principal. The elective share trust could provide the spouse with a general power of appointment over the assets upon his or her death, so that 100% of the trust assets would count toward the satisfaction of the elective share. This provision is usually not included in an elective share trust because the

settlor does not want his or her spouse to have ultimate control over the disposition of the trust assets.

  - The individual could create an entity, such as a family limited partnership or LLC, and provide for the distribution of interests in such entity to his or her spouse upon death. The entity interests would be of little utility because of the restrictions on transferability, participation, and liquidation.
    - *Zoldan v. Zohlman*, 11 So. 3d 982 (Fla. 3d DCA 2009) – A decedent had an obligation under a postnuptial agreement to name his stepdaughter as an equal heir with sons of a previous marriage. The decedent's estate consisted primarily of a trust, which was funded with a 99% interest in a limited partnership to which the decedent had transferred $40 million in securities. Contrary to the terms of the postnuptial agreement, only the decedent's three sons were named as trust beneficiaries. The stepdaughter obtained a judgment for monetary damages in an amount equal to the value of sharing in the estate equally with the three sons. The court concluded that fair market value was what a willing buyer would pay a willing seller for an interest. The stepdaughter's shares were valued at fair market value, which was less than the fair value due to the discounts for lack of marketability and minority interests.
  - If an individual plans to leave certain assets to his or her spouse, but fears that the spouse may elect against his or her estate, the individual could include a provision in his or her will or revocable trust that provides for the distribution of less desirable assets to the spouse if the spouse makes such election.
  - Assets transferred to an irrevocable trust in which an individual has not retained the right to or enjoyed the possession or use of the income or principal of the assets would not be included in the elective estate. The individual should make gifts to such an irrevocable trust to remove assets from his or her elective estate.
  - The individual could make gifts in the amount of $14,000, as indexed for inflation, to various individuals each year, and to educational institutions and medical providers under § 2503(e), in order to remove assets from the elective estate.

Pretermitted Spouse

- In certain circumstances, a surviving spouse who is not included in the deceased spouse's last will may choose to take advantage of the share to which he or she would be entitled as a pretermitted spouse, rather than an elective share.
- The intestate share to which the spouse would be entitled to is as follows:
  - If there are no living lineal descendants of the decedent, the entire intestate estate.
  - If there are surviving lineal descendants of the decedent, all of whom are also lineal descendants of the surviving spouse, and the surviving spouse has no other descendants, the entire intestate estate.
  - If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, one-half of the intestate estate.
  - If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, one-half of the intestate estate.

- If the testator marries after executing a will and the will does not provide for the spouse or does not specifically omit the spouse, and there is no nuptial agreement, the spouse may be entitled to a pretermitted spouse share.
- Depending on the assets owned by the testator, the spouse may choose to take the share to which he or she is entitled as a pretermitted spouse, rather than the elective share.
- If an individual wants to ensure that his or her spouse is not entitled to the share to which the spouse would otherwise be entitled as a pretermitted spouse, it is essential that such individual either enter into a nuptial agreement with his or her spouse in which the spouse waives the share he or she would take as a pretermitted spouse, or amend his or her documents to specifically provide for the spouse or omit the spouse.

Checklist for Planning Before Dissolution

Considerations for Inclusion in the Property Settlement Agreement

- Division of Assets – Waivers of life insurance policies and retirement plans should specifically refer to the proceeds of such policies and retirement plans.
- Division of Liabilities
- Waiver of statutory rights by the spouse in the event of death of the client.
- Provision that the spouse will be treated as predeceased in the event of the death of the client for all purposes of construing the deceased spouse's last will, revocable trust, and irrevocable trust, if any, and any beneficiary designation of life insurance policies, retirement plans, annuities, and any other asset that may otherwise pass pursuant to a beneficiary designation.
    - This is particularly important in connection with irrevocable trusts that do not provide that the spouse will be treated as predeceased in the event of a legal separation or divorce.
- Obligation to consent to gift split.
- Obligation to file joint federal income tax returns.
- Provision requiring the personal representative of a deceased spouse to make a DSUE amount portability election in the event of the spouse's death before an entry of a final divorce decree.

Revision of Estate Planning Documents / Retitling of Assets / Beneficiary Designation

- If the client creates an irrevocable trust for the benefit of his or her spouse, language should be included in the trust to provide for the termination of such spouse's interest in the event of a legal separation or divorce.
- The client should revise his or her will to remove the spouse as a beneficiary and personal representative, remove the spouse's descendants as beneficiaries, if intended, and name guardians of minor children.
- The client should revise his or revocable trust to remove the spouse as a beneficiary and cotrustee or successor trustee, and remove the spouse's descendants as beneficiaries, if intended.
- The client should revise his or her durable power of attorney, designation of health care surrogate, and living will to remove the spouse as the nominated agent or surrogate.
- Assets should be retitled in accordance with the property settlement agreement, if any.
- Beneficiary designations for retirement plans, life insurance policies, annuities, and similar assets should be revised to remove the spouse, and the spouse's descendants, if any. A waiver

must be executed after marriage by the spouse with regard to qualified plan benefits. Consider rolling over a qualified plan into an IRA to avoid the waiver requirement.
- If anticipating an inheritance or gifts from one's parents, the client should request that the parents create and fund discretionary spendthrift trusts for the client's benefit, rather than leave assets outright to the client.

Elective Share Planning
- Provide for the creation and funding of an elective share trust under the will or revocable trust.
- Create an entity and provide for the distribution of entity interests to the spouse.
- Include a provision in testamentary documents regarding satisfaction of the elective share.
- Make gifts to an irrevocable trust, in the amount of $14,000, as indexed for inflation in accordance with the gift tax annual exclusion under § 2503(b), to various individuals each year (subject to the one-year lookback period), or to educational institutions and medical providers under § 2503(e) in order to remove assets from the elective estate,

Additional Advice
- If there is no nuptial agreement, the client should ensure that he or she executed a will after marriage that either provides for the spouse or expressly omits the spouse, to avoid a claim that the spouse is entitled to a share of the estate as a pretermitted spouse.

Speaker Panel Discussion

By

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PANEL QUESTIONS

1. What do you see as some of the key take-aways from this seminar?

2. Were there any items from the other presentations that you found particularly interesting or insightful?

3. What do you see as the key planning opportunities to discuss with clients before 12/31/17?

4. How do you see the field of estate / asset protection planning changing over the next 5 / 10 / 20 years?

5. If you could implement one legislative change in Florida in in your field what would it be? Why?

6. What are some common issues that you see that can be addressed with advance planning? What advice would you give to clients and / or other lawyers avoid such issues?