NAEPC
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DESIGNING AND IMPLEMENTING ESTATE PLANNING STRUCTURES WITH THE IRS IN MIND: AUDIT TRIGGERS AND CONSIDERATIONS ASSOCIATED THEREWITH

Wednesday, October 11, 2023

From 3:00 PM to 4:00 PM EST

(60 minutes)

Presented By:

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ATTORNEYS AT LAW

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Personal Representatives Don't Look Good in Orange: How to Prevent your Executor/Personal Representative from Going to Jail

- If you know that the decedent has done something illegal before dying and there is a risk of conspiracy or aiding and abetting, consider going to the IRS Civil Investigative Division and explain the situation before they find out.
- The IRS policy is that they do not criminally prosecute people who come to them first.
- If you don't want to be accused of being a co-conspirator and you're administering an estate in which criminal planning has occurred – go to the IRS and come clean!

IRS as Super Creditor in Bankruptcy

- The IRS is referred to as a “super creditor,” meaning that its efforts to collect tax are not restricted by the state’s laws, which generally impose restrictions on other creditors.
- A federal tax lien is the government’s legal claim against your property when you neglect or fail to pay a tax debt, this lien gives the IRS the status of a secured creditor in the bankruptcy proceeding.
- As a secured creditor, the IRS’s claim is secured by the specific assets subject to the lien, and the IRS has first priority to claim those assets.


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10 Year Statute of Limitations on IRS Collections

- The IRS generally has 10 years from the date your tax was assessed to collect the tax and any associated penalties and interest from you.
- This time period is called the "Collection Statute Expiration Date" (CSED).
- Certain situations can add to the 10-year expiration date, such as filing bankruptcy, living outside of the U.S. continuously for 6 months or more, requesting a Collection Due Process Hearing, and more.

Gift Tax Statute of Limitations - Adequate Disclosure Rules

- **Statute of limitations begins to run when transaction is adequately disclosed - Treas. Reg. § 301.6501(c)**

  - Description of property and consideration received
  - Identity/relationship of transferor/transferee
  - Trust TIN & description, if applicable
  - Description of any position contrary to proposed, temporary, or final Treasury Regulations or Revenue Rulings **(2704 Proposed Regulations)**
  - Qualified appraisal (strongly recommended)

*Prepared and signed by individual who regularly performs appraisals and is qualified to appraise the property (but not donor, donee or family member)

*Provides detailed information set forth in Treas. Reg. § 301.6501(c) (dates, purpose, information considered, analysis)

*Special requirements for transactions involving interests in corporation, partnerships and trusts. Treas. Reg. § 301.6501(c) - 1(2)

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Statute of Limitations -- Donee Liability

- Donee liability for donor's gift tax may exist under I.R.C. § § 6901 or 6324(b) if donor does not pay
- Important consideration in advising whether to file adequate disclosure gift tax return for sale transaction to start statute of limitations running
- Donee's statute of limitations does not expire until one year after donor's statute of limitations expires.
- *U.S. v. Marshall*, 798 F.3d 296 (5th Cir. 2015)
- Split in circuits on whether donee liability for gift tax is limited to value of gift received (3rd/5th/8th Circuits) or includes unlimited liability for interest (11th Circuit).

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Substantial Estate or Gift Tax Valuation Understatement Penalties (§ 6662 (g) & (h))

- Substantial valuation understatement -- value of item reported is 65% or less of value as finally determined (20% penalty)
- Gross valuation understatement -- value of item reported is 40% or less than value as finally determined (40% penalty)
- Reasonable cause exception § 6664 (c) requires taxpayer to act in "good faith" and "with reasonable cause" in reporting the value

  - Reasonable reliance on professional advice qualifies. Treas. Reg. § 1.6664
  - Relying on appraisal may or may not be "reasonable." Compare - *Estate of Richmond v. Comm'r,* T.C. Memo 2014-26 (February 11, 2014) and *Litman et. al. v. United States*, 326 F.3d 1268 (Fed. Ct. 2008)

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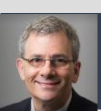

What the IRS Looks For in an Estate Tax Return Audit

- <u>Pre-Audit</u>
  - On the estate tax return, each item should have a description and a value. Item descriptions should be written from the reader's perspective, and should be concise yet comprehensive.
  - Where using an alternate valuation date, two values should be listed: the value at the time of death and the value at the alternate valuation date.
  - Each item's value should be included in the summation, and the values should be formatted as numbers, not text, to ensure they are being included in the final summation.
  - If using computational software, check that all inputs are correct before the software calculates an output. All questions should be answered consistently. All relevant documents should be attached. If they can't be attached, a disclosure statement should be attached with an explanation. All required elections should be attached. It is important for the preparer to scrutinize the return for internal inconsistencies.

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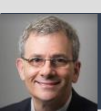
What the IRS Looks For in an Estate Tax Return Audit

- Pre-Audit
  - What generally leads to an audit are controversial positions, technical lapses, and unusual items in the return or in the attachments to the return.
  - Unusual assets, liabilities, or expenses can lead to audits. When these appear in an estate plan, the preparer should attach documents to explain the potential problem areas as much as possible.
  - It is worth reiterating here the importance of carefully considering each item’s description. It is the description that gives the examiner comfort that the item and its reported value are accurately portrayed and do not need to be reviewed further.



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Potential Audit Triggers

- Valuation Discounts
- Easements
- Deductions
- Sloppiness


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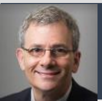
Form 709 Red Flags: Discount Valuations

- A taxpayer who has checked “Yes” for having taken a valuation discount on Form 709 must attach an explanation giving the factual basis for the claimed discounts and the amount of the discounts taken.
- This is a high profile item for the IRS audit. Too often an appropriate detailed explanation is ignored or incorrect.
- If the IRS does not later accept the client’s rationale, attorneys could be exposing themselves to malpractice claims from their clients.
- The best advice is to have a professional business valuation prepared which provides unbiased market-based support for the value reached.
- Using a qualified business valuation expert will help to assure use of current market data and accepted approaches which the IRS will know how to review for legitimacy and which will have a much better chance of being accepted.

Form 706 Red Flags

- Form 706 also includes a number of items that if checked “Yes,” must include an attached explanation, including but not limited to:
  1. Did the decedent at the time of death own any property as a JTWROS (Joint tenant with right of survivorship) in which (a) one or more of the other joint tenants was someone other than the decedent’s spouse, and (b) less than the full value of the property is included on the return as part of the gross estate?
  2. Did the decedent at the time of death own any interest in a partnership, an unincorporated business, or a limited liability company; or own any stock in an inactive or closely held corporation?
     a) If “Yes,” was the value of any interest owned discounted on the estate tax return? If “Yes,” the taxpayer must report the total accumulated or effective discounts taken on Schedule F or G.



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Form 706 Red Flags

3. Were there in existence at the time of the decedent's death any trusts not created by the decedent under which the decedent possessed any power, beneficial interest, or trusteeship?

4. Was the decedent, immediately before death, receiving an annuity or a private annuity?

5. Was the decedent ever the beneficiary of a trust for which a deduction was claimed by the estate of a predeceased spouse under section 2056(b)(7) and which is not reported on this return?

- If "Yes," you must complete and attach an explanation

6. Did the decedent have an interest in or signature or authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?

Pay Attention to Aesthetics

- In a recent presentation for the 49th Annual Notre Dame Tax & Estate Planning Institute, Louis Harrison, Esq. noted that aesthetics are everything when submitting a return.
- "You spend an extra 10 hours on the aesthetics, you avoid a hundred hours on an audit."
- For example, if a taxpayer has checked "Yes" for having taken a valuation discount, it might be simplest to include the entire explanation for the discount in Schedule F and Schedule G, but why make it easy for the IRS?
- Why not just put the name of the asset, date, and valuation amount in the Schedules and say "see exhibit 11" and attach an exhibit at the back of the return that includes a beautiful description of the valuation and the law supporting how the practitioner arrived at the discounted valuation amount?
- It is more likely that the explanation will be looked at more carefully if it appears on the Schedules as opposed to page 256 of the return.

Pay Attention to Aesthetics

Form 706 (Rev. 8-2019)

Estate of: | **Decedent's social security number**

Part 4—General Information *(continued)*

If you answer "Yes" to any of the following questions, you must attach additional information as described.		**Yes**	**No**
10	Did the decedent at the time of death own any property as a joint tenant with right of survivorship in which **(a)** one or more of the other joint tenants was someone other than the decedent's spouse, and **(b)** less than the full value of the property is included on the return as part of the gross estate? If "Yes," you must complete and attach Schedule E		
11a	Did the decedent, at the time of death, own any interest in a partnership (for example, a family limited partnership), an unincorporated business, or a limited liability company; or own any stock in an inactive or closely held corporation?		
b	If "Yes," was the value of **any** interest owned (from above) discounted on this estate tax return? If "Yes," see the instructions on reporting the total accumulated or effective discounts taken on Schedule F or G		
12	Did the decedent make any transfer described in sections 2035, 2036, 2037, or 2038? See instructions. If "Yes," you must complete and attach Schedule G		
13a	Were there in existence at the time of the decedent's death any trusts created by the decedent during his or her lifetime?		
b	Were there in existence at the time of the decedent's death any trusts not created by the decedent under which the decedent possessed any power, beneficial interest, or trusteeship?		
c	Was the decedent receiving income from a trust created after October 22, 1986, by a parent or grandparent?		
	If "Yes," was there a GST taxable termination (under section 2612) on the death of the decedent?		
d	If there was a GST taxable termination (under section 2612), attach a statement to explain. Provide a copy of the trust or will creating the trust, and give the name, address, and phone number of the current trustee(s).		
e	Did the decedent at any time during his or her lifetime transfer or sell an interest in a partnership, limited liability company, or closely held corporation to a trust described in line 13a or 13b?		
	If "Yes," provide the EIN for this transferred/sold item. ▶		
14	Did the decedent ever possess, exercise, or release any general power of appointment? If "Yes," you must complete and attach Schedule H		
15	Did the decedent have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?		
16	Was the decedent, immediately before death, receiving an annuity described in the "General" paragraph of the instructions for Schedule I or a private annuity? If "Yes," you must complete and attach Schedule I		
17	Was the decedent ever the beneficiary of a trust for which a deduction was claimed by the estate of a predeceased spouse under section 2056(b)(7) and which is not reported on this return? If "Yes," attach an explanation		

Pay Attention to Aesthetics

Form 706 (Rev. 8-2019)

Estate of: | **Decedent's social security number**

SCHEDULE F—Other Miscellaneous Property Not Reportable Under Any Other Schedule

(For jointly owned property that must be disclosed on Schedule E, see instructions.)
(If you elect section 2032A valuation, you must complete Schedule F and Schedule A-1.)

Note: If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions for more information. If you are not required to report the value of an asset, identify the property but make no entries in the last three columns.

		Yes	No
1	Did the decedent own any works of art, items, or any collections whose artistic or collectible value at date of death exceeded $3,000? If "Yes," submit full details on this schedule and attach appraisals.		
2	Has the decedent's estate, spouse, or any other person received (or will receive) any bonus or award as a result of the decedent's employment or death? If "Yes," submit full details on this schedule.		
3	Did the decedent at the time of death have, or have access to, a safe deposit box? If ''Yes,'' state location, and if held jointly by decedent and another, state name and relationship of joint depositor. If any of the contents of the safe deposit box are omitted from the schedules in this return, explain fully why omitted.		

Item number	Description. For securities, give CUSIP number. If trust, partnership, or closely held entity, give EIN	CUSIP number or EIN, where applicable	Alternate valuation date	Alternate value	Value at date of death
1					

Pay Attention to Aesthetics

Form 706 (Rev. 8-2019)

Estate of:	**Decedent's social security number**

SCHEDULE G—Transfers During Decedent's Life

(If you elect section 2032A valuation, you must complete Schedule G and Schedule A-1.)

Note: If the value of the gross estate, together with the amount of adjusted taxable gifts, is less than the basic exclusion amount and Form 706 is being filed solely to elect portability of the DSUE amount, consideration should be given as to whether you are required to report the value of assets eligible for the marital or charitable deduction on this schedule. See the instructions for more information. If you are not required to report the value of an asset, identify the property but make no entries in the last three columns.

Item number	Description. For securities, give CUSIP number. If trust, partnership, or closely held entity, give EIN	Alternate valuation date	Alternate value	Value at date of death
A.	Gift tax paid or payable by the decedent or the estate for all gifts made by the decedent or his or her spouse within 3 years before the decedent's death (section 2035(b))	X X X X X		
B.	Transfers includible under sections 2035(a), 2036, 2037, or 2038:			
1				
	Total from continuation schedules (or additional statements) attached to this schedule .			
TOTAL (Also enter on Part 5—Recapitulation, page 3, at item 7.)				

Form 890 vs. Form 890-AD: Extending the Statute of Limitations When Requested by the IRS

- All extensions involving a change in estate tax and/or related penalties require an agreement form.
- When a settlement is reached on the basis of mutual concessioners or hazards of litigation, or when the settlement otherwise necessitates finality, the IRS will secure a special agreement form.
  - The special agreement form used is Form 890-AD
- All other settlements require a general agreement form.
  - The general agreement form used is Form 890.

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Form 890

Form **890** (Rev. October 1988)	Department of the Treasury – Internal Revenue Service **Waiver of Restrictions on Assessment and Collection of Deficiency and Acceptance of Overassessment - Estate, Gift, and Generation - Skipping Transfer Tax** *(Please see the instructions on the back of this form)*	Date Received by Internal Revenue Service

Part 1. Consent to Assessment and Acceptance of Overassessment

I consent to the immediate assessment and collection of any deficiencies *(increase in tax and penalties)* and accept any over-assessment *(decrease in tax and penalties)* shown below, plus any interest provided by law. I understand that by my signing this waiver, a petition to the United States Tax Court may not be made, unless additional deficiencies are determined.

Date of Death or Period Ending:

Item	Increase	Decrease
Tax		
Penalty		
Total		

If the estate is required to file with the District Director of Internal Revenue evidence of payment of estate, inheritance, legacy, succession, or generation - skipping transfer taxes to any State or the District of Columbia, I understand that such evidence must be filed by __________ , or the credits for these taxes will not be allowed. I also agree to the assessment and collection of the increase in estate tax and penalties of $ ______ based on the disallowed credits, plus interest figured to the 30th day after____________ ,or until this increase is assessed, whichever is earlier.

Form 890-AD

Form 890-AD (Rev. Nov. 1980)	Department of the Treasury - Internal Revenue Service **Estate Tax** **Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment**	Symbols

I consent to the immediate assessment and collection of any deficiencies *(increase in tax and penalties)* and accept as correct any overassessment *(decrease in tax and penalties)* shown below, plus any interest provided by law. I understand that by my signing this form, the estate will not be able to petition the United States Tax Court, unless additional deficiencies are determined and a notice of deficiency issued.

Item	Increase	Decrease
Tax		
Penalty		

This offer is subject to acceptance by or on behalf of the Commissioner of Internal Revenue. It will take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it will have no effect.

If this offer is accepted by or on behalf of the Commissioner, the case will not be reopened in the absence of fraud, malfeasance, concealment, or misrepresentation of material fact, or an important mistake in mathematical calculation; and no claim for refund or credit will be filed or prosecuted other than for the overassessment shown above and any amounts that may be allowable as credits under sections 2011 and 2014 of the Internal Revenue Code.

Estate of

Executor or Administrator Sign Here	By	Title	Date

IRS Audit Checklists

- The IRS examining lawyer is to be looking for the following on the return:
  1. Each item has a value
  2. Each item has a date of valuation
  3. Each item has a detailed description
  4. All values are included in the summation
  5. All questions are answered, and answered consistently
  6. All relevant documents are attached, or if they cannot be attached, a disclosure statement explains why.
  7. All required elections are attached
  8. No controversial positions, technical lapses, or unusual items exist.

IRS Audit Checklists

- During the Audit, the IRS will normally do the following:
  1. Initial information request for corroborative documents
  2. Conduct the first interview obtaining information and setting the stage for the future procedures.
  3. Follow an established audit order from least controversial to most controversial.
  4. Have later inquiries that may require technical memoranda
  5. Propose and negotiate changes to the return

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What the IRS Looks For in an Estate Tax Return Audit

- Phase 1 of the Audit- The Initial Information Request
  - The first step of the audit is generally the initial information request, collecting corroborative documents containing information related to the estate tax return. The examiner will also search public records and conduct relevant internet searches. There are two purposes behind this initial information request. First, to identify assets that were missed from the estate tax return. Second, it gives the examiner an idea of the skills of the preparer.
- Phase 2 of the Audit – The Examination Stage
  - Next, the examiner will conduct the first interview, either over the phone or in person. This sets the stage for obtaining additional information and the protocols for future interactions. The examiner follows an established audit order, which generally begins with the least controversial schedules and ends with review of administrative expenses.
  - Later inquiries from the examiner may require technical memoranda with respect to positions reflected on the return. These requests give the examiner the choice of accepting the position on the return or to set the stage for a negotiation of the item. If requests from the examiner are unclear, the preparer can ask for clarification. The preparer should only provide exactly what is requested by the examiner, no more and no less.
  - During the examination stage, all changes are proposed, not final. The changes may be negotiated until the close of the examination. Prior to closing the examination, the preparer should have the examiner agree to take all administrative costs associated with the examination process, including interest due the government on agreed deficiencies, as allowable deductions under §2053.

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What the IRS Looks For in an Estate Tax Return Audit

- <u>Phase 3 of the Audit – Closing the Examination.</u>
  - If the case is only partially agreed upon, there are two options. First, the whole case can be written up as unagreed, and all items will go to the appeals function. Second, only the individual unagreed items will be taken to the appeals function. The latter is the better option because it shows good faith and increases credibility.
  - Before moving on to appeals, the IRS's Fast Track Settlement procedures allows an appeals mediator to facilitate settlements at the examination level. If the case is not resolved in Fast Track Settlement, appeals remains available.

- <u>Phase 4 of the Audit – The Appeal</u>
- If the examiner and the estate's representative cannot reach an agreement to one or more proposed adjustments, the procedure for review is similar to an income tax audit. First, the examiner prepares a report of the proposed adjustments. After the examiner's manager approves, a 30-day letter is sent to the executor. The letter explains that the executor has three options: (1) accept the report and sign a waiver; (2) request an IRS appeals office conference; or (3) do nothing, in which event a statutory notice of deficiency (90-day letter) will be issued.
- The appeals process is initiated by the preparer answering the 30-day letter with a protest letter. The goal of the IRS appeals procedure is to avoid litigation. As such, the protest letter should be an effort to explain the legal and factual support the estate has for its position that is contrary to the proposed adjustments.

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What the IRS Looks For in an Estate Tax Return Audit

- Phase 4 of the Audit – The Appeal, cont'd.
  - If the executor cannot or does not wish to resolve the adjustments within the IRS appeals division, the executor will receive a statutory notice of deficiency, also known as a 90-day letter. Once the 90-day letter is received, the executor must: (1) pay the deficiency and be done with the matter; (2) file a formal petition with the Tax Court within 90 days and contest the matter without having to pay any deficiency until the decision is final; (3) pay the deficiency and file a refund claim; or (4) let the tax be assessed and attempt to deal with the IRS collection function through an offer in compromise or other administrative proceeding.

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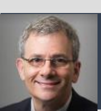
What to Do if You Discover an Inaccurate Return

- Circular 230, *Regulations Governing Practice Before the Internal Revenue System*, provides that the tax practitioners have a duty to promptly disclose to a client any errors they discover in the client's previously filed tax returns and to advise the client of its consequences.
- But what is the tax practitioner to do when they have discovered an error in a previous return, have informed the client of the error, advised the client of its consequences, and recommended corrective measures and the client declines to follow recommendations?
- The ultimate decision regarding corrective action is solely the client's to make. Therefore, a tax practitioner has no legal obligation to disclose the error discovered to the IRS.
- In fact, unless required to do so by law, the tax practitioner is prohibited from unilaterally disclosing the matter to the IRS.
- https://www.thetaxadviser.com/issues/2013/jul/bailliff-jul2013.html



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Many Past IRS Notices and Other Guidance Are Invalid by Reason of Being “Legislative” and issued without public input or following the Federal Administrative Procedure Act

Administrative Procedure Act (APA)

- The APA authorizes federal agencies to promulgate rules.
- The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."
- There are two kinds of rule rules: legislative and interpretive, neither of which is expressly defined by the APA.
- A **legislative rule** is adopted by a government agency in accordance with the notice and comment requirements of the APA that has the force of law, and imposes new duties on all regulated parties.
- An **interpretive rule** is a document produced by the agency to explain regulations it has promulgated or to explain the meaning of a statute that it administers. They can include many agency pronouncements, such as guidance documents and interpretive bulletins, and memos.

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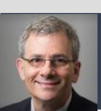
The APA and Recent Cases Involving the IRS and Conservation Easements

- **Background:** In consolidated action, taxpayer, a limited liability company (LLC) classified as a partnership for federal income tax purposes, petitioned for readjustment of partnership items after Internal Revenue Service (IRS) issued notice of final partnership administrative adjustment disallowing charitable deductions related to syndicated conservation easement transactions listed in IRS notice. Both sides moved for summary judgment.

- **Holdings**:
  - The IRS notice was a “legislative rule” subject to Administrative Procedure Act's (APA) notice-and-comment procedures, and
  - The IRS failed to establish that Congress expressly allowed it to bypass APA notice-and-comment procedures with respect to the notice.



The APA and A Recent Case Involving the IRS and Conservation Easements

- The opinion

- Congress tasked the IRS with determining “by regulations” how taxpayers are to “make a return or statement” and the information they must provide therein to the IRS. See I.R.C. § 6011(a).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Does the APA Issue Cause Notice 2021-49 to be Inapplicable.

- Probably not.

- Notice 2021-49 provides guidance and addresses changes by the American Plan Rescue Act of 2021, as well as provides guidance on Notice 2021-20 and Notice 2021-11 (employee credit retention under section 2301 of the Coronavirus Aid, Relief, and Economic Securities Act).

- It serves to clarify what is required of taxpayers in regards to the tax credit. It does not go so far as to amend the existing legislation.

- However, it could be argued that requiring an employer to file an amended return to obtain the ERC credit and poses reflect these changes imposes a new duty upon the taxpayer, and thus this rule may be legislative in nature.

Know the Difference Between Attorney Client Privilege and Work Product Privilege

- A client can waive the attorney-client privilege.
- A client may not be able to waive the work product privilege.
- E-mails and Memorandums informally written between staff members about a client's situation may most appropriately be labeled as "work product" and may not be viewable by the client or anyone else for that matter.

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Kovel Letters

- A Kovel letter is a legal tool used in situations where a third-party, such as an accountant or consultant, is brought into a legal matter to assist the attorney in providing legal advice to a client.
- This letter is typically issued by an attorney to the third-party professional and informs them that their communications with the client are protected by attorney-client privilege.
- It extends the attorney-client privilege to the third-party so that their discussions and work related to the legal matter are confidential and cannot be disclosed in court or to third parties.
- The purpose of the Kovel letter is to facilitate effective communication between the attorney, the client, and the third-party professional while maintaining the confidentiality of these communications under the umbrella of attorney-client privilege.

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Work Product Privilege

- Work product privilege, on the other hand, is a broader legal doctrine that protects certain documents and materials prepared by an attorney or their team in anticipation of litigation or for the purpose of providing legal advice.
- It is not limited to communications with third parties but encompasses various materials created by an attorney, such as memos, research, notes, and other documents, that are prepared in the context of legal representation.
- Work product privilege is designed to encourage open and candid communication between attorneys and their clients and to protect the attorney's thought processes and strategies from being disclosed to opposing parties in litigation.
- However, work product privilege is not absolute, and there are exceptions and limitations, including the doctrine of qualified immunity and the requirement that the materials must be prepared in anticipation of litigation.

Kovel Letters vs. Work Product Privilege

- A Kovel letter is a specific tool used to extend attorney-client privilege to third-party professionals who assist in legal matters, while work product privilege is a broader legal doctrine that protects materials and documents prepared by an attorney in the course of legal representation, primarily in anticipation of litigation.
- Both concepts serve to protect the confidentiality of certain information in the context of legal representation, but they are applied differently and serve different purposes.

Bills Can Cause Chills

- Descriptions of work completed on a bill will normally not be attorney-client privileged.
- The IRS can read bills that you send to clients.
- Bland billing descriptions such as “drafting and research” may therefore be better than “conference with client to discuss the need for a new appraisal because the old one has many problems,” or “discussion of the defect in the old trust being replaced by decanting.”

Excerpts from: Bankruptcy Law for Estate Planning and Professional Advisors

by: Alan S. Gassman, Alberto F. Gomez, Michael C. Markham and Adriana Choi

- **Evidentiary Rules And The Protections And Privileges Allowed In Bankruptcy - continued:**

PRIVILEGE LOG OF: [*party designation and name of party claiming privilege*]	
Nature of Privilege:	[*Identify privilege or protection*] [*Cite statutory authority for privilege or protection, if applicable*]
Type of Document:	[*Describe type of document*]
Subject Matter:	[*Describe subject matter, e.g., Information provided by (name of party) to (name of accounting firm) for purposes of inclusion in (name of accounting firm)'s report to (name of attorney) concerning tax consequences of proposed merger between (name of corporation) and (name of corporation) in connection with proposed litigation between (names of parties)*]
Date of Document:	[*Date*]
Author of Document:	[*Name*]
Recipient of Document:	[*Name*]
Custodian of Document:	[*Name and address*]
Application of Privilege:	[*Describe how each element of the asserted privilege is applicable to the document*]

3-37 Federal Litigation Guide: New York and Connecticut § 37.200 (2017).

Appraisals and Valuation Disputes

- It seems clear that most IRS audits and audit issues involve the question of valuations and valuation discounts.
- For small businesses and real estate this will commonly involve what the value of the underlying business or real estate was at the time of a transfer.
- For entity interests this will typically involve what the discounts are for (1) lack of marketability and (2) lack of control.
    - If the lack of marketability discount is 20% and the lack of control discount is 20% then the total discount is based upon 1.0 minus (80% x 80%) (64%), with the result being a 36% discount.

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Appraisals and Valuations

- Who should determine the value of a business or real estate?
- Who should determine the discounts being taken?
- There are mainline appraisal firms that are well known and commonly seen at conferences and events.
  - These are the General Motors, Toyota, and Ford of appraisers.
  - They do a thorough and consistent job, and often provide superb results.
  - Planners are unlikely to be criticized for relying upon them.
- These mainline appraisal firms have very good personnel who are good witnesses, but typically charge at the top tier for the work they do.
- In addition, there are a great many well qualified and experienced valuation experts who may cost significantly less and may be inclined to use lower capitalization rates and lower discount percentages to come in at more conservative values.
- Before the Great Recession of 2007-2012 it was commonly said that MAI (and the term MAI-Member, Appraiser Institute) stood for “Made As instructed.” Some were almost jailed after 2007. Are those days gone?

Tip #1 for Working with Appraisers

- Normally the appraiser or appraisers should be hired by the lawyer under attorney-client privilege, with the results of their work not to be released unless or until approved by the lawyer and the client.
- If there is a glitch or unwanted result then all information associated with the appraisal can be kept confidential under the attorney-client privilege if and to the extent that the communications are properly conducted and limited to be under the attorney-client privilege.
- It is normally fine for the client or others to talk to the appraiser, but safest for this to occur with the attorney present at the meeting or on the phone with all discussion of value and results to be with the lawyer and only with the lawyer. One misfired e-mail can ruin 100's of hours and tens of thousands of dollars.
- It is crucial to assure that the appraiser only provides written information that should be kept confidential via the lawyer until it is determined that the appraiser will be used.
    - **<u>VERY IMPORTANT AND COMMONLY FORGOTTEN OR NOT KNOWN</u>**: All written communications with the appraiser will be discoverable if the appraiser's appraisal or testimony is used.
    - Appraisers who send emails like "I could go lower but now we are getting really aggressive" cannot be safely hired.
- When interviewing and evaluating whether an appraiser is to be used the above considerations are very important.

Tip #2 for Working with Appraisers

- We sometimes hire multiple appraisers under the attorney-client privilege before determining which appraiser to use.
  1. If the item to be appraised is real estate in a rural area or a business where only two or three appraisers really know the industry, it is advantageous to hire all or most of the qualified appraisers so that they can be on your team (and not the IRS's team) in the event of a valuation dispute.
  2. It can be appropriate in non real estate valuations to first buy a review to receive estimated valuation amounts or discount percentages from multiple appraisers, and only use one appraisal, whether this be the appraisal that comes in the lowest, or from the appraiser who seems to have the best grasp of the situation.

Tip #3 for Working with Appraisers

- Ask an appraiser to stratify his or her work into two stages.
  - Stage 1: Review the situation and come up with a tentative valuation amount or range for perhaps 60% of what the total appraisal cost will be if we go to Stage 2.
  - Stage 2: Come up with a final amount and write the report.
- Our firm will sometimes hire two appraisers to initially handle stage 1.
- Once we have their ranges of numbers we can decide whether to hire one or both appraisal firms to write reports, and then decide which report to use.
- Most often we only hire one appraisal firm to write the final report (stage 2).
  - One very reputable appraisal firm recently came in at 57% of what another leading firm came in at in a $100 million plus project – guess which firm we hired to complete the appraisal report?

Tip #4 for Working with Appraisers

- Should the lawyer and other advisors require the client to obtain an appraisal?
  - Convention Wisdom – “Absolutely”- don’t do the project without it. (So many sales and gifts never happen).
- Reasoning:
  1. The IRS and Tax Court judges have been known to “punish” a taxpayer that did not buy an expensive appraisal.
  2. The cost of the appraisal makes the legal, accounting, and other fees look smaller in comparison ☺.
  3. There is less liability exposure for the lawyer, accountant and other team members if a full formal appraisal has been obtained.
- Disadvantages of this approach:
  1. The client may not go forward.
     - In most situations, it is better for the client to go forward with a less than full appraisal than to do nothing at all.

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Tips for Filing Returns

- While estate and gift tax returns may require valuation reports or at least the valuation methodology to be attached to the return, not all transfers have to be reported on a gift or estate tax return.
  - If the client's estate is under the estate tax filing limit (presently $12,920,000 minus previous "taxable gifts" for 2023) then no Form 706 will have to be filed and no valuation reports will be needed to be attached.
  - It may nevertheless be prudent to have a report prepared that makes it clear why no Form 706 had to be filed.

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Tips for Filing Returns

- An installment sale between the taxpayer and a grantor trust that is outside of the taxpayer's estate, or in exchange for a private annuity owed by the trust, needs to be based upon fair market value, but does not require a formal appraisal report.
  - It is "best practice" to disclose the sale details on a timely filed gift tax return to start the 3 year statute of limitations, but not all clients will select this course of action.
  - Many clients will choose to "fly under the radar" because (a) their estate may be under the estate tax filing limit anyway and/or (b) they would prefer to let their heirs deal with the situation and save the costs for now.
  - Sometimes the children or other family members are willing to pay for the planning and/or the appraisals, but sometimes not.
  - Even if Gift Tax has to be paid the family may come out ahead because of the tax exclusive nature of the estate tax system.

Must a sale for adequate consideration be reported on a Gift Tax Return? vs. Optional (Recommended)

WHAT HAS TO BE REPORTED ON A GIFT TAX RETURN
VERSES OPTIONAL (BUT RECOMMENDED)

		Required To Be Disclosed	Not Required To Be Disclosed
1.	Any seed capital gift to the irrevocable trust.	Required, if exceeds the $15,000 annual exclusion that may be available.	
2.	The funding of a family holding LLC		May not need to be reported.
3.	A sale for a proper note - amount owed equals FMV of assets sold.		May not need to be reported.
4.	Cancellation or gifting of the note.	This will need to be reported.	

Malpractice Considerations for the Advisor Who Goes Forward Without an Appraisal

- Is it malpractice not to insist upon a full appraisal that would cause a client to not do responsible planning?
- Is it malpractice to not encourage a client to go forward without an appraisal if this will almost undoubtedly reduce estate and gift tax liability and/or exposure?
- Sometimes a real estate broker "opinion of value," the County property assessor value, or a Zillow value will be used in a family sale for real estate, or a "back of a napkin" multiple of EBITDA value or a letter from a business broker maybe used for a business.
- This may be much better than no sale or gift at all.

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The "Other Client's" Appraisal Technique

- Years ago a client refused to obtain an appraisal for an installment sale of a non voting LLC interest, and the matter was audited. The auditor asked where we came up with a 32.8% discount.
- We informed the auditor that we used the same 32.8% discount as had been used in another appraisal done for other clients with similarly situated entities that year.
- The appraiser accepted a sterilized valuation report that had been prepared for another client within 8 months of when the transfer occurred, without any adjustment.
- Don't try this at home!

How to Work with the IRS

- There are many papers and lectures on how to work with the IRS.
- In the author's opinion, the first book to read is *How to Win Friends and Influence People* by Dale Carnegie and the second book to read is also *How to Win Friends and Influence People* by Dale Carnegie.

How to Work with the IRS

- Louis Harrison gave a very good lecture entitled Practical *Navigation of Estate and Gift Tax Audits post COVID: The World has Changed, and so has the Audit Mindset* at the 2023 49th Annual Notre Dame Tax and Estate Planning Institute on September 21st 2023.
- He noted that you never tell another professional that they are wrong in a direct manner.
- When asked for information or documentation you provide it in a timely and professional manner.
- If you do not know the answer to a question do not try to make an answer up. You are no longer in law school (thank heavens!)
- You do not provide more than has been requested

How to Work with the IRS

- IRS personnel have reportedly revealed to Louis that they believe that his settlements have been more advantageous than the settlements they give many other advisors because of their respect for him.
- The author has had similar experiences.
- The author has had long appeal conferences where the first 70% of the conference centers in on the history of the appellate officer, the appellate officer’s hobbies, and what the appellate officer and the author have in come.
  - The other 30% of the conferences have been quick resolution, or honest straight forward discussion on what the taxpayers options are and what can be settled, and what may need to be resolved in court.
- <u>Bringing a hard nosed and threatening litigator to an IRS auditor meeting or an initial appeals meeting may be the worst thing possible</u>

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How to Work with the IRS

- The author normally keeps a tax litigator in the background to provide guidance and to be ready to help, but bringing a known gunfighter to the IRS communication saloon may result in a gunfight.
- As Mark Twain said, “Don’t wrestle with pigs. You both get dirty and the pig likes it.” This is probably how the IRS feels about litigators, but the IRS agents have nothing to lose, and you do, including your reputation.
- Better to “Do the right thing. It will gratify some people and astonish the rest.”

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The “Information Dump” Alternative

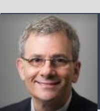
- Louis pointed out in his talk that sometimes other tax advisors use a strategy of creating significant work for the auditor or appeals officer by writing long memos, providing more information than has been requested, and making sure that anything provided is disorganized and will take significant review and assembly time.
- It is then hoped that the IRS person will put this in the “too hard to handle file” and simply settle or let the statute of limitations run. But the more someone works on a matter the more they will want and continue to work on it.
- In the author’s opinion, a client should be conferred with before thinking about using such a strategy, and for most tax professionals and situations this is definitely not the way to go.

How to Work with the IRS

- The author has sometimes written a very short appellate letter that begins with “this is the shortest letter that I felt that we could write to comply with the statutory law and facilitate our initial phone call. I am more than glad to write a more extensive ‘appellate brief style’ protest letter if requested, but I am having a hard time understanding why the auditor believes that our position is not correct.”
- Sometimes , the appeals officer will call upon receipt and say “thanks for being straightforward. Let us resolve this now with minimum fanfare.”

Choosing an Estate Tax Planning Strategy Based Upon Valuation or Litigation Issues

- GRAT's offer a statutory adjustment that should completely avoid the risk of a gift tax liability if a good faith valuation process has been followed.
  - Louis Harrison reports that the audit rate for GRATs and Charitable Lead Annuity Trusts (CLATs) is high, but that the agents generally are only looking at whether there was a good faith appraisal and if the required annual payments to the taxpayer (for a GRAT) or to the charity (for a CLAT) have been made.
- Many planners prefer an installment sale to a Grantor Trust for a number of reasons, including the fact that an installment sale can use the long term Applicable Federal Rate for a long term interest only note that essentially freezes values for much longer than a GRAT, and the Grantor Trust that purchases that assets can be generation skipping tax exempt from day one to benefit children without being subject to estate tax in their estates.
- Nevertheless there is a larger risk of gift treatment with an installment sale.
  - A Wandry clause does not eliminate this risk.
  - A Petter/Christiansen/McCord clause with an overflow to charity or a disclaimer of excess amounts to charity should be more effective in front of a Tax Court judge. Use Trust overflow clauses as well.



Do Everything (or as much as possible) Right

- Make sure of the following:

1. Your documents are sound. There is an advantage to using an established well respected document preparation service/company/platform.
2. Make sure that step-by-step instructions are designed and followed for what will occur.
3. Make sure that the step-by-step instructions have been followed.
4. Make sure that tax returns are properly filed and that financial statements and reporting are all consistent with the applicable plan.
5. Remember that gift and estate tax returns are art/not science documents that should be carefully reviewed by lawyers or other professionals who understand the substantive law behind the arrangement.
6. Remember that an auditor will judge whether to audit a return and how much back up information to request based upon thoroughness and clarity of preparation, and whether the preparer seems to be competent and organized.

Do Everything Right, Cont'd.

7. Most of our "audits" consist of phone conversations about one or two items and whether we can reduce our valuation discount.

8. It also helps to publish – some IRS agents and officers have thanked us for articles that have helped them in the past and have been extremely courteous and reasonable in their treatment.

9. Income tax compliance - a high percentage of accountants do not understand defective grantor trusts and file Form 1041's paying income tax at the trust level at the highest bracket when the income tax should be getting paid by the individual taxpayer.

10. Getting a copy of the first informational or complex or simple 1041 to be filed the year after a trust is formed can be a good idea to make sure they get it right. They often don't.

IRS Rules No Step-up In Basis for Grantor Trust Assets

- RR 2023-2 and Applying for a Refund

Rev. Rul. 2023-2 - Got it Wrong?

- On March 29, 2023 Revenue Ruling 2023-2 was issued by the Treasury Department.
- The ruling held that assets owned by an irrevocable grantor trust should not receive an adjustment in basis on the death of the grantor, because the Trust's assets were not considered to have been "acquired from or to have passed from the decedent" to the beneficiaries for purposes of IRC § 1014(a) due to the fact that the gift had already been completed.
- Rather, the beneficiary is receiving the assets from the trust, which does not constitute assets being "bequeathed" or "devised" by the grantor on the grantor's death where the gift is completed during the life of the grantor.

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Rev. Rul. 2023-2 - Got it Wrong?

- The facts presented in Rev. Rul. 2023-2 were as follows:
  - In Year 1, A, an individual, established Irrevocable Trust T, and funded T with Asset in a transfer that was a completed gift for gift tax purposes. A retained a power over T that causes A to be treated as the owner of T for income tax purposes…. A did not hold a power over T that would result in the inclusion of T's assets in A's gross estate… By the time of A's death in Year 7, the fair market value (FMV) of Asset had appreciated. At A's death, the liabilities of T did not exceed the basis of the assets in T, and neither T nor A held a note on which the other was the obligor.

Rev. Rul. 2023-2 - Got it Wrong?

- The ruling's holding indicates that because transfers to an irrevocable trust are "completed gifts" at the time of the transfer, when the grantor does not hold a beneficial interest in or a retained power over the Trust property (i.e. certain decision-making provisions that would require the trust asset be included in the grantor's gross estate), the beneficiary of the trust is not "inheriting" these assets from the grantor on the grantor's death, and the assets are therefore not within the purview of the step-up in basis under §1014(a).

Rev. Rul. 2023-2 - Got it Wrong?

- With Rev. Rul 2023-2, the IRS has now taken a formal stance on this issue, but there remains contrary authority and arguments that can be used by the Tax Court, the Court of Claims, and an appellate court in reaching the opposite conclusion.

Rev. Rul. 2023-2 - Got it Wrong?

- Jonathan Blattmachr, Mitchell M. Gans, and Hugh H. Jacobson published an article entitled “Income Tax Effects of Termination of Grantor Trust Status By Reason of the Grantor’s Death,” in the September 2002 edition of the Journal of Taxation. The authors posit that:
- Although § 1014(b)(9) requires grantor trust assets to be included in the estate of the grantor to receive a basis adjustment, § 1014(b)(1) does not require inclusion in the grantor’s estate.
- Nothing in the language of the Statute, the Regulations, or the legislative history related to the passage of the Statute affirmatively preclude[s] transfers made under a lifetime trust from qualifying as a bequest or devise. [B]ecause a grantor trust’s assets are deemed to be owned by the grantor for income tax purposes, a good argument can be made that the assets held in such trust should be viewed as passing as a bequest or devise when the trust ceases to be a grantor trust at the moment of death.

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Rev. Rul. 2023-2 - Got it Wrong?

- Private Letter Ruling 201245006 is further support for the fact that assets received by a beneficiary from a irrevocable grantor trust should receive a step-up on the death of the grantor.
- There, a Taxpayer, who was a citizen of a foreign country, created an irrevocable trust. Pursuant to the terms of the trust, the assets were held for the taxpayer during the taxpayer's lifetime. On the death of the taxpayer, absent the exercise of a power of appointment by the taxpayer, the assets of the trust would be held in further trust for the benefit of the taxpayer's descendants. The taxpayer requested confirmation that the assets of the trust would receive an adjustment in basis equal to their fair market value as of the death of the taxpayer.
- The IRS concluded that the basis of the trust assets would be equal to their fair market value as of the taxpayer's death.

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Rev. Rul. 2023-2 - Got it Wrong?

- The IRS's analysis in PLR 201245006 concludes that § 1014(b)(1) provides that property acquired by bequest, devise, or inheritance, or by the decedents estate from the decedent shall be considered to have been acquired from or to have passed from the decedent for purposes of § 1014(a).
- The IRS acknowledged that §1014(b)(9), which requires assets receiving an adjustment in basis to be included in the estate of the decedent, does not apply to property described in any other paragraph of § 1014(b)

Rev. Rul. 2023-2 - Got it Wrong?

- Furthermore, when asked about the situation of the basis adjustment for grantor trusts in June of 2015, and many times thereafter, Mr. Blattmachr responded that his position on the issue has not changed since his 2002 article for the Journal of Taxation.
- "You own those assets up until the moment you die for income tax purposes. We believe at that time, you, the individual, at your death, have for the first time, transferred those assets, which will now be to the trust, which did not exist for income tax purposes until the moment you die."

Rev. Rul. 2023-2 – Applying for a Refund

- Now that Rev. Rul 2023-2 has been issued, we do not believe that the IRS's position is beyond question.
- Although there is the risk of penalty, a taxpayer might consider paying the capital gains tax on the tax return as if the assets did not receive an adjustment in basis, and then filing an amended tax return requesting a refund based on the assets receiving a step-up in basis, and providing full disclosure that this position was taken.
- Then, if the step-up is basis is denied, the taxpayer did not make a substantial underpayment on the original return, and the risk of penalties being incurred by the taxpayer should be greatly reduced.

Rev. Rul. 2023-2 – Applying for a Refund

- While not providing disclosure of this position may expose a taxpayer and his or her tax advisors to an understatement penalty, we believe that it is safer for a tax return to take the position that the assets of a grantor trust receive an adjustment of basis on the death of the grantor, rather thank risking a malpractice claim from the grantor's heirs in future years.
- If necessary, a tax advisor may want to considered entering into an Indemnification Agreement with the grantor's family whereby they would agree to indemnify the tax advisor if he or she becomes exposed to any penalties associated with a potential understatement.

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Audit Risks from §2036(a)(2)

- Louis Harrison has indicated that there are minimal risks associated with 2036(a)(2) (aka Strangi and Powell) for "sound" estate plans that have valid economic substance and are not abusive.
- Apparently, very few if any participants at Notre Dame Institute who attended Louis's talk raised their hands when asked whether they had seen the IRS using §2036(a)(2)/Powell in conventional estates. I don't think they were sleeping.
- Nevertheless, it is important to have business purposes and to avoid abusive factual situations.
- MORE OFTEN THE BIGGER PROBLEM WILL BE WHERE A CLIENT GAVE SOMETHING AWAY AND KEPT USING IT, WHICH WILL CAUSE INCLUSION UNDER IRC SECTION 2036(a)(1).

Safety Precautions and Who to CC.

- The use of a “control trust” that allows an independent trustee of a separate trust to determine if and when there will be a liquidation or any distribution from an entity is a safety precaution from 2036(a)(2) that we commonly use and adds very little extra cost or complexity.
- Planners might consider writing a letter that describes the business purposes of the arrangement and copying someone who would not be covered under the attorney-client privilege so that this letter would be immediately discovered by the IRS without having to risk loss of attorney-client privilege by trying to use correspondence that would otherwise be privileged with a result of the IRS being able to obtain all attorney-client privileged documents.

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Safety Precautions and Who to CC., Cont'd.

- Determining who to copy on various items can be of great importance.
- For example, there may be a financial or investment advisor who is intricately involved with planning.
  - Are they "part of the team" and privileged because they are assisting the lawyer and CPA?
  - Or are they outside of the attorney-client privilege?
- This can be a close call and something to consider.

Can You Avoid Having to File an Estate Tax Return

1. Keep the client's estate under the exemption amount
2. If the client has significant assets but a lot of debt move the assets and the debt to an LLC so that the client owns the LLC.
   - E.g. a client has $5,000,000 of personal and residential assets and $20,000,000 of investment assets subject to $15,000,000 of debt.
   - Instead of having a $25,000,000 estate that would require the filing of an estate tax return, put the $20,000,000 of investment assets subject to the $15,000,000 of debt under an LLC and now the client has a $10,000 estate and no estate tax filing but still a full step up on death. t .
3. If the client is just over the exemption amount and near death, consider a charitable gift or a marital gift to get the client under the 706 filing limit.
4. Transfer a portion of the client's assets for a self-cancelling installment note and/or a private annuity before death, if allowable, to avoid 706 filing.

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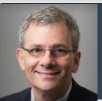
Savings Clause to Overflow to Charity or Marital Deduction Trust



Irrevocable Trust Flexible Gifting Techniques
Use defined value formula gifting, w/charity

- The clauses with the most history/authority are defined value formula gifting clauses that pour any excess over to charity:

  - See *Estate of Christiansen v. Comm'r*, 130 T.C. 1 (T.C. 2008), aff'd 586 F.3d 1061 (8th Cir. 2009)

  - *Succession of McCord v. Comm'r*, 461 F.3d 614 (5th Cir. 2006)

  - *Estate of Petter v. Comm'r*, T.C. Memo 2009-280 (T.C. 2009)

Irrevocable Trust Flexible Gifting Techniques
Use defined value formula gifting, w/charity

- There is no specific case using a marital pourover, but in theory it is logically no different from using a charitable pourover, and involves much fewer issues.

- Imagine the income tax filing headaches when you have to go back years later and amend entity tax returns, individual and/or trust tax returns because the ownership was improperly reported and none of the K-1s and other tax filings were correct due to incorrect allocation of ownership.

- If shares are reallocated from IGT to marital trust, both are grantor trusts and this largely goes away.

- If shares are reallocated outright to spouse, and spouses file jointly, this problem largely goes away as well.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Irrevocable Trust Flexible Gifting Techniques
Use defined value formula gifting, w/charity

- There is no specific court case or ruling using an incomplete gift or a GRAT as the pourover, but in theory this should also be possible. The “public policy” in favor of charitable/marital deductions is not quite there.

- In lieu of pouring over into a GRAT or incomplete gift trust, such as a DAPT, you can simply copy the defined value gift in the *Wandry* case.

- *Wandry* simply used a defined value formula wherein any excess amount is deemed to have never been transferred in the first place. The IRS lost the case, but did not acquiesce in the decision. Unlike the *Christiansen* and *McCord* cases, which are at the appellate level and good authority in the 5th and 8th Circuit, *Wandry* is only a tax court memorandum decision – T.C. Memo 2012-88.

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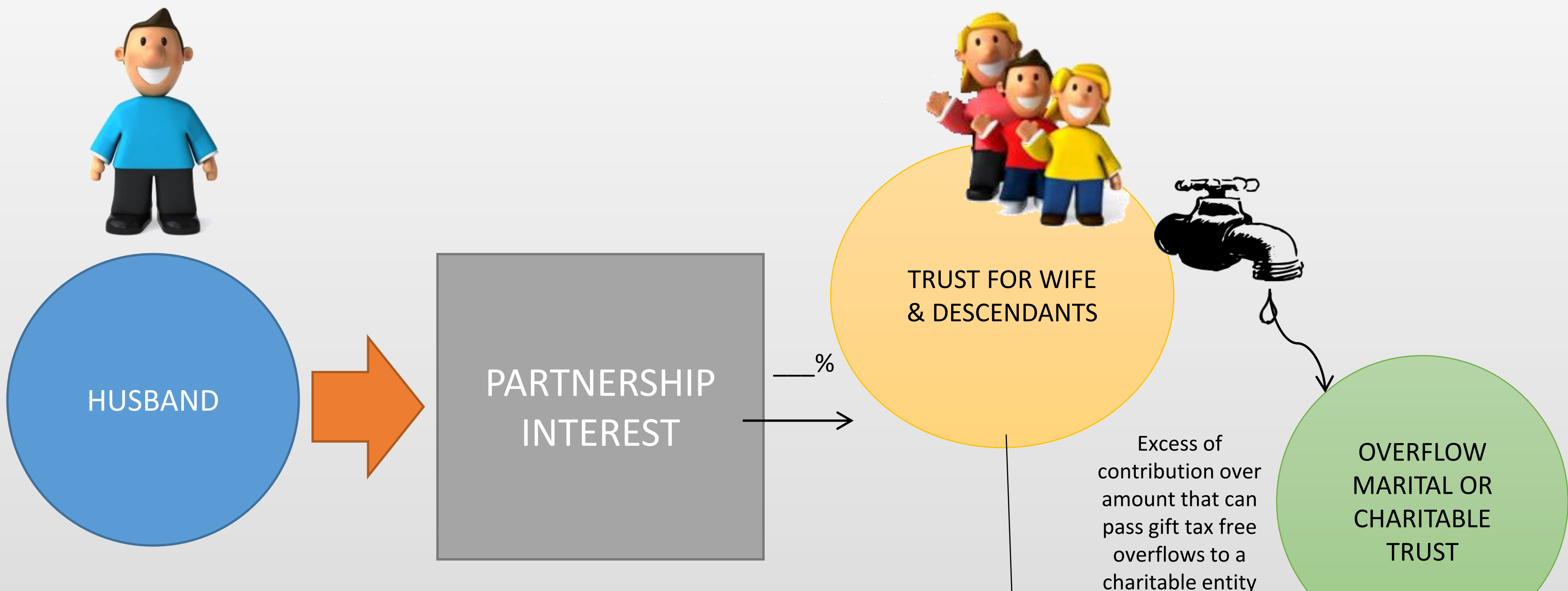
OTHER VALUATION SAVINGS TRANSACTIONS



Can the overflow recipient be a:

$12,920,000

- Spouse
- Spousal trust that qualifies for a marital deduction?
- Zeroed-out GRAT?
- Trust where the grantor has retained a right or power that prevents the transfer from being a completed gift?

Rest of funds

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Marital Overflow Clause

SPECIAL LANGUAGE (Cont.):

Disposition of SMITH Marital Deduction Share. The SMITH Marital Deduction Share shall be held as a separate trust to be known as the SMITH MARITAL DEDUCTION TRUST, and shall be held, managed and distributed for the benefit of the Grantor's spouse as follows:

(1) Income. Commencing with the date of the funding of the SMITH MARITAL DEDUCTION TRUST, the Trustee shall pay to or for the benefit of the Grantor's spouse during such spouse's lifetime all the net income in convenient installments but no less frequently than annually.

(2) Principal. In addition, the Trustee may pay to or for the benefit of the Grantor's spouse at any time and from time to time such sums from principal as are reasonably necessary for the Grantor's spouse's health, education, maintenance and support. Furthermore, an Independent Trustee, if appointed, may pay to or for the benefit of the Grantor's spouse at any time and from time to time such amounts, up to and including the whole thereof, as such Independent Trustee deems appropriate in its sole and absolute discretion, provided that no non-Independent Trustee then serving shall have any ability whatsoever to participate in such decision.

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Marital Overflow Clause

(3) IRAs and Qualified Plans. If this SMITH MARITAL DEDUCTION TRUST becomes the beneficiary of any individual retirement account (IRA), qualified retirement plan, or similar tax-deferred arrangement or annuity (the "Plan"), the Trustee shall withdraw from such Trust's share of the Plan, in each calendar year, and deposit in such Trust, at minimum the "minimum distribution amount" which is required to be withdrawn from such share under Section 401(a)(9) of the Code, the Regulations thereunder, or other applicable law, as then in force, provided that the Grantor’s spouse may require, on an annual basis by signed writing delivered to the Trustee, that the Trustee so withdraw and deposit the greater of the minimum distribution amount or the net income on the Trust's share of such Plan for such year. The net income of this SMITH MARITAL DEDUCTION TRUST’s share of the Plan shall be included in computation of the Trust's net income for the purpose of determining any required income distributions.

(4) Prohibited Distributions. Notwithstanding anything in this Trust Agreement to the contrary, no distribution of income or principal shall be made from the SMITH MARITAL DEDUCTION TRUST to or for the benefit of anyone but the Grantor’s spouse during the Grantor’s spouse's lifetime, unless the Grantor’s spouse executes her inter vivos limited Power of Appointment as described below.

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Marital Overflow Clause

(5) Power of Appointment. The Grantor's spouse shall have a testamentary general Power of Appointment (as defined in Section 1.09 of this Trust Agreement) with respect to the SMITH MARITAL DEDUCTION TRUST, and upon the death of the Grantor's spouse, the Trustee shall pay the remaining principal, or such portion thereof over which said Power is exercised, as the Grantor's spouse directs pursuant to the exercise of such Power.

Further, the Grantor's spouse shall have an inter vivos limited Power of Appointment (as defined in Section 1.09 of this Trust Agreement) with respect to the SMITH MARITAL DEDUCTION TRUST, provided that the Grantor's spouse must exercise such power, if at all, by making specific reference to such power in a written document signed in the presence of two witnesses and a notary and delivered to the Trustee. Upon receipt of such document, the Trustee shall pay such principal or a portion thereof over which said power is exercised, as the Grantor's spouse directs pursuant to the exercise of such power.

(6) Disposition in Lieu of Exercise of Powers of Appointment. Upon the death of the Grantor's spouse and to the extent not otherwise effectively appointed, any property remaining in the SMITH MARITAL DEDUCTION TRUST shall be held, managed and distributed pursuant to Section 5.01(b) of this Trust Agreement, which are the protective trust provisions for descendants.

Marital Deduction Savings Clause for Revocable Trust

4.05 Construction of Marital Deduction. It is my primary intention that, to the extent so elected, the federal estate tax marital deduction as described in Section 4.02(a) of this Article shall be obtained, if my spouse survives me, in order to reduce the federal estate tax on my death to zero or to the absolute minimum possible if a reduction to zero cannot be achieved, notwithstanding any provision in this Trust or in my estate plan that might be construed as compromising this objective. All questions regarding the marital deduction devise and this Trust shall therefore be resolved accordingly. The powers and discretions of the Trustee with respect to administration of my estate and of the Trust Estate shall not be exercised or exercisable except in a manner consistent with my intent as expressed in this paragraph. To the extent that any other provision of this Trust conflicts with the primary intent as expressed in this paragraph, giving rise to an ambiguity, the ambiguity shall be resolved as directed in this paragraph. Should there be an ambiguity as to whether any provision necessary for qualification for the marital deduction is included in this Trust, the ambiguity shall be resolved as directed in this paragraph. As regards to the marital deduction, all other provisions of this Trust are subordinate to this paragraph. Notwithstanding the above, nothing in this Section shall be construed to invalidate any measures taken after my death, such as qualified disclaimers or partial Q-TIP elections, to minimize the aggregate estate taxes imposed on my estate and the estate of my spouse. No Trust Protector, Trust Advisor, Trustee, or any other party who may be appointed under this Trust shall have any power or authority to make any change to any rights of a surviving spouse that would detrimentally effect the qualification of a marital devise for the federal estate tax marital deduction.

Trust Protector Language to Prevent Inadvertent Disqualification from the Marital Deduction

6.16 Trust Protector Provision.

(a) I hereby appoint BOB BURNS, ESQUIRE and REBECCA ROADS, ESQUIRE as Trust Protectors hereunder, provided that the approval of my spouse, SALLY SAMPLE , shall be required before any change can be made if my said spouse is living and able to deliberate. If any one of them fails or ceases to act as Trust Protector, then the remaining Trust Protector shall select a board certified estate and probate attorney who has an "AV" rating in the Martindale-Hubbell law directory licensed to practice in the State of Florida to serve in such Trust Protector's stead. At any time, any two serving Trust Protectors, by unanimous consent, may appoint …

(a) Notwithstanding anything in this Trust Agreement to the contrary, no power exercisable hereunder shall be exercisable in any way not explicitly consented to by my spouse, SALLY SAMPLE, if living and able to deliberate, or if my spouse, SALLY SAMPLE, is not living or able to deliberate, then the approval of any individual named as a potential Trustee under Section 6.03 of this Trust Agreement, or in any way that would deprive the Grantor of the right to appoint how the assets held under the Trust will be devised in the event of the Grantor's death, or would disqualify any marital devise or marital or Q-TIP Trust established hereunder from qualifying for the federal estate tax marital deduction or deprive any spouse of the Grantor powers to serve as Trustee and to select successor Trusteeship to apply during said spouse's lifetime or to detrimentally affect the Grantor's surviving spouse in any material way or deprive the Grantor's spouse of rights as to Trusteeship or Trustee selection under Article Six hereof. Further, as to any trust funded by IRA, pension, or qualified plan proceeds, the Scrivener Protector shall not be empowered to add any beneficiary who is older than the Designated Beneficiary of any trust herein established as of the time of appointment or a non-individual, as defined under Internal Revenue Code Section 401(a)(9) and the regulations thereunder.

Charitable Overflow Clause

(b) If Spouse Does Not Survive. Upon the date of death of the survivor of my spouse and I, if the separate trusts established for the benefit of my children and/or their descendants under one or more Trust Agreements established by me or my spouse (including, without limitation **NAMES OF TRUSTS**) (collectively "Other Affiliated Trusts") together have a Net Fair Market Value (as such term is defined below) of at least Twenty-Five Million Dollars ($25,000,000) in the aggregate, as such amount is adjusted for inflation pursuant to Section 4.08 of this Trust Agreement (the "Threshold Amount"), then I intend for an amount of the rest, remainder and residue of the Trust estate to be distributed to the **NAME OF CLAT** to be held, managed and administered pursuant to Section 4.02(g) of this Trust Agreement based upon the smallest amount, that, if allowed as a federal estate tax charitable deduction, would result in the least possible federal estate tax being payable by reason of my death (the "Applicable Charitable Amount"), with the disposition to the **NAME OF CLAT** to qualify for the federal estate tax charitable deduction; provided, however, that in lieu of the devises to the **NAME OF CLAT** described above, the Trustees of this Trust Agreement shall have the discretion to transfer all or a portion of the Applicable Charitable Amount to one or more 501(c)(3) charitable organizations (including, without limitation, a 501(c)(3) charity that is established by the Trustees, which could be a school that qualifies as an "educational organization" as specifically defined in Section 170(b)(1)(a)(ii) of the Internal Revenue Code), so long as the devise to the applicable charitable organization or organizations qualifies for the federal estate tax charitable deduction and do not result in a violation of the "Self-Dealing" rules under Section 4941 of the Internal Revenue Code and the Treasury Regulations thereunder as a result of the type of assets passing to said charitable organization or organizations or otherwise.

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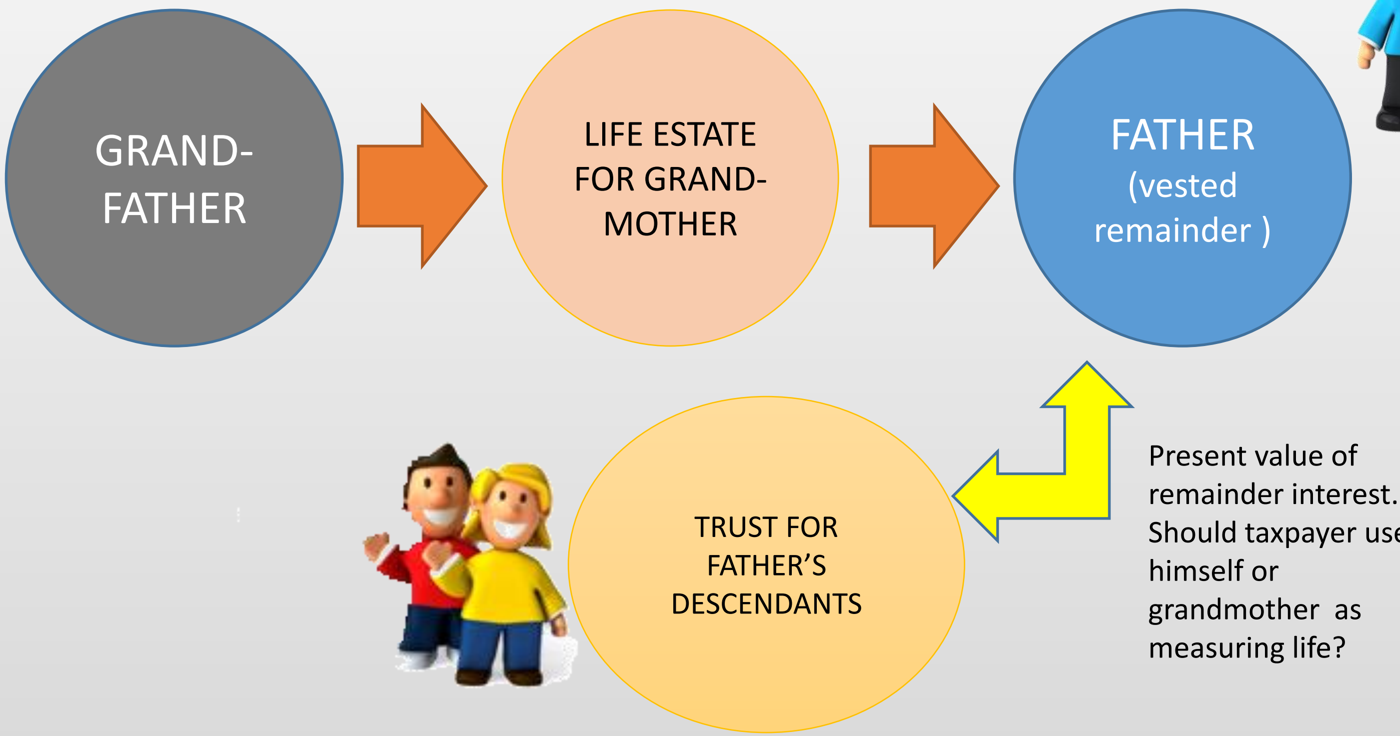
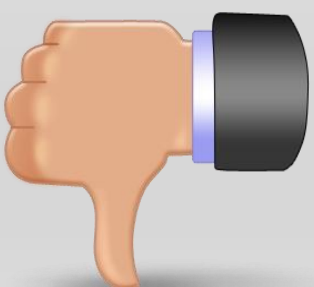
Charitable Overflow Clause

If the Other Affiliated Trusts do not have an aggregate Net Fair Market Value equal to or exceeding the Twenty-Five Million Dollar ($25,000,000) (as such amount is adjusted for inflation pursuant to Section 4.08 of this Trust Agreement) Threshold Amount, then I intend for the separate trusts established for the primary benefit of my children under Section 4.02(e) and/or Section 4.02(f) to be funded with the minimum amount necessary to cause all trusts established for my children and/or their descendants (including, without limitation, the Other Affiliated Trusts) to have assets with a Net Fair Market Value of assets of at least Twenty-Five Million Dollars ($25,000,000) (as such amount is adjusted for inflation pursuant to Section 4.08 of this Trust Agreement) in the aggregate, regardless of whether estate tax will be incurred by reason of any additional funding, if such funding is necessary. For the purposes of this Trust Agreement, the term "Net Fair Market Value" shall mean the value of assets (including, without limitation, any death benefit proceeds payable on one or more life insurance policies owned by the applicable trust or trusts), minus liabilities (including, without limitation, any liabilities owed to me, my spouse, or any other Trust Agreement established by either or both of us or any entity owned by either or both of us), of the applicable trust or trusts, and shall be determined by the Trustee of this Trust Agreement after consultation with the trustee of the applicable trusts and the certified public accounting firm who prepares the income tax returns for the applicable trusts, and the determination made by the Trustee of this Trust Agreement shall be binding unless clearly erroneous.

Proctor v. Comm'r, 142 F.2d 824 (4th Cir. 1944)

The Court held that the defined value formula was a condition subsequent and it was against public policy.





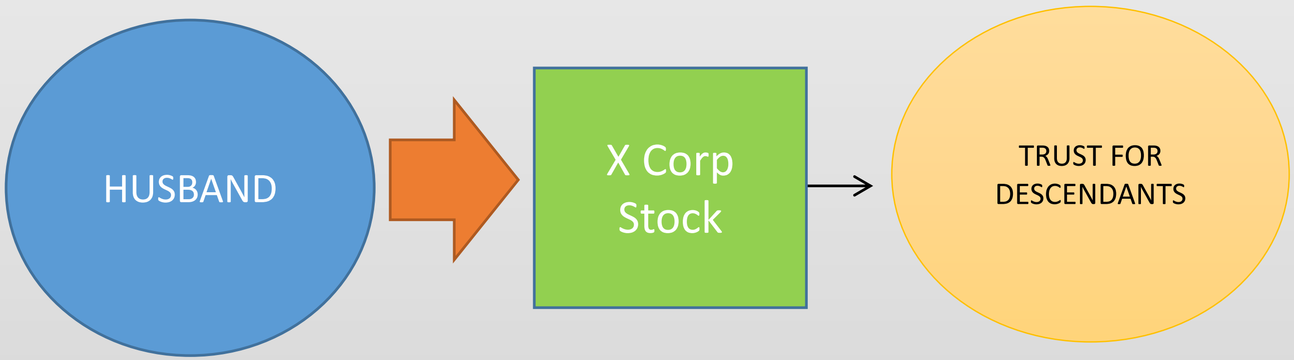
I hereby give the present value of my remainder interest to the Trust for Father's Descendants calculated by using __________ as the measuring life. Language verbatim from *Proctor*: **"However, in the event it should be determined that any part of the transfer in trust hereunder is subject to gift tax, it is agreed by all the parties hereto that in that event the excess property hereby transferred which is decreed by such court to be subject to gift tax, shall automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of the grantor."**

Introduction to *King*

- The *King* clause, which indicates that the sales price will be increased in an installment sale by an increase of the promissory note principal amount and retroactive payment of additional interest, was approved in *King* v. US., 545 F.2d 700 by the Tenth Circuit Court of Appeals. Why not keep the whole transfer intact and use a King clause, as opposed to having the IRS be able to back out part of the transfer and losing future growth on what is transferred?
- It is possible to use a *Wandry* clause and to also provide that if the *Wandry* clause is not respected that the overflow amount will be added to the promissory note under a backup *King* clause.
- Also, the trust receiving the seed capital gift and issuing the promissory note should have overflow provisions which can generally provide that any amount that would be a gift exceeding a certain dollar amount or the taxpayer's estate and gift tax exemption amount can revert back to the taxpayer, pass to Section 2056(b)(5) Marital Deduction Trust (which does not require a QTIP election) or a charitable overflow provision.

King v. U.S., 545 F.2d 700 (10th Cir. 1976)

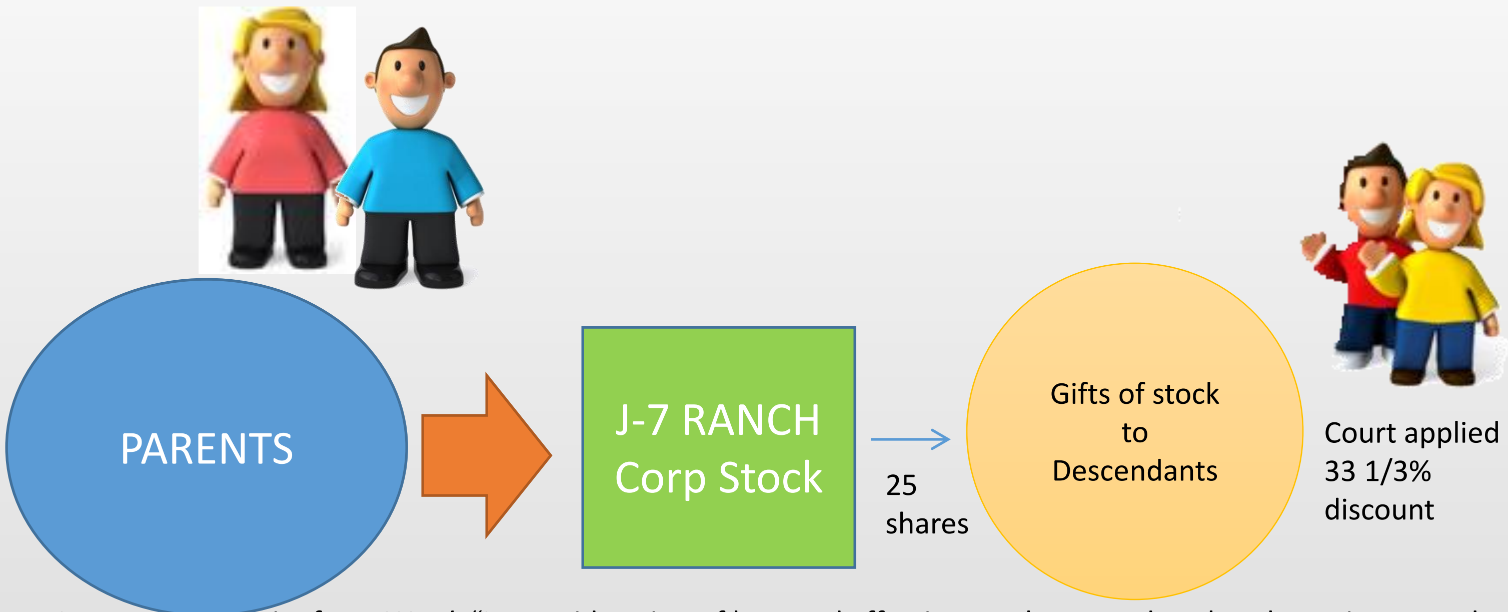
The Court distinguished this case from *Proctor* because the stock was being sold, rather than gifted and the price adjustment clause was a "proper means of overcoming uncertainty in ascertaining the fair market value of the stock."



I hereby <u>sell</u> stock in X corporation, the current fair market value being $______ , to Trust For Descendants. Language verbatim from *King*: "If the fair market value of the stock is ever determined by the IRS to be greater or less than the fair market value determined herein, the purchase price shall be adjusted to the fair market value determined by the IRS."

Ward v. Comm'r., 87 T.C. 78 (1986)

The Court held that the gift adjustment clause was void as contrary to public policy. The Court distinguished this case from *King* because there was no arm's length transaction present and the agreement had the effect of retroactively altering the amount of a completed gift (condition subsequent).

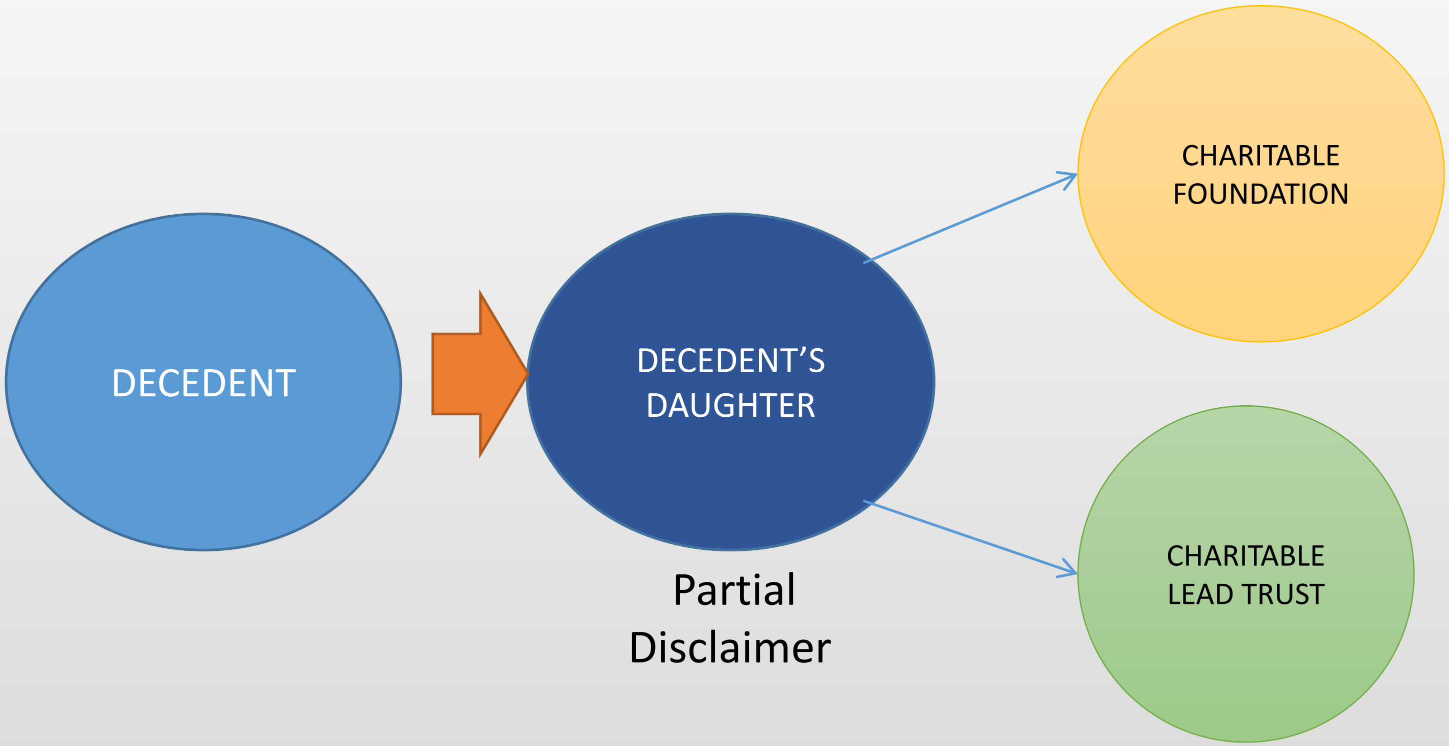


Language verbatim from *Ward*: "In consideration of love and affection, each Donor does hereby assign to each Donee all of the Donor's right, title and interest in and to twenty-five (25) shares of the capital stock of J-SEVEN RANCH, INC., a Florida corporation, hereinafter called the "Corporation". The parties acknowledge that the computation of the number of shares constituting each gift has been based upon their mutual understanding and belief that the fair market value of each share is $ 2,000.00, resulting in tax liability for each Donor less than the amount of unified credit against gift tax to which the Donor is entitled at this time under applicable provisions of law.

Each party hereto agrees that if it should be finally determined for Federal gift tax purposes that the fair market value of each share of capital stock of the Corporation exceeds or is less than $ 2,000.00 an adjustment will be made in the number of shares constituting each gift so that each Donor will give to each Donee the maximum number of full shares of capital stock of the Corporation, the total value of which will be $ 50,000.00 from each Donor to each Donee and a total of $ 150,000 from each Donor to all Donees. Any adjustment so made which results in an increase or decrease in the number of shares held by a stockholder of the Corporation will be made effective as of the same date as this Agreement, and any dividends paid thereafter shall be recomputed and reimbursed as necessary to give effect to the intent of this Agreement."

In re Christiansen, 586 F.3d 1061 (8th Cir. 2009)

Court upheld the formula disclaimer, with the excess passing to charity



Language verbatim from *Christiansen:* "I hereby disclaim that portion of the Gift determined by reference to a fraction, the numerator of which is the fair market value of the Gift (before payment of debts, expenses and taxes) on ______, and the denominator of which is the fair market value of the Gift (before payment of debts, expenses and taxes) on _____ ("the Disclaimed Portion"). The fair market value of the Gift (before payment of debts, expenses and taxes) on _____, shall be the price at which the Gift (before payment of debts, expenses and taxes) would have changed hands on _____, between a hypothetical willing buyer and a hypothetical willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts , as such value is finally determined for federal estate tax purposes."

Dispositions to Charity Under *McCord/Petter* Type Family Installment Sales

- Under the *McCord* and *Petter* arrangements, a small sliver of the applicable family entity was treated as going to charity at the moment of sale, and the only open question was whether a larger percentage of the entity was transferred to the charity at the time of the sale.
- In other words, as opposed to the agreements indicating that the charity was receiving a percent of the company and would therefore receive a greater percentage later if determined appropriate by a tax court or other court of competent jurisdiction, the agreement indicated that the charity was receiving a percentage of the applicable entity equal to a portion sufficient so that there would be no gift being considered as made to the family trust that was purchasing the rest of the applicable percentage for a fixed dollar amount.
- For instance, if the sales price was $1 million for 25% and the charity was receiving 1% at the time of the transfer, if the Tax Court found that 25% of the entity was really worth $2 million then the charity would be receiving 13.5% at the moment of the transaction, and the parties would correct percentages of ownership and provide makeup payments to take into account that the charity actually received 13.5% instead of 1% at the time of the sale.

Issues Presented by *McCord/Petter* Type Family Installment Sales *(cont'd)*

- Will the excess transfer qualify for an income tax deduction?
- Specifically, will the taxpayer know within 3 years of filing the income tax return for the tax year in question whether the charitable contribution is actually greater than what is reported on the income tax return?

  - ❖ One strategy is to file the gift tax return as soon as possible in the year following the sale in order to get the 3 year statute on the audit of a gift tax return running, while filing an extension for the individual income tax return of the taxpayer, and probably filing the income tax return on the last possible day, or possibly even thereafter if this is legal, given that gift tax auditors will commonly request an extension of the statute of limitations and may be less likely to settle on favorable terms if the taxpayer does not grant an extension to some extent.

From Ed Morrow's LISI Estate Planning Newsletter #2831

Tax Effect of a Qualified Disclaimer to the Donor

Often when a donee/beneficiary disclaims an intervivos gift, there is no gift tax effect to the donor. If the gift is initially made to a child who disclaims, for example, but the assets simply stay in trust for or pass to that child's children, the gift is still complete. In such an instance, however, it may now be subject to generation skipping transfer (GST) tax as well, since a disclaimer does not invoke the predeceased ancestor exception.[12]

What if, upon disclaimer, the assets pass back to the donor? Treasury regulations provide that if a donee makes a qualified disclaimer, it "undoes" the gift for federal gift tax purposes if the asset reverts to the donor:

(c)(1) The gift tax also applies to gifts indirectly made. Thus, any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax. See further § 25.2512-8 relating to transfers for insufficient consideration. However, in the case of a transfer creating an interest in property (within the meaning of § 25.2518-2(c)(3) and (c)(4)) made after December 31, 1976, this paragraph (c)(1) shall not apply to the donee if, as a result of a qualified disclaimer by the donee, the interest passes to a different donee. Nor shall it apply to a donor if, as a result of a qualified disclaimer by the donee, a completed transfer of an interest in property is not effected. See section 2518 and the corresponding regulations for rules relating to a qualified disclaimer.[13] **[emphasis added]**

This gift tax regulation contains no time frame or limit as to this important effect, but references §2518 and its regulations, which of course must be done within the later of nine months after the gift or nine months after the disclaimant reaches age 21.

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From Ed Morrow's LISI Estate Planning Newsletter #2831

The disclaimer regulations reinforce this conclusion:

(b) Effect of a qualified disclaimer. If a person makes a qualified disclaimer as described in section 2518(b) and § 25.2518-2, for purposes of the Federal estate, gift, and generation-skipping transfer tax provisions, the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the
transferor of the property to the person entitled to receive the property as a result of the disclaimer.[14]
[emphasis added]

Thus, if a donor gives property in September 2020 but the donee disclaims in March of 2021, the gift is undone (if, under state law and the donative instrument, it reverts to the donor). Similarly, if the donee does not become age 21 until March of 2023, and files a qualified disclaimer within nine months of that date, the effect is exactly the same.

Just because a gift **may** come back to the donor through a voluntary action of another does not make the original gift incomplete.[15] Otherwise, no gift would ever initially be complete, since donees can always disclaim or later give it back.

Nuances of these conclusions, however, are discussed below.

Wandry and other Clauses

Defined Value Provisions

An Introduction to *Wandry* and other savings clauses

- *Wandry* is a Tax Court Memorandum case with no precedential value, although it has been favorably referred to in at least one other Tax Court Memorandum case. That and $8 dollars will get you a Star Bucks coffee and a cookie and diabetes.
- Overflow to charity provisions that provide for a small initial amount to go to an arm's length charity and for any overflow resulting from gift tax treatment to also go to the charity have been blessed by both the Fifth and Eighth Circuit Court of Appeals, which is stronger precedent than a full Tax Court decision from a jurisprudence standpoint.

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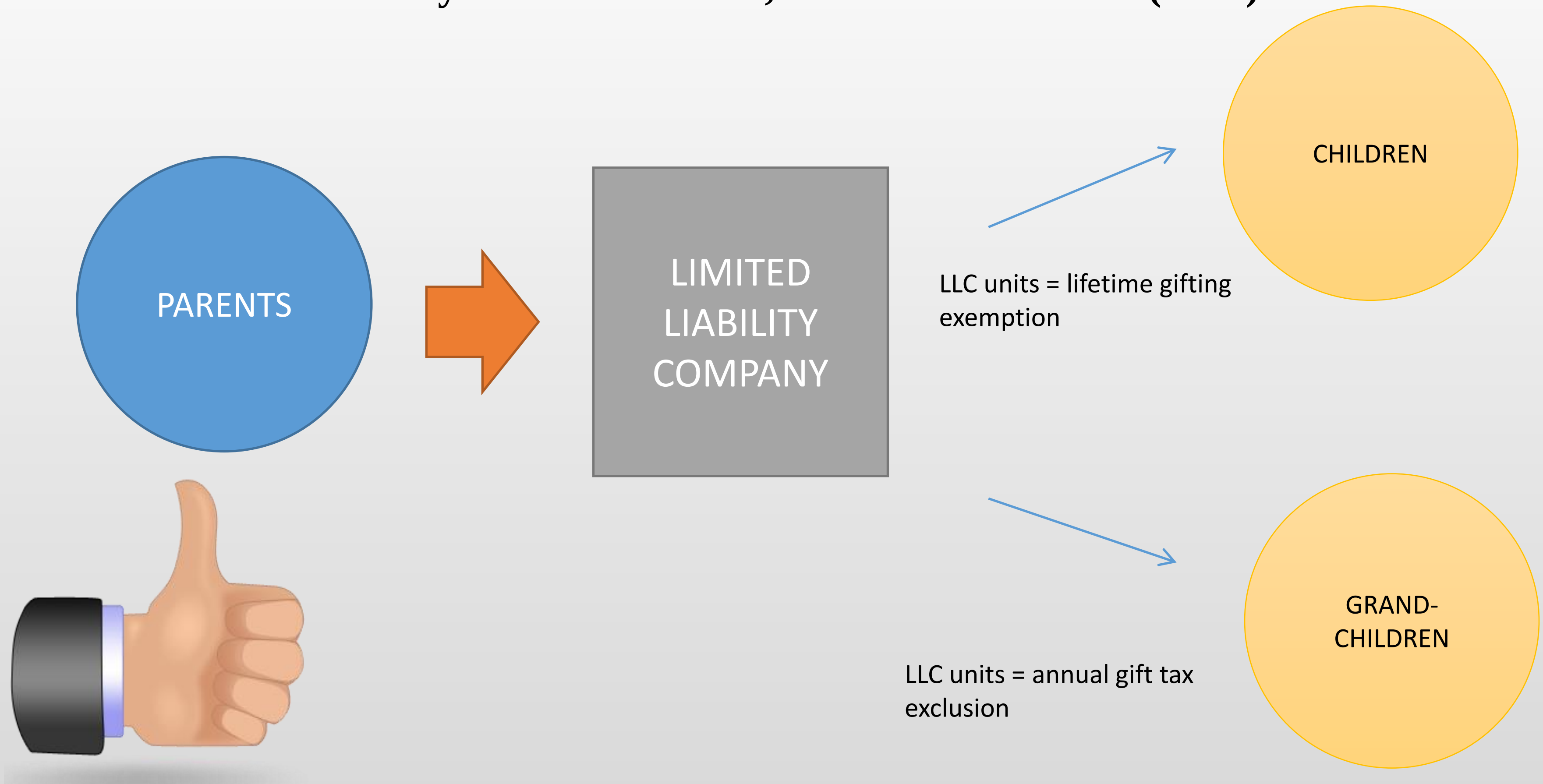
Wandry v. Commissioner, T.C. Memo 2012-88 (2012)



Language verbatim from *Wandry*: "Although the number of Units gifted is fixed on the date of the gift, that number is based on the fair market value of the gifted Units, which cannot be known on the date of the gift but must be determined after such date based on all relevant information as of that date. Furthermore, the value determined is subject to challenge by the Internal Revenue Service ("IRS"). I intend to have a good-faith determination of such value made by an independent third-party professional experienced in such matters and appropriately qualified to make such a determination. Nevertheless, if, after the number of gifted Units is determined based on such valuation, the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of gifted Units shall be adjusted accordingly so that the value of the number of Units gifted to each person equals the amount set forth above, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law."

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The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner*

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "The Sorensen Brothers grew up in a family of firefighters, and their father served as captain at the firehouse in their hometown. The Sorensen Brothers spent considerable time during their childhood and teenage years at the firehouse, where meals were served family style and cooked by fellow firefighters. It was this childhood communal dining experience that would shape their eventual careers. . . .
- "Chris, who is eight years older than Robin, started his career as a rock musician traveling across the United States. At age 23, he added to his career repertoire the titles of professional firefighter and EMT, where he made $12,500 per year. Shortly thereafter, Robin joined his father and Chris in the family profession — becoming a firefighter and EMT at age 19 and 20, respectively.
- "Robin and Chris soon decided to explore their true calling — making and serving quality food with excellent customer service. . . .
- In the early 1990s, Robin and Chris decided that they were ready to open their own shop, choosing the sandwich business because they understood it was less expensive than other types of restaurants to get started in."

Robin IRS Agent Chris

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the IRS's Pretrial Memorandum For Respondent in Chris Sorensen et al. v. Commissioner, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "The brothers opened the first Firehouse Subs in Jacksonville, Florida in 1994. In 1995, petitioners created Firehouse Restaurant Group, Inc. (FRG) as a Florida corporation, which elected to be taxed as an S corporation under § 1362(a) of the Internal Revenue Code. FRG was headquartered in Jacksonville, Florida, and operated and franchised Firehouse Subs restaurants, which specialize in sub sandwiches. FRG also provided financing to franchisees through its subsidiaries.
- "By the end of 2011, there were over 500 Firehouse Subs in the United States, over 90% being franchises, that served about 700,000 customers per week, and grossed over $285,000,000 in system wide sales. By the end of 2014, Firehouse grossed over $550,000,000 in system wide sales and was projected to gross $667,000,000 in system wide sales for 2015.
- "As of December 31, 2014, FRG operated 27 restaurants and had 823 franchises across 43 states and Puerto Rico."

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "Prior to the transfers at issue in this case, on December 28, 2014, the Sorensen Brothers owned Firehouse stock through their revocable trusts — Robin's Living Trust and Chris's Living Trust. Specifically, the shareholders of Firehouse stock were as follows:

Shareholder	Shares	% Interest
Robin's Living Trust	3,200	35.56%
Chris's Living Trust	3,200	35.56%
Other Shareholders	2,600	28.88%
Total	**9,000**	**100.00%**

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The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "In late 2014, the Sorensen Brothers' advisors encouraged them to transfer a portion of their ownership in Firehouse for estate planning purposes. . . .
- "The Sorensen Brothers ultimately heeded advisor recommendations and decided to make gifts of Firehouse stock to their respective Family Trusts prior to the end of 2014. The decision to complete the gifts prior to the end of 2014 was driven by the timing of when these discussions and decisions occurred, coupled with general unease that the then-current $5.34 million gift and estate tax exemption could be legislated away at any time."

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The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "In order to address the Sorensen Brothers' intent to maintain voting control while also facilitating gifts to the Family Trusts, on December 28, 2014, the Firehouse stock ownership was recapitalized, dividing the shares into voting stock and non-voting stock.
- "After recapitalization, the shareholders of Firehouse stock were as follows:"

Shareholder	Voting	Non-voting	Total	% Interest
Robin's Living Trust	3,200	28,800	32,000	35.56%
Chris's Living Trust	3,200	28,800	32,000	35.56%
Other Shareholders	2,600	23,400	26,000	28.88%
Total	**9,000**	**81,000**	**90,000**	**100.00%**

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "After considering several potential structures for the gifts, and relying on the advice of their estate planning attorney Mr. Trudeau, the Sorensen Brothers decided to make defined value gifts of non-voting shares in the amount of $5,000,000 (an amount within the Sorensen Brothers' respective gift tax exemption amounts) to the Family Trusts. The Sorensen Brothers' decision was based both on their desire to utilize only the amount of their gift tax exemptions and on the logistical fact that an appraisal of the shares could not be completed in the 20 days between when they initiated the appraisal and the end of 2014, the date by which they wanted to ensure the gifts were made."

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "On December 31, 2014, Robin, as trustee of Robin's Living Trust, made a gift of Firehouse non-voting shares worth $5,000,000 to Tabitha, as trustee of Robin's Family Trust, defined in the Irrevocable Stock Power transfer document as [the below]: . . .
- "Also on December 31, 2014, Chris, as trustee of Chris's Living Trust, made a gift of Firehouse non-voting shares worth $5,000,000 to Kirsten as trustee Chris's Family Trust, defined in the Irrevocable Stock Power transfer document in the same manner, specifically as:

  > [A] specific number of nonvoting shares in FIREHOUSE RESTAURANT GROUP, INC., a Florida corporation (the "Company"), that have a fair market value as finally determined for federal gift tax purposes equal to exactly $5,000,000. The precise number of shares transferred in accordance with the preceding sentence shall be determined based on all relevant information as of the date of transfer in accordance with a valuation report that will be prepared by the Dixon Hughes Goodman, LLP ("DHG"), Jacksonville, Florida, an independent third-party professional organization that is experienced in such matters and appropriately qualified to make such a determination. However, the determination of fair market value is subject to challenge by the Internal Revenue Service ("IRS"). While the parties intend to initially rely upon and be bound by the valuation report prepared by DHG, if the IRS challenges the valuation and a final determination of a different fair market value is made by the IRS or a court of law, the number shares transferred from the transferor to the transferee shall be adjusted accordingly so that the transferred shares have a value exactly equal to $5,000,000, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or court of law."

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "The Sorensen Brothers engaged DHG to complete an appraisal of non-voting Firehouse stock in order to determine the number of shares equivalent to $5,000,000. . . .
- "In April of 2015, DHG issued its appraisal, opining that the value of one non-voting share of Firehouse stock as of the date of the gift, December 31, 2014, was $532.79. The Sorensen Brothers relied on this appraisal in reporting the 2014 Gifts.
- "Because the Sorensen Brothers' gifts as trustees of their respective Living Trusts were gifts from revocable trusts and treated as gifts from Robin and Chris individually, the gifts of $5 million worth of stock were reported on Robin's and Chris's 2014 Gift Tax Returns. The gifts were reported as follows: '[A] number of non-voting shares of stock in Firehouse Restaurant Group, Inc. ("Firehouse") that have a value as finally determined for federal gift tax purposes equal to $5,000,000 as of the date of the transfer.'"

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "In order to determine the number of shares transferred on December 31, 2014, counsel for the Sorensen Brothers used DHG's valuation of one non-voting share of Firehouse stock ($532.79) to calculate the number of shares transferred in the Sorensen Brothers' respective $5,000,000 gifts, resulting in transfers of 9,384.56 to each of the Sorensen Brothers' respective Family Trusts. The Sorensen Brothers reported this number on the Gift Tax Returns based on the formula contained in their respective transfer documents. Specifically, the Gift Tax Returns stated as follows:

  > Based on the summary report on the valuation of one non-voting share in Firehouse Restaurant Group, Inc. as of December 31, 2014, attached and marked as Exhibit II (the 'Valuation Report'), the value of one non-voting share of Firehouse stock as of the date of the gift was determined to be $532.79. Therefore based on the formula set forth above and the value as determined by the Valuation Report, the donor transferred 9,385 non-voting shares in Firehouse stock [. . .] with a value equal to $5,000,000, and the precise number of shares transferred cannot be finally determined until the value of such shares are finally determined for federal gift tax purposes."

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "After the gifts and completion of DHG's appraisal, the shareholders of Firehouse stock were as follows:"

Shareholder	Voting	Non-voting	Total	% Interest
Robin's Living Trust	3,200	19,415	22,615	25.13%
Robin's Family Trust	0	9,385	9,385	10.43%
Chris's Living Trust	3,200	19,415	22,615	25.13%
Chris's Family Trust	0	9,385	9,385	10.43%
Other Shareholders	2,600	23,400	26,000	28.88%
Total	**9,000**	**81,000**	**90,000**	**100.00%**

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

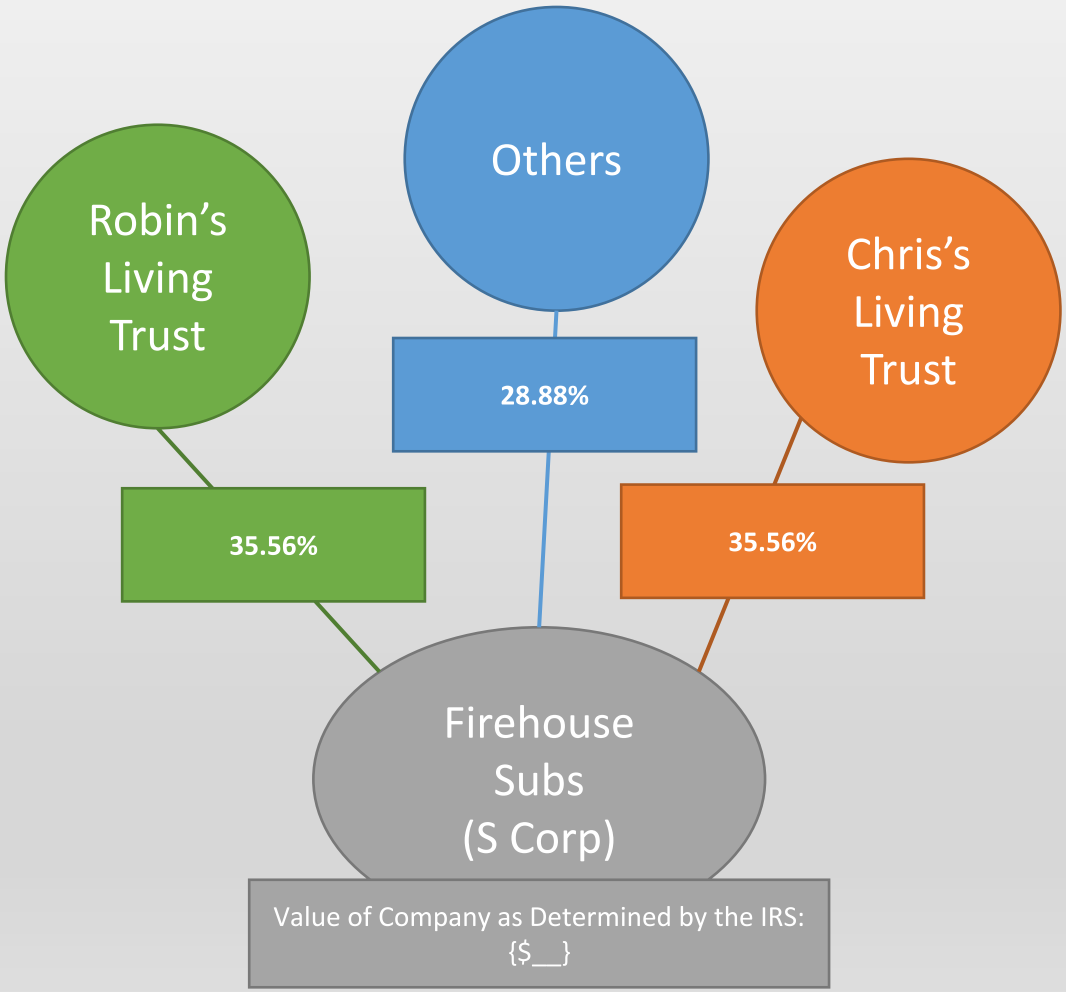
The following is taken from the Amended Pretrial Memorandum For Petitioner in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "The Sorensen Brothers ultimately decided to part with up to 50% of their interests in Firehouse and, after using their exemptions in 2014 to make gifts, they decided to transfer the balance (up to 50% of their interests) by sale.
- "On March 31, 2015, Robin and Chris each sold 5,365 Firehouse non-voting shares to the trustees of their respective Family Trusts in exchange for $2,858,418 from each trustee. Because the sales occurred just 3 months after the Sorensen Brothers' prior gifts, the purchase price was based on the DHG valuation report as of December 31, 2014. The purchase price was satisfied with the issuance of promissory notes from Robin's Family Trust and Chris's Family Trust, secured by stock pledge agreements."

Shareholder	Voting	Non-voting	Total	% Interest
Robin's Living Trust	3,200	14,050	17,250	19.16%
Robin's Family Trust	0	14,750	14,750	16.38%
Chris's Living Trust	3,200	14,050	17,250	19.16%
Chris's Family Trust	0	14,750	14,750	16.38%
Other Shareholders	2,600	23,400	26,000	28.88%
Total	**9,000**	**81,000**	**90,000**	**100.00%**

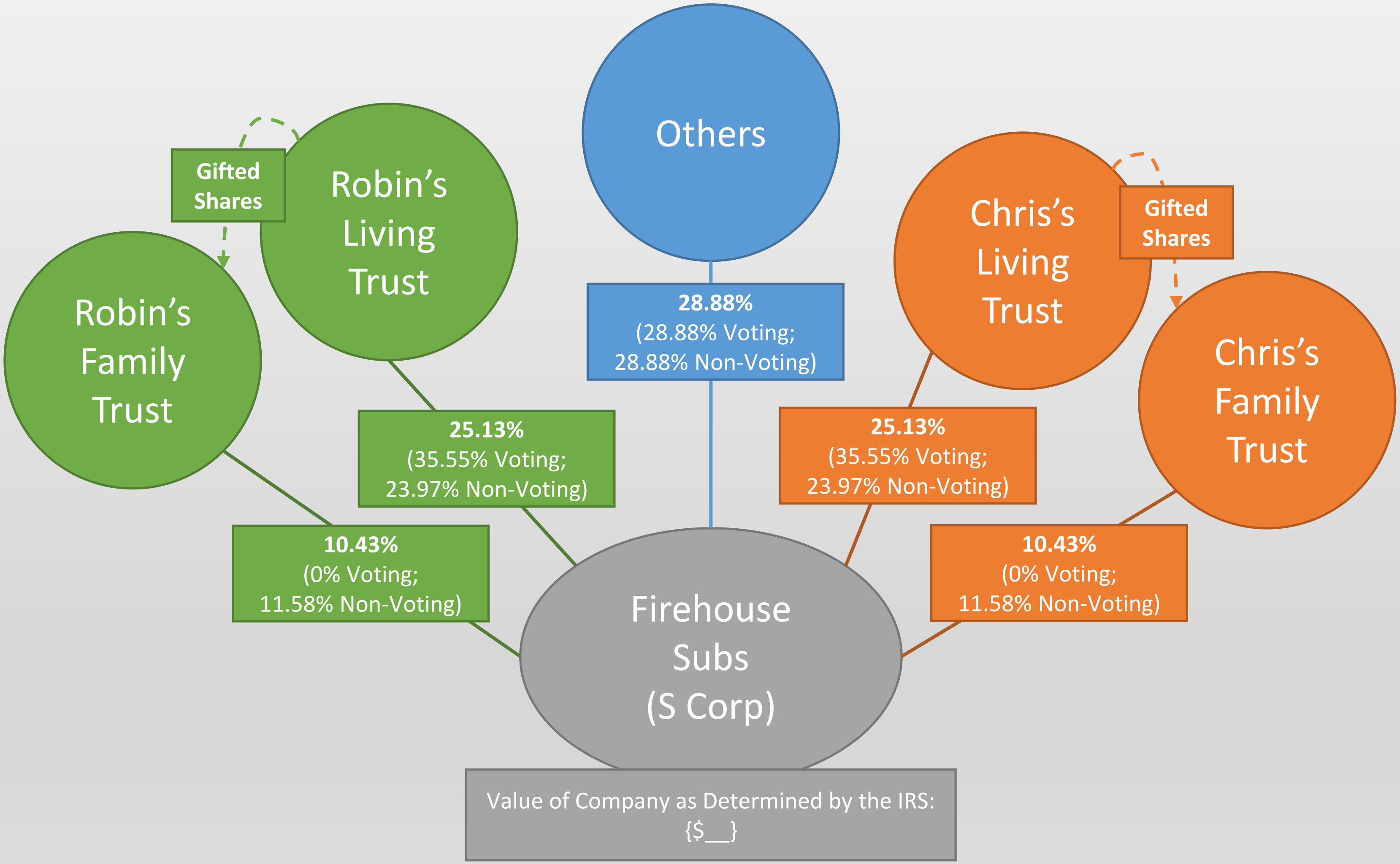
The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

2014 PRIOR TO GIFTS AND SALE TO FAMILY TRUSTS



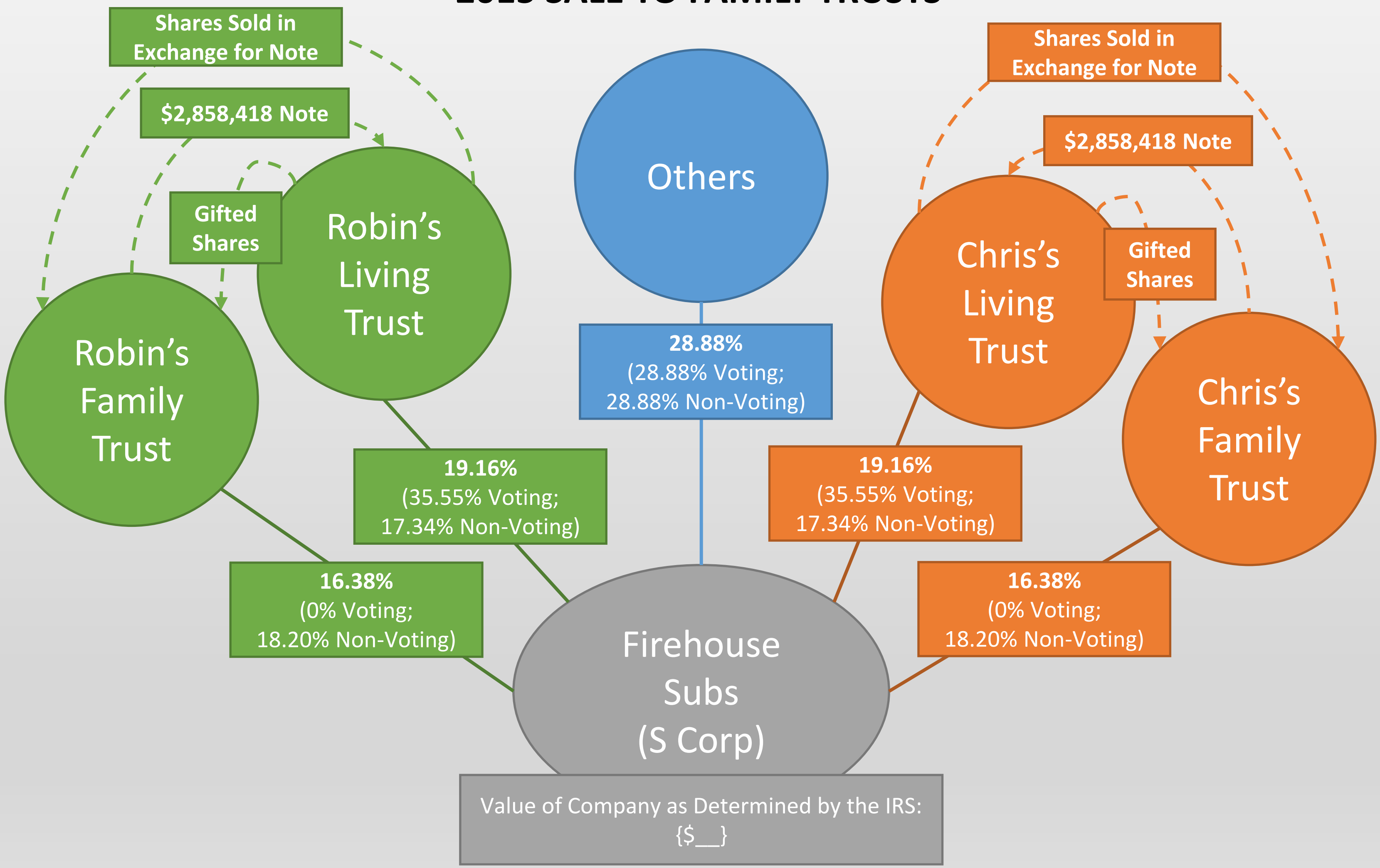
The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

2014 GIFTS TO FAMILY TRUSTS



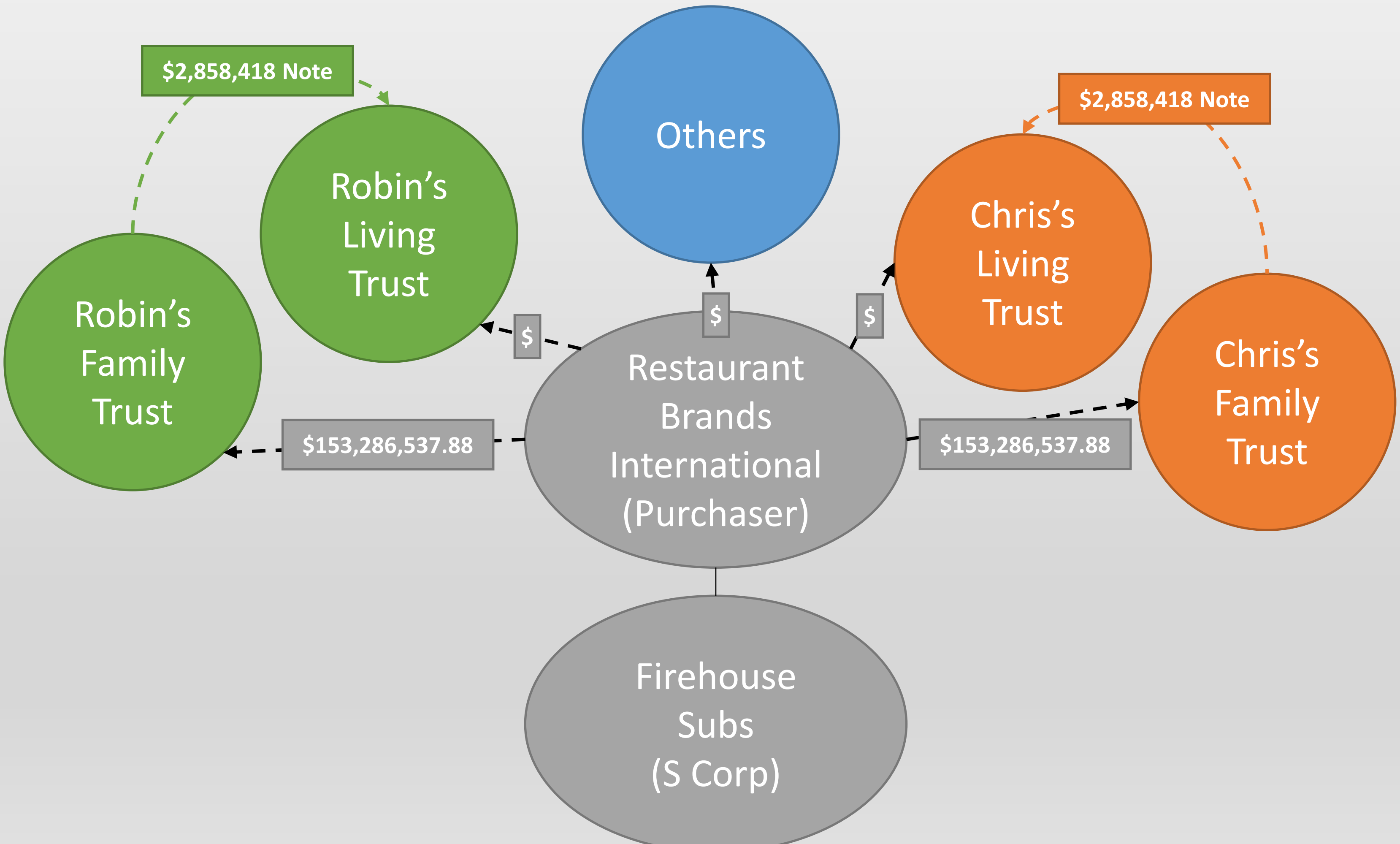
The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

2015 SALE TO FAMILY TRUSTS



The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

2021 SALE OF COMPANY FOR $1 BILLION



The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

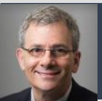
The following is taken from the IRS's Pretrial Memorandum For Respondent in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "On November 15, 2021, Restaurant Brands International, Inc. announced that it was acquiring [Firehouse Restaurant Group, Inc.] for $1 Billion in cash. On December 9, 2021, petitioners' respective Living Trusts and Irrevocable Family Trusts transferred all their shares in [Firehouse Restaurant Group, Inc.]. Today, neither petitioners' Living Trusts nor petitioners' Irrevocable Family Trusts own shares in [Firehouse Restaurant Group, Inc.]. Petitioners' Irrevocable Family Trusts each received $153,286,537.88 of the net acquisition proceeds on December 15, 2021, the date the acquisition of [Firehouse Restaurant Group, Inc.] closed."

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the IRS's Pretrial Memorandum For Respondent in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

- "On September 19, 2018, [the IRS] timely issued a notice of deficiency to each petitioner regarding his 2014 gift tax year (2014 SND). The 2014 SNDs determined that the per-share value of the FRG stock on December 31, 2014 is $1,923.56 per share. Based on the Schedule K-1s included with [the IRS's] copy of FRG's 2015 Form 1120S [the IRS] believed petitioners may have each transferred up to 13,343 shares of FRG stock in 2014. Thus, [the IRS] determined that each petitioner made a gift on the transfer of 13,343 shares of FRG stock in the amount of $25,666,061 rather than the $5,000,000 reported on the returns. . . .
- "On October 17, 2019, [the IRS] timely issued a notice of deficiency to each petitioner regarding his 2015 gift tax year (2015 SND). The 2015 SNDs determined that each petitioner made a gift of $7,613,450 to his respective Irrevocable Family Trust. This determination was based on the fact that 3,958 shares of the 13,343 shares that were determined transferred in the 2014 SND, may have been transferred in 2015. [The IRS] later learned through discovery that 5,365 shares were transferred by each petitioner on March 31, 2015."



The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the IRS's Pretrial Memorandum For Respondent in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

"ISSUES

"1. Whether petitioners are liable for additional gift tax on the transfers, through their respective living trusts, of 9,385 nonvoting shares of Firehouse Restaurant Group, Inc. (FRG) stock on December 31, 2014 to their respective family trusts, the Robin O. Sorensen Family Trust and the Chris R. Sorensen Family Trust (Irrevocable Family Trusts), for the benefit of their respective spouses and children.

"2. Whether each petitioner, through their respective living trusts, transferred 5,365 nonvoting shares of FRG stock for insufficient consideration that resulted in a gift, under I.R.C. § 2512(b) and Treas. Reg. § 25.2512-8, on March 31, 2015.4

"3. What is the value of the 9,385 nonvoting shares of FRG stock that were transferred on December 31, 2014, as described in issue statement 1?

"4. What is the value of the 5,365 nonvoting shares of FRG stock that were transferred on March 31, 2015, as described in issue statement 2?

"5. Whether a gross valuation misstatement penalty applies under I.R.C. § 6662(h) with respect to each petitioner's 2014 gift tax valuation misstatement.

"6. Whether, in the alternative, a substantial gift tax valuation misstatement penalty applies under I.R.C. § 6662(a) and (g) with respect to each petitioner's 2014 gift tax valuation misstatement.

"7. Whether, in the alternative, a penalty for negligence or disregard of rules or regulations applies to each petitioner's understatement under I.R.C. § 6662(a) and (c) with respect to each petitioner's 2014 gift tax return.

"8. Whether a gross valuation misstatement penalty applies under I.R.C. § 6662(h) with respect to each petitioner's 2015 gift tax valuation misstatement.

"9. Whether, in the alternative, a substantial gift tax valuation misstatement penalty applies under I.R.C. § 6662(a) and (g) with respect to each petitioner's 2015 gift tax valuation misstatement.

"10. Whether, in the alternative, a penalty for negligence or disregard of rules or regulations applies to each petitioner's understatement under I.R.C. § 6662(a) and (c) with respect to each petitioner's 2015 gift tax return."

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the IRS's Pretrial Memorandum For Respondent in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

IRS Arguments Regarding Each Issue:

"Issue 1 — Each Petitioner Gifted 9,385 Nonvoting Shares to His Irrevocable Family Trust on December 31, 2014

"A. Each Petitioner Relinquished Dominion and Control over 9,385 Nonvoting Shares of FRG on December 31, 2014

1. Petitioners' Respective Irrevocable Family Trusts were Listed as the Owners of 9,385 Shares of FRG on FRG's Tax Returns.
2. Each Irrevocable Family Trust Enjoyed the Benefits of Owning 9,385 Shares of FRG by Receiving over $11,400,000 in Distributions.
3. No Documents Between Petitioners and Their Respective Irrevocable Family Trusts Make the Gift of FRG Stock Contingent on a Redetermination of Value.
4. Petitioners' Respective Irrevocable Family Trusts Transferred the Nonvoting Shares in FRG in December 2021.
5. The "Irrevocable Stock Power" language attempting to "adjust" the number of nonvoting shares of FRG that were transferred by Petitioners on December 31, 2014 is a condition subsequent and violates Public Policy.

"B. The *Wandry* Opinion Improperly Focused on the Donor's Subjective Intent in Contradiction of the Applicable Statutes and Regulations

"C. The Facts in This Case are Distinguishable from the Facts in *Wandry*

"D. Petitioners and the Irrevocable Family Trusts are Unable to 'Adjust' the Number of Gifted FRG Shares; Thus, the Number of Shares Gifted is Final'"

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The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the IRS's Pretrial Memorandum For Respondent in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

"Issue 2 — Petitioners transferred 5,365 shares of FRG for insufficient consideration on March 31, 2015

"Issue 3 — The Fair Market Value of One Nonvoting Share of FRG as of December 31, 2014 is $2,076.86 (rounded)

> A. Tax Affecting an S Corporation Results in Undervaluing an Entity and is Not Supported by Case Law or the Valuation Community
>
> B. The Facts of This Case Support the Valuation Conclusion Reached in Mr. Anderson's Opening Report

"Issue 4 — The Fair Market Value of One Nonvoting Share of FRG as of March 31, 2015 is $2,228.62 (rounded)

"Issues 5 and 8 — Petitioners are liable for a Gross Valuation Misstatement Penalty under I.R.C. 6662(a), (g), and (h)

"Issues 6 and 9 — In the Alternative, Petitioners are Liable for a Substantial Estate or Gift Tax Valuation Misstatement Penalty Under I.R.C. § 6662(a), (b)(5), and (g)

"Issues 7 and 10 — In the Alternative, Petitioners are Liable for the Accuracy-Related Penalty Due to Their Negligence Under I.R.C. § 6662(a), (b)(1), and (c)"

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the IRS's Pretrial Memorandum For Respondent in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

The Cow Analogy

"Petitioners argue that even though they each transferred 9,385 non-voting shares in Firehouse stock in 2014, the "precise number of shares transferred cannot be finally determined until the value of such shares [is] finally determined for federal gift tax purposes." As stated in the Irrevocable Stock Powers,

> the determination of fair market value is subject to challenge by . . . [respondent]. While the parties intend to initially rely upon and be bound by the valuation report prepared by DHG, if the IRS challenges the valuation and a final determination of a different fair market value is made by the IRS or a court of law, the number of shares transferred from the transferor to the transferee shall be adjusted accordingly so that the transferred shares have a value exactly equal to $5,000,000, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law."

"Assuming that this clause is binding on the parties to the 2014 gift, an assumption that is very much in contention, and assuming further that the parties do in fact honor their "shall be adjusted accordingly" clause in light of the value determined by the Court, the adjustment will not change the fact that on December 31, 2014, each petitioner, through his Living Trust, made a competed gift of 9,385 nonvoting shares of FRG stock when he relinquished dominion and control over the shares."

The Story of Firehouse Subs: *Chris Sorensen et al. v. Commissioner* (cont'd)

The following is taken from the IRS's Pretrial Memorandum For Respondent in *Chris Sorensen et al. v. Commissioner*, Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (T.C. 2022):

The Cow Analogy (cont'd)

"Consider that if a farmer agrees to transfer his son several cows worth $1,000 as finally determined for federal gift tax purposes, and the farmer's appraiser determines that five cows equal that value, then the transfer is for five cows. The son is now the owner of five cows. Years pass. The son breeds the cows and opens a barbeque stand. If a later gift tax examination finds that each cow was actually worth more, and that two extra cows had been included in the transfer, nothing in the agreement would allow the farmer to take the two cows back. They were sold as barbeque. The parties might be held to their agreement — a transfer of the number of cows as finally determined to equal $1,000 coupled with the possibility of the farmer getting something (barbeque?) in the event of a redetermination of value. But whatever it is, it won't be the cows transferred. And it might be nothing; the farmer may not pursue his claim, and if he does, he is now just a general creditor who must stand in line with all the other unsecured creditors of the barbecue operation.

"The farmer's use of a transfer clause that contemplates subsequent events does not change the fact that the transfer of the five cows was complete on the execution of the documents. This is the case even though the number of cows was indefinite until the initial appraisal was completed. Robinette, 318 U.S. at 187 (gift was complete despite "indefiniteness of the eventual recipient"); Nelson v. Commissioner, 17 F.4th 556, 561 (5th Cir. 2021) (same); Estate of Sommers v. Commissioner, T.C. Memo. 2013-8, at *45-46 (filling in the blanks upon receipt of the appraisal was a "ministerial act" implementing the parties' original agreement); Treas. Reg. § 25.2511-2(b) (gift is complete upon cessation of dominion and control). The transfer was of five cows, regardless of whether the transfer is structured as a gift or a sale.

"Under the farmer's transfer document, however, a redetermination of the value of a cow might give rise to a right of recovery against the son. But a right that is dependent upon the occurrence of an event beyond the donor's control, such as a later redetermination of value by federal authorities or the courts, does not alter the fact that the transfer is complete for gift tax purposes upon the execution of the documents. Smith, 318 U.S. at 181; Robinette, 318 U.S. at 187; Ward v. Commissioner, 87 T.C. 78, 111 (1986); Estate of Kolb v. Commissioner, 5 T.C. 588, 593 (1945); Mack v. Commissioner, 39 B.T.A. 220, 229 (1939); See also Wandry v. Commissioner, 2012-46 I.R.B. 543, 2012 WL 5473819 (November 13, 2012). The possibility that the farmer might get something back does not change the fact that he transferred five cows upon the execution of the documents, regardless of whether the transfer is structured as a gift or a sale.

"And the possibility that petitioners might get something back because of this proceeding does not change the fact that on December 31, 2014, petitioners gave up dominion and control over the FRG stock. Therefore, petitioners' gifts are taxable to the extent that the value of 9,385 nonvoting shares of FRG exceeds petitioners' available annual exclusions and lifetime exemption equivalents. See I.R.C. §§ 2501(a); 2503(b); and 2505(a)."

VALUATION DECISIONS: FROM 1999-2020

Case	Assets	Court	Discount from NAV/ Proportionate Entity Value
Dougherty (1990)	securities	Tax	25%
Bennett(1993)	securities	Tax	15%
Hendrickson (1999)	securities	Tax	30%
Jameson (1999)	Timber property	Tax	3%
Strangi 1 (2000)	securities	Tax	31%
Borgatello (2000)	securities	Tax	33%
Dunn (2000)	securities	Tax	15%
Knight (2000)	securities/ real estate	Tax	15%
Maggos (2000)	securities	Tax	25%
Jones (2001)	real estate	Tax	8%; 44%
Dailey (2001)	securities	Tax	40%
Adams (2001)	securities/real estate/minerals	Fed. Dist.	54%
Church (2002)	securities/ real estate	Fed. Dist.	63%
McCord (2003)	securities/ real estate	Tax	32%
Lappo (2003)	securities/ real estate	Tax	35%
Peracchio (2003)	securities	Tax	29.50%
Deputy (2003)	boat company	Tax	30%
Green (2003)	bank stock	Tax	46%
Thompson (2004)	publishing company	Tax	40.50%
Estate of True (2004)	family partnership interests	Tax	20%
Kelley (2005)	cash	Tax	32%
Temple(2006)	marketable securities	Fed. Dist.	21.25%
Temple(2006)	ranch	Fed. Dist.	38%
Temple(2006)	winery	Fed. Dist.	60%
Astleford (2008)	real estate	Tax	30% (GP); 36%(LP)
Holman (2008)	Dell stock	Tax	22.50%
Keller (2009)	securities	Fed. Dist.	47.50%
Litchfield (2009)	securities	Tax	25%
Murphy (2009)	securities/ real estate	Fed. Dist.	41%
Gallagher (2011)	publishing company	Tax	47%
Koons (2013)	cash	Tax	7.50%
Richmond (2014)	marketable securities	Tax	46.5% (37% LOC/LOM & 15% BIG)
Giustina (2016)	timber company	Tax	25% LOM
Streightoff (2018)	marketable securities	Tax	18% LOM
Grieve (2020)	marketable securities	Tax	35% (98.8% non-vot. LLC int.)
Nelson (2020)	equipment co.	Tax	40.5% (stock); 31.6% (LP)

This slide is partly stolen from John Porter

Formula Transfers - Gift Tax Reporting

- **Starts the statute of limitations**

  - Need to file to obtain "as finally determined value"

- **Report consistent with formula**

  - Avoid *Knight v. Comm'r* problem
  - Reflect formula in gift tax return schedule
  - Units initially allocated based on formula and appraisal
  - Attach formula transfer documents and appraisal
  - Satisfy adequate disclosure rules to start limitations running

This slide courtesy of John Porter

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GRATS

- **Terms Comply with § 2702 Regs?**
- **GRAT operated in accordance with terms?**

    1) Substantiation of annuity payments
    2) *Atkinson* analysis

- **Valuation**

    1) Initial transfer of assets
    2) Exercise of power of substitution
    3) Use of hard to value asset to pay annuity
    4) Consider *Wandry* type formula for 2 & 3

This slide courtesy of John Porter

Can You Wait To Get This Started?

Step Transaction Doctrine

- *Senda*, *Holman*, and other court decisions.

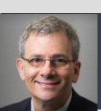
- A transfer of assets to an LLC that is immediately followed by a transfer of non-voting member interests by gift will be considered to be a gift of the underlying assets, with no discount permitted.

- It is safest to wait 30-45 days between contribution and member interest transfer.

- The more volatile the asset contributed, the less waiting time required.

Summary of cases where courts have addressed the step transaction doctrine by analyzing the close proximity between date of funding of entity and date of transfer of entity interests.

Case Name/ Court	Deci-sion Date	Date Entity Formed	Date Assets Transf-erred	Date Interest Gifted	# of days in between	Court Found For	Type of Assets Inves-ted	Court Held	Court's Dicta	Special notes
Holman v. Comr. (U.S. Tax Ct.)	5/27/08	11/3/99	11/2/99	11/8/99	6	Taxpayer	Shares of Dell stock	The limited partnership was formed and the shares of Dell stock were transferred to it almost 1 week in advance of the gift, so that on the facts before us, the transfer cannot be viewed as an indirect gift of the shares to the donees. Furthermore, the gift may not be viewed as an indirect gift of the shares to the donees under the step transaction doctrine.	This case is distinguishable from *Senda* because petitioners did not contribute the Dell shares to the partnership on the same day they made the 1999 gift; indeed, almost 1 week passed between petitioners' formation and funding of the partnership and the 1999 gift. Petitioners bore the risk that the value of an LP unit could change between the time they formed and funded the partnership and the times they chose to transfer the LP units. Therefore, the Court decided not to disregard the passage of time and treat the formation and funding of the partnership and the subsequent gifts as occurring simultaneously under the step transaction doctrine. Also, in this case, the IRS conceded that a 2-month separation is sufficient to give independent significance to the funding of a partnership and a subsequent gift of LP units.	There were other gifts and transfers, but the Court was only concerned with the November set of transactions.



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Case Name/ Court	Deci-sion Date	Date Entity Formed	Date Assets Transf-erred	Date Interest Gifted	# of days in between	Court Found For	Type of Assets Inves-ted	Court Held	Court's Dicta	Special notes
Senda v. Comr. (U.S. Tax Ct.)	7/12/04	6/3/98 (SFLP I) 12/2/99 (SFLP II)	12/28/98 12/20/99	12/28/98 12/20/99	0 0	IRS	Shares of stock Shares of stock	The taxpayers' transfers of stock to partnerships, coupled with transfer of limited partnership interests to their children, were indirect gifts of stock to children, and thus, stock and not partnership interests, would be valued for gift tax purposes.	Petitioners presented no reliable evidence that they contributed the stock to the partnerships before they transferred the partnership interests to the children. It is unclear whether petitioners' contributions of stock were ever reflected in their capital accounts. At best, the transactions were integrated and, in effect, simultaneous. Therefore, the Court concluded that the value of the children's partnership interests was enhanced upon petitioners' contributions of stock to the partnerships and were indirect gifts.	On January 31, 2000, petitioner gave to each child an additional 4.5-percent limited partnership interest in SFLP II.

Summary of cases where courts have addressed the step transaction doctrine by analyzing the close proximity between date of funding of entity and date of transfer of entity interests.

Case Name/ Court	Deci-sion Date	Date Entity Formed	Date Assets Transf-erred	Date Interest Gifted	# of days in between	Court Found For	Type of Assets Inves-ted	Court Held	Court's Dicta	Special notes
Estate of Jones v. Comr. (U.S. Tax Ct.)	3/6/01	1/1/95 (JBLP) 1/1/95 (AVLP)	1/1/95 1/1/95	1/1/95 1/1/95	0 0	Tax-payer	Assets including real property	Transfers of property to partnerships were not taxable gifts.	All of the contributions of property were properly reflected in the capital accounts of the taxpayer, and the value of the other partners' interests was not enhanced by the contributions of decedent. Therefore, the contributions do not reflect taxable gifts.	

Summary of cases where courts have addressed the step transaction doctrine by analyzing the close proximity between date of funding of entity and date of transfer of entity interests.

Case Name/ Court	Deci-sion Date	Date Entity Formed	Date Assets Transf-erred	Date Interest Gifted	# of days in between	Court Found For	Type of Assets Inves-ted	Court Held	Court's Dicta	Special notes
Shepherd v. Comr. (U.S. Tax Ct.)	10/26/00	8/2/91	Leased Land (8/1/91) ; Bank Stock (9/9/91)	8/2/91	Varies	IRS	Fee interest in timberland subject to a long-term timber lease and stocks in three banks	Transfers represent separate indirect gifts to his sons of 25% undivided interests in the leased timberland and stocks.	Not every capital contribution to a partnership results in a gift to the other partners, particularly where the contributing partner's capital account is increased by the amount of his contribution, thus entitling him to recoup the same amount upon liquidation of the partnership. Here, however, petitioner's contributions of the leased land and bank stock were allocated to his and his sons' capital accounts according to their respective partnership shares. Upon dissolution of the partnership, each son was entitled to receive payment of the balance in his capital account.	

Valuation of Promissory Notes for Transfer Tax Purposes										
	Date the note was entered in to	**Face amount of the note**	**Duration of the note**	**Interest rate on the note**	**Decedent's date of death**	**How long the note had to run following death of decedent**	**Applicable federal rate on date of death**	**Whether or not the note was secured**	**Financial strength of the lender**	**Discount rate applied**
Estate of Berkman v. Commissioner (1)	5 notes: 1 in '68 1 in '69 2 in '70 1 in '72	$275,000	20 years	6%	1974 (2-6 years after issuance of notes - depending on the note)	Unknown	9.75%	No	Unknown	50% or more for each note (longer term notes got greater discounts)
B. Smith v. U.S. (2)	1977	$10,312,000	20 years	6%	1988	Unknown	7.57%	Unknown	Unknown	Discount applied – specific percentage amount not given. (Lack of marketability, lack of protective covenants, lack of formal acknowledgement of the debt by the lender, unusual payment schedule, market interest rate increase.)
Estate of Hoffman v. Commissioner (3)	1992	2 notes: $278,147; $173,083	20	7.61%	1994	Until maturity	7.58%	No	Strong	Discount applied – specific percentage amount not given.
Estate of Harper v. Commissioner (4)	1991	$450,000	1 year	10.75%	1995	Note was renewed each year until decedent's death	7.19%	Yes	Unknown	12% (no assurance that the note would be paid in full at the next maturity date and issues affecting the property the note was secured by.)

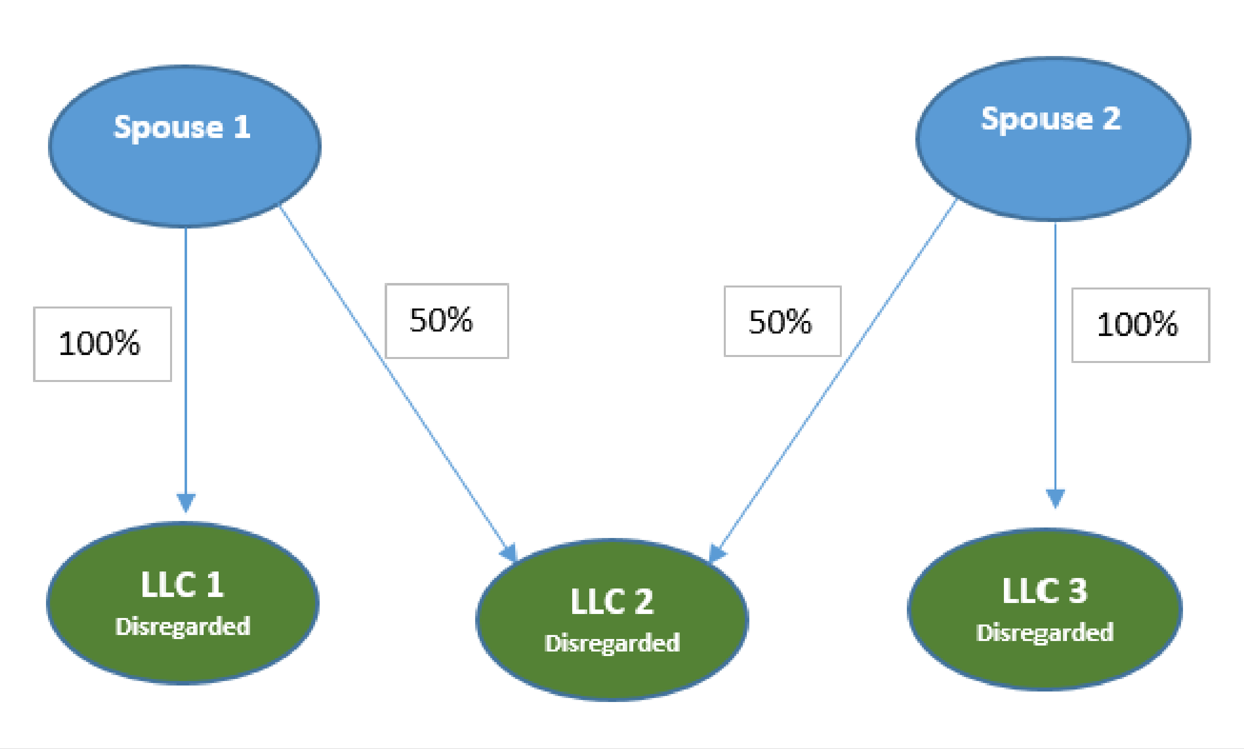
Valuation of Promissory Notes for Transfer Tax Purposes										
	Date the note was entered in to	**Face amount of the note**	**Duration of the note**	**Interest rate on the note**	**Decedent's date of death**	**How long the note had to run following death of decedent**	**Applicable federal rate on date of death**	**Whether or not the note was secured**	**Financial strength of the lender**	**Discount rate applied**
Example Appraisal One (5)	2012	Unknown	9 years	0.95%	Unknown	Unknown	3.40%	Unknown	Unknown	12.85% (lack of collection rights and lack of marketability)
Example Appraisal Two (6)	2012	Unknown	9 years	1.07%	Unknown	Unknown	Not provided	Yes	Weak	21.6% (no protective covenants, size of the note, lack of marketability, weak financial strength of issuer.)
Valuation Scenario 1 (7)	Unknown	$1,000,000	9 years	3%	Unknown	Unknown	3%	Unknown	Unknown	Subject to discounts because note likely would not have a fair market value equal to its face value. No specific discount percentage given.
Valuation Scenario 2 (8)	Unknown	$1,000,000	20 years	4%	Exactly one year after issuance of note	Unknown	4%	Unknown	Unknown	Subject to discounts because, when compared, other similar long-terms loans are meaningfully discounted. No specific discount percentage given.

Don’t Create Tax Return Requirements That Are Not Needed

- Where an LLC has only one member, the IRS typically disregards the LLC for tax purposes.
- Income and deductions of the LLC are reported on the owner’s personal tax return.
- Oftentimes taxpayers will create unneeded requirements to file partnership tax return.
- The following scenarios illustrate how this may occur.

Don’t Create Tax Return Requirements That Are Not Needed

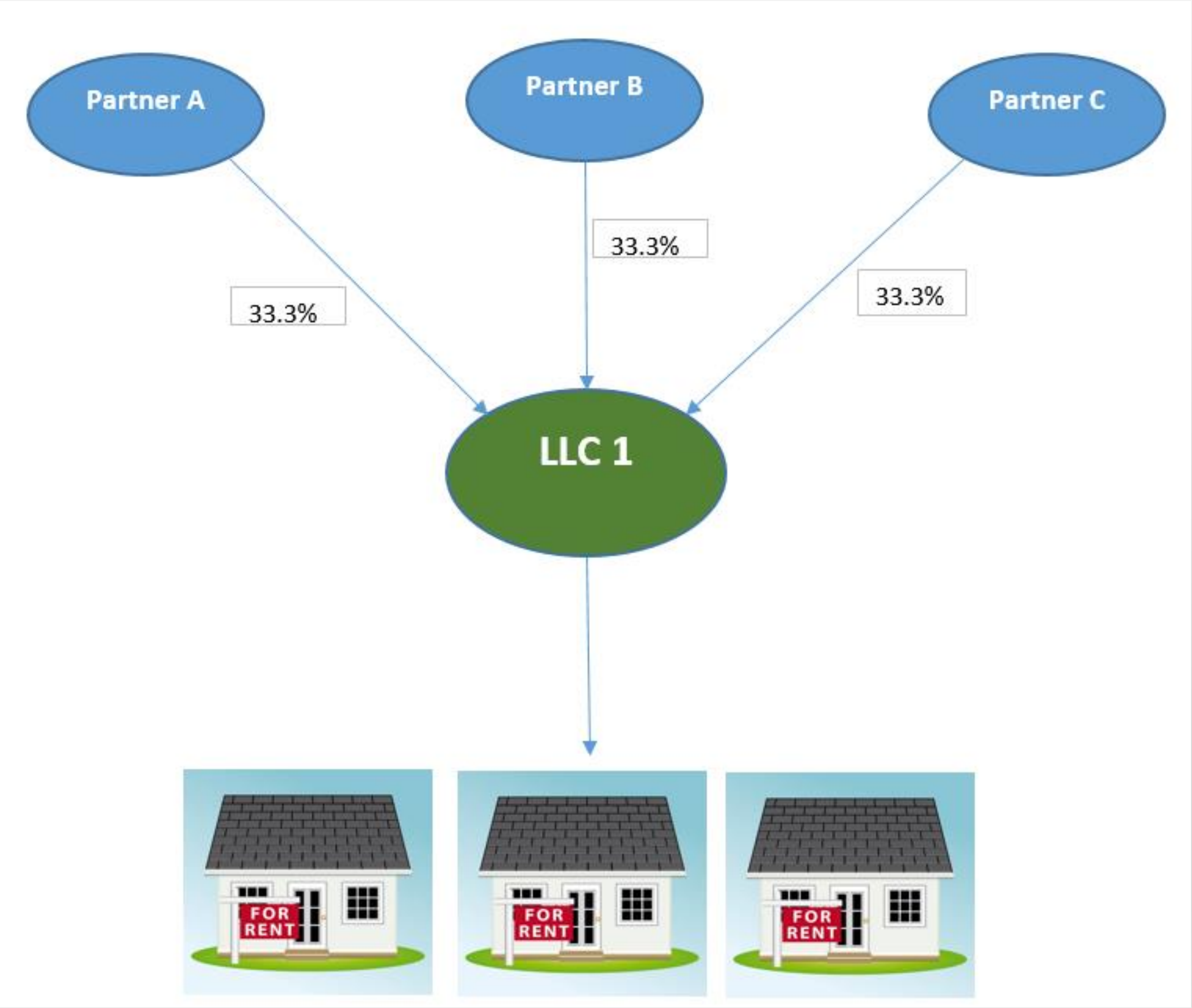
All LLC’s owned by Spouse 1 and Spouse 2 can be disregarded for income tax purposes.



Don't Create Tax Return Requirements That Are Not Needed, Cont'd.

Here, Partners A, B and C each own 1/3 of an LLC that owns a rental property business.

Under this entity structure, the LLC is <u>regarded</u> for income tax purposes and a Form 1065 (Return of Partnership Income) is required.



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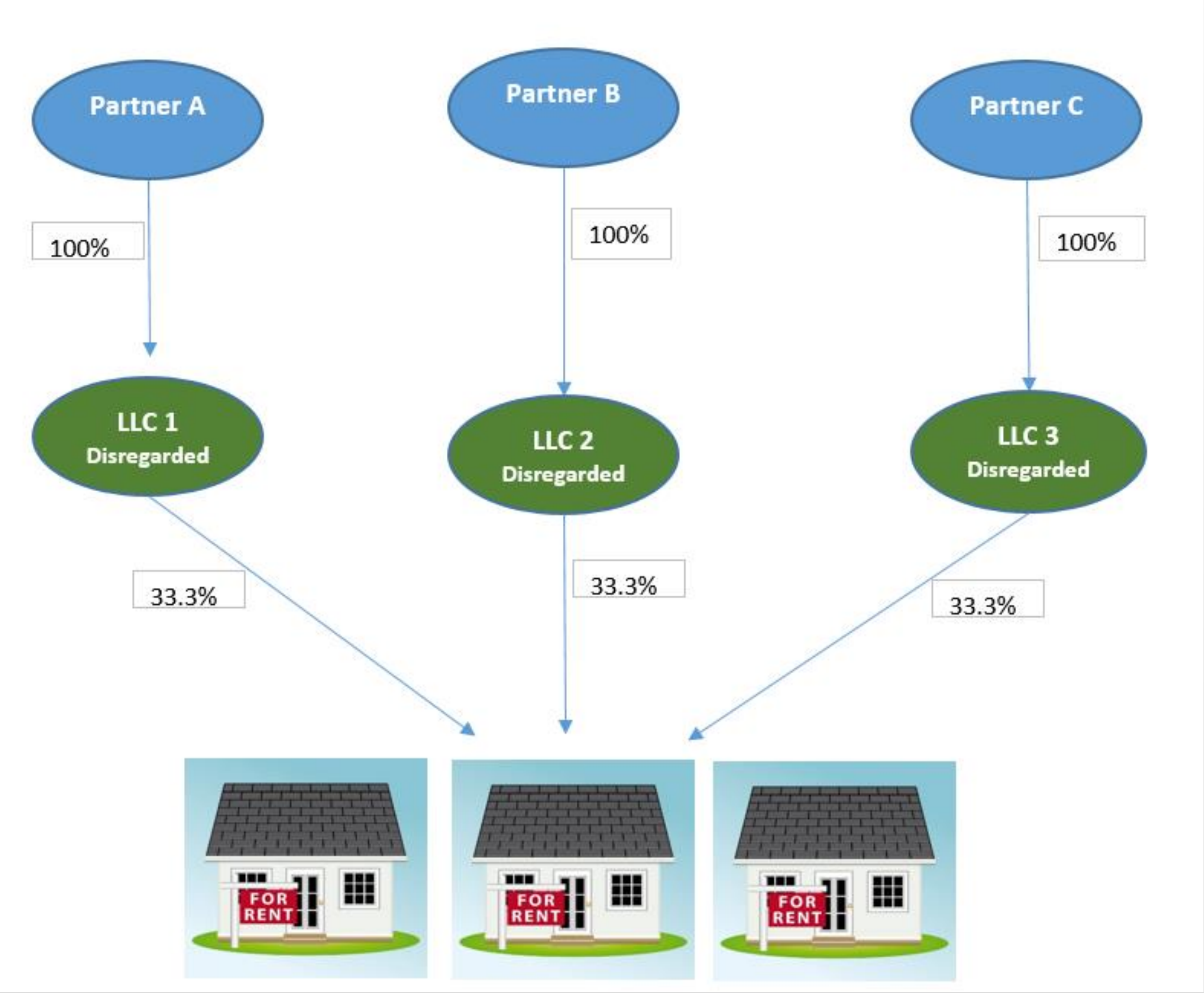
Don’t Create Tax Return Requirements That Are Not Needed, Cont’d.

Here, Partners A, B and C each own 100% of an LLC that owns 1/3 of the rental properties.

The LLC is dis<u>regarded</u> for income tax purposes and No Form 1065 Return of Partnership Income is required.



2^{nd} Class of Stock Issues for S Corporations

Eligibility to Become an S Corporation

Only certain entities can be classified as S corporations for federal income tax purposes. While there is no restriction as to the size of an entity's income, number of employees or value of assets, an S corporation must meet the following requirements:

1. It may not have more than 100 shareholders. All shareholders of the S corporation must be "eligible shareholders."

2. No shareholder is a non-resident alien.

3. The entity provides for no more than a "single class of stock."

4. Must not have previously made an S corporation election and revoked such election within the last 5 years, unless consent is received from the IRS.

5. No shareholder is an "ineligible shareholder," (i.e., an insurance company subject to tax under subchapter L, financial institution which uses the reserve method of accounting for bad debts, or a DISC or former DISC.)

All Shareholders are "Eligible S Corporation Shareholders"

Only the following individuals and entities are eligible as S corporation shareholders:

1. United States citizens or residents (i.e., green card holders).

2. Disregarded grantor trusts or disregarded limited liability companies, which are considered as owned by otherwise eligible S corporation shareholders for federal income tax purposes.

3. Certain trusts, which include Qualified Subchapter S Trusts (QSSTs), Electing Small Business Trusts (ESBTs), Disregarded Grantor Trusts for federal income tax purposes, trusts that were Grantor Trusts for federal income tax purposes prior to the death of the Grantor (but only for 2 years on the day of the Grantor's death), and Voting Trusts Estates of deceased United States citizens or residents.

4. Certain tax exempt organizations, such as Section 501(c)(3) charitable organizations.

S Corporation Requirement – No More than 100 Shareholders

The 100 shareholder rule is fairly straightforward, although beneficiaries of a single trust that is an eligible S corporation shareholder are not counted as separate shareholders.

Additionally, each shareholder of the corporation is counted as one shareholder, with the following exceptions:

1. Beneficiaries of a single trust that is an eligible S corporation shareholder are not counted as separate shareholders;

2. A husband and wife (and their estates) are treated as one shareholder, regardless of whether each spouse owns stock in the S corporation individually, or the spouses own such stocks jointly;

3. All “members of a family” (and their estates) are treated as one shareholder for the purposes of the 100 shareholder limitation. The term “members of a family” means a common ancestor, six generations preceding an applicable person, any lineal descendant of such common ancestor, and any spouse or former spouse of such common ancestor or lineal descendant. In other words, the members of a shareholder’s family include all lineal descendants of the great, great, great, great grandparents of the shareholders, and their spouses.

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No Shareholder is a Non-Resident Alien

- Any individual shareholder of an S corporation must be a United States citizen or a United States resident alien. A permissible resident alien shareholder is an individual who has a green card.

- However, a non-resident alien may be a beneficiary of an ESBT without jeopardizing the ESBT's eligibility to be an S corporation stock shareholder.

The Entity Provides for No More than a "Single Class of Stock"

- This requirement is one of the biggest gray areas with respect to S corporation election eligibility. If an S corporation is considered to provide for a second class of stock, then the S corporation election could be terminated and the corporation will be taxed as a C corporation for federal income tax purposes.

- Essentially, this requirement means that all shareholders of the S corporation must have identical rights to operating and liquidating distributions. The Treasury Regulations under Internal Revenue Code Section 1361 provide that if identical rights to operating and liquidating distributions are conferred to all shareholders based upon the entity's governing documents and applicable state of law, then the S corporation is generally deemed to provide for a single class of stock.

- It is noteworthy that an S corporation is not considered to have second class of stock if there are differences in voting rights between the shareholder of an S corporation. Accordingly, an S corporation can provide for voting and non-voting stock without fear of the second class of stock rules being violated, so longs as each shareholder has equal liquidation and distribution rights.

- It is therefore very important for a Shareholder Agreement or Operating Agreement for an S corporation to provide for distributions to be made strictly on a pro rata basis as to ownership, and also for any buy-sell provisions to reflect that the minimum purchase price for the shareholder's stock is no less than the book value of such stock as determined pursuant to Generally Accepted Accounting Principals.

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Sample Language to Help Assure That The S Corporation Election for the Entity is Not Inadvertently Terminated and Remains in Compliance With The S Corporation Rules

6.01 Election. The Members and the Company acknowledge that an I.R.S. Form 2553, "Election by a Small Business Corporation," has been or will be filed by the Company and its Members pursuant to which the Company has or will elect to be treated as an "S corporation" under Subchapter S of the Code . The Members and the Company agree not to take any action which would cause the Company to lose its status as an "S corporation" as defined in §1361 of the Code (unless otherwise determined by the Members owning a majority (i.e., more than fifty percent (50%)) of the Membership Units), and each Member further agrees not to sell or otherwise Transfer his Units, either during his lifetime or by will or trust instrument, to any party or parties who would cause the Company to lose its status as an "S corporation" including, but not limited to, a Transfer to an individual who is a non-resident alien, a Transfer to one (1) or more other persons who would cause the Company to have more than the permitted number of shareholders (presently one hundred (100)), a Transfer to a trust which is not a "permitted shareholder" under the Code, or a Transfer to any other non-permitted "S corporation" shareholder. Any such Transfer of Units by a Member which would cause the Company to lose its status as an "S corporation" shall be void ab initio.

6.02 Opinion of Counsel. Notwithstanding any other provision in this Agreement, the Company may require as a condition precedent to any Transfer of Units hereunder that the transferor Member, at the sole expense of such Member, furnish to the Company an opinion of counsel approved by the Company that the Transfer of Units will not cause the Company to lose its status as a "S Corporation" as described in §1361(b) of the Code, and that the Transfer will not cause the Company to lose its eligibility as an "S corporation" as defined in §1361(a)(1) of the Code.

6.03 Qualified Distributions. The Members agree that they will cause the Company to pay any dividends pro rata to ownership as set forth in Section 7.03 hereof.

6.04 Section 1377(a)(2) Election. In the event of a purchase and sale pursuant to this Agreement which terminates a Member's entire interest in the Company, the "Affected Members" (as defined in §1377(a)(2)(B) of the Code) and the Company agree to elect under §1377(a)(2) of the Code to have the rules provided in §1377(a)(1) of the Code applied as if the Company's taxable year consisted of two (2) taxable years, the first of which ends on the date of the closing of the purchase and sale hereunder. The Affected Members and the

Company further agree to consent to such election in the manner required under §1377(a)(2) of the Code and any Treasury Regulations promulgated thereunder. In the event of such election, all income and expenses of the Company allocable to the Units sold and purchased from the beginning of its taxable year during which the purchase and sale occurs to and including the date of the closing of such purchase and sale hereunder shall be allocated to the seller of the Units pursuant to §1377(a)(2) of the Code, and all income and expenses of the Company allocable to the Units sold and purchased after the date of the closing of such purchase and sale shall be allocated to the purchaser of the Units hereunder.

6.05 Treasury Regulation Section 1.1368-1 Qualifying Disposition Election. In the event of a Qualifying Disposition of Units during any thirty (30) day period during the Company's taxable year pursuant to Treasury Regulations Section 1.1368-1(g), the Company may (based upon the decision of the Members owning not less than a majority of the Membership Units) elect to treat the year as if it consisted of two (2) separate taxable years, the first of which ends on the close of the day on which the Qualifying Disposition occurs. If the Company decides to file such election, each Member who has held stock in the Company during the taxable year agrees to consent to such election in the manner required by the Treasury Regulations. In the event of such election, the Company shall treat the taxable year as separate taxable years for the purpose of allocating items of income and loss, making adjustments if any to the accumulated adjustments account, earnings and profits and basis, and determining the tax effect of distributions under §1368 of the Code.

A "Qualifying Disposition," as presently defined in Treasury Regulations Section 1.1368-1(g)(2), means: (i) a disposition by a Member of twenty percent (20%) or more of the Member's Units in one (1) or more transactions during any thirty (30) day period; (ii) a redemption treated as a sale or exchange of twenty percent (20%) or more of the outstanding Units of the Company from a Member in one (1) or more transactions during any thirty (30) day period; or (iii) an issuance of additional stock by the Company equal to or greater than twenty-five percent (25%) of the outstanding stock to one (1) or more new shareholders during any thirty (30) day period during the Company's taxable year.

6.06 Inadvertent Termination. If at any time prior to a dissolution of the Company or a formal revocation of its election as an "S corporation" in accordance with §1362(d) of the Code, the Company's election is terminated due to inadvertence, then the Company shall, as soon as practicable after discovery of the circumstances resulting in such termination, seek a determination from the Internal Revenue Service in accordance with §1362(f) of the Code or any available revenue procedures providing for automatic inadvertent termination relief that the circumstances resulting in termination of the S election were inadvertent and that the status of the Company as an electing small business corporation under Subchapter S shall be restored. In such event, each person who was a Member at any time during the period of such inadvertent termination agrees to consent to the action of the Company in requesting a determination of inadvertent termination and the Company and each Member agrees to make such adjustments consistent with treatment of the Company as an "S corporation" as may be required by the Internal Revenue Service with respect to the period of inadvertent termination.

6.07 Special Rules Applicable to Trusts. If, at any time during which the Company's "S corporation" election is still in effect, a trust which is a Member is in danger of losing (or will lose in two (2) years or less) its status as a "permitted shareholder" under either §1361(c)(2)(A) or (d) of the Code, then, unless the trust can demonstrate to the satisfaction of the Company's tax counsel or certified public accountant that it can and will remain a "permitted shareholder" for Subchapter S purposes, the Trustee of the Trust agrees to transfer the Company's stock to a beneficiary of the Trust who the Company's tax counsel has determined will be a "permitted shareholder" for sub-chapter S purposes.

6.08 Loss of Resident Alien Status or Citizenship. If, at any time during which the Company's "S corporation" election is still in effect, a Member is in danger of being classified as a non-resident alien under the Code, then, unless such Member can demonstrate to the satisfaction of the Company's tax counsel or certified public accountant that he will not be classified as a non-resident alien under the Code, the individual agrees to transfer the stock of the Company to a third party agreed upon by the individual and the Company who the Company's tax counsel has determined will be a "permitted shareholder" for sub-chapter S purposes.

6.09 Sale or Option Minimum Price. If at any time any Agreement is entered into or any provision under this Agreement applies to require any Member to sell their ownership interest in the Company for less than the percentage of ownership multiplied by the book value of the Company as determined under Generally Accepted Accounting Principles, then in order to avoid having a "second class of stock" under the S-Corporation Rules, the minimum price applicable for such shares shall be the book value as determined under Generally Accepted Accounting Principles by the then acting certified public accountants for the Company, based upon a date of valuation determined appropriate in order to avoid having a second class of stock exist under this Agreement. This shall serve to modify any Section of this Agreement to the extent applicable.

What if the Election Is Late?

- Section 1362(b) states that an S election will be effective for a taxable year as long as it takes place any time during the preceding taxable year or in the current taxable year if made on or before the 15th day of the third month of the taxable year.

- It is noteworthy that *Rev. Proc. 2013-30* allows the IRS Form 2553 for an S election to be filed up to 3 years and 75 days after the effective date of the election, as long as the election would have been otherwise valid for the taxable year. That Revenue Procedure requires a statement to be made that the S election was intended to have been made on the effective date and that the corporation has reasonable cause for the failure to file within 75 days from the effective date of the S election, which needs to be something more than just an inadvertent oversight. *Rev. Proc. 2013-30* has several strict requirements for late elections, which is beyond the scope of this book.

- Some advisors believe that the Form 2553 reasonable cause statement can be filed even if the taxpayer had not intended to make the S election until after the effective date requested, but this is not the case, and a fraud penalty, along with other penalties that apply to paid preparers of tax returns and forms, could be imposed where there is no documentation or evidence that an S election was intended as of the effective date requested on the late filed Form 2553.

11 Common LLC Planning Errors

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

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

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

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

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

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

11 Common LLC Planning Errors, Cont'd.

2.) Entity Documents Can Disqualify S Election

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

Common causes of this catastrophic treatment are as follows:

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

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

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

11 Common LLC Planning Errors, Cont'd.

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

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

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

4.) Forced Sale Provisions

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

11 Common LLC Planning Errors, Cont'd.

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

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

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

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

11 Common LLC Planning Errors, Cont'd.

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

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

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

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

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

11 Common LLC Planning Errors, Cont'd.

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

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

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

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

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

11 Common LLC Planning Errors, Cont'd.

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

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

Form **2553**
(Rev. December 2017)
Department of the Treasury
Internal Revenue Service

Election by a Small Business Corporation

(Under section 1362 of the Internal Revenue Code)
(Including a late election filed pursuant to Rev. Proc. 2013-30)

► You can fax this form to the IRS. See separate instructions.
► Go to *www.irs.gov/Form2553* for instructions and the latest information.

OMB No. 1545-0123

Note: This election to be an S corporation can be accepted only if all the tests are met under *Who May Elect* in the instructions, all shareholders have signed the consent statement, an officer has signed below, and the exact name and address of the corporation (entity) and other required form information have been provided.

Part I **Election Information**

Type or Print	Name (see instructions)	**A** Employer identification number
	Number, street, and room or suite no. If a P.O. box, see instructions.	**B** Date incorporated
	City or town, state or province, country, and ZIP or foreign postal code	**C** State of incorporation

D Check the applicable box(es) if the corporation (entity), after applying for the EIN shown in **A** above, changed its ☐ name or ☐ address

E Election is to be effective for tax year beginning (month, day, year) (see instructions) . . . . ►

Caution: A corporation (entity) making the election for its first tax year in existence will usually enter the beginning date of a short tax year that begins on a date other than January 1.

F Selected tax year:
(1) ☐ Calendar year
(2) ☐ Fiscal year ending (month and day) ►
(3) ☐ 52-53-week year ending with reference to the month of December
(4) ☐ 52-53-week year ending with reference to the month of ►
If box (2) or (4) is checked, complete Part II.

G If more than 100 shareholders are listed for item J (see page 2), check this box if treating members of a family as one shareholder results in no more than 100 shareholders (see test 2 under *Who May Elect* in the instructions) ► ☐

H Name and title of officer or legal representative whom the IRS may call for more information | Telephone number of officer or legal representative

I If this S corporation election is being filed late, I declare I had reasonable cause for not filing Form 2553 timely. If this late election is being made by an entity eligible to elect to be treated as a corporation, I declare I also had reasonable cause for not filing an entity classification election timely and the representations listed in Part IV are true. See below for my explanation of the reasons the election or elections were not made on time and a description of my diligent actions to correct the mistake upon its discovery. See instructions.

Sign Here Under penalties of perjury, I declare that I have examined this election, including accompanying documents, and, to the best of my knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete.

Signature of officer | Title | Date

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 18629R Form **2553** (Rev. 12-2017)

Name	Employer identification number

Part I **Election Information** *(continued)* **Note:** If you need more rows, use additional copies of page 2.

J Name and address of each shareholder or former shareholder required to consent to the election. (see instructions)	**K** **Shareholder's Consent Statement** Under penalties of perjury, I declare that I consent to the election of the above-named corporation (entity) to be an S corporation under section 1362(a) and that I have examined this consent statement, including accompanying documents, and, to the best of my knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete. I understand my consent is binding and may not be withdrawn after the corporation (entity) has made a valid election. If seeking relief for a late filed election, I also declare under penalties of perjury that I have reported my income on all affected returns consistent with the S corporation election for the year for which the election should have been filed (see beginning date entered on line E) and for all subsequent years.		**L** Stock owned or percentage of ownership (see instructions)		**M** Social security number or employer identification number (see instructions)	**N** Shareholder's tax year ends (month and day)
	Signature	Date	Number of shares or percentage of ownership	Date(s) acquired		

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Must Not Have Previously Made an S Corporation Election and Revoked Such Election Within the Last 5 Years

- Generally speaking, if an S corporation's S corporation election is terminated or revoked, then the entity cannot make another S corporation election until 4 years following the end of the taxable year in which the initial S corporation election was revoked or terminated, unless the IRS provides consent.

- The purpose for this prohibition is to prevent an entity from electing in and out of S corporation status.

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Converting From C Corporation to S Corporation

- C corporations can elect to convert to an S corporation within 75 days after the date upon which the S election will be effective, but entity documents that comply with the S corporation rules must have existed on the first S corporation date.

- The C corporation will be treated as an S corporation for federal income tax purposes, which means that pass-through taxation will apply except for a few significant exceptions.

IRC Section 1375 Sting Tax Considerations

- Under Section 1375, an S corporation that was formally a C corporation with “earnings and profits” that were accumulated before making the S election may be subject to a corporate level tax on passive income, such as rental income.

- The tax will only apply to the extent that passive income exceeds 25% of the corporation’s gross receipts.

- This “sting tax” can be avoided by making a tax-deductible compensation distribution and/or paying out dividends to eliminate all accumulated earnings and profits before the S election effective date, or by having active business revenues in the company after the election is made that exceed 25% of the corporation’s gross receipts.

- Many taxpayers consider having the corporation buy a convenience store that sells gasoline because of the high revenue numbers and relatively safe economic results that a convenience store can generate.

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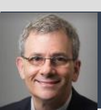
IRC Section 1374 Unrecognized Built-In Gains Rules

- The more challenging tax imposed as the result of a conversion is under Section 1374, which provides that assets owned by a C corporation that are worth more than their tax basis at the time that the S election is made must be tracked and the revenues from the liquidation or sale of those assets within 5 years of conversion will be taxed at the S corporation level as if it were a C corporation each year for purposes of measuring the income and paying the 21% corporate level tax.

- Additionally, Internal Revenue Code Section 1363(d) accelerates income that relates to the taxpayer's LIFO inventory. This means that a C corporation that uses the LIFO (Last-In, First-Out) method in its last year before converting to an S corporation is assessed a LIFO recapture tax. The amount of the recapture tax is based upon the amount by which the inventory value under the FIFO method (First-In, First-Out) lower of cost or market method exceeds the inventory value under the LIFO method. This tax is payable in four installments, with the first payment due by the unextended due date of the C corporation's federal tax return, and the final three installments must be paid by the unextended due date of the S corporation's three succeeding tax returns.

- Examples of unrecognized built-in gain items owned by a cash basis professional corporation would include accounts receivable, furniture and equipment (including furniture and equipment that is fully depreciated and subject to depreciation recapture), and any goodwill owned by the entity.



IRC Section 1374 Unrecognized Built-In Gains Rules, Continued

- The most common and expedient way to avoid the unrecognized built-in gain rules is to accrue a large expense on the books of the company that equals or exceeds the unrecognized built- in gain that is otherwise applicable on the last day of the C corporation year before the S election is made (normally December 31st, with the S election to be effective the following January 1st).

- For example, if a cash basis professional practice S corporation has $100,000 of accounts receivable, $200,000 of goodwill, and the fair market value of its furniture and equipment exceeds the tax basis by $100,000, then an amount that is equal to or exceeds the total of these three amounts ($400,000) may be declared to be owed as compensation for services previously rendered to the company by one or more of the employees of the corporation.

- The compensation may also then be declared as accrued as a bonus payable to them as of the last day of the last C corporation year, assuming that this will qualify as reasonable compensation. This bonus must actually be paid within two and half months (75 days) of the effective date of the S election with respect to any individual who is a 5% or more shareholder in the company. Taxpayers may also consider executing deferred compensation agreements and corroborating the reasons for the compensation being offered.

- Further, this example assumes that the corporation is on the cash method of accounting, as opposed to the accrual method of accounting.

IRC Section 1374 Unrecognized Built-In Gains Rules, Continued

- Another method of reducing unrecognized built-in gains would be to purchase assets that would yield a depreciation deduction for the corporation.

- In the example above, for instance, the practice corporation might purchase $80,000 worth of computer and copier equipment that can be immediately expensed via a Section 179 deduction or under the new bonus deprecation rules under Section 168, so that the bonus compensation would only need to be $320,000. The furniture and equipment would have to be actually purchased and “placed in service” on or before the last day of the C corporation tax year to qualify. Other assets and liabilities must also be considered but are beyond the scope of this simplified example.

- Any accrued bonus should be paid within a reasonable time in addition to the normal compensation that shareholder employees would receive. For example, if a shareholder employee is normally paid $20,000 a month and a $60,000 bonus is declared, it would not be safe to stop paying the salary and to instead classify the $20,000 a month as a bonus, because the IRS may argue that the accrued bonus was not genuine.

- Many practices will therefore borrow money from a bank or shareholders, and actually pay the bonus, while then repaying the loan amounts over a period of months or years. The lender can receive a lien on the assets of the professional practice to stay in front of any potential future creditors of the practice. For this reason, many practices elect to keep the debt in place indefinitely, and to simply pay reasonable and tax-deductible interest on that loan.

- While the bonus paid will be taxable to the employee shareholder, a deduction will be received on the S corporation tax return at the time of payment, so the bonus will “wash” for income tax purposes, but employment taxes will be payable thereon.

Dear John:

Thanks for asking me for a list of what needs to be done to make an S Election and wanting to know exactly what is involved.

What comes to mind is as follows:

1. Decide upon an S Election effective date, which must be January 1st, unless there is a bona fide business reason for using a fiscal year.

2. Determine your assets that have unrecognized built in gain, and value them.

   Assuming that you are on a cash basis of accounting this will include accounts receivable and any entity goodwill, as well as furniture, equipment, and leasehold improvements to the extent that the current fair market value of such assets exceed the Company's adjusted basis in the assets. Adjusted basis is equal to the price paid for the asset less any depreciation deductions taken.

   I do not know what the rule-of-thumb right now would be for the goodwill of a law firm, but it seems to me that potential liabilities and any adverse publicity would reduce goodwill.

3. Declare a bonus to the shareholders and any other employees who have earned such a bonus for past services, in an amount sufficient so that total obligations of the company, including the bonus accrual, exceed the amount of built in gain. The bonus should be documented in minutes signed before the end of the month preceding the effective date. This can be simultaneous with the signing of new Employment Agreements which increase working obligations for the Company.

   I would also check to see if this bonus will zero out any retained earnings, which I assume will be the case, to avoid AAA account issues and the Section 1375 "Sting Tax" which would apply if there were retained earnings upon conversion and income from passive activities after the conversion exceed 25% of the Corporation's gross receipts.

4. I gave some thought as to whether the bonuses should be mentioned in the updated employment agreements, and think it best not to. If the IRS ever looks at the employment agreements years from now and sees there was a large bonus that would have otherwise not been noticed by an auditor, this might be problematic so I would keep the bonus to annual minutes and not mention it in the employment agreement.

5. As to any shareholder who owns more than 10% of the stock of the company the bonus needs to be paid within 75 days of the S Election date.

   Assuming that all of your shareholders own less than 5% of the corporate stock this 75-day deadline does not apply, but I would make the payment within the deadline in case an auditor ever gets confused about these rules.

6 It would look best if the bonuses are all different as opposed to exactly the same so that they appear more like compensation bonuses as opposed to being dividends.

7. It would be best if the company could actually pay the bonuses and the shareholders would loan back monies.

It would be best to have the loans back not be equal, and to have one or more shareholders not loan back the money, but equal loans back should be fine. You can set the interest rate high enough so that those who loan back more than others can be happy with that decision.

8. There should be promissory notes payable to each shareholder, a co-creditor agreement between the shareholders, and a security agreement giving the shareholders a lien on the corporate assets.

9. A UCC-1 financing statement should also be prepared giving the shareholders who participate in the loan a blanket lien on all assets of the practice.

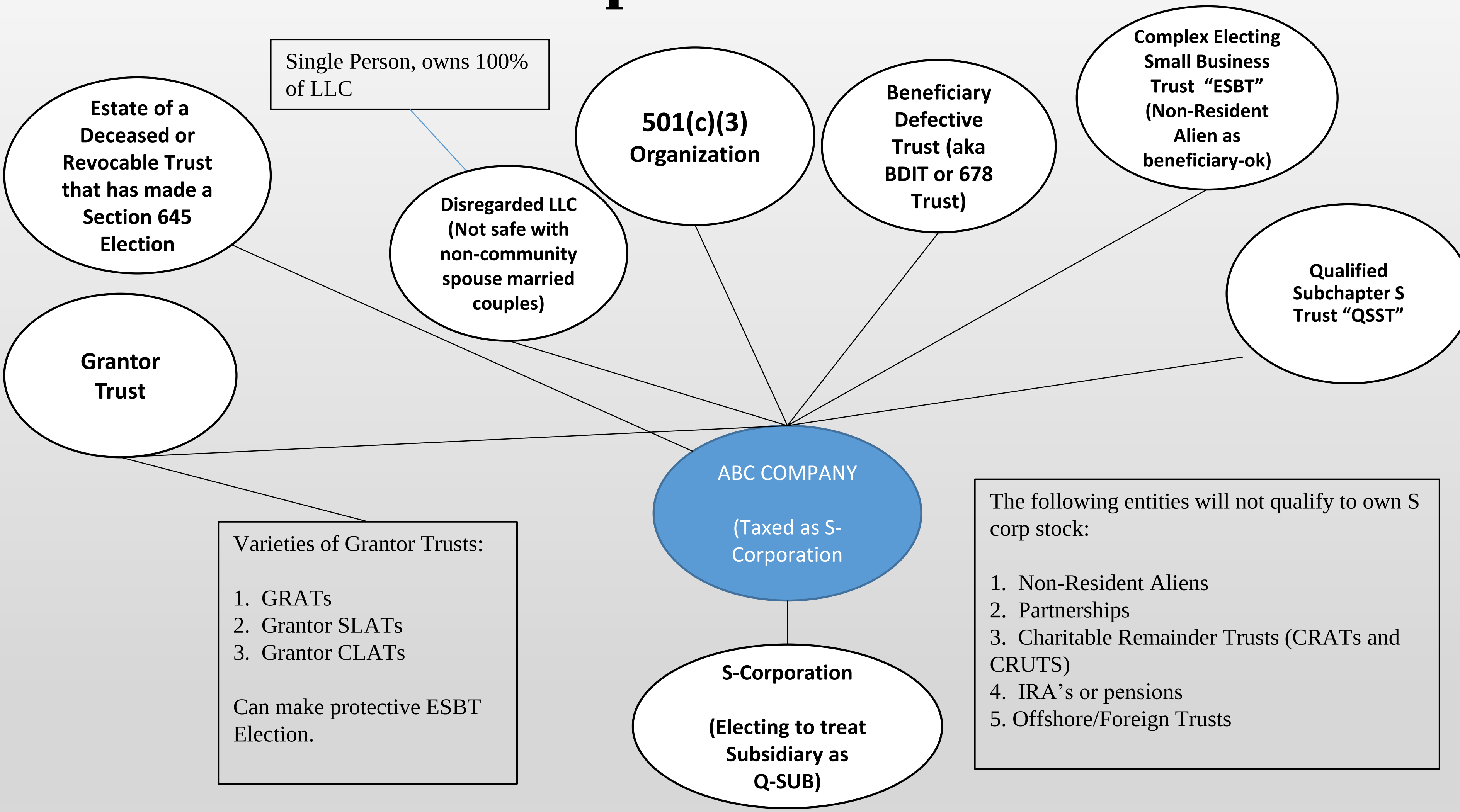
I welcome any questions, comments or suggestions that you may have on this, and thanks very much for the opportunity to be of service.

Best personal regards,

VIA EMAIL & U.S. MAIL

Alan S. Gassman

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



Varieties of Grantor Trusts:

1. GRATs
2. Grantor SLATs
3. Grantor CLATs

Can make protective ESBT Election.

The following entities will not qualify to own S corp stock:

1. Non-Resident Aliens
2. Partnerships
3. Charitable Remainder Trusts (CRATs and CRUTS)
4. IRA's or pensions
5. Offshore/Foreign Trusts

Correcting Second Class of Stock Issues for S-Corporations

- An S-Corp can only have one class of stock.
- Where the single-class-of-stock requirement is inadvertently breached, the IRS may provide retroactive relief, thereby allowing the S corporation to avoid corporate level income tax.
- If the inadvertent breach is caught and corrected in a timely fashion (generally within 3 years and 75 days) after the stock transfer, the taxpayer can obtain automatic relief. If the inadvertent breach is not timely discovered and corrected, the correction may require an expensive and time-consuming private letter ruling.

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Correcting Second Class of Stock Issues for S-Corporations

- In PLR 201935010 the IRS addressed a situation where a corporation had filed an S election and had filed S corporation returns. Assuming that the election was valid, all of the shareholders filed their individual income tax returns including their pro rata shares of S corporation items.
- A potential purchaser conducting a due-diligence study discovered that the corporation actually had two classes of stock when the corporation filed its S election. One class was voting stock and the other was nonvoting stock.
- Although Subchapter S permits variations in voting rights among shareholders, it mandates equal distribution and liquidation rights for all shareholders. Nevertheless, the corporation's directors had altered the liquidate rights, thereby breaching the single-class-of-stock requirement.
- Upon identifying the issue, the corporation modified its articles of incorporation to ensure equal liquidation rights for both stock classes.
- The IRS determined that the invalidity of the initial election was unintentional and recognized the corporation as an S corporation from the effective date of the election.

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Correcting Second Class of Stock Issues for S-Corporations

- IRS Letter Ruling 201949009 pertained to an LLC that had previously applied to become an S corporation. According to the LLC's operating agreement, it was intended to be classified as a partnership for federal income tax purposes, with its members treated as partners. Furthermore, the LLC had two distinct categories of ownership interests: a capital interest and a profits interest. During the liquidation of the partnership, the profits interest was entitled only to assets generated after the issuance of the profits interests. This arrangement violated the single-class-of-stock rule because the capital and profits interests did not have equal pro rata entitlements.
- Subsequently, the entity in question merged with another corporation as part of a Type F reorganization, which involves a mere change in the identity, form, or place of organization of one corporation before the merger. The surviving corporation asserted that all entity and owner tax returns, from the date of the initial S election onwards, were consistently filed as if the S election had been in effect. In response, the IRS chose to treat the merged entity as if the S election had been in effect from the date of the initial election until the merger took place. However, the IRS refrained from making determinations regarding the validity of the F reorganization or the overall eligibility of the entity as an S corporation.

Certain Debt Obligations May Be Considered a Second Class of Stock

- Under certain circumstances, debt owned by an S corporation to one or more shareholders can be categorized as a secondary class of stock.
- An obligation, regardless of whether it’s officially labeled as a debt, will typically be considered a second class of stock if it meets two criteria: (1) it essentially represents equity or leads to the holder being treated as a shareholder according to general tax laws, and (2) a principal purpose behind the obligation is to bypass the distribution or liquidation rights granted by the existing stock or to evade the maximum shareholder limit. (Regs. Sec. 1.1361-1(l)(4)(ii)).

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Certain Debt Obligations May Be Considered a Second Class of Stock

- Determining whether an obligation should be classified as debt or equity holds practical significance for several reasons:
  - The S corp's ability to maintain its S election hinges on only having one class of stock.
  - Payments made on debt will reduce the corporate income accessible for distribution and are likely to vary from the amounts that would typically be distributed to shareholders on equity.
- Due to these considerations and the ambiguity surrounding the "principal purpose" test, practitioners should be mindful of the factors that courts take into account when deciding whether an obligation should be categorized as debt or equity. The Tax Court has identified and applied various criteria in cases where the obligation in question was determined to be equity. These criteria include the parties' intent, the level of capitalization (whether it's sufficient or insufficient), the source of repayment, and the enforceability of repayment (e.g., American Offshore, Inc., 97 T.C. 579 (1991); Gray, T.C. Memo. 1997-67).
- Note: The regulations found in Regs. Sec. 1.1361-1(l) governing the one-class-of-stock rules do not apply to obligations issued before May 28, 1992, and not substantially altered after that date. However, S corporations and their shareholders have the option to apply these regulations to previous tax years (Regs. Sec. 1.1361-1(l)(7)).

IRS Guidance Implements Process for S-Corps to Resolve Certain Common Issues Without PLR Requests.

- In 2022, the IRS published guidance (Rev. Proc. 2022-19) providing a process to allow S corporations and qualified subchapter S subsidiaries (QSubs) to resolve certain issues with the IRS outside the private letter ruling process.
- The Rev. Proc. describes five "issues that the IRS historically has identified as not affecting the validity or continuation" of an S corporation election under §1362(a) or an S corporation's election to treat its corporate subsidiary as a QSub under §1361(b)(3)(B)(ii)

IRS Guidance Implements Process for S-Corps to Resolve Certain Common Issues Without PLR Requests., Cont'd.

- The following 5 issues may now be addressed without the need to obtain a PLR:
    1. Agreements or arrangements with no principal purpose to circumvent the one-class-of-stock requirement
    2. Disproportionate distributions when the corporation's governing provisions provide for identical distribution and liquidation rights.
    3. Certain errors or omissions on Form 2553 (*Election by a Small Business Corporation)*, or Form 8869 *(Qualified Subchapter S Subsidiary Election)*, including missing shareholder consent, errors regarding a permitted year, or a missing officer's signature.
    4. A lack of written acknowledgement that the IRS has accepted the corporation's S election or its subsidiary's QSub election
    5. A federal income tax filing that is inconsistent with an S election or QSub election.

Rev. Proc. 2022-19: Additional Second Class of Stock Considerations

- Rev. Proc 2022-19 further explains that the IRS will not treat an S corporation as having violated the one-class-of-stock requirement under §1361(b)(1)(D) as the result of an agreement or arrangement identified in section 2.03(1)(c) of Rev. Proc. 2022-19 if its principal purpose was not to circumvent the one-class-of-stock requirement.
- Section 2.03(1)(c) of the revenue procedure describes certain agreements and arrangements that are not governing provisions and are not treated as second classes of stock as long as there was no principal purpose to use the agreement to get around the one-class-of-stock requirement. The revenue procedure further notes that "because the existence of a principal purpose is inherently factual in nature, the IRS will not rule in these situations."

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Rev. Proc. 2022-19: Additional Second Class of Stock Considerations

- A corporation is not considered to run afoul of the one-class-of-stock requirement if its governing provisions provide for identical liquidation and distribution rights. Therefore, the IRS will not treat any disproportionate distributions that a corporation makes as violating the one-class-of-stock requirement if its governing provisions provide for identical distribution and liquidation rights.
  - The IRS has issued a plethora of rulings determining that distributions that differ in timing or amount do not create a second class of stock if the governing provisions of the S corp provide identical rights to distribution and liquidation proceeds. (See e.g., PLR 9519035)

Private Placement Variable Life Insurance (PPVLI)

In a variable life insurance policy, assets are kept in a separate account, from which mortality costs and certain expenses are deducted yearly. The income generated by assets in the separate account is exempt from current taxation under § 72 and is not taxed until the policy is surrendered or the policy lapses. This incentivized taxpayers to use life insurance policies as investment vehicles. Congress curbed some of this activity by passing §§ 7702 and 7702A, which laid forth certain scenarios in which a life insurance policy would not be taxed as a life insurance policy.

- Under § 7702, a "cash value buildup test" applies to determine whether the policy should be taxed as a life insurance policy. If the policy fails this test, all income from both the inside build-up and the death benefit will be rendered currently taxable.
- Under § 7702A, a "seven-pay test" applies to determine whether the policy is a "modified endowment contract" (or "MEC"). If the policy is a MEC, only the tax-deferred nature of the inside build-up is lost. The death benefit is still tax-free.

Private Placement Variable Life Insurance (PPVLI)

However, so long as a policy passed the tests under §§ 7702 and 7702A, the inside build-up and death benefit would both remain free of current income taxation. This meant policies with an investment component would still be viable.

In a retail variable life insurance policy, the only investments available in the separate account are those investments pre-selected by the issuing insurance company. Therefore, the policy owner is restricted by a "menu" of available investments. For some clients, this makes variable life insurance considerably less attractive.

Life insurance professionals eventually asked: "Why can't we create a product that would allow access to a broader selection of investments for the separate account of a variable life insurance policy?"

Private Placement Variable Life Insurance (PPVLI)

The answer to the question came in the form of **Private Placement Variable Life Insurance (PPVLI).** Rather than purchasing a policy from a traditional issuer, the client can purchase a custom-designed policy unrestricted by a "pre-selected" investment menu. Besides meeting the tests in §§ 7702 and 7702A, the policy must also meet the following requirements:

- **Diversification** in accordance with the RIC rules under § 851(b)(3) to meet the safe harbor in § 817(h)(2); and
- **No investor control**, a doctrine developed by the IRS in Rev. Rul. 77-85, 1977-1 C.B. 12 and refined over several other Revenue Rulings. The Tax Court afforded the investor control doctrine *Skidmore* deference in *Webber v. Commissioner*, 144 T.C. No. 17 (2015).

Private Placement Variable Life Insurance (PPVLI)

Investor control is typically avoided through the following measures:

- **Formation of a custom insurance-dedicated fund (IDF).** Under Rev. Rul. 82-54, 1982-1 C.B. 11, and Rev. Rul. 2003-91, 2003-2 C.B. 347, an IDF will not trigger investor control, provided the IDF itself is diversified. An IDF must only allow for the cash value of annuities and life insurance policies to invest; participation cannot be open to the general public. *See* Rev. Rul. 81-225, 1981-2 C.B. 12.
  - The IDF manager, who selects the individual investments, must meet the following criteria:
    1. Must be a third party unrelated to the policyholder.
    2. Must not accept anything more than broad general input from policyholder regarding how to invest and manage the assets.
    3. Must perform its own due diligence regarding each individual investment.
- **Avoidance of all indicia of ownership**. The policyholder cannot manage, directly access, or exercise any powers conferred by the policy's assets. Access can only be achieved through policy loans.

Private Placement Variable Life Insurance (PPVLI)

PPVLI has the following uses:

- For high-net-worth individuals who enjoy owning alternative assets giving rise to ordinary income, PPVLI avoids the current income taxation on these tax-inefficient assets. Such assets might include long-short equity hedge funds, international bond funds, REITs, MLPs, and investments requiring mark-to-market treatment under § 1256.
- For non-resident aliens who wish to invest in U.S. assets, PPVLI avoids non-resident alien withholding, ECI issues, FIRPTA, ineligibility for a § 1031 exchange, and other adverse consequences of non-resident alien ownership. This is because the PPVLI can simply make a § 953(d) election to be treated as a United States taxpayer, even if the policy is actually located offshore.

Private Annuities and Self-Cancelling Installment Notes

Private Annuity - is a financial arrangement between two parties, typically family members, where one party (the "annuitant") transfers ownership of an asset to another party (the "obligor") in exchange for a regular stream of income for the rest of the annuitant's life. Unlike traditional annuities offered by insurance companies, private annuities are not regulated by financial institutions and can offer unique benefits in certain situations.

Introduction to Private Annuities in Estate Planning

1.Definition of Private Annuities:

1. A private annuity is a financial arrangement used in estate planning.
2. Involves transferring an asset from the grantor to a beneficiary in exchange for a promise to make periodic annuity payments to the grantor for the remainder of their life.

2.Key Parties Involved:

1. Grantor: The individual transferring the asset.
2. Beneficiary: The individual receiving the asset and making annuity payments.

3.Benefits of Private Annuities:

1. Facilitates asset transfer while providing a steady income stream for the grantor.
2. Can reduce the grantor's taxable estate.
3. Potential estate and gift tax benefits, depending on certain conditions.

Mechanism of Private Annuities

Process Overview:
- Grantor transfers an asset (property, investments, etc.) to the beneficiary.
- In return, the beneficiary promises to pay the grantor a fixed annuity for life.
- The annuity payments continue until the grantor's death.

Determining Annuity Amount:
- Annuity amount is based on actuarial calculations.
- Factors include the asset's value, grantor's age, prevailing interest rates, and life expectancy.

Tax Implications:
- Initial transfer is not subject to income tax.
- Annuity payments may have income tax consequences for both parties.
- Potential estate and gift tax implications to consider.

Advantages of Private Annuities in Estate Planning

Steady Income Stream:

- Grantor receives regular annuity payments, ensuring financial stability.

Estate Tax Reduction:

- Asset transferred is removed from grantor's taxable estate.
- Potential reduction in estate tax liability upon death.

Gift Tax Considerations:

- Potential to reduce gift tax liability for the grantor, depending on actuarial factors.

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Implementation Steps and Expert Guidance

1. **Professional Consultation:**
   - Work with financial advisors, estate planners, and tax experts.
   - Ensure compliance with legal and tax requirements.

2. **Asset Valuation:**
   - Determine the value of the asset to be transferred.

3. **Actuarial Calculation:**
   - Calculate annuity payments based on relevant factors.

4. **Drafting the Agreement:**
   - Create a legally binding agreement outlining terms and conditions.

5. **Regular Review:**
   - Periodic evaluation of annuity payments and estate plan.

S.C.I.N
Self Cancelling Installment Note

Should the “risk premium” for a SCIN be added as additional principal or additional interest?

Facts: Senior Age 70

Reg. § 1.72–9 life expectancy tables are used.

Life Expectancy: 16 years

Long-Term AFR 5.0%

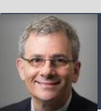
Note Term: 16 years

Interest Risk Premium: 5.01444% (10.01444% x $1,000,000 = **$100,144 annual interest**)

Principal Risk Premium: $644,677 (5.0% x $1,644,677 = **$82,234 annual interest**)

5.01444% Risk Premium Added to Interest

Year	Annual Payment	Interest Portion		Note Balance
1	100,144	100,144		1,000,000
2	100,144	100,144		1,000,000
3	100,144	100,144		1,000,000
4	100,144	100,144		1,000,000
5	100,144	100,144		1,000,000
6	100,144	100,144		1,000,000
7	100,144	100,144		1,000,000
8	100,144	100,144		1,000,000
9	100,144	100,144		1,000,000
10	100,144	100,144		1,000,000
11	100,144	100,144		1,000,000
12	100,144	100,144		1,000,000
13	100,144	100,144		1,000,000
14	100,144	100,144		1,000,000
15	100,144	100,144		1,000,000
16	1,100,144	100,144	1,000,000	0



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$664,677 Risk Premium Added to Principal

Year	Annual Payment	Interest Portion		Note Balance
1	82,234	82,234		1.644.677
2	82,234	82,234		1.644.677
3	82,234	82,234		1.644.677
4	82,234	82,234		1.644.677
5	82,234	82,234		1.644.677
6	82,234	82,234		1.644.677
7	82,234	82,234		1.644.677
8	82,234	82,234		1.644.677
9	82,234	82,234		1.644.677
10	82,234	82,234		1.644.677
11	82,234	82,234		1.644.677
12	82,234	82,234		1.644.677
13	82,234	82,234		1.644.677
14	82,234	82,234		1.644.677
15	82,234	82,234		1.644.677
16	1,726,911	82,234	1.644.677	0

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How to Value a SCIN

Senior Age 70 §1274 discount rate of 5.0%
Reg §1.72-9 Table V life expectancy 16.0 years.
Sale of asset valued at $1,000,000.

A	B	C	D	E	F	
Year	Age	5.0% Present Value Factor	Age 70 2010 CM Survival Factor	Actuarial Present Value (CxD)	SCIN Annual Payment	2702 Value of Each Payment (ExF)
	70.00	1.000000				
1.00	71.00	0.952381	0.986364	.93939461	$151,459	$142,279.77
2.00	72.00	0.907029	0.958245	.86915661	151,459	$131,641.59
3.00	73.00	0.863838	0.928416	.80200088	151,459	$121,470.25
4.00	74.00	0.822702	0.896941	.73791536	151,459	$111,763.92
5.00	75.00	0.783526	0.863973	.67694522	151,459	$102,529.45
6.00	76.00	0.746215	0.829659	.61914056	151,459	$93,768.96
7.00	77.00	0.710681	0.794092	.56434613	151,459	$85,473.30
8.00	78.00	0.676839	0.757298	.51256897	151,459	$77,633.16
9.00	79.00	0.644609	0.719250	.46363476	151,459	$70,220.00
10.00	80.00	0.613913	0.679870	.41738134	151,459	$63,216.16

$1,200,00
If only use the present value in column C and do not apply a risk premium for the probability of survival in column D

The principal risk premium must be $200,000.

<u>$1,000,000</u>

Whether to Make the Note Self-Canceling

The IRS takes the position that a self-canceling note is worth significantly less than the face value, because of the probability of dying during the note term.

The statutes permit a private annuity sale using standard life expectancy amounts, if the lender whose life is used has better than a 50% chance of living at least one year at the time that the arrangement is put into place.

Private annuity sales normally do not work as well as sales for promissory notes because:

a. Special “probability of exhaustion” rules require that any trust purchasing assets in exchange for a private annuity must have a significant amount of assets, which will usually significantly exceed the amount of the note.

b. An individual sale for a private annuity can trigger significant ordinary income (when a defective grantor trust is not being used).

Give the Note Some SCIN. (Cont.)

- Until the IRS took the position in the Tax Court case of Estate of Davidson that the standard life expectancy tables cannot be used in structuring a self-cancelling installment note, most practitioners and commentators were of the opinion that a self-cancelling installment note can be structured without gift risk, if the noteholder had a better than 50% chance of surviving at least one year after the note is issued, or, in fact, survived at least 18 months, because of Treasury Regulation §25.7520-3(b)(3), which applies these standards when assets are sold for a private annuity contract.

- A promissory note is very much like a private annuity, because it provides for fixed annual payments that are clearly measurable at the time that the note is issued.

- The Davidson case was settled, so there may be no authority that a note cannot be structured with payments that would analogized to a private annuity, while using the better than 50% chance of survival standard.

- The terminal illness requirement under the Section 7520 Treasury Regulations prevents use of normal life expectancy assumptions, if there is a "terminal illness," which is an incurable illness or other deteriorating physical condition that causes the transferor to have a 50% or higher probability of dying within one year.

  "Individuals suffering from the general infirmities of old age, but not from a specific, incurable life-threatening illness" are not considered to be terminally ill under the regulations. If an elderly person has one or more illnesses, none of which standing alone are considered to be life-threatening, then that person would not be considered terminally ill. Several serious diseases and conditions, such as heart disease, diabetes, many forms of cancer, and Alzheimer's Disease, do not automatically reduce life expectancy to a 50% probability of death within one year, until these afflictions have progressed to advanced stages."

Give the Note Some SCIN. (Cont.)

- Families who are concerned about the possibility of paying gift tax at the time that a SCIN is entered into can consider the SCGRAT strategy discussed in LISI Newsletter #2230 (June 3, 2014), whereby the Grantor places valuable assets in an LLC that is owned by the Grantor. The LLC gives the Grantor a self-cancelling installment note, which causes the value of the LLC to be very small, if the promissory note is worth its face amount.

- The Grantor then gifts the 99% non-voting member interest in the LLC and some cash or marketable securities to a “zeroed out” Grantor Retained Annuity Trust (“GRAT”) in exchange for the right to receive two annual payments.

- Each payment will be worth approximately 51.20% of the day one value of the LLC as of the moment that it was transferred to the GRAT. The payment can be satisfied by paying cash that the LLC can distribute to the GRAT or in the form of assets equal in value to such amounts that the LLC may distribute to the GRAT each year. When the Grantor has established one or more Defective Grantor Trusts, such trusts may transfer cash to the GRAT in exchange for LLC interests, so that the GRAT has money to use to pay to the Grantor as scheduled.

If it turns out that the self-cancelling installment note has a very small value, then the Grantor will be owed larger payments from the GRAT, and no gift tax will be due.

The possibility that a Grantor, who is diagnosed with a condition that dramatically reduces life expectancy, can convert a promissory note to be self-cancelling can be a significant advantage to maintaining the note.

Installment Note Strategies

<u>Convert the Note Into an Annuity.</u>

Noteholders who live in states that provide creditor protection for annuities may wish to convert the note, in whole or in part, to an annuity right.

Planners who draft documents such as Grantor Retained Annuity Trusts (GRATs) and Qualified Personal Residence Trusts (QPRTs) that will or may make annuity payments should review applicable state law to determine how such payments will be treated for creditor exemption purposes.

Example:

In the 2019 case of *in re Resin* (aka the Pink Hippo case) Cayman Island annuity contracts purchased by a trustee of an asset protection trust that was found to be penetrable by the south Florida Bankruptcy Court were held to be protected when the trustee purchased them and made them payable to the debtor without the debtor's assistance. The Court found that the Florida fraudulent transfer statute did not apply where the debtor did not make the transfer and did not request that the trustee of a very old and cold trust to make the transfer.

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Convert the Note Into an Annuity. (Cont.)

Alternatively, a note could be converted in whole or in part to a private annuity, subject to the possibility that the Probability of Exhaustion Test would need to be satisfied in order to avoid having a gift occur at the time of conversion.

The Probability of Exhaustion Test under Section 7520 Treasury Regulations and Revenue Ruling 77-374 generally provides that the payer trust must have a sufficient net worth, and/or guarantors who pay guarantee payments, to assure that all annuity payments can be made until the payee reaches age 110, under the assumption that the assets available to satisfy the payments will grow only at the Section 7520 rate, which is 1.6% in December of 2021.

Example:

A Grantor age 70 making a seed capital gift of $1,000,000 to a Spousal Limited Access Trust (“SLAT”) could contribute $10,000,000 of assets to the SLAT and take back an annuity paying him $813,246.15 per year for life, or a 14 Year promissory note in the amount of $10,000,000 at 1.90% (based on the December long-term AFR) not self-cancelling, or 6.050% if self-cancelling.

Private annuity payments can be very flexible. They can be deferred and/or increase annually by a certain percentage.

In the *Kite* case, Mrs. Kite contributed $10,605,278 worth of assets to her trusts in exchange for annuity payments that would begin ten years from the date of the transfer in the amount of $1,900,679.34 annually until the death of Mrs. Kite.

Convert the Note Into an Annuity. (Cont.)

In a recent private annuity structure, a 73-year-old wanted to have $2,400,000 a year to spend for the first nine years, and then the remaining payments for his lifetime would be based on the value of the assets contributed to the trust to avoid a gift.

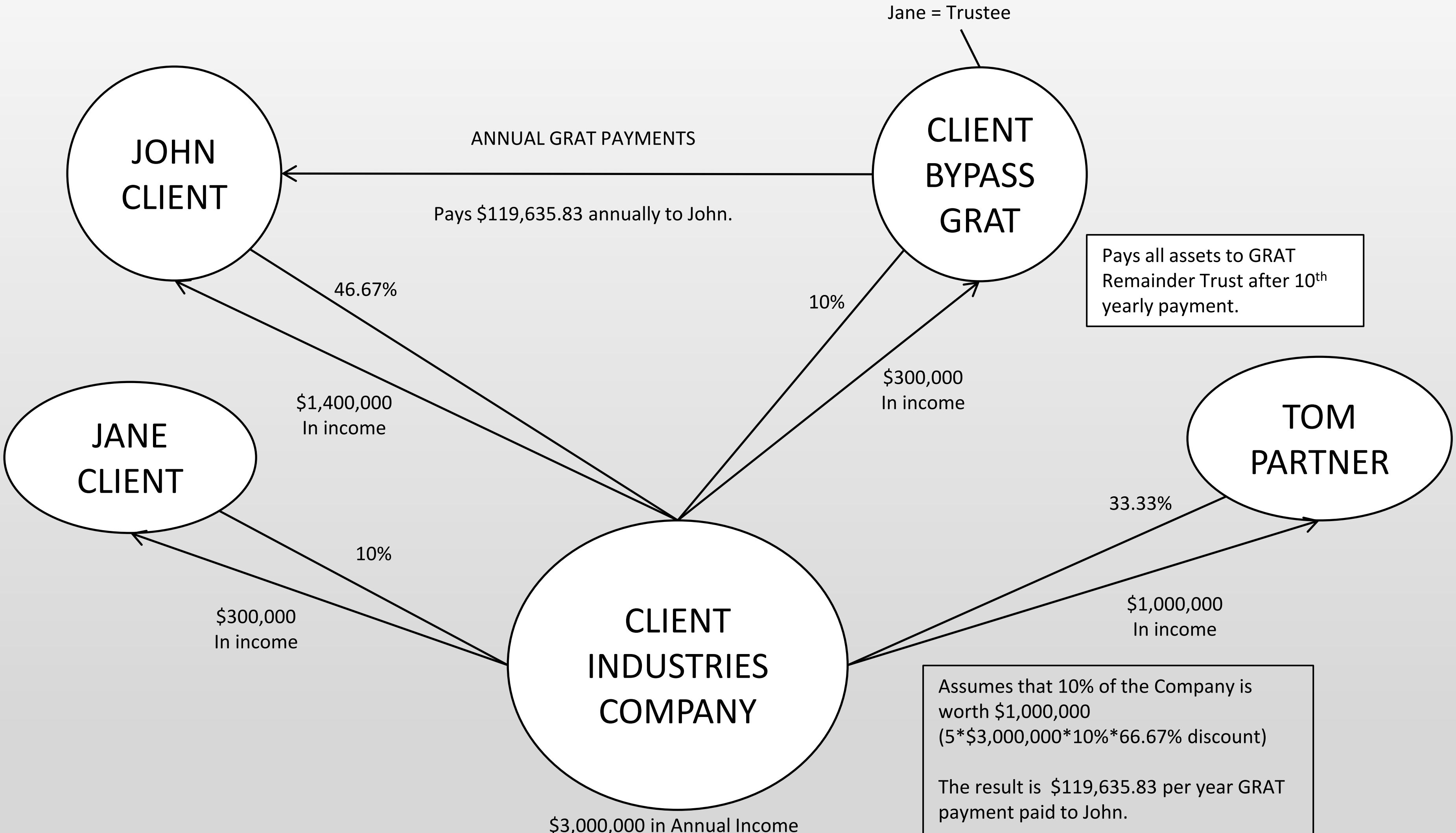
- If the 73-year-old transfers $35,000,000 to the trust he could receive $2,400,000 for the first nine years, and $3,816,570 annually for his remaining lifetime.

- His wife will be well supported by the SLAT, which has over $92,000,000 in value.

- The taxpayer will continue to pay the income tax on income earned by the SLAT.

- There are sufficient assets in the trust to satisfy the Probability of Exhaustion Test, and the taxpayer's estate can be kept under the remaining amount of his estate tax exemption to avoid federal estate tax.

CLIENT – GRAT CHART



For the purposes of this chart, the Company is valued at $15,000,000 based on approximate annual income of $3,000,000. Assuming a 33.33% discount, a 10% interest in the Company is worth $1,000,000

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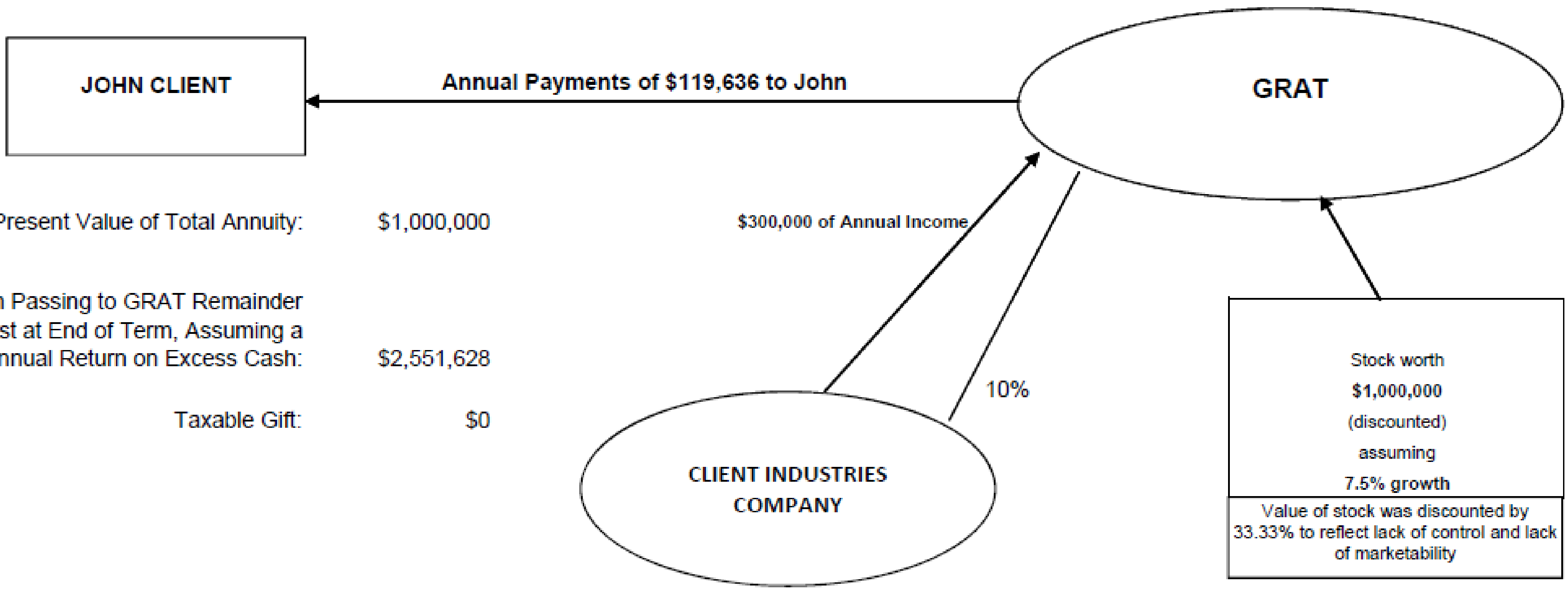
CLIENT- GRAT CHART

$1,000,000 CONTRIBUTION--ZERO TAXABLE GIFT--LEVEL ANNUAL ANNUITY PAYMENT

Year	Annual Annuity	Percentage of Income Earned By Client Industries Company	Excess Cash--Assuming a 7.5% Annual Return
1	$119,636	$300,000	$180,364
2	$119,636	$300,000	$374,256
3	$119,636	$300,000	$582,689
4	$119,636	$300,000	$806,755
5	$119,636	$300,000	$1,047,626
6	$119,636	$300,000	$1,306,562
7	$119,636	$300,000	$1,584,918
8	$119,636	$300,000	$1,884,151
9	$119,636	$300,000	$2,205,827
10	$119,636	$300,000	$2,551,628

plus 10% share of Company



Present Value of Total Annuity: $1,000,000

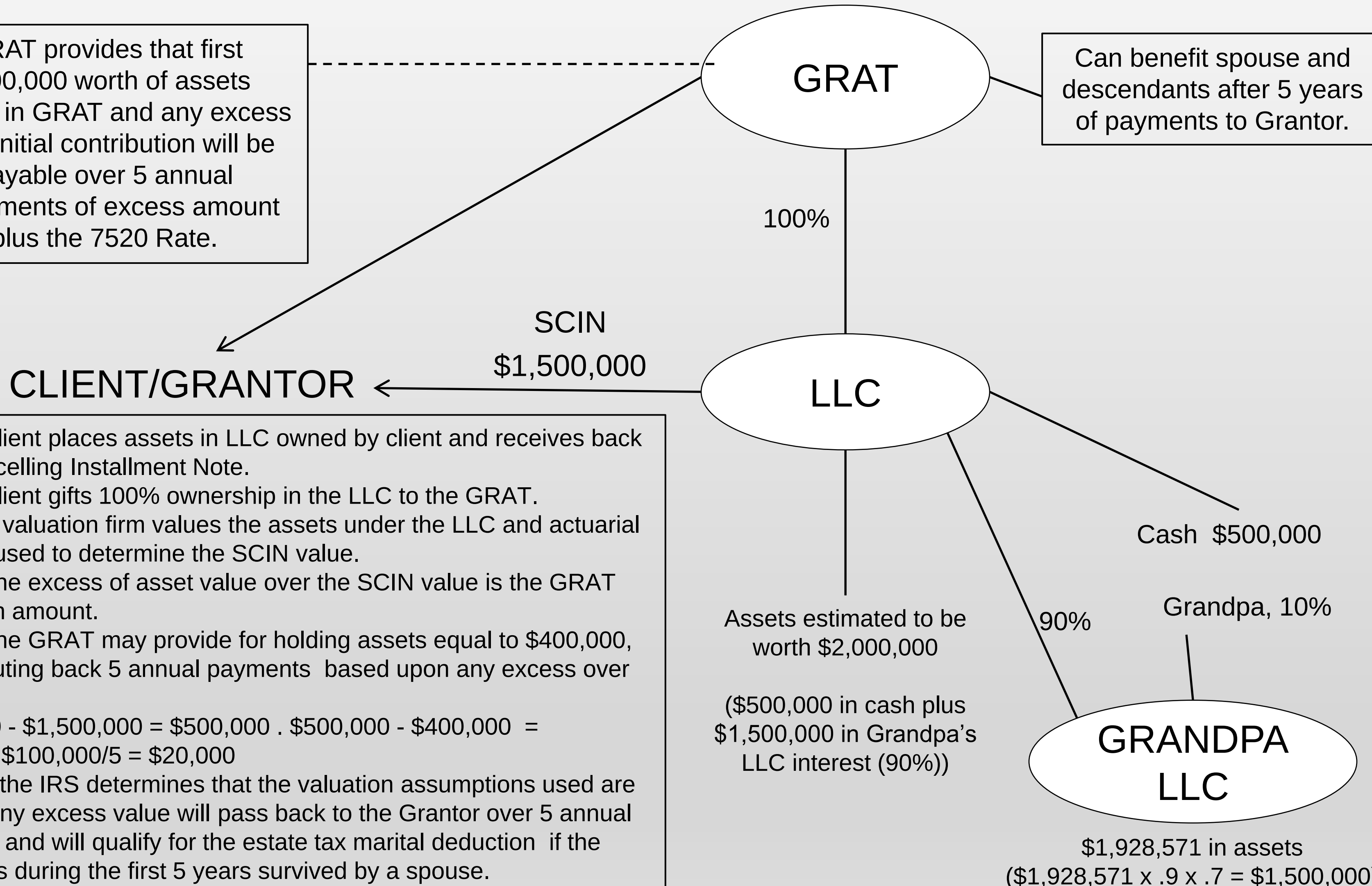
Cash Passing to GRAT Remainder Trust at End of Term, Assuming a 7.5% Annual Return on Excess Cash: $2,551,628

Taxable Gift: $0

MORE THAN ONE WAY TO SCIN A GRAT? (The "SCGRAT") WHAT IF THERE IS NOT TIME TO APPRAISE THE UNDERLYING ASSETS AND ENTITY DISCOUNTS BEFORE COMPLETING A SELF-CANCELLING INSTALLMENT NOTE TRANSACTION?

GRAT provides that first $400,000 worth of assets remain in GRAT and any excess from initial contribution will be payable over 5 annual installments of excess amount plus the 7520 Rate.

Can benefit spouse and descendants after 5 years of payments to Grantor.



Step 1 – Client places assets in LLC owned by client and receives back a Self-Cancelling Installment Note.
Step 2 – Client gifts 100% ownership in the LLC to the GRAT.
Step 3 – A valuation firm values the assets under the LLC and actuarial tables are used to determine the SCIN value.
Step 4 – The excess of asset value over the SCIN value is the GRAT contribution amount.
Step 5 – The GRAT may provide for holding assets equal to $400,000, and distributing back 5 annual payments based upon any excess over $400,000.
$2,000,000 - $1,500,000 = $500,000 . $500,000 - $400,000 = $100,000. $100,000/5 = $20,000
Step 6 – If the IRS determines that the valuation assumptions used are incorrect, any excess value will pass back to the Grantor over 5 annual payments, and will qualify for the estate tax marital deduction if the grantor dies during the first 5 years survived by a spouse.

BACKGROUND INFORMATION THAT IS PERTINENT TO THE CONSIDERATION OF THE SCGRAT

BY: ALAN S. GASSMAN, J.D., LL.M. AND KENNETH J. CROTTY, J.D., LL.M.

The use of a leveraged Grantor owned limited liability company, or limited partnership is the subject of extensive writings provided by S. Stacy Eastland, who is a well respected estate tax planning lawyer who presently works as a Managing Director for Goldman & Sachs.

Mr. Eastland's Bloomberg BNA outline that was presented on March 23, 2012 entitled Two of our Favorite 2012 Gift Planning Ideas We See Out There; The Leveraged GRAT and the Remainder Purchase Marital Trust discusses the use of an LLC that can initially be owned by the Grantor to hold investments and can owe a note back to the Grantor to effectively leverage the contribution to a Grantor Retained Annuity Trust ("GRAT").

These materials include an in depth discussion of the Step Transaction Doctrine at pages 23 through 26 indicating that "The creation of the family limited partnership, or Family Limited Liability Company should be designed to be sufficiently independent on its own, and as an a act that does not require a sale to that trust. There does not have to be a business purpose for the creation of the trust. It is difficult for this writer (Mr. Eastland) to understand the business purpose of any gift. As noted above, the Supreme Court has said on two separate occasions, estate and gift tax law should be applied in a manner that follows estate property law analysis. The outlined footnotes the US Supreme Court Cases of *United States v. Bess* (1958), *Morgan v. Commissioner* (1940), and the Ninth Circuit Case of *Lindt v. US*, which provides the following quote from Learned Hand's decision "that anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury" *Helvering v. Gregory* 69 F. 2d 809, 810-11 (2d Cir. 1934)?

Mr. Eastland's outline provides further discussion on the ability to have a GRAT provide that a specified dollar of value in assets can be retained, with excess value being used to measure the GRAT's payments back to the Grantor. Footnote 61 on page 57 of Mr. Eastland's materials reads as follows:

> For example, the formula might define the annuity as that percentage of the initial value of the trust assets (as finally determined for federal gift tax purposes) which will result in an annuity having a present value at the inception of the trust equal to the initial value of the trust assets (as so determined) less $4,800,000. A GRAT annuity defined in this way has not been passed upon by the IRS or the courts. It should meet the requirements of Treas. Reg. 25.2702-3(b)(i)(B), which permits the annuity to be "[a] fixed fraction or percentage of the initial fair market value of the property transferred to the trust, as finally determined for federal tax purposes, payable periodically but not less frequently than annually, but only to the extent the fraction or
>
> percentage does not exceed 120 percent of the fixed fraction or percentage payable in the preceding year." In order to freeze the remainder value at a constant dollar amount, such a formula definition generates a greater annuity percentage (not just a greater annuity amount) for a higher initial value. The percentage is dependent upon finally determined asset values and is fixed by them, since there is only one percentage corresponding to any given initial value of the trust. It therefore is hard to see in what sense this would not be a "fixed percentage," and the regulatory definition, with its reference to values "as finally determined for federal tax purposes," seems entirely consistent with defining the annuity percentage in this way. An initial annuity percentage defined in this way could then be made subject to the 20% annual increase permitted under the regulation, although that is not a feature of the technique under discussion.

Mr. Eastland's materials further discuss whether generation skipping tax exemption can be allocated to a GRAT where there is less than a 5% chance that the Grantor will die before receiving all GRAT payments.

Mr. Eastland states that based upon the rates in effect at the time of publication in 2012 that a two year GRAT payable to a Grantor under age 70 would satisfy the 5% maximum life expectancy requirement and that it should therefore be possible to allocate GST exemption to the GRAT under the ETIP ("Estate Tax Inclusion Period") rules. The ETIP rules prevent allocation of GST exemption to a GRAT in many circumstances. This discussion begins at page 55 of those materials.

It would be safest to wait until the GRAT term ends before allocating GST exemption to the GRAT.

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Client has assets valued at $10,000 that he would like to sell to a trust for his descendants in exchange for a $9,000,000 self-cancelling installment note (SCIN).

He has a disease and a life expectancy of 3 years.

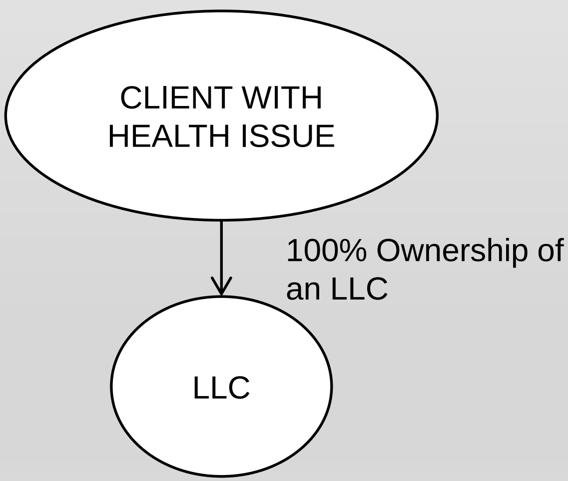
He is age 69 and is informed that under the IRS tables and applicable rules the note could bear interest at 6.438%, payable interest only, and would need to balloon within 14 years.

If the standard tables can be used to compute the value of the SCIN, then it would be worth $9,000,000. If a willing buyer was to buy the SCIN from a willing seller, it would be worth $1,000,000.

Client would like to attempt an installment sale with a trust for his descendants, but does not want to risk being considered to have made an $8,000,000 taxable gift that would result in a $1,064,000 or more gift tax liability. Client hopes to recover from the health challenges, and not have to make a large payment to the IRS during his lifetime.

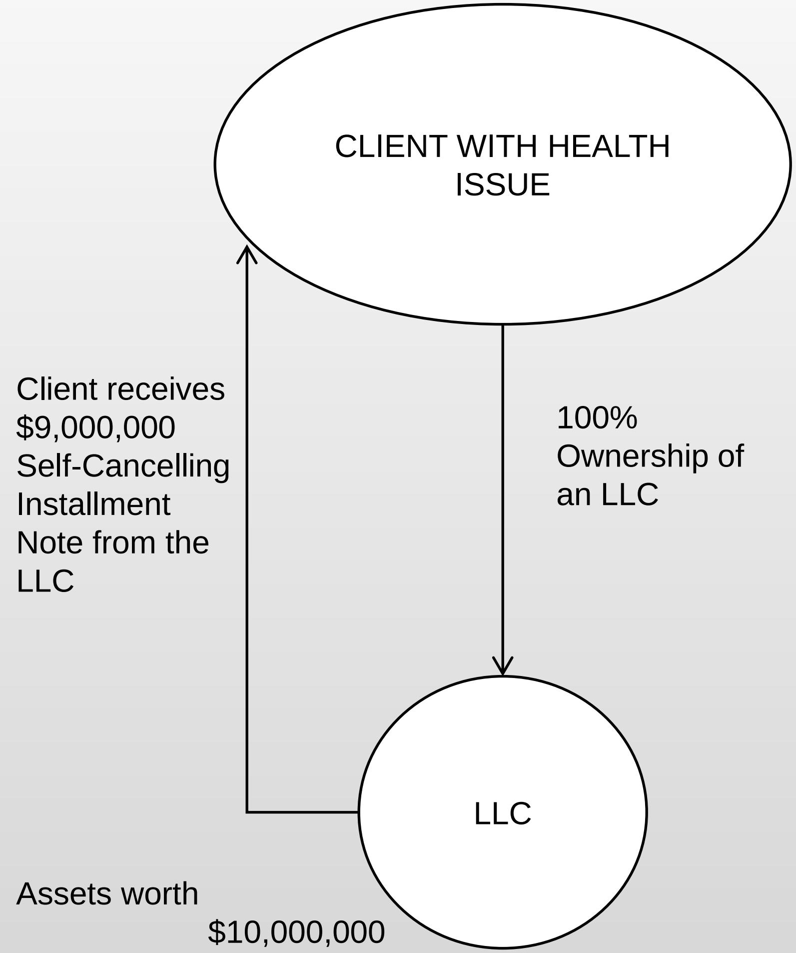
Client is scheduled for surgery this week and has a 5% mortality risk. If client survives the surgery, he will have a life expectancy of 6 years.

STEP 1 – ESTABLISH LLC AND FUND IT WITH ASSETS



Assets worth $10,000,000

STEP 2 – TAKE A NOTE BACK FROM THE LLC

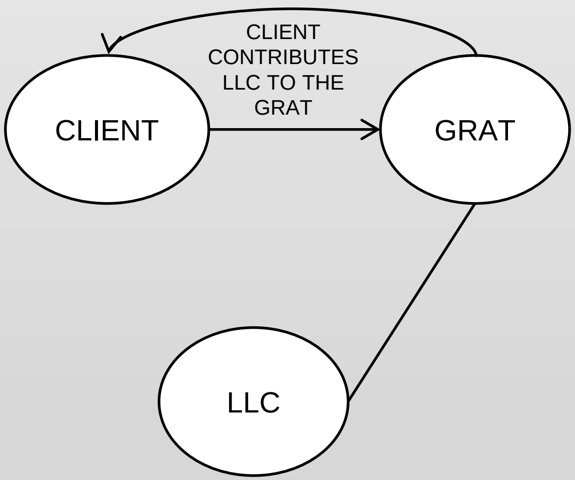


Assets worth	$10,000,000
Self-Cancelling Installment Note	($9,000,000)
Taxpayer Calculated Value of LLC	$1,000,000
Possible IRS Asserted Value of Note	$1,000,000
Possible IRS Asserted Value of LLC	$9,000,000

STEP 3

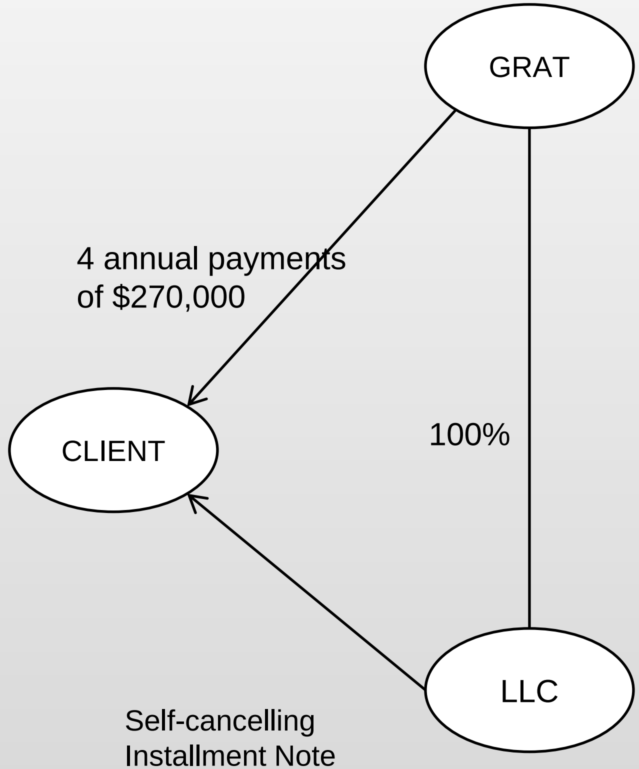
Client establishes a Grantor Retained Annuity Trust (GRAT) which provides that the value of assets contributed to it will be multiplied by 27%, and that dollar amount will be paid to client each year for four (4) consecutive years.

GRAT makes 4 annual payments of 27% of the value of the LLC back to the client.



STEP 4 – HOPED FOR OUTCOME

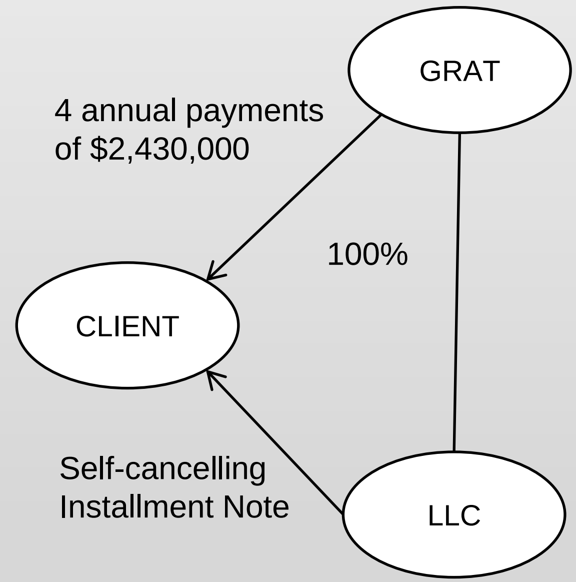
Client transfers 100% ownership of the LLC to the GRAT and payments of $270,000 per year are scheduled to be made.



The client also receives annual interest payments of $579,420 a year from the LLC under the SCIN.

STEP 5 – OUTCOME IF NOTE IS WORTH ONLY $1,000,000

In the unlikely event that the IRS were to succeed in claiming that the promissory note is worth only $1,000,000, then there would be no gift tax due, and because under the GRAT formula payment clause client would have the right to receive $2,430,000 per year worth of assets from the GRAT. This generally places the family back to where they would be.



The client also receives annual interest payments of $64,380 a year from the LLC under the SCIN

SCIN V. PRIVATE ANNUITY V. GRAT CHART

	SCIN	PRIVATE ANNUITY	GRAT (ineffective if Grantor dies before the term expires)
Can be valued based upon standard life expectancy tables, if taxpayer has better than 50% chance of living one year.	This is being contested by the IRS. CCA 201330033 and *Davidson*	Safe, under Treasury Regulation Sections 20.2031-7(d); 20.7520-3(b)	Safe, under Internal Revenue Code Section 2702(a)(2)(B); 20.7520-3(b).
Must pass the "probability of exhaustion test" (significant minimum value held under trust and/or by guarantors).	No.	Yes- According to Treasury Regulation Section 1.7520-3(b)(2)(i); 20.7520-3(b)(2)(i); 25.7520-3(b)(2)(I), but is the IRS's position under the Regulation incorrect? – See Katzenstein, *Turning the Tables: When do the IRS Actuarial Tables Not Apply?*, Thirty-Seventh Univ.of Miami Inst. On Est. Planning, Ch. 3 (2003) and Wojnaroski, *Private Annuities for Healthy Individuals and How to Deal with the Exhaustion Test,* 37th Annual Notre Dame Tax and Estate Planning Institute, Ch. 11 (2011).	No, if structured as a *Walton*-style GRAT.
Must make annual payments.	Probably, interest only until it balloons. The IRS, in CCA 201330033, implied that payments of interest and principal show indicia of genuine debt.	No- The *Kite* case allowed no payments for the first 9 years.	Yes.
Compatible with defective grantor trust.	Yes.	Yes, subject to probability of exhaustion test.	Yes, it is a Grantor Trust.
Payments must include principal.	Not until it balloons. The IRS, in CCA 201330033, implied that payments of interest and principal show indicia of genuine debt.	Probably not- as in the *Kite* case.	Equal or increasing payments would represent principal conceptually.
Explainable to the client.	Yes.	Yes.	Slightly more complicated.
Income tax imposed upon death.	Possibly not, but IRS may not agree. (See Zaritsky, <u>Tax Planning for Family Wealth Transfers</u> §12.04[h], (4th ed. 2002))	No.	No- but on death, there is a negative estate tax impact. Before term expires?
Stepped up basis if assets are sold or transferred to grantor trusts.	Yes, hopefully. (See Blattmachr, Gans and Jacobson, *Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor's Death*, Journal of Taxation, September 2002)	Yes, hopefully. (See Blattmachr, Gans and Jacobson, *Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor's Death*, Journal of Taxation, September 2002)	Yes, hopefully. Depending upon structuring.
Possible usury issues for older taxpayer.	Yes, unless the risk premium is applied to the note principal.	No.	No.
Are Payment Rights Creditor Protected?	Generally not, but can be held by family limited partnership or other entities that provide charging order remedy only or creditor protection.	Yes, in several states.	Yes, in several states.

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GASSMAN CROTTY & DENICOLO, P.A.
ATTORNEYS AT LAW

Valuation of Promissory Notes for Transfer Tax Purposes										
	Date the note was entered in to	**Face amount of the note**	**Duration of the note**	**Interest rate on the note**	**Decedent's date of death**	**How long the note had to run following death of decedent**	**Applicable federal rate on date of death**	**Whether or not the note was secured**	**Financial strength of the lender**	**Discount rate applied**
Estate of Berkman v. Commissioner (1)	5 notes: 1 in '68 1 in '69 2 in '70 1 in '72	$275,000	20 years	6%	1974 (2-6 years after issuance of notes - depending on the note)	Unknown	9.75%	No	Unknown	50% or more for each note (longer term notes got greater discounts)
B. Smith v. U.S. (2)	1977	$10,312,000	20 years	6%	1988	Unknown	7.57%	Unknown	Unknown	Discount applied – specific percentage amount not given. (Lack of marketability, lack of protective covenants, lack of formal acknowledgement of the debt by the lender, unusual payment schedule, market interest rate increase.)
Estate of Hoffman v. Commissioner (3)	1992	2 notes: $278,147; $173,083	20	7.61%	1994	Until maturity	7.58%	No	Strong	Discount applied – specific percentage amount not given.
Estate of Harper v. Commissioner (4)	1991	$450,000	1 year	10.75%	1995	Note was renewed each year until decedent's death	7.19%	Yes	Unknown	12% (no assurance that the note would be paid in full at the next maturity date and issues affecting the property the note was secured by.)

Valuation of Promissory Notes for Transfer Tax Purposes										
	Date the note was entered in to	**Face amount of the note**	**Duration of the note**	**Interest rate on the note**	**Decedent's date of death**	**How long the note had to run following death of decedent**	**Applicable federal rate on date of death**	**Whether or not the note was secured**	**Financial strength of the lender**	**Discount rate applied**
Example Appraisal One (5)	2012	Unknown	9 years	0.95%	Unknown	Unknown	3.40%	Unknown	Unknown	12.85% (lack of collection rights and lack of marketability)
Example Appraisal Two (6)	2012	Unknown	9 years	1.07%	Unknown	Unknown	Not provided	Yes	Weak	21.6% (no protective covenants, size of the note, lack of marketability, weak financial strength of issuer.)
Valuation Scenario 1 (7)	Unknown	$1,000,000	9 years	3%	Unknown	Unknown	3%	Unknown	Unknown	Subject to discounts because note likely would not have a fair market value equal to its face value. No specific discount percentage given.
Valuation Scenario 2 (8)	Unknown	$1,000,000	20 years	4%	Exactly one year after issuance of note	Unknown	4%	Unknown	Unknown	Subject to discounts because, when compared, other similar long-terms loans are meaningfully discounted. No specific discount percentage given.

FURTHER SAMPLE LANGUAGE

SHOULD EVERY ESTATE PLANNING LAWYER OFFER TO BE APPOINTED AS A TRUST PROTECTOR?

By Alan Gassman and Seaver Brown

Should every estate planning lawyer offer to be appointed as a trust protector to help ensure that testamentary intent will be followed as occurred in the case of *Minassian v. Rachins*, 152 So. 3d 719 (Fla. 4th Dist. App. 2014)?

Executive Summary

Florida Statute Section 736.0808 allows the settlor of a trust to give a third person the sole discretionary power to amend or terminate the trust for certain specified reasons. This discretionary power is typically given to either a trustee or another individual other than the settlor. [Fla. Stat. §736.0808(3)(2008)]

The concept of a trust protector has a long and storied history. Under British Common Law, it was well-accepted procedure to appoint a trust protector who could change the terms of the trust for the benefit of some or all of the beneficiaries and, in some instances, terminate the trust altogether. One reason settlors would confer this power to amend or terminate trust provisions was to have a viable remedy to address any unforeseen events after their death, some of the most prominent of which included ambiguous trust provisions, a change in circumstances, or a change in the applicable estate tax laws. However, despite the various reasons why a trust might need to be amended, the underlying purpose has always been to effectuate the settlor's original intent.

Facts

In the case of *Minassian v. Rachins*, there was a dispute between the settlor's surviving spouse, acting as trustee, and his children from a prior marriage. [152 So.d 719 (Fla. 4th Dist. App. 2014). The crux of the matter dealt with a trust protector who had the sole and absolute discretion to determine and then alter provisions that were ambiguous or erroneous enough to defeat the settlor's original intent.

Scrivener Protector Provision

The law firm of GASSMAN, CROTTY & DENICOLO, P.A. has drafted this Trust Agreement and it is expected that the law firm will be available in the event of the Grantor's death or incapacity in order to help to assure that the intentions of the Grantor are followed. It is recognized that in the course of drafting and administering trust agreements there can be ambiguities, inconsistencies, and changes in circumstances which can cause inconvenience, disputes, and hardships for trustees and one or more beneficiaries. The Grantor hereby empowers the law firm of GASSMAN, CROTTY & DENICOLO, P.A., or its successor, to make changes to this Trust Agreement by providing written notice confirming such change in order to comport with the Grantor's intentions and to avoid potential uncertainty, litigation, or arbitration, provided that any such changes will be consistent with a fiduciary duty to follow the Grantor's intentions. Such power granted to the law firm of GASSMAN, CROTTY & DENICOLO, P.A. shall only apply so long as a member of the firm is a Martindale-Hubbell AV-rated and Florida board certified trust and estate lawyer who approves such action, and the exercise of such power shall be limited as to not cause loss of the federal estate tax marital deduction or the federal estate tax charitable deduction with respect to any transfer to such trust or any trust herein established. Further, no such action may be taken without having written notice of the proposed action provided to each adult beneficiary of the Trust, or to the Designated Representative of any adult beneficiary or beneficiaries who are empowered to waive and receive notice for them. Further, such power may be overridden by an action of the Trust Protectors acting under this Trust Agreement, if Trust Protectors are appointed under this instrument and empowered to make changes, and shall further be subject to the following limitations:

(a) Notwithstanding anything in this Trust Agreement to the contrary, no power exercisable hereunder shall be exercisable in any way not explicitly consented to by my spouse, if living and able to deliberate, or if my spouse, is not living or able to deliberate, then the approval of any individual named as a potential Trustee under 6.03 of this Trust Agreement (or the approval of one or more of my adult children if no individual named above or under Section 6.03 of this Agreement can deliberate and act), or in any way that would deprive the Grantor of the right to appoint how the assets held under the Trust will be devised in the event of the Grantor's death, or would disqualify any marital devise or marital or Q-TIP Trust established hereunder from qualifying for the federal estate tax marital deduction or deprive any spouse of the Grantor powers to serve as Trustee and to select successor Trusteeship to apply during said spouse's lifetime or to detrimentally affect the Grantor's surviving spouse in any material way or deprive the Grantor's spouse of rights as to Trusteeship or Trustee selection under Article Six hereof. Further, as to any trust funded by IRA, pension, or qualified plan proceeds, the Scrivener Protector shall not be empowered to add any beneficiary who is older than the Designated Beneficiary of any trust herein established as of the time of appointment or a non-individual, as defined under Internal Revenue Code Section 401(a)(9) and the regulations thereunder.

(b) The Scrivener Protector shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this instrument should be exercised. Further, a Scrivener Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to the Scrivener Protectors shall be in the sole and absolute discretion of a Scrivener Protector, and shall be binding and conclusive on all persons. A Scrivener Protector shall not be required to exercise any power or discretion granted under this instrument. Absent bad faith on the part of a Scrivener Protector, the Scrivener Protector is exonerated from any and all liability for the acts or omissions of any other fiduciary or agent thereof hereunder or arising from any exercise or non-exercise of the powers and discretions conferred under this instrument.

Further, the Scrivener Protector may appoint __________, CPA as a Special Independent Trustee with the power to distribute any and all assets of any trust herein established to one or more of the beneficiaries of this Trust or any trust herein established, provided that the only beneficiary that may receive such a distribution from any trust that has been intended to qualify for the federal estate tax marital deduction shall be my surviving spouse, and the consent from ______, ________ or ________________________ must be received before such power is provided. **[THE PRECEDING SENTENCE IS INTENDED TO ENABLE THE TRUST TO BE DECANTED UNDER APPLICABLE STATE LAW]**

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agassman@gassmanpa.com

Trust Protectors
Sample Language

<u>Trust Protector Provision.</u>

(a) The Grantor hereby appoints PAUL ACCOUNTANT, CPA and ALEX ATTORNEY, ESQUIRE as Trust Protectors hereunder. If PAUL ACCOUNTANT, CPA is unable or unwilling to serve as a Trust Protector, then ALEX ATTORNEY, ESQUIRE may choose a reputable certified public accountant who is with the CPA firm of CASH & BASIS, P.A., or any successor CPA firm thereof, and if ALEX ATTORNEY, ESQUIRE is unable or unwilling to serve as Trust Protector, then PAUL ACCOUNTANT, CPA may choose an alternate Trust Protector, who shall be a reputable licensed lawyer practicing with the law firm of GASSMAN, CROTTY & DENICOLO, P.A. or any successor law firm thereof. If neither of PAUL ACCOUNTANT, CPA nor ALEX ATTORNEY, ESQUIRE can serve as a Trust Protector, then there shall be no further Trust Protector serving or any further Trust Protector action. No trust created under this instrument is required to have a Trust Protector acting with respect to that trust. Notwithstanding any provision under this Section to the contrary, no Trust Protector who is not a U.S. citizen or permanent "green card" resident may serve so long as the United States tax rules would cause this Trust to be treated as a "foreign trust" by reason of having one or more foreign Trust Protectors and any power otherwise vested in such an individual shall be null and void from inception. Under no circumstances shall the Grantor be appointed to serve as a Trust Protector.

(b) The Trust Protectors may, by unanimous vote, and for the sole benefit of the beneficiaries named or designated in this Agreement, as deemed appropriate by them in their absolute discretion, and with respect to any trust as to which the Trust Protector is acting, modify or amend:

(1) The trust administrative provisions relating to the identity, qualifications, succession, removal and appointment of the Trustee;

(2) The financial powers of the Trustee;

(3) The provisions relating to the identity of the contingent beneficiary of trust property;

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Trust Protectors
Sample Language Continued

(4) The withdrawal rights granted under this instrument (except a withdrawal right that has already matured at the time the Trust Protector seeks to exercise the power conferred under this subparagraph);

(5) The terms of any trust created under this instrument with respect to:

(i) The purposes and events for which the Trustee may distribute trust income and principal, or withhold trust income and principal otherwise distributable, and the facts and circumstances the Trustee may take into account in making distributions, including whether the Trustee shall require the approval of an "adverse party" (as such term is defined in Internal Revenue Code Section 672 (b) and Treasury Regulation Section 1.672 (b)-(1)) before making a distribution of trust income or principal to or for the benefit of the Grantor's spouse during the Grantor's lifetime so that no distributions would be made to the Grantor's spouse until one or more of the adult descendants of the Grantor authorize such a distribution;

(ii) The termination date of the trust, either by extending or shortening the termination date (but not beyond any applicable perpetuities period);

(iii) The identity of the permissible appointees under any testamentary power of appointment granted to the beneficiary for whom the trust is named;

(iv) With the consent of all Trust Protectors, and when deemed reasonably necessary by the acting Co-Trustees to avoid having Trust assets made available to creditors, divorcing spouses, or other non-beneficiaries, institutions, or to avoid causing a beneficiary to be ineligible for governmental or institutional support, or to prevent monies from being spent unwisely, to divert assets from one trust or beneficiary herein designated to another trust or beneficiary herein designated; and

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Trust Protectors
Sample Language Continued

(v) Benefits payable or to be paid to any descendant of the Grantor, establishing separate shares or trusts with trust assets for one or more specified descendants of the Grantor, and providing for assets which are held under any trust herein established to be transferred to another trust established under this Agreement for the benefit of one or more descendants of the Grantor, which may include provisions which permit one or more descendants, or descendants meeting certain qualifications, to receive amounts as deemed appropriate for health, education, and maintenance.

(6) Notwithstanding anything in this Trust Agreement to the contrary, no power exercisable hereunder shall be exercisable in any way that would disqualify any marital devise or marital or Q-TIP Trust established hereunder from qualifying for the federal estate tax marital deduction. Further, as to any trust funded by IRA, pension, or qualified plan proceeds, the Trust Protectors shall not be empowered to add any beneficiary who is older than the Designated Beneficiary of any trust herein established as of the time of appointment, as defined under Internal Revenue Code Section 401(a)(9) and the regulations thereunder.

(c) It shall always require at least two Trust Protectors to take any action. Any appointment of a successor Trust Protector hereunder shall be in writing, may be made to become effective at any time or upon any event, and may be single or successive, all as specified in the instrument of appointment. The Trust Protectors may revoke any such appointment before it is accepted by the appointee, and may specify in the instrument of appointment whether it may be revoked by a subsequent Trust Protectors. In the event that two or more instruments of appointment or revocation by the same Trust Protectors exist and are inconsistent, the latest by date shall control.

(d) Any Trust Protector may resign by giving prior written notice to the Trustee. All trusts created under this instrument need not have or continue to have the same Trust Protector. The provisions of this instrument that relate to the Trust Protector shall be separately applicable to each trust held hereunder.

Trust Protectors
Sample Language Continued

(e) Notwithstanding any other provision of this instrument, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this instrument for the direct or indirect benefit of the Trust Protector, the Trust Protector's estate, or the creditors or either, or that would cause the Trust Protector to possess a general power of appointment with the meaning of Sections 2041 and 2514 of the Code. Further, no exercise by the Trust Protectors shall in any way be for the direct or indirect benefit of the Grantor.

(f) A Trust Protector acting from time to time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, may at any time irrevocably release, renounce, suspend, cut down, or modify to a lesser extent any or all powers and discretions conferred under this instrument by a written instrument delivered to the Trustee.

(g) A Trust Protector shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this instrument should be exercised. Further, a Trust Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to the Trust Protectors shall be in the sole and absolute discretion of a Trust Protector, and shall be binding and conclusive on all persons. A Trust Protector shall not be required to exercise any power or discretion granted under this instrument. Absent bad faith on the part of a Trust Protector, the Trust Protector is exonerated from any and all liability for the acts or omissions of any other fiduciary or any beneficiary hereunder or arising from any exercise or non-exercise of the powers and discretions conferred under this instrument.

(h) The exercise of any power authorized under this Section shall require the consent of both Trust Protectors.

(i) Notwithstanding any provision herein to the contrary, unless or until such time as the Trust is taxed as a foreign trust under the Internal Revenue Code and applicable regulations, a person who is not a permanent resident or citizen of the United States, and no entity that is not a United States entity shall have the power to act as Trust Protector without unanimous consent of an acting U.S. Trust Protector or Trust Protectors, and the Trustee or Co-Trustees then serving under this Trust.

(j) The Trust Protectors acting from time to time, if any, may appoint any one or more individuals as successor Trust Protectors, but only by unanimous written approval of all of the originally named Trust Protectors. Further, by majority vote, the Trust Protectors acting at any time may appoint successor Trust Protector who meet the requirements set forth under subsection (a) above. It shall always require at least two Trust Protectors to take any action. Any appointment of a successor Trust Protector hereunder shall be in writing, may be made to become effective at any time or upon any event, and may be single or successive, all as specified in the instrument of appointment. The Trust Protectors may revoke any such appointment before it is accepted by the appointee, and may specify in the instrument of appointment whether it may be revoked by a subsequent Trust Protectors. In the event that two or more instruments of appointment or revocation by the same Trust Protectors exist and are inconsistent, the latest by date shall control.

Useful Trust Protector Provision – Avoiding Inadvertent Grantor Trust Status

Notwithstanding any provision herein to the contrary, if any powers granted to or exercisable by the Trust Protectors under this Section ____ result in this Trust or any Trust created under this Trust Agreement to be classified as a "Defective Grantor Trust," and causes such Trust to be considered as “owned” solely by the Grantor for federal income tax purposes, pursuant to Code Sections 671 through 679 (the “Grantor Trust Rules”), then such powers shall not be exercisable by the Trust Protectors until after the death of the Grantor.

Is the following safe? –

> Notwithstanding the preceding sentence, while the Grantor is living such powers shall be exercisable by the Trust Protectors only upon the written consent of an “Adverse Party,” which is defined as any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power which he or she possesses respecting the trust, including a person having a general power of appointment over the trust property, and a board certified estate and probate attorney who has an “AV” rating in the Martindale-Hubbell law directory licensed to practice in the State of Florida who has represented the Grantor or a certified public accountant who has done accounting work for the Grantor and has extensive experience preparing estate and income tax returns for a reputable trust company.

Unique Irrevocable Trust Provisions - Contingent Marital Devise Provision

In the highly unlikely event that the Grantor's contributions to this Trust exceed the maximum amount that can be gifted by the Grantor without incurring Federal Gift Tax, then the Trustee shall divide the Trust estate into two separate shares, hereinafter designated as the SMITH FAMILY TRUST SHARE and the SMITH MARITAL DEDUCTION TRUST SHARE. The SMITH FAMILY TRUST SHARE shall be a fraction of the Trust estate of which (a) the numerator shall be the largest amount that if allowed using the Grantor's Federal Gift Tax Exemption would result in no Federal Gift Tax being payable by the Grantor by reason of the gift to this Trust, and (b) the denominator shall be the value as finally determined for Federal Gift Tax purposes of the assets in the Trust estate immediately after such gift that would have otherwise caused gift tax to be imposed has been made. The SMITH MARITAL DEDUCTION TRUST SHARE shall be the remainder of the Trust estate. No property shall be allocated to the SMITH MARITAL DEDUCTION TRUST SHARE that would not qualify for the Federal Gift tax Marital Deduction and the Federal Estate Tax Marital Deduction. The SMITH FAMILY TRUST SHARE shall be held pursuant to the terms of Section ____ and Article ____ of this Trust. The SMITH MARITAL DEDUCTION SHARE shall be held for the benefit of the Grantor's spouse, pursuant to Section ____ below.

Unique Irrevocable Trust Provisions -
If the Grantor's Spouse is a Contributor to this Trust

To take into account that the Grantor's spouse may be considered to be the contributor of certain assets to this Trust, and should thereby not have any right to receive distributions or benefits from any such Trust that the Grantor's spouse has funded, in the event that for any reason the Grantor's spouse is considered to be the contributor or co-contributor of assets to this Trust or any trust herein established, then such assets shall be set aside and held as a separate trust, in a manner identical to the provisions set forth in Section 5.01(b) hereof, provided that no distributions whatsoever shall be made to the Grantor's spouse from such separate subtrust, and that no power of appointment otherwise exercisable by the Grantor's spouse shall be considered to be exercisable or exercised, notwithstanding any provision herein to the contrary.

The purpose of this provision is to avoid having the Grantor's spouse be considered the owner of any Trust assets for purposes of Internal Revenue Code Section 2036(a)(1) and (2) or any Treasury Regulations set forth therein. Consistent therewith, the Grantor's spouse shall not be the Trustee of any such separate trust and any acting Co-Trustee shall have the power to act without joinder or consent of the Grantor's spouse as to any such trust.

Clayton QTIP vs. Disclaimer To Credit Shelter Trust vs. Other Alternatives

1. May elect to be treated as a credit shelter trust without participation or consent from surviving spouse.

   - Better than a disclaimer, because surviving spouses are not always rationale.

2. May elect to be treated as a QTIP trust so that there will be a step-up in income tax basis on second death.

3. Disadvantage – Must file an estate tax return.

   Alternative – If clients are well under estate tax exemption, simply use a credit shelter trust and allow Trust Protectors to give the surviving spouse a Power of Appointment.

   But no Power of Appointment needed for a QTIP

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Clayton QTIP Sample Language

I hereby appoint __________, __________ and __________ (or if left blank, selection shall occur as described in Section 1.11)as Independent Fiduciaries (or Independent Fiduciary if only one is named) for the purposes of allowing for determination of whether there should be an alteration of the CLIENT FAMILY TRUST established hereunder whereby some or all of such assets may be held as a Q-TIP Marital Deduction Trust, as separate Q-TIP Marital Deduction Trusts, and/or paid, in whole or in part, outright to my spouse for income and estate tax planning purposes in view of the new estate tax law.

In order to facilitate this, each Independent Fiduciary shall have the power to cause my Personal Representative to file a timely filed federal estate tax return with respect to my estate, to designate that all or a portion of the CLIENT FAMILY TRUST shall qualify as a Q-TIP Trust under Code Section 2056(b)(7) in which case such Trust shall meet the following requirements, and shall be construed to have the following provisions effective upon my death, notwithstanding anything in Section 4.02(d) to the contrary: (a) the Trustee shall pay all income to my spouse beginning upon my date of death, no less frequently than annually; (b) the Trust assets shall be used solely for my spouse during said spouse's lifetime, with any and all distributions to be made solely to said spouse; and (c) the Trustee shall be required to keep the Trust assets under such Trust productive, provided that such requirements shall not apply except to the extent that my Personal Representative, based upon the written instructions from the majority of the Independent Fiduciaries, elects for such Trust to qualify for the federal estate tax marital deduction by making a "Clayton Q-TIP Election" pursuant to Code Section 2056 and Treasury Regulation Section 20.2056(b)-7(d)(3)(i). In addition, if determined appropriate by the Independent Fiduciary or Fiduciaries, the Trust assets may be paid in whole or in part outright to my said spouse.

Joint Grantor Trusts Are Really Two Trusts In One – Formally Divided On First Death For Grantor Trust Purposes

(b) Grantors intend that this Trust shall be a Grantor Trust as defined in Code Sections 671 through 679 Code during Grantors' lifetimes. Consistent with this intent, and notwithstanding any commingling of assets, this Trust shall be considered to be two separate equal Trusts, one funded by each Grantor hereof, and as to Sub-Trusts established herein, each such Sub-Trust shall be considered as two separate equal Trusts, one funded by each Grantor hereof, provided that the Trustee may hold all such Trusts as undivided Trusts for compliance purposes and shall further have the ability to sever this Trust and any Sub-Trusts into separately managed Trusts, with each containing such portion of the Trust estate as is considered as owned by the respective Grantor under Code Sections 671 through 679. Therefore, notwithstanding any provision in this Agreement to the contrary, this Trust is and shall be considered to be composed of two (2) separate and distinct Trusts, one (1) of which is funded with the contribution or contributions being made by JOHN SMITH, and one (1) of which is being funded with the contribution or contributions being made by JANE SMITH, it being the intention of the parties to have one (1) Trust funded solely by JOHN SMITH and one (1) Trust funded solely by JANE SMITH. Any joint assets transferred to the Trustee shall be considered as transferred one-half (½) by JOHN SMITH and one-half (½) by JANE SMITH. Unless or until otherwise separately tracked and designated any and all expenses paid, distributions made, and other expenditures shall be considered to have been made one-half (½) from each such separate trust, and any withdrawals by a beneficiary or beneficiaries under Section 4.01 of this Agreement shall be considered to have been withdrawn one-half (½) from each Trust. As the result of the above, in the event of the death of one (1) Grantor, the separate and distinct Trust herein established by such Grantor shall be segregated and held separate and apart from the separate and distinct Trust being established by the deceased Grantor's spouse. This Trust Agreement and all terms hereof shall be construed in accordance with the above notwithstanding any provision herein to the contrary.

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Use This Provision To Attempt To Avoid Inadvertent Triggering Of Income Tax When Appreciated Assets Are Contributed To An Entity Taxed As A Partnership By Multiple Partners

6.02 Investment Company Avoidance Provision. The parties recognize that Internal Revenue Code Section 721(b) could require certain Members to recognize gain upon the contribution of appreciated assets to the Company if the Company is taxed as a partnership for federal tax purposes and is composed of more than eighty percent (80%) in marketable securities, and the contribution results, directly or indirectly, in the diversification of the contributing Members' interests in the underlying assets, thus leading to the classification of the Company as an "Investment Company." In order to avoid application of Section 721(b), each Member agrees not to make any contribution to the Company that would cause a taxable event under Internal Revenue Code Section 721(b). In the event of such a contribution, then to the extent necessary to avoid Investment Company status, the assets so contributed that would otherwise result in gain being recognized by the contributing Member shall be held as a separate capital account by the Company for the exclusive benefit of the contributing Member. The contributing Member shall be allocated all of the income and gains or losses (including dividends and both pre-contribution and post-contribution gains and losses) from the contributed property in such a manner as to avoid the application of Section 721(b) and to comply with the provisions of Section 704(b) and the applicable Treasury Regulations thereunder. Upon withdrawal from the Company, the withdrawing Member shall be returned the property originally contributed and/or any proceeds from the sale thereof.

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Use This Language To Help Assure That Transferability Restrictions Will Not Apply To Gifts That Would Qualify For The $17,000 Per Year Gift Tax Exclusion

12.05 Exceptions. The transfer restrictions applicable to assignment of Membership Interests contained in this Article Twelve shall not apply to the following:

(a) * * * ;

(b) * * *;

(c) Any Membership Interest as a Member received as a gift under which the donor excluded such gift by reason of the annual gift tax exclusion under Internal Revenue Code Section 2503, as amended, to the extent provided herein. Such an interest so received shall be freely transferable by the Member receiving such gift and any transferee of such Member for a period of one hundred twenty (120) days after the receipt thereof. After the expiration of such one hundred twenty (120) day period, this exception shall no longer apply, and such Membership Interest shall be subject to the restrictions contained in this Article Twelve unless such Membership Interest has been transferred or sold during such one hundred twenty (120) day period, in which event the transfer limitations herein applicable shall not apply to such Membership Interest; or

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Use This Language To Help Assure That Transferability Restrictions Will Not Apply To Gifts That Would Qualify For The $17,000 Per Year Gift Tax Exclusion, Cont'd

(d) The transfer of some or all of a Member's ownership interest to a family limited partnership, trust, limited liability company or other entity which is owned solely for the benefit of the Member making the transfer or the Member's Immediate Family, provided that any entity taking ownership must join in this Agreement to be responsible for all obligations of the Member.

If an interest of a Member is transferred pursuant to subsections (a), (b), (c) or (d) above, the transferee shall become a substituted Member upon the completion of the requirements listed in subsections 12.04(b) and (c) of this Agreement. If required by state law, an amendment to the existing Articles of Organization shall be filed and recorded. For the purposes of this Section, "immediate family" is defined to mean the Member's father or mother, spouse, brother or sister, and children and other lineal descendants of all generations.

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DESIGNING AND IMPLEMENTING ESTATE PLANNING STRUCTURES WITH THE IRS IN MIND: AUDIT TRIGGERS AND CONSIDERATIONS ASSOCIATED THEREWITH

Wednesday, October 11, 2023

From 3:00 PM to 4:00 PM EST

(60 minutes)

Presented By:

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

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